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OF

CASES DECIDED IN THE COURT OF SESSION,
COURT OF JUSTICIARY, COURT OF TEINDS, RAILWAY AND
CANAL COMMISSION, VALUATION APPEAL COURT,
PROVISIONAL ORDER COMMITTEES,
PRIVY COUNCIL, AND HOUSE OF LORDS.

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INDEX OF CASES.

A v. B, 731
A B v. C B, 411
Aberchirder Magistrates v. Banff District Committee and Others, 409
Aberdeen Assessor, British Linen Company v., 442
Aberdeen City Parish v. Caledonian Railway Company, 771
Aberdeen University Court v. Aberdeen University Senatus Academicus, 743
Adams v. Mackenna, 868
Addie's Trustees v. Caledonian Railway Company, 769
Addison v. Brown, 335
Agnew v. The British Legal Life Assurance Company, Limited, 284
Airdrie Burgh, Lanarkshire County Council v., 632
Airdrie, Coatbridge, and District Water Trustees and Others, Lanarkshire Upper Ward District Committee v., 526
Airdrie, Coatbridge, and District Water Trustees v. Flanagan, 422
Alexander v. Little & Company, 607
Alexander's Executor (Mitchell) v. Mackersy, 107
Allan v. Thomas Spowart & Company, Limited, 599
Amey and Others, Walker's Trustees v., 242
Angus v. H. M. Advocate, 49
Argo v. Pauline and Others, 23
Argyllshire Assessor, The Glasgow Abstainers' Union v., 320
Atholl, Duke of, and Others, Robertson and Others v., 173
Atlas Steel Works, Limited, Scobie and Others v., 739
Avery v. Hilson, 505
Ayr County Council v. Paterson and Others, 594

Baird v. Earl of Wemyss, 614
Baird (Liquidator of David Gillies & Sons, Limited) v. Gillies and Others, 322
Baird, William, & Company v. Savage, 300
Balmenach Glenlivet Distillery, Limited v. Croall and Others, 820
Banff District Committee and Others, Magistrates of Aberchirder, 409
Barbour v. Renfrewshire Lower District Committee, 348
Bate's Trustees v. Bate, 660
Beale & Mactavish and Another, Singer Manufacturing Company v., 58
Bell v. Mitchell, 53
Bell, Wright v., 136
Bett (Jack) v. Edie, 344
Bile Bean Manufacturing Company v. Davidson, 827
Binning v. Easton & Sons, 312
Blackburn v. Sharp and Another, 209
Black v. Claxton, 865
Bo'ness and Carriden Parish Council and Shotts Parish Counsel, West Calder Parish Council v., 68
Brandes, Schönwald, & Company, Robertson v., 635
Bray and Others v. Peterkin (Bruce's Trustee) and Others, 746
British Legal Life Assurance Company, Limited, Agnew v., 284
British Linen Company v. Assessor for Aberdeen, 442
British Linen Company v. Cowan, 512
Brown v. Brown, 503
Brown v. Fraser, 741
Brown v. Kinnaird, 340
Brown v. Magistrates of Kirkcudbright, 81
Brown v. North British Railway Company, 327
Brown, Addison v., 335
Brown & Company, Limited, M'Groarty v., 598
Brown & Company, Limited, Quinn v., 643
Bruce's Trustees and Others (Peterkin), Bray and Others v., 746
Bryson v. J. Dunn & Stephen, Limited, 236
Burghead Harbour Company, Limited v. George (Collector of Duffus Parish), 754

Cairns, Gillies v., 218
Caledon Shipbuilding and Engineering Company, Limited v. Kennedy, 430, 688
Caledonian Railway Company, Aberdeen City Parish v., 771
Caledonian Railway Company, Addie's Trustees v., 769
Caledonian Railway Company, Glasgow Corporation v., 534
Caledonian Railway Company, Hamilton & Calder v., 696
Caledonian Railway Company, Massie v., 281

Digitized by Google

Caldwell v. Dykes, 606
Callender Brodie, Milne (Christison's Trustee) v., 701
Campbell v. Cochrane, 221
Campbell and Another, Hill v., 226
Campbell and Others v. Scottish Educational News Company, Limited, 487
Campbell, Vallance v., 507
Canavan v. John Green & Company, 200, 604
Cant v. Pirnie's Trustees, 782
Carswell, Purves v., 266
Cathcart Parish Council v. Glasgow Parish Council, 653
Christison's Trustee (Milne) v. Callender Brodie, 701
Clark v. Dykes, 389
Claxton, Black v., 865
Claytons v. H. M. Advocate, 388
Clippens Oil Company, Limited v. The Edinburgh and District Water Trustees, 540
Clyde Navigation Trustees v. Reid and Others, 187
Clyde Valley Electrical Power Company, M'Laughlan v., 25
Coatbridge Burgh, Lanarkshire County Council v., 632
Cochran & Son v. Leckie's Trustee, 715
Cochrane, Campbell v., 221
Coggans and Harwood, H. M. Advocate v., 45
Colville & Sons, Limited, Tigue v., 129
Commissioners of Inland Revenue, General Accident Assurance Corporation, Limited v., 368
Connal & Company, Limited v. Reid and Others, 187
Conn v. Burgh of Renfrew, 664
Convery v. Lanarkshire Tramways Company, 92
Cook v. M'Neill, 397
Cooper & Company v. Jessop Brothers, 517
Corbet's Trustees v. Elliott's Trustees and Others, 379
Couper v. M'Kenzie, 416
Cowan, The British Linen Company v., 512
Crawford and Another (Owners of the s.s. "Warsaw") v. Granite City Steamship Company, Limited (Owners of the s.s. "Linn o' Dee"), 732
Crawford, Macrorie v., 394
Crieff Magistrates v. Young, 385
Croall and Others, Balmenach Glenlivet Distillery, Limited v., 820
Crooke v. The Scots Pictorial Publishing Company, Limited, 723
Cuthbertson v. Maxtone Graham (Liquidator of Irvine and Fullerton Property Investment and Building Society), 17

Dalzell v. Dickie & Murray, 61
Da Prato and Others v. Magistrates of Partick, 406
Darini, H. M. Advocate v., 704
Davidson, Bile Bean Manufacturing Company v., 827
Deas, Rowland v., 859
Dickie & Murray, Dalzell v., 61
Dobson v. The United Collieries, Limited, 260
Drummond (Macpherson's Trustee), Macpherson v., 102
Duffus Parish Collector (George), Burghead Harbour Company, Limited v., 754
Duncan v. Jackson, 341
Duncan, Stark's Trustees v., 288
Dunlop Pneumatic Tyre Company, Limited v. Dunlop Motor Company, Limited, 784
Dunn & Stephen, Limited, Bryson v., 236
Dykes, Caldwell v., 606
Dykes, Clark v., 389

Eadie and Caledonian Railway Company, Lanarkshire County Council v., 805
Easton & Sons, Binning v., 312
Edie, Jack (Bett) v., 344
Edinburgh and District Water Trustees, The Clippens Oil Company, Limited v., 540
Edinburgh and Leith Corporations Gas Commissioners, Muir & Son, Limited v., 598
Edinburgh and Leith Hiring Company, Limited, and Others v. Suburban District Committee of Midlothian County Council, 298
Edinburgh Assessor, Parish Council of Edinburgh v., 435
Edinburgh Assessor, The Liverpool, China, and India Tea Company, Limited, and Another v., 303
Edinburgh Assessor, Thomas Usher & Sons, Limited v., 310
Edinburgh City and Others, Grant v., 475
Edinburgh Collieries Company, Limited v. Assessor for Musselburgh, 307
Edinburgh Life Assurance Company, Smith (Liquidator of the Union Club, Limited) v., 801
Edinburgh Magistrates, M'Arthur v., 727
Edinburgh Parish Council v. Assessor for Edinburgh, 435
Edinburgh, The Lord Provost, Magistrates, and Council of the City of, Ireland v., 4
Elgin Guildry Fund Society v. Ministers of Elgin and Others, 399
Elliott's Trustees and Others, Corbet's Trustees v., 379
Elsmie & Son v. Tomatin Spey District Distillery, Limited, and Another, 324
Emmerson v. Oliver, 291
Esson's Trustees and Others, Shaw's Trustees v., 21

Fairfield Shipbuilding and Engineering Company, Limited, Macdonald v., 1
Fairweather (Urquhart's Trustee), Urquhart v., 7
Ferguson & Company, Hunter v., 451
Fergusson and Others (Muir's Trustees), Sim and Others v., 795
Flanagan, Airdrie, Coatbridge, and District Water Trustees v., 422
Formans, Macrorie v., 63
Forrest, J. & F. v. Governors of George Watson's Hospital, 183
Forsyth, Vellutini v., 51
Fraser, Brown v., 741

General Accident Assurance Corporation, Limited v. Commissioners of Inland Revenue, 368
General Accident Assurance Corporation, Limited, Petitioners, 367
George (Collector of Duffus Parish), Burghead Harbour Company, Limited v., 754
Gibb, Inland Revenue v., 674
Gillies and Others, Baird (Liquidator of David Gillies & Sons, Limited) v., 322

Digitized by Google

Gillies v. Cairns, 218
Glasgow Abstainers' Union v. Assessor for Argyllshire, 320
Glasgow and South-Western Railway Company, Kennedy v., 31
Glasgow and South-Western Railway Company, Lunnie v., 372
Glasgow Corporation v. Caledonian Railway Compay, 534
Glasgow Parish Council, Cathcart Parish Council v., 653
Glenday v. Johnston, 38
Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Company, Limited, 684
Gourlay Brothers & Company (Dundee), Limited, Sweeney v., 690
Gow Brothers & Gemmell, Robb v., 120
Granite City Steamship Company, Limited (Owners of the s.s. "Linn o' Dee"), Crawford and Another (Owners of the s.s. "Warsaw") v., 732
Granite Supply Association, Limited v. The Solicitor of Inland Revenue, 65
Grant v. City of Edinburgh and Others, 475
Green & Company, Canavan v., 200, 604
Greenock Assessor, Ormston v., 318
Grieve, Tasker v., 42
Guthrie v. Guthrie, 371

H v. P, 258
H. M. Advocate v. Coggans and Harwood, 45
H. M. Advocate v. Darini, 704
H. M. Advocate v. Heywood-Lonsdale's Trustees, 529
H. M. Advocate v. Sir Mark J. M'Taggart Stewart and Spouse, 465
H. M. Advocate v. Warrender's Trustees, 278
H. M. Advocate, Angus v., 49
H. M. Advocate, Claytons v., 388
H. M. Advocate, Priteca v., 861
Hackston v. Millar, 395
Hamilton & Calder v. Caledonian Railway Company, 696
Hamilton v. Duke of Montrose, 764
Hannah, Stewart v., 74
Harrower and Others, Mactaggart & Company v., 815
Hart v. Hunter, 294
Hawick Parish Council v. Urban Electric Supply Company, Limited, 448
Henderson, Johnstone v., 486
Heywood-Lonsdale's Trustees, H. M. Advocate v., 529
Heywood - Lonsdale's Trustees, Inland Revenue v., 589
Hill v. Campbell and Another, 226
Hilson, Avery v., 505
Hope v. The Lasswade District Committee of the County Council of Midlothian ,and Others, 679
Horn & Company, Limited v. Tangyes, Limited, 362
Hunter v. Ferguson & Company, 451
Hunter, Hart v., 294
Hunt's Trustees v. Hunt and Others, 432

Improved Edinburgh Property Investment Building Society v. Whites, 683
Inland Revenue v. Gibb, 674
Inland Revenue v. Heywood-Lonsdale's Trustees, 589
Inland Revenue v. Irvine and District Water Board, 649
Inland Revenue, Paterson v., 692
Inland Revenue (Reith), Walker v., 245
Ireland v. The Lord Provost, Magistrates, and Council of the City of Edinburgh, 4
Irvine and District Water Board, Inland Revenue v., 649

Jack (Bett) v. Edie, 344
Jackson, Duncan v., 341
Jessop Brothers, Cooper & Company v., 517
Johnston, Glenday v., 38
Johnstone v. Henderson, 486
Johnstone and Others, M'Leans v., 612
Johnstons, Welsh & Forbes v., 353

Keith v. Lauder, 230
Kennedy v. The Glasgow and South-Western Railway Company, 31
Kennedy, Caledon Shipbuilding Company, Limited v., 430, 688
Kinnaird, Brown v., 340
Kinnaird, Somerville v., 337
Kirkcudbright Magistrates, Brown v., 81
Kirk's Trustees v. Walker and Others, 176

Lamb, Massey v., 509
Lanarkshire County Council v. Burgh of Airdrie, 632
Lanarkshire County Council v. Burgh of Coatbridge, 632
Lanarkshire County Council v. Eadie and Caledonian Railway Company, 805
Lanarkshire Tramways Company, Convery v., 92
Lanarkshire Upper Ward District Committee v. Airdrie, Coatbridge, and District Water Trustees and Others, 526
Lancashire and Yorkshire Accident Insurance Company, Limited, Glen's Trustees v., 684
Lasswade District Committee of the County Council of Midlothian and Others, Hope v., 679
Lauder, Keith v., 230
Leckie's Trustee, Cochran & Son v., 715
Lee v. Pollock's Trustees, 657
"Linn O'Dee," Owners of the s.s. (Granite City Steamship Company, Limited), Crawford and Another (Owners of the s.s. "Warsaw") v., 732
Liquidator of David Gillies & Son (Baird) v. Gillies and Others, 322
Liquidator of the Irvine and Fullarton Property Investment and Building Society (Maxtone Graham), Cuthbertson v., 17
Little & Company, Alexander v., 607
Little, Yeaman v., 504
Liverpool, China, and India Tea Company, Limited, and Another v. The Assessor for Edinburgh, 303
Lunnie v. Glasgow and South-Western Railway Company, 372

MacBrayne, Lady Seafield v., 705
Macdonald v. The Fairfield Shipbuilding and Engineering Company, Limited, 1
MacFarlane's Trustees v. Macfarlane and Others, 494
Mackay, A. & A. Y., Wood & Company v., 458
Mackay v. Miller, 392
Mackenna, Adams v., 868

Digitized by Google

Mackersy, Mitchell (Alexander's Executor) v., 107
Mackie's Trustees and Others, National Bank of Scotland, Limited v., 13
Mackintosh's Trustee and Another v. Stewart's Trustees, 363
Macmillan, Scott's Trustees v., 179
Macpherson v. Drummond (Macpherson s Trustee), 102
Macrorie v. Crawford, 394
Macrorie v. Formans, 63
Mactaggart & Company v. Harrower and Others, 815
M'Allan v. Perthshire County Council, Western District, Dunblane, 592
M'Arthur v. Magistrates of Edinburgh, 727
M'Cardle v. M'Cardle's Judicial Factor, 268
M'Cardle, Petitioner, 282
M'Clymont, M'Kinlay v., 9
M'Clymont, Russel v., 601
M'Connell & Reid v. W. & G. Muir, 641
M'Cosh v. Moore, 167
M'Fadyen and Others, Turner's Trustees v., 712
M'Gowan, Whitelaw v., 346
M'Gregor v. M'Laughlin, 77
M'Groarty v. John Brown & Company, Limited, 598
M'Kee v. Orr, 292
M'Kenna v. The United Collieries, Limited, 713
M'Kenzie, Couper v., 416
M'Kinlay v. M'Clymont, 9
M'Laughlin, M'Gregor v., 77
M'Laughlan v. The Clyde Valley Electrical Power Company, 25
M'Leans v. Johnstone and Others, 612
M'Neill, Cook v., 397
Magowan, Todd v., 26
Massey v. Lamb, 509
Massie v. The Caledonian Railway Company, 281
Maver, Park v., 191
Maxtone Graham (Liquidator of Irvine and Fullerton Property Investment and Building Society), Cuthbertson v., 17
Melville and Others, Wemyss Collieries Trust, Limited v., 98
Middleton's Trustees v. Middleton, 718
Midlothian County Council, Suburban District Committee, Edinburgh and Leith Hiring Company, Limited and Others v., 298
Millar, Strathmore Auction Company, Limited v., 866
Miller & Son v. Oliver & Boyd, 270
Miller, Hackston v., 395
Millar, Mackay v., 392
Milne (Christison's Trustee) v. Callander Brodie, 701
Mitchell (Alexander's Executor) v. Mackersy, 107
Mitchell, Bell v., 53
Moffat, Town Clerk of (Tait), Petitioner, 95
Montrose, Duke of, Hamilton v., 764
Moore, M'Cosh v., 167
Moore (Surveyor of Taxes) v. Stewarts & Lloyds, Limited, 811
Morrison v. Waters & Company and Another, 646
Mortensen v. Peters, 872
Muir & Son, Limited v. Edinburgh and Leith Corporations Gas Commissioners, 598
Muir v. Muirs, 240
Muir's Trustee (Fergusson and Others), Sim & Others v., 795
Muir, W. & G., M'Connell & Reid v., 641
Murray Petitioner, 686
Murray's Trustees v. Trustees of St Margaret's Convent and Another, 774
Musselburgh Assessor, Edinburgh Collieries Company, Limited v., 307

National Bank of Scotland, Limited, v. Mackie's Trustees and Others, 13
Nicoll, Vaughan v., 351
Nimmo & Son, Limited, Petitioners, 106
North British Railway Company, Brown v., 327

Oliver & Boyd, Miller & Son v., 270
Oliver, Emmerson v., 291
Ormond & Company, Taylor v., 652
Ormston, v. Assessor for Greenock, 318
Orr, M'Kee, v. 292

Park v. Maver, 191
Partick Magistrates, Da Prato and Others v., 406
Paterson v. Inland Revenue, 692
Paterson and Others, Ayr County Council v., 594
Paton & Hendry, Tyrrell v., 89
Patrick v. Wood, 46
Pauline and Others, Argo v., 23
Perthshire County Council, Western District, Dunblane, M'Allan v., 592
Peterkin (Bruce's Trustee) and Others, Bray and Others v., 746
Peters, Mortensen v., 872
Pirnie's Trustees, Cant v., 782
Pheysey, Petitioner, 597
Pollock's Trustees, Lee v., 657
Pollokshaws Co-operative Society, Limited v. Stirling Maxwell, 375
Priteca v. H. M. Advocate, 861
Purves v. Carswell, 266

Quinn v. John Brown & Company, Limited, 643

Reid and Others, Connal & Company Limited v., 187
Reid and Others, Clyde Navigation Trustees v., 187
Reith (Inland Revenue), Walker v., 245
Renfrew Burgh, Conn v., 664
Renfrewshire Lower District Committee, Barbour v., 348
Robb v. Gow Brothers & Gemmell, 120
Robertson v. Brandes, Schönwald, & Company, 635
Robertson and Others v. Duke of Atholl and Others, 173
Robertson, Wolfe v., 499
Rowland v. Deas, 859
Russel v. M'Clymont, 601
Ruthven and Others v. Ruthven, 11

St Margaret's Convent Trustees and Another, Murray's Trustees v., 774
Savage, William Baird & Company, Limited v., 300
Sawrey-Cookson v. Sawrey-Cookson's Trustees, 209
Schwab and Others, Westerman (Westerman's Executor) v., 161

Digitized by Google

Scobie and Others v. Atlas Steel Works, Limited, 739
Scots Pictorial Publishing Company, Limited, Crooke v., 723
Scottish Educational News Company, Limited, Campbell and Others v., 487
Scott's Trustees v. Macmillan, 179
Seafield, Lady, v. MacBrayne, 705
Selkirk's Trustees, Turner v., 208
Sempill, Taylor v., 870
Sharp and Another, Blackburn v., 209
Shaw's Trustees v. Esson's Trustees and Others, 21
Shiell's Trustees v. Shiell's Trustees, 623
Sim and Others v. Fergusson and Others (Muir's Trustees), 795
Singer Manufacturing Company v. Beale and Mactavish and Another, 58
Smith (Liquidator of Union Club, Limited) v. Edinburgh Life Assurance Company, 801
Smith and Others, Walker v., 454
Solicitor of Inland Revenue, Granite Supply Association, Limited v., 65
Somerville v. Kinnaird, 337
Spowart & Company, Limited, Allan v., 599
Stark's Trustees v. Duncan, 288
Stewart v. Hannah, 74
Stewart v. Stewart, 522
Stewart, Sir Mark J. M'Taggart, and Spouse, H. M. Advocate v., 465
Stewart's Trustees, Mackintosh's Trustee and Another v., 363
Stewarts & Lloyds, Limited, Moore (Surveyor of Taxes) v., 811
Stirling Maxwell, Pollokshaws Co-operative Society, Limited v., 375
St Margaret's Convent Trustees and Another, Murray's Trustees v., 774
Strathmore Auction Company, Limited, v. Millar, 866
Surveyor of Taxes (Moore) v. Stewarts and Lloyds, Limited, 811
Sweeney v. Gourlay Brothers & Company (Dundee), Limited, 690
Symingtons, Petitioners, 157

Tait (Town Clerk of Moffat), Petitioner, 95
Tangyes Limited, Horn & Company, Limited v., 362
Tasker v. Grieve, 42
Taylor v. Ormond & Company, 652
Taylor v. Sempill, 870
Thomson & Gillespie v. The Victoria Eighty Club, 628
Tigue v. Colville & Sons, Limited, 129
Todd v. Magowan, 26
Tomatin Spey District Distillery, Limited, and Another, Elsmie & Son v., 324
Turner v. Selkirk's Trustees, 208
Turner's Trustees v. M'Fadyen and Others, 712
Tweeddale's, Marquis of, Trustees v. Marquis of Tweeddale and Others, 193
Tyrrell v. Paton & Hendry, 89

Union Club Liquidator (Smith) v. Edinburgh Life Assurance Company, 801
United Collieries, Limited, Dobson v., 260
United Collieries, Limited, M'Kenna v., 713
Urban Electric Supply Company, Limited, Hawick Parish Council v., 448
Urquhart v. Fairweather (Urquhart's Trustee), 7
Usher, Thomas, & Sons, Limited v. Assessor for Edinburgh, 310

Vallance v. Campbell, 507
Vaughan v. Nicoll, 351
Vellutini v. Forsyth, 51
Victoria Eighty Club, Thomson & Gillespie v., 628

Walker v. Reith (Inland Revenue), 245
Walker v. Smith and Others, 454
Walker and Others, Kirk's Trustees v., 176
Walker's Trustees v. Amey and Others, 242
Wallace v. Wallace's Trustees, 402
Warrand v. Watson and Others, 252, 799
Warrender's Trustees, H.M. Advocate v., 278
"Warsaw," Owners of the s.s. (Crawford and Another) v. Granite City Steamship Company, Limited (Owners of the s.s. Linn o' Dee), 732
Waters & Company and Another, Morrison v., 646
Watson v. Wordie & Company, 644
Watson and Others, Warrand v., 252, 799
Watson's Hospital, Governors of, J. & F. Forrest v., 183
Welsh & Forbes v. Johnstons, 353
Wemyss Collieries Trust, Limited v. Melville and Others, 98
Wemyss, Earl of, Baird v., 614
West Calder Parish Council v. Bo'ness and Carriden Parish Council and Shotts Parish Council, 68
Westerman (Westerman's Executor) v. Schwab and Others, 161
Whitelaw v. M'Gowan, 346
Whites, The Improved Edinburgh Property Investment Society v., 683
Wolfe v. Robertson, 499
Wood, Patrick v., 46
Wood & Company v. A. & A. Y. Mackay, 458
Wordie & Company, Watson v., 644
Wright v. Bell, 136
Wylie's Trustees v. Wylie and Others, 383

Yeaman v. Little, 504
Young, Magistrates of Crieff v., 385
Youngs, Petitioners, 648

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HOUSE OF LORDS AND PRIVY COUNCIL CASES.

Alianza Company, Limited v. Bell (Surveyor of Taxes), 572
Ashton Gas Company v. Attorney General and Others, 567
Back v. Dick, Kerr, & Company, 884
Baudains and Others v. Richardson and Another, 587
Boston Fruit Company v. British and Foreign Marine Insurance Company, 892
British Equitable Assurance Company v. Baily, 578
Brown v. John Hastie & Company, Limited, 671
Calthorpe v. Trechmann, 581
Charlesworth and Another v. Watson and Another, 569
Commissioner of Public Works v. Hills, 894
Cory & Son, Limited v. Harrison and Others, 571
Crossan v. Caledon Shipbuilding and Engineering Company, Limited, 852
Fisherrow Harbour Commissioners v. Musselburgh Real Estate Company, Limited, 110
Glasgow Parish Council v. Parish Council of Kilmalcolm, 639
Grant v. Grant and Another, 109
Huntly and Another v. Brooks' Trustees, 121
Inland Revenue v. Old Monkland Conservative Association, 119
Inverarity v. Forfarshire County Council, 673
Johnson v. Marshall, Sons, & Company, 888
Kinross, 152
Kintore, Earl of, and Others v. Alexander Pirie & Sons, Limited, 838
Macleay v. Tait, 581
M'Laughlin v. Westgarth and Another, 891
Manchester Carriage and Tramways Company v. Swinton and Pendlebury Urban District Council, 573
Montreal and St Lawrence Light and Power Company v. Robert, 585
National Trustees, Executors, and Agency Company of Australasia v. General Finance Agency and Guarantee Company of Australia, 554
Paddington Mayor and Borough Council and Another v. Attorney-General and Another, 565
Sheffield Corporation v. Barclay and Others, 556
Somerville & Son, Limited v. Edinburgh and District Water Trustees, 843
Sutherland v. Standard Life Assurance Company, 115
Underground Electric Railway Company of London v. Commissioners of Inland Revenue, 576
Van Eijck & Zoon (Owners of the "Anglia's" Cargo) v. Somerville and Another (Owners of the "Anglia"), 841
Westminster Mayor and Corporation v. London and North-Western Railway Company, 560
White and Others v. White & Sons, 116
Williams and Others v. North's Navigation Collieries, Limited, 881
Windram and Others (Owners of "Buccleuch") v. Robertson (Owner of "Kyanite"), 672

PROVISIONAL ORDERS COMMITTEES.

Ardrossan, Saltcoats, and District Tramways Provisional Order, 901.
Blairgowrie, Rattray, and District Water Provisional Order, 912.
Clydebank and District Water-works and Burgh Extension Provisional Order, 913.
Dumbarton Water-works and Burgh Extension Order, 903.
Dumbartonshire Tramways Provisional Order, 905.
Dunbartonshire (Duntocher and Dalmuir) Water Order, 904.
Dunfermline and District Tramways Provisional Order, 900.
Falkirk and District Tramways (Extensions) Provisional Order, 899.
Rutherglen Burgh Provisional Order, 906.
Glasgow and South-Western Railway Company Provisional Order, 911.
Notices to Agents, &c., 898.

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INDEX OF STATUTES.

A. of S., July 11, 1828, p. 657
A. of S., November 25, 1857, pp. 268, 282
A. of S., June 3, 1898, pp. 1, 312
39 and 40 Geo. III, c. 98 (Thellusson Act 1800), p. 465
44 Geo. III, c. 62 (Caledonian Canal Act 1804), p. 705
6 Geo. IV, c. 48 (Justices of the Peace Small Debt (Scotland) Act 1825), p. 499
6 Geo. IV, c. 120 (Judicature Act 1825), pp. 522, 612, 657
7 and 8 Geo. IV, c. 53 (Excise Management Act 1827), p. 26
1 and 2 Will. IV, c. 37 (Truck Act 1831), p. 831
1 and 2 Will. IV, c. 43 (Turnpike Roads Act 1831), pp. 526, 805
2 and 3 Will. IV, c. 65 (Representation of the People (Scotland) Act 1832), pp. 341, 344
7 Will. IV and 1 Vict. c. 41 (Small Debt (Scotland) Act 1837), pp. 385, 652, 866
1 Vict. c. 26 (Wills Act 1837), pp. 161, 746
5 and 6 Vict. c. 35 (Property Tax Act 1842), pp. 65, 119, 572, 674, 811
8 and 9 ... c. 19 (Lands Clauses Consolidation (Scotland) Act 1845), p. 327
8 and 9 ... c. 33 (Railways Clauses Consolidation (Scotland) Act 1845), pp. 534, 805
8 and 9 ... c. 83 (Poor Law (Scotland) Act 1845), pp. 68, 754, 771
13 and 14 ... c. 36 (Court of Session Act 1850), pp. 266, 281
16 and 17 ... c. 80 (Sheriff Court Act 1853), p. 362
17 and 18 ... c. 91 (Lands Valuation (Scotland) Act 1854), pp. 303, 307, 310, 442, 754, 771
19 and 20 ... c. 58 (Registration of Voters (Scotland) Act), pp. 337, 340
19 and 20 ... c. 79 (Bankruptcy (Scotland) Act 1856), pp. 102, 268, 282, 504, 686
20 and 21 ... c. 27 (Caledonian Canal Act 1857), p. 705
20 and 21 ... c. 56 (Court of Session Distribution of Business Act 1857), pp. 268, 282
23 and 24 Vict. c. 46 (Caledonian Canal Act 1860), p. 705
25 and 26 ... c. 89 (Companies Act 1862), pp. 157, 324, 362, 739
25 and 26 ... c. 97 (Salmon Fisheries (Scotland) Act 1862), p. 63
27 and 28 ... c. 53 (Summary Procedure (Scotland) Act 1864), pp. 26, 53, 394, 505, 509, 607, 870
29 and 30 ... c. 51 (Lunacy (Scotland) Act 1866), p. 266
30 and 31 ... c. 131 (Companies Act 1867), pp. 581, 820
31 and 32 ... c. 48 (Representation of the People (Scotland) Act 1868), pp 291, 340, 346
31 and 32 ... c. 84 (Entail Amendment (Scotland) Act 1868), p. 623
31 and 32 ... c. 100 (Court of Session Act 1868), pp. 209, 598, 612
31 and 32 ... c. 123 (Salmon Fisheries (Scotland) Act 1868), p. 63
33 and 34 ... c. 78 (Tramways Act 1870), pp. 534, 573
34 and 35 ... c. 112 (Prevention of Crimes Act 1871), pp. 45, 868
35 and 36 ... c. 62 (Education (Scotland) Act 1872), p. 865
35 and 36 ... c. 91 (Municipal Corporations (Borough Funds) Act 1872), p. 664
37 and 38 ... c. 32 (Building Societies Act 1874), p. 683
37 and 38 ... c. 94 (Conveyancing (Scotland) Act 1874), p. 375
38 and 39 ... c. 62 (Summary Prosecutions Appeals (Scotland) Act 1875), p. 607
39 and 40 ... c. 70 (Sheriff Courts Act 1876), p. 683
39 and 40 ... c. 75 (Rivers Pollution Prevention Act 1876), p. 632
40 and 41 ... c. 26 (Companies Act 1877), p. 820
40 and 41 ... c. 33 (Dentists Act 1878), p. 102
41 and 42 ... c. 51 (Roads and Bridges (Scotland) Act 1878), pp. 526, 805

Digitized by Google

42 and 43 Vict. c. 42 (Valuation of Lands (Scotland) Amendment Act 1879), p. 442
43 and 44 ... c. 20 (Inland Revenue Act 1880), p. 692
43 and 44 ... c. 34 (Debtors (Scotland) Act 1880), p. 38
43 and 44 ... c. 42 (Employers' Liability Act 1880), p. 200
45 and 46 ... c. 42 (Civil Imprisonment (Scotland) Act 1882), p. 38
45 and 46 ... c. 77 (Citation Amendment (Scotland) Act 1882), p. 335
46 and 47 ... c. 62 (Agricultural Holdings (Scotland) Act 1883), p. 701
48 Vict. c. 3 (Representation of the People Act 1884), pp. 291, 344, 346
48 and 49 Vict. c. 16 (Registration Amendment (Scotland) Act 1885), p. 292
50 and 51 ... c. 35 (Criminal Procedure (Scotland) Act 1887), p. 45
50 and 51 ... c. 58 (Coal Mines Regulations Act 1887), p. 260
51 and 52 ... c. 75 (Railway and Canal Traffic Act 1888), p. 696
52 and 53 ... c. 23 (Herring Fishery (Scotland) Act 1889), p. 872
52 and 53 ... c. 50 (Local Government (Scotland) Act 1889), pp. 594, 664
52 and 53 ... c. 54 (Clerks of Session Regulation Act 1889), p. 282
52 and 53 ... c. 55 (Universities (Scotland) Act 1889), p. 743
53 and 54 ... c. 10 (Herring Fisheries (Scotland) Act Amendment Act 1890), p. 872
53 and 54 ... c. 39 (Partnership Act 1890), p. 402
54 and 55 ... c. 39 (Stamp Act 1891), pp. 368, 576, 649
55 and 56 ... c. 55 (Burgh Police (Scotland) Act 1892), pp. 45, 46, 81, 95, 385, 389, 406, 507, 859
56 and 57 Vict. c. 61 (Public Authorities Protection Act 1893), pp. 409, 526, 540
57 and 58 ... c. 13 (Arbitration (Scotland) Act 1894), p. 517
57 and 58 ... c. 30 (Finance Act 1894), pp. 278, 465, 529, 589
57 and 58 ... c. 44 (Heritable Securities (Scotland) Act 1894, p. 115
57 and 58 ... c. 58 (Local Government (Scotland) Act 1894), p. 679
57 and 58 ... c. 60 (Merchant Shipping Act 1894), pp. 294, 416, 607, 841
58 Vict. c. 16 (Finance Act 1895), p. 649
58 and 59 Vict. c. 41 (Lands Valuation (Scotland) Amendment Act 1895), p. 303
58 and 59 ... c. 42 (Sea Fisheries Regulation (Scotland) Act 1895), p. 872
60 and 61 ... c. 37 (Workmen's Compensation Act 1897), pp. 1, 129, 191, 236, 260, 300, 312, 351, 430, 592, 598, 599, 643, 687, 690, 713, 852, 884, 888
60 and 61 ... c. 38 (Public Health (Scotland) Act 1897), pp. 81, 348, 673
61 and 62 ... c. 10 (Finance Act 1898), p. 245
61 and 62 ... c. 21 (Poor Law (Scotland) Act 1898), pp. 68, 653
61 and 62 ... c. 36 (Criminal Evidence Act 1898), p. 395
63 Vict. c. 7 (Finance Act 1900), p. 465
63 and 64 Vict. c. 49 (Town Councils (Scotland) Act 1900), pp. 95, 664
63 and 64 ... c. 50 (Agricultural Holdings (Scotland) Act 1900), p. 701
3 Edwd. VII, c. 25 (Licensing (Scotland) Act 1903), p. 859
3 Edwd. VII, c. 33 (Burgh Police (Scotland) Act 1903), pp. 51, 392, 406, 664
3 Edwd. VII, c. 36 (Motor Car Act 1903), p. 53
5 Edwd. VII, c. 13 (Aliens Act 1905), p. 704
Act of Adjournal 1906, p. 704

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INDEX OF SUBJECTS.

Abandonment. See *Process.*
Abandonment of Domicile of Origin. See *Domicile.*
Abatement. See *Revenue.*
Acceptance by Lender's Agent of Obligation. See *Agent and Client.*
Accident. See *Reparation.*
Accident Arising Out of and in Course of Employment. See *Master and Servant.*
Accident Assurance. See *Revenue.*
Accretion. See *Succession.*
Accumulation of Income. See *Succession.*
Accumulations by Trustees. See *Revenue.*
Acquiescence. See *Justiciary Cases.*
Acquisition of Residential Settlement. See *Poor.*
Action by Commissioners. See *Justiciary Cases.*
Action in Scotland by Domiciled Irishman for Solatium. See *Foreign.*
Action of Approbation. See *Teinds.*
Action of Damages. See *Justiciary Cases—Process—Reparation—Company.*
Action of Division, Approbation, and Valuation. See *Teinds.*
Action of Relief. See *Relief.*
Action of Separation and Aliment. See *Husband and Wife.*
Action to Recover Cost of Repairing Road. See *Limitation of Actions.*
Ad Valorem Duty. See *Revenue.*
Adjournment. See *Election Law—Justiciary Cases.*
Administration. See *Burgh.*
Administration of Justice — Advocate—Peer—House of Lords — Right of an Advocate who is a Peer to be Heard at the Bar. A Peer may be heard as counsel on an appeal at the bar of the House of Lords, but this does not include his appearing before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case. Kinross, p. 152.

—— *Trial before Lord Ordinary without a Jury—Lord Ordinary before whom Case Depending Removed to Inner House—Competency of Lord Ordinary thereafter Completing the Trial—Lunacy (Scotland) Act* 1866 (29 *and* 30 *Vict. c.* 51), *sec.* 24—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 46. In an action of damages against a medical man for the alleged wrongful granting by him of a certificate under the Lunacy Acts, the Lord Ordinary—before whom the case was being tried without a jury, in accordance with the provisions of sec. 24 of the Lunacy Act 1866, and secs. 46 and 47 of the Court of Session Act 1850—was removed to the Inner House before hearing counsel on the proof or pronouncing his findings in fact. *Held* that there was no incompetency in the Lord Ordinary, though removed to the Inner House, completing the trial of the action. *Allan* v. *M'Murray*, June 20, 1855, 17 D. 969, *commented on.* Purves *v.* Carswell, p. 266.

Administration of Justice—Distribution of Business—Power to Transfer—Transfer to Another Lord Ordinary of Cause Appropriated to Junior Lord Ordinary—Jurisdiction of Judge to whom Cause was Transferred on the Appointment of a New Junior Lord Ordinary—Court of Session Act 1857 (*Distribution of Business Act*) (20 *and* 21 *Vict. cap.* 56), *secs.* 1 *and* 4—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 164—*Act of Sederunt*, 25*th November* 1857, *sec.* 29—*Clerks of Session Regulation Act* 1889 (52 *and* 53 *Vict. cap.* 54), *sec.* 3. In a petition appropriated by statute to the Junior Lord Ordinary, a Junior Lord Ordinary intimated that having acted as counsel in the cause he desired not to exercise jurisdiction; and the Lord President transferred the cause to another Lord Ordinary. *Held* (after consultation with the Judges of the Second Division) (1) that the Lord President had power so to transfer the cause under sec. 1 of the Court of Session Act 1857 (Distribution of Business Act), and (2) that on the appointment of a new Junior Lord Ordinary the cause did not revert to him unless re-transferred. M'Cardle, Petitioner, p. 282.

—— See *Parent and Child.*
Admission of Liability. See *Poor.*
Advertisement. See *Landlord and Tenant.*
Agent and Client — Contract—Company — Law-Agents' Claims against a New Company Charged against the Original Firm—Contract between Company and Firm—Law-Agent not Named or Defined in Contract—"Jus quæsitum tertio"—Title to Sue. A Firm having resolved to turn

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their business into a limited company, instructed Messrs W. & F., law-agents, to act for them in the matter, and a preliminary agreement, declared only to be binding if adopted by the company, was thereafter entered into between the Firm and W. (of Messrs W. & F.) on behalf of the proposed company. This agreement, *inter alia*, provided that the Firm should pay all the expenses of the flotation up to the allotment of the shares, including a commission to the agents of the company. After the company was formed, a minute, on the narrative that the company had agreed to adopt the preliminary agreement, and for that purpose to enter into the present agreement in order that the terms of sale might be binding on it, was entered into between the firm and the company. This minute gave the full terms of the sale and also contained a stipulation that the Firm should pay all the preliminary expenses up to the allotment of shares. Messrs W. & F., who were not parties to or named in either agreement, having carried through the whole transaction, raised an action against the partners of the now dissolved Firm and the Firm for payment of their commission as agents for the company, which they averred fell in terms of the agreement to be paid by them and not by the company. *Held* that as Messrs W. & F. were neither parties to the agreement nor properly defined therein they had no title to sue thereon. Welsh & Forbes *v.* Johnstons, p. 353.

Agent and Client—Company—Flotation—Business Account in connection with Flotation—Charges for Promotion—Applicability of Table of Fees—Charges Properly Made in Form of a Commission, and where Company Formed to Take over Property or Business the Charge against Promoters Includes the Ordinary Commission Chargeable against a Buyer. Opinion per curiam that the table of fees is not applicable to the business of the promotion of a company, and that such business was rightly charged in the form of (1) the charge of a commission, depending in amount on the labour involved, against the promoters of the company, and (2) where the company was formed to take over a property or business, and the same agent carried through the whole transaction, the charge against the sellers, of the ordinary commission according to scale chargeable against a seller, but without any corresponding charge against the company of the ordinary commission chargeable against a buyer, such buyer's commission being covered by the charge against the promoters. Welsh & Forbes *v.* Johnston, p. 353

——— *Law-Agent Acting on Behalf of Lender—Scope of Authority—Borrower a Partner of a Firm of Law-Agents — Acceptance by Lender's Agent of Obligation Granted by Borrower in his Firm's Name to Produce Deed Vesting Security-Subjects in Borrower. Held* (*per* Lord Johnston, Ordinary) that a law-agent acting on behalf of a client, who was lending money to a member of a firm of law-agents, was not justified in accepting from the borrower, without ascertaining that he had his partner's authority, an obligation granted by him but in his firm's name undertaking to produce a deed vesting in the borrower the security-subjects which stood vested in a third party, and consequently that the lender could not on the obligation recover from the borrower's partners. Walker *v.* Smith and Others, p. 454.

Agreement. See *Railway — Master and Servant.*

Alien. See *Justiciary Cases.*

Aliment. See *Diligence.*

All Parties not Called. See *Process.*

Allowance of Expenses. See *Expenses.*

Allowance of Proof in Petition. See *Arbitration.*

Amendment. See *Election Law—Justiciary Cases.*

Annual Value. See *Valuation Cases.*

Appeal—Appeal on Questions of Fact—Review by House of Lords. Observations per Lord Chancellor (Loreburn) in a case depending on review of a finding in fact, found by both the Lord Ordinary and the Inner House. Windram and Others (Owners of "Buccleuch") *v.* Robertson (Owner of "Kyanite,"), p. 672.

——— See *Expenses — Process — Jurisdiction — Bankruptcy — Process — Valuation Cases—Justiciary Cases.*

Appeal for Expenses. See *Process.*

Appeal for Jury Trial. See *Process—Expenses.*

Appeal from Sheriff. See *Process.*

Appeal from Sheriff-Substitute to Sheriff. See *Jurisdiction.*

Appeal on Question other than Value. See *Valuation Cases.*

Appeal to Court of Session. See *River.*

Appeal to House of Lords. See *Process.*

Application for Admission to Poor's Roll. See *Poor's Roll.*

Application for Arbitration. See *Master and Servant.*

Application for New Trial. See *Reparation.*

Application for Review. See *Master and Servant.*

Application for Warrant. See *Parent and Child—Process.*

Appointment of County Assessor. See *Local Government.*

Appointment of English Commissioner. See *Witness.*

Appointment to Fee. See *Succession.*

Arbiter. See *Arbitration.*

Arbitration—Lease—Clause of Reference —Application to Claims Advanced after Termination of Lease. A mineral lease contained a clause of reference of disputes between the parties as to, *inter alia*, "the rights or obligations of either party, or in any way in relation to the premises." It also stipulated that the tenant should be bound "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be

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their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish so as to restore the land occupied by them and their said predecessors, . . . and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with." A claim having been made by the landlord, after the termination of the lease and removal of the tenant, for the fulfilment of this stipulation, and the tenant having denied liability, *held* that the decision of the dispute fell within the reference clause. M'Cosh *v.* Moore, p. 167.

Arbitration—Clause of Reference—Contract—Construction—Contract of Copartnery for Watchmaking Business—Disputes "in any way relating hereto" Referred to Arbitration—Dispute whether Proposed Additions Amount to a Different Business Held to Fall under Clause of Reference. A contract of copartnery for the carrying on of a watchmaker's and jeweller's business provided, *inter alia*, "Any disputes that may arise between the partners, or between the heirs of a deceasing partner, in any way relating hereto, shall be referred to the amicable decision of an arbiter to be mutually chosen, whose decision shall be final." A question having arisen as to whether certain proposed additions to the business fell within the scope of a watchmaker's and jeweller's business, for which alone the copartnery existed, *held* that the question was one relating to the construction of the contract, and fell accordingly under the clause of reference. Muir *v.* Muirs, p. 240.

——— *Scope of Reference—Extension by Pleadings — Bar.* In an arbitration under a reference clause referring any question as to the true intent and meaning of a minute of agreement, parties lodged claims which extended beyond the limits of the clause of reference. The arbiter closed the record and proposed to allow a general proof in order to determine whether the claims fell within the reference. One of the parties protested that he should not be compelled to lead proof save to expiscate facts showing the true intent and meaning of the agreement. *Held* that the scope of the reference had not been enlarged by the proceedings of parties—*per* Lord President on the ground that the agreement of parties was the basis of a reference, and there was no such agreement here to an extended reference; *per* Lord M'Laren on the ground that no arbitration can be enlarged without the consent of the arbiter as well as that of the parties, and that had not been given here before one of the parties had resiled; *per* Lord Pearson on the ground that in the special circumstances there was still time for the parties to withdraw from an extended reference. *Opinions* (*per* Lord President and Lord M'Laren) that it is commonly on the ground of bar that a party to a reference is not allowed to challenge an award which, while within the pleadings in the reference, is outwith the scope of the reference clause. Miller & Son *v.* Oliver & Boyd, p. 270.

Arbitration — Scope of Reference — True Intent and Meaning of Agreement—Averment that Words in Agreement have not Ordinary but Special Meaning — Averment that Condition of Agreement though Apparently not Really Fulfilled—Alleged Fraudulent Conduct of Party so as to Fulfil Condition — "Business Turnover." A minute of agreement which referred to an arbiter any questions as to its true intent and meaning, provided that the purchaser of a business should pay a certain sum for the goodwill on the basis that the seller should introduce to him not less than a certain sum of "business turnover." The purchaser refused to pay the price on the ground that the condition had not been fulfilled, and maintained (1) that "business turnover" meant a turnover of business on which there was the usual business profit, and (2) that the seller, who under the agreement was thereafter employed as a manager, had accepted business below current rates and bound to result in a loss, in order to swell and bring up to the required figure the turnover. He pleaded in defence to an action that the question fell within the reference clause. *Held* that the reference clause was not applicable, because (1) the words "business turnover" must be taken in their ordinary meaning and left nothing to the arbiter to decide, and (2) the averment of the fraudulent conduct of the seller when acting as manager did not raise a question of "the true intent and meaning" of the agreement. Miller & Son *v.* Oliver & Boyd, p. 270.

——— *Arbiter — Disqualification — Arbiter—Functus Officio—Previous Final Award by Arbiter Reduced but not on Ground of his Misconduct. Opinion per* Lord Pearson (Ordinary) that an arbiter who had acted as arbiter under a clause of reference in an agreement and had issued his final award, which, together with all proceedings since the closing of the record, had been reduced, but not on the ground of his misconduct, was not *functus officio* and disqualified from acting further. Miller & Son *v.* Oliver & Boyd, p. 270.

——— *Process — Jurisdiction — Petition to Appoint Arbiter — Decision in Petition of Questions of Fact and Law—Allowance of Proof in the Petition—Competency of Proceedings and of a Reclaiming Note—Arbitration (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 13), *sec.* 3. In a petition to appoint an arbiter under section 3 of the Arbitration (Scotland) Act 1894 the Lord Ordinary without proof repelled objections that the Court had no jurisdiction, that there was no binding agreement between the parties, and that the reference clause relied on, viz., "any dispute arising from this contract to be settled by arbitration here in the usual way," was part of the agreement, and allowed a proof as to the "usual way." The

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respondents, who were English merchants, neither residing nor carrying on business in Scotland, reclaimed, on the ground that the Lord Ordinary had exceeded his jurisdiction, such proceedings in the petition not being in contemplation of the statute. The petitioners objected to the competency of the reclaiming note. *Held* that in the circumstances (1) the reclaiming note was competent, and (2) the interlocutor of the Lord Ordinary should be recalled and process sisted until the questions at issue between the parties had been decided by appropriate proceedings in a competent Court. Cooper & Company *v.* Jessop Brothers, p. 517.

Arbitration—Procedure—Plea Prejudicial to Arbitration Stated after Arbiter has Entered upon Arbitration—Competency—Agricultural Holdings (Scotland) Acts 1883 *and* 1900 (46 *and* 47 *Vict. c.* 62, 63 *and* 64 *Vict. c.* 50). In an arbitration under the Agricultural Holdings (Scotland) Acts 1883 and 1900, the proprietrix, after the arbiter who had been nominated by the Board of Agriculture had entered upon the arbitration and considered the claim and counter-claim stated, desired to withdraw her counter-claim. The arbiter being in doubt as to whether she could competently do so, framed a case to the Sheriff-Substitute under rule 9 of Schedule II of the Agricultural Holdings (Scotland) Act 1900 asking his opinion on the matter. Thereupon on the crave of the proprietrix certain questions equivalent to pleas prejudicial to the arbitration were added. These had not been raised in the pleadings before the arbiter, although objections to a similar effect had been stated to the nomination of an arbiter. Objection was taken to the competency of the questions at that stage of the case, the proper and only remedy having been, as maintained, to have interdicted the arbiter from proceeding. *Held* that the questions could competently be considered. *Observations* (*per* the Lord President) as to rules of pleading in arbitrations. Milne (Christison's Trustee) *v.* Callender-Brodie, p. 701.

—— See *Witness — Master and Servant.*

Arbitration at Instance of Workman. See *Master and Servant.*

Arbitration Clause. See *Contract—Process.*

Arrears of Aliment. See *Diligence.*

Arrest. See *Reparation.*

Arrestments—Debt Due by Company in Liquidation—Proper Method of Arresting—Arrestment in Hands of Liquidator as Individual Ineffectual. An arrestment "in the hands of you, A, accountant, Glasgow," of "the sum of . . . due and addebted by you to B . . . " the schedule of arrestment in no way indicating that the debt was due by A in any other than a private capacity, *held* ineffectual to attach a sum to which A as liquidator of a limited company had ranked B in respect of a debt due by the company to him. *Per* Lord Stormonth Darling—"The proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such." Baird (Liquidator of David Gillies & Sons, Limited) *v.* Gillies and Others, p. 322.

Articles of Association. See *Company.*

Assessment. See *Public Health—Valuation Acts.*

Assessment of Compensation. See *Process.*

Assignation — Company — Bankruptcy — Assignation of Uncalled Capital—Intimation of Assignation—Statement by Committee of Management Made at General Meeting that Uncalled Capital had been Assigned in Security—Sufficiency of Intimation—Club. A club incorporated under the Companies Acts assigned in security the uncalled capital on its shares, issued and to be issued. A statement that this had been done, contained in a report by the committee of management, was read by the secretary at a general meeting of the club, but no other intimation was given. The club having thereafter gone into voluntary liquidation, the assignee claimed a preference *quoad* the capital assigned. *Held* that the assignation had not been validly completed, and that no preference had been thereby constituted in the assignee. Smith (Liquidator of the Union Club, Limited) *v.* Edinburgh Life Assurance Company, p. 801.

Assignation in Trust. See *Succession.*

Assignation of Decree. See *Process.*

Assignation of Uncalled Capital. See *Assignation.*

Assignee Sisted as Pursuer along with Original Pursuer. See *Process.*

Averment. See *Arbitration—Reduction.*

Averment of English Law. See *International Law.*

Averment of Misconduct. See *Reparation.*

Bankruptcy — Sequestration — Beneficium Competentiæ — Working Tools — Implements of Livelihood—Tools of a Practiser of Dentistry—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102—*Relevancy.* A, who practised dentistry, brought an action against the trustee on his sequestrated estate, in which he prayed the Court to interdict the defender from selling, removing, or otherwise interfering with certain articles. Pursuer averred that the articles in question were absolutely necessary and essential for his carrying on the business of dentist, and so earning his livelihood, and pleaded that these articles in consequence remained his property, and did not fall under the sequestration. *Held* that the rule exempting working tools from being attachable for debt was not necessarily confined to labouring men, and proof allowed. *Observed* that where "a dentist does his whole work himself with his own hands, the tools and implements he so uses are, then, the tools and implements of his trade." Macpherson *v.* Drummond (Macpherson's Trustee), p. 102.

—— *Election of Trustee—Appeal—Competency—Error of Sheriff in Deducting Amount of a Vote which in Fact had not been Given—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 71. At

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a meeting of creditors for the election of a trustee in a sequestration objection was taken to a number of votes for one of the two candidates on a ground which the Sheriff subsequently upheld. The Sheriff, misled by the parties themselves, in giving effect to his judgment disallowed the vote of a creditor who, according to the minute of the meeting, had in fact not voted, and deducted the amount of it from the candidate's total. By doing so the Sheriff was led to declare the wrong candidate in a majority and trustee. The unsuccessful candidate brought an appeal. *Held* that the appeal was incompetent inasmuch as the Sheriff had exercised his jurisdiction and his decision was, under section 71 of the Bankruptcy (Scotland) Act 1856, final. *Farquharson v. Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573, *distinguished*. Yeaman v. Little, p. 504.

Bankruptcy—Sequestration—Gazette Notice—Clerical Error—Date—Nobile Officium—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 48, *and Schedule* (*B*). A notice of sequestration in the form of Schedule B of the Bankruptcy (Scotland) Act 1856 was inserted in the *Edinburgh Gazette* of 5th June 1906, but owing to a clerical error the date of the deliverance was stated to be 5th June instead of 9th May. The corresponding notice in the *London Gazette* was correct. The Sheriff having difficulty in confirming the election of the trustee, a petition was presented on 23rd June 1906 by the agent in the sequestration craving the Court to authorise the insertion of a correct notice. The Court *authorised* the petitioner to insert a notice setting forth the error and correct date, and authorised the Sheriff upon proof of such notice having been duly inserted to confirm the election of trustee and commissioner as if the date of the first deliverance had been correctly notified. Murray, Petitioner, p. 686

—— See *Contract—Assignation.*

Bar — Mora — Contributory Negligence — Obligation by Partner in Name of Firm—Fraud of Partner—Delay in Enforcing Obligation. A member of a firm of law-agents borrowing money for his own use granted an obligation in his firm's name undertaking to produce a deed vesting in himself the security-subjects which stood vested in a third party. The lender's agent accepted the obligation, but no steps were taken to enforce it. Nine years later the lender sought, on the obligation, to recover from the partners of the borrower's dissolved firm. *Held* (*per* Lord Johnston, Ordinary) that the lender could not recover from the partners other than the borrower inasmuch as her agent had contributed to the loss in not seeing that the obligation was fulfilled. Walker *v.* Smith and Others, p. 454.

—— See *Arbitration.*

Bearer Cheque. See *Payment.*

Betting. See *Justiciary Cases.*

Bill of Exceptions. See *Expenses.*

Bill of Exchange—Forgery—Adoption—Silence as a Personal Bar to Disclaiming Liability—General Right of Persons Receiving Letters regarding Matters with which not Concerned. A person whose name had been forged to a bill, of the existence of which he was ignorant, *held* not to have incurred any legal obligation towards the holder, by adoption of his signature or otherwise, because of the fact that he had not repudiated a number of former bills, bearing the same forged signature, in answer to past-due notices requesting him to have them retired, even on the assumption that he fully understood the import of the notices he received. *Observed* by Lord Ardwall, expressly approved by the Lord Justice-Clerk and Lord Stormonth Darling—"I consider it to be the right of every person who receives a letter or other document regarding a matter in which he has no concern, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense." The British Linen Company *v.* Cowan, p. 512.

Bona Fides. See *Local Authority.*

Bond Granted by Heir of Entail. See *Revenue.*

Borough Occupation Franchise. See *Election Law.*

Borrower. See *Agent and Client.*

Bounding Title. See *Title to Heritage.*

Breach of Contract. See *Contract—Landlord and Tenant.*

Breach of Interdict. See *Jurisdiction.*

Break in Lease. See *Valuation Cases.*

Bridge. See *Railway—Road.*

"Building" — Meaning of — Prohibition against "Buildings" in Act of Parliament for Preservation of Open Spaces—Screen—What Constitutes a "Building" Depends upon Context. Certain Acts of Parliament whose object was, *inter alia*, to preserve open spaces for purposes of recreation prohibited the erection of "buildings" upon such open spaces. *Held* that a screen erected with the object of preventing an adjoining owner from acquiring a prescriptive right to the access of light over such an open space was not a "building." *Per* the Lord Chancellor (Halsbury)—"A screen or some erection of that nature might be considered a 'building' with reference to some covenants, and might not be considered a 'building' with reference to others. The subject-matter to be dealt with and the subject to which the covenant is supposed to be applied are all to be looked at to see what the word 'building' means in relation to that particular subject-matter." Judgment of the Court of Appeal *reversed*. Mayor and Borough Council of Paddington and Another *v.* Attorney-General and Another, p. 565.

—— See *Election Law—Road.*

Building Regulations. See *Burgh.*

Building Restriction. See *Superior and Vassal—Property.*

Building Site. See *Superior and Vassal.*

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Building Society. See *Company—Process.*

Burgh—Dean of Guild—Building Regulations—Height of Buildings—Side Street — Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 44 — *Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 5—*Edinburgh Improvement and Tramways Act* 1896 (59 *and* 60 *Vict. cap. ccxxiv*), *sec.* 87 (7)—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxviii*), *sec.* 80. The Edinburgh Municipal and Police (Amendment) Act 1891, by section 44, subsequently amended by later Acts, provides that the sanction of the Magistrates and Council is required before buildings in any existing street or court be increased in height beyond certain limits. The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), adds this proviso — "Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not, to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council." The Provost, Magistrates, and Council of the City of Edinburgh opposed the granting of a warrant to erect buildings 50 feet high in a street which, being only 120 feet long, formed a cul de sac and was 40 feet wide, on the ground that their sanction (which they had refused) was necessary for building to a height exceeding the width of the street. *Held* that the street was a side street within the meaning of section 34, sub-section 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, and that the sanction of the Magistrates was not required. Ireland *v.* The Lord Provost, Magistrates, and Council of the City of Edinburgh, p. 4.

—— *Police Burgh—Town Council—Absence of Quorum through Resignation of Councillors—Petition by Town-Clerk —Procedure—Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 36, 38, 58, 61, 66, 71, *and* 113—*Burgh Police Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 17, 25, *and* 26. A police burgh was governed by a town council consisting of nine councillors, including a provost and two bailies. In November 1905 there fell to be elected four councillors, but no nominations being lodged, no election took place. Thereafter three of the remaining five councillors intimated their intention to resign, with the result of leaving, when their intention should be given effect to, no quorum of the council, which under sec. 71 of the Town Councils (Scotland) Act 1900 consisted of three. Attempts were made to hold a meeting of the council, but the councillors who had intimated their resignation refused to attend, and the business of the burgh was in consequence brought to a standstill. The town-clerk presented this application, in which he craved the Court either (1) to appoint a special election of seven councillors to be held in manner provided by the Town Councils (Scotland) Act 1900, sec. 36, or (2) alternatively to declare that the burgh was without a legal council, and to remit to the Sheriff of the county to proceed with an election in the manner provided by the Burgh Police (Scotland) Act 1892, secs. 25 and 26, and by the Town Councils (Scotland) Act 1900. The Court *appointed, hoc statu*, a special election of seven councillors to be held. Tait (Town-Clerk of Moffat), Petitioner, p. 95.

Burgh—Common Good—Administration—Proposal by Town Council to Pay Out of Common Good Expenses of Opposing Parliamentary Bill—Title of Burgess to Object—Burgh Police (Scotland) Act 1903 (3 *Ed. VII, c.* 33); *Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. c.* 49); *Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 50); *Municipal Corporations (Borough Funds) Act* 1872 (35 *and* 36 *Vict. c.* 91). The common good of a royal burgh being corporate property falls as such to be administered by the town council as the executive of the corporation, and having been originally derived from the Crown, the title to complain of any misapplication of it is vested exclusively in the Crown, and no action at law directed against the council's administration is competent at the instance of any individual burgess or burgesses (unless he or they can allege a patrimonial interest distinct from his or their interest as members of the community) except in so far as certain limited rights of intervention have been conferred by various statutes now consolidated in the Town Councils (Scotland) Act 1900. In particular, the Burgh Police (Scotland) Act 1903, the Local Government (Scotland) Act 1889, the Municipal Corporations (Borough Funds) Act 1872, do not affect the law which regulates the right of burghs to deal with the common good, or the manner of their doing so. An individual burgess *held* not entitled to object to a town council defraying the expense of opposing a bill in Parliament out of the "common good." *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C., *followed.* Conn *v.* Burgh of Renfrew, p. 664.

—— *Municipal Corporations (Borough Funds) Act* 1872 (35 *and* 36 *Vict. cap.* 91). The question of the applicability of the above Act to Scotland *raised* but *not decided.* Conn *v.* Burgh of Renfrew, p. 664.

—— *Dean of Guild—"Court Open and Accessible to the Public"—Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap. cxxxii*), *sec.* 5 — *Edinburgh Municipal and Police (Amendment) Act* 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 40. A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. The only

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access to the tenement was to be through the remaining part of the back-green, and through a passage leading therefrom, along one side of the villa, to the public street. *Held* (*aff.* the Dean of Guild) that the court which would be formed out of the remainder of the back-green after the erection of the tenement, would not be "open and accessible to the public," and so would not be a court as defined in sec. 5 of the Edinburgh Municipal and Police Act 1879, and accordingly that the provisions of sec. 40 of the Edinburgh Municipal and Police (Amendment) Act 1891, requiring the submission of plans and sections of new courts, did not apply. M'Arthur *v.* Magistrates of Edinburgh p. 727.

Burgh—Dean of Guild—"Tenement"—Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap.* cxxxvi), *sec.* 50—*Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 7—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap.* cxxxiii), *sec.* 80. The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 50, as amended by the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, sec. 34, sub-sec. 7, and the Edinburgh Corporation Act 1900, sec. 80, regulates the open space required to be attached to houses, and, *inter alia*, provides that "in the case of houses in tenements intended to be occupied or used as flats or separate dwellings," any open space in front is not to be reckoned as part of the open space required. A semi-detached villa was by a horizontal partition divided into two dwelling-houses, each having its separate entrance. *Held* that it was not a house "in tenements," and accordingly that in reckoning the open space required, the open space in front was to be taken into account. *Opinion per* the Lord Justice-Clerk that, "speaking generally, the word 'tenement' is used to describe a building containing a number of dwelling-houses within four walls, all or a number of them having a common access from the street." M'Arthur *v.* Magistrates of Edinburgh, p. 727.

——*Dean of Guild—Building Regulations—Open Space "Used Exclusively in Connection with" House—Edinburgh Municipal and Police (Amendment) Act* 1891 (54 *and* 55 *Vict. cap.* cxxxvi), *sec.* 50—*Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv.*), *sec.* 34, *sub-sec.* 7—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap.* cxxxiii), *sec.* 80. The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 50, as amended by the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, sec. 34, sub-sec. 7, and by the Edinburgh Corporation Act 1900, sec. 80, provides that the requisite open space attached to houses shall be "pertaining to and used exclusively in connection with" such houses. A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. Access to the tenement from the street was to be obtained through a passage at one side of the villa, and through the remaining part of the back-green. *Held* (*reversing* the Dean of Guild) that the petitioner was not bound to erect a fence in continuation of the sidewall of the villa so as to separate the passage to the new tenement from the back-green to be used exclusively in connection with the villa. M'Arthur *v.* Magistrates of Edinburgh, p. 727.

Burgh. See *Justiciary Cases — Public Health—Property—Road.*

Burgh Franchise. See *Election Law.*

Burgh Represented on County Council. See *Local Government.*

Bursary — University — Power to Award Bursaries — University Court — Senatus Academicus—Universities (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 55), *secs.* 6 (1) (2) *and* 7 (1). The Universities (Scotland) Act 1889, section 6, provides—"The University Court, in addition to the powers conferred upon it by the Universities (Scotland) Act 1858, shall . . . have power (1) to administer and manage the whole revenue and property of the University . . . including funds mortified for bursaries and other purposes." Sec. 7—"The Senatus Academicus shall continue to possess and exercise the powers hitherto possessed by it, so far as they are not modified or altered by the Universities (Scotland) Act 1858, or by this Act, and shall have power (1) to regulate and superintend the teaching and discipline of the University. . . ." The University Court of a University having presented a scheme for the administration of a bursary fund, *held* that while it was right that the views of the Senatus Academicus should be heard in the adjustment of the scheme, the power of appointment to bursaries lay by statute in the hands of the University Court. Aberdeen University Court *v.* Aberdeen University Senatus Academicus, p. 743.

Business Account. See *Agent and Client.*

Bye-Law. See *Statute.*

Casualty. See *Superior and Vassal.*

Caution for Expenses. See *Process.*

Certificate not Delivered to Client. See *Contract.*

Change of Domicile. See *Domicile.*

Citation. See *Jurisdiction—Process—Title to Heritage.*

Civil or Criminal. See *Justicary Cases.*

Claim. See *Election Law—Patent.*

Claim and Declaration. See *Election Law.*

Claim for Compensation. See *Master and Servant.*

Claim on Sum Recovered by Trustee. See *Contract.*

Clause of Exclusion. See *Succession.*

Clause of Reference. See *Arbitration.*

Clause of Waiver. See *Company.*

Clerical Error. See *Justiciary Cases—Bankruptcy.*

Clerk of Court Giving Evidence qua Depute Town Clerk. See *Justiciary Cases.*

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Club—Social Club—Liability of Members and of Committee-men—Goods Purchased on Credit by Clubmaster on Instructions of Committee—Liability Jointly and Severally of Committee. Held per Lord Pearson (1) that the ordinary members of a social club, in the absence of special circumstances, are not liable for goods supplied to the club on the orders of the clubmaster; but (2) that the members of the committee, which passed the accounts for payment in ordinary course, and whose members had general knowledge that the supplies necessary for the club's existence were being given by the particular tradesman, were liable; and (3) that such liability was not *pro rata* but joint and several. Thomson & Gillespie *v.* The Victoria Eighty Club, p. 628.

Club. See *Assignation.*

Collision. See *Ship—Expenses.*

Common Employment. See *Reparation.*

Common Good. See *Burgh.*

Common Passage. See *Justiciary Cases.*

Company—Building Society—Winding-up—List of Contributories—Forfeiture of Shares in case of Failure to Pay Instalments—Automatic Forfeiture of Shares Entitling a Member who had Failed to Pay Instalments to have his Name Removed from the List of Contributories. The rules of a building society provided, *inter alia*, as follows—"16. Every member failing to pay his monthly instalments shall be fined a penny per share for every month such instalments are in arrears, and such fines may be liquidated from the first monies paid in by the defaulter, or deducted from the amount already paid in by him, and, so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society. . . ." This rule also made provision for intimation to a member who was in arrear. An order having been pronounced for the winding up of the society, the liquidator presented a note for settlement of the list of contributories. C objected to his name being placed on the list on the ground that he had several years before ceased to be a member of the society. It was admitted that the instalments paid by C in respect of shares were 10s. in all; that if rule 16 operated automatically, the amount of 10s. standing at the credit of C would have been extinguished by fines in 1882; and that no intimation had at any time been given to C that he was in arrear. *Held* (*aff.* the interlocutor of Lord Johnston, Ordinary) that rule 16 automatically operated a forfeiture of shares; that C had accordingly ceased to be a member of the society in 1882; and therefore that his name fell to be removed from the list of contributories. *Moore* v. *Rawlins*, 1859, 6 C.B. (N.S.) 289, *distinguished.* Cuthbertson *v.* Maxtone Graham (Liquidator of Irvine and Fullarton Property Investment and Building Society), p. 17.

Company—Articles of Association—Construction—Rearrangement of Capital—Powers of Directors—Payments to Reserve Fund—Detriment of Preference Shareholders. The directors of a company, whose capital consisted of preference shares entitled to a cumulative preferential dividend as well as ordinary shares, had power under the original articles of association to apply out of the profits, before recommending any dividend, such sum as they thought proper to reserve fund. On a rearrangement of the capital, whereby the ordinary shares were divided into preferred ordinary and deferred ordinary, the preference shareholders received under certain new and additional articles of association, a right to, *inter alia*, an additional non-cumulative dividend of 1 per cent. if the profits were sufficient to meet certain other interests to which they were postponed *quoad* this increase of dividend. In 1904 the profits were sufficient to provide for these prior interests and to leave a surplus of £2884, 0s. 6d. The directors, however, proposed to apply to reserve fund £2500, the exact amount required to pay the additional non-cumulative 1 per cent. to the preference shareholders. In a question with the preference shareholders as to the construction of the articles of association, *held* that the new articles of association giving the preference shareholders the increase of dividend did not derogate from the directors' power under the original articles to apply profits to reserve, and that the directors were entitled so to apply this sum, although thereby the preference shareholders were deprived of their additional 1 per cent. of dividend. Wemyss Collieries Trust, Limited *v.* Melville and Others, p. 98.

——*Statute—Winding-up—Grounds for—Construction of General Words in Separate Sub-section of Act—Ejusdem Generis—"Just and Equitable" Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79, *sub-sec.* 5. Section 79 of the Companies Act 1862 enacts—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances, that is to say, (1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year of its incorporation or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up." *Held* that sub-section (5) was a substantive enactment to which effect would be given although the conditions present might not be *ejusdem generis* with those enumerated in sub-secs. (1), (2), (3), and (4) of that section. *Observations* (*per* Lord M'Laren) as to when in the construction of a statute general words are to be

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confined to things *ejusdem generis* with those enumerated. Symingtons, Petitioners, p. 157.

Company—Winding-up—Grounds for—"Just and Equitable"—Deadlock—"Substratum" Gone—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79 (5). A limited company was formed to take over a business formerly carried on by two brothers A and B as partners. A, B, and C (another brother) were appointed directors. B was appointed managing director. No shares, however, were issued, and the assets of the firm were never formally transferred to the company. Owing to continuous quarrelling on the part of A and B, who between them had the whole substantial interest in the company, no business was done. Finally, with the support of four members of the company, who, however, had merely a nominal interest in it, B was made sole director. A and C having petitioned the Court to wind up the company, *held* that it was just and equitable that a winding-up order should be pronounced, and petition *granted*. Symingtons, Petitioners, p. 157.

—— *Winding-up—Supervision Order or Winding-up Order—Wishes of Creditors and Shareholders—Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 149. On January 4 a creditor to the extent of £152, 7s. 8d. brought a petition to have a company wound up compulsorily. On 13th January an extraordinary general meeting of the company was held, at which a resolution was passed that as the company by reason of its liabilities could not continue its business it be wound up voluntarily, and that A be appointed liquidator, with instructions to place the liquidation under the supervision of the Court. A note was accordingly presented which set forth the resolution, and stated that a majority of the creditors approved of the voluntary winding-up and of the liquidator appointed, and a mandate stating the approval of creditors to the extent of £3176, 7s. 9d., who were a majority in number and value, was lodged in process. The petitioning creditor contended that the shareholders had no *locus standi* to oppose his petition; that no creditor opposed the petition and the mandate produced was not sufficient; that out of eight creditors for whom the mandate was lodged five were or had been directors of the company, and so had other interests than those of creditors; and that the liquidator appointed was the nominee of one of the directors. *Held* that as the majority of the creditors as well as the shareholders desired the voluntary winding-up to be continued under supervision, and as there was no suggestion that the petitioners would be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding-up were granted, or in any other way, a supervision order should be made and the liquidation be continued with A as liquidator. In *re West Hartlepool Iron Works Company*, 1875, L.R., 10 Ch. 618, *approved* and *followed*. Elsmie & Son *v.* Tomatin Spey District Distillery, Limited, and Another, p. 324.

Company—Indemnity—Forged Transfer of Stock—Innocent Presentment for Registration—Implied Contract to Indemnify. Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another, and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request. A and B were the joint and registered owners of a certain corporation stock. A, in fraud of B, forged a transfer in favour of C & Co., a firm of bankers, who advanced him money on the security of the stock. C & Co. forwarded the transfer to the corporation with a request that the stock should be registered and a new certificate issued in C's name. This was done and C transferred the stock to D for value. C & Co. and D and the corporation, all of them, acted in good faith in ignorance of A's fraud, and without negligence. B, upon discovering the fraud, brought an action against the corporation and recovered from them the value of his interest in the stock. *Held*, in an action by the corporation against C & Co., that the latter were bound to indemnify the former. Judgment of the Court of Appeal *reversed*. Corporation of Sheffield *v.* Barclay and Others, p. 556.

—— *Life Assurance Company — Assurance Policy — Construction — Effect of Prospectus on Terms of Policy—Participation in Profits—Change of Regulations.* The deed of settlement of an insurance company founded in 1854 provided that its profits were to be divided as directed by its bye-laws, and that its bye-laws could be altered by other bye-laws. In 1886 the bye-laws provided that the whole profits made in the mutual branch were to be divided among the policy-holders in that branch. In that year the company issued to the respondent a policy entitling him to £400 on death, and "all such other sums, if any, as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time." There was nothing further in the policy or the proposal which could be construed into a contract by the assurance company to pay anything beyond the £400, and the respondent's proposal for insurance was made on a form in which he expressly agreed to "conform to and abide by the deed of settlement and bye-laws, rules, and regulations of the company in all respects." The re-

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spondent, however, had taken his policy relying upon a prospectus issued by the company, which stated — "The entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund." In 1902 the assurance company proposed under the Companies Act 1890 to alter its constitution by becoming registered as a company with limited liability, with a memorandum and articles of association which provided that 5 per cent. of the profits of the mutual department were to be carried to a reserve fund. The proposed change was perfectly competent, looking to the constitution of the company as set forth in the original deed of settlement. *Held* that the company had not contracted with the respondent that the whole of the profits of the mutual department should be divided among the policy-holders in that department. Judgment of Court of Appeal *reversed*. British Equitable Assurance Company *v.* Baily, p. 578.

Company—Liability of Directors—Prospectus—Non-Disclosure of Contracts—Fraudulent Prospectus—Action for Damages—Necessary Proof—"Knowingly Issuing"—Mistake—Clause of Waiver—Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *section* 38. Section 38 of the Companies Act 1867 provides that every prospectus of a company shall specify certain particulars of any contract entered into by the company before the issue of the prospectus, and that any prospectus which does not do so "shall be deemed fraudulent" on the part of the directors "knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. In an action for damages for fraud brought against the directors of a company who had issued a fraudulent certificate within the meaning of the above section, by a person who had taken shares on the faith of the certificate, *held* (1) that to succeed he must prove (*a*) that had he known of the omitted contract he would not have become a shareholder, (*b*) that he had suffered damage; (2) that the omission having been due to an innocent mistake of the directors they were in any case protected by a clause of waiver waiving any fuller compliance with section 38 than that contained in the prospectus. *Per* Lord Lindley—"The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus but never knew of the existence of a contract which ought to have been disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section but forgot all about it when he issued a prospectus not referring to it." Calthorpe *v.* Trechmann—Macleay *v.* Tait, p. 581.

Company—Ultra Vires—Invalid Resolution—Third Party bona fide Acting upon it—Company Barred from Pleading Invalidity in Question with Him. Relying upon what purported to be a valid resolution of a company duly communicated by its officials, a third party in *bona fide* and with nothing to put him on his inquiry sold certain property to the company. The resolution was invalid inasmuch as the quorum prescribed by the bye-laws had not been present when it was passed. *Held* that in a question with the third party the company could not plead that the resolution was invalid. Montreal and St Lawrence Light and Power Company *v.* Robert, p. 585.

——— *Winding-up—Petition for Winding-up Order—"Just and Equitable"—Petition by Individual Shareholders within Six Months from Incorporation and before any Shareholders' Meeting—Companies Act* 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79 (1), (2), (5). Section 79 of the Companies Act 1862 provides that a company may be wound up by the Court "(1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; . . . (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up." Less than six months after the incorporation of a limited company formed for the purpose, *inter alia*, of working a patent for horse-shoes, three preference shareholders presented a petition under section 79 (5) for winding-up by the Court, averring that the patent was worthless, that no shoes had been manufactured, that the actual cost of making the shoes largely exceeded that estimated in the prospectus, that the capital had all been spent, that the plant was insufficient, that business could only be carried on at a loss, and that there had been mismanagement by the directors. Answers were lodged by the company explaining the delay in commencing business and generally denying the averments of the petitioners. No meeting of shareholders had ever been summoned to consider the question of winding-up. The Court *dismissed* the petition. *Per* the Lord Justice-Clerk—"I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet

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done." *Per* Lord Stormonth Darling—"Where a petition is presented under sub-section 5 of section 79—that is, the 'just and equitable' head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen." Scobie and Others *v.* Atlas Steel Works, Limited, p. 739.

Company—Reduction of Capital—Memorandum of Association—Reduction to Meet Losses Partially Laid on Shareholders Preferential by Memorandum—Power of Court to Confirm—Fair and Equitable Scheme—Companies Acts 1867 (30 *and* 31 *Vict. cap.* 131); 1877 (40 *and* 41 *Vict. cap.* 26). The memorandum of association of a company provided that the capital should consist of 6000 preference shares and 6000 ordinary shares, all of £10 each, with power to increase or reduce the capital, and ("without prejudice to existing rights") to divide the shares into classes, and that the preference shares should be entitled to a cumulative preferential 5 per cent. dividend, and in the event of a winding-up to priority in repayment. The company's business having greatly depreciated, resolutions were passed approving of a scheme for reduction of capital whereby the preference shares were to become £5, 10s. shares instead of £10 shares, and the ordinary shares £1 shares instead of £10 shares, thus making one-third of the loss fall on the preference shareholders. No alteration was made on the voting power of a share. The ordinary shares had been taken and were held by the vendors and their representatives, and they were still continuing to manage the business. A petition for confirmation having been presented, a small number of preference shareholders opposed, on the ground (1) that it was *ultra vires* of the Court to sanction a scheme, like the one proposed, inconsistent with the memorandum of association, and (2) that the scheme was not in character fair and equitable, such as should be confirmed. *Held* (1) that confirmation of the scheme was *intra vires* of the Court—*British and American Trustee and Finance Corporation* v. *Couper* [1894], A.C. 399, *followed; Ashbury* v. *Watson*, L.R., 30 Ch. Div. 376, *distinguished*—and (2) that the scheme was fair and equitable and should be confirmed. *In re Allsopp & Sons, Limited*, July, 1903, 51 W.R. 644, *followed*. *Per* Lord President—"I cannot read that case" (*British and American Trustee and Finance Corporation* v. *Couper*) "without coming to the conclusion that it really has settled, in a way that we must certainly follow, that, so far as the question of *intra vires* is concerned, there really is no limit to what the Court can do. They may confirm any resolution however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard, that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement." Balmenach-Glenlivet Distillery, Limited *v.* Croall and Others, p. 820.

Company. See *Reparation—Agent and Client—Assignation.*

Company Incorporated by Act of Parliament. See *Limitation of Action.*

Compensation—Liquid and Illiquid Claims—Constitution—Sist. In an action to recover the price of 400 bags of flour sold and delivered, the defenders sought to set off the price paid by them for 250 bags sold to them about the same time for which a delivery-order had been granted and acknowledged by the storekeeper, but of which they had not obtained delivery owing to a dispute as to the ownership of the flour. The question of the ownership was the subject of two multiplepoindings, one in the Sheriff Court which had been sisted to await a decision in the other, which was in the Court of Session, but to which the defenders were not parties. The Lord Ordinary had pronounced judgment in the Court of Session multiplepoinding action, which the defenders maintained would rule the Sheriff Court action, with the effect that the pursuers never were owners of the 250 bags. *Held* that the counter claim was neither liquid nor *quod statim liquidari potest*, and so could not be set off against the liquid claim of the pursuers, and that there were no special circumstances averred to lead the Court to depart from the general rule and to grant a sist. M'Connell & Reid *v.* W. & G. Muir, p. 641.

——— See *Executor—Master and Servant—Public Health.*

Compensation Water. See *River.*

Competency. See *Husband and Wife—Arbitration—Bankruptcy—Interdict—Jurisdiction—Justiciary Cases—Master and Servant—Process—Relief—River—Teinds—Valuation Cases.*

Competency of Amendment. See *Election Law.*

Competency of Appeal. See *Master and Servant.*

Competency of Arbitration. See *Master and Servant.*

Competency of Evidence. See *Justiciary Cases.*

Competency of Remit. See *Process.*

Competency of Witness. See *Justiciary Cases.*

Complaint. See *Justiciary Cases,*

Complaint of Breach of Interdict. See *Jurisdiction.*

Condition-Precedent. See *Master and Servant.*

Conditional Institution. See *Succession.*

Confidentiality. See *Process.*

Conflict of Laws. See *Foreign.*

Construction of Agreement. See *Railway.*

Constructive Residence. See *Poor.*

Contract—Breach of Contract—Stockbroker Purchase of Shares—Certificates not Delivered to Client but Allowed to Remain in Stockbroker's Office—Failure of Client to Demand Certificates—Negligence

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—Delay—Liability for Loss. A instructed a firm of stockbrokers to purchase shares. In his transactions with the firm he invariably dealt with C, a confidential and "accredited" clerk in the firm's employment, and also his brother-in-law. A duly paid for the shares, and became the registered holder, but the certificates sent by the companies to the stockbrokers were not sent on to him but remained in the office, and as he was going on with a series of other transactions A did not ask for them. C executed forged transfers, sold the shares, and pocketed the proceeds. The first of the transfers in favour of A was dated November 1901, and the last December 1902. C absconded in September 1903. In April 1904 A brought an action for delivery of the certificates (or otherwise for damages). *Held* that as A's claim had not been timeously made, the defenders were not liable for the loss. *Opinion* (*per* Lord President) that in ordinary stockbroking transactions the contract with the stockbroker included the delivery to the client of the certificates for the stock purchased. Robb *v.* Gow Brothers & Gemmell, p. 120.

Contract—Reparation—Breach of Contract—Implied Warranty—Supply of Rope Slings by Shipowner to Stevedore—Accident through Defective Rope Sling to Stevedore's Employee—Liability of Shipowner. Shipowners, following a general custom, supplied to the stevedore the rope slings required for unloading their vessel. A sling broke and caused injury to be done to one of the stevedore's employees, who recovered damages from him under the Employers' Liability Act. The stevedore brought an action against the shipowners to recover the damages paid and the expenses. *Held* that the shipowners did not warrant the rope slings, which were no part of the ship's permanent equipment, but supplied them only to the approbation of the stevedore, and consequently that the shipowners were not in breach of contract and must be *assoilzied*. *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640, *distinguished*. *Dictum* of Lord Young in *M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206, 28 S.L.R. 144, *approved*. Wood & Company *v.* A. & A. Y. Mackay, p. 458.

——— *Construction—Sale of Business—Contract not to "Directly or Indirectly Carry on, or be Engaged, or Concerned, or Interested in" the Business.* A coal merchant, engaged both in the home and foreign trade, sold his home business to a company, entering at the same time into an agreement with the company not to "directly or indirectly carry on, or be engaged, or concerned, or interested in the coal trade in any part of Great Britain or the Isle of Man." He subsequently sold his foreign business to another company on credit, looking for payment to the company's future profits. The company subsequently started a home business in Great Britain. *Held* that the mere fact of his being a creditor of the company did not make him "concerned or interested in" the coal trade in the meaning of the agreement. Cory & Son, Limited *v.* Harrison and Others, p. 571.

Contract—Construction—Foreign—Arbitration Clause—Reference to Arbitration in a Country not that of the Parties nor of Fulfilment—Law Governing Validity and Effectiveness of Clause. A contract between a merchant in Scotland and a mercantile firm in Antwerp, to be implemented in Scotland, contained this clause—"*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way." *Held* that the question whether the clause was valid and effective fell to be determined by the law of England. *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, *followed*. Robertson *v.* Brandes, Schonwald, & Company, p. 635.

——— *Insurance Policy—Construction—Grammatical Error—A Negative in Proviso to a Condition Nullifying Whole Intention of Condition—Reading Proviso as if there were No Negative therein.* A policy of insurance against accident stipulated that the right to recover under it should be forfeited on the expiry of . . . from the date of the accident "unless within these periods a settlement with the insured or his representatives has been agreed upon, or his claim referred to arbitration, or in the absence of notice from the company requiring the matters in difference to be referred to arbitration, legal proceedings have *not* been taken by the insured against the company. . . ." *Held* that as the whole intention of the condition was to impose a limit of time on claims, and as the presence of the word "not" in the proviso was to nullify this intention, the clause must be read omitting the "not." Glen's Trustees *v.* the Lancashire and Yorkshire Accident Insurance Company, Limited, p. 684.

——— *Bankruptcy—Ranking—Preference—Invoice—Receipt Note—Goods in Custody of Bankrupt—Clause Printed in Invoice or Receipt Note that "All Goods Held in Trust Covered by Insurance against Fire"—Claim on Sum Recovered by Trustee in Bankruptcy from Insurance Company.* A miller who was insured against fire received hay to be cut, and sent in return receipt notes or invoices with the following clause printed on them:—"All goods held in trust covered by insurance against fire." A fire having occurred, hay belonging to a customer was destroyed, and, the miller having become insolvent, the trustee on his sequestrated estate recovered from the insurance company the estimated loss by the fire. *Held* (1) that the miller had undertaken to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession, and (2) that whether his customers' risks were or were not covered by the policies, the insurance company having paid, the customer was entitled

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to a ranking on the money recovered preferable to the general creditors. Cochran & Son *v.* Leckie's Trustee, p. 715.

Contract—Breach—Penalty or Liquidated Damages—Criterion. "The criterion of whether a sum, be it called penalty or damages, is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made." Commissioner of Public Works *v.* Hills, p. 894.

—— *Interpretation — "Actual Cost" of Constructing Railway Line—Interest.* A contract between a colonial government and a contractor provided that in the event of the latter failing to complete the construction of a railway by a given date the former should take over and pay "the actual cost" of the work in so far as completed. *Held* that the contractor was not entitled under the contract to interest on the amount. Commissioner of Public Works *v.* Hills, p. 894.

—— See *Arbitration—Agent and Client—Relief—Process—Misrepresentation.*

Contract between Company and Firm. See *Agent and Client.*

Contract of Copartnery. See *Arbitration.*

Contributory Negligence. See *Reparation—Bar.*

Conveyance on Sale. See *Revenue.*

Conviction. See *Justiciary Cases.*

Copartnery for a Fixed Term. See *Partnership.*

Copyright — Photograph — Copyright in Photographs — More than One Person Interested in Sitting. "It seems settled that if a person goes to a photographer and asks for a sitting, he is entitled to the copyright of the photographs then taken, it being presumed that he is liable to pay for them and intends to pay for them. On the other hand, it seems that if a photographer invites some celebrated person to give him a sitting, and the person agrees to do so, the copyright of the photograph is the photographer's, even though the sitter should afterwards pay for copies. Further, if a third person employs a photographer to take the likeness of another person, whether that person be a celebrated person or not, and arranges for a sitting accordingly, the photographs taken at such sitting belong to the third person, and he is liable to pay for the sitting." *Application* of the law above stated in a case where more than one person was interested in the sitting. Crooke *v.* The Scots Pictorial Publishing Company, Limited, 723.

Cost of Transferring Business to New Premises. See *Income Tax.*

Counter Claim. See *Justiciary Cases.*

County Council. See *Local Government.*

County Occupation Franchise. See *Election Law.*

Crave as to Expenses. See *Process.*

Crown Case. See *Expenses.*

Custody of Child. See *Parent and Child.*

Custom of Trade. See *Reparation.*

Damages. See *Reparation—Landlord and Tenant.*

Damages for Decree being Taken in Absence. See *Reparation.*

Dean of Guild. See *Burgh.*

Debt Due by Company in Liquidation. See *Arrestments.*

Debt Due by Law-Agent to Executor. See *Executor.*

Decree in Absence. See *Reparation.*

Decree for Something Different from what Asked. See *Justiciary Cases.*

Decree of Fine or Imprisonment. See *Jurisdiction.*

Deductions. See *Income Tax—Valuation Cases—Poor—Revenue—Master & Servant.*

Deed Executed in Contemplation of Marriage. See *Trust.*

Deed Executed by Lady Domiciled in England. See *International Law.*

Deed in Scottish Form. See *International Law.*

Deed of Gift. See *Revenue.*

Delay. See *Contract.*

Delay in Enforcing Obligation. See *Bar.*

Deletion. See *Reparation.*

Delict. See *Process.*

Delivery. See *Donatio mortis causa.*

Demise of Ship. See *Insurance.*

Dependants. See *Master and Servant.*

Deposit-Receipt. See *Donation—Trust.*

Desertion. See *Poor.*

Designation. See *Process.*

Destination. See *Succession.*

Diligence—Meditatio Fugæ Warrant—Aliment—Arrears of Aliment—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 4 *—Civil Imprisonment (Scotland) Act* 1882 (45 *and* 46 *Vict. c.* 42), *secs.* 3 *and* 4. A woman who seventeen years before had given birth to an illegitimate child, presented a petition in the Sheriff Court craving warrant for committing to prison a man against whom she was about to raise an action of filiation and aliment. She had not previously taken any steps to enforce her claim for aliment. The *in meditatione fugæ* warrant having been granted, and imprisonment having followed thereon, *held* in a suspension (1) that the debt in question was not a "sum decerned for aliment" excepted from the operation of section 4 of the Debtors (Scotland) Act 1880, which abolishes imprisonment for debt; (2) that by the Civil Imprisonment (Scotland) Act 1882, sec. 3, imprisonment was no longer a competent diligence even for alimentary debts; (3) that imprisonment on an *in meditatione fugæ* warrant, being merely an ancillary diligence, was therefore here incompe-

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tion; and (2) that the same should be passed simpliciter. Cain v. M'Colm, May 26, 1892, 19 R. 813, 29 S.L.R. 730, distinguished. Grandy v. Johnston, p. 39.

Diligence—Meditatio Fugæ—Conformity of Warrant for Imprisonment to Prayer. The prayer of a petition for imprisonment on an in meditatione fugæ warrant craved that the defender should be committed to the prison of Forfar. The Sheriff committed him to the prison of Dundee. *Opinion* that in the circumstances this disconformity did not render the warrant invalid. Grandy v. Johnston, p. 39.

—— *See Process.*

Direction to Divide Residue. See Succession.

Direction to Pay. See Succession.

Direction to Sell and Divide. See Succession.

Disallowance of Expenses. See Expenses.

Discharge. See Misrepresentation.

Discharge by Daughter in her Marriage-Contract. See Revenue.

Discharge of Possible Claim for Legitim. See Revenue.

Discretion of Arbitrator. See Master and Servant—Expenses.

Discretion of Local Authority. See Public Health.

Discretionary Powers of Trustees. See Succession.

Dismissal with Admonition. See Justiciary Cases.

Disputes Referred to Arbitration. See Arbitration.

Disqualification. See Arbitration.

Disqualification of Occupier. See Election Law.

Divorce. See Expenses—Husband and Wife.

Documentary Evidence. See Justiciary Cases.

Domicile—Change of Domicile—Abandonment of Domicile of Origin—Proof. In order to lose his domicile of origin mere change of residence is not sufficient, but a man "must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile." An English banker acquired an estate in Scotland, where for many years he continued chiefly to reside, and which he described as his "home," but he continued to conduct his business in England, to hold his real property there, and to live for short periods from time to time in two residences which he continued to keep up in that country. *Held* that he had not lost his domicile of origin in England. *Observed, per* Lord Chancellor, that "the nature of the man himself, the sort of character he had, and what he was endeavouring to settle," were elements to be taken into consideration in deciding the question. Huntly and Another *v.* Brooks' Trustees, p. 112.

—— See *Jurisdiction.*

Donation mortis causa—Deposit-Receipt—Deposit-Receipt Taken in Name of One of the Favoured Persons and of Another Person "in Trust"—Donation mortis causa or Nuncupative Will. A person in contemplation of his death, being desirous of benefiting four persons, members of the family, took a deposit-receipt for £500 in the names of one of them and of another person "in trust." A question having arisen after his death as to whether the £500 was a donation mortis causa or was merely a nuncupative will, *held* (following *Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, 4 S.L.R. 184) that there was here a donation mortis causa, and (following *Mitchell* v. *Wright*, 21st November 1734, M. 9082) that the fact that the money had not been handed over to the persons favoured but to two persons one of whom only was one of the donees and the other not, did not affect the validity of the donation. National Bank of Scotland, Limited v. Mackie's Trustees and Others, p. 13.

Donation mortis causa—Deposit-Receipt—Delivery. Circumstances in which *held*—approving judgment of Lord Ordinary (Low)—that a *mortis causa* donation had been made by a deposit-receipt found in the donor's repositories after her death. Scott's Trustee v. Macmillan, p. 179.

Donation mortis causa. See Trust.

Double Distress. See Process.

Election Law—Household Franchise—Occupation for Twelve Calendar Months—Entry on First Day of the Twelve Months—Disqualification of Occupier—Representation of the People (Scotland) Act 1868 (31 and 32 Vict. c. 48), sec. 3—Representation of the People Act 1884 (48 Vict. c. 3), secs. 2 and 7 (4). The tenant of a house situated in a county entered on his tenancy on 1st August 1904, and claimed at a Registration Court held in October 1905 to be enrolled as a voter in respect thereof. *Held* that the claimant was not qualified by possession for "not less than twelve calendar months next preceding the last day of July," as required by statute, his possession having been one day short of that period. *Waddell* v. *Macphail*, December 2, 1865, 4 Macph. 130, 1 S.L.R. 50, *followed.* Emmerson v. Oliver, p. 291.

—— *Process — Procedure — Adjournment — Lodger Franchise — Failure of Claimant to Appear after Citation—Motion for Adjournment in order to again Cite the Claimant Refused.* A person claiming to be enrolled as a voter under the lodger franchise, whose claim was objected to, was cited under warrant of the Sheriff-Substitute to appear at a diet of the Court. He failed to appear, and a motion for an adjournment in order that he might be again cited was refused by the Sheriff-Substitute. *Held* that the granting of an adjournment depending upon the reasonableness of the motion was a matter for the discretion of the Sheriff; and that, as the stated case contained no material for the Court to decide whether the motion was reasonable or not, the Sheriff's judgment must be upheld. M'Kee *v.* Orr, p. 292.

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Election Law—Evidence—Lodger Franchise—Claim and Declaration—Presumption in Favour of Claimant's Qualification—Rebutting the Presumption on Facts Ascertained from Valuation Roll—Registration Amendment (Scotland) Act 1885 (48 *and* 49 *Vict. cap.* 16), *sec.* 14. The Registration Amendment (Scotland) Act 1885 (48 and 49 Vict. cap. 16), sec. 14, enacts—"In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification." Where a claimant under the lodger franchise, duly cited, failed to appear, the Sheriff found that the *prima facie* evidence of the qualification contained in his declaration was rebutted by facts disclosed by the assessor from the valuation roll, and there being no other evidence in support of the claim, rejected it. *Held* that there being no question raised as to the competency of the evidence on which the Sheriff proceeded, and his decision being on a matter of fact, the Court could not competently interfere. M'Kee *v.* Orr, p. 292.

——*Occupation Franchise—Claim—Failure to State Houses Successively Occupied—Amendment—Registration of Voters (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 58), *sec.* 46. The claimant to a vote in respect of occupancy set forth as his qualification the occupancy of a house which it appeared that he had only occupied for a period of three months. Leave to amend the claim by the insertion of a statement setting forth successive occupation of other houses for the qualifying period was refused by the Sheriff. *Held* that, in the absence of a finding in fact to that effect, the omission in the claim was not a casual error within the meaning of section 46 of the Registration of Voters (Scotland) Act 1856, and that consequently the Sheriff had rightly refused to allow the amendment. *Osborne* v. *Melville*, December 7, 1899, 2 F. 266, 37 S.L.R. 186, *approved*. *Ross* v. *Carberry*, November 18, 1897, 25 R. 98, 35 S.L.R. 109, *distinguished*. *Opinion* (*per* Lord Johnston) that where the omission or error was a casual error within the meaning of the section, the Sheriff was bound to allow amendment. Somerville *v.* Kinnaird, p. 337.

——*Lodger Franchise—Claim—Omission to Insert Designation of Party to whom Rent Payable—Competency of Amendment—Registration of Voters (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 58), *sec.* 46—*Representation of the People (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 48), *secs.* 4, 19, *and Sched. I.* The claimant to a lodger vote set forth in his statutory schedule of claim, in the column for statement of the "name, description, and residence of the person to whom rent paid," a name, without specifying any designation or residence. A motion for leave to amend the claim by the insertion of the particulars was refused by the Sheriff. *Opinion per curiam* that the error was not a casual error within the meaning of section 46 of the Registration of Voters (Scotland) Act 1856, which the Sheriff by the said section was empowered to allow to be amended. Brown *v.* Kinnaird, p. 340.

Election Law—Burgh Franchise—"Building"—Representation of the People (Scotland) Act 1832 (2 *and* 3 *Will.* IV, *c.* 65), *sec.* 11. *Held* (Lord Kinnear reserving opinion) that a meter house built of stone and lime, 4 feet 6 inches long, 3 feet broad, and 4 feet high, is not a "building" within the meaning of section 11 of the Representation of the People (Scotland) Act 1832. *Question* whether, since the Representation of the People Act 1884, the ownership of land within a burgh, combined with residence in or within seven miles of it, will not suffice to give a qualification. Duncan *v.* Jackson, p. 341.

——*Occupation - Franchise — Borough Occupation-Franchise—Tenant of Houses Occupied by his Servants having Service Franchise—"Occupant as Tenant"—Representation of the People (Scotland) Act* 1832 (2 *and* 3 *Will. IV, cap.* 65), *sec.* 11—*Representation of the People Act* 1884 (48 *Vict. cap.* 3), *secs.* 3, 5, *and* 7 (7). A tenant farmer whose tenancy included two houses in a burgh occupied by servants in his employment, who were in the enjoyment of the service franchise in respect thereof, claimed to be entered on the roll in respect of his occupancy of said houses as tenant. *Held* that the employer was not an "occupant as tenant" for the purposes of the franchise, and not therefore entitled to be enrolled, but that the occupiers of the houses in the sense of the franchise statutes were the servants who occupied the houses in virtue of their employment, and who alone were entitled to be enrolled, and that in respect of the service qualification. Jack (Bett) *v.* Edie, p. 344.

——*County Occupation Franchise—Personal Occupancy—Temporary Absence on Business from Qualifying Premises—Representation of the People (Scotland) Act* 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 6—*Representation of the People Act* 1884 (48 *Vict. c.* 3), *sec.* 5 and 7 (6). A person claimed to be registered as a voter for a county under the occupation franchise in terms of the Representation of the People Act 1884 (48 Vict. cap. 3), sec. 5. It appeared that during twelve months prior to the application the claimant was temporarily absent from the qualifying premises for the purposes of his business, but that during that period the premises had been occupied by his wife, and that the furniture therein was his property. *Held* that the claimant's occupancy as tenant of the premises sufficiently satisfied the requirements of the statute notwithstanding his absence from them, and that therefore he was entitled to be registered. Whitelaw *v.* M'Gowan, p. 346.

Election of Trustee. See *Bankruptcy.*

Employment. See *Master and Servant.*

Enforcement of Restriction. See *Superior and Vassal—Property.*

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Enrolled Law-Agent. See *Process.*
Entry. See *Election Law—Payment.*
Equitable Remedy. See *Process.*
Error. See *Reduction—Process.*
Error, Grammatical. See *Contract.*
Error of Sheriff. See *Bankruptcy.*
Essential Defect. See *Justiciary Cases.*
Essential Error. See *Reduction—Misrepresentation—Landlord and Tenant.*
Estate Duty. See *Revenue.*
Evidence. See *Justiciary Cases—Election Law.*
Exclusion of Review. See *Justiciary Cases.*
Executor—Eadem persona cum defuncto—Compensation—Debt Due by Law-Agent to Executor in respect of Executory Estate Compensated with Debt Due to Law-Agent by Deceased in respect of Business Account. The law-agent of a deceased lady, who at her death was his debtor for the amount of a business account, was employed by her executor to realise her estate. The estate turned out to be of less value than the amount of the business account. In an action by the executor against the law-agent for payment of the amount realised by the deceased's estate, *held* (1) that the executor was not a trustee for the creditors of the deceased, but was simply the representative of the deceased and debtor to her creditors and creditor to her debtors, and (2) that consequently the pursuer's claim was extinguished by compensation. *Globe Insurance Company* v. *Mackenzie*, August 5, 1850, 7 Bell's App. 296; and *Stewart's Trustees* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R. 570, *followed*. *Gray's Trustees* v. *Royal Bank*, November 27, 1896, 23 R. 199, 33 S.L.R. 140, *disapproved*. Mitchell (Alexander's Executor) *v.* Mackersy, p. 107.
Exemption from Income-Tax Claimed by a Society. See *Revenue.*
Expenses — Multiplepoinding — Appeal — Will—Uncertainty—Unsuccessful Claimant in Sheriff Court Allowed Expenses of Appeal out of the Fund in medio. Expenses of appeal allowed to an unsuccessful claimant in an appeal from the Sheriff Court out of the fund *in medio* —there being doubt as to the meaning of the bequest, the Sheriff and Sheriff-Substitute having differed, and the action being a multiplepoinding to which the appellant had been called *nominatim*. Argo *v.* Pauline and Others, p. 23.
——*Appeal for Jury Trial—Summar Roll Discussion—Preliminary Pleas—Allowance of Expenses in Interlocutor Deciding Preliminary Pleas.* In an action of damages for solatium in which the pursuer had appealed for jury trial, the defenders pleaded, *inter alia*, no relevant case and no title to sue. After a discussion in the Summar Roll, the Court, in the interlocutor repelling the preliminary pleas, *allowed* the pursuer the expenses of the discussion. Convery *v.* Lanarkshire Tramway Company, p. 92.
——*Process—Appeal—Failure to Inform Sheriff as to Position of Authoritative Decisions a Ground for Refusing Successful Party Expenses of Appeal.* A Sheriff in an action before him granted pursuer decree following a decision of one of the Divisions of the Court of Session founded on by the pursuer. That decision was contrary to a previous decision of the House of Lords, which had not been quoted to the Division. The defender failed to point out this omission to the Sheriff. In an appeal, the Court, while following the House of Lords' decision and recalling the Sheriff's judgment, allowed no expenses in the Court of Session to either party, both being responsible for the position which made the appeal necessary. Mitchell (Alexander's Executor) *v.* Mackersy, p. 107.
Expenses — Divorce — Wife's Expenses — Taxation as between Agent and Client. It is a rule of the law of Scotland that where a wife is successful in her defence to an action of divorce she is entitled to her expenses as between agent and client. Grant *v.* Grant and Another, p. 109.
——*Crown Case—Test Case.* The Inland Revenue brought an action to recover income-tax in a case where exemption was claimed, and, being unsuccessful, appealed to the House of Lords. At the discussion the respondents asked that they, whether successful or not, should be granted their expenses inasmuch as it was a test case. Counsel for the appellant (pursuer) consented. On judgment being given for the appellant their Lordships made an order granting the respondents their expenses both in the appeal and in the Courts below. Inland Revenue *v.* Old Monkland Conservative Association, p. 119.
——*Multiplepoinding—Multiplepoinding where Dispute might have been Decided by Direct Action—Expenses of Raising the Action. Question* whether, in the event of the real raiser of a multiplepoinding being unsuccessful in his claim, the general rule of allowing him the expenses of bringing the action out of the fund *in medio* would be followed if the dispute could have been equally well determined in a direct action at his instance against the other claimant. Connal & Company, Limited *v.* Reid and Others. Clyde Navigation Trustees *v.* Reid and Others, p. 187.
——*Jury Trial—Bill of Exceptions—New Trial—Expenses of Discussion on Bill of Exceptions.* The rule that when a new trial is granted the question of expenses should be reserved, applies not only to the expenses of the former trial and of a motion for a new trial, but also to the expenses of the discussion on a bill of exceptions. Canavan *v.* J. Green & Company, p. 200.
——*Petition for Winding-up Order — Resolution of Company to Wind-up Voluntarily under Supervision—Refusal of Winding-up Order—Expenses of Petitioner.* Where the Court, giving effect to the wishes of a large majority of a company's creditors, and taking into consideration the whole circumstances of the case, refused the petition of one creditor for a winding-up order, and decided that

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the voluntary winding-up under supervision resolved on by the company subsequent to the petition being presented should be continued, it *allowed* the petitioning creditor his expenses, and directed them to form part of the expenses of the liquidation. Elsmie & Son *v.* Tomatin Spey District Distillery, Limited, and Another, p. 324.

Expenses—Process—Interlocutor—Taxation—Public Authorities Protection Act 1893 (*56 and 57 Vict. c.* 61), *sec.* 1 (*b*)—*Interlocutor in Ordinary Form Giving Expenses to a Defending Public Authority—Proper Time to Move for Expenses as between Agent and Client.* In an action against the District Committee of a County Council and the County Road Board the defenders were found entitled to expenses. The interlocutors were in ordinary form. The defenders having presented a note to the Lord President in which they craved his Lordship to move the Court to direct the Auditor to tax their account as between agent and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893, and stated that the Auditor had refused to do so on the ground that he had no warrant to tax the account otherwise than as between party and party—*held* that the defenders' motion not having been made before the interlocutors were signed was not timeous, and note *refused*. Magistrates of Aberchirder *v.* Banff District Committee and Others, p. 409.

—— *Ship — Collision — Petition for Limitation of Liability—Respondent Opposing Limitation Liable for Expenses Caused by Opposition—Merchant Shipping Act* 1894 (*57 and 58 Vict. cap.* 60), *sec.* 504. In a petition for limitation of liability brought under section 504 of the Merchant Shipping Act 1894, the respondent, who opposed the petition contending unsuccessfully that the petitioner was not entitled to the benefit of limitation, *held* liable to the petitioner in such expenses as had been caused by his contention. Couper *v.* M'Kenzie, p. 416.

—— *Disallowance of Expenses on Ground of Unsatisfactoriness of Witnesses.* The unsatisfactoriness of the witnesses in a cause is not a ground for refusing the successful party his expenses. Wood & Company *v.* A. & A. Y. Mackay, p. 458.

—— *Jury Trial — Slander — Verdict for Defender on Pursuer's Issue—No Verdict Returned on Defender's Counter Issue of Veritas—Motion by Pursuer for Modification of Expenses.* A jury, in an action of damages for slander returned a verdict for the defender on the pursuer's issue, and following the direction of the presiding judge, to which no exception was taken, found that it was unnecessary to return a verdict on the defender's issue of *veritas*. The pursuer asked a modification of the expenses in respect of the issue of *veritas*, which had not been established. The Court *granted* the defender his expenses without modification. Campbell and Others *v.* Scottish Educational News Company, Limited, p. 487.

Expenses—Jury Trial—Two Trials in both of which Pursuer Successful—Verdict in First Trial Set Aside on Ground of Misdirection—Expenses of First Trial. In an action of damages for personal injury the pursuer obtained a verdict which was afterwards set aside on the ground of misdirection. At the second trial the pursuer again obtained a verdict. The pursuer moved for expenses of both trials. *Held* that as the verdict in the first trial had been set aside on the ground of misdirection the pursuer was entitled to the expenses of the first trial as well as those of the second. *Opinions reserved* as to the right of a pursuer who has been successful in both trials to the expenses of the first where the verdict in it has been set aside as contrary to the evidence. *M'Quilkin* v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; and *Grant* v. *William Baird & Company, Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365, *commented on*. Canavan *v.* John Green & Company, p. 604.

—— *Several Defenders—Liability of Unsuccessful Defender for Expenses of Successful Defender.* In an action against two defenders "conjunctly and severally or severally" for damages in respect of the death of the pursuer's son, one of the defenders was found liable and the other assoilzied. *Held*, in the circumstances of the case, that as the successful defender had been brought into Court owing to the conduct of the unsuccessful defender in repudiating liability, in the knowledge of facts peculiarly within his own province and which no inquiry on the part of the pursuer might have been able to discover, the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer. *Mackintosh* v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; and *Thomson* v. *Edinburgh and District Tramways Company, Limited*, January 15, 1901, 3 F. 355, 38 S.L.R. 263, *commented on*. Morrison *v.* Waters & Company and Another, p. 646.

—— *Parish Council Sisted Defenders—Liability for Expenses from Lodging of Minute Craving Sist only—Action to Determine Position of Right-of-Way.* The Landward Committee of a Parish Council sisted themselves as defenders to an action to determine the position of an admitted right-of-way within the parish, brought against the District Committee of the County Council, who did not defend. *Held* that the Landward Committee, who were found to have no title, were only liable in expenses from the date of lodging the minute of sist. Hope *v.* The Lasswade District Committee of the County Council of Midlothian and Others, p. 679.

—— *Master and Servant—Workmen's Compensation Act* 1897 (*60 and 61 Vict. cap.* 37), *Schedule II, sec.* 6—*Incompetent Application for Arbitration—Discretion of Arbiter.* The Workmen's Compensation Act 1897, Schedule II, section 6, provides:—"The costs of and incident to

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the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. . . ." *Held* that this enactment did not cover the expenses of an application for arbitration found to be incompetent and premature. Kennedy *v.* Caledon Shipbuilding and Engineering Company, Limited, p. 687.

Expenses—Husband and Wife—Petition by Wife for Custody of Children—Wife's Expenses—Whether Wife Entitled to Expenses as between Party and Party or as between Agent and Client—"Necessary" Expenses. Held that as the expenses incurred by a wife in a successful petition for custody of children were not "necessary" expenses which a husband was bound to pay, the petitioner was only entitled to expenses in ordinary form. *Question* (*per* Lord Kinnear) as to the rule observed in awarding a wife expenses in a consistorial cause, "whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband, should be applicable to the case of a wife having a considerable separate estate." A *v.* B, p. 731.

——— See *Justiciary Cases.*

Expenses after Verdict Applied. See *Master and Servant.*

Expenses Carried by Minute. See *Process.*

Expenses of Unsuccessful Trial. See *Master and Servant.*

Expiry of Reclaiming Days. See *Process.*

Faculties and Powers. See *Succession.*

False Statement in Advertisement. See *Landlord and Tenant—Trade Name.*

Fee. See *Succession.*

Fellow-Servant. See *Reparation.*

Fencing. See *Reparation.*

Feu Charter. See *Superior and Vassal.*

Feuars with a Common Superior. See *Superior and Vassal.*

Finality Clause. See *Process.*

Finality of Decree. See *Process.*

Fire Insurance. See *Insurance.*

Fishings — Salmon-Fishing — Trespass — Parties Nominally Fishing for Trout—Facts Held Sufficient to Warrant Interdict. A *pro indiviso* proprietor of salmon-fishing having the exclusive right on seven out of every eight week days, raised an action of interdict against certain persons, the townsmen of a town which was the other *pro indiviso* proprietor of the salmon-fishing, having the exclusive right on the eighth day, and which exercised its right by leaving it open to the townsmen, to have them prohibited from unlawfully trespassing on his fishing. The defenders averred that they were fishing for brown trout, which class of fishing was in fact open to them. Interdict *granted* where it was established, though no salmon had actually been taken, that the defenders (1) had made no difference in their method of fishing on the days when they were not entitled to fish for salmon, and (2) had used minnow tackle or large sized flies (though not technically salmon flies), and (3) had fished in the months of August and September, months when, broadly speaking, only salmon and sea trout are taken with the rod. Warrand *v.* Watson and Others, p. 799.

Fishings—Salmon-Fishing—River—Rights of Upper Salmon-Fishing Proprietor—Rights of Lower Riparian Millowner. The proprietors of salmon-fishing in the upper reaches of a river are not entitled, as against a lower riparian millowner, to insist upon having the condition and flow of the river left in their natural state, save in so far as affected by rights acquired by prescription; their right is limited to seeing that there is no obstruction or abstraction of such a character as materially to impede the free passage of salmon. *Question* whether, in cases where water is abstracted, it is necessary that at least an equal amount of water to that abstracted be sent down the stream of the river, on the ground that salmon always follow the main stream. Earl of Kintore and Others *v.* Alexander Pirie & Sons, Limited, p. 838.

——— See *Justiciary Cases.*

Foreign—Reparation—Conflict of Laws—International Private Law—Lex loci delicti commissi—Action in Scotland by Domiciled Irishman for Solatium. A domiciled Irishman living in Ireland raised an action in a Sheriff Court in Scotland against a tramway company operating there, to recover damages, by way of solatium, for the death of his son, who had been killed, he averred, by their negligence. The law of Ireland recognising no claim for solatium, the defenders pleaded, *inter alia*—(1) The action is irrelevant; (2) no title to sue. *Held* that the pursuer's remedy was regulated by the *lex loci delicti commissi* irrespective of his domicile, and an allowance of issues *granted. Kendrick* v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62, *explained and distinguished.* Convery *v.* Lanarkshire Tramways Company, p. 92.

——— See *Jurisdiction—Witness.*

Foreign Contract. See *Contract—Process.*

Foreign Heritage. See *International Law.*

Foreigner. See *Master and Servant.*

Foreshore. See *Harbour.*

Forfeiture of Shares. See *Company.*

Forgery. See *Bill of Exchange.*

Fraud—Principal and Agent—Stockbroker—Fraud by Stockbroker's Accredited Clerk—Stockbroker not Liable for Certificates of Stock Misappropriated by Clerk nor for Sums of Money Credited to Client in Monthly Account Receipted by Clerk. An "accredited" clerk in a stockbrokers' office obtained possession of certificates of stock belonging to a client whose brother-in-law he was, which had been left in the office, and, executing forged transfers, sold the stock and appropriated the proceeds. On another occasion in the fortnightly account rendered to the client he credited him with the amount of a cheque and receipted the account, although the stockbrokers had not received the cheque, which he had appro-

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priated to his own use. It was not proved that he had any authority to grant receipts. *Held—affirming* judgment of Lord Ordinary (Low)—that the rule of law established in *Barwick* v. *English Joint Stock Bank* (L.R. 2 Ex. 259), and *Clydesdale Bank* v. *Paul* (March 8, 1877, 4 R. 626 14 S.L.R. 403), whereby an innocent principal is only held liable for his agent's fraud where the fraud is committed within the scope of the service and for the principal's benefit, applied, and that the stockbrokers were consequently not liable. Robb *v.* Gow Brothers & Gemmell, p. 120.

Fraud. See *Justiciary Cases—Trade Name—Process.*

Fraud of Partner. See *Bar.*

Gaming. See *Justiciary Cases.*

Gazette Notice. See *Bankruptcy.*

Gift. See *Revenue.*

Gift of Fee. See *Succession.*

Glebe Lands. See *Teinds.*

Goods in Custody of Bankrupt. See *Contract.*

Goods in Custody of Insured. See *Insurance.*

Goods in Possession of Debtor. See *Justiciary Cases.*

Goods Purchased on Credit. See *Club.*

Harbour—Statute—Construction—Fisherrow Harbour Act 1840 (3 *Vict. c. lxxiii*), *secs.* 2, 49, *and* 76—"*Precincts of Harbour*"—"*Along the Shore*"—*Foreshore.* The Fisherrow Harbour Act 1840 in section 2 provides that where in the Act the word "harbour" occurs it shall be understood to mean the harbour of Fisherrow, and shall include "the whole precincts thereof as after specified, and the piers, quays . . . presently existing or which are hereby authorised to be made or maintained . . . unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." Section 49 enacts "that it shall not be lawful for any person to throw . . . any ballast, dirt, ashes, rubbish, . . . into the said harbour . . . nor shall it be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast, or any other purpose, except from such place or places as shall from time to time be appointed for that purpose under the authority of the said commissioners . . ." The word "precincts" is not defined in the Act, but section 76 provides that "for the purposes of this Act, and for no other purposes whatever, the said harbour shall be deemed to extend along the shore from the M burn on the west to the R burn on the east, and to seaward to the extent of 100 yards below low-water mark opposite to the shore between the foresaid burns." Certain parties owned lands abutting on the sea between the burns M and R, and claimed right to remove sand therefrom from below the line of high-water of ordinary spring tides. In an action of declarator brought against them by the Harbour Commissioners, *held* that the terms "harbour and its precincts" were not to be read as meaning only the harbour proper and the ground in close proximity where any operations might do damage to its works, but included the whole foreshore between the said burns, *i.e.*, up to the line of high-water of ordinary spring tides, and consequently that the defenders were not entitled to remove the sand without the Commissioners' authority. Fisherrow Harbour Commissioners *v.* Musselburgh Real Estate Company Limited, p. 110.

Harbour. See *Poor—Valuation Acts.*

Height of Buildings. See *Burgh.*

House of Lords. See *Administration of Justice.*

Household Franchise. See *Election Law.*

Hours of Closing. See *Statute.*

Husband and Wife—Nullity of Marriage—Impotency—Incapacity of Woman—Absence of Structural Defect—Impracticability of Consummation—Circumstances in which Impracticability Inferred. Seven months after the marriage a husband brought an action of nullity against the wife on the ground of her impotency. The spouses had separated three and a-half months after the marriage, but prior to that date the husband, who was able and anxious to consummate the marriage and had had sufficient opportunities, had used every means to that end short of physical violence, but without attaining his object. There was no structural incapacity in the wife. No reason was suggested for a wilful refusal on her part. *Held* (1) (*aff.* Lord Ordinary Johnston's opinion) that incapacity on the part of the woman was not restricted to cases where some structural incapacity existed, but included cases where consummation was impracticable, an inference to be drawn from the facts; and (2) (*rev.* Lord Ordinary Johnston) that in the circumstances of the case incapacity on the part of the woman was to be inferred, and consequently that the man was entitled to decree. A B *v.* C B, p. 411.

——*Divorce—Separation and Aliment—Process—Action of Separation and Aliment Raised Pending Action of Divorce on Same Grounds—Competency—Lis alibi pendens.* A wife raised an action of divorce against her husband on the ground of adultery. Having changed her mind as to the remedy she desired, she thereafter raised an action of separation and aliment against him on the same grounds without having abandoned the divorce action. The defender pleaded—"The action is incompetent" and "*Lis alibi pendens.*" *Held* that the action was competent, it being open to the defender in the event of the pursuer not proceeding with or abandoning the action of divorce to move that it be dismissed with expenses. Stewart *v.* Stewart, p. 522.

——See *Expenses.*

Husband Living Apart. See *Master and Servant.*

Hypothec. See *Lease.*

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Implements of Livelihood. See *Bankruptcy.*
Implied Contract. See *Master and Servant —Company.*
Implied Mandate. See *Partnership.*
Implied Warranty. See *Contract.*
Imprisonment. See *Justiciary Cases.*
Income Tax—Profits—Deductions—Cost of Transferring Business to New Premises —Property Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Schedule D, Case* 1, *Rule* 3. A company engaged in the business of buying and selling granite found it necessary to acquire a larger yard. It removed stones and cranes from the old to the new yard, re-erecting the cranes there. *Held* that in estimating the annual profits for the purposes of the Income Tax Acts the company was not entitled to deduct the cost of the transference of stones to the new yard and the re-erecting of the cranes. Granite Supply Association, Limited *v.* The Solicitor of Inland Revenue, p. 65.
—— See *Revenue.*
Indemnity. See *Company.*
Indictment. See *Justiciary Cases.*
Infringement. See *Patent—Trade Name.*
Innuendo. See *Reparation.*
Insanity. See *Poor.*
Insurance—Fire Insurance—Goods in Custody of Insured—Policy Covering Property Held by Insured "in Trust or on Commission, for which he is Responsible." A miller who received from customers hay to be cut, was insured against fire by policies "on stock-in-trade the property of the insured, or held by him in trust or on commission for which he is responsible." *Opinion per* Lord Kyllachy that the policies might "quite well be read as constituting an insurance by the bankrupt for himself and all others concerned of the whole goods in his premises." Cochran & Son *v.* Leckie's Trustees, p. 715.
—— *Marine Insurance—Policy Effected by Owner of Ship—Right of Charterer to Benefit of Policy—Demise of Ship.* The owners of a vessel effected a policy of insurance on her, the policy being in common form and purporting to be made on the proposal of certain insurance brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The policy contained a collision clause. The vessel was chartered under a charter-party amounting to a demise of the ship during the currency of the charter to the charterers. Owing to her fault a collision took place with another vessel, the damages for which were paid by the charterers, who afterwards brought this action to recover them from the insurance company under the policy effected by the owners. There was no evidence of intention on the part of the owners to protect the charterers by insurance unless such intention could be inferred from the mere fact of the existence of the policy, taken in connection with the language of the charter, of which only the following clauses bore on the question, viz., clause 3, which declared that the charterers should pay for certain specified charges "and all other charges whatsoever" except repairs to hull and machinery and anything appertaining to keep the ship in working order; clause 17—"It is understood in event of steamer from above causes (stress of weather, etc.) putting in to any port or ports other than those to which she is bound that the charterers are covered as to expenses as the owners are by their insurance"; clause 22—"That the owners shall pay for the insurance of the vessel." *Held* that the charterers could not recover from the insurance company, there being no evidence that their interest was covered by the policy. Boston Fruit Company *v.* British and Foreign Marine Insurance Company, p. 892.
Insurance. See *Poor.*
Insurance Policy. See *Contract.*
Interdict—Interim Interdict—Subsistence of Interdict. Held (*per* Court of Seven Judges) that interim interdict having been granted in the Bill Chamber and the Note passed, the interdict subsisted till the Note was finally disposed of either by a judgment of the Lord Ordinary not reclaimed against, or by a judgment of the Inner House on a reclaiming note. Clippens Oil Company, Limited *v.* The Edinburgh and District Water Trustees, p. 540.
—— *Interim Interdict—Mineral Company Interdicted by Water Trustees—Question of Interdict Wrongous—Preservation of Status Quo—Prevention of Respondents from Doing what otherwise not Entitled to Do.* At the instance of water trustees interim interdict was granted against a mineral company interdicting it from mining under or within forty yards of the trustees' water-pipes. This interdict was eventually upon the Note refused and the company brought an action of damages. Pending this action the trustees sought and obtained on a different ground an interdict interdicting the company from mining so as to damage the pipes which had been found entitled to support. In the action of damages *held* that the interim interdict was wrongous, entitling to damages, inasmuch as (1) it was not one merely preserving the *status quo*, and (2) not being in exactly similar terms to the interdict finally obtained, its effect had not been only to prevent the pursuers doing what otherwise they were not entitled to do. *Observed per* Lord President—"I do not think that to show the defenders were trying to cripple the pursuer of set purpose has anything to do with the interdict being wrongous." Clippens Oil Company, Limited *v.* The Edinburgh and District Water Trust, p. 540.
——— *Competency—Form—Salmon-Fishing —Proprietors of Salmon-Fishing in Upper Reaches of River—Obstruction to Passage of Salmon by Lower Riparian Millowner—Rigidity of Interdict.* Where

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the proprietors of salmon-fishings in the upper reaches of a river allege obstruction to the passage of salmon up the river on the part of a lower riparian millowner, interdict at their instance is the appropriate remedy. Where an interdict had been granted by the Court of Session defining the respective rights of the salmon-fishing proprietors of the upper reaches of a river and a lower riparian millowner in a question as to obstruction by the latter, the House of Lords in affirming the order added a declaration "that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy." Earl of Kintore and Others *v.* Alex. Pirie & Sons, Limited, p. 838.

Interdict. See *Process—Road—Trade Name.*

Interdict Granted in Sheriff Court. See *Jurisdiction.*

Interest. See *Contract.*

Interim Interdict. See *Interdict—Process.*

Interlocutor. See *Master and Servant—Expenses.*

Interlocutor Ordering Inquiry. See *Process.*

Interlocutor Pronounced on Withdrawal of Reclaiming Note. See *Process.*

International Law—Jurisdiction—Foreign Heritage Owned by Domiciled Scotsman—Refusal of Owner to Implement Order of Court to Convey Foreign Heritage—Motion for Order on the Principal Clerk of Court to Execute Conveyance in Owner's Name Considered and Refused. In an action where the defender had been ordered by the Court to execute a conveyance of a certain heritable subject in Ireland in favour of the pursuers, but had refused to do so, a note craving the Court to authorise and ordain the Principal Clerk of Court to execute the required conveyance on behalf of the defender *refused.* Ruthven and Others *v.* Ruthven, 11.

—— *Succession — Will — Revocation by Marriage—Will of Englishwoman subsequently Marrying Domiciled Scotsman—Wills Act* 1837 (1 *Vict. c.* 26), *secs.* 18 *and* 35. *Held* that a will dealing with moveable estate, which was duly executed by a lady domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman. Westerman (Westerman's Executor) *v.* Schwab and Others, p. 161.

—— *Conflict — Trust-Deed Executed by Scotchwoman in intuitu of English Marriage—Deed in Scottish Form and Majority of Trustees Scottish — Revocability of Trust Conveyance—Power to Revoke.* Prior to her marriage a Scotchwoman executed a trust conveyance by which she conveyed her estate to trustees. The deed was executed *in intuitu* of an English marriage, but it was in Scottish form, and two of the three trustees nominated in it were Scotch. *Held* (1) that the question of the revocability of the deed fell to be determined by Scotch, and not by English law; but (2) that averments that "by the law of England the effect of marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed or settlement in contemplation of the marriage," were relevantly made by the defenders and must be the subject of inquiry. Sawrey-Cookson *v.* Sawrey-Cookson's Trustees, p. 209.

International Law — Conflict — Deed Executed by Lady Domiciled in England Ratifying Trust-Deed Executed by her in Contemplation of Marriage, and when Domiciled in Scotland — Revocability — Averment of English Law—Relevancy. A lady, subsequent to her marriage to a domiciled Englishman, executed a ratification of a Scottish trust-conveyance granted by her in contemplation of marriage, and when she was domiciled in Scotland. She subsequently claimed right to revoke the ratification. *Held* (1) that the question of the revocability of the ratification was to be determined by English law, and (2) that averments to the effect that by the law of England the ratification was irrevocable were relevantly made in defence, and must be the subject of inquiry. Sawrey-Cookson *v.* Sawrey-Cookson's Trustees, p. 209.

International Private Law. See *Foreign.*

Interpretation. See *Statute—Contract.*

Interpretation of Regulations. See *Process.*

Inter vivos Disposition. See *Trust.*

Intestacy. See *Succession.*

Intimation of Assignation. See *Assignation.*

Intimation of Motion. See *Process.*

Invalid Resolution. See *Company.*

Investment. See *Trust.*

Issue. See *Reparation.*

Issues and Counter Issue. See *Process.*

Judicial Factor—Special Powers—Power to Sell Heritable Subject—Report by Accountant of Court against Power Craved — Power Granted by Court. Circumstances in which a petition for the appointment of a judicial factor on an intestate estate, with special power to sell a heritable property included in the said estate, having been presented, the Court *granted* the special power craved, although the Accountant of Court, to whom a remit had been made, had reported against the special power being granted. Youngs, Petitioners, p. 648.

Judicial Slander. See *Reparation.*

Jurisdiction—Foreign—Domicile—Citation—Scotch Domicile of Origin and Personal Service in Scotland without Forty Days' Residence there. Held (*aff.* judgment of Lord Low) that a Scottish domicile of origin coupled with personal service in Scotland without forty days' residence there does not found jurisdiction against one who has abandoned his original domicile. *Opinion* (*per* the Lord Justice-Clerk) that a Scotch domicile of succession coupled with personal service in Scotland but without forty days' resi-

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dence there would not found jurisdiction in Scotland. Tasker *v.* Grieve, p. 42.

Jurisdiction—Justices of the Peace for County of Midlothian — Jurisdiction within County of City of Edinburgh—Edinburgh Extension Act 1896 (59 *and* 60 *Vict. cap. cciii*). *Held* (by the Whole Court unanimously) that the Justices of the Peace for the County of Midlothian have jurisdiction in small debt actions within the area of the existing City or Burgh of Edinburgh as defined prior to the passing of the Edinburgh Extension Act 1896. *Question*—whether their previously existing jurisdiction has been determined by force of that statute within the districts annexed to the City by that Act. Wright *v.* Bell, p. 136.

——— *Process—Sheriff Court—Interdict—Complaint of Breach of Interdict—Appeal—Decree of Fine or Imprisonment in Default Pronounced in Absence of Defender — Refusal to Review Proceedings when Interdict Granted — Competency.* A Sheriff-Substitute having interdicted a defender from interfering with heritable subjects or their rents, subsequently found on petition that a breach of interdict had been committed, and in the absence of the defender fined him and adjudged him, in default of payment, to be imprisoned, refusing to review the proceedings when the interdict was originally granted. The Sheriff having adhered to his Substitute's judgment, an appeal to the Court of Session was taken. *Held* (1) that the proceedings in the Sheriff Court were competent; (2) that inquiry was not allowable into the proceedings when interdict was granted; (3) that the defender's absence when judgment was pronounced did not invalidate the judgment. Stark's Trustees *v.* Duncan, p. 288.

——— *Appeal—Process—Interdict Granted in Sheriff Court—Breach of Interdict—Appeal from Sheriff-Substitute to Sheriff—Minute of Parties Waiving Certain Objections — Sheriff not thereby Constituted Arbiter—Appeal—Competency.* In a complaint for breach of interdict, in a Sheriff Court, the evidence was not formally recorded, and the Sheriff-Substitute gave judgment, the defender not being present in person. On appeal to the Sheriff a minute of parties was presented accepting the Sheriff-Substitute's notes as the notes of the evidence and waiving objection to the judgment having been given in defender's absence. An appeal having been taken to the Court of Session it was contended that the appeal was incompetent, parties having by their minute made the Sheriff arbiter and so excluded the jurisdiction of the Court. *Held* that the case being *quasi* criminal, it was not possible to make the Sheriff arbiter and that appeal was competent—*Dykes* v. *Merry & Cuninghame*, March 4, 1869, 7 Macph. 603, 6 S.L.R. 405, *distinguished*. Stark's Trustees *v.* Duncan, p. 288.

——— See *International Law—Process—Justiciary Cases—Railway.*

Jurisdiction of Judge. See *Administration of Justice.*

Jury Trial. See *Expenses—Process—Reparation.*

Jus Crediti. See *Succession.*

Jus quæsitum tertio. See *Agent and Client.*

Justices of the Peace. See *Jurisdiction.*

Justiciary Cases—Summary Procedure—Sentence — Imprisonment — Summary Procedure Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 18 (6) *and Schedule K*, 6. *Opinion* that in a summary prosecution for a penalty it is not competent to grant warrant of imprisonment for a specified period in the second alternative form of warrant in Schedule K, 6, appended to the Summary Procedure Act 1864, unless the Act imposing the penalty expressly authorises such imprisonment. *Murray* v. *Jones*, June 17, 1872, 2 Couper 284, *disapproved*. Todd *v.* Magowan, p. 26.

——— *Jurisdiction—Civil or Criminal—Suspension — Competency — Sentence of Imprisonment not Authorised by Act Founded on—Summary Procedure (Scotland) Act* 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 28. Where the Court in a suspension of a conviction in a summary prosecution for a statutory penalty under which the accused had been sentenced to imprisonment for a specified period, were of opinion that under the Act imposing the penalty it was not competent on conviction to grant warrant of imprisonment for a specified period, *held* that as the jurisdiction was civil and not criminal, as defined by sec. 28 of the Summary Procedure Act 1864, suspension of the conviction in the High Court of Justiciary was incompetent. Todd *v.* Magowan, p. 26.

——— *Jurisdiction—Review—Revenue Prosecution — Suspension — Oppression—Refusal of Adjournment—Excise Management Act* 1827 (7 *and* 8 *Geo. IV, c.* 53), *sec.* 79. A person who had been convicted and sentenced in an Exchequer prosecution by a Court of Justices without appealing to Quarter Sessions brought a suspension, *inter alia*, upon the ground that he had been oppressively refused an adjournment and convicted in absence. *Opinion* that the suspension was incompetent. *Circumstances* in which *observed* that the Justices ought to have granted an adjournment. Todd *v.* Magowan, p. 26.

——— *Indictment—Aggravation—Previous Conviction—Conviction of being Found with Intent Libelled as Aggravation—Criminal Procedure (Scotland) Act* 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 63—*Prevention of Crimes Act* 1871 (34 *and* 35 *Vict. c.* 112), *sec.* 7—*The Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 409—*The Glasgow Police (Further Powers) Act* 1892 (55 *and* 56 *Vict. c. clxv*), *sec.* 25. *Held* that it is not competent under the Criminal Procedure (Scotland) Act 1887, sec. 63, to libel as an aggravation of the crime of dishonest appropriation of property a previous conviction of being found with intent to commit a crime. H. M. Advocate *v.* Coggans and Harwood, p. 45.

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Justiciary Cases—Suspension—Burgh—Entertainment—"Public Show or other Like Place of Public Entertainment"—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 397. The Burgh Police (Scotland) Act 1892, by section 397, which prohibits the opening or setting up within the burgh without the permission of the magistrates, of a "public show of any description whatever, whether in open ground or in any house or building, or caravan or tent," enacts that "if any person shall open or set up . . . any such public show or other like place of public entertainment without the sanction or permission of the magistrates . . . all such persons" shall be liable to a penalty. A musician having been convicted of a contravention sought to have the conviction suspended on the ground, *inter alia*, that he did not open a public show within the meaning of the section. He stated that, permission having been refused him by the magistrates, he "placed on the foreshore a portable platform eighteen inches in height, and put thereon a piano, upon which accompaniments were played to the songs given by members of his concert party." *Held* that the accused's actings amounted to a contravention of the section, and suspension *refused*. Patrick *v.* Wood, p. 46.

——*Suspension—Complaint—One or Two Charges—"Prohibition"—Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 397. The Burgh Police (Scotland) Act 1892, section 397, which prohibits the opening of any public show without the permission of the magistrates, and also gives power to the magistrates to make "regulations and prohibitions" dealing with such shows, enacts—"If any person shall open . . . any such public show . . . without the sanction or permission of the magistrates, or shall contravene any such regulation or prohibition, all such persons shall" be liable to a penalty. A having been convicted under a complaint which charged him with having set up a public show without the sanction of the magistrates, "and in direct violation of the prohibition of the said magistrates," brought a suspension, *inter alia*, on the ground that there were two branches to the charge, both requiring to be established, viz., giving an entertainment and disregarding a prohibition, and that such prohibition had not by competent evidence been established. *Held* that inasmuch as the prohibition referred to in the complaint was not a "regulation or prohibition," but was merely the refusal of an application by the accused for permission, for the proof of which the evidence produced was sufficient, there were no two branches to the charge requiring to be separately established, and suspension *refused*. Patrick *v.* Wood, p. 46.

——*Suspension—Evidence—Competency of Witness—Clerk of Court Giving Evidence qua Depute Town-Clerk. Held* that in a complaint under section 397 of the Burgh Police (Scotland) Act 1892, the officiating clerk of court, who was the depute town-clerk, was a competent witness to prove by parole evidence that the accused had applied for permission to give entertainments, which permission had been refused. Patrick *v.* Wood, p. 46.

Justiciary Cases—Suspension—Complaint—Relevancy—Nomen juris—"Wilful Fire Raising"—Setting Fire Wilfully to a Stack of Hay. An indictment charged the accused with setting fire to a stack of hay, "and this you did wilfully." Objection was taken to the relevancy of the complaint on the ground that it charged no crime either at common law or under the statutes, inasmuch as "wilful fire-raising was a *nomen juris* signifying a crime which could only be committed in connection with heritage and certain kinds of moveables, but not hay." *Held* that though it might have been more usual to have had the words "culpably and recklessly" instead of the word "wilfully," still the indictment relevantly averred a crime. Angus *v.* H. M. Advocate, p. 49.

——*Suspension—Conviction—Conviction not Agreeing with Charge—Charge of Setting Fire to a Stack of Hay Wilfully—Conviction of "Wilful Fire-Raising as libelled." Held* that a conviction for "wilful fire-raising as libelled" referred back to the indictment, and was therefore good under an indictment which did not charge the accused with the crime of "wilful fire-raising," but with setting fire wilfully to a stack of hay. Angus *v.* H. M. Advocate, p. 49.

——*Stated Case—Ice-Cream and Aerated Water Shop—Sale of Aerated Water in Fish Restaurant—Registration—Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *sec.* 82, *sub-sec.* (1). The Burgh Police (Scotland) Act 1903, section 82 (1), provides for a register of ice-cream and aerated-water shops, and imposes a penalty on any person who keeps such a shop without its being registered therein. Two persons having been supplied in a fish restaurant with aerated water, the keeper thereof was convicted of a contravention of the Burgh Police (Scotland) Act 1903, sec. 82 (1), in not having his premises registered in terms thereof. An appeal was taken. *Held* that the subsection did not strike at the supplying of aerated water, but at the keeping of a certain class of shop, viz., aerated-water shops, and consequently that it did not apply to premises where the principal business carried on was, as here, that of a fish restaurant, although aerated waters might also be supplied to customers, and therefore that such premises did not fall to be registered under the Act. Vellutini *v.* Forsyth, p. 51.

——*Suspension—Noting Documentary Evidence—"Documentary Evidence that May be Put In"—Summary Procedure (Scotland) Act* 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 16). The Summary Procedure (Scotland) Act 1864, sec. 16, provides as follows:—"It shall not be necessary in any proceeding under the authority of this Act to record or preserve a note of the evidence adduced, but the record shall set

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forth in the form of the Schedule (I) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in." A person was tried on a summary complaint and convicted by the Sheriff of reckless driving of a motor bicycle. During the course of the trial the Sheriff asked the accused for his licence, and on its being handed to him by the accused, looked at it, asked the accused some questions about it, and handed it back. *Held* that the provision of the Act was imperative as to the necessity of a note being made of any documentary evidence put in, but that on the facts of the present case the licence was not documentary evidence put in in the sense of the Act. Bell *v.* Mitchell, p. 53.

Justiciary Cases—Suspension—Conviction and Sentence—Disconformity to Statute—Motor Car—Driver's Licence—Endorsation of Driver's Licence on Conviction—Motor Car Act 1903 (3 *Edw. VII, c.* 36), *sec.* 4, *sub-sec.* (1) *c.* The Motor Car Act 1903, sec. 4, enacts—"(1) Any court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under this Act, (*a*) may, if the person convicted holds any licence under this Act, suspend that licence for such time as the court thinks fit, and, if the court thinks fit, also declare the person convicted disqualified for obtaining a licence for such further time after the expiration of the licence as the court thinks fit: and (*b*) may, if the person convicted does not hold any licence under this Act, declare him disqualified for obtaining a licence for such time as the court thinks fit; and (*c*) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the court made under this section, to be endorsed upon any licence held by him, and shall also cause a copy of those particulars to be sent to the council by whom any licence so endorsed has been granted." The driver of a motor bicycle was convicted of reckless driving on a summary complaint, but, on the craving of the prosecutor, the Sheriff dispensed with the endorsation of the accused's licence. A suspension of the conviction was brought on the ground that the conviction was bad in respect that the Sheriff had not complied with the requirements of the Act by ordering the endorsation of the licence. *Held* that endorsation of the licence, under section 4 (1) (*c*), was not in the meaning of the Act a part of the conviction, but merely a ministerial act which the court was directed to perform, and consequently that the conviction did not fall to be quashed in consequence of endorsation not having been ordered. *Observed* that there were other orders which might be made under the section, which, if made at all, must form part of the conviction, viz., orders for suspension of a licence or disqualification from procuring a licence. Bell *v.* Mitchell, p. 53.

Justiciary Cases—Suspension—Refusal to Entertain Appeal—Statute—Application to Scotland—Right of Appeal Given Generally—Special Right of Appeal in Scotland also Given—Motor Car—Motor Car Act 1903 (3 *Edw. VII, c.* 36), *sec.* 11, *sub-sec.* (2), *and sec.* 18, *sub-sec.* (6). The Motor Car Act 1903, section 11, sub-section (2), enacts—"Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction in the same manner as he may appeal if ordered to be imprisoned without the option of a fine." Section 18 enacts—"In the application of this Act to Scotland . . . (6) Any person convicted of an offence under this Act and ordered to be imprisoned without the option of a fine, or adjudged to pay a fine exceeding ten pounds, shall have a right of appeal against the conviction. Such appeal shall lie to the sheriff-depute, and shall be heard summarily. . . ." Where a motorist was convicted of reckless driving under the Motor Car Act 1903, section 1, and was fined £9, he appealed to the Sheriff, who refused to entertain the appeal as being incompetent. *Held* that the appeal was rightly not entertained by the Sheriff, inasmuch as the right of appeal given in section 11 of the Act, although that section was in the general part of the Act which applied both to England and Scotland, was only applicable to England, and the only right of appeal in Scotland was provided for in section 18, which did not cover the case. Bell *v.* Mitchell, p. 53.

———*Small Debt Appeal—Decree for Something Different from what Asked—Competency—Action of Damages—Sale under a Sequestration for Rent of Goods not the Property of the Debtor—Goods in Possession of Debtor on Hire and Sale System—Remaining Instalments Sued for—Value of Goods Given.* A manufacturing company raised in the Small Debt Court, against sheriff-officers and a landlord's factor, an action of damages because of the sale by them, under a warrant granted in a sequestration for rent, of a sewing-machine belonging to the company but in the possession of the debtor under a hire and sale agreement. The company sued for the amount still due to them under the agreement. The Sheriff-Substitute gave decree for the value of the machine shortly before the sale. An appeal having been brought, *held* that the Sheriff-Substitute's decree was incompetent, inasmuch as it was for a different thing from that asked in the summons, and appeal *sustained*. *Observed* (*per* Lord Johnston) that the fact of the hire and sale system having become common placed no onus of inquiring into the true ownership of goods upon sheriff-officers, who in the execution of their duty were entitled to rely on the protection of the statutory procedure. Singer Manufacturing Com

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pany *v.* Beale & Mactavish and Another, p. 58.

Justiciary Cases—Complaint—Relevancy—No Known Crime Charged—Dog—"Keeping and Allowing to Go at Large a Ferocious Dog to the Danger of the Lieges. Held that a summary complaint which charged the accused with "keeping and allowing to go at large a ferocious, savage, or vicious dog to the danger of the lieges," with the result that another person was attacked and bitten by it, was irrelevant, inasmuch as no crime known to the common law of Scotland was charged, and no statute constituting such an offence was averred. Dalzell *v.* Dickie and Murray, p. 61.

Justiciary Cases—Fishing—Salmon Fishing—Weekly Close Time—Removal of Leaders of Bag-Nets—Duty to Remove Leaders as soon as Wind and Weather Permit—Reasonable Excuse—Salmon Fisheries (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 7—*Salmon Fisheries (Scotland) Act* 1868 (31 *and* 32 *Vict. c.* 123), *sec.* 24 *and Schedule D.* The Salmon Fisheries (Scotland) Act 1862, section 7, enacts that "the weekly close-time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning." The Salmon Fisheries (Scotland) Act 1868, section 24, enacts—"The proprietor, and when let the occupier, of every fishery at which . . . bag-nets are used shall, in regard to such nets, do all acts required by any bye-law in force within the district in which such fishery is situated, for the due observance of the weekly close-time;" and Schedule D contains a bye-law with regard to the observance of the weekly close-time, which requires—"3. That the netting of the leader of each and every bag-net shall be entirely removed and taken out of the water." Where in a summary prosecution it was proved that the occupier of a salmon fishing had, owing to wind and weather, been unable to remove the leaders of his bag-nets on Saturday night, and it was admitted by the complainer that the accused was under no obligation to remove them on Sunday, but there was no proof that wind and weather or other obstacle, save the darkness of an early August morning, prevented their being removed on the Monday morning before the end of the weekly close-time—*held* (*reversing* the judgment of the Sheriff-Substitute) that the occupier of the fishery had been guilty of a contravention of the Salmon Fisheries (Scotland) Act 1868, section 24, and regulation 3 of bye-law Schedule D, in not removing the leaders of the bag-nets between 12 p.m. on Sunday and 6 a.m. on Monday, he having proved no sufficient excuse for not having done so. *Observations* on the case of *Middleton* v. *Patersons*, January 30, 1904, 4 A. 321, 6 F. (J.C.) 27, 41 S.L.R. 256. Macrorie *v.* Formans, p. 63.

—— *Complaint—Relevancy—Merchant Shipping Act* 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 320—*Receiving Money for Steerage Passage without Giving Contract-Ticket—Money not Stated to have been Received for a Specified Passage at a Given Time in a Specified Ship.* The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), section 320, enacts—"(1) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Isles to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract-ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters. (2) The contract-ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract-ticket, not being inconsistent with this Act, shall be obeyed as if set forth in this section. (3) If any person fails to comply with any requirement of this section he shall, for each offence, be liable to a fine not exceeding fifty pounds." A complaint set forth that the respondent had been guilty of offences against the above-quoted section by receiving money for steerage passages from Glasgow, or some other British port, to ports in America without giving in return therefor the required contract-tickets. It did not state that the money was received for a specified passage at a given time on a specified ship, and an objection to the relevancy was taken on that ground. *Held* that the complaint was relevant. *Morris* v. *Howden*, [1897] 1 Q.B. 378, *commented on and considered.* Hart v. Hunter, p. 294.

Justiciary Cases—Small Debt Appeal—Oppression—Deviation from Statutory Form—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 141 *and* 339—*Action by Commissioners for Expense of Street Paving—Appeal against "Any Order, Deliverance, or Act of the Commissioners"—Proof Allowed that Work was Improperly Executed—Small Debt (Scotland) Act* 1837 (7 *Will. IV, and* 1 *Vict. cap.* 41), *sec.* 31. In a small debt action for the proportion of the cost of paving the street applicable to the defender's property which abutted thereon, the defence was stated that the operations in question had been improperly executed and had damaged the property. The Sheriff-Substitute allowed a proof, and repelled an objection by the pursuers to the competency thereof, taken on the ground that the defender had not appealed at the time and in the manner provided by the Burgh Police (Scotland) Act 1892, sec. 339, and that the pursuers consequently were entitled to decree without inquiry. After proof and on consideration of a report from a civil engineer to whom he had remitted, the Sheriff-Substitute dismissed the action. The pursuers appealed. *Held* that the

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small debt appeal was incompetent, as there was no oppression or deviation in point of form from the statutory enactments on the part of the Sheriff, but at most only an error in law. *Opinions* (*per* Lord Justice-Clerk and Lord Stormonth Darling) that the appeal under section 339 of the Burgh Police (Scotland) Act 1892 was not the respondent's remedy in such a case as was here disclosed. Magistrates of Crieff v. Young, p. 385.

Justiciary Cases—Fraud—Fraud in Connection with Betting on Horse-Races—Fraudulent Tampering with Post Letters—Relevancy. An indictment set forth that A fraudulently obtained from B, a postman, letters consisting of envelopes which had been stamped with the official postmark indicating that they had been posted before noon on a certain day, and did in the afternoon of the same day enclose in the envelopes notes offering to make bets with C, a bookmaker, that certain horses would win certain races, which races A knew had already been run earlier in the same afternoon, and won by the said horses; that A transmitted by post the notes to C, and did thus pretend to C that he was offering *bona fide* bets on races which had not been run when the notes were written and posted, thereby inducing C to accept the bets so offered, and to pay to A the proceeds thereof, which he appropriated. *Held* that the complaint was relevant—*Wood and White* v. *H.M. Advocate*, October 23, 1899, 3 Adam 64, 2 F. (J.C.) 6, 37 S.L.R. 18, *followed; H.M. Advocate* v. *Hodkinson and Morton*, March 24, 1903, 4 Adam 219, 40 S.L.R. 834, *commented on.* Claytons *v.* H.M. Advocate, p. 388.

——— *Police — Gaming — Betting — Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—"*House, Room, or Place*"—*Enclosure*—"*Act in any Manner in Conducting such Gaming*"—*Accused not the Occupier of Premises nor his Employee.* A person was charged with a contravention of section 407 of the Burgh Police (Scotland) Act, in that he had conducted betting within a certain enclosed piece of ground. The enclosure was open to members of the public at certain times on payment of a penny each, was entered by a door in which an enumerating turnstile was fixed, and was fitted up as a quoiting ground, but the real purpose of the enclosure was for making bets in. The accused was not the tenant or occupier of the ground, nor employed by him, but the gatekeeper directed parties on entering to where the accused was standing making bets, and gave them a card with particulars of regulations for betting. *Held* (1) that the enclosure was a "place," and (2) that the accused was a person "conducting such gaming or betting" therein within the meaning of the section. Clark *v.* Dykes, p. 389.

——— *Police — Burgh — "Aerated Water Shop" — Sale of Aerated Waters for Consumption Off the Premises—Burgh Police (Scotland) Act* 1903 (3 *Ed. VII, cap.* 33), *sec.* 82, *sub-sec.* 1. A person having been supplied in a confectioner's shop with aerated water for consumption off the premises, the keeper thereof was convicted of a contravention of the Burgh Police (Scotland) Act 1903, sec. 82 (1), in not having his premises registered in terms thereof. *Held*, on appeal, that the shop in question was not an aerated water shop within the meaning of the sub-section, and therefore did not fall to be registered under the Act. Mackay *v.* Miller, p. 392.

Justiciary Cases—Complaint—Relevancy—Clerical Error—Amendment—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 5. A complaint charged the accused with contravening the Salmon Fisheries (Scotland) Act 1868, inasmuch as he had committed two distinct offences, (1) and (2), under different sections of the Act. The prayer of the complaint sought conviction "of the aforesaid contravention." An objection to the relevancy of the complaint on the ground of ambiguity, taken during the trial and after part of the evidence had been led, was sustained, and a motion by the prosecutor for leave to amend the prayer of the complaint by adding the letter "s" to the word "contravention" therein, was refused by the Sheriff, who assoilzied the accused. *Held* that the proposed amendment was competent and should have been allowed. Macrorie v. Crawford, p. 394

——— *Evidence — Criminal Evidence Act* 1898 (61 *and* 62 *Vict. cap.* 36) *sec.* 1 (*f*) (*iii*)—*Persons Accused Jointly under One Complaint—One Accused Electing to Give Evidence in his Own Defence—Evidence of One Accused Incriminating Another—Right of Latter to Cross Examine.* One of several accused brought a suspension of the conviction obtained against him, on the ground that some of the other accused had elected to give evidence on their own behalf, and had given evidence incriminating him, and the magistrate had refused to allow him to cross-examine those who incriminated him. *Held* that the cross-examination was incompetent, and in the circumstances should have been allowed — *The King* v. *Hadwen and Ingham*, [1902] 1 K.B. 883, *approved.* Hackston *v.* Millar, p. 395.

——— *Evidence—Competency of Evidence—Statements Made by Accused during Preliminary Inquiries Used as Evidence against Him.* In a prosecution of a person for reset of stolen goods, the prosecutor adduced the evidence of two police constables to show that the accused had made a certain statement to them during the preliminary inquiries in the case and before any charge had been preferred against the accused with regard to the stolen goods. *Held* that the statement of the accused was of the nature of precognition, and that it was therefore incompetent to use it as evidence against him in subsequent proceedings. Cook *v.* M'Neill, p. 397.

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Justiciary Cases—Record—Note of Documentary Evidence—Failure to Note—Letter Produced and Read in Court—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 16. The Summary Procedure (Scotland) Act 1864, section 16, enacts—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the Schedule (I) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in. In a suspension of a summary conviction, *held* that where a letter had been produced at the trial, read in Court, and put to one of the witnesses as written by her, it fell to be noted in the record of proceedings, and that this not having been done the conviction fell to be quashed.—Avery *v.* Hilson, p. 505.

——*Police—Betting and Gaming—Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—*Person Conducting Betting in a House, Room, or Place—Person a Trespasser.* A person was convicted of a contravention of the Burgh Police (Scotland) Act 1892, sec. 407, in that he had conducted betting in a common passage, off a public street, serving as an entry to two dwelling-houses. The accused was not owner, tenant, or occupier of any part of the building, and had merely trespassed therein for the purpose of carrying on betting. *Held* on appeal that the accused, being a trespasser only, was not a person conducting betting in a house, room, or place within the meaning of sec. 407. *Question* whether the passage was a place within the meaning of sec. 407—*Wright* v. *Smith*, December 19, 1903, 4 Adam 316, 6 F. (J.C.) 18, 41 S.L.R. 198, *considered*, and *followed—Clark* v. *Dykes*, Feb. 20, 1906, 43 S.L.R. 389, *distinguished*. Vallance *v.* Campbell, p. 507.

—— *Burgh—Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 4—"*Street*"—*Common Passage. Opinion* that a common passage, leading from the public street and serving as the entry to two dwelling-houses, the passage and houses forming one building under the same roof, was not a "street" within the meaning of the Burgh Police (Scotland) Act 1892, sec. 4. Vallance v. Campbell, p. 507.

—— *Procedure—Summary Prosecution—Right of Accused to Adjournment—Adjournment Refused but after Evidence for Prosecution had been Led Granted—Summary Procedure (Scotland) Act* 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 11. The accused in a summary complaint, who had not had a copy of the complaint but only a notice to attend served upon him, was refused an adjournment, although subsequently, after the evidence for the prosecution was concluded, an adjournment was granted. *Held* in a suspension that the refusal was a fundamental error vitiating all the subsequent proceedings. Massey *v.* Lamb, p. 509.

Justiciary Cases—Review—Suspension—Competency—Exclusion of Review save by Circuit Court—Fundamental Error—Refusal of Adjournment—Aberdeen Police and Waterworks Act 1862 (25 *and* 26 *Vict. c. cciii*), *secs.* 515 *and* 516. The Aberdeen Police and Waterworks Act 1862, by section 515, provides that no proceedings under it shall be subject to any form of review or stay of execution "unless in manner or on some one or more of the grounds hereinafter mentioned;" and section 516 allows an appeal to the next Circuit Court to be held in Aberdeen on certain grounds. The accused in a complaint under the Aberdeen Police and Waterworks Act 1862, having been convicted, raised in the High Court a suspension, on the ground that when brought before the magistrate he had after pleading, but before any witness was examined, asked an adjournment, which adjournment the magistrate had, contrary to section 11 of the Summary Procedure (Scotland) Act 1864, refused. The respondent pleaded that the suspension was incompetent in view of the provisions of the Special Act. *Held* that as the refusal was a fundamental error, vitiating all the subsequent proceedings, suspension in the High Court was competent. Massey *v.* Lamb, p. 509.

—— *Small Debt Appeal—Deviation in Point of Form from the Statutory Enactments—Leading without Notice Evidence of Previous Over-Payments in Defence of Claim for Wages—Counter Claim—Small Debt (Scotland) Act* 1837 (7 *Will. IV. and* 1 *Vict. cap.* 41), *secs.* 11 *and* 31. In a small debt action for wages, the defenders, without having given any notice of counter claim, led evidence of previous over-payments to the pursuer to an amount exceeding the sum sued for, and the Sheriff giving effect to such evidence assoilzied them. *Held* (*per* Lord Pearson) on appeal that this defence was truly a counter claim of which notice should have been given in terms of the Small Debt (Scotland) Act 1837, section 11, and that its admission without notice was such a deviation in point of form from the statutory enactments as had prevented substantial justice from being done within the meaning of section 31 of the said Act, and appeal *sustained*. Taylor *v.* Ormond & Company, p. 652.

——*Alien—Expulsion—Aliens Act* (5 *Ed. VII, c.* 13), *sec.* 3—*Act of Adjournal* 1*st February* 1906. Circumstances in which a certificate of conviction and recommendation for expulsion were *granted* under the Aliens Act (5 Ed. VII, cap. 13), section 3 (1) (*a*), and Act of Adjournal of 1st February 1906. H. M. Advocate *v.* Darini, p. 704.

—— *Licensing Acts—Procedure—Licensing (Scotland) Act* 1903 (3 *Edw. VII, c.* 25), *sec.* 91 (2) *and* (3)—*Complaint Brought under Burgh Police Act* 1892 (55 *and* 56 *Vict. cap.* 55), *and not under Summary Jurisdiction Acts — Competency.* The

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Licensing (Scotland) Act 1903, section 91, provides—"(1) Every person who shall commit any breach of certificate, or who shall in any other manner offend against this Act, shall be prosecuted . . . (2) Breaches of certificate and other offences in this section referred to, may, unless by this Act otherwise specially directed or authorised, be prosecuted and tried as police offences before and by any magistrate or magistrates of any royal, parliamentary, or police burgh, officiating in any Court for the trial of police offences under the provisions of any local or general Police Act, in the same way and manner, in all respects, as may be provided for the trial of police offences by any such local or general Police Act in force in the county, district, or burgh, where the defender shall reside or the offence shall have been committed . . . (3) Every offence committed against this Act shall, except where inconsistent with the provisions and conditions of this Act, be tried and determined under the provisions of the Summary Jurisdiction Acts. . . ." *Held* in a suspension that in spite of the terms of sub-section (3) of section 91 it was competent to bring a complaint charging an offence against the Act, proceeding under the Burgh Police (Scotland) Act 1892 and not under the Summary Jurisdiction Acts, an option having been given by subsection (2). Rowland *v.* Deas, p. 859.

Justiciary Cases—Licensing Acts—Complaint—Relevancy—Licensing (Scotland) Act 1903, *sec.* 70 (1)—*Using Obscene Language while Drunk—Omission of "to the Annoyance of" Any Person.* The Licensing (Scotland) Act 1903, section 70 (1), *inter alia*, provides—"Every person who in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises, behaves when drunk in a riotous or disorderly manner, or while drunk uses obscene or indecent language to the annoyance of any person, shall be liable on summary conviction to" a penalty. *Held* in a suspension that a complaint in which it was charged that the accused did "behave while drunk in a riotous and disorderly manner, swear, shout aloud, and use obscene language," but which omitted "to the annoyance of" any person, was irrelevant. Rowland *v.* Deas, p. 859.

—— *Complaint — Relevancy — Writing Threatening Letters with View to Extort Money—Demand for Money on Separate Slip not Specifically Stated to have been Attached to Letter.* An indictment charged the accused "that you did write or cause to be written a threatening letter . . . of which the following is the English translation . . . . on slip 'I will await your cheque for £50 by to-morrrow Thursday morning, not later,' and did put said letter into an envelope addressed to . . . And all this you did (1) with intent to put said . . . in a state of alarm and of apprehension of injury to his fortune and reputation; and (2) for the purpose of extorting money from him." Objection was taken to the relevancy on the ground that the first head set forth no crime, and no circumstances were set forth to support the second, inasmuch as nothing was said of the "slip" having been written, posted, or received. *Held* in a suspension that the indictment set forth a relevant charge of an attempt to extort money by threats. Priteca *v.* H. M. Advocate, p. 861.

Justiciary Cases — Jurisdiction — Competency—Trial by Sheriff and Jury—Suspension on Ground that Competent Evidence was Excluded by Sheriff. Opinions that the High Court of Justiciary can entertain a suspension of a sentence pronounced by a Sheriff on the verdict of a jury, taken on the ground that the Sheriff had excluded competent evidence. *Burns & Hart* v. *Young*, December 19, 1856, 2 Irv. 571, and *Quarns* v. *Hart*, June 4, 1866, 5 Irv. 251, *commented on.* Priteca v. H. M. Advocate, p. 861.

—— *Evidence—Competency—Charge of Attempt to Extort Money by Threatening Letters — Evidence to Show Previous Letters to which Slip Containing Demand Alleged to Belong Contained Legitimate Request.* In the trial before a Sheriff and jury of a person charged with sending a threatening letter with a view to extort money, the demand having been on a slip separate from but attached to the letter, the accused sought to establish that the slip was attached not to the letter libelled but to a previous one legitimately asking for money. On his further attempting to prove that the sum asked in such previous letter was due him objection was taken and sustained. *Held* in a suspension that the proposed evidence was rightly excluded and suspension *refused.* Priteca *v.* H. M. Advocate, p. 861.

—— *Conviction and Sentence—Validity—Statute Enacting Liability to Fine or Imprisonment on Conviction—Dismissal with Admonition—Education (Scotland) Act* 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 70. A statute provided that an accused should, on conviction of an offence, be liable to a penalty not exceeding a certain amount or to imprisonment not exceeding a certain period. An accused was convicted and admonished. *Held*, on a suspension, that the conviction and sentence was not conform to statute, and conviction *quashed. Fraser* v. *Neilson*, February 6, 1903, 4 A. 139, 5 F. (J.) 51, 40 S.L.R. 534, and *Gardner* v. *Dymock*, January 9, 1865, 5 Irv. 13, *followed.* Black *v.* Claxton, p. 865.

—— *Small Debt Appeal — Relevancy — "Malice and Oppression"—"Deviations in Point of Form from the Statutory Enactments"—Capricious and Unjustifiable Exercise of Jurisdiction—Small Debt (Scotland) Act* 1837 (7 *Will. IV and* 1 *Vict. cap.* 41), *sec.* 31. In a debts recovery action at the instance of A against B, arrestments were used on the dependence of the action. B raised

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a small debt action against A claiming damages for the wrongous, nimious, and oppressive use of the said arrestments, but in it he made no averment of malice. Leaving the debts recovery action still pending, the Sheriff-Substitute proceeded to consider the small debt action and gave judgment therein for B. He further continued the debts recovery action, although the debt of which that action was the subject was admitted and a sum of money had been consigned to meet it. *Held* upon appeal that though there had been capricious and unjustifiable exercise of jurisdiction, there was not such unjustifiable or unwarrantable abuse of process as would amount to the grounds of review under the Small Debt (Scotland) Act 1837, section 31. Strathmore Auction Company, Limited *v.* Millar, p. 866.

Justiciary Cases — Suspension — Mora — Acquiescence — Objection to Relevancy Not Taken — Sentence Obtempered, and Delay of Eleven Weeks—Expenses. An accused was charged in a Sheriff Court with a statutory offence. He took no objection to the relevancy, was convicted, and sentenced to pay a fine, which he did. Eleven weeks thereafter he raised a suspension based on an objection to relevancy, which went to the essence of the charge. *Held* that the accused was not barred by *mora* and acquiescence, and that the suspension was competent, but *expenses* allowed to neither party. Adams *v.* Mackenna, p. 868.

—— *Complaint—Relevancy—Suspension —Essential Defect—Prevention of Crimes Act* 1871 (34 *and* 35 *Vict. c.* 112), *sec.* 13 *—Purchasing Old Metals in Less than Statutory Quantities—Omission to State Accused a "Dealer in Old Metals."* By section 13 of the Prevention of Crimes Act 1871 a penalty is imposed upon "any dealer in old metals" who purchases certain metals in quantities less than those prescribed by the Act. A, described as "general dealer," was charged with an offence under the section in a complaint which did not aver that he was a "dealer in old metals." *Held* in a suspension that the charge was irrelevant, and that the defect was essential, not merely in the *modus*, allowing of objection being taken in the High Court though not taken in the inferior Court. Adams v. Mackenna, p. 868.

—— *Process — Adjournment of Diet — Minute of Procedure not Specifically Adjourning Diet — Suspension — Summary Procedure (Scotland) Act* 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 10, *and Sched. E* (2). At the diet for the trial of a complaint charging an offence under the Licensing Acts, the witnesses for the prosecution, though cited, not appearing, the magistrates granted warrant to apprehend them and bring them up to give evidence on a certain date. The minute of procedure, however, had no record that the diet was adjourned to such date, but the accused was present and knew. The accused having been convicted and sentenced, brought a suspension. *Held* that the adjournment not having been duly recorded the complaint fell, and conviction *quashed*. Taylor *v.* Sempill, p. 870.

Justiciary Cases—Jurisdiction—Territorial Waters — Waters Outside Three Mile Limit but within Scope of Bye-Law—Otter Trawling by Foreigner on Foreign Vessel —Herring Fishery (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7 — *Herring Fisheries (Scotland) Act Amendment Act* 1890 (53 *and* 54 *Vict. c.* 10)—*Sea Fisheries Regulation (Scotland) Act* 1895 (58 *and* 59 *Vict. cap.* 42), *sec.* 10. The master of a trawler registered in Norway, a Dane residing in Grimsby, being charged in the Sheriff Court with a contravention of the Fisheries Acts by the use of the otter trawl in a part of the Moray Firth outside the three mile limit but within an area closed against trawlers by bye-laws of the Scottish Fishery Board in virtue of the provisions of the Herring Fisheries (Scotland) Acts, objected to the relevancy of the complaint on the ground of no jurisdiction. He was convicted and sentenced. On a case stated to the High Court, *held* by the Whole Court unanimously that the appellant was subject to the jurisdiction of the Court and that the conviction and sentence were legal and competent. Mortensen *v.* Peters, p. 872.

Landlord and Tenant—Lease—Reduction—Damages—Misrepresentation—Warranty — Advertisement — False Statement in Advertisement on a Matter of Opinion—Essential Error—Relevancy. A tenant raised an action against his landlord for reduction of his lease, or alternatively for damages, on the averment that whereas the farm had been advertised as "comprising a hill capable of keeping about 2000 blackfaced sheep and summering 100 cattle," it was not so capable, nor of "maintaining and summering anything like these numbers. At most it could and can only properly carry 1400 sheep, and there is no summering for cattle." He pleaded (1) that he was induced to enter into the lease by the defender's false and fraudulent representations, and (2) essential error induced by the defender. *Held*, affirming the Lord Ordinary (Ardwall), that the pursuer's averments were irrelevant. Hamilton *v.* The Duke of Montrose, p. 764.

——*Lease—Obligation—Contract—Breach of Contract—Damages—Personal Exception—Statement of Damage from Failure to Repair Fences — Prejudice through Want of Notice and Specification—Relevancy.* A tenant brought an action of damages against his landlord on the averment that the defender had in the lease undertaken within a reasonable time after its commencement (Whitsunday 1899) to execute all necessary repairs to the existing fences on the farm; that though repeatedly called upon to execute the said repairs he did not complete them till October 1904; that the insufficiency of the fencing, and in particular of two fences

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specified, had enabled the sheep to stray on to the lower ground in summer and eat the winter grazing, and that the loss thereby sustained by the pursuer, in particular in having to buy food stuffs for winter feeding, amounted to not less than the sum sued for. *Held* that, there being no averment of damage such as a landlord could be called upon to meet, pursuer's averments were irrelevant. *Per* LORD LOW—"I am not satisfied, however, that what was said in "*Broadwood* v. *Hunter*, February 2, 1855, 17 D. 349, "to the effect that a tenant loses his right to claim damages if he does not make a specific claim year by year, and pays his rent without deduction, applies in the general case to a claim for damages in respect the landlord has failed to implement obligations undertaken by him in the lease." Hamilton *v.* Duke of Montrose, p. 764.

Landlord and Tenant. See *Reparation.*

Lands Excambed for Old Glebe. See *Teinds.*

Law-Agent See *Agent and Client.*

Law-Agency. See *Partnership.*

Lease—Renunciation—Hypothec—Lease at a Yearly Rent for a Period Beginning at a Martinmas and Terminating at a Whitsunday—Year of Lease Current—Whether Lease Runs from Martinmas to Martinmas or from Whitsunday to Whitsunday. A let certain premises to B "for the period from the term of Martinmas 1903 to the term of Whitsunday 1913." B undertook to pay a yearly rent of £1000 "at two terms in the year, by equal portions, beginning the first term's payment . . . at the term of Whitsunday 1904, when the sum of £500 will be payable for the half-year preceding, and the next term's payment of £500 at Martinmas thereafter, and so forth half-yearly and termly during the currency" of the lease. B having renounced the lease as at Whitsunday 1906, a question arose in connection with A's right of hypothec, whether the year of the lease current at the date of renunciation was from Martinmas 1905 to Martinmas 1906 or from Whitsunday 1905 to Whitsunday 1906. *Held* that the lease was a Martinmas to Martinmas lease, and that A's hypothec covered the rent for the year from Martinmas 1905 to Martinmas 1906. Smith (Liquidator of the Union Club, Limited) *v.* Edinburgh Life Assurance Company p. 801.

—— See *Arbitration—Valuation Cases—Landlord and Tenant.*

Letters of Diligence. See *Witness.*

Lex loci delicti commissi. See *Foreign.*

Liability for Expenses. See *Expenses.*

Liability for Loss. See *Contract—Payment.*

Liability of Members and of Committeemen. See *Club.*

Liability for Stipend. See *Teinds.*

Liability of Company. See *Reparation.*

Liability of Directors. See *Company.*

Liability of Local Authority. See *Public Health.*

Liability of Shipowner. See *Contract.*

Liability of Trustees. See *Trust—Process.*

Liability of Unsuccessful Defender. See *Expenses.*

Licence Duty. See *Revenue.*

Licensing Acts. See *Justiciary Cases.*

Life Assurance Company. See *Company.*

Liferent. See *Succession.*

Liferent of Whole Capital. See *Succession.*

Liferent Reducible. See *Succession.*

Limitation of Actions—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1—*Company Incorporated by Act of Parliament—Action to Recover Cost of Repairing Road Opened by Company under Statutory Power—Turnpike Roads Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C, sec.* 100. In an action by a District Committee of a County Council against Water Trustees as the successors of a Water Company incorporated by Act of Parliament and the contractors, for the expense incurred in repairing and restoring a road which the Water Company had opened under powers in their Act, but which as alleged had not been properly restored, the defenders pleaded that the action was barred by the Public Authorities Protection Act 1893, sec. 1, as not being timeously brought. *Held* that as the Water Company was in fact and in substance a commercial company, empowered for its own purposes and with a view to profit to carry on the undertaking, it was not a public authority in the sense of the Act, and so was not protected thereby. *Held*, further, that as the action was laid on section 100 of the General Turnpike Act 1831 (incorporated in the Roads and Bridges Act 1878, by sec. 123 thereof), it was not a claim in respect of an act or default on the part of the Water Company, and therefore not an action or proceeding of the nature contemplated by the Public Authorities Protection Act. Lanarkshire Upper Ward District Committee *v.* Airdrie, Coatbridge, and District Water Trustees and Others, p. 526.

—— *Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. cap.* 61)—*Public Authority Acting with a View to Cripple Opponents — Relevancy of Averment.* In an action brought by a mineral company against water trustees to recover damages for wrongous interdict, *observed* (*per* Lord President)—"I do not think that to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available." Clippens Oil Company, Limited *v.* The Edinburgh and District Water Trust, p. 540.

Limitation of Liability. See *Ship.*

Lis alibi pendens. See *Husband and Wife.*

List of Contributories. See *Company.*

Liquid and Illiquid Claims. See *Compensation.*

Local Government—Public Health—Sanitary Authority—Statutory Power—Ultra Vires—Bona Fides—Power to Make Subterranean Lavatory — Lavatory Constructed Incidentally Forming a Subway —Rules which should Govern Public Bodies in their Exercise of Statutory Powers.

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An Act of Parliament conferred upon a sanitary authority power to construct lavatories under its streets, but conferred no power to make subways. *Held* that in constructing an underground lavatory with access from both sides of a street, which constituted and was in fact used as a subway, the sanitary authority had not acted *ultra vires*, its primary intention having been *bona fide* to construct a lavatory and not a subway. *Observed* by the Lord Chancellor—"That where the Legislature has conferred a statutory power to a particular body, with a discretion as to how it is to be used, it is beyond the power of any court to contest that discretion, assuming the thing done is the thing which the Legislature has authorised." By Lord Lindley—"I am not aware of any authority to show that the High Court can properly grant an injunction to restrain a public body authorised to make a particular work for some public purpose from exercising its authority, on the ground that in the opinion of the Court the work being made is larger or handsomer and more costly than it need have been . . . unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorised work." By Lord Macnaghten—"A public body invested with statutory powers . . . must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably . . . and have some regard to the interest of those who may suffer for the good of the community." Mayor and Corporation of Westminster *v.* London and North-Western Railway Company, p. 560.

Local Government—County Council—Burgh Represented on County Council—Appointment of County Assessor—Representatives of Burgh not Assessed for Payment of County Assessor's Salary to Vote in his Selection—"Matter Involving Expenditure"—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 73 (8). *Held* that the selection of a county assessor, whose salary had been already fixed, was not a matter involving expenditure in the literal sense of section 73, sub-section 8, of the Local Government (Scotland) Act 1889, and that therefore the representatives of a burgh which did not contribute to the assessment levied by the County Council to pay the salary of and outlays incurred by the assessor, were entitled to vote thereon. Ayr County Council *v.* Paterson and Others, p. 594.

——— *Title to Sue—Parish Council—County Council—District Committee—Action to Determine Position of an Admitted Right-of-Way—Right of Parish Council to Take up Defence of Action—Local Government (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 29 *and* 42. A proprietor of lands brought an action against a District Committee of a County Council in order to have the position of an admitted public right-of-way determined. The District Committee did not defend, but the Landward Committee of the Parish Council of the parish in which the right-of-way lay sisted themselves as defenders. *Held* that the Landward Committee had no title, and that the right to litigate on such matters lay with the County Council and its District Committee. Hope *v.* The Lasswade District Committee of the County Council of Midlothian and Others, p. 679.

Locality. See *Teinds.*

Lodger Franchise. See *Election Law.*

Malice. See *Reparation.*

Malice and Oppression. See *Justiciary Cases.*

Mandate. See *Partnership.*

Maintenance. See *Poor—Road.*

Marine Insurance. See *Insurance.*

Marriage Contract. See *Succession.*

Marriage Contract Provision. See *Revenue.*

Marriage Schedules. See *Public Records.*

Master Patent. See *Patent.*

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 8—*A.S.*, 3rd *June* 1898, *sec.* 7 (*a*)—*Memorandum of Verbal Agreement—Registration—Genuineness—Special Warrant to Register. Held* that a Sheriff is bound, under Schedule II, sec. 8, of the Workmen's Compensation Act 1897, and section 7 (*a*) of the relative Act of Sederunt of 3rd June 1898, to grant a special warrant for the registration of a memorandum of a verbal agreement between an injured workman and his employers, fixing the amount of compensation due by the latter to the former, if he is satisfied that it is genuine in the sense of being the agreement actually arrived at by the parties. Whether the parties were labouring under essential error as to their rights when they made the agreement, or whether the agreement is contrary to the statute in respect that it awards the workman too high a rate of compensation, are questions he is neither bound nor entitled to consider. *Opinion reserved* upon the question whether a sheriff-clerk would be bound to record a memorandum of a written agreement in which it appeared *ex facie* that the compensation awarded was beyond the maximum which, upon any view of the facts, could be awarded to the workman under the Act. Macdonald *v.* The Fairfield Shipbuilding and Engineering Company, Limited, p. 1.

——— *Parent and Child—Implied Contract—Employment of Daughter by Father—Wages—Presumption.* A daughter aged thirty brought an action against her father and his trustee acting under trust deed for behoof of creditors, in which she claimed wages *quantum meruit* (*a*) as dressmaker for three years, (*b*) as housekeeper for three years. It was proved that pursuer about seven years previous to the action had, with her elder sister (also a dressmaker) and

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her brother, accompanied her father when he took up business as a general merchant, and that by so doing she gave up employment as dressmaker, by which she was earning 7s. 6d. a week. According to pursuer she accompanied her father because "he was to give me remuneration for my services, but he did not say how or in what way he would remunerate me," and according to her father she came "on the understanding that there would be employment for all in the business." The elder sister kept what she earned as dressmaker, but after a year married. The pursuer, who for the three years in question acted both as dressmaker and housekeeper, received no wages at any time, but only clothes, board and lodging, and pocket money. The brother got no wages but was virtually a partner. Some five years after starting the business pursuer's father said to her that if he sold the business (which he did not succeed in doing) she would be paid for her services. On no other occasion was payment mentioned, and pursuer never asked her father for wages. *Held* that no definite arrangement had been proved by pursuer by which she was to receive wages from her father for her services, and that in the circumstances, which indicated a business carried on for the benefit of the family as a whole, none was to be presumed. *Opinion* (*per* Lord Low) that the dictum of Lord President Boyle in *Anderson* v. *Halley*, June 11, 1847, 9 D. 1222 at p. 1227, cannot be taken as laying down any absolute or general rule as to a presumption in such circumstances. Urquhart *v.* Fairweather (Urquhart's Trustee), p. 7.

Master and Servant—Workmen's Compensation Act 1897 *sec.* 1 (3), *and First Schedule*, 12—*Compensation—Agreement Arbitration—Competency of Arbitration where Subsisting Unrecorded Agreement—Agreement to Pay Compensation during Incapacity — Termination of Incapacity—Refusal of Farther Payments—Arbitration at Instance of Workman.* A workman, who had been injured in his employment in August 1903, entered into an agreement with his employers under which they bound themselves to pay him 12s. 5d. weekly during the period of his incapacity as compensation under the Workmen's Compensation Act 1897. The agreement was not recorded. The employers continued the weekly payments down to 14th December 1903, when his incapacity ceased; but from that date they refused further payments. In March 1905 the workman brought an arbitration before the Sheriff of Lanarkshire, in which he asked decree against his employers for the sum of 12s. 5d. weekly from 21st December 1903 until the further orders of the Court. The Sheriff granted decree for the sum sued for from 14th December 1903 till the date of his award. In a stated case on appeal at the instance of the employers, in which the question of law was whether the appellants were liable to pay compensation from the date at which the incapacity ceased to the date of the Sheriff's award, the Court answered the question in the negative, *holding* (1) that the arbiter could pronounce no decree for payments, either by way of arrears or otherwise, based upon the agreement, as the Act conferred no jurisdiction upon the statutory tribunal to deal with agreements except with regard to their statutory registration and the review of their terms in an application under Schedule I, 12; (2) that this being an arbitration under section 1 (3), he could only under the statute award compensation during incapacity. *Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 785, 41 S.L.R. 609, *commented on.* Tigue *v.* Colville & Sons, Limited, p. 129.

Master and Servant — Workmen's Compensation Act 1897—*Payment under Unrecorded Agreement—Cessation of Incapacity—No Necessity to have Recovery Judicially Ascertained before Stopping Payment—Recorded Agreement Distinguished. Opinion, per* Lord Low, that the rule that an employer paying compensation under a recorded agreement cannot cease payment until the fact of the workman's recovery has been formally ascertained, as by the certificate of a medical referee or the decree of an arbiter, does not apply in the case of an unrecorded agreement, there being nothing in the Act compelling him in that case to continue payment for a single day after the incapacity has ceased. Tigue *v.* Colville & Sons, Limited, p. 129.

——— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 2, *sub-sec.* (1)—*Claim for Compensation — "Claim" means a Demand for Definite and Specified Sum.* By section 2, sub-section 1, of the Workmen's Compensation Act 1897 it is provided that proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and "unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident." A workman was injured on 16th August 1894. On 20th September 1904 his law-agent wrote to the employers as follows—"I am instructed" on behalf of the workman "to give formal notice of the claim arising in respect of injuries received by him whilst in your employment on 16th August 1904. . . . I understand you are already acquainted with the circumstances, but it is necessary to give you notice in order to found proceedings should these be necessary for obtaining compensation." On 14th August

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1905 the workman brought an arbitration in the Sheriff Court. *Held* (*following Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855, 36 S.L.R. 643) that the letter was not a "claim for compensation" in the sense of the Act, inasmuch as it did not contain a demand for a definite and specified sum, and that consequently the arbitration proceedings of 4th August 1905 were not maintainable. *Powell* v. *Main Colliery Company Limited*, [1900] A.C. 366, *commented on*. Park *v.* Maver, p. 191.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule, secs.* 1 *and* 2—*Compensation—Partial Incapacity—Discretion of Arbitrator—All the Circumstances to be Considered which Arbitrator Thinks Relevant—Interlocutor.* In considering an application under the Workmen's Compensation Act 1897 to vary the weekly payment during partial incapacity, the arbitrator is to have regard to all circumstances which he thinks relevant, as well as to the difference in the wage-earning capacity before and after the accident, and any payment not wages received from the employer in respect of the injury during the incapacity, both of which he is bound by the statute to consider; but it is not necessary that he should show in a stated case that he has had in view any particular consideration save those required by the statute—*Geary* v. *William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; and *Parker* v. *William Dixon, Limited*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663, *commented on* and *approved*. Bryson *v.* J. Dunn & Stephen, Limited, p. 236.

—— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*"—*Acting in Breach of a duly Published Statutory Rule—De facto Ignorance of Statutory Rule duly Published—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58)—*Permitting Naked Light to be in such a Position as to Ignite an Explosive.* Rule 1 of the additional special rules framed for a mine in pursuance of the Coal Mines Regulation Act 1887 provided —"While charging shotholes or handling any explosives not contained in a securely closed case or canister, a workman shall not smoke or permit a naked light to remain in his cap or in such a position that it could ignite the explosive." A miner having drilled a shothole went to his powder-box for a cartridge, and having got the cartridge, which was not in a closed case or canister, was returning to his working-place with the cartridge in his hand and his lamp in his cap. In getting back he had to crawl through a narrow road only 2 feet in height, and while he was doing so the naked light in his cap came in contact with the powder in the cartridge, an explosion ensued, and he was injured. The conditions of exhibition at the mine of the special rules satisfied the requirements of sub-sec. 1 of sec. 57 of the Coal Mines Regulation Act 1887. The workman, however, did not *de facto* know the rule, having neither read it nor seen it, and in acting as he did he was following his own practice and that of other miners in the mine. *Held* that the accident having been caused through the workman's breach of a duly published statutory rule, his injury was attributable to his serious and wilful misconduct in the sense of sec. 1, sub-sec. 2 (c), of the Act. *M'Nicol* v. *Speirs, Gibb, & Co.*, Feb. 24, 1899, 1 F. 604, 36 S.L.R. 428, *commented on*. *Opinion* (*per* Lord President and Lord Kyllachy) that acting in breach of a duly published statutory rule, where there was no dominant reason for so doing, was serious and wilful misconduct for which ignorance of the rule could in no circumstances be an excuse. *Opinion* (*per* Lord M'Laren) that circumstances were conceivable where the workman might be excusably ignorant. *Opinion* of Lords Kinnear and Stormonth-Darling *reserved*. *Opinion* of Lord President and Lord Kinnear that, apart from the breach of the statutory rule, the act of the workman was serious and wilful misconduct in the sense of the statute, and that this was a mixed question of fact and law on which the Court might review the decision of the arbitrator. Dobson *v.* The United Collieries, Limited, p. 260.

Master and Servant—Workmen's Compensation Act 1897, *sec.* 7 (2) (*b*)—"*Dependants*"—*Wholly Dependent—Husband Living Apart from and Not Supporting Wife—Foreigner.* In an arbitration under the Workmen's Compensation Act 1897, in which the widow of a workman claimed compensation from his employers on account of the death of her husband while in the course of his employment, it was proved that the deceased, who was a Pole, had resided in this country for nine months, during which period he had remitted to his wife in Poland £1. In addition to that sum the wife's means of livelihood were derived from employment as an outdoor worker, together with contributions from her relatives. *Held* (1) that the wife was a "dependant" within the meaning of section 7, sub-section 2 (*b*), of the Workmen's Compensation Act 1897; (2) that she was not wholly dependent upon her husband's earnings within the meaning of the said Act. *Cunningham* v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Sneddon* v. *Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992, 41 S.L.R. 826; and *Addie & Sons' Collieries, Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85, *commented on*. William Baird & Company, Limited *v.* Savage, p. 300.

—— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 2 (*c*)—"*Serious and Wilful Misconduct*"—*Question of Fact or Law—Competency of Appeal.* A farm servant was driving a lorry into town. Shortly after his setting

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out the servant was discovered lying injured on the road, the lorry being upset. There was no direct evidence as to the cause of the accident other than the servant's evidence, but the reins were found tied to a drag wheel on the front of the lorry. The Sheriff-Substitute found that the cause of the accident was the servant's tying the reins to the wheel and the horse's head having been pulled round so as to make it run back and upset the lorry, and he was of opinion that the servant's conduct amounted to serious and wilful misconduct in the sense of the Act, and held that he was therefore not entitled to compensation. In an appeal *held* that the Sheriff-Substitute's decision was not subject to review, in respect that his finding that the applicant had been guilty of serious and wilful misconduct was a finding as to fact and was not insupportable in view of the facts proved. Vaughan *v.* Nicoll, 351.

Master and Servant — Workmen's Compensation Act 1897, *sec.* 1, *sub-sec.* (3) *— Arbitration — Condition-Precedent to Jurisdiction of Arbitrator—Application for Arbitration before Master who Admits Liability has had Time to Consider Claim —Plea that Application for Arbitration Premature—Refusal of Sheriff to State a Case thereon.* On 1st November 1905 an employer received from a workman a claim for compensation alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897. On 2nd November a petition under the latter Act was served on him at the instance of the workman. The employer admitted liability, but objected to the competeny of the proceedings since there was no question at issue between the parties as required by section 1 (3) of the Act, and there had been no reasonable opportunity to admit liability. The Sheriff having found the defences irrelevant and awarded compensation with expenses, refused to state a case. *Held* that the Sheriff was bound to state a case, since questions of law were involved with regard to jurisdiction and competency. Caledon Shipbuilding and Engineering Company, Limited *v.* Kennedy, p. 430.

——— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—*Accident Arising Out of and in Course of Employment—Workman Doing Work outwith Scope and Time of his Ordinary Duties under Voluntary Arrangement with Fellow-Workman—Cases of Emergency.* A county council were repairing a road by means of a steam roller, the hour for the daily commencement of operations being 7 a.m. The engineman, who otherwise would have had to come on duty before that hour, for his private convenience arranged with a surfaceman, one of his fellow-workmen, that the latter should do the work of breaking up the engine's fire and getting up steam. The work for which the surfaceman was employed by the county council, and which did not begin until 7 a.m., was to sweep and put "blinding" on the road while it was being rolled. He was accidentally injured while getting down from the engine before 7 a.m. *Held* that the accident did not arise out of and in the course of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897. Lord M'Laren's statement in *Mensies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, of the law applicable to the case where a workman is injured while doing something outwith the strict scope of his employment in a case of emergency, *approved*. M'Allan *v.* Perthshire County Council, Western District, Dunblane, p. 592.

Master and Servant — Workmen's Compensation Act 1897, *sec.* 1, *sub-sec.* (2) (*c*) *—Serious and Wilful Misconduct—Drunk and Unfit to Work.* "Being drunk and unfit to work" is serious and wilful misconduct within the meaning of section 1 (2) (*c*) of the Workmen's Compensation Act 1897. M'Groarty *v.* John Brown & Company, Limited, p. 598.

——— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *Schedule* 1, *sec.* 12 *— Application for Review — Power of Arbiter to Declare that the Compensation Payable to the Workman shall Cease at a Future Date.* In an application to have the compensation payable to an injured miner ended or diminished, the arbiter, on a report by a medical referee to the effect that the miner's wage-earning capacity would be completely restored after three months' work on the surface, directed that the compensation should cease after a certain future date, giving effect to the report. *Held* that the arbiter had exceeded his power, inasmuch as his function in assessing compensation was to have regard to the workman's present state, and not to pronounce a judgment the validity of which would depend on his condition at a future date. Allan *v.* Thomas Spowart & Company, Limited, p. 599.

——— *Wages—Implied Contract—Services Rendered by Niece to Aunt—Presumption.* A niece in impoverished circumstances came to live with an elderly aunt, occupying the position of an adopted daughter. During her aunt's last illness, extending over several years, she performed all the duties of a sick-nurse. She, along with other relatives, obtained certain benefits under her aunt's will, which had been made prior to her illness. *Held* that she was not entitled, in the absence of a contract to that effect, to remuneration or wages for the services she had rendered. Russel v. M'Clymont, p. 601.

——— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3) *—Arbitration—Application for Arbitration before Master has had Time to Consider Claim, and before Date of First Weekly Payment has Arrived—Competency.* A workman met with an accident entitling him to compensation under the Workmen's Compensation Act. On

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31st October he wrote intimating a claim against his master under the Employers Liability Act or alternatively under the Workmen's Compensation Act. The first weekly payment under the latter statute fell due on 4th November. On 2nd November the workman lodged a petition for arbitration. The master pleaded that the application was incompetent and premature inasmuch as there was no question between the parties when it was presented and no time had been given him to consider the claim as made. The Sheriff-Substitute found the defences irrelevant, and awarded compensation. *Held* on appeal that as there was no dispute between the parties when the petition was lodged as to the liability to pay compensation or its amount or duration, the compensation payable not being at the time of the application in arrear, no question had arisen within the meaning of section 1, sub-sec. (3), of the Act, and consequently that the condition-precedent to an arbitration was wanting, and the Sheriff-Substitute ought to have dismissed the petition. *Field* v. *Longden and Sons*, [1902] 1 K.B. 47, *approved*. Kennedy *v.* Caledon Shipbuilding and Engineering Company, Limited, p. 687.

Master and Servant—Workmen's Compensation Act 1897, *sec.* 1, *sub-sec.* (3)—*Arbitration—Application for Arbitration while Master is Paying Full Compensation—Competency.* His employers, without arbitration or a specific agreement, were paying an injured workman the full weekly compensation which he could claim under the Workmen's Compensation Act 1897, but had on several occasions when making payment intimated to him that they thought he had recovered, and that the payments might soon be stopped. The workman after a time presented a petition for arbitration. *Held*, on appeal, that the petition was incompetent and should have been dismissed, inasmuch as (1) when it was lodged no question had arisen between the parties as required by section 1 (3) of the Act prior to arbitration, and (2) the workman had no right to have his right to compensation constituted and controlled by a court of law irrespective of the Act. Sweeney *v.* Gourlay Brothers & Company (Dundee), Limited, p. 690.

—— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (4)—*Expenses of Unsuccessful Trial at Common Law and under Employers' Liability Act Deducted from Compensation—Expenses after Verdict Applied Allowed to Neither Party—Process.* A workman brought an action at common law and under the Employers' Liability Act, but containing no reference to the Workmen's Compensation Act 1897, to recover damages from his employers for injuries sustained when in their employment. A jury returned a verdict for the defenders, whereupon the pursuer moved the Court to assess compensation under the Workmen's Compensation Act 1897. The motion was postponed, and renewed when the case was in the roll to apply the verdict. The defenders admitting liability, the Court applied the verdict, found the defenders entitled to expenses, and of consent found them liable in compensation under the Workmen's Compensation Act, but there being no evidence on which to assess the compensation, allowed a proof as to the amount. Thereafter parties having agreed as to the amount of compensation due, the defenders moved, under sec. 1 (4) of the Workmen's Compensation Act, to deduct from this their taxed expenses down to the date when the verdict was applied. The pursuer opposed this, and moved for his expenses since that date. *Held* that the defenders were entitled to deduct from the award of compensation their expenses as taxed down to the date when the verdict was applied, and thereafter that no expenses were due to or by either party. M'Kenna *v.* The United Collieries, Limited, p. 713.

Master and Servant—Wages—Deduction of Fine Due by Workman—Truck Act 1831 (1 *and* 2 *Will. IV, c.* 37), *sec.* 3. *Held* that under the Truck Act 1831 an employer was not entitled to deduct from a workman's wages the amount of a fine due by the workman to the master under an order of a court of summary jurisdiction. The only deductions he can make are those expressly sanctioned by the statute (see sections 23 and 24). Williams and Others *v.* North's Navigation Collieries, Limited, p. 881.

—— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37)—*Employment "on or in or about" an "Engineering Work"—Sec.* 7, *sub-sec.* 1. A firm of contractors who were engaged in substituting electric for horse tramway lines in the streets of a town stored the new rails when unloaded from the railway trucks in the railway company's yard by arrangement with the railway company. An employee of the contractors was injured while stacking the rails. The yard abutted upon a street through which the electric tramway would ultimately run, but at the time of the accident operations had not extended beyond a point distant over a quarter of a mile from the yard. *Held* (*aff.* the judgment of the Court of Appeal, *diss.* Loreburn, L.C., and Lord James of Hereford) that the injured man was not at the time of the accident employed on or in or about an engineering work within the meaning of section 7 of the Workmen's Compensation Act 1897. Back *v.* Dick, Kerr, & Company, p. 884.

—— *Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37)—"*Serious and Wilful Misconduct*"—*Workman Using Hoist in Violation of Rules—Sec.* 1 (2) (*c*). The rules of a workshop provided that workmen were only to use a certain hoist when they were in charge of a load. There was nothing particularly mysterious or dangerous about the working of the hoist, and, unknown to their employers, the workmen often used it when not

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in charge of any load. A workman was injured while thus using it. *Held* that he had not been guilty of "serious and wilful misconduct" in the sense of the Act. *Opinions* that "wilful" imports that the misconduct was deliberate and not merely thoughtless, and that "serious" applies to the misconduct itself and not to its consequences. Johnson *v.* Marshall, Sons, & Company, p. 888.

Master and Servant. See *Reparation—Process—Expenses—Misrepresentation.*

Meditatio Fugæ Warrant. See *Diligence.*

Memorandum of Association. See *Company.*

Milk Supply. See *Public Health.*

Mineral Lease. See *Valuation Cases.*

Mines and Minerals—Mining Lease—Construction—Undertaking to Win, Work, and Get Fairly, Duly, and Honestly the Whole of the Coal. A lease for a term of twenty-one years of a seam of coal provided that the lessees should, as soon as they commenced working the coal, pay a yearly rent of £100 per acre of coal, and until then a yearly rent of £5. They undertook that they would "at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine . . . or seam . . . in a proper and workmanlike manner." It ultimately turned out to be impossible to work the coal except at a loss, and the lessees declined to do so. *Held* that on a true construction of the lease they were bound to work the coal (the words "fairly, duly, and honestly" adding to rather than detracting from their obligation), and that accordingly they were liable to the lessors in damages for breach of contract. Charlesworth and Another *v.* Watson and Another, p. 569.

Minority. See *Reduction.*

Minute not in Statutory Form. See *Process.*

Minute of Abandonment. See *Process.*

Minute of Parties. See *Jurisdiction.*

Minute of Procedure. See *Justiciary Cases.*

Misnomer. See *Process.*

Misrepresentation—Essential Error—Contract—Discharge—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37). A workman who had been injured and was in receipt of compensation under the Workmen's Compensation Act 1897 with a registered agreement, received a call from an officer of the Insurance Company which was paying the compensation. The officer desired to obtain a final discharge, and in the course of the conversation with the workman, who was still very weak, referred to the recent report of their medical man on an examination as suggesting that the workman would be well again in some months. He did not read the report or give it to the workman to read. As matter of fact the report stated that the probable duration of disability would be some months, but that progress had been so slow no prediction could be made. The workman granted a discharge on what were, inasmuch as he did not recover, very favourable terms for the Insurance Company, and subsequently brought a reduction on the ground of misrepresentation and essential error. *Held* that there had been misrepresentation inducing to the granting of the discharge, and that the discharge must be reduced. Crossan *v.* Caledon Shipbuilding and Engineering Company, Limited, p. 852.

Misrepresentation. See *Reduction—Landlord and Tenant—Trade Name.*

Mora. See *Bar—Justiciary Cases.*

Mortis Causa. See *Donation.*

Motion by Pursuer for Modification of Expenses. See *Expenses.*

Motion for Adjournment. See *Election Law.*

Motion for Order on the Principal Clerk of Court. See *International Law.*

Motion for Trial. See *Process.*

Motion to Dispose of Petition in Single Bills. See *Process.*

Multiplepoinding. See *Expenses—Process.*

Mutuality of Rights. See *Superior and Vassal.*

Name, Descriptive or Fancy? See *Trade Name.*

Nautical Assessor. See *Process.*

Negligence. See *Reparation—Contract—Relief—River.*

Negligence of Fellow-Servant. See *Reparation.*

Newspaper Articles. See *Reparation.*

New Trial. See *Expenses.*

Nobile Officium. See *Public Records—Bankruptcy.*

Nomen juris. See *Justiciary Cases.*

Non-Disclosure of Contracts. See *Company.*

Note of Documentary Evidence. See *Justiciary Cases.*

Notice for Sittings. See *Process.*

Notice to Owner. See *Public Health.*

Nullity of Marriage. See *Husband and Wife.*

Nuncupative Legacy. See *Succession.*

Objection. See *Teinds.*

Objection to Relevancy. See *Justiciary Cases.*

Obligation. See *Landlord and Tenant.*

Obligation by Firm to Produce Deed. See *Partnership.*

Obligation by Partner. See *Bar.*

Obligation on Tenant. See *Valuation Cases.*

Obstruction on Public Highway. See *Reparation.*

Obstruction to Passage of Salmon. See *Interdict.*

Occupation Franchise. See *Election Law.*

Omission to Insert Designation. See *Election Law.*

Onus. See *Succession.*

Oppression. See *Justiciary Cases.*

Order to Find Caution. See *Process.*

Otter-Trawling. See *Justiciary Cases.*

Parent and Child—Custody of Child—Failure of Divorced Spouse to Deliver Child—Application for Warrant to Officers of Law to Take Child into Custody—Warrant to be Granted by Inner House—

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Administration of Justice. In an action of divorce at the instance of a husband against his wife, the Lord Ordinary granted decree and found the pursuer entitled to the custody of a female pupil child, the only child of the marriage. The defender having left the house where she had been residing, taking the child with her, and no information as to her whereabouts being obtainable by the pursuer, he applied to the Lord Ordinary to grant warrant to officers of law to take the child into custody and deliver her to him. The Lord Ordinary being of opinion that the order craved could not competently be pronounced in the Outer House, reported the case to the First Division. The Court, in the circumstances stated by the Lord Ordinary, pronounced the interlocutor craved, but was of opinion that it could not competently have been pronounced in the Outer House—*Leys* v. *Leys*, July 20, 1886, 13 R. 1223, 23 S.L.R. 834, *followed*. Guthrie *v.* Guthrie, p. 371.

Parent and Child. See *Master and Servant.*

Parents' Right. See *Succession.*

Parish Council. See *Local Government.*

Parish Council Sisted Defenders. See *Expenses.*

Partner or Employee. See *Revenue.*

Partnership—Copartnery for a Fixed Term—Death of Partner Immediately on Expiry of Fixed Period without New Agreement—Question of Continuance of Partnership—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *secs.* 27 *and* 32. A partnership agreement was entered into for five years "from and after the first day of January" 1895. One of the partners died on the morning of the 2nd January 1900. No new express agreement had been entered into. *Held* that the partnership was dissolved and that there had not been in fact a "continuance of the business by the partners" in the sense of section 27 of the Partnership Act 1890 so as to infer a continuance of the partnership. Wallace *v.* Wallace's Trustees, p. 402.

—— *Copartnery for Fixed Term—Continuance of Partnership after Expiry of Term—Rights and Duties of the Partners—"As they were at the Expiration of the Term"—Partnership Act* 1890 (53 *and* 54 *Vict. cap.* 29), *sec.* 27 (1). *Opinion* (*per* Lord Mackenzie, Ordinary) that the words "at the expiration of the term" in section 27 (1) of the Partnership Act 1890, where that section says that in a partnership for a fixed term continued beyond the term "the rights and duties of the partners remain the same as they were at the expiration of the term" are equivalent to "during the partnership term." Wallace *v.* Wallace's Trustees, p. 402.

—— *Mandate — Law-Agency — Implied Mandate — Power of Partner to Bind Firm — Partner of Law-Agent's Firm Borrowing Money on Security of Property Vested in Third Party—Obligation by Firm to Produce Deed Vesting Property in Partner Granted by the Partner.* It is not within the implied mandate of the partner of a firm of law-agents to grant a letter of obligation in the name of the firm undertaking to produce a deed vesting in him property on the security of which he is borrowing money, but which stands vested in a third party. Walker *v.* Smith and Others, p. 454.

Partnership. See *Revenue.*

Patent—Patents for Inventions—Master Patent or merely Patent for Mechanical Arrangement—Claim—Infringement. A patent, the object of which was the prevention of leakage of steam in steering and the like engines by the introduction into the steam feed-pipe of a casing which contains a cut-off valve operated from and acting in unison with the controlling valve of the steering or like engine, claimed—"In connection with the valves of steering and like engines, fitting in a passage or casing through which the steam enters the controlling valve casing, a double beat or equivalent valve having opposite inclines acted on by counterpart inclines moving with the controlling valve, the parts being arranged and operating substantially as and for the purposes hereinbefore described." The owner of the patent maintained that it was a master or pioneer patent, no means up to its date having been invented for preventing the leakage of steam in steering engines, and sought to have declared as infringements later patents having the same object and using a cut-off valve, which valve, however, was operated by a different mechanical device. *Held* that the claim must be construed as being merely for a mechanical arrangement, and consequently that the later patents, the mechanical device in which did not infringe the mechanical arrangement in the earlier patent, were not infringements. Brown *v.* John Hastie & Company, Limited, p. 671.

Payment—Proof—Bearer Cheque—Entry in Fortnightly Account—Forged Entry of Receipt of Cheque—Fraud by Clerk in Employment of Intended Payee—Liability for Loss. In payment of shares bought for him by a firm of stockbrokers, A drew a bearer cheque for the price, which he either sent by post to the firm or handed to C, a confidential clerk in the firm's employment. C stole the cheque, made a forged entry of the receipt of the money in the fortnightly statement which the firm were in the habit of sending to A, and discharged the account. C had no power to bind the firm for receipt of money. A having brought an action against the firm for delivery of the shares, the firm pleaded that they had not received payment. *Held* that as A's method of transmitting the money was not a reasonably safe method to adopt, and as C had not *de facto* power to grant receipts on behalf of the firm, the defenders were not liable for the loss. *Opinion* (*per* Lord M'Laren) that "to send a cheque which is not only not crossed, but is made payable to bearer, is according to modern ideas, not a payment in the ordinary course of business." Robb *v.* Gow Brothers and Gemmell, p. 120.

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Payment Contingent on Profits. See *Revenue.*
Payment Made to Rival Company. See *Revenue.*
Payment of Compensation. See *Master and Servant.*
Payment of Dividend. See *Revenue.*
Payment to Party Not Entitled. See *Trust.*
Payment to Reserve Fund. See *Company.*
Payment within Year of Death. See *Revenue.*
Penalty. See *Contract.*
Penalty or Civil Compensation. See *Process.*
Periodical Payment. See *Revenue.*
Perjury. See *Process.*
Personal Exception. See *Landlord and Tenant.*
Personal Name. See *Trade Name.*
Personal Occupancy. See *Election Law.*
Personal Security. See *Trust.*
Person a Trespasser. See *Justiciary Cases.*
Person Conducting Betting. See *Justiciary Cases.*
Persons Accused Jointly. See *Justiciary Cases.*
Petition. See *Process—Ship.*
Petition by Individual Shareholders. See *Company.*
Petition by Town Clerk. See *Burgh.*
Petition by Wife for Custody of Children. See *Expenses.*
Petition for Limitation of Liability. See *Expenses.*
Petition for Winding-up Order. See *Expenses.*
Petition to Appoint Arbiter. See *Arbitration.*
Photograph. See *Copyright.*
Pier Dues. See *Statute.*
Plea Prejudicial to Arbitration. See *Arbitration.*
Plea that Application for Arbitration Premature. See *Master and Servant.*
Police Burgh. See *Burgh.*
Police. See *Justiciary Cases.*
Policy Effected by Owner of Ship. See *Insurance.*
Policy of Insurance. See *Revenue.*
Pollution. See *River.*
Poor—Settlement—Desertion—Acquisition of Residential Settlement by Husband Living Apart from Wife and Family—Constructive Residence—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1. S., having a residential settlement in West Calder, in September 1898 deserted there his wife and family, who became chargeable to that parish and remained so till March 1899, when the wife discovered S. residing in the parish of Shotts. She left the poorhouse and with her family returned to West Calder, where she was occasionally visited by her husband, at first surreptitiously owing to a warrant having been issued for his arrest, and was given by him small sums of money for her support. On 3rd June 1899 S. removed his wife and family to Shotts parish, where they remained till 15th May 1902, when he again deserted them, and on the 28th May they again received relief. West Calder maintained that S. had acquired a residential settlement in Shotts, having resided for more than three years prior to May 1902 in that parish. Shotts maintained that S. had not acquired a residential settlement in its parish, inasmuch as prior to 3rd June 1899 S. was constructively resident in West Calder, where his wife and family were, and where he was visiting them. *Held* that S. had acquired a residential settlement in Shotts. West Calder Parish Council *v.* Bo'ness and Carriden Parish Council and Shotts Parish Council, p. 68.
Poor—Relief—Admission of Liability—Continuance of Liability—Interruption of Relief—Poor Law Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 70). With regard to a case of a wife and family, who had received relief owing to the husband's desertion, an inspector of poor wrote—"I am instructed to admit liability in this case." The wife and family remained in the poorhouse from their admission till 23rd November 1903, when they left of their own accord and "drifted up and down for four days in search of" the husband, when they again, on 27th November, applied for relief and were sent back to the poorhouse. *Held* that as the wife and family had not become self-supporting during their absence from the poorhouse, there had been no interruption of liability, and that the admission was still binding. West Calder Parish Council *v.* Bo'ness and Carriden Parish Council and Shotts Parish Council, p. 68.
——— *Settlement — Capacity to Acquire Residential Settlement — Bodily and Mental Weakness Rendering Self-Maintenance Impossible — Maintenance in a Charitable Institution.* A person whom "mental weakness and chronic physical disease" renders incapable of maintaining himself, may, by the necessary residence for the requisite period in a charitable institution, without begging or applying for parochial relief, acquire a residential settlement in the parish where the institution is situated. *Question* whether an insane person could so acquire a residential settlement. Parish Council of Glasgow *v.* Parish Council of Kilmalcolm, p. 639.
——— *Settlement — Capacity to Acquire Residential Settlement—Insanity—Certification—Poor Law (Scotland) Act* 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1. The fact that a pauper is insane during the necessary period of residence is *per se* sufficient to prevent him from acquiring a settlement in a parish. It is not essential that his insanity should have been formally certified. *Facts* upon which the Court *held* that a pauper was insane and incapable of acquiring a settlement. Cathcart Parish Council *v.* Glasgow Parish Council p. 653.
——— *Poor Rates—Harbour—Rights and Powers Below Low-Water Mark—Deductions from Annual Value—Expense of Dredging Harbour—Poor Law Amendment (Scotland) Act* 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 37—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91). A

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parish council refused to allow as a deduction from the annual value of a harbour, under section 37 of the Poor Law Amendment (Scotland) Act 1845, the average cost of dredging the harbour, on the ground that such expense was not incurred in maintaining the lands and heritages, the subjects of assessment, but was an expense of carrying on business incidental to an incorporeal right of harbour in the harbour company not included in the entry in the valuation roll, or alternatively was expenditure in operations on the *solum* of the sea below low-water mark which did not form part of the harbour as that subject fell to be and was entered in the valuation roll. *Held* that the average cost of dredging was a proper deduction, inasmuch as (1) it was an expense necessary for maintaining in use the wharves, &c.; and (2) harbour was a complex heritable subject, duly entered in the valuation roll, which embraced any right such as was now sought to be distinguished, and required for its maintenance such expense—*Adamson* v. *Clyde Navigation Trustees*, June 26, 1863, 1 Macph. 974, June 22, 1865, 3 Macph. (H.L.) 100; *Mersey Dock and Harbour Board* v. *Jones*, June 22, 1865, 3 Macph. (H.L.) 102, note; and *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213, *commented on*. Burghead Harbour Company, Limited *v.* George (Collector of Duffus Parish), p. 754.

Poor—Poor-Rates—Deductions—Insurance where no Premiums Paid—Rates and Taxes—Whether Actual or Average—Whether Owners Only or both Owners and Occupiers—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37. *Held* (*per* Lord Stormonth Darling, Ordinary, and acquiesced in) (1) that in calculating over an accepted number of years the "probable annual average cost of insurance" for deduction from the annual value, under section 37 of the Poor Law Amendment (Scotland) Act 1845, prior to assessing, no allowance fell to be made for insurance in years in which no premiums had been paid or money set aside in lieu thereof—*Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, *distinguished;* (2) that the rates, taxes, and public charges which fell to be deducted under the section were those actually payable and not an average estimate thereof; and (3) that where the owner was also the occupier the proportion of taxes deductible was the owner's proportion only. Burghead Harbour Company, Limited, *v.* George (Collector of Duffus Parish), p. 754.

Poor Rates. See *Valuation Acts—Poor—Railway.*

Poor's Roll—Circumstances Warranting Admission. A porter earning 23s. a week, with no children, who had been found to have a *probabilis causa litigandi*, *held* entitled to admission to the poor's roll in order to defend an action of adherence and aliment brought against him by his wife, and to raise an action of divorce on the ground of adultery against her, she having been already admitted to the poor's roll. The Lord Justice-Clerk *dissents* from the opinions expressed by Lord Young in the following cases—*Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, 22 S.L.R. 356; *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, 22 S.L.R. 865; *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601; *Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752. Brown *v.* Brown, p. 503.

Poor's Roll—Application for Admission—Precognitions Obtained by Reporters—Names and Addresses of Witnesses—Rights of Opposing Party. The reporters *probabilis causa litigandi* are bound to show to an opposing party any precognitions which they may have obtained from an applicant for the benefit of the poor's roll in so far as they contain statements of fact. The reporters, however, have a discretion to withhold the names and addresses of the applicant's witnesses. Cant *v.* Pirnie's Trustees, p. 782.

Positive Prescription. See *Prescription.*

Possession. See *Prescription.*

Possessory Action. See *Process.*

Postponement of Vesting. See *Succession.*

Power Granted by Court. See *Judicial Factor.*

Power of Appointment. See *Succession.*

Power of Arbiter. See *Master and Servant.*

Power of Court to Confirm. See *Company.*

Powers of Magistrates. See *Statute.*

Power of Partner to Bind Firm. See *Partnership.*

Power of Sheriff. See *Public Health.*

Powers of Directors. See *Company.*

Power to Award Bursaries. See *Bursary.*

Power to Invest. See *Trust.*

Power to Let Undertaking. See *Valuation Cases.*

Power to Revoke. See *International Law—Trust.*

Power to Sell Heritable Subjects. See *Judicial Factor.*

Power to Transfer. See *Administration of Justice.*

Precognitions Obtained by Reporters. See *Poor's Roll.*

Preference. See *Contract.*

Preliminary Pleas. See *Expenses.*

Premises Occupied without Lease. See *Valuation Cases.*

Prescription—Positive Prescription—Possession—Acts of Possession not Attributable to Claim of Ownership—Railway and Canal Company. Circumstances in which *held* that certain acts of possession on the part of a railway and canal company were not attributable to a claim of ownership, and could not establish a title by prescription. Brown *v.* North British Railway Company, p. 327.

——— *River—Abstraction of Water from River—Prescriptive Right to Abstract Water at One Place—Right to Abstract the Same Amount of Water at Another Place—Right to Abstract at One Place Amount of Water Formerly Abstracted at Two Places.* "The effect of forty

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years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction. Earl of Kintore and Others *v.* Alexander Pirie & Sons, Limited, p. 838.

Previous Conviction. See *Justiciary Cases.*

Principal and Agent. See *Fraud.*

Privilege. See *Reparation.*

Probable Cause. See *Reparation.*

Procedure. See *Justiciary Cases—Arbitration—Public Health—Burgh—Process—Election Law.*

Process—Appeal for Jury Trial—Proof or Jury Trial—Trifling Nature of Case—No Definite Injuries Specified. In an action of damages for personal injuries alleged to be sustained through falling into an excavation on the side of a street made by the defenders while engaged in laying an electric cable, the pursuer, a miner, averred that he "sustained very severe injuries. Amongst other injuries he is suffering from very severe bruises on the chest and right down the right leg. He has also sustained a severe nervous shock. He has been confined to bed as a result of his injuries, and has been incapacitated from carrying on his work." The pursuer having appealed for jury trial, *held*, in accordance with the rule laid down in *Sharples* v. *Yuill*, 42 S.L.R. 538, that the case fell to be remitted to the Sheriff. M'Laughlan *v.* The Clyde Valley Electrical Power Company, p. 25.

——— *Summons—Designation—Error in Designation—Party Illegally Designed Seeking Equitable Remedy—Dentists Act* 1878 (41 *and* 42 *Vict. cap.* 33), *sec.* 3. The Dentists Act 1878, section 3, enacts—"From and after 1st August 1879, a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is specially qualified to practise dentistry unless he is registered under this Act. Any person who . . . not being registered under this Act, takes or uses any such name . . . as aforesaid shall be liable, on summary conviction, to a fine not exceeding twenty pounds." A, who practised dentistry, but was not registered under the Dentists Act 1878, raised an action to prevent the trustee on his sequestrated estate from selling certain implements alleged to be working tools of his profession, in which he was, through the error of his agent, designed as dental surgeon. His agent had simply followed the designation in the sequestration proceedings, and pursuer had never in his practice maintained that he was a qualified dentist or designed himself as dental surgeon. *Held* that pursuer was not barred by the error in designation from stating a relevant case. *Observed* that the practising of dentistry by an unregistered person was not of itself illegal. Macpherson *v.* Drummond (Macpherson's Trustee), p. 102.

Process—Appeal—Appeal to House of Lords—Point on Record Requiring Proof not Raised in the Division. A former proprietor of an estate sought to have reduced proceedings in the Sheriff Court under section 8 of the Heritable Securities (Scotland) Act 1894, whereby a creditor had had his disposition in security made irredeemable, and so become proprietor. He averred on record that in the advertisement of the property prior to the exposure for sale it had been wrongly described, so that it had appeared less than it really was. This point was not raised in the Division, but was taken on an appeal to the House of Lords. *Held* that the point, inasmuch as it went to an allowance of proof which had not been asked for in the Division, could not now be entertained, and that it must be presumed to have been abandoned. Sutherland *v.* Standard Life Assurance Company, p. 115.

——— *Proof or Jury Trial—Right-of-Way.* In an action raised by members of the public against proprietors, for declarator that a right-of-way existed (1) from A to B *via* certain places, (2) also from A to B for the first part *via* the same places, but for the latter part *via* certain other places, a portion of this latter part being claimed by alternative routes forming a bifurcation, the defenders argued for a proof in lieu of jury trial on the ground of (1) the complexity of rights-of-way sought to be established, (2) the danger of the jury being misled by the evidence, since part of the right-of-way claimed was an admitted right-of-way, another part was a tolerated route, and traffic from either end to and from a certain well near the right-of-way claimed was likely to be mistaken for through traffic. *Held* that there was nothing to take the case out of the settled rule of practice that right-of-way cases should be tried by a jury. Robertson & Others *v.* Duke of Atholl & Others, p. 173.

——— *Multiplepoinding — Competency — Double Distress.* A & Co., timber merchants, shortly before bankruptcy granted to B & Co., timber measurers, one of their creditors, delivery orders applicable to certain lots of timber which were lying at D & Co.'s yards. A & Co. having become bankrupt, the timber was claimed by E, their trustee, and also by B & Co.; and an agreement was entered into between them that the timber should meanwhile be sold in the ordinary course of business and the proceeds deposited in bank in their joint names. Portions of the timber were sold and the proceeds deposited. E having discovered that the timber was lying in D & Co.'s yards, and not as he had supposed in B & Co.'s actual custody, raised an action of multiplepoinding in name of D & Co. and the Bank, as nominal raisers, the fund *in medio* being the unsold timber and the sums deposited. B & Co. objected to

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the competency of the action on the ground that there was no double distress. *Held* (*following Commercial Bank of Scotland v. Muir*, Dec. 1, 1897, 25 R. 219, 35 S.L.R. 174) that as there were two competing claimants to funds in the hands of a third party the action was competent. Connal & Co. Limited *v.* Reid & Others. Clyde Navigation Trustees *v.* Reid & Others, p. 187.

Process—Reclaiming Note—Assignation of Decree—Assignee Sisted as Pursuer along with Original Pursuer—Interlocutor Pronounced on Withdrawal of Reclaiming Note. The pursuer in an action for payment having obtained decree in the Outer House, the defender lodged a reclaiming note. Subsequently the pursuer assigned his right under the decree, and his assignee was sisted as pursuer along with the original pursuer. The defender, desiring to withdraw his reclaiming note, moved the Court to refuse the reclaiming note. The original pursuer thereupon moved the Court to recal the interlocutor of the Lord Ordinary, and of new grant decree in similar terms in favour of his assignee. The Court *refused* the reclaiming note. Turner *v.* Selkirk's Trustee, p. 208.

—— *Reclaiming Note — Competency — Expiry of Reclaiming Days on a Day on which Clerk's Office not Open—Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 54. Section 54 of the Court of Session Act 1868 enacts that where the leave of the Lord Ordinary has been obtained, "a reclaiming note, presented before the whole cause has been decided in the Outer House, may be lodged within ten days from the date of the interlocutor granting leave with one of the clerks of the Division of the Court in which the cause depends, without transmission of the process or any part thereof. Where the time for lodging a reclaiming note under section 54 of the Court of Session Act 1868 expired on a day when the clerk's office was not open, *held* that the reclaiming note was competently lodged on the first day thereafter on which the clerk's office was open. Blackburn *v.* Sharp and Another, p. 209.

—— *Possessory Action—Interdict—Competency—Property Held pro indiviso—Right of Pro indiviso Proprietor to Protect Property from Encroachment by Outsider—Salmon Fishing.* A *pro indiviso* proprietor is entitled by interdict to protect the property held *pro indiviso*, as for example salmon-fishing, from encroachment by an outsider. Warrand *v.* Watson and Others, p. 252.

—— *Interdict — Procedure — Trespass — Wrongous Fishing—Fishing Denied, but Right to Fish Asserted—Right to Interdict de plano.* In defence to an action of interdict, brought by the proprietor of a salmon-fishing against certain persons whom he alleged to have on certain specified occasions unwarrantably fished therein, the defenders denied that they had fished, but asserted that they had a right to fish. *Held* that interdict *de plano* could not be granted, but that there must be inquiry whether the defenders had fished. *Macleod* v. *Davidson*, November 17, 1886, 14 R. 92, 24 S.L.R. 69, *distinguished.* Warrand *v.* Watson and Others, p. 252.

Process—Reclaiming Note—Competency—Judicial Factory under sec. 164 *of The Bankruptcy* (*Scotland*) *Act* 1856, *sec.* 164—*Interlocutor Ordering Inquiry and not Disposing of Merits—Reclaiming Note Incompetent—Bankruptcy* (*Scotland*) *Act* 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 164 *and* 171—*Act of Sederunt*, *25th November* 1857, *sec.* 29—*Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56), *secs.* 4 *and* 6. The Lord Ordinary, in dealing with certain objections to a report by the Accountant of Court on the accounts of a judicial factor appointed under section 164 of The Bankruptcy (Scotland) Act 1856, pronounced an interlocutor with a view to inquiry and investigation merely, and which did not finally dispose of any matter on the merits. *Held*, on a consideration of The Bankruptcy (Scotland) Act 1856, secs. 164 and 171, Act of Sederunt 25th November 1857, sec. 29, Distribution of Business Act 1857, secs. 4 and 6, that a reclaiming note was incompetent. M'Cardle *v.* M'Cardle's Judicial Factor, p. 268.

—— *Jury Trial—Appeal for Jury Trial—Remit to Outer House—Motion for Trial—Trial not Necessary within Three Weeks of Party's Motion—Court of Session Act* (13 *and* 14 *Vict. c.* 36), *sec.* 40—*Notice for Sittings. Observed* (*per* Lord President) that the provision of section 40 of the Court of Session Act 1850 that "where an issue or issues is or are approved . . . it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a place for the trial of such issue or issues, such time being . . . except upon special cause shown, not later than three weeks from the date of such motion," does not apply to cases appealed from the Sheriff Court for jury trial; and where such a case has been remitted to the Outer House the judge to whom the case is remitted may try it at any time before the next sittings, but if he is unable to do so notice may be given for such sittings. Massie *v.* The Caledonian Railway Company, p. 281.

—— *Appeal from Sheriff—Competency—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *Sched.* ii (8)—*A.S. 3rd June* 1898, *sec.* 7 (*a*)—*Application for Warrant to have Memorandum Recorded. Held* (*per* the Lord President, Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling; *diss.* Lord M'Laren and Lord Kinnear; *abs.* Lord Kincairney, who resigned before the advising) that the judgment of the Sheriff in an application for special warrant to have an alleged agreement, under the Workmen's Compensation Act 1897 recorded, is final, and appeal therefrom *dismissed* as incompetent. Binning *v.* Easton & Sons, p. 312.

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Process—Citation—Registered Letter—Enrolled Law-Agent—Service by Registered Letter by Party Himself being Enrolled Law-Agent—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3. A party to an action who is an enrolled law-agent may himself execute service by registered letter. Addison *v.* Brown, p. 335.

——— *Citation—Service by Registered Letter—Statement of Inducice—Citation Amendment (Scotland) Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 4, *sub-secs.* (1) *and* (2). The Citation Amendment (Scotland) Act 1882, section 4, enacts—"The following provisions shall apply to service by registered letter:—(1) The citation or notice subjoined to the copy or other citation or notice required in the circumstances shall specify the date of posting, and in cases where the party is not cited to a fixed diet but to appear or lodge answers or other pleadings within a certain period, shall also state that the *inducice* or period for appearance or lodging answers or other pleadings is reckoned from that date; (2) the *inducice* or period of notice shall be reckoned from twenty-four hours after the time of posting." . . . An interlocutor granting decree was served upon the defender by registered letter. The notice continued, after stating the date of posting, "from which the *inducice* or appearance is reckoned." A suspension and interdict having been brought on the ground that the notice was wrong inasmuch as the *inducice* ran from twenty-four hours after the date of posting, *held* that the notice, following as it did explicitly the words of section 4, sub-section 1, was right, and the suspension and interdict *refused*. Addison *v.* Brown, p. 335.

——— *Appeal—Competency—Sheriff Court Act* 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24—*Sisting Process—Order to Find Caution and Sisting Procedure till Caution Found—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 69. *Held* that an interlocutor pronounced in the Sheriff Court ordaining a limited company (in virtue of section 69 of the Companies Act 1862) to find caution for expenses of an action in which they were pursuers, and sisting procedure until such caution should be found, was an interlocutor sisting process, and therefore appealable. Horn & Company, Limited *v.* Tangyes, Limited, p. 362.

——— *Reduction—Reduction of Decree—Perjury by Party—Res Judicata—Competency of Action of Reduction.* An action of reduction of a decree obtained *in foro* in a preceding action between the parties, or those whom they represent, on the ground simply that the party who obtained the decree committed perjury, is incompetent, inasmuch as no matter extrinsic of the matter of the preceding action is put in issue, and the question is *res judicata*. Mackintosh's Trustee and Another *v.* Stewart's Trustees, p. 363.

——— *Petition—Remit to Reporter—Consideration of Report—Motion to Dispose of Petition in Single Bills—Intimation of Motion to be Made to Keeper of the Rolls.* A party intending to move the Court to dispose in the Single Bills of an application which would in ordinary course be sent to the Summar Roll must intimate the motion to the Keeper of the Rolls, in order that the Court may have the opportunity of considering the matter beforehand. General Accident Assurance Corporation, Limited, Petitioners, p. 367.

Process—Caution for Expenses—Reclaiming Defender—Trust Deed for Behoof of Creditors Granted after Reclaiming. A defender in an action reclaimed and subsequently executed a trust deed for behoof of creditors. On the trustee's refusal to sist himself in the action, the pursuer, in a note, craved the Court to ordain the reclaimer to find caution for expenses. The Court *refused* the prayer of the note. Johnstone *v.* Henderson, p. 486.

——— *Jury Trial—Issues and Counter Issue—Verdict on One Issue only.* The Lord President—"In a case where the verdict on one of the issues tabled exhausts the case and leads either to decree as craved or to absolvitor, any answers on the remaining issues is matter not of right but of convenience." Campbell & Others *v.* Scottish Educational News Company, p. 487.

——— *Misnomer—Jurisdiction—Review—Small Debt Court—Diligence—Suspension—Misnomer of Party Obtaining Decree—Finality of Decree—Attempt to Suspend Diligence following Decree—No Distinction between Suspension of Decree and Diligence following it—Action of Damages for Wrongful Poinding—Justices of the Peace Small Debt (Scotland) Act* 1825 (6 *Geo.* IV, *c.* 48), *secs.* 14 *and* 15. By secs. 14 and 15 of the Justices of the Peace Small Debt (Scotland) Act 1825 it is provided that small debt decrees shall not (except in cases not here in point) be "subject to advocation, nor to any suspension, appeal, or other stay of execution . . . nor . . . reduction before the Court of Session." A, registered under the Moneylenders Act 1900 as carrying on business at X under the name of "the Exchange Loan Company," lent a sum of money to B and took in exchange a bill drawn by himself in the name of "The Exchange Loan Company, Limited," payable at X and accepted by B. B having failed to repay the advance, A raised an action against him on the bill in the Small Debt Court under the Act of 1825 in the name of "The Exchange Loan Company, Limited," and obtained a decree in the following terms:—"Find the above-designed B liable to the also above-designed Exchange Loan Company, Limited, in the sum of . . . and hereby decree and ordain . . . execution to pass hereon by poinding. . . ." B throughout knew that A was the Exchange Loan Company, Limited, and, although present in Court, raised no objection to the instance of the action. A proceeded afterwards to poind B's

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effects. B brought a suspension on the ground that it was incompetent to do diligence on the decree because of the inaccurate addition of the word "Limited" to A's registered name. He also brought an action for damages for wrongful poinding. The Court, *holding* that all objections to the decree and diligence were foreclosed by secs. 14 and 15 of the Act of 1825, *refused* the suspension and *assoilzied* the defender in the action for damages. Wolfe *v.* Robertson, p. 499.

Process—Abandonment—Minute of Abandonment—Minute not in Statutory Form—Crave as to Expenses—Expenses Carried by Minute in Statutory Form—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10. A pursuer in an action of divorce, after a proof on the question of jurisdiction in which she had been successful, and the expenses of which had been paid her by the defender, changed her mind as to the remedy she desired, and with a view to bringing an action of separation and aliment lodged a minute of abandonment. The minute was not in statutory form inasmuch as it contained a crave that she should be allowed to abandon on payment merely of any expenses the minute itself had caused. *Held* that the minute of abandonment must be in statutory form. *Opinions* that a minute in statutory form would carry payment of the full expenses, including repayment of the expenses already paid to the pursuer in connection with the question of jurisdiction. Stewart *v.* Stewart, p. 522.

—— *Diligence for Recovery of Documents—Confidentiality—Action of Damages for Wrongous Interdict—Interim Interdict by Water Trustees against Mineral Company—Report by Man of Skill to Water Trustees after Interdict Obtained.* In an action of damages for wrongous interdict brought by a mineral company against water trustees the pursuers sought to recover a report by a man of skill made on the mineral workings to the defenders shortly after the interim interdict complained of had been obtained. The Court *held* that the report should be produced to be examined by it, and if with a bearing to go into the case in whole or in part. The Clippens Oil Company, Limited *v.* The Edinburgh and District Water Trust, p. 540.

—— *Proof in Outer House—Reclaiming Note—Further Proof Allowed by Inner House—Remit to Lord Ordinary—Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 62. Section 62 of the Court of Session Act 1868 is as follows:—"The third section of the Act 29 and 30 Vict. cap. 112 [Evidence (Scotland) Act 1868] is hereby amended to the effect of providing that, notwithstanding the terms of said section, 'where proof shall be ordered by one of the Divisions of Court,' it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion." During the debate on a re claiming note presented by the defenders against an interlocutor of the Lord Ordinary in favour of the pursuers pronounced after proof, the pursuers obtained leave to amend their record and the defenders to answer the amendment. Thereafter, the defenders having moved to be allowed to lead additional proof, the pursuers contended that under the section set forth above it could only be taken by one of the Judges of the Division, a remit to the Lord Ordinary being incompetent. The Court *remitted* to the Lord Ordinary to take further proof and to report. Muir & Son, Limited *v.* Edinburgh and Leith Corporations Gas Commissioners, p. 598.

Process—Appeal—Appeal merely on Question of Expenses—When only to be Given Effect to. *Per* Lord President—"I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits." Caldwell *v.* Dykes, p. 606.

—— *Appeal — Competency — Finality Clause—Compensation Claimed by Seaman under sec.* 166, *sub-sec.* (2), *of the Merchant Shipping Act* 1894—*Penalty or Civil Compensation—Merchant Shipping Act* 1894 (57 *and* 58 *Vict. c.* 60), *secs.* 166, *sub-sec.* (2), *and* 709—*Summary Procedure (Scotland) Act* 1864 (27 *and* 28 *Vict. c.* 53), *secs.* 3 *and* 28—*Summary Prosecutions Appeals (Scotland) Act* 1875 (38 *and* 39 *Vict. c.* 62), *secs.* 2 *and* 3. Section 709 of the Merchant Shipping Act 1894 provides that all orders, decrees, and sentences, pronounced by any sheriff or justice of the peace in Scotland under the authority of the Act shall be final and not subject to review. The Summary Prosecutions Appeals (Scotland) Act 1875 provides that either party to a cause, *i.e.*, a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty before an inferior judge, may appeal notwithstanding any provision contained in the Act under which the cause shall have been brought excluding review. A seaman brought a complaint against his employers in a Justice of the Peace Court for recovery of compensation alleged to be due to him under sec. 166 (2) of the Merchant Shipping Act 1894. The complaint bore to be under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. The Justices having dismissed the complaint, the seaman appealed on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875. *Held* that as the complaint was not a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty or a sum of money in the nature of a penalty in the sense of the Summary Procedure Act

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1864, the Prosecutions Appeals Act 1875 did not apply, and that therefore the appeal was incompetent. Alexander *v.* Little & Company, p. 607.

Process—Proof—Proof or Jury Trial—Appeal for Jury Trial—Collision at Sea—Action of Damages—Interpretation of Regulations—Nautical Assessor—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 40)—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73. An action of damages for collision at sea raised in the Sheriff Court and appealed to the Court of Session for trial by jury under section 73 of the Court of Session Act 1868 and section 40 of the Judicature Act 1825, *held* unsuitable for jury trial, and *remitted* to a Lord Ordinary for proof, on the ground that it involved not a pure question of fact but the construction of the regulations for preventing collisions at sea, and called for the presence of a nautical assessor. *Opinions per* the Lord Justice-Clerk and Lord Kyllachy—That collision cases involving merely questions of fact may be suitable for jury trial. *Per* the Lord Justice-Clerk—"I know of no case where the judge trying a case with a jury has had a nautical assessor." *Per* Lord Stormonth Darling—"I am quite clear you cannot have both a nautical assessor and a jury . . . When these two demands are both made I think the demand for a jury must give way." M'Leans *v.* Johnstone and Others, p. 612.

——— *Contract — Foreign — Arbitration Clause—Validity according to Foreign Law of Arbitration Clause—Mode of Ascertainment.* The validity of an arbitration clause fell to be determined by English law. The Lord Ordinary allowed a proof. *Held* that as proceedings would have to be taken in England under the Arbitration Act in order to start the arbitration, the proof allowed was unnecessary as the validity of the clause would be determined in the course of such proceedings, and *action sisted, hoc statu*, in order that parties might carry through arbitration proceedings in England if the clause was valid and covered the dispute in question. Robertson *v.* Brandes, Schonwald & Company, p. 635.

——— *Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 4—*Assessment of Compensation in Action Brought Independently of the Act—"Court in which the Action is Tried."* In an action of damages for personal injuries at common law and alternatively under the Employers' Liability Act 1880, a Sheriff after a proof assoilzied the defenders, and inasmuch as the pursuer intimated he did not wish to proceed under the Workmen's Compensation Act 1897, found it unnecessary to pronounce further. The pursuer appealed, and, on the Court proceeding on new findings in fact to dismiss the action, moved for compensation to be assessed under the Workmen's Compensation Act. The defenders argued that that should be done in the Sheriff Court. The Court *remitted* to the Sheriff. Quinn *v.* John Brown & Company, Ltd., p. 643.

Process—Abandonment—Withdrawal of Minute of Abandonment—Right to Withdraw—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10—*Act of Sederunt* 11*th July* 1828, *sec.* 115. The pursuer in an action, who has lodged a minute of abandonment, has an absolute right to withdraw such minute, the defender's remedy being to move for absolvitor in the action on the ground of delay, which motion the Lord Ordinary may grant if consistent with the justice of the case, or may refuse allowing the pursuer to proceed subject to conditions as to expenses. Lee *v.* Pollock's Trustees, p. 657.

——— *Pursuer—Designation—Address of Pursuer (a Society)—"Building Society Incorporated under the Building Societies Act* 1874"—*Sheriff Courts Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 6. In a petition in the ordinary Sheriff Court the pursuer was designed as "The Improved Edinburgh Property Investment Building Society, incorporated under The Building Societies Act 1874," no address being given. *Held* that this description satisfied the requirements of the Sheriff Courts Act 1876, section 6. The Improved Edinburgh Property Investment Building Society *v.* Whites, p. 683.

——— *Equitable Remedy—Fraud—Protection of Trade Name—Fraud by Complainers Seeking an Equitable Remedy not Pleaded on Record but Disclosed at Proof.* In an action of interdict for the protection of a trade name, where in the proof it was disclosed, though not pleaded on record, that the business had been established by a fraud on the public, the Lord Ordinary (Ardwall), the point having been taken by counsel but without amendment, proceeded to dispose of the case on this ground, and his jugdment was subsequently sustained by the Division. Bile Bean Manufacturing Company *v.* Davidson, p. 827.

——— *All Parties not Called—Trust—Liability of Trustees—One Trustee Called—Delict.* The representatives of one of several trustees having been sued for an accounting, they pleaded that the action should be dismissed, as all the trustees or their representatives had not been called. *Opinion, per* Lord Ordinary (Salvesen), that the rule established by *Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490, that where a defender is liable *in solidum* in respect of a delict or *quasi* delict the pursuer is entitled to proceed against him alone, even although there may have been others who acted along with the defender and against whom the defender might have a right of relief, might well be reconsidered in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible. Sim and Others *v.* Ferguson and Others (Muir's Trustees), p. 795.

——— *Remit—Remit Subsequent to Proof—Terms of Remit—Competency of Remit.* In an action of declarator and interdict

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at the instance of the salmon-fishing proprietors of the upper reaches of a river against a lower riparian mill-owner, with the object of terminating or reducing his abstraction of water, a proof was taken, by which it was established that there was illegal obstruction to the passage of salmon on the part of the mill-owner. Thereafter a remit to men of skill was made "to report (1) what depth or volume of water, measured by inches or otherwise, flowing over the S. dyke and thence downwards over the W. dyke to the foot of the said W. tail-race, would be in their opinion sufficient to secure the free passage of salmon in said part of the river; and (2) whether any, and if so what, arrangements are possible which would automatically or otherwise insure the observance by the defenders of the limitations attaching, as above expressed, (*i.e.*, in previous portion of interlocutor)" "to their right to abstract water from the river at S. dyke." Objection was taken to the remit on the ground that it was submitting to the arbitrament of the men of skill after a proof the whole substance of the case. *Held* that the remit was rightly made. Earl of Kintore and Others *v.* Alexander Pirie & Sons, Limited, p. 838.

Process. See *Expenses — Jurisdiction — Election Law—Reparation—Arbitration —Husband and Wife—River—Master and Servant—Justiciary Cases.*

Profits. See *Income Tax—Revenue.*

Profits Credited to an Employee. See *Revenue.*

Prohibition against "Buildings." See *Buildings.*

Promise of Landlord to Repair Defects. See *Reparation.*

Proof. See *Domicile—Payment—Process.*

Proof Allowed. See *Justiciary Cases—Process.*

Proof of Trust. See *Trust.*

Proof or Jury Trial. See *Process.*

Property—Pro indiviso Property—Trespass—Burgh—Salmon-Fishing—Outsider Pleading in Defence of Trespass a Plea to Title Conceivably Open to pro indiviso Proprietors inter se—Indweller of Burgh Asserting Burgh's Right to Property not Claimed by Burgh. A was *pro indiviso* owner along with the burgh of X of salmon-fishings, A having the right of fishing on seven days and the magistrates and council of X (as representing the community of the burgh) on every eighth day. The burgh's right to fish had been dedicated to the public, but was only exercised by the public fishing. A having brought an action of interdict against certain of the indwellers of the burgh for fishing on days other than the eighth day, the respondents pleaded that the rights of the burgh as in a question with A were more extensive than the burgh was content to claim, and that as indwellers in the burgh they were, in exercise of those more extensive rights, entitled to fish not only on the eighth but on other days as well. *Held* that the indwellers of the burgh were not entitled to plead in defence to a summary action of interdict rights which the burgh might, as in a question of title, conceivably plead against the other *pro indiviso* proprietor. Warrand *v.* Watson and Others, p. 252.

Property—Common Property—Clause Prohibiting Pro indiviso Proprietor Suing a Division. A feu-charter contained a grant of a *pro indiviso* share of certain subjects with a clause prohibiting the feuar from suing a division. *Opinions* that the prohibiting clause was of no effect, at least as against a singular successor in the feu. Grant *v.* City of Edinburgh and Others, p. 475.

——— *Common Property and Common Interest—Rights of Proprietors—Square and Street Held in Common Property by Proprietors of Adjoining Houses—Conveyance of Square and Street to Improvement Trustees—Extinction of Common Interest.* In the feu-charters of the houses round a square there was conveyed to the individual proprietor by bounding titles (1) his house and (2) in common property the street and garden ground in the centre of the square. The individual proprietors sold their interests in the street and garden ground to Improvement Trustees. *Held* (1) that the individual proprietors in addition to their interest as *pro indiviso* proprietors had had a common interest in the street and garden ground, but (2) that such common interest had been extinguished by the conveyances of the common property to the Improvement Trustees. Grant *v.* City of Edinburgh and Others, p. 475.

——— *Common Property—Rights of Proprietor—Servitude—Sale of Interest in Common Property with Restriction on Use—Validity of Restriction.* The individual proprietors of a subject held in common property by separate conveyances sold their interests to trustees stipulating that the subject should not be built upon. *Held* that, at least as against a singular successor of the trustees, the restriction was of no effect inasmuch as it was not competent for a *pro indiviso* proprietor to impose a servitude *non ædificandi* on the common property, and consequently that one of the former proprietors had no title to prevent building over part of the subject. Grant *v.* City of Edinburgh and Others, p. 475.

——— *Servitude—Constitution—Building Restriction—Restriction Imposed by Recorded Deed—Prohibition of "Any Building of an Unseemly Description"—Erection of Tenement near Villas.* Proprietors of adjoining feus made an agreement whereby it was provided that the proprietor of the one feu should not be entitled to erect on a portion of his feu "any building of an unseemly description," and a deed giving effect to this agreement was duly recorded in terms of the Titles to Land (Scotland) Act 1868. Singular successors in the other feu, on which there was a large villa, subsequently brought an action to obtain declarator that the restriction was valid

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and interdict against the erection of tenements. *Held* (*rev.* Lord Ordinary Ardwall) that "whether it enters the title or not, a condition against the erection of buildings that are unseemly is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors." *Opinion* (*per* Lord Kinnear) that it was not "unseemly that four-storeyed tenements should be erected in the neighbourhood of a handsome villa." *Question* (*per* Lord Kinnear) whether the registration of a written instrument, which forms no part of the title to land, will serve the same purpose as infeftment following upon the conveyance of the land with regard to the imposition of restrictions. *Coutts* v. *Tailors of Aberdeen*, August 3, 1840, 1 Rob. 296; Bell's Prin. 979; and dictum of Lord President Inglis in *Bankes & Company* v. *Walker*, June 5, 1874, 1 R. 981, 11 S.L.R. 566, *commented on*. Murray's Trustees *v.* Trustees of St Margaret's Convent and Another, p. 774.

Property — Real Burden — Restriction on Building—Restriction Imposed in Disposition of Portion of Disponer's Lands—Enforcement of Restriction by Subsequent Disponees of the Other Portions of the Lands with Special Assignations—Restriction not Stated to be in Favour of any Particular Lands — Validity — "Tenements of First-Class Self-Contained Dwelling-Houses." An association owning lands in 1879 sold and conveyed, by disposition subsequently recorded, a portion of these lands to A under the restriction "that no buildings shall be erected upon the said plot of ground other than tenements of first-class self-contained dwelling-houses." This restriction was declared to be a real burden affecting the lands, but was not declared to be in favour of any lands. The association continued to hold the remainder of the lands, which lay on the opposite side of the street, till 1885–1887, when they conveyed them to a firm of builders by contracts of ground annual, subsequently recorded, which contained special assignations of the disposition to A with the obligations therein contained. These builders in turn transmitted the lands and the rights to B, C, and D. The singular successors of A having proposed to erect tenements to be occupied in flats, B, C, and D objected on the ground that this was a violation of the restriction. The singular successors of A claimed (1) that B, C, and D were not entitled to enforce the restriction, inasmuch as (*a*) it was too vague, not being in favour of any lands, and (*b*) was at least not enforceable by them; and (2) (not maintained on appeal) that the proposed buildings were not a violation, the restriction allowing "tenements" and being to be read in favour of freedom. *Held* (*aff.* Dean of Guild) that B, C, and D were entitled to enforce the restriction. *Opinion reserved* as to whether without the assignation B, C, and D would have been so entitled. Mactaggart & Company *v.* Harrower and Others, p. 815.

Property Passing on Death. See *Revenue.*

Proportionate Assessment. See *Valuation Cases.*

Prospectus. See *Company.*

Provision by Father. See *Revenue.*

Public Authority. See *Limitation of Action.*

Public Health — Burgh — Formation of Sewer—Power Conferred by Two Statutes with Different Procedure—Procedure—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 103—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 219. The Public Health (Scotland) Act 1897 confers powers on local authorities to construct sewers. The Burgh Police (Scotland) Act 1892 confers cognate powers. Objection having been taken to the proceedings of the local authority in a burgh with regard to the formation of a sewer in respect that it had not complied with the requirements of the latter statute, *held* that the powers conferred by the Public Health Act were independent of those conferred by the Burgh Police Act, and consequently that it was sufficient for the local authority to have complied with the requirements of the former statute. *Opinion* (*per* Lord M'Laren) that the safe course for the local authority was to follow the more recent statute. Brown *v.* Magistrates of Kirkcudbright, p. 81.

——— *Burgh — Sewer — Construction of Sewer through Private Property—Procedure—Notice to Owner—Report of Surveyor—Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 103 *and* 109. The Public Health (Scotland) Act 1897, sec. 103, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained . . . and may carry such sewers . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ." Section 109 provides that in the event of the owner of premises refusing access "the local authority may, after written notice to such owner, . . . apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant. . . ." The owners of a close, under which a local authority proposed to construct a sewer, having brought a suspension on the ground that the requirements of the Act had not been complied with, *held* that written notice given 16 days before application to the Sheriff for warrant to enter, together with a report by the burgh surveyor, a retired sea captain, in which he stated that for the scheme of drainage proposed, which he considered best for the district, it was necessary to carry the sewer through the close in question, was sufficient com-

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pliance with the requirements of the Act. Brown *v.* Magistrates of Kirkcudbright, p. 81.

Public Health—Burgh—Sheriff—Construction of Sewer through Private Ground—Discretion of Local Authority—Power of Sheriff to Order Inquiry if Course of Sewer be Necessary—Public Health (Scotland) Act 1897, *sec.* 109. The Public Health (Scotland) Act 1897, sec. 103, confers power on a local authority to carry sewers, "after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ." Sec. 109 enacts—"In case it shall become necessary to enter . . . any lands or premises for the purpose of making plans—or other purposes ancillary to the powers herein given as to sewers, . . . and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority . . . to enter and do all or any of the works . . . at all reasonable times in the daytime." *Opinion* (*per* Lord M'Laren) that in an application for authority to enter premises for the purpose of forming a sewer, the sheriff in a suitable case has power to allow a proof or to call for a report from an expert as to the proposed course of the sewer being necessary. *Opinion* (*per* Lord Adam) that no inquiry as to that matter is competent, as all discretion or judgment as to the proper course of the sewer is left to the local authority. *Opinion* of Lord President *reserved.* Brown *v.* Magistrates of Kirkcudbright, p. 81.

—— *Infectious Diseases—Milk Supply—Prohibition of Milk Supply by Order of Sheriff—Compensation for Stopping Milk Supply from Dairy—Liability of Local Authority of District where Dairy is Situated—Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 60 (2), (3), (7), *and* 164. An outbreak of infectious disease having occurred in a burgh, the medical officer thereof intimated to the local authority of the adjoining county that he had evidence against the milk supplied from a farm within its district. The county local authority having resolved that no order prohibiting the farmer from supplying milk was necessary, the burgh local authority appealed to the Sheriff, who granted the order. The farmer claimed compensation under section 164 of the Public Health (Scotland) Act 1897. Both local authorities denied liability, maintaining that it was the other which was liable. *Held* that the county local authority in whose district the farm was situated was the one liable. Barbour *v.* Renfrewshire Lower District Committee, p. 348.

—— *Special Drainage District—Assessment—Expenses of Forming Special Drainage District—Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 133. When a special drainage district is formed in a county, the local authority is entitled under section 133 of the Public Health (Scotland) Act 1897, to levy within the special district, an assessment to raise a fund to meet the expenses, including legal expenses, properly incurred in the formation of the special district but prior to its formation. Inverarity *v.* Forfarshire County Council, p. 673.

Public Health. See *Local Government.*

Public Highway. See *Road.*

Public-House. See *Valuation Cases—Revenue.*

Public Officer. See *Reparation.*

Public Records—Nobile Officium—Transmission of Public Records for Production in English Court—Register of Marriages—Marriage Schedules. The Court *granted* the prayer of a petition presented by an Englishman, who was suing an action of divorce in the High Court of Justice in England, for the purpose of having the Registrar-General authorised to exhibit in the suit certain volumes in his custody. Pheysey, Petitioner, p. 597.

Public Road. See *Road.*

Purchase of Shares. See *Contract.*

Pursuer. See *Process.*

Railway—Agreement—Siding—Agreement "to Maintain and Uphold in Full Efficiency"—Question whether Obligation Confined to Structural Maintenance of Siding or whether it Extended to the Working of the Siding as well. By agreements dated in 1858 and 1878 between A (the proprietor of an estate) and a railway company, the company undertook "to maintain and uphold in full efficiency" in all time coming" a siding of the said railway for the accommodation of A and his tenants. In 1905 A raised the present action against the company for decree (1) that they were bound to accept delivery at the said siding of all parcels, goods, merchandise, &c., duly tendered by him or his tenants, and (2) that they were bound to do everything necessary to maintain and uphold the said siding in full efficiency, and in particular to supply a sufficient staff of servants, plant, machinery, waggons (including a "sundries" waggon when required), as well as a crane, for use at the said siding. *Held* that the agreement referred only to the structural maintenance of the siding and works connected therewith (which were not alleged to be inefficient), and did not extend to the working of the siding or to questions as to facilities for traffic, and action *dismissed. Opinion* (*per* Lord President) that such an agreement could not be expiscated by *contemporanea expositio. Lytton* v. *Great Northern Railway Company* (1856), 2 K. & J. 394, *followed.* Kennedy *v.* The Glasgow and South-Western Railway Company, p. 31.

—— *Jurisdiction — Court or Railway Commissioners—Siding—Agreement "to Uphold and Maintain in Full Efficiency"*

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—*Construction of Agreement.* *Held* that the question whether a siding was or was not being maintained in full efficiency in the sense of an agreement was one of construction of the agreement, and so within the jurisdiction of the Court of Session. *Opinions* that questions of proper railway facilities were not for the Court but for the Railway Commissioners. Kennedy *v.* The Glasgow and South-Western Railway Company, p. 31.

Railway—Superfluous Lands—Land Taken for a Double Line—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120. At the making of a railway, land for a double line of rails was taken, but only a single line was to be at first laid, the second line to be laid if and when necessary. The land which was not immediately required was not fenced off, but was allowed to be used by the farm tenants of the adjoining lands. *Held* (*by* Lord Ardwall, Ordinary) (1) that the land acquired for the future doubling of the line could not become "superfluous lands" within the meaning of sec. 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and (2) that if it could, then in that case it would be necessary for the claimant in order to succeed, to prove that at no future date would the railway company require to double the line of rail. Brown *v.* North British Railway Company, p. 327.

——— *Rates and Charges—Distinguishing Rates—Terminal Charges—Traffic Carried over Railway from One Private Siding to Another—Right of Trader to Specification as to how Charge for Services Made up—"Terminals"—"Special Services"—Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 33, *sub-sec.* (3). The Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), section 33 (3), enacts—"The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified." *Held* (1) that the above-quoted enactment was not limited to "station-to-station" rates but was also applicable to "siding-to-siding" rates; and (2) that "terminal charges" as therein used included not only terminal charges proper, *i.e.*, "terminals" in the sense of the Railway Rates and Charges No. 19 (Caledonian) Railway, &c., Order Confirmation Act of 1892 (the Act regulating the right of the railway company to charge), but also charges for services which under the nomenclature of the Act of 1892 would be "services" as distinguished from "terminals." Hamilton & Calder *v.* Caledonian Railway Company, p. 696.

Railway—Bridge—Undertaking to Build a Bridge—Approaches. A railway company by agreement acquired land for an intended branch railway and undertook to construct at their own expense an accommodation bridge over the branch railway, "plans and sections of the bridge . . . and of the approaches to the said bridge" to be submitted to the proprietors' engineers before the construction was commenced. The railway company maintained that they were not bound to construct the approaches to the bridge. *Held* that in the absence of excluding words an obligation to construct a bridge included the obligation to construct its approaches. Addie's Trustees *v.* Caledonian Railway Company, p. 769.

——— *Poor Rates—Deductions from Annual Value—"Repairs, &c."—Deductions to be Calculated as on Whole Railway and not as on Subjects in Parish—Poor Law (Scotland) Act* 1845 (8 *and* 9 *Vict. c.* 83), *secs.* 37 *and* 45—*Lands Valuation (Scotland) Act* 1854 (17 *and* 18 *Vict, c.* 91), *sec* 22. *Held* that the deductions from the yearly value in the parish, as entered in the valuation roll, for repairs, &c., which a railway company is entitled to under section 37 of the Poor Law (Scotland) Act 1845, are to be calculated "at the same percentage as the repairs, &c., over the whole undertaking bear to its *cumulo* valuation," and do not depend on the character of the railway property, *e.g.*, stations or permanent way, within the parish. Aberdeen City Parish *v.* Caledonian Railway Company, p. 771.

——— See *Road.*

Ranking. See *Contract.*

Rates and Charges. See *Railway.*

Rates and Taxes. See *Poor.*

Rates Chargeable by Private Owner of Public Pier. See *Statute.*

Ratification. See *Reduction.*

Receipt Note. See *Contract.*

Reclaiming Defender. See *Process.*

Reclaiming Note. See *Process.*

Record. See *Justiciary Cases.*

Redemption. See *Superior and Vassal.*

Reduction—Minority—Misrepresentation—Essential Error—Trust Conveyance in Contemplation of Marriage—Averments—Relevancy. In an action of reduction of a trust-conveyance raised by a lady with consent of her husband against the trustees, the pursuer averred that when she executed the deed she was a minor and knew nothing of business that she was told by her father, whom she trusted, that she had better sign it, and that the deed was merely a testamentary arrangement of her fortune; that she now discovered that it was alleged to be an irrevocable deed under which she had tied up her whole fortune, even as against herself. *Held* that her averments were

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relevant. Sawrey-Cookson *v.* Sawrey-Cookson's Trustees, p. 209.

Reduction—Ratification by Married Woman with Consent of her Husband of Conveyance Executed by her when Unmarried—Misrepresentation—Error—Concealment—Relevancy. A lady having applied to the trustees acting under a trust conveyance granted by her prior to her marriage to pay her part of the trust funds, the trustees refused to do so unless she granted a ratification of the trust conveyance. After negotiations in which she had independent legal advice, and in which the parties dealt with each other at arm's length, she executed the ratification. In a subsequent action, in which she claimed to reduce the ratification, she averred that she had signed it under essential error; that the trustees had failed to inform her that the trust conveyance was revocable; and that she had been induced to execute the ratification by misrepresentations on the part of the trustees, and in consequence of statements made on their behalf that it was truly of the nature of a receipt. *Held* (*rev.* the judgment of Lord Ardwall, Ordinary) that the pursuer's averments were irrelevant. Sawrey-Cookson *v.* Sawrey-Cookson's Trustees, p. 209.

—— See *Process—Succession—Landlord and Tenant.*

Reduction of Capital. See *Company.*

Reduction of Decree. See *Process.*

Reference to Arbitration. See *Contract.*

Reference to Feuing Plan. See *Superior and Vassal.*

Refusal of Adjournment. See *Justiciary Cases.*

Refusal of Owner to Implement Order of Court. See *International Law.*

Refusal of Payments. See *Master and Servant.*

Refusal of Sheriff to State a Case. See *Master and Servant.*

Refusal of Winding-Up Order. See *Expenses.*

Refusal to Entertain Appeal. See *Justiciary Cases.*

Refusal to Review Proceedings. See *Jurisdiction.*

Registered Letter. See *Process.*

Registration. See *Master and Servant—Justiciary Cases.*

Regulations for Preventing Collisions at Sea. See *Ship.*

Relevancy. See *Reparation—Justiciary Cases—Reduction—International Law—Landlord and Tenant—Foreign.*

Relevancy of Averment. See *Limitation of Action.*

Relief—Reparation—Negligence—Contract—Action of Relief by Stevedore against Shipowner—Damages Paid to Stevedore's Employee Injured through Defective Rope Sling Supplied by Shipowner—Competency. A stevedore, from whom one of his employees, injured through the breaking of a rope sling, had recovered damages under the Employers' Liability Act, brought an action of relief against the shipowner who had supplied the rope slings. *Held* that, assuming (what the Court held was not the case) the shipowner might be liable in damages for breach of contract as having warranted the rope slings, the action of relief was not the stevedore's competent remedy, inasmuch as the employee's claim was based on the negligence of the stevedore, without proving which he could not have succeeded, and the stevedore's claim against the shipowner was based on contract, and there could be no relation between them. *Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066, *approved* and *followed*. *Burrows* v. *Marsh Gas and Coke Company*, L.R. 5 Exch. 67, 7 Exch. 96, *commented on* and *distinguished*. *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640, *commented on*. Wood & Co. *v.* A. & A. Y. Mackay, p. 458.

Remit. See *Process.*

Renunciation. See *Lease.*

Reparation—Landlord and Tenant—Defective House—Known Danger—Promise of Landlord to Repair Defects—Relevancy. The tenant of a house as tutor for his pupil child, and his wife in her own interest with his consent, raised an action against the landlord to recover damages for personal injury. They averred that the ceiling of the said house was old and rotten and dangerous to the inmates; that the factor when calling for rent saw or ought to have seen the ceiling's condition; that on 10th December about two feet square of the ceiling fell; that the same day the factor was shown what had happened and urged to repair the ceiling, and "indicated that the matter would be attended to;" that relying on this assurance, and daily expecting the ceiling to be repaired, pursuers continued to occupy the house; that nothing was done; that on Thursday 15th December a further portion of the ceiling fell on the female pursuer and her daughter, aged eleven, and severely injured them. *Held* that the action must be remitted to proof. M'Kinlay *v.* M'Clymont, p. 9.

—— *Slander — Innuendo — Relevancy — Privilege—Malice—Facts and Circumstances Inferring Malice.* A law-agent, appointed to wind up an executry estate, but from whom the agency had been taken, and against whom an action of count, reckoning, and payment had been brought by the executrix, wrote a letter to an insurance company, the cautioners for the executrix, advising them to withdraw their bond, as a personal guarantee given by him to the company that the estate would be divided by him according to law, was, in the altered circumstances, useless. In the letter he stated that the executrix's son "is demanding payment of the whole estate. . . . I have reason to suspect that if the son who is demanding the whole estate gets hold of it, the other beneficiaries will never receive the share they are entitled to." In an action for damages for slander brought by the son against the law-agent, the pursuer proposed an issue in which he innuendoed the letter as meaning that he would dishonestly appropriate money that did not

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belong to him, and averred that the defender wrote it maliciously with the object of obstructing the executrix, retaining the funds and agency in his own hands, and inducing the company to withdraw their bond. The defender objected to the issue on the ground that the letter could not bear the proposed innuendo, and that the occasion being privileged it was necessary for the pursuer to aver facts and circumstances inferring malice, and that he had not done so. The Court allowed the issue, *holding* (1) that the innuendo was admissible; (2) that the occasion was privileged; (3) that assuming the necessity for an averment of facts and circumstances, the pursuer's averments were sufficient. Stewart v. Hannah, p. 74.

Reparation—Decree in Absence—Service of Wrong Summons—Regular Return of Citation—Damages for Decree Taken in Absence when Summons had in fact not been Served—Malice—Relevancy. In an action in the Sheriff Court at the instance of A against B for payment of an account, the sheriff officer instructed to serve the summons inadvertently served a wrong summons on the defender (the summons actually served by him being one at the instance of C against D), but returned a regular execution of citation. A took decree in absence against B, and having extracted the decree, was proceeding to do diligence when the decree was set aside. Thereafter B raised an action of damages against A for wrongfully taking the decree in absence against him, averring that the decree had been published in the "Black Lists," and that he had suffered thereby. B did not aver that A had acted maliciously or that the mistake had been caused otherwise than by inadvertence on the part of the sheriff officer. *Held*—*rev.* judgment of Lord Ordinary (Dundas)—that as there was no averment of malice on record, the pursuer's statement disclosed no issuable matter, and action *dismissed* as irrelevant. M'Gregor v. M'Laughlin, p. 71.

——— *Negligence—Master and Servant—Ship—Defective Hatchway—Injuries Sustained by Falling Down a Hatchway—Defect Existing Prior to Voyage and not Obviously Reparable by Crew—Relevancy.* In an action of damages for personal injuries brought by a ship's engineer against the owners of the ship, the pursuer made averments to the effect that his injuries had been caused through the hatches not being on, which state of matters was due to the defective condition of the beam on which they should have rested, and that this defect had, unknown to him, existed prior to that voyage, and for a considerable period, and was or ought to have been known to the defenders. *Held* that the action was relevant, inasmuch as the defect (1) was alleged to have existed prior to the commencement of the voyage, and (2) was not one which it was self-evident the crew could have repaired. *Gordon* v. *Pyper*, November 22, 1802, 20 R. (H.L.) 23, *distinguished*. Tyrrell v. Paton & Hendry, p. 89.

Reparation—Negligence—Master and Servant—Employers' Liability Act 1880 (43 & 44 *Vict. c.* 42), *sec.* 1, *sub-sec.* 3—*"Orders or Directions" to which Workman Bound to Conform—Order must be a Particular Order.* A, an ordinary workman, was engaged to work at a stone-planing machine, where he was to be under the orders of B who was in charge of the machine, but no set orders were given him as to what his precise duties were to be, his knowledge of them being presumed. In the course of the operations it was necessary from time to time to clear the machine of chips, and this work was done by A. While he was so clearing the machine B, without warning him, set it in motion, and A's foot was crushed. It was not necessary that A should have stood where he did, and he had received no order from B how he was to do the work. B, however, had not interfered to prevent his standing where he did. A raised an action of damages under the Employers' Liability Act 1880 and obtained a verdict. On a bill of exceptions and motion for a new trial by the defenders, *held* (*diss.* Lord Stormonth Darling) that in section 1 (3) of the Employers' Liability Act 1880 "orders or directions" to which the injured workman was bound to conform, and did conform, and in conforming to which he was injured, meant a particular order, "particular in this sense, that within its scope it supersedes the workman's own private judgment and discrimination and substitutes for it the behest of the person to whose directions he is bound to conform," and inasmuch as there was no such order given to A a new trial *granted*. Canavan v. John Green & Company, p. 200.

——— *Negligence—Master and Servant—Ship—Seaman Injured through Defective Ladder—Duty to Inspect—Custom of Trade—Fellow Servant.* A ship's steward having been injured through the giving way of one of the rungs of a ladder leading down into the lazarette of the ship, sued the shipowner, his employer, for damages. The evidence showed that while the ladder was originally sufficient, it was unsafe at the time of the accident. It was also proved that it was the custom in the trade in question to leave the repair of minor defects in the ways of a ship to the master and crew. There was no proof that it was usual to have an inspection of a lazarette ladder at the commencement of each voyage. *Held* (1) that the lazarette ladder was one of the minor matters which were left to the care of the persons in charge of the ship by the proved custom of the trade, on which the Court, in such cases sitting as a jury, must go, and (2) that consequently no fault on the part of the shipowner was established, inasmuch as the defect in the lazarette ladder was either latent or, if apparent, had not been repaired owing to the negligence of a fellow servant. Gillies v. Cairns, p. 218.

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Reparation—Judicial Slander—Privilege—Communication to Pursuer's Agent by Defender—Malice—Relevancy. An employer, replying to a claim on the ground of wrongous dismissal, made by a dismissed servant through an agent, wrote, *inter alia*—"... I may inform you that the reason of" the servant's "dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." And later in another letter—"I do not anticipate any difficulty in proving that" the servant "did dishonestly take my butter." *Held* (recalling the judgment of Lord Ardwall) (1) that the communications were of the nature of pleadings and entitled to the highest privilege; (2) that facts and circumstances from which to infer malice were not relevantly averred; and consequently (3) that no issue could be allowed. *Opinion* (*per* Lord M'Laren) that the facts and circumstances necessary for an inference of malice in the case must have been antecedent to and independent of the dismissal. Campbell *v.* Cochrane, p. 221.

—— *Alleged Illegal Arrest—Alleged False Charge—Public Officer—Police Constable—Malice and Want of Probable Cause—Arrest and Charge by Constable on which Conviction has Followed—Issue—Relevancy.* In an action of damages against two police constables for an alleged illegal arrest and an alleged false charge made by them while admittedly acting within the scope of their duty, the pursuer averred no facts and circumstances from which malice might be inferred, and admitted that he was convicted on the charge of which he complained. *Held* that the pursuer was not entitled to an issue either *quoad* the arrest or *quoad* the charge, inasmuch as (1) while want of probable cause was essential to an issue, the conviction showed that there was probable cause, and (2) the pursuer had failed to set forth on record facts and circumstances from which malice might be ligitimately inferred. Hill *v.* Campbell and Another, p. 226.

—— *Arrest—Public Officer—Police Constable—Unnecessary Violence in Making Arrest—Issue.* In an action of damages against police constables, the pursuer, who had been arrested and charged by them while acting within the scope of their duty, and had subsequently been convicted on the charge, proposed the following issue:—"Whether . . . the pursuer was wrongly and forcibly taken into custody . . . by the defenders while acting as police constables." In support of the issue he *inter alia* averred that "he was violently seized by the defenders and subjected to gross and unnecessary violence. He was held by the wrists by the defenders, one on each side, and his arms twisted, and considerable and unnecessary violence was applied to him, causing several bruises on one of his arms, as well as swelling with considerable pain, in consequence of which he had to submit himself to medical inspection and treatment the following morning." *Held* (1) that the issue was inappropriate and must be disallowed inasmuch as the insertion of malice and want of probable cause was unnecessary unless the question was as to the use of improper violence, and (2) that the averments were insufficient to found a case upon improper violence. *Wood* v. *North British Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407, *distinguished*. *Opinion* (*per* Lord Kinnear) that the issue (1) failed to put the question of unnecessary violence to the jury, and (2) erroneously assumed that for a police constable to use any force at all in making an arrest was an actionable wrong. Hill *v.* Campbell and Another, p. 226.

Reparation — Slander with respect to Trade — Privilege — Malice — Probable Cause—Ship—"Register of Defaulting Crews"—Member of Association which Kept Register Reporting Seaman as Defaulter. A was chief engineer of a steam trawler belonging to a fishing company of which B was manager. The fishing company was a member of an association of owners of fishing vessels. The members of the Owners' Association had resolved that a "Register of Defaulting Crews" should be kept, and that if a member of the crew of a steam trawler belonging to a member of the association, after engaging to go to sea in such trawler, should absent himself or refuse to go to sea, or should come on board in a state of intoxication, the member of the association should report to its secretary the name of the member of the crew, and the offence committed by him, for insertion in the register. A register accordingly was so kept. A, without due notice, left the said steam trawler when she was ready to go to sea, and so delayed her departure. B reported to the secretary of the Owners' Association that A had been drunk and had refused to go to sea, and accordingly A's name and the said alleged offences were entered in the register. The Court after proof were of opinion that in making the report B was not actuated by malice, and that he had reasonable grounds for believing that the statements of and concerning A contained in the report were true. *Held* (1) that B was privileged in making the report, and in respect that he did not make the report maliciously was not liable in damages to A for slander, and (2) that the circumstances did not disclose any other ground upon which A was entitled to claim damages from B. Keith *v.* Lauder, p. 230.

—— *Slander — Statement by Defender that Pursuer had Committed Adultery with Defender—Veritas—Averments of Misconduct by Pursuer with Men other than Defender — Relevancy — Deletion.* In an action of damages for slander founded on an alleged statement by the defender, contained in a letter written by him to the pursuer, and subsequently repeated by him before witnesses, that she (the pursuer) had committed adultery

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with him, the defender pleaded that the statement was true, and lodged a statement of facts in which he averred, *inter alia*, that the pursuer had on a specified occasion committed adultery with A, and had on other specified occasions been guilty of indecent familiarities with B and C. *Held* (*affirming* judgment of Lord Pearson, Ordinary) that these averments were irrelevant and fell to be deleted from the record. *A* v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297, *followed*. H. *v.* P., p. 258.

Reparation—Slander—Master and Servant—Letter and Statement by Official of Company—Threat if Accounts Not Settled to Report to Authorities—"Greatest Liar and Fraud"—Innuendo—Liability of Company for Letter and Statement by its Official Acting within Scope of Employment. An insurance superintendent wrote to one of the agents under him that as the latter had not appeared on the day for settling his accounts and was reported to have left the town, he would give him till the Monday morning following to settle; "failing this, I shall be obliged to report the matter to the authorities." The superintendent on the same day called, and in the presence of the agent and his wife stated that the agent was "the greatest liar and fraud that had ever come into" the town, and that if he did not settle as required he would give him "into the hands of the authorities." The agent brought an action of damages against the company, in which he averred that the letter and statements falsely and calumniously represented that he was guilty of dishonest misappropriation, and that his conduct was such as to make it necessary to report the matter to the criminal authorities. He also averred that the letter was written and the statements made by the superintendent in the course of his employment as representing the company and as acting in its interests and for its benefit, and were false, calumnious, and malicious. *Held* (1) (*aff.* judgment of Lord Ardwall, Ordinary) that the letter was not slanderous and would not bear the innuendo sought to be put upon it, and (2) (contrary to the opinion of Lord Ardwall, Ordinary) that the statements by the superintendent were not slanderous. *Opinion* (*per* Lord Ardwall, Ordinary) that it was only in special circumstances that a master was liable for the slander of his servant, and as there were no such circumstances here the company could not be held responsible. *Opinions* of the Division on this point *reserved*. *Citizens Life Assurance Company, Limited* v. *Brown*, [1904] A.C. 433, *commented on*. Agnew v. The British Legal Life Assurance Company, Limited, p. 284.

——— *Obstruction on Public Highway—Lighting—Fencing—Duty of Drivers—Contributory Negligence.* An obstruction on a public highway, caused by the opening up of its east half for a length of 100 yards for the laying of drain pipes, was on the night of an accident marked off in the following manner, viz., at the north end by three red lamps, one in the centre of the road, one at the wall, and one halfway between; at the south end by a red lamp in the centre of the road and a white lamp at the wall; along the centre of the road by a line of white lamps extending from the one central red lamp to the other. At the south end a cord was stretched between the uprights on which the lamps were hung. The driver of a van approaching from the south on the near or west side of the road saw the lights, and after consulting two men who were sitting beside him, but without sending either ahead to investigate, and without pulling his horses to a walk, drove on at an "ambling" trot between the red and white lights through the cord and into the trench twelve feet beyond. He believed that the white light next the wall indicated that the road was safe on that side. *Held* that he had been guilty of contributory negligence sufficient to exclude a claim for damages at the instance of his employers against those responsible for the obstruction. *Observations* on the lighting and fencing of obstructions on highways and the duties of drivers. Edinburgh and Leith Hiring Company, Limited, and Others *v.* Suburban District Committee of Midlothian County Council, p. 298.

Reparation—Negligence—Master and Servant—Common Employment—Negligence of Fellow-Servant—Accident to Boy Assisting Servant but not in Employment. The father of a boy ten years of age brought an action against a railway company for damages for personal injury to his son. He averred that A, a carter in defenders' employment, and acting in the ordinary course of his employment, negligently, in view of the boy's age, requested his son's assistance and left him in charge of his horse and lorry within the entrance to a goods station of defenders', where the boy was injured through B, another carter in defenders' employment, negligently running his lorry into A's lorry. The defenders denied liability. *Held* that the action must be dismissed, inasmuch as the boy, whether assisting A voluntarily or at his request, could be in no better position as regards claims against A's master than A himself, and that the principle of common employment therefore applied. *Potter* v. *Faulkner*, (1861) 1 B. and S. 800, *approved*. Lunnie *v.* Glasgow and South-Western Railway Company, p. 372.

——— *Slander—Innuendo—Newspaper Articles.* In an action of damages for slander brought by a town councillor against the proprietors of a newspaper which had published certain articles commenting on his conduct while a member of the town council, *held* that the pursuer was entitled to an issue—"It being admitted that the defenders in the issues of 18th and 21st July 1905 of the *Ayr Observer and Galloway Chronicle* printed and published the articles con-

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tained in the schedule hereto annexed, Whether the statements contained in the said articles are of and concerning the pursuer, and falsely and calumniously represent that the pursuer took advantage of his position as a member of the Town Council of Ayr and convener of the Roads and Footpaths Committees thereof to throw the burden of taking over and repairing the footpaths of property belonging to himself upon the burgh, while he caused footpaths of a like character and in a like position belonging to other proprietors to be reconstructed at their expense; that he was thus unfaithful to the public trust reposed in him as a member of the Town Council of Ayr and Committees thereof, and that in his municipal position he acted corruptly for his personal benefit, to the loss, injury and damage of the pursuer,"—that being a meaning which the ordinary reader might reasonably extract from the articles. Hunter *v.* Ferguson & Company, p. 451.

Reparation—Slander—Process—Jury Trial—Action of Damages for Slander—Application for New Trial on Ground Verdict Contrary to Evidence. In actions of damages for slander a motion to set aside the verdict as being contrary to evidence and to grant a new trial is to be granted or refused on precisely the same grounds as in any other action. *Ross* v. *M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190, *approved. Observations per* Lord President on criterion to be applied in reviewing verdicts in such cases. Campbell and Others *v.* Scottish Educational News Company, Limited, p. 487.

—— *Damages — Wrongous Interdict—Mineral Company Interdicted from Working Main Seam—Measure of Damages.* Interim interdict was granted against a mineral company which stopped it from working its main seam. The interdict having been eventually upon the Note refused, the company brought an action of damages, and claimed as for a total loss of its business on averments that the loss of the mineral had necessitated the stoppage of its works, which entailed the rapid deterioration of its machinery, the loss of its workmen and of its business connection. It was proved mineral could have been obtained from inferior seams, but that that would probably have entailed a very considerable loss on working. *Held* that the damages were to be assessed on the basis of the company having kept its works and business going by using mineral obtained elsewhere than from the main seam. The Clippens Oil Company, Limited *v.* The Edinburgh and District Water Trust, p. 540.

—— *Damages—Accident—Street—Horse-Vice—"Reesting"—Stopping Suddenly when in Front of Another Vehicle—Relevancy.* The pursuer in an action for damages averred that when driving a lorry along a street, seated with his legs over the near side, and when about to overtake a two-horse lorry of the defenders proceeding in the same direction at a walking-pace, he looked back over his shoulder on hearing the bell of a tramcar; that while in the act of doing so he was injured by his legs coming against the defenders' lorry, which had suddenly stopped owing to one of its horses having come to a standstill in accordance with a vicious habit of "reesting" known to the defenders. He further averred that the defenders were in fault in using such a horse in their business. *Held* that the pursuer had not stated a relevant case of fault against the defenders. Watson *v.* Wordie & Company, p. 644.

Reparation—Wrongous Information—Privilege—Probable Cause—Facts and Circumstances Inferring Malice—Whether Malice Necessarily Antecedent—Relevancy. A, a plasterer, brought an action against B, a builder, for damages for false information having been given to the police leading to his arrest and trial for theft in the following circumstances:—B, in order that A might do certain plaster work for him, employed him to make according to a plan belonging to B five cornice moulds. These A made with his own zinc, but with B's wood as a backing. He did not, however, he averred, follow the plan, as it had been departed from and was worthless. B paid for making the moulds, but, as A averred, not for the zinc, of which B was aware. Having been dismissed by B, A, admittedly to cause inconvenience, removed the moulds and plan, and wrote falsely stating that he had burnt them, adding, "You are at liberty to give me in charge for theft if you fancy you have a case." B informed the police, but, as A averred, maliciously withheld the fact that the zinc was his. A was arrested and tried for theft, but acquitted, and averred that the information was given in answer to the challenge in his letter or in retaliation for a small-debt summons which had been served at his instance. *Held* that facts and circumstances inferring antecedent malice did not require to be averred, and that the action was not irrelevant, and an issue including malice and want of probable cause allowed. Brown *v.* Fraser, p. 741.

—— See *Contract—Relief—Foreign.*

Report by Accountant of Court. See *Judicial Factor.*

Report by Man of Skill. See *Process.*

Repugnancy. See *Succession.*

Res judicata. See *Process.*

Resolution of Company to Wind-up. See *Expenses.*

Respondent Liable for Expenses Caused by Opposition. See *Expenses.*

Restriction. See *Succession.*

Restriction Imposed by Recorded Deed. See *Property.*

Restrictions on Building. See *Superior and Vassal—Property.*

Restriction on Use. See *Valuation Cases.*

Revenue—Income-Tax—Exemption from Income-Tax Claimed by a Society—Statute—Construction—Income-Tax Act 1842 (5

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and 6 *Vict. c.* 35), *sec.* 163. The Income-Tax Act 1842, section 163, grants exemption to "any person charged or chargeable with the duties" who shall prove that his income does not exceed a certain amount. *Held* (*rev.* the judgment of the Court of Session) that this exemption applied only to persons proper and not to societies. Inland Revenue *v.* Old Monkland Conservative Association, p. 119.

Revenue — Partnership — Income-Tax — Abatement—Employee—Partner or Employee—Profits Credited to an Employee in the Books of a Company but not his Indefeasibly—Finance Act 1898 (61 *and* 62 *Vict. cap.* 10), *sec.* 8. A testator by his trust-disposition and settlement conveyed his whole estate to trustees. He left also, regarding his business, a deed of arrangement which formed part of his settlement as if embodied therein. Article (1) thereof named fifteen employees and allocated to each a certain number of shares, as prospective interests in the business, with a declaration that these "shall not become vested interests until the whole of my capital and interest has been paid out as after mentioned, and it shall not be competent . . . for any employee to sell, convey or dispose of his interest in the profits or in the business itself." Article (2) provided that after certain deductions the profits of the business were to be divided among the surviving employees in proportion to the number of their shares, ten per cent. of such profits being paid to them in cash and the remainder being credited to their respective accounts in said business, and forming a fund available for paying out the testator's capital, until his whole capital and interest was paid out. Article (3) provided that payment should not be made to the representatives of any employee dying or becoming bankrupt, of the amount standing to his credit in the books, before all the testator's capital and interest in the business had been paid out. Article (4) provided that the employees should carry on the business as carried on by the testator. The trustees were not to be required to take any active part in the business, nor to be liable for omissions or negligence, but were to have the sole right of granting authority to sign the firm name, of appointing managers and superintendents, of settling questions as to salaries and wages, and of removing employees from the business. Article (5) empowered the trustees to require payment of such of the testator's capital as they thought from time to time not necessary for the business, and directed them after the whole of the testator's capital and interest had been paid out, and after the amounts due to representatives of deceased and bankrupt employees had been paid, to convey to the surviving employees the whole business at the price of £20,000. Article (6) entitled the trustees to inspect the books from time to time, and empowered them, if losses were made, to wind up the business, paying out first the testator's capital, and dividing any remaining proceeds amongst the employees. A, an employee, whose total income for the year ending 5th April 1905 amounted (1) if his income was taken as his salary plus his share of the ten per cent. of profits paid in cash, to £561, but (2) if his income was taken as his salary plus his share of the full amount of the profits, whether paid or credited, to £2000, claimed abatement of income-tax equal to the income-tax upon £120, on the ground that his total income for the year of assessment though exceeding £160 did not exceed £600 (61 and 62 Vict. cap. 10, sec. 8). *Held* (1) that the business was property of the trustees until the conditions were fulfilled for their conveying it to the employees, and that till then the employees were only employees with a right to share in ten per cent. of the profits, and not partners; (2) that the share of the ninety per cent. of profits credited to A in the books of the company was not part of his income for the year of assessment; and (3) that A was consequently entitled to the abatement claimed. *Mersey Docks* v. *Lucas*, 1883, L.R. 8 App. Ca. 891; *Hudson* v. *Gribble*, *Bell* v. *Gribble*, [1903] 1 K.B. 517; and *Smythe* v. *Stretton*, 1904, 20 Times L.R. 443, *distinguished*. Walker *v.* Reith (Inland Revenue), p. 245.

Revenue—Estate-Duty—Property Passing on Death—Deductions Allowable as Debts—Debts Incurred for "Full Consideration in Money or Money's Worth wholly for the Deceased's Own Use and Benefit"—Marriage-Contract Provision—Provision by Father in Son's Marriage-Contract—Discharge of Possible Claim for Legitim—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 7. A father in his son's marriage contract bound himself, in contemplation of the son's marriage and in consideration of a conveyance by the son's intended spouse in an indenture or marriage settlement executed by her, to grant a bond over his estate in security of an obligation undertaken by him in the said contract to settle a sum of £30,000 in trust for behoof of the son, and on his (the son's) death for behoof of his widow in liferent and their issue in fee. In the marriage contract the son discharged any claim of legitim that he might have against his father's estate. *Held* that the bond being granted in consideration of, not only the discharge of legitim, but also the marriage, was not a debt incurred "for full consideration in money or money's worth wholly for the deceased's own use and benefit," within the meaning of sec. 7 (1) of the Finance Act 1894, and therefore that it did not fall to be deducted in ascertaining the value of his estate for the purpose of estate duty. H. M. Advocate *v.* Warrender's Trustees, p. 278.

——— *Stamp Duty—Stamp Act* 1891 (54 *and* 55 *Vict. cap.* 39), *First Schedule—Policy of Insurance—Accident Assurance with Clause Returning Part of Premiums on Assured Reaching Certain Age—Question if Accident Policy also a Life*

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Policy—Appropriate Stamp. A policy of assurance against accident or illness contained a clause whereby the insurance company undertook to return to the assured on his attaining a certain age, or to his representatives at that time should he have died, the policy still being in force, a certain proportion of the premiums which had been paid under the policy, provided that no payment had been made under two of the preceding clauses. *Held* that the policy was an accident policy and not a life as well as accident policy, and consequently that it was only subject to the accident insurance policy stamp of 1d. under the Stamp Act 1891. General Accident Assurance Corporation, Limited *v.* Commissioners of Inland Revenue, p. 368.

Revenue—Estate Duty—Settlement Estate Duty—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*b*), 21 (1), *and* 23 (14)—*Trust Constituted Prior to Act—Fund to be Held by Trustees till Death of Party and then to be Invested in Estate to be Entailed—Death of Party Subsequent to Act.* A testator died in 1867. His trustees, who paid inventory duty, were directed to hold the residue of his estate till the death of A, when it was to be invested in land which was to be entailed. A died in 1902. *Held* that estate duty and settlement estate duty were payable on the value of the residue of the testator's estate—*per* Lord President on the ground that within the meaning of section 2 (1) (*b*) of the Finance Act 1894, the residue was property in which a person other than the deceased, *i.e.*, the trustees, had an interest which ceased on the death of the deceased, and duty was payable to the extent to which a benefit accrued from the cessor of that interest; *per* Lord Pearson, Ordinary, on the ground that the residue constituted entailed property, which by section 23 (14) was not settled property within the meaning of the Act, and so was excluded from the exemption granted by section 21 (1) to property settled by a person dying before the Act on which inventory duty had been paid. H. M. Advocate *v.* Sir Mark J. M'Taggart Stewart and Spouse, p. 465.

——*Estate Duty—Propulsion of Estate—Deed of Gift—Use of the Property Subsequent to Propulsion and Gift—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*b*) *and* (*c*)—*Finance Act* 1900 (63 *Vict. cap.* 7), *sec.* 11. A lady, heiress of entail in possession, some years previous to her death granted a deed of propulsion of the estate in favour of the next heir her daughter, and also granted in the daughter's favour and that of the daughter's husband a deed of gift of her whole personal property including the furniture of the mansion-house of the entailed estate. The deeds were duly completed and possession was taken, but the lady continued to live with her daughter in the mansion-house, where she occupied a bedroom and had the use of the public rooms. *Held* (*rev.* Lord Ordinary (Pearson), who subsequently in the Division *dissented*) that the propulsion and deed of gift were effectual to exclude a claim for estate duty on the value of the entailed estate and the personal property on the lady's death, her occupation subsequent to the cession having been not an incident of proprietorship but the privilege of a guest. H. M. Advocate *v.* Sir Mark J. M'Taggart Stewart and Spouse, p. 465.

Revenue—Estate Duty—Propulsion of Estate—Use of Part of Estate Subsequent to Propulsion—Estate Surrendered Indivisible. Held by Lord Pearson, Ordinary, that where there has been a deed of propulsion of an estate, the estate surrendered is, so far as regards estate duty, indivisible, and if a benefit in any part is retained, the whole claim for exemption from estate duty fails. H. M. Advocate *v.* Sir Mark J. M'Taggart Stewart and Spouse, p. 465.

——*Estate Duty—Deed of Gift—Separable Entities Gifted—Property not in View of Parties—Accumulations by Trustees Unlawful under Thellusson Act* (39 *and* 40 *Geo. III, cap.* 98)—*Failure to Formally Notify Deed of Gift to Trustees.* Testamentary trustees continued to make accumulations in accordance with the trust after such accumulations were unlawful under the Thellusson Act, and this was not discovered by anyone till the death of a lady to whom such unlawful accumulations fell. The lady had some years prior to her death granted a deed of gift of her whole personal property in favour of her daughter and her daughter's husband. The husband was the leading trustee, and the law-agents who managed the trust had prepared the deed of gift, but no formal intimation of the deed of gift had been made to the trustees. The Court, while holding the deed of gift effectual to exclude a claim for estate duty on the rest of the property, *held* that estate duty was payable on the value of the unlawful accumulations. H. M. Advocate v. Sir Mark J. M'Taggart Stewart and Spouse, p. 465.

——*Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Payment within Year of Death—Prepayment of Obligation in Daughter's Marriage-Contract Prestable on Payer's Death, thereby Extinguishing Annuity—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2, *sub-sec.* (1) (*c*)—"*Gift.*" In 1899 A bound himself in the marriage-contract of a daughter to pay a present annuity of £300 to her and on his death a sum of £15,000 to the marriage-contract trustees for her behoof, with power to prepay the said sum in whole or in part, but as soon as the said sum or £10,000 thereof should have been paid the annuity was to cease. In 1900 A paid to the trustees £10,000 and died within six weeks. Estate duty and settlement estate duty on the £10,000 having been claimed under section 2 (1) (*c*) of the Finance Act 1894—*held* that these duties were payable. H.M. Advocate *v.* Heywood-Lonsdale's Trustees, p. 529.

——*Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Gift—Con-*

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sideration in Money or Money's Worth—Discharge by Daughter in her Marriage-Contract of her Legal and Conventional Rights—Finance Act 1894 (*57 and 58 Vict. cap.* 30), *sec.* 3, *sub-secs.* 1 *and* 2. A father, bound by marriage-contract and bond of corroboration to pay to his younger children after his death a sum of £12,000 with power of apportionment reserved, made certain provisions in favour of his daughter in her marriage contract, which she accepted in discharge of her legal and conventional rights through his death. *Held* that for the purpose of calculating estate duty such discharge was not a consideration in money or money's worth which, in terms of the Finance Act 1894, sec. 3, sub-secs. 1 and 2, fell to be deducted from a payment by the father to the daughter's marriage-contract trustees made within a year of his death and forming property deemed to pass on his death. H.M. Advocate *v.* Heywood-Lonsdale's Trustees, p. 529.

Revenue — Income-Tax — Gas Company — Maximum Rate of Dividend Provided by Statute—Payment of Dividend Free of Income-Tax. The Special Act of a gas company provided that the profits of the company to be divided among the ordinary shareholders in any year should not exceed a specified rate. *Held* that in calculating the rate of dividend income-tax ought to be included. Ashton Gas Company *v.* Attorney General and Others, p. 567.

——— *Income Tax — Profits — Nitrate Grounds — Exhaustion of Material — Deductions—Income Tax Act* 1842 (*5 and 6 Vict. c.* 35), *sec.* 100, *Sched. D, 1st Case, Rule III, sec.* 159. An English company owned lands, buildings, and plant in Chili, digging out of the land a substance called "caliche" and extracting from it soda, potash, and iodine, from the sale of which they made their profits. The lands, &c., when all the "caliche" has been extracted would be of almost no value. *Held* that in computing their profits for income tax under Schedule D they were not entitled to deduct any yearly sum to meet the exhaustion of the "caliche." Alianza Company, Limited *v.* Bell (Surveyor of Taxes), p. 572.

——— *Stamp Duty—Conveyance on Sale—Ad valorem Duty—Periodical Payment Payment Contingent on Profits—Stamp Act* 1891 (*54 and 55 Vict. c.* 39), *secs.* 56 *and* 57. Sec. 56 (2) of the Stamp Act 1891 provides as follows:—"Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument." By an agreement by which a company's business was sold it was provided that part of the consideration payable to the sellers was to be the annual payment out of profits of a sum equal to a dividend of 3 per cent. on the amount for the time being paid up on such of the original ordinary share capital in the new company as should for the time being have been issued; such payment was however postponed to the payment of a cumulative annual dividend of 5 per cent. to the ordinary shareholders. At the date of the agreement the whole ordinary share capital had been issued, but only about a quarter of it paid up. *Held* that under sec. 56 *ad valorem* duty fell to be paid on a sum representing 3 per cent. on the amount of ordinary share capital paid up at the time of the agreement (that being "money payable periodically . . . in perpetuity, or for an indefinite period . . . ") multiplied by twenty, and that it was immaterial that the amount payable periodically was subject to the contingency of there being sufficient funds to pay the 5 per cent. dividend. *Per* Lord Lindley—"There is nothing in sec. 57 which either cuts down or excludes sec. 56." Underground Electric Railway Company of London *v.* Commissioners of Inland Revenue, p. 576.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Finance Act 1894 (*57 and 58 Vict. cap.* 30), *secs.* 2 (1) (*c*), 5 (1)—*Bond Granted by Heir of Entail within Year of Death to Daughter's Marriage-Contract Trustees.* An heir of entail in possession, who had debarred himself from disentailing save on voluntary consents, arranged for power to charge the entailed estates to a certain amount in favour of certain persons. In virtue of this power he granted a bond and disposition in security for a certain sum in favour of the marriage-contract trustees of a daughter whose portion he wished to increase, the sum to be held by them in terms of the marriage-contract, and within a year of so doing he died. *Held* (1) that the sum in the bond and disposition in security was property deemed to pass on the death of the heir of entail within the meaning of the Finance Act 1894, section 2 (1) (*c*), and was liable for estate duty, and (2), being so deemed to pass, inasmuch as it passed under the marriage-contract, it was also liable for settlement estate duty. Inland Revenue *v.* Heywood-Lonsdale's Trustee, p. 589.

——— *Stamp Duty—"Conveyance or Transfer on Sale"—Water Undertaking—Compulsory Statutory Transfer of Undertaking—Stamp Act* 1891 (*54 and 55 Vict. cap.* 39), *secs.* 1, 57, *and First Sched.—Finance Act* 1895 (*58 Vict. cap.* 16), *sec.* 12. The corporation of a burgh constructed water-works for the supply of their own area, and also entered into agreements with neighbouring outlying districts by which they undertook to supply them with water for a money payment fixed on the basis of the assessable rental of the different districts

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It was not entitled to make a profit. Subsequently the corporation promoted a Provisional Order for powers to bring in additional water. This was opposed by the outlying districts, and eventually a new Provisional Order was promoted and passed providing for the transference of the water undertaking from the corporation to a new joint board representing both burgh and districts, on certain terms which included (1) a cash payment to the burgh; (2) relief from all expenses incurred by the burgh in connection with the Parliamentary proceedings; and (3) a transference of the whole debts and liabilities of the undertaking. The Inland Revenue claimed payment of conveyance on sale duty in respect of this transference. *Held* (1) that the transaction was a conveyance on sale upon which duty was payable, and (2) that the cash payment, the relief from Parliamentary expenses, and the amount of the debts and liabilities taken over, were parts of the consideration for the transfer, and together formed the *cumulo* sum upon which the duty fell to be calculated, without any deduction being made on the ground of the interest which the Corporation had in the Board. Inland Revenue v. Irvine and District Water Board, p. 649.

Revenue—Income Tax (Schedule D)—Moneys Held by Person in Representative Capacity—List to be Furnished by Person not Himself Directly Chargeable—Whether Statement of Profits Necessary or merely Name and Address—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *secs.* 42 *and* 51. The Income Tax Act 1842 provides, sec. 42, that in the case of a trustee or agent who is in receipt of profit, &c., belonging to another, and who is not himself directly chargeable with duty, it shall be sufficient if he delivers a list "in the manner hereinafter required of the name and residence" of the persons entitled thereto. Section 51 provides that every person who shall be in receipt of any money belonging to another for which such other person is chargeable shall "deliver in manner before directed a list in writing, in such form as this Act requires, signed by him, containing a true and correct statement of all such money, value, profits, or gains, and the name and place of abode of every person to whom the same shall belong. . . ." A firm of underwriters on being asked to furnish a list in terms of section 51 of the Income Tax Act 1842 containing the profits due to their constituents, declined to do so, holding that under section 42 of the Act they were not bound to do more than furnish a list containing their names and addresses. *Held* that the underwriters were bound to furnish the list called for containing the profits, section 42 being merely a proviso on preceding sections, and referring shortly to the list required by section 51 and not restricting the scope of such list. Inland Revenue *v.* Gibb, p. 674.

Revenue—Public-House—Licence Duty—Billiard Saloon in Flat above—Whether Part of Licensed Premises—"Offices"—Inland Revenue Act 1880 (43 *and* 44 *Vict. c.* 20), *sec.* 43. The tenant of a public-house was tenant under a separate lease of a billiard saloon situated in the flat immediately above the public-house. There was no internal communication between the saloon and the public-house, access to the saloon being obtained by an outside staircase. *Held* that the billiard saloon was neither part of the dwelling-house in which the retailer resided or retailed spirits, nor within the description "offices, courts, yards, and gardens therewith occupied," and consequently that licence duty was not exigible in respect thereof. Paterson *v.* Inland Revenue, p. 692.

——*Income Tax—Profits—Deductions—Payment Made to Rival Company for Commanding Interest in its Management—"Money wholly Expended for the Purpose of Such Trade"—Income Tax Act* 1842 (5 *and* 6 *Vict. cap.* 53), *sec.* 100, *Schedule D, Rules Applying to First and Second Cases, No. I.* A company having made an agreement with another company carrying on a similar business, whereby it obtained, in return for an undertaking to make up the yearly profits of the second company to a certain amount a commanding interest in its management, claimed to deduct from its yearly profits for the purposes of income tax assessment the sum paid to the other company. The Income Tax Commissioners allowed the deduction, holding that the payment had been made by the company "for the purpose of its trade and that it might sell its goods at a better price." The Surveyor appealed. *Held* (1) that the question was one of fact rather than of law, and (2) that the deduction had rightly been allowed. Moore (Surveyor of Taxes) *v.* Stewarts & Lloyds, Limited, p. 811.

——See *Valuation Cases.*

Revenue Prosecution. See *Justiciary Cases.*

Review. See *Justiciary Cases—Process.*

Review by House of Lords. See *Appeal.*

Revocation. See *Trust—International Law.*

Right in Security. See *Title to Heritage.*

Right of Accused to Adjournment. See *Justiciary Cases.*

Right of Appeal. See *Justiciary Cases.*

Right of Charterers to Benefit of Policy. See *Insurance.*

Right of Local Authority. See *Road.*

Right of Parish Council to Defend Action. See *Local Government.*

Right of Representatives of Burgh. See *Local Government.*

Right of Trader to Specification. See *Railway.*

Right-of-Way. See *Process.*

Right to Charge Dues. See *Statute.*

Right to Exclusive Use of Trade Name. See *Trade Name.*

Right to Interdict. See *Process.*

Right to Protect Property. See *Process.*

Right to Revoke. See *Trust.*

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Rights and Duties of Partners. See *Partnership.*
Rights of Lower Riparian Millowner. See *Fishings.*
Rights of Opposing Party. See *Poor's Roll.*
Rights of Proprietors. See *Property.*
Rights of Upper Salmon-Fishing Proprietor. See *Fishings.*
Riparian Millowners. See *River.*
River—Process—Pollution—Rivers Pollution Prevention Act 1876 (*39 and 40 Vict. cap.* 75), *sec.* 11—*Appeal to Court of Session in Common Form—Competency—Statute.* The Rivers Pollution Prevention Act 1876, sec. 11, provides for review by one of the Divisions of the Court of Session by way of special case of any proceedings under that Act in the Sheriff Court, and it also provides for a petition or complaint presented in the Sheriff Court being removed to be tried by the Superior Courts in the first instance if thought desirable. In a petition presented in a Sheriff Court to have the defenders ordained to cease polluting certain streams, the defenders, after the Sheriff had found that they had admitted polluting and were therefore guilty of a breach of the Act, brought an appeal to the Court of Session in common form. *Held* that section 11 of the River Pollution Prevention Act 1876 was exhaustive as to the method of review and exclusive of the common law right of appeal; that the appeal was therefore incompetent and fell to be dismissed; and that it was not and could not at this stage be an application to have the case tried in the first instance in the Superior Court. *Guthrie, Craig, Peter, & Company* v. *Brechin Magistrates*, January 9, 1885, 12 R. 469, 22 S.L.R. 343, *commented on.* Lanarkshire County Council *v.* Burgh of Airdrie. Lanarkshire County Council *v.* Burgh of Coatbridge, p. 632.
——*Pollution—Water-works—Compensation Water—Riparian Millowners—Compensation Water so Turbid as to Render Stream Unfit for Millowners' Use—Statutory Duty—Negligence.* The waters of a stream were under statutory authority impounded in a reservoir by water trustees for the purpose of supplying a town with water and of giving compensation water. The trustees were under obligation to pass down the stream a certain amount of compensation water but nothing was said as to its quality. Owing to a dry season the reservoir became very low, with the result that the silt in it was exposed and was carried into and mixed with the water, but it had been as low on previous occasions and only once had there been complaint. During the period now in question, however, there were exceptional climatic conditions. Millowners on the stream, who had for long used its water in their manufacture, having brought an action of damages against the trustees on the ground that during a certain period the compensation water was so turbid and polluted as not only itself to be unfit but also to have rendered the water of the stream unfit for use, the trustees denied liability, and also denied that they were responsible for the quality of the compensation water but only for the quantity. *Held* (*per* Lord Chancellor, Lords Macnaghten, Davey, and Atkinson, *diss.* Lords James and Robertson, *rev.* Second Division) (1) that the millowners' right to the waters of the stream had been impaired by the statutes to the extent of the reasonable exercise of the statutory powers conferred on the trustees; (2) that it was for them to show affirmatively and clearly that the powers had not been exercised with reasonable precaution; and (3) that in the absence of such proof the trustees were entitled to be assoilzied in the action for damages. *Opinions contra* (*per* Lord James of Hereford) (1) that the statutes contemplated the giving as compensation water of water fit for use unless that was impracticable; (2) that it fell to the trustees to show that in the circumstances of the case to do so had been impracticable; and (3) that, having failed to adduce such proof, they were liable in damages; and (*per* Lord Robertson) (1) that the reservoir was primarily to give fit compensation water; (2) that a duty towards the pursuers was thereby imposed on the trustees; and (3) that owing to their view of the statutes the trustees had not attempted to fulfil such duty and were therefore liable in damages. Somerville & Son, Limited *v.* Edinburgh and District Water Trustees, p. 843.
River. See *Water—Fishings—Prescription.*
Road—Public Road—Turnpike Roads Act 1831 (*1 and 2 Will. IV, cap.* 43), *sec.* 100—*Roads and Bridges Act* 1878 (*41 and 42 Vict. cap.* 51), *sec.* 123, *and Sched. C, sec.* 100—*Recovery of Cost of Repairing Road Damaged by the Laying of Water Pipes—Repair Recoverable that of a Repair to be Executed immediately and once for all.* Under section 100 of the Turnpike Roads Act 1831, which is incorporated into the Roads and Bridges Act 1878 by sec. 123 thereof, a road authority is empowered, where a road has been damaged by being opened up for the laying of pipes, *e.g.*, for water, and has not been sufficiently restored, to execute the necessary repair and to recover the cost from the party having opened the road. *Held* that the repair contemplated by the Act is "a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared." Lanarkshire Upper Ward District Committee *v.* Airdrie, Coatbridge and District Water Trustees and Others, p. 526.
——*Railway—Burgh—Maintenance of Roadway—Bridge Carrying Street Over Railway—Railway's Obligation to Maintain Road—District Annexed to City from County—Special Powers of City Authority as to Streets—"Public Highway"—Rail-*

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ways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39. The Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, provides for "any turnpike road or public highway" crossed by a railway being bridged by the railway company, and enacts that such bridges with the approaches shall be maintained by the railway company. A railway company, whose Special Act conferred power in certain cases to substitute for existing portions of road new portions which were to be subject to the same provisions as the existing portions, crossed with its lines certain roads which at the formation of the line were under a county local authority. The roads were bridged in terms of section 39 of the Railways Clauses Consolidation (Scotland) Act 1845, in places new portions of road being substituted for existing portions. Some years subsequently the district embracing these roads was annexed to a City whose Special Act vested the roads in the city authority and subjected them to its other Special Acts, which contained provisions as to streets after being put on the register of public streets being maintained thereafter by the local authority. In an action by the City against the railway company to enforce the obligation of maintaining the roadway, *held* (1) that the Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, by its terms "turnpike road or public highway" applied to streets in a city as well as roads in a county district, and so still applied to the roads in question; (2) that the substituted portions were in the same position as the other portions of road; and (3) that the special powers of the transferees could not operate a release from its obligations to the railway company. Glasgow Corporation *v.* Caledonian Railway Company, p. 534.

Road—Railway—Burgh—Maintenance of Roadway — Bridges Carrying Streets across Line — City Authority Owning Tramway System Using Bridges—Liability for Maintenance—Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 28—*Railways Clauses Consolidation (Scotland) Act* 1845, *sec.* 39. A railway company was bound in terms of the Railways Clauses Consolidation (Scotland) Act 1845, section 39, to maintain the roadway upon bridges and approaches thereto which carried streets across their line. These roadways were also utilised by a tramway system owned by the corporation of the city in which they lay, the Tramways Act of 1870 being incorporated in their Special Act. In an action by the corporation to enforce against the railway company the obligation of maintenance of the roadway, *held* that the company's obligation was not to maintain the whole roadway, with a right of relief against the tramway, but was merely to maintain the portion of the roadway not falling within section 28 of the Tramways Act as incorporated in the Special Act. Glasgow Corporation *v.* Caledonian Railway Company, p. 534.

Road—Railway—Substitution of New Road for Old—Right of Local Authority in the Old Road—Building by Adjoining Owner on Old Road where it Forms Cul-de-sac—Interdict — The Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 46 *and* 49—*Turnpike Roads (Scotland) Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 70—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 42 *and* 43. A railway company in the exercise of statutory powers interfered with a public road, occupying the site of part of it with their railway line and station platforms, and provided a substituted road to the satisfaction of the local authority in terms of the 49th section of the Railways Clauses Consolidation (Scotland) Act 1845, which was incorporated with their Special Act. The new road ran to the north of the old and formed a cord to the arc which the old road had described. A portion of the old road near the east end of the arc about 88 feet in length was not actually used by the railway company, and formed a cul-de-sac affording access to property fronting it on the south belonging to A but affording access to no other property. A having acquired from the railway company the ground which lay *ex adverso* of his property, on the other side of the old road and between it and the new, proposed to build over the said portion of the old road. No steps had at any time been taken under the Turnpike Roads (Scotland) Act 1831, section 70, or later under the Roads and Bridges (Scotland) Act 1878, sections 42 and 43, to have the old road closed. *Held*, on an application by the county council as county road trustees for interdict, that no right in the portion of the old road in question remained in the complainers. Lord Low—"Now, it seems to me that when a road has been interfered with by a railway company, acting under statutory powers, in such a way that it cannot be restored, and the company provide a substituted road, in terms of the 49th section" of the Railway Clauses Consolidation (Scotland) Act 1845, "to the satisfaction of the local authority, the General Road Acts have no application." *Campbell* v. *Walker*, May 29, 1863, 1 Macph. 825, *distinguished*. Lanarkshire County Council *v.* Eadie and Caledonian Railway Company, p. 805.

Sale. See *Title to Heritage.*
Sale of Business. See *Contract.*
Sale of Interest in Common Property. See *Property.*
Sale under a Sequestration. See *Justiciary Cases.*
Salmon Fishing. See *Justiciary Cases—Process—Property—Fishings—Interdict.*
Sanitary Authority. See *Local Government.*
Scotch Domicile of Origin. See *Jurisdiction.*
Sentence. See *Justiciary Cases.*
"*Serious and Wilful Misconduct.*" See *Master and Servant.*
Service by Registered Letter. See *Process.*
Service of Wrong Summons. See *Reparation.*

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Services Rendered. See *Master and Servant.*
Servitude. See *Property.*
Separation and Aliment. See *Husband and Wife.*
Sequestration. See *Bankruptcy.*
Settlement. See *Poor.*
Settlement Estate Duty. See *Revenue.*
Sewer. See *Public Health.*
Sheriff. See *Public Health — Title to Heritage.*
Sheriff Court. See *Jurisdiction.*
Ship—Collision—Limitation of Liability—Fishing-Boat—Fishing-Boat Registered only in Fishing-Boat Register under Part IV of Merchant Shipping Act 1894 *Entitled to Limitation of Liability — Merchant Shipping Act* 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 2, 373, 503, 508. Section 503 of the Merchant Shipping Act of 1894 limits a shipowner's liability in certain cases of loss of life, injury, or damage. Section 508 provides that this benefit shall not extend to any British ship which is not recognised as a British ship within the meaning of the Act. Section 2 provides, sub-sec. 1, that every British ship (with exceptions enumerated in sec. 3 not here in point) shall be "registered under this Act;" sub-sec. 2, that any such ship "not registered under this Act" shall not be recognised as a British ship. *Held* that a British fishing-boat registered only in the Fishing-Boat Register under Part IV of the Act, and not under Part I, was a British ship registered under the Act within the meaning of sec. 2, and that its owner was entitled to the limitation of liability conferred by sec. 503. Couper *v.* M,Kenzie, p. 416.
——— *Collision—Limitation of Liability—Fishing-Boat — Tonnage — Deduction of Crew Space — Surveyor's Certificate — Registration — Merchant Shipping Act* 1894 (57 *and* 58 *Vict. cap.* 60). In calculating the tonnage of a steam fishing-boat, registered only under Part IV of the Merchant Shipping Act 1894, for the purpose of the limitation of the owner's liability under sec. 503, *held* that the owner was entitled to deduct crew space which was certified by a Board of Trade surveyor, although neither the certificate nor any entries in connection with it had been registered in the register appointed to be kept under Part I of the Act. Couper *v.* M'Kenzie, p. 416.
——— *Collision—Fog—Rules to be Observed by Vessels Navigating in Fog—Regulations for Preventing Collisions at Sea—Relation of Article* 16 *to Articles* 19, 21, 23. The Regulations for Preventing Collisions at Sea provide:—By article 16—That a steamer in a fog hearing another vessel's fog-signal forward of her beam shall stop her engines and then navigate with caution. By article 19—That when two steamers are crossing with risk of collision the vessel which has the other on her starboard side shall keep out of the other's way. By article 23—That every steam vessel directed to keep out of another vessel's way shall on approaching, if necessary, stop and reverse. The steamer "Linn o' Dee," navigating in a fog, heard forward of her beam and upon her starboard side the fog-signal of an unseen steamer. The sound seemed gradually to "broaden," which indicated a possibility that the vessel from which it proceeded was crossing the course of the "Linn o' Dee" from starboard to port. The "Linn o' Dee" stopped her engines in conformity with article 16. A collision took place. *Held* that she had acted rightly, and was not bound to have acted upon article 23 and reversed her engines. *Opinions* that while all the articles are to be read together so far as practicable, article 16 contains all the obligatory directions with reference to speed in fog, and is imperative so long as the position of the other vessel has not been ascertained with certainty. Crawford and Another (Owners of the s.s. "Warsaw") *v.* Granite City Steamship Company, Limited (Owners of the s.s. "Linn o' Dee"), p. 732.
Ship — Collision — Decree in Favour of Owners of One Ship Obtained in Conjoined Actions for Damages—Petition by Owners of the Other Ship for Limitation of Liability and Distribution — Opening up in the Petition at the Instance of Claimants not Represented in Conjoined Actions the Decree Obtained therein — Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504. In conjoined actions for damages for collision in which both ships were found to be to blame, the owners of the "Anglia" obtained against the owners of the "Olga" decree for a sum which exceeded their total liability as limited by section 503 of the Merchant Shipping Act 1894. The owners of the "Olga" having presented under that Act a petition for limitation of liability and for distribution, the owners of the "Anglia" claimed to rank for the sum in their decree; the owners of the "Anglia's" cargo, however, having appeared and put in a claim, sought to have such decree opened up, maintaining that the value of the "Anglia" had been overstated and had not been contested by the owners of the "Olga" because they had had little or no interest to do so, but that the finding of such value could not be binding on them when they were not represented in the actions. *Held* that the owners of the "Anglia" were bound to try again in the petition the amount of their claim. Van Eijck & Zoon (Owners of the "Anglia's" Cargo) *v.* Somerville and Another (Owners of the "Anglia"), p. 841.
——— See *Reparation—Expenses.*
Sist. See *Compensation.*
Slander. See *Reparation—Expenses.*
Small Debt Appeal. See *Justiciary Cases.*
Small Debt Court. See *Process.*
Special Drainage District. See *Public Health.*
Special Powers. See *Road — Judicial Factor.*
Special Warrant. See *Master and Servant.*
Stamp Duty. See *Revenue.*

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Stated Case. See *Justiciary Cases.*
Statement by Defender. See *Reparation.*
Statement of Profits. See *Revenue.*
Statement of Damage. See *Landlord and Tenant.*

Statute—Bye-Law—Ultra vires—Powers of Magistrates — Hours of Closing — Ice-Cream Shops—Burgh Police (Scotland) Acts 1892 (*55 and 56 Vict. cap.* 55), *secs.* 316, 317, 318, 380 (6); 1903 (*3 Ed. VII. cap.* 33), *sec.* 82 (2). Under the Burgh (Scotland) Act 1892, sec. 380 (6), ice-cream shops may only be open between the hours of 5 in the morning and 12 midnight. The Burgh Police (Scotland) Act 1903, sec. 82 (2), empowers town councils of burghs to make bye-laws (subject to confirmation by the Sheriff and Secretary for Scotland) in regard to the hours of opening and closing ice-cream shops within the limits prescribed by the Act of 1892, subject to the proviso that the hours for business are not to be restricted to less than 15 hours daily. The town council of a burgh duly passed a bye-law making it illegal for such premises to be kept open except between 7 o'clock in the morning and 10 o'clock at night. In an action for reduction of the bye-law at the instance of the ice-cream vendors of the burgh, on the ground that it was unreasonable, oppressive, and *ultra vires*, the pursuers averred that unless the bye-law was reduced their businesses would be ruined, as they would be precluded from doing business during the most profitable period of the 24 hours. *Held* (1) that the only ground upon which the Court could proceed was that of *ultra vires*; (2) that the pursuer's averments were irrelevant to support such a case, as they disclosed nothing which on the face of the bye-law showed it to be *ultra vires*. Da Prato and Others *v.* Magistrates of Partick, p. 406

—— *Statutory Law — Interpretation — Previous Legislation. Per* Lord Kyllachy —"I should doubt much whether the courts of law are at liberty, in construing Acts of Parliament, to do with reference to the course of previous legislation, or to inferences which they may be disposed to draw from previous statutes as to the probable intentions of the Legislature." Couper *v.* Mackenzie, p. 416.

—— *Tramways Act* 1870 (*33 and 34 Vict. cap.* 78), *sec.* 43—*Interpretation—Purchase of Tramway within its District by Local Authority under Compulsory Powers—Whether Bound also to Pay for Depot out of District "Suitable and Used . . . for Purposes of Undertaking."* Section 43 of the Tramways Act 1870 provides:—"Where the promoters of a tramway in any district are not the local authority, the local authority . . . may . . . by notice . . . require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district . . ." *Held* that the words "within such district" qualified the word "undertaking" and not the words "lands . . . promoters," and that accordingly a local authority acquiring a tramway undertaking under the above section was bound to pay the promoters the value of a depot suitable to and used by them in the undertaking, although not situated within the district of the local authority. Manchester Carriage and Tramways Company *v.* Swinton and Pendlebury Urban District Council, p. 573.

Statute—Construction—Canal—Pier Dues—Right to Charge Dues subject to Power in Commissioners to Regulate Stated to be in Statute—No Provisions in Statute for such Regulation—Rates Chargeable by Private Owner of Public Pier—"Wharfage" Rates—Right of Owner of Pier to Levy Rates on Vessels Touching—Caledonian Canal Acts 1804 (*44 Geo. III, c.* 62), *sec.* 58; 1857 (*20 and 21 Vict. c.* 27), *Schedule; and* 1860 (*23 and 24 Vict. c.* 46), *sec.* 10. The Caledonian Canal Act 1804, sec. 58, after providing for the owners of lands adjoining the canal having power to erect wharfs, quays, landing places, &c., and to land goods, &c., thereon, enacts—". . . and all rates and duties which shall be paid to the use and benefit of the said wharfs, quays, landing places, cranes, weigh beams, and warehouses, shall be(subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage) and are hereby vested in such owner or owners of the lands, grounds, or wastes who shall make, construct, and erect the same respectively as aforesaid, and his, her, and their representatives, so that the rates and powers herein granted to the said Commissioners shall not be thereby reduced or infringed." The Act contains no provisions dealing with the limitation, &c. of such rates and duties by the Commissioners. *Held* (1) that the section conferred a power to charge rates and duties although there were no provisions dealing with the exercise by the Commissioners of the power to limit, &c., but (2) that such rates and charges were "wharfage" rates only, *i.e.*, a rate upon goods and passengers landed at or shipped from the pier, and not "tonnage" rates, *i.e.*, a rate on the tonnage of the boat touching at the pier. Lady Seafield *v.* Macbrayne, p. 705.

—— *Interpretation—Clause of Protection—Special Enumeration of Persons Protected — Person Not so Included Not Necessarily Excluded from Protection.* When a statute contains a special enumeration of protected persons it does not necessarily follow that a person not included in the enumeration is ex-

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cluded from the protection afforded by the statute. M'Laughlin *v.* Westgarth and Another, p. 891.

Statute. See *Justiciary Cases—Harbour—Revenue—Company—River.*

Statutory Duty. See *River.*

Statutory Law. See *Statute.*

Statutory Power. See *Local Authority.*

Substitution of Issue for Parents. See *Succession.*

Succession — Trust — Uncertainty — "Such Charitable, Benevolent, or Religious Objects or Purposes within the City of Aberdeen" as the Trustees shall Institute or Select. A testator by her trust-disposition and settlement directed that the residue of her estate should be applied by her trustees "at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select." *Held* that the bequest was void from uncertainty. *Macintyre* v. *Grimond's Trustees*, March 6, 1905, 42 S.L.R. 466, and *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212, *followed.* Shaw's Trustees *v.* Esson's Trustees and Others, p. 21.

—— *Will—Meaning of Bequest—Description of Class—"My Relatives of Like Degree in Scotland Living at the Time of My Death."* A testatrix made this bequest—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death." *Held* that a relative in the same degree of relationship as Mr Argo, but whose home and ordinary residence were in Australia, though she happened to be in Scotland on a visit at the time of the testatrix's death, was not within the class whom the testatrix intended to benefit. Argo *v.* Pauline and Others, p. 23.

—— *Trust—Vesting—Repugnancy—Discretionary Power of Trustees to Withhold Payment—Conditional Institution of Issue of Beneficiary—"Dying," meaning Dying before Receiving Payment, and not Dying before Term when Legacy might have been Paid.* A testator who died in 1884 conveyed to trustees his whole estate, *inter alia*, "(*Second*) For payment at the first term of Whitsunday or Martinmas after my death . . . to my nephews" A and B, "equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner in which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said" A or B "dying leaving lawful issue, my trustees shall be entitled to apply such deceaser's share of the legacy for behoof of such issue in any way they may think proper, and failing such issue they shall be entitled to hold the share of such deceaser for behoof of the survivor of my said nephews in like manner and subject to the same conditions as are applicable to the original legacy." With regard to the residue of his estate, he directed his trustees "to divide the same among the legatees before named in proportion to the legacies hereinbefore bequeathed to them respectively. . . ." A died in 1902 intestate, leaving a widow and issue, and without having claimed or received full payment of his half-share of the said legacy and its accompanying proportionate share of residue. Of the unpaid balance his widow claimed one-third as *jus relictæ*. *Held* (1) that the unpaid balance of the half-share of the legacy had not vested in A, and so was not subject to his widow's claim of *jus relictæ*, and (2) that the share of residue followed, as regarded all its conditions and incidents, the share of legacy to which it was attached. Kirk's Trustees *v.* Walker and Others, p. 176.

Succession — Vesting — Liferent or Fee — Direction to Pay subject to Declaration to Hold for Legatee in Liferent and her Children in Fee—Death of Legatee without Issue. A testator by his trust-disposition and settlement directed his trustees "to make payment" at a certain term after his death of a certain sum to each of his daughters, "but . . . subject always to the provisions, declarations, powers, directions, and others hereinafter written." In a subsequent purpose of the settlement he provided and declared that, "notwithstanding anything to the contrary hereinbefore written," the trustees were to "set aside and hold and retain and invest in their own names," as trustees, the several provisions granted to each of his daughters for behoof of the daughters, "in liferent for their respective liferent uses allenarly . . . and for behoof of their respective children equally among them in fee." The *jus mariti* and right of administration of the daughters' husbands were excluded, and the daughters' liferents were declared to be alimentary and not liable to the diligence of creditors. There was no destination-over of the daughters' shares in the event of their dying without issue. *Held* (1) that the daughters took a fee of the sums directed to be paid to them respectively, which was reducible to a liferent only in the event of their having issue, and (2) that on the death of a daughter without issue her share fell to be disposed of as part of her moveable estate. Marquis of Tweeddale's Trustees *v.* Marquis of Tweeddale and Others, p. 193.

—— *Vesting—Vesting subject to Defeasance—Conditional Institution of Class Members of which not Ascertained — Direction to Sell and Divide—Effect on Postponement of Vesting.* A truster directed his trustees to hold his heritable

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property and apply the annual proceeds for the maintenance of A, declaring that if A should be survived by lawful issue his trustees should hold the heritable property and apply the proceeds for the maintenance and education of said issue, and should convey it to said issue equally on their attaining majority; but in the event of A not having lawful issue, or of his issue dying before majority, then his trustees were to "thereupon sell said heritable property and divide the free proceeds thereof as follows:—viz., one-fourth part thereof to the children of B equally, one-fourth to the children of C equally, one-fourth to E, one-fourth to F, whom failing to his children equally *per capita.*" A survived the testator and died unmarried. In a special case dealing with the provisions to B's children, *held* that vesting was not postponed till the death of A, but took place *a morte testatoris* in the children of B alive at the time of the testator's death, subject to defeasance in the event of A dying leaving issue. *Forbes* v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1, *commented on.* Corbet's Trustees *v.* Elliott's Trustees and Others, p. 379.

Succession — Vesting — Uniform Period of Vesting—No Presumption in favour of. *Per* Lord Kyllachy—"I think it is clear both on principle and authority that there is no general presumption as against vesting of different provisions at different periods." Corbet's Trustees *v.* Elliott's Trustees and Others, p. 379.

——*Vesting—Destination to Issue—Contingencies Depending on Birth or Survivance of Issue—Conditional Institution of Issue—Suspensive or Resolutive Condition.* *Per* Lord Kyllachy—"It is now, I apprehend, settled law that destinations to issue or contingencies depending on the birth or survivance of issue operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event of no issue in fact existing. *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346, and *Wylie's Trustees* v. *Wylie and Others*, November 29, 1902 (reported *infra*), *referred to.* Corbett's Trustees *v.* Elliott's Trustees and Others, p. 379.

——*Vesting—Vesting subject to Defeasance—Conditional Institution of Issue—Suspensive and Resolutive Conditions.* A marriage-contract provided that the trustees should during the subsistence of the marriage pay to the wife or to her husband if he survived her the annual proceeds of the trust funds, and with regard to the capital that it should "belong to the child or children of the said intended marriage, . . . share and share alike, . . . declaring that if any child of the said intended marriage shall have predeceased the said term of payment" (in the event which happened the death of the liferentrix) "leaving lawful issue, such issue shall succeed to the share of such child so predeceasing." The liferentrix survived her husband and died survived by several children and predeceased by a son A, who was survived by a daughter B, who survived the liferentrix. *Held* that a contingency depending merely upon the existence or survivance of issue fell to be read as a resolutive and not as a suspensive condition, and accordingly that a share of the capital vested originally in A, subject, however, to defeasance in the event, which happened, of his predeceasing the term of payment leaving lawful issue, and therefore that B took in her own right as conditional institute. Wylie's Trustees *v.* Wylie and Others, p. 383.

Succession — Vesting — Acceleration — Conditional Institution of Issue—Liferent of Capital — Postponement of Vesting till Liferenter's Death—Liferent Reducible in Certain Contingency to One-Third—Contingency having Happened Effect on Vesting of Remaining Two-Thirds — Accumulation of Income—Intestacy. A testatrix in her trust-disposition and settlement directed her trustees to pay to her husband during his lifetime if he survived her the net income of her estate, providing, however, that in the event of his contracting a second marriage the provision in his favour should be restricted to one-third. She further directed that "upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me," her trustees were to hold and apply, pay and convey, "the fee or capital of the residue of my said means and estate" to her children equally on majority, or in the case of daughters, marriage, "declaring that in the event of any of them predeceasing the period of payment and conveyance, and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue." No provision was made as to the disposal (1) of the income which would be set free if the liferenter married, or (2) of such part of the capital as would in that event no longer be required for the restricted liferent. The testatrix was survived by her husband and three children. The trustees paid the whole income to the husband until he entered into a second marriage, after which they continued to pay him one-third of the income and accumulated the remainder. The children all attained majority. In a special case, *held* (1) that vesting was postponed until the death of the husband, and that his second marriage had not accelerated the date of vesting and payment of two-thirds of the estate; (2) that the accumulated income was not disposed of by the trust-disposition and settlement and accordingly fell into intestacy. Hunt's Trustees *v.* Hunt and Others, p. 432.

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Succession — Destination — Marriage-Contract — Jus Crediti — Fund Destined in Contract to Spouse's Nearest Lawful Heirs —Question whether Fund Carried by a Will or by the Contract. Where in a marriage-contract, which on failure of issue destines the fee of the funds contributed by one spouse to that spouse's nearest lawful heirs, it is intended that such destination should be indefeasible, the intention must be expressed in clear and unambiguous terms and will not be inferred from such a fact as the parents, from whom the funds were coming, being parties to the contract. H. M. Advocate *v.* Sir Mark J. M'Taggart Stewart and Spouse, p. 465.

—— *Vesting—Survivorship—Conditional Institution—Accretion - Clause of Exclusion—Substitution of Issue for Parents—Parents' Rights Conditional—Effect on Children's Rights—Clause of Exclusion as to Original Shares Applicable to Accrescing Shares.* A testator who died in 1863 directed his trustees twelve months after the decease of the longest liver of himself and spouse to convert his estate into cash, divide the proceeds into a certain number of parts, and "pay" certain of them to the children of his son A. There followed immediately declarations to the following effect —(1) That the shares in question should not be payable to the grandchildren till the death of both parents, who were meantime to receive the income; (2) That E, one of the grandchildren (otherwise provided for) should not participate in the bequest; (3) That in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parents' share. There were four grandchildren, C, D, E, F. The testator's widow died in 1871; the survivor of the grandchildren's parents in 1904. C died without issue in 1883. D died in 1895 leaving issue still surviving. E died in 1880 leaving a son G surviving. F was still alive. In a special case brought to determine the rights of parties in the succession to C, *held* (1) that vesting of the grandchildren's shares was postponed till the death of their mother in 1904; (2) that the express exclusion of E sufficed *per se* to exclude his son G; (3) that D's issue, as conditional institutes and in their own right, took only D's original share of the bequest and not the proportion of C's share which would have accresced to D had D survived the liferentrix; (4) that the whole of D's share by the express clause of survivorship was carried to F. *Martin* v. *Holgate*, (1866) L.R., 1 E. & I. Ap. 175, and *Young* v. *Robertson*, 1862, 4 Macq. 337 (second case), *discussed*. Macfarlane's Trustees *v.* Macfarlane and Others, p. 494.

—— *Will—Reduction—Undue Influence —What Constitutes.* For the reduction of a testamentary writing upon the ground of "undue influence" it must be proved that the will of the testator was in the particular matter in question coerced into doing what he or she did not desire to do. To prove that the testator was induced to do as he or she did by degrading or pernicious influences, or that, generally, a certain person had the power unduly to overbear the testator's will, is insufficient. *Observations* of Sir J. Hannen in *Wingrove* v. *Wingrove*, 11 P.D. 81, *approved*. Baudains and Others *v.* Richardson, p. 587.

Succession—Vesting—Liferent—Fee—Liferent Interest—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17 *—Construction.* The Entail Amendment Act 1868, section 17, provides that it shall be competent to constitute by trust or otherwise a liferent interest in moveable estate in favour only of a party in life at the date of the deed (in the case of a testamentary deed the death of the granter), and where any moveable estate shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable estate shall belong absolutely to such party. A testator, who died in 1875, by his trust-disposition and settlement directed that the income of his estate should be divided equally among his four children, the issue of any who might predecease the period of the payment of the capital to receive their parent's share of income, under burden of an annuity to the widow or widower of such predeceasing child. On the death of all his children his whole means were to be divided among his grandchildren then alive and the issue of such as might have predeceased, payment being made on their respectively attaining twenty-one years. In the event of any of his sons or daughters dying without issue, their portion of the income was to be divided among their surviving brothers and sisters, and the capital of such portions was to be equally divided among his grandchildren and their issue, as before provided, at the period of division. The testator was survived by four sons, one of whom, A, died in 1895, survived by a widow and four sons, one of whom, B, born in 1878, died in 1905, after attaining majority. The income was paid by the trustees to the testator's four sons while alive, and after A's death his share of income, less an annuity to his widow, was divided among his four sons until the death of B. In a special case brought to determine B's rights at the date of his death in his grandfather's estate, *held* that his interest under the trust disposition and settlement was not a liferent interest but a contingent right of fee, and that accordingly he had not acquired by virtue of section 17 of the Entail Amendment Act of 1868 an absolute right of property in any portion of his grandfather's estate when he attained majority. Shiell's Trustees *v.* Shiell's Trustees, p. 623.

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Succession—Vesting—Trust—Assignation in Trust—Liferent by Implication—Accessory—Repugnancy—Gift of Fee on a Party's Death. A in contemplation of her marriage to B assigned to trustees her whole estate; "(*Second*) After my death, in the event of my marrying and predeceasing the said" B "and of there being no children or issue of children of said intended marriage, for behoof of the said" B "in liferent . . . so long as he shall remain unmarried . . .; (*Third*) for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally, or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen . . . after the decease or second marriage of the said" B "if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee: But declaring always . . . that in the event of the said" B "entering into a second marriage, the foresaid liferent provision created in his favour, in the event before mentioned, shall as on the date of such second marriage *ipso facto* cease and determine." A was married to B, and died intestate survived by B and two sons. B claimed a liferent by implication under the third purpose, or alternatively that the income of the estate till his death or second marriage was undisposed of and fell into intestacy. *Held* that B was not entitled to a liferent of the trust estate, that it vested as at A's death in her sons, and that they were entitled to immediate payment both of the capital and the accrued interest, it following as an accessory. *Ralph* v. *Carrick*, 1879, 11 Ch. Div. 873, *commented on and distinguished*. Bate's Trustees *v.* Bate, p. 660.

——— *Will—Direction to Divide Residue according to Verbal Instructions—Nuncupative Legacy.* A testatrix directed her trustees to divide the residue of her estate according to her wishes as expressed verbally to A. In an action of multiplepoinding raised by the trustees, A averred that the testatrix had told her —"I wish £100 given to the poor of Inverary Parish and you will come and take the rest"—and claimed to be ranked and preferred to the whole of the residue with the exception of the said sum of £100. *Held* by the Lord Ordinary (Dundas) that it was incompetent to prove such verbal instructions by parole evidence or by reference to the oath of A, and that the residue of the estate had therefore fallen into intestacy, but that A and the Inspector of Poor of Inverary Parish, who was also a claimant, were entitled to lead proof by parole evidence of nuncupative legacies in their favour respectively of £8, 6s. 8d. Turner's Trustees *v.* M'Fadyen and Others, p. 712.

——— *Faculties and Powers—Power of Appointment — Exercise — Validity — Power to Appoint to Fee—Appointment to Fee Subsequently Restricted to Liferent —Restriction Held pro non scripto—Introduction of Appointees not Objects of Power.* By her marriage contract a wife was empowered to apportion the fee of a sum of money among the children of the marriage "in such proportions, and with such restrictions, and on such terms, and payable at such periods" as she might declare in writing. There were two children, a son and daughter. By her will and codicil she appointed the whole sum to her son, with a declaration that instead of being paid to him it should be held by her testamentary trustees for his liferent use allenarly and his issue in fee, subject to such conditions and in such shares as he might appoint, and failing appointment, equally. There followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by issue, as also powers to the trustees to make advances to the son out of capital, and to the son to provide a liferent to his wife if he married in case of her surviving him. *Held* (1) that the provisions restricting the son's right to a liferent, and disposing otherwise of the fee, were *ultra vires* and wholly invalid, the suggestion being rejected that the valid could be eliminated from the invalid with the effect of giving a fee to the daughter and a liferent to the son, as figured by Lord M'Laren in *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; (2) that they fell to be treated as *pro non scriptis*, the son taking the fee of the whole fund under the initial part of the appointment. *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635, *followed*. Middleton's Trustees *v.* Middleton, p. 718.

Succession—Faculties and Powers—Power of Appointment — Exercise by General Settlement—Intention—Onus—English Wills Act 1837 (1 *Vict. c.* 26), *sec.* 27, *a Correct Expression of Law of Scotland.* Section 27 of the English Wills Act 1837, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have a power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will," *held* to be a correct expression of the law of Scotland. Lord Brougham's dictum as to the law of Scotland in *Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. p. 106, at p. 141, on which the above section is founded, *approved*. *Opinion per* Lord Low that the presumption in favour of the exercise of the power can be rebutted only by evidence of intention amounting practically to a declaration that the power is not exercised. A testator conveyed his

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whole means and estate, heritable and moveable (except the estate of X to be settled in the fourteenth place), to trustees for various purposes, including *fourth*, division of furniture among A, B, C, grandnieces of wife failing exercise by wife of power of appointment conferred on her; *eighth*, liferent of whole income to wife; *twelfth*, on death of wife if she survived him, payment of residue of moveable estate as appointed by her, or, failing appointment, equally among grandnieces A, B, C; *fourteenth*, as regarded estate of X, on death of wife sale of estate and payment of proceeds as she might appoint, or, failing appointment, division among certain relatives of wife from whom A, B, C, otherwise provided for, were excluded. By her will the wife, after expressly exercising the power of appointment as to furniture, provided, "as regards the remainder of my means and estate I provide" that the residue be divided between her grandnieces A and B (C had died) in the proportion of two-thirds to A and one-third to B. By subsequent codicil she expressly exercised the power of appointment over the residue of her husband's moveable estate in favour of A and B. *Held* (*dub.* Lord Stormonth Darling) that the power of appointment conferred on the wife by purpose *fourteen* as regarded the proceeds of the sale of X, had been validly exercised by her will in favour of A and B. *Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612, *commented on.* Bray and Others *v.* Peterkin (Bruce's Trustee) and Others, p. 746.

Succession. See *International Law—Trust.*

Summar Roll. See *Expenses.*

Summary Procedure. See *Justiciary Cases.*

Summary Prosecution. See *Justiciary Cases.*

Summons. See *Process.*

Superior and Vassal—Feu Charter—Condition of Feu Charter—Building Restriction—Interest to Enforce Condition of Feu Charter. The singular successors of the original feuars of a piece of ground, about an acre in extent, brought an action against the superiors for declarator that they were entitled to remove a villa situated on the feu, and to erect tenements of dwelling-houses on the ground as they might think proper. The feu charter provided, *inter alia*, that the feuar "shall be bound to build and maintain on the area or piece of ground hereinbefore disponed a dwelling-house of the value of not less than £800, according to a plan to be approved of by" the superiors, "and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained a declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" with resolutive clauses. There was no general prohibition in the feu charter against dwelling-houses additional to that stipulated for being built on the feu, and certain tenements had already been erected. The ground on which the pursuers sought the declarator was, that the said tenements already built fulfilled the conditions required in the stipulated dwelling-house and that the superiors had no longer any interest to object to the erection of additional tenements involving the demolition of Napier Villa. *Held* that even if it were necessary for the superiors to shew an interest to insist on the maintenance of said dwelling-house (which the Court did not hold that it was) the stipulation itself implied interest, and that nothing had occurred to take away that interest. J. & F. Forrest *v.* Governors of George Watson's Hospital, p. 183.

Superior and Vassal—Casualty—Redemption—Redemption Price—Building Site—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15. A co-operative society purchased certain subjects which were at the date of the purchase, and had been for years previously, covered with buildings. With a view to the erection of new buildings they demolished these, and when the ground was bare, except for the foundations of the new buildings, brought an action against the superior concluding for declarator, *inter alia*, that the redemption price of the casualties was a certain sum which was arrived at by taking as a basis of the calculation the value of the subjects if let on a lease of ordinary duration for such a purpose as a builder's yard. *Held—aff.* the Lord Ordinary (Dundas)—that in estimating the "yeir's mail" the subjects must be regarded as a building site, and that inasmuch as, on the evidence, £67, 10s. would have been a fair feu-duty, that sum, with the addition of the fifty per cent. required by statute, the casualties being exigible only on the death of the vassal, *i.e.*, £101, 5s. was the amount payable for the redemption of the casualties. Pollokshaws Co-operative Society, Limited *v.* Stirling Maxwell, p. 375.

——— *Casualty—Redemption of Casualties—Payment of Outstanding Casualties—Time before which Payment must be Made — "Before Redemption shall be Allowed" — "Allowed" — Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15. Section 15 of the Conveyancing (Scotland) Act 1874 has the following proviso:—"And provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid. . . ." *Held* (*per* Lord Dundas, Ordinary) that, where agreement has failed, redemption is only "allowed" when the decree of the Court is pronounced, and consequently that a casualty being due and outstanding at the raising of the action did not make incompetent an action brought by a vassal for the redemption of the casualties of his hold-

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ing. Pollokshaws Co-operative Society *v.* Stirling Maxwell, p. 375.

Superior and Vassal—Casualty—Redemption of Casualties—Date of Redemption—Date Casualty to be Estimated—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15. In an action by a vassal for redemption of casualties, *held* (*per* Lord Dundas, Ordinary) that "the date of redemption" as at which "the amount of the highest casualty" is to be "estimated" is the date at which the matter becomes litigious by the raising of the action. Pollokshaws Co-operative Society *v.* Stirling Maxwell, 375.

—— *Restriction on Building—Feuars with a Common Superior—Reference to Feuing Plan—Mutuality of Rights and Obligations—Enforcement of Restriction by One Feuar against Another.* A proprietor feued out to two feuars two different portions of his estate, placing them under similar building restrictions, and referring to a plan of the estate, but in the first charter it was stated that "the superiors shall not be bound by the plan in feuing out the remaining portion of the estate further than by a general conformity thereto," and in the second that "the feuing plan is referred to for no other purpose whatever than as showing the portion of the ground feued." *Held—sust.* Lord Ordinary (Ardwall)—that there was no mutuality of rights and obligations, and consequently that the building restrictions were not enforceable by the owners of the one feu against the owners of the other. *Hislop* v. *MacRitchie's Trustees*, January 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, *commented on and followed.* Murray's Trustees *v.* Trustees of St Margaret's Convent and Another, p. 774.

Supervision Order or Winding-up Order. See *Company.*

Survivorship. See *Succession.*

Suspension. See *Justiciary Cases—Process.*

Taxation. See *Expenses.*

Teinds—Valuation by Sub-Commissioners—Action of Division, Approbation, and Valuation—Action of Approbation at instance of Proprietor of a Part only of Lands Valued—Competency. In 1629 a valuation of the teinds of the lands of A was made by the Sub-Commissioners. In 1900 the proprietor of a part of the lands of A raised an action of division, approbation, and valuation to have the Sub-Commissioners' valuation approved, and to apportion the share of the *cumulo* valuation applicable to his portion of the lands. The owners of the other parts of the lands were not parties to the action but were called as defenders. *Held* that it was competent for the owner of part of the lands valued to sue for approbation without the concurrence of the proprietors of the rest of the lands. Elgin Guildry Fund Society *v.* Ministers of Elgin and Others, p. 399.

—— *Valuation—Report by Sub-Commissioners—Terms of Report—Terms Constituting a Valuation by Consent.* A report by Sub-Commissioners narrated that the titular and others appearing "condiscendit yat ye rentall of ye teind scheiffs" of certain lands "suld be valued to ye auld rentall, viz.—. . ." *Held* that these words constituted a valuation. Elgin Guildry Fund Society *v.* Ministers of Elgin and Others, p. 399.

Teinds—Locality—Teind Rental—Grazings and Plantations Forming a Park and Policies—Principle of Valuation. Certain lands, the teinds of which fell to be valued because of an augmentation of stipend, consisted of grazings and plantations forming the park and policies attached to a mansion-house. *Held* (*rev.* Lord Pearson, Ordinary) that the teinds should be valued at one-fifth of the rent which could have been got for the subjects in their actual condition as at the date of the augmentation. *Burt* v. *Home*, January 12, 1878, 5 R. 445, 15 S.L.R. 472, *commented upon.* Baird *v.* Earl of Wemyss, p. 614.

—— *Locality—Objection—Title to Object.* Objection was raised by one of two titulars to an interim scheme of locality and rectified state of teinds on the ground that a third titularity existed in the parish which had not been recognised by the common agent. *Held* (*per* Lord Pearson, Ordinary) that the objector's title to insist on the objection depended on his interest to do so, and there being no interest the objection *disallowed.* Baird *v.* Earl of Wemyss, p. 614.

—— *Locality—Glebe Lands—Lands Excambed for Old Glebe and Designed as New Glebe—Liability for Stipend.* A new glebe was designed in 1776 out of part of the lands of A given in excambion for the lands formerly constituting the glebe. In connection with this excambion it was stipulated that the remainder of the lands of A should be burdened, *inter alia*, with the teinds affecting the whole of the lands of A, including the new glebe. *Held* (*per* Lord Pearson, Ordinary) that the new glebe lands not being teind free lands the teind thereof should not be deducted in a process of locality so as to affect the interests of the heritors *inter se.* Baird *v.* Earl of Wemyss, p. 614.

—— *Valuation—Valuation by Sub-Commissioners at instance of Tacksman without Mention of Titular—Order by High Commissioners to Desist from Valuing the Lands—Validity of Sub-Valuation.* Objection was taken to an interim scheme of locality and rectified state of teinds on the ground that effect had been given therein to a valuation by the Sub-Commissioners obtained at the instance of the tacksman and dated 1630, which the objector alleged to be invalid in respect that (1) it did not appear *ex facie* of the report that the titular had been called; (2) an order of the High Commissioners dispensing with the valuation, and alleged to refer to the lands in question, was produced to the Sub-Commissioners in 1632, bidding them desist

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from the valuation. *Held* (*rev.* Lord Pearson, Ordinary) that the sub-valuation was valid and could be approved. Baird *v.* Earl of Wemyss, p. 614.

Teind Rental. See *Teinds.*

Tenant's Profits. See *Valuation Cases.*

Terms of Remit. See *Process.*

Territorial Waters. See *Justiciary Cases.*

Test Case. See *Expenses.*

"*Tied House.*" See *Valuation Cases.*

Title to Heritage—Right in Security—Sale—Heritable Securities (Scotland) Act 1894 (57 *and* 58 *Vict. c.* 44), *secs.* 8 *and* 10—*Sheriff—Citation—Irregularity in Service of Writ not Affecting Title Depending on Decree following thereon.* The Heritable Securities (Scotland) Act 1894, by section 8, provides means whereby a creditor who has exposed for sale under his security the lands held in security and has failed to find a purchaser, may, by applying to the sheriff, obtain a decree and have his disposition in security made irredeemable, but before such application can be granted it must be served upon the proprietor. Section 10 enacts—"No purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor." A creditor having had his application under section 8 granted by the Sheriff, and having followed thereafter the procedure necessary to make his disposition irredeemable, disponed the lands to third parties. The proprietor brought an action to have reduced the dispositions and whole proceedings, upon the ground that the service of the application upon him had been made by a messenger-at-arms, not a sheriff officer. *Held* that assuming the service of the application was irregular, such irregularity was within the meaning of section 10. *Question* whether a misdescription of the property in the advertisement prior to the exposure for sale would be covered. Sutherland *v.* Standard Life Assurance Company, p. 115.

——— *Bounding Title—Measurement—Bounding Title where Lands Defined by Measurement and no other Description.* A disposition in 1819 conveyed to a canal company "all and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement being part of my lands . . . which are required for the purposes of the said canal and on which the company have commenced their operations." It contained no further description of the area of ground conveyed. There existed, however, extrinsic evidence by which the area conveyed could be identified. The disposition had been recorded, which under the Canal Company's Act operated to the effect of giving infeftment. *Held* that to make the disposition a valid warrant for infeftment the area conveyed at the date of infeftment must have been a definite subject capable of identification; that extrinsic evidence was therefore competent to identify it at the present time; and that the area having been identified the title was a bounding title. Brown *v.* North British Railway Company, p. 327.

Title to Object. See *Teinds—Burgh.*

Title to Sue. See *Agent and Client—Local Government.*

Tonnage. See *Ship.*

Trade Name—Personal Name—Infringement—Fraud—Deception—Personal Name already Associated with One Trade or Branch of Trade Applied by Persons of Same Name to Other Trade or Branch of Trade. Robert Dunlop and John Fisher Dunlop, partners in a cycle and, to a limited extent, a motor repairing business in Kilmarnock, under the name of "R. & J. F. Dunlop," separated the motor and cycle branches of their business and formed of the former a company with a capital of £500, called the "Dunlop Motor Company Limited," of which they and a few friends and relatives were the shareholders. Under the memorandum and articles of association, which were very wide in their scope, they had power to deal in and manufacture, *inter alia*, motors and motoring "accessories." The company had neither the capital nor plant to manufacture motors, but had reasonable prospects of doing good business in repairs and "accessories." The Dunlop Pneumatic Tyre Company, Limited, famous as makers of the "Dunlop" tyre for cycles and motors, the patent for which had recently expired, but who also were makers of cycling and motoring "accessories" of every description, and who also had power under their memorandum and articles of association to manufacture motors, sought to interdict the Dunlop Motor Company, Limited, from carrying on the proposed business under that name or any name comprising the word "Dunlop." There was no evidence to show that the complainers had acquired a special right to the name "Dunlop" in connection with accessories as they had with tyres, or that the respondents had been actuated by any fraudulent motive in the selection of their name, or that any members of the public had really been misled by the name. The Court *refused* to grant interdict. *Per* Lord Kyllachy—"The law . . . has never yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been in addition to the mere use of that name some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another.' The Dunlop Pneumatic Tyre Company, Limited *v.* The Dunlop Motor Company, Limited, p. 784.

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Trade Name—Misrepresentation—Fraud—False Statements in Advertising—Fraud whereby Trade Established Disentitling to Protection of Trade Name. A company established a large business for certain pills, called "Bile Beans," by extensive advertising through which ran the story that the pills were compounded, with other ingredients, of a vegetable substance of marvellous health-giving properties which had been long known and used by the natives of Australia but only recently, after great research, discovered by C. F., a scientist. The labels and wrappers of the pill-boxes did not contain distinct references to this discovery, but the pills were called C. F.'s. The company having raised an action of interdict for the protection of the "trade name" of the pills it was proved that the story was a fabrication, the pills being compounded of ingredients known to all chemists. *Held* that the false and fraudulent misrepresentations of the complainers, by which they had built up their business and were deceiving the public, disentitled them to have that business protected by the Court. Bile Bean Manufacturing Company v. Davidson, p. 827.

——*"Passing Off"—Name Descriptive or Fancy?—Secondary Meaning of Words Used—"Bile Beans"—Right to Exclusive Use of Trade Name because of Association in Mind of Public—Sufficiently Distinguishing—Interdict.* In 1899 a company started to sell pills in the United Kingdom. The pills were sold in boxes on which were labels bearing, *inter alia*, the words "Charles Forde's Bile Beans for Biliousness." In 1904 one Davidson began to sell liver pills in boxes on which were labels bearing, *inter alia*, the words "Davidson's Bile Beans." His pill-boxes differed from the company's in size and price, and the colouring, printing, and general appearance of the respective labels were different. The company raised an action to interdict him from selling as bile beans pills not made or supplied by them. The words "Bile Beans" had formed part of a trade-mark taken out in this country by J. F. Smith & Company, of St Louis, U.S.A., in 1887, who, however, did not appear to have sold any of their bile beans in this country, and the complainers had in 1902 obtained an assignment of this trade-mark. Since 1887, in America, the word "bean" had been applied to oviform pills, and appeared in drug catalogues, but pills of that shape were not in common use in England. In certain of their advertisements the complainers referred to bile beans as "a title given to express exactly what the preparation is, a bean for the bile." *Opinions* (*per* the Lord Justice-Clerk, and Lords Kyllachy and Stormonth Darling, affirming the Lord Ordinary, Ardwall) that complainers had failed to prove that "Bile Beans" was a "fancy name" of their invention. *Opinions* (*per* Lord Justice-Clerk and Lord Kyllachy, affirming the Lord Ordinary, Ardwall) (1) that the complainers had failed to prove that the term "Bile Beans" was so associated in the public mind with their pills that they were entitled to the exclusive use of the term, and (2) if that were to be held otherwise, that they had failed to prove that the respondent's pills had not been sufficiently distinguished. *Opinion* of Lord Low on these matters *reserved*. Bile Bean Manufacturing Company *v.* Davidson, p. 827.

Trespass. See *Process—Property—Fishings.*

Trial. See *Administration of Justice—Process—Justiciary Cases.*

Trust—Proof of Trust—Proof of Purposes of Trust—Writ. At the request of A, B lodged with a bank a sum of money belonging to A, and took a deposit-receipt therefor in his own name and that of another person "in trust." On A's death, *held* that the deposit-receipt bearing that the sum of money was held by the persons named in it "in trust" was sufficient writ of B to establish the trust as against him, and that the objects and purposes of the trust might be competently proved by parole. The National Bank of Scotland, Limited *v.* Mackie's Trustees and Others, p. 13.

——*Succession—Donation mortis causa—Subsequent General Trust-Disposition Revoking all Previously Executed Testamentary Writings.* A trust-disposition and settlement by which the testatrix conveyed to trustees her "whole means, estate, and effects, heritable and moveable, real and personal," contained the following clause:—"And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The testatrix had at an earlier date made a *mortis causa* donation by means of a deposit-receipt. *Held* that *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, 17 S.L.R. 597, was a case in point, and, following it, that the general trust-disposition and settlement with its clause of revocation was not sufficient by itself to revoke the prior *mortis causa* donation. Scott's Trustees *v.* Macmillan, p. 179.

——*Revocation—Married Woman—Deed Executed in Contemplation of Marriage—Subsequent Marriage—Power to Revoke.* In contemplation of marriage a lady executed a trust conveyance conveying her estate to trustees. Subsequent to her marriage she claimed right to revoke it. *Held* that on the authority of *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267, had she remained a Scotchwoman she would have been entitled to revoke it. *Watt* v. *Watson* (*cit. sup.*) *commented on.* Sawrey-Cookson, *v.* Sawrey Cookson's Trustees, p. 209.

——*Inter vivos Disposition—Right to Revoke.* A lady in a trust-disposition (on the narrative that owing to delicate health, and in order to make provision for herself in the event of continued illness or incapacity) declared that she instantly made over to A and B, as trustees, £700 sterling. The purposes were (first) payment of annual income

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to the truster during life; (second) power to the trustees in their discretion at any time to apply the whole or part of the capital for the truster's behoof; (third) on her death the realisation of investments and payment of proceeds, subject to two legacies to C and D, in equal shares to the truster's mother, brother, and two sisters, with destinations-over in the event of the brother or either sister predeceasing the truster. The deed contained powers of investment and sale, and a declaration that it was irrevocable. The sum of £700 was handed over to the trustees, and the deed registered. The lady, of the same date, executed a testament in which she appointed A and B her sole executors, and bequeathed the whole personal estate belonging to her at her death to her mother, brother, and two sisters in equal shares, with a destination-over similar to that in the trust-disposition. The testatrix reserved her liferent, with power to revoke or alter, and she revoked all previous settlements made by her. By two codicils she left two legacies to C. The lady died, survived by her husband, who claimed *jus relicti* out of the £700, maintaining that the trust-disposition was merely administrative and testamentary, and therefore revocable. *Held* that it was irrevocable. Walker's Trustees *v.* Amey and Others, p. 242.

Trust—Liability of Trustees—Payment to Party not Entitled Made bona fide and on Advice of Solicitors. Circumstances in which *held* that trustees who, acting in *bona fide* and on the advice of competent solicitors, paid away a part of the trust estate to persons who were not legally entitled to it, were liable to make good the amount to the assignees of the persons legally entitled, and were not protected by section 3 of the Victorian Trusts Acts 1901. National Trustees, Executors, and Agency Company of Australasia *v.* General Finance Agency and Guarantee Company of Australia, p. 554.

—— *Investment—"Personal Security"—Power to Invest on Heritable or Good Personal Security—Mere Personal Obligation—Deposit-Receipt of Colonial Bank—Ultra Vires.* By an antenuptial contract of marriage trustees were authorised "to invest the trust funds on heritable or good personal security." They invested in deposit-receipts of colonial banks. There was no suggestion that these were not in good credit or that the investments were not sufficiently good of their class. *Held, affirming* the Lord Ordinary (Salvesen), that "personal security" covered security depending on personal obligation only, and that the trustees had acted within their powers. Sim and Others *v.* Fergusson and Others (Muir's Trustees, p. 795.

—— See *Succession—Process.*

Trust Constituted Prior to Act. See *Revenue.*

Trust Conveyance. See *Reduction.*

Trust-Deed. See *International Law—Process.*

Ultra Vires, See *Statute—Local Authority—Company—Trust.*

Undue Influence. See *Succession.*

University. See *Bursary.*

Validity. See *Succession—Property—Justiciary Cases—Process.*

Validity of Sub-Valuation. See *Teinds.*

Valuation. See *Teinds.*

Valuation Acts—Valuation Roll—Conclusive Evidence of Annual Value from which Deductions to be Made—Poor-Rates—Assessment—Harbour. Held that in assessing a harbour for poor-rates a parish council is bound to accept as conclusive the annual value as appearing in the valuation roll, and to make therefrom the deductions allowed by section 37 of the Poor Law Amendment (Scotland) Act 1845, whatever deductions may already have been made by the assessor in arriving at such annual value. *Edinburgh and Glasgow Railway Company* v. *Meek,* December 10, 1864, 3 Macph. 229, and *Magistrates of Glasgow* v. *Hall,* January 14, 1887, 14 R. 319, 24 S.L.R. 241, *followed.* Burghead Harbour Company, Limited *v.* George (Collector of Duffus Parish), p. 754.

Valuation Cases—Lease—Consideration other than Rent—Obligation on Tenant to Fit up Premises for his Trade—Measure of Consideration other than Rent—Competency of Looking at Negotiations prior to Lease—Valuation of Lands (Scotland) Act 1851 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Lands Valuation (Scotland) Amendment Act* 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4. A lease of a shop stipulated that the tenants "shall at their own expense fit up the premises hereby let for the trade or business of a cafe or tearooms to be carried on by them therein." The tenants, with the consent of the landlord, spent a large sum of money on the premises, partly on alterations and partly on decoration. The assessor claimed that such expenditure should be divided over the years of the lease, and added to the rent stipulated for therein in order to arrive at the rent to be entered in the valuation roll. The landlord maintained that the obligation on the tenant was not a consideration other than rent, at least of any value to him, and produced the correspondence prior to the lease to show that the rent was fixed prior to the alterations, &c., being considered. *Held* (1) that the obligation on the tenants was a consideration other than rent; (2) that the correspondence prior to the lease could not be looked at; but (3) that the measure of the consideration other than rent was not what had been spent by the tenant, *e.g.*, in ornamentation and decoration, but "how much was fairly and reasonably expended in such alterations upon the building as were required to fit it for the particular business." The Liverpool, China, and India Tea Company, Limited, and Another *v.* The Assessor for Edinburgh, p. 303.

—— *Mineral Lease—Mineral Field Situated Partly in County, Partly in Burgh*

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—Proportionate Assessment of Subject as between County and Burgh—Portion of Minerals Worked Situated Wholly within County—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *secs.* 1 *and* 42. A colliery company leased from the proprietor thereof a certain mineral field, lying partly in a county and partly in a burgh, at a fixed rent (or in the option of the proprietor at a royalty on the output). The minerals in question had so far been exclusively worked from the portion of the field lying in the county. The assessor for the burgh claimed that he was entitled to assess the portion of the field lying within the burgh, and entered it in the burgh roll at a rent which bore the same proportion to the whole rent as the portion of the mineral field in the burgh bore to the whole mineral field. The tenants appealed against the entry altogether, or alternatively maintained that the rent entered should be *nil*. *Held* that the minerals having been let, were, although unworked, lands and heritages within the meaning of the Valuation Acts, and that therefore the burgh assessor had no option but to enter them in the burgh roll as he had done. Edinburgh Collieries Company, Limited *v.* Assessor for Musselburgh, p. 307.

Valuation Cases—Consideration other than Rent—"Yearly Rent Conditioned as the Fair Annual Value"—Public-House—"Tied" House—Premises Occupied without Lease—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6. A firm of brewers, owners of a public-house, had a tenant for many years originally holding in virtue of a lease but subsequently by tacit relocation. Owing to improvements carried out by the local authority, the buildings in which the public-house was were taken down and new buildings substituted. In the new buildings the brewers erected a new public-house, more advantageous for business, but allowed their old tenant the occupation at the old rent, there being, however, no proved agreement. The tenant was under no obligation to take beer from the proprietors, but as matter of fact he did receive a good deal of beer from them and the tenancy was admitted to be terminable at the end of any year. *Held* that the rent of the premises was not the "yearly rent conditioned as the fair annual value," and that the magistrates were justified in disregarding it in arriving at the valuation. Thomas Usher & Sons, Limited *v.* Assessor for Edinburgh, p. 310.

——*Consideration other than Rent—Purchase of Goodwill of Business—Break in Lease—Subsequent Purchaser of Property Raising Rent at Break in Lease.* A, the proprietor and occupier of a public-house, in consideration of a rent of £39 and the payment of a sum of money for goodwill, granted to B a lease of the premises for fifteen years from Whitsunday 1897 with a break at Whitsunday 1905. The premises were entered in the valuation roll at £50, of which £30 was the rent in the lease and £20 was one-fifteenth of one-half of the purchase price of the goodwill. A subsequently sold the property to C, who, taking advantage of the break in the lease, raised the rent payable thereunder to £40, and this was given effect to by minute of agreement, the whole other conditions of the lease being conserved. The Assessor thereupon entered the property in the roll at £60. C appealed and maintained that the entry should be £40, inasmuch as that was the full rent he obtained after purchasing the property in open market, and that he had received nothing for goodwill, and if any of the payment for goodwill effeired to the property it must be considered to have been exhausted at the time of the break in the lease. *Held* that as C had bought the subject under burden of the lease to B he was liable to all the consequences of that lease, that the agreement between C and B at the break in the lease was not a termination of the old and a substitution therefor of a new lease, and that therefore the Assessor had acted rightly in entering the subject in the roll at £60. Ormston *v.* Assessor for Greenock, p. 313.

Valuation Cases—Annual Value—Convalescent Home—Valuation per Bed or Percentage on Cost of Erection—Restriction. A convalescent home was erected on ground held under a feu-disposition which contained certain restrictions which precluded its use for any other purpose than that of the erection and maintenance thereon of a convalescent home under the management of a certain specified body of trustees. *Held* that in valuing the home for the purposes of the valuation roll regard must not be paid to the restrictions in the feu-disposition, but a fair annual value must be taken at which such a subject might be expected to let if unhampered by these restrictions. Principle of valuation at £2 per bed, or 4 per cent. on cost of erection approved. The Glasgow Abstainers' Union *v.* Assessor for Argyllshire, p. 320.

——*Municipal Electric Light Undertaking—Method of Valuation—"Revenue" Principle or "Contractor's" Principle. Held* that in ascertaining the true yearly rent or value of a municipal electric lighting undertaking which had been in existence for ten years the "revenue" or "profits" method should be applied. *Opinions* that the "contractor's" principle (viz., a percentage upon the cost of the undertaking) might be usefully employed as a means of testing the amount arrived at by another method. Parish Council of Edinburgh *v.* Assessor for Edinburgh, p. 435.

——*Municipal Electric Light Undertaking—"Revenue" Method of Valuation—Deductions for Depreciation.* An electric undertaking was carried on by a municipal corporation as undertakers under a Provisional Order. The necessary power stations were erected by and belonged to the corporation, together with the whole machinery and plant therein, and the electric mains, &c., throughout the burgh.

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Held that in ascertaining the true yearly rent by the "revenue" method no deduction fell to be allowed in respect of depreciation of lands and heritages, but that a deduction should be allowed for interest on tenant's floating capital and depreciation of tenant's chattels, and 6 per cent. allowed on the *cumulo* amount thereof. Parish Council of Edinburgh *v.* Assessor for Edinburgh, p. 435.

Valuation Cases—Municipal Electric Light Undertaking — "Revenue" Method of Valuation—Deductions—Tenant's Profits—Power to Let. A municipal corporation carrying on an electrical undertaking was entitled by Provisional Order to make profit on the undertaking subject to certain restrictions as regards rate of charge for the supply of energy and the amount of profit which might be made. It was further entitled to let the undertaking to a tenant subject to similar restrictions. *Held* that in ascertaining the true yearly rent by the "revenue" method a deduction should be allowed for tenant's profits and 10 per cent. allowed in respect thereof on the balance obtained after deducting from gross revenue expenditure and interest upon tenant's capital. Parish Council of Edinburgh *v.* Assessor for Edinburgh, p. 435.

——— *Electric Light Undertaking—"Contractor's" Method—Valuation of Wayleaves. Opinions* that in valuing an electric light undertaking according to the "contractor's" method the value of wayleaves obtained by statutory authority would require to be included. Parish Council of Edinburgh *v.* Assessor for Edinburgh, p. 435.

——— *Appeal — Competency — Appeal on Question other than Value—Appeal on Question of Ownership—Valuation of Lands (Scotland) Amendment Act* 1879 (42 *and* 43 *Vict. cap.* 42), *sec.* 6—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. cap.* 91) *and* 1857 (20 *and* 21 *Vict. cap.* 58). *Held* that no question of title or ownership could be raised in the Valuation Appeal Court, which Court could only entertain questions as to valuation, and consequently that an appeal on the ground that the appellants' name had been erroneously entered in the valuation roll as proprietor of a certain heritable subject was incompetent. British Linen Company *v.* Assessor for Aberdeen, p. 442.

———*Electric Lighting Works—Principle of Valuation—"Contractor's" Principle or "Revenue" Principle.* A company was proprietor of electric works and of the mains connected therewith. The undertaking had been in operation for two and a-half years, and two balance-sheets had been issued. *Held* that the "revenue" or "profits" principle was rightly applied to arrive at the yearly value. Hawick Parish Council *v.* Urban Electric Supply Company, Limited, p. 448.

——— *Electric Lighting Works—"Revenue" Principle — Deductions — Allowance for Repairs and Depreciation.* In applying the revenue or profits principle for the purpose of reaching the yearly value of electric lighting works erected two and a-half years previously, the magistrates allowed as deduction for repairs and depreciation of machinery not the amount expended as appearing in the balance-sheet but an estimated amount to be expended over a course of years. On an appeal the Court *approved* the yearly rent arrived at by allowing such estimated amount as a deduction. Hawick Parish Council *v.* Urban Electric Supply Company, Limited, p. 448.

Valuation Roll. See *Valuation Acts.*

Value of Goods Given. See *Justiciary Cases.*

Verbal Agreement. See *Master and Servant.*

Verdict. See *Expenses—Process.*

Veritas. See *Reparation.*

Vesting. See *Succession.*

Vesting subject to Defeasance. See *Succession.*

Wages. See *Master and Servant.*

Warrant. See *Parent and Child.*

Warranty. See *Landlord and Tenant.*

Water—River—Mill Dam—Abstraction—Title to Abstract — Right to Increase Amount Taken. A Crown charter dated in 1738 granted a mill "cum stagnis lie Dammie Inlairs et acqueductis aliisque integris privilegiis et pertinentiis ejusdem quibuscumque." The mill was on a river and was so described The dam from which it drew water was a pool in the river formed by a natural barrier of rock which had been slightly raised with wood. *Held—rev.* judgment of the Second Division of the Court of Session, *aff.* that of the Lord Ordinary (Kincairney)—that the mill owners had no higher right to abstract water for the mill than that of a riparian proprietor, and consequently that in a question with another millowner who derived his water from the same source, they were not entitled to abstract more water than they had been in use to abstract for the prescriptive period. White and Others *v.* White & Sons, p. 116.

——— *Water Rates—Supply at Meter Rate or at Domestic Water Rate—Dwelling-House—Private-Dwelling-House—Airdrie and Coatbridge Waterworks Act* 1846 (9 *and* 10 *Vict. cap. cclxxxviii*), *sec.* 52—*Airdrie and Coatbridge Waterworks Amendment Act* 1892 (55 *and* 56 *Vict. cap. cxvii*), *sec.* 46—*Airdrie, Coatbridge, and District Water Trust Act* 1900 (63 *and* 64 *Vict. cap. xcviii*), *sec.* 42. A public-house which had no sleeping accommodation used water mainly for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, *i.e.*, the washing of casks and bottles and other trade utensils. The available supply of water of the District Water Trustees was more than was required for domestic and ordinary purposes, and when that was so it was provided that the trustees "shall, if so required, contract" for a supply to "public baths, wash-houses, works, manufactories, railways, or other premises" at a meter rate

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and upon terms to be agreed upon or to be fixed by the Sheriff. *Held* that under the District Water Acts the occupier of the public-house was entitled to a supply of water at meter rates, and that the Water Trustees were not entitled to charge their general domestic water rate. *Opinions* (*per* Lord Kyllachy and Lord Low—*doubting* Lord Stormonth Darling and the Lord Justice-Clerk) that the public-house was not a "private dwelling-house. *Observations* (*per* Lord Kyllachy) on the general scheme of the statutes. Airdrie, Coatbridge, and District Water Trustees *v.* Flanagan, p. 422.

Weekly Close Time. See *Justiciary Cases.*

Wilful Fire-Raising. See *Justiciary Cases.*

Will. See *Succession—Expenses—International Law.*

Winding-up. See *Company.*

Witness—Foreign—Arbitration—Witness and Haver in England—Appointment of English Commissioner—Letters of Diligence to Cite Witness—Form of Interlocutor. An arbiter having ordered a proof and appointed a commissioner in England for taking the deposition of a witness and haver who was resident there, the party at whose instance the commission had been granted presented a petition, *inter alia*, for approval of the appointment of the commissioner and for letters of diligence for citing the said witness to appear before him. The Court *refused* to grant letters of diligence but *confirmed* the appointment of the commissioner. John Nimmo & Son, Limited, Petitioners, p. 106.

Wrongous Information. See *Reparation.*

Wrongous Interdict. See *Reparation.*

Writ. See *Trust.*

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ERRATA.

Page 181, 1st col., 28th line from foot—*for* "*Crombie*" *read* "*Crosbie.*"

Page 411, 2nd col., 18th line from top—*for* "impractical" *read* "impracticable."

Page 502, 2nd col., 17th line from top—*for* "all" *read* "which."

Page 549, 2nd col., 31st line from bottom—*for* "1899" *read* "1897"; 15th line from bottom—*for* "1895" *read* "1898."

Page 550, 1st col., 31st line from top—*for* "Again at that judgment" *read* "Against that judgment."

Page 646, 2nd col., 15th line from top—*the first* "or" *should be* "and."

Page 859, 2nd col., 18th line from bottom—*for* "Edw. IV" *read* "Edw. VII."

Page 915, 1st col., 15th line from top—*for* "1890" *read* "1900."

SCOTTISH LAW REPORTER.

43

OCTOBER 1903 TO OCTOBER 1906.

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THE

SCOTTISH LAW REPORTER.

WINTER SESSION, 1905–1906.

COURT OF SESSION.

Friday, October 20, 1905.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

MACDONALD *v.* THE FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 8—*A.S., 3rd June* 1898, *sec.* 7 (*a*) — *Memorandum of Verbal Agreement—Registration—Genuineness—Special Warrant to Register.*

Held that a Sheriff is bound, under Schedule II, sec. 8, of the Workmen's Compensation Act 1897, and section 7 (*a*) of the relative Act of Sederunt of 3rd June 1898, to grant a special warrant for the registration of a memorandum of a verbal agreement between an injured workman and his employers, fixing the amount of compensation due by the latter to the former, if he is satisfied that it is genuine in the sense of being the agreement actually arrived at by the parties. Whether the parties were labouring under essential error as to their rights when they made the agreement, or whether the agreement is contrary to the statute in respect that it awards the workman too high a rate of compensation, are questions he is neither bound nor entitled to consider.

Opinion reserved upon the question whether a sheriff-clerk would be bound to record a memorandum of a written agreement in which it appeared *ex facie* that the compensation awarded was beyond the maximum which, upon any view of the facts, could be awarded to the workman under the Act.

Section 8 of the second Schedule appended to the Workmen's Compensation Act 1897 provides—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt], by the said committee or arbitrator, or by any party interested, to the [Sheriff-Clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall, for all purposes, be enforceable as a [Sheriff Court] judgment: Provided that the [Sheriff] may at any time rectify such register."

(The words in brackets are substituted for their English equivalents in terms of section 14 (*a*).)

The Act of Sederunt of 3rd June 1898 provides as follows:—Section 7 (*a*)—"The memorandum as to any matter decided by a committee, or by an arbitrator other than a Sheriff, or by agreement, which is by paragraph 8 of the second Schedule appended to the Act required to be sent to the Sheriff-Clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all the parties interested, or where it purports to be a memorandum of a decision or award of a committee or of an arbitrator agreed on by the parties and to be signed in the former case by the secretary or by at least two members of the committee, and in the latter case by the arbitrator, the Sheriff-Clerk shall proceed to record it in the special register to be kept by him for the purpose with-

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out further proof of its genuineness. In all other cases he shall before he records it send a copy . . . to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed, he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

Thomas Macdonald, blacksmith, Glasgow, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Fairfield Shipbuilding and Engineering Company, Limited, praying the Court "to grant warrant to the Sheriff-Clerk of Lanarkshire at Glasgow to record in the special register provided for the purpose a memorandum of agreement, dated 27th July 1904, sent to the Sheriff-Clerk of Lanarkshire aforesaid by the pursuer and his agent Robert Kyle, writer, Glasgow, that the same might be recorded pursuant to paragraph 8 of the second Schedule of the Workmen's Compensation Act 1897, containing the terms upon which the pursuer and the defenders agreed to settle the claim of compensation made by the pursuer against the defenders under said Act; and to find the defenders liable in expenses."

The circumstances which led up to the action were as follows:—The pursuer, while in the employment of the defenders, met with injuries which entitled him to compensation under the Workmen's Compensation Act 1897. Application was made by the pursuer to the defenders for payment of compensation in terms of the Act, and a verbal agreement was entered into between the parties by which the defenders agreed to pay the pursuer the sum of 16s. weekly. The pursuer's wages in the defenders' employment were at the rate of 32s. a-week, but at the time of the accident he had been only one day in their employment, his actual earnings being 6s. 4d. For some time the defenders paid the pursuer 16s. weekly, but ultimately, having come to the conclusion that on a proper interpretation of the Act they were only bound to pay him 3s. 2d., they ceased the payments of 16s. and offered instead payments at the rate of 3s. 2d. The pursuer thereupon raised the action.

The defenders opposed the action, and pleaded, *inter alia*, "Essential error." The Sheriff-Substitute (DAVIDSON) allowed a proof, by which the facts set forth above were established. On the 31st January 1905 he issued the following interlocutor:—"Having heard parties' procurators and considered the proof and productions, grants warrant as craved."

Note.—". . . I think the authors of the Act really meant (though they did not say so) that the compensation payable should either be ascertained by proceedings before an arbiter or by agreement, and that the result in each case was to be recorded. I might refer to the case of *Keeling*, 116 L.T. Journal 595, where an agreement was ordered to be registered, although it had been admittedly superseded by a subsequent one. Having got this length then, that a genuine agreement was arrived at (and this cannot be seriously disputed) the question remains whether the respondents can competently resist the recording of it on the ground that it was come to on their part in error as to their true legal rights. A very able argument, founded on several authorities, was submitted on this head for the respondents. But I do not think the Court can give any effect to their contention at this stage at anyrate. The direction of the Act is perfectly simple, and the duty of the Clerk and the Court is purely administrative. Once satisfied that an agreement has been made, I have no power to refuse to order its registration. . . . ."

The defenders appealed to the Sheriff (GUTHRIE), who on 15th March pronounced the following interlocutor:—"(1) Finds that the pursuer, on 28th March 1904, while in the defenders' employment, was injured in the course of his employment in one of his eyes, and claimed compensation under the Workmen's Compensation Act 1897: (2) Finds that he was paid compensation by the defenders through their insurers at the rate of 16s. per week for twelve weeks conform to receipts in process, each of which bears that the payments were the weekly payments to which he was entitled under the Workmen's Compensation Acts 1897 and 1900, for the personal injury caused by said accident: (3) Finds that the pursuer's wages in the defenders' employment were at the rate of 32s. a-week: (4) Finds that he had at the time of the accident been one day in the employment, his actual earnings being 6s. 4d.: (5) Finds that the weekly payments aforesaid were made and received by the parties while they were in error as to their rights under the Workmen's Compensation Acts, and that it cannot, from the receipts produced or from other evidence in the cause, be inferred that there was a genuine agreement to the effect stated in the memorandum libelled: Therefore recals the interlocutor of 31st January last; refuses the petition, and decerns.

Note.—"There is no such plea for the pursuer, but it was argued that the appeal is incompetent in respect that the granting of the warrant is merely an administrative act. Sheriff Davidson seems to have held this opinion, probably founding on dicta in *Cammick*, 4 Fr. 198. But although certain opinions were there expressed, the First Division case of *Cochrane* v. *Traill*, 3 Fr. 27, 1091, was not overruled, and it remains as a direct authority to the effect that the application under Schedule II, sec. 8, and the Act of Sederunt of June 3, 1898, sec. 7, is an ordinary Sheriff Court process. Lord Adam in the latter case indicates that the Sheriff has to determine the question whether an agreement for which registra-

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tion is sought is or is not a genuine agreement, and it may not be unreasonable in many cases that the application should follow the usual course of a Sheriff Court action. So accordingly it was, I think, decided. And although the considerations of expedition and finality which no doubt moved the Second Division Judges in *Cammick* v. *Glasgow Iron and Steel Company* may be more in accordance with the policy of this statute, yet it is nothing new to find anomalies and even absurdities in its enactments.

"It was argued that if this case is an ordinary Sheriff Court action, section 11 of the Sheriff Court Act 1877 applies, and the agreement, if there be an agreement, may and ought to be set aside *ope exceptionis* on the ground of mutual error. It is hardly necessary, perhaps, to found on that section, as it may be said that there is no agreement that can be set aside until the pursuer establishes in this proceeding that there is an agreement. However that may be, I find that as the parties were alike in error in making the payments there can be no legitimate inference that they agreed to pay during the inability of the pursuer the sum claimed in the memorandum, or if such an inference is made it is made only to be set aside or negatived on the ground of mistake.

"A good deal was said on the effect of error in law. But it seems to be clear that the mistake under which the parties laboured was as to what in fact their rights were under the statutes, and that even in England the Courts would set aside a contract on the ground of such a mistake. *A fortiori* in Scotland it is laid down by Professor Bell (Principles 11) that error in law as well as in fact will invalidate a contract, although it may not always entitle to restitution after it is fulfilled. The statement is by Professor Bell himself, not by his editor; it is according to the authorities, and it has never, I think, been doubted. Here restitution is not sought by the defenders, and it is the pursuer who seeks to set up a contract founded on error. It would be contrary to good conscience to allow this to be done."

The pursuer appealed to the Court of Session, and argued—Neither the fact that the agreement may have been entered into by the parties under essential error as to their rights under the Act, nor that it may have provided for a rate of compensation in excess of that exigible under the Act were grounds upon which the Sheriff could refuse to register a memorandum. As to essential error, the maxim *ignorantia juris neminem excusat* was applicable, the ignorance here being ignorance of the public law of the country and not of a mere private right—*Cooper* v. *Phibbs*, 1867, 2 E. and I. App. Cases, 149, Lord Westbury at p. 170. And as to the objection that the agreement provided undue compensation, the answer was that under section 8 of the second Schedule of the Act, and section 7 of the Act of Sederunt, the Sheriff had no concern with the contents of the agreement but was bound to register it if satisfied that it was genuine, *i.e.*, embodied accurately the terms of the arrangement actually arrived at by the parties—*Cammick* v. *Glasgow Iron and Steel Company, Limited*, November 26, 1901, 4 F. 198, L.J.-C. at p. 201, 39 S.L.R. 138; *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27 and 1091, Lord Adam at p. 30, 38 S.L.R. 18. If the agreement were incorrect it could be reviewed in the manner provided by Schedule I, 12, Schedule II, 8 of the Act.

Argued for the respondents—The pursuer was only entitled to 3s. 2d. per week—*Grewar* v. *Caledonian Railway Company*, June 19, 1902, 4 F. 895, 39 S.L.R. 687; *Cadzow Coal Company, Limited* v. *Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40. It was *a priori* improbable that it was intended by the Legislature that an agreement demonstratably not in accordance with the Act should be recorded. This was confirmed by the language of section 8 of Schedule II, which provided for the recording of an agreement in one event only, viz., "where the amount of compensation under this Act shall have been ascertained." Until therefore the true amount of compensation had been ascertained there was no agreement capable of being recorded. "Genuine" both in the Schedule and Act of Sederunt meant "true," not only in the sense of accurate as to what took place between the parties but accurate under the Act. If this agreement were registered the respondents would have no means of redress, the remedy provided by section 12 of Schedule I being only available where there had been a change of circumstances—*Crossfield & Sons, Limited* v. *Tanian*, [1900] 2 Q.B. 629. The Sheriff's reasoning on the question of essential error was sound and should be adopted.

LORD KYLLACHY—In this case the Sheriff-Substitute granted warrant for the recording of the agreement, and the first question for our consideration is whether the Sheriff-Substitute's determination is subject to review. If it were necessary to decide that question, we should require to postpone the decision until the issue of another case which is now before Seven Judges, and in which judgment has not yet been pronounced. But in the view which I take, it appears to me that even if the competency of the appeal here from the Sheriff-Substitute to the Sheriff were affirmed, there are no grounds for disturbing the judgment of the Sheriff-Substitute. The question before the Sheriff-Substitute was simply the genuineness of the agreement, and it appears to me that even now no grounds have been stated going to impeach its genuineness. The genuineness of the agreement is admitted. It is admitted to be as much a genuine agreement as if it had been in writing and signed by both parties. The objection to it stated by the respondents is only this, that although in fact made between the parties, it was induced by essential error—in other words, that although a genuine agreement, it was not a valid agreement, either as being induced by essential error or as being an agreement which upon examination of the whole facts would be

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found to be contrary to the provisions of the statute—contrary in this sense, that it awarded the pursuer undue compensation. That being so, it does not appear to me to be possible to doubt that the Sheriff-Substitute was right in granting the special warrant which is in question. His only error was in allowing proof, or rather in allowing, as I think he did, a proof going beyond the question of genuineness. It was, I apprehend, his duty, as soon as it was admitted or proved that the agreement was a genuine agreement—genuine in the ordinary sense of the term—to have at once granted his warrant. In other words, he was not, I think, either entitled or bound to go behind the agreement, and after a proof of the whole facts, to consider and decide whether the agreement was consistent with the various decisions of the Courts, English and Scottish, as to the construction of the Workmen's Compensation Act.

It has, no doubt, been argued that when this agreement is examined, not with reference to what appears on its face, but with reference to the whole facts disclosed in the proof, it was an agreement contrary to the just construction of the statute, and therefore as a statutory agreement null and void. But it is, I think, vain to suggest that it was the intention of the statute that questions of this sort should be considered by the Sheriff-Substitute. Against that it seems conclusive that the Sheriff-Substitute performs exactly the same function as the Sheriff-Clerk performs if a written agreement purporting to be signed by both parties is tendered to him to be recorded. The Sheriff-Clerk in such a case would plainly not be entitled or bound to inquire what the facts were, what the workmen's wages were, what his "average weekly earnings" were, or what was the true construction of the statute as applied to these facts. His duty would plainly be to record the agreement *de plano*, and that being so the position of the Sheriff-Substitute differed only in this respect, that there being here no written agreement, but only a verbal agreement, and the parties being in dispute as to whether that agreement was truly made, he (the Sheriff-Substitute) had to be satisfied before he granted his warrant that the agreement was truly in fact made.

I say nothing as to what the result would be if there were a written agreement, and if upon the face of that agreement it appeared that the compensation awarded was beyond the maximum which upon any view of the facts could be awarded to the workman under the Act. In that case a totally different question would arise. Possibly in that case the Sheriff-Clerk might refuse to record, but such a case is not likely to occur, and I reserve my opinion upon it until it does occur.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

LORD LOW had not yet taken his seat in the Division.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute of 31st January 1905.

Counsel for Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondents—Dewar, K.C.—A. Moncrieff. Agents—Drummond & Reid, W.S.

Wednesday, October 25.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

IRELAND *v.* THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH.

Burgh—Dean of Guild—Building Regulations—Height of Buildings—Side Street — Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 44 — *Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 5—*Edinburgh Improvement and Tramways Act* 1896 (59 *and* 60 *Vict. cap. ccxxiv*), *sec.* 87 (7)—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, by section 44, subsequently amended by later Acts, provides that the sanction of the Magistrates and Council is required before buildings in any existing street or court be increased in height beyond certain limits. The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), adds this proviso —"Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not, to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Provost, Magistrates, and Council of the City of Edinburgh opposed the granting of a warrant to erect buildings fifty feet high in a street which, being only 120 feet long, formed a *cul de sac* and was 40 feet wide, on the ground that their sanction (which they had refused) was necessary for building to a height exceeding the width of the street.

Held that the street was a side street within the meaning of section 34, subsection 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, and that the sanction of the Magistrates was not required.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 44, provides:—

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"Houses or buildings in any existing street or court shall not, without the sanction of the Magistrates and Council, be increased in height above the height of one and a-quarter times the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest habitable room; provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height."

The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), provides:—"Sections 42 and 44 of the Act of 1891 are hereby amended as follows:— . . . Sections 42 and 44 shall be read as if the word 'habitable' occurring therein respectively were omitted therefrom, and as if the following proviso were added to each of those sections respectively:—'Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council.'"

The Edinburgh Improvement and Tramways Act 1896, section 87 (7), provides:—"Section 44 of the Act of 1891 shall from and after the passing of the Act be read as if the words 'but in no case shall any house or building be erected, raised, or increased to a greater maximum height than 60 feet, measured from the level of the pavement to the ceiling of the highest room, without the consent of the Magistrates and Council,' had been inserted after the word 'room' first occurring in the said section."

The Edinburgh Corporation Act 1900, section 80, *inter alia*, enacts:—"Section 44 of the Act of 1891 shall be read as if the words 'above the height of one and a-quarter times' occurring in the said section were omitted and the word 'beyond' inserted in lieu of the words so omitted, unless in the case of a house or building in an existing street which may be made of the same height as the adjoining houses, but not exceeding one and a-quarter times the width of the said street."

William Adamson Ireland, proprietor of the premises No. 11 Elliot Street, Edinburgh, presented a petition in the Edinburgh Dean of Guild Court, in which he called as respondents, amongst others, the Lord Provost, Magistrates, and Council of the City of Edinburgh, and craved "warrant to remove part of the present building at No. 11 Elliot Street, Edinburgh, and erect a four-storey building with attic floor."

The height of these proposed buildings was originally to be 64 feet, but the petitioner, with the leave of the Dean of Guild, amended his petition by deleting the words "with attic floor" and lodged amended plans, which showed buildings of a height of 50 feet, being one and a-quarter times the width of Elliot Street. The petitioner's property was situated at the end of Elliot Street, which formed a *cul de sac*, being 40 feet in width, and about 120 feet in length. This *cul de sac* ran off the south side of Albert Street, the width of which was about 60 feet. The Lord Provost, Magistrates, and Council appeared as respondents, and notwithstanding the amendment made, opposed the granting of the warrant; they maintained that their sanction (which they refused to give) was necessary.

The petitioner maintained that their sanction was not necessary for the amended proposal.

The Dean of Guild was of opinion that section 44 of the 1891 Act, as amended by the subsequent Acts above quoted, should read as follows—"Houses or buildings in any existing street or court shall not, without the sanction of the Magistrates and Council, be increased in height beyond the width of the street or court in which such houses or buildings are situate, measuring from the level of the pavement to the ceiling of the highest room, but in no case shall any house or building be erected, raised, or increased to a greater maximum height than 60 feet measured from the level of the pavement to the ceiling of the highest room, without the consent of the Magistrates and Council; provided always that any existing house or building in any existing street if taken down may be rebuilt to its existing height; provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Dean of Guild granted warrant to the petitioner in terms of the prayer of the petition as amended.

The respondents appealed to the Second Division of the Court of Session.

The respondents and appellants argued—They accepted the effect of the amending statutes above quoted as being to make section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891 read as held by the Dean of Guild. The proviso added to section 44 of the said Act by section 34, sub-section 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, was inapplicable to Elliot Street. The proviso was intended and had been framed to meet such a case as occurred in the case of *Pitman and Others* v. *Burnett's Trustees* (January 26, 1882, 9 R. 444, 19 S.L.R. 411), where a building extended from a main street through to "a lane or side or back street." Though Elliot Street was a *cul de sac* it was not a side street in the sense of said proviso, which meant and should be interpreted as if it read "provided further that the height of houses or buildings parts of which," &c. The proviso was worded as a restriction, and was so intended, but the petitioner's interpretation made it a relaxation, for by

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it a building if in a side street exceeding 40 feet in width might without consent of Magistrates and Council be built above the height of 60 feet, and that, though in streets not being "lane or side or back streets," *i.e.*, in more important streets, buildings might not without consent exceed 60 feet in height.

The petitioner (respondent) argued—The amendments to section 44 of the Edinburgh Municipal and Police (Amendment) Act 1891, which were effected by the Edinburgh Improvement and Tramways Act 1896, section 87 (7), and by section 80 of the Edinburgh Corporation Act 1900, left untouched the proviso adjected to section 44, by section 34 (5), of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893. The amendment made by the Corporation Act of 1900 was somewhat unintelligible and its effect was doubtful, but assuming the Dean of Guild's reading of section 44 as amended was correct, Elliot Street being only 120 feet in length and being a *cul de sac* was a side street and fell under the said proviso, and the proposed height of 50 feet was less than one and a half times its width, which was about 40 feet. The contention of the appellants that a side street would be in a more favourable position than a larger street only applied to side streets exceeding 40 feet in width, and possibly streets exceeding this width would not be side streets, but in any event statutes in restraint of private rights were to be read strictly and against the framers, whose intentions were immaterial. Alternatively in the event of Elliot Street being held to be not a side street, the respondents pleaded—The Edinburgh Corporation Act of 1900 did not substitute the word "beyond" for the words "above the height of one and a quarter times" in the case of a building in an existing street. Elliot Street was an existing street, and the proposed building was within the limit of one and a quarter times its width.

At advising—

LORD JUSTICE-CLERK—There can be no doubt with regard to these statutes that some of their clauses have been framed in a rather awkward manner, leading to dubiety and to an interpretation being put upon the statute which possibly those who promoted it did not intend. After giving the case the best consideration I have been able to give, I cannot hold that the Dean of Guild was wrong. It seems to me that the interpretation put by him upon the clause is correct. It is as distinctly stated as possible that if a building is in a side street it may be of a height of one and a half times the width of the side street in which it is, and if any person wishes to build to a height greater than that he must have the consent of the magistrates. Now, whatever was intended by the framers of the statute, I cannot see that they have done otherwise than produce a clause under which we must hold that this building may be of a height one and a half times the width of the street, provided we are satisfied that this was a side street. Now, in the first place, that is a question of fact, and it is a question of fact for the Dean of Guild to decide. In the second place, I cannot see how this street can be held to be anything but a side street for this very simple reason, that of all streets which can be called side streets, a street which is a *cul de sac* must essentially be a side street. It cannot possibly be anything else. It leads nowhere, and no access can be got to the city except at one end. These are my views upon this matter of fact. I see no ground for holding that the Dean of Guild has gone wrong. It would be desirable that these Acts of Parliament should be put into some more intelligible shape than they are at present.

LORD KYLLACHY—I see no escape from the construction which the Dean of Guild has put upon these enactments. The intention of the clause specially in question may be open to doubt, but as to its construction I think there can be no doubt, and therefore, though with some regret, I am bound to concur.

LORD STORMONTH DARLING—I concur. It is very desirable that statutes which impose restraints on the rights of property should be worded as clearly as possible. The municipal statutes applicable to this case are not by any means models of clearness, and it may be that the intention of the framers has not been adequately given effect to, but with that we have nothing to do. The Dean of Guild has held that this is a side street, and, once that appears, there seems to me to be an end of the case.

LORD LOW—I am of the same opinion. I think it is very likely that what was intended when this clause was framed was a provision of the nature figured by Mr Guthrie. But in order that such a meaning may be gathered from the clause, it is evident that a great number of important words have to be read into the clause which are not there, and of course this is quite an inadmissible way of dealing with an Act of Parliament. As the clause stands it exactly meets the present case, because you have a side street and a house being built in a side street, and the clause says in the most distinct terms that in such a case the building shall not be higher than one and a half times the width of the street without the consent of the magistrates. The words exactly apply to this case, and I have no doubt that the Dean of Guild was perfectly right in applying them literally and allowing the lining.

The Court adhered.

Counsel for Petitioner (Respondent)—Solicitor-General (Clyde, K.C.)—W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for Respondents (Appellants)—Guthrie, K.C.—J. A. Welsh. Agent—Thomas Hunter, W.S.

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Saturday, October 28.

SECOND DIVISION.

[Sheriff Court of Aberdeen, Kincardine, and Banff, at Peterhead.

URQUHART *v.* FAIRWEATHER (URQUHART'S TRUSTEE).

Master and Servant — Parent and Child —Implied Contract — Employment of Daughter by Father—Wages—Presumption.

A daughter aged thirty brought an action against her father and his trustee acting under trust deed for behoof of creditors, in which she claimed wages *quantum meruit* (*a*) as dressmaker for three years, (*b*) as housekeeper for three years. It was proved that pursuer about seven years previous to the action had, with her elder sister (also a dressmaker) and her brother, accompanied her father when he took up business as a general merchant, and that by so doing she gave up employment as dressmaker by which she was earning 7s. 6d. a week. According to pursuer she accompanied her father because "he was to give me remuneration for my services, but he did not say how or in what way he would remunerate me," and according to her father she came "on the understanding that there would be employment for all in the business." The elder sister kept what she earned as dressmaker, but after a year married. The pursuer, who for the three years in question acted both as dressmaker and housekeeper, received no wages at any time, but only clothes, board and lodging, and pocket money. The brother got no wages but was virtually a partner. Some five years after starting the business pursuer's father said to her that if he sold the business (which he did not succeed in doing) she would be paid for her services. On no other occasion was payment mentioned, and pursuer never asked her father for wages.

Held that no definite arrangement had been proved by pursuer by which she was to receive wages from her father for her services, and that in the circumstances, which indicated a business carried on for the benefit of the family as a whole, none was to be presumed.

Opinion (*per* Lord Low) that the dictum of Lord President Boyle in *Anderson* v. *Halley*, June 11, 1847, 9 D. 1222 at p. 1227, cannot be taken as laying down any absolute or general rule as to a presumption in such circumstances.

Ann Urquhart, whose age was thirty, brought an action against her father William Urquhart, and against Thomas Fairweather, his trustee under a trust deed for behoof of creditors, granted 27th March 1904, in which she sued defenders for £257.

Pursuer averred that wages were due her by her father for serving in his shop as shopwoman and milliner from Martinmas 1896 to Whitsunday 1898 (78 weeks), and as dressmaker, milliner, and shopwoman from then till the granting of the trust deed, nearly six years (305 weeks), and as housekeeper for the three years preceding the granting of the trust deed. She further averred that a reasonable wage for these services (after deductions for board, lodging, and clothes) amounted to the said sum of £257.

This claim was in view of the triennial prescription restricted by minute to £96, being the corresponding amount for three years.

The action was defended by Fairweather, who denied that any wages were due to the pursuer, and that there was any agreement between the pursuer and her father that she should be paid wages.

The facts were as follows — Pursuer's father and mother, her brother, her elder sister and herself, had seven or eight years previous to this action resided at Pittenweem in Fifeshire. Her father and brother were gardeners there, her elder sister was a dressmaker, and pursuer herself was learning dressmaking, and as an "improver" was earning 7s. 6d. a week. On his wife succeeding to a little money William Urquhart (pursuer's father) removed to Strichen, where he bought a business as general merchant, and a house. The whole family removed to Strichen with their father, the son being taken into the business, of which he had no prior knowledge, "just to have it called 'Urquhart & Son,'" though whether he was actually a partner or not did not clearly appear.

According to the pursuer the understanding on which she accompanied her father was, "he was to give me remuneration for my services, but he did not say how or in what way he would remunerate me." Her elder sister came on the same understanding.

According to her father, after a family meeting and consultation at Pittenweem, when it was agreed they should all keep together, they came north with him "on the understanding that there would be employment for all in the business," but he did not think anything was mentioned about remuneration at that time.

For the first year or so after coming to Strichen the elder sister took charge of the dressmaking, pursuer helping at it and the drapery department. The elder sister kept what she made as her remuneration. The younger sister did not receive or ever ask for wages. She only got her board and what money she required for clothing and pocket money, which was very little.

After about a year the elder sister married and left Strichen. The dressmaking was given up for about a year, and then the pursuer took it up and took charge of it till the granting of the trust-deed—a period of about five years. It was the only successful part of the business, and she eventually had as many as four assistants. For the three years preceding this action the pursuer had also acted as her father's housekeeper, her mother having died two years before and

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having been ill for the year preceding her death.

The only occasion subsequent to leaving Pittenweem and before the granting of the trust deed, on which remuneration was mentioned between pursuer and her father was in May 1902. The business had not been doing well, and there was a proposal, which fell through, to sell it and the house. Her father on that occasion said that if the business were sold she would be paid for her services, but whether along with or after his creditors was not clear on the evidence; there was no mention of the amount she was to be paid.

The father's affairs became embarrassed in the beginning of 1904, and inquiry was made into them. In the month of March the defender Fairweather saw William Urquhart several times about his affairs, and got detailed lists from him of claims against him, including among others a claim for a servant's wages. On 21st March Messrs G. & J. M'Bain, chartered accountants, made an approximate list of liabilities from William Urquhart's books and his information, and this also included the servant's wages but made no mention of the pursuer's. The meeting of creditors was then held on 29th March, when a state of affairs was exhibited, and the trust deed signed by William Urquhart as sole partner. Up to this point there was apparently no suggestion made by pursuer or her father that she had any claim against him. When the matter was first mentioned was not quite clear. William Urquhart said he mentioned it to the defender Fairweather and to his agent Storie the day of the meeting of creditors. This was denied, and the claim was not noted though a claim for a servant's wages was noted, and also a claim by pursuer for some furniture. Fairweather stated that the first mention was on an occasion identified as 7th May. The first letter on the subject was dated 10th May.

The Sheriff-Substitute (ROBERTSON) on 10th February 1905 pronounced the following interlocutor:—"Finds in fact (1) that the pursuer is the daughter of William Urquhart, formerly merchant at Strichen; (2) that the compearing defender is trustee under a trust-deed for behoof of creditors granted by the said William Urquhart on 29th March 1904; (3) that for about seven years prior to said last-mentioned date pursuer worked for her father and assisted in his business, taking charge of a dressmaking department, and also (for the last two years) acting as housekeeper; (4) that but for the pursuer's assistance it would have been necessary for said William Urquhart, if he carried on this department of his business, to have engaged someone else at an expense of from £1 to £1, 5s. a-week; (5) that pursuer was grown-up and earning wages elsewhere as a dressmaker's improver when she came to Strichen with her father and mother and began to work for her father as above stated; (6) that when pursuer began working for her father there was no definite agreement between them that she was to be paid wages, nor was any rate of wages or terms or conditions of employment mentioned; (7) that in point of fact pursuer never asked wages from her father and received none, though she got her board and what clothing and pocket-money she required, which amounted to very little; (8) that no mention was made of this claim by the said William Urquhart when giving information as to the state of his affairs before and at the time of the signing of the trust-deed, nor for some weeks thereafter, when the claim was mentioned to the present defender: Finds, in above circumstances, that pursuer is not now entitled to claim wages as against her father's estate, and assoilzies defender Thomas William Fairweather, as trustee foresaid, from the conclusions of the action, and decerns," with expenses, &c.

The pursuer appealed to the Sheriff (CRAWFORD), who on 6th April 1905 affirmed the interlocutor appealed against.

The Sheriff held that even on the view of the law most favourable to the pursuer there was but a slight presumption in her favour, and that was displaced by the two facts "that no claim was made for seven years, and no claim was intimated at the time that the bankrupt executed a trust deed."

The pursuer appealed to the Court of Session, and argued—(1) Apart altogether from presumption, the facts and circumstances of the case justified the claim. The son was a partner or at any rate had an interest in the business, and so got no wages. The daughters had no interest in the business. The elder had been remunerated; why should not the younger, who had not waived though she had not pressed her claim. She accepted the Sheriff-Substitute's findings in fact except (6), but maintained that here there was an agreement between the pursuer and her father. This distinguished the present case from that of *Miller* v. *Miller*, June 8, 1898, 25 R. 995, 35 S.L.R. 769. It was true no rate of wages was specified. Pursuer was therefore entitled to a *quantum meruit*. (2) There was in law a presumption that where services were rendered wages were due, even in the case of relations—*Anderson* v. *Halley*, June 11, 1847, 9 D. 1222, and especially Lord President Boyle at p. 1227. True, in the case of parent and child it might be only slight—Lord Moncreiff's opinion in *Miller*. The present case, apart from the agreement above referred to, differed from *Miller* in that the pursuer entered her father's business after she was grown up, and gave up her former employment to do so. As to the Sheriff's objections—no claim was made for seven years, because pursuer knew her father's business was not prospering. It was a mere oversight of her father's that no claim was intimated at the time the trust deed was granted, and the claim was intimated within two months after. In *M'Naughton* v. *Finlayson's Trustees*, November 4, 1902, 40 S.L.R. 645, the sole question decided was that an alleged written contract was not the deed of the defender.

The defender argued — There was no definite agreement here to pay wages. It

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was the case of a family business, where all worked for its success, and in the success of which, if it succeeded, all would participate. The case was similar to that of *Miller*. The remarks of Lord President Boyle in *Anderson* were wider than necessary to decide the case, and were opposed to older decisions.

LORD JUSTICE-CLERK—It is not necessary to call for any further reply. This is one of those unfortunate cases where services have been rendered by a member of a family but no definite arrangement has been entered into as to remuneration. I quite assent to the view that in such cases to some extent there is a presumption in favour of wages being due, but the presumption is slight. The facts here are that when the daughter came to assist her father in his business she had no arrangement by which she was to receive remuneration in the form of wages. At first she was in charge of one department, and after her sister married she went to another. It seems likely that the view was that if the business was successful all the family would profit by it. In the event of their father's death, if the business had proved profitable, it would be a good thing for the family. But that there was any arrangement for wages being paid to the pursuer is not proved by the evidence. The evidence is rather to the effect that there was no such arrangement. She got board and lodging and clothing and such pocket money as she required, but no wages. I think the principle of the case of *Miller*, 25 R. 995, applies. This was a family arrangement. It may very well be that in such cases an arrangement by which services are given by the members of the family without wages is the only means of carrying on the family. There may be no profit, but there is support for the family from the business so carried on. I think here that the pursuer has no case. I come to this conclusion not without regret, but in my opinion the judgments of the Sheriffs are right and must be affirmed.

LORD KYLLACHY—I agree, and have nothing to add.

LORD LOW—I am of the same opinion. The dictum of Lord President Boyle in the case of *Anderson*, 9 D. 1222, at p. 1227, although unimpeachable when read as applicable to the circumstances of that particular case, cannot be taken as laying down any absolute or general rule. It is impossible to say that when a father is tenant of a farm or a shop which he carries on with the assistance of members of his family who receive board and lodging, clothes, and pocket-money, there is any presumption that those members of the family are also entitled to claim money wages. Indeed, my impression is that the presumption is rather the other way, although after all there is perhaps little to be gained by considering the question of presumption in such cases, because each case must be decided on its own merits. In the circumstances of this case I think the Sheriffs have come to the right conclusion.

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal.

Counsel for Pursuer — Hunter — Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for Defender—Dean of Faculty (Campbell, K.C.) — Wilton. Agents — Mackay & Young, W.S.

Saturday, October 28.

SECOND DIVISION.

[Sheriff Court of Lanarkshire, at Glasgow.

M'KINLAY *v.* M'CLYMONT.

Reparation — Landlord and Tenant — Defective House—Known Danger—Promise of Landlord to Repair Defects — Relevancy.

The tenant of a house as tutor for his pupil child, and his wife in her own interest with his consent, raised an action against the landlord to recover damages for personal injury. They averred that the ceiling of the said house was old and rotten and dangerous to the inmates; that the factor when calling for rent saw or ought to have seen the ceiling's condition; that on 10th December about two feet square of the ceiling fell; that the same day the factor was shown what had happened and urged to repair the ceiling, and "indicated that the matter would be attended to;" that relying on this assurance, and daily expecting the ceiling to be repaired, pursuers continued to occupy the house; that nothing was done; that on Thursday 15th December a further portion of the ceiling fell on the female pursuer and her daughter, aged eleven, and severely injured them.

Held that the action must be remitted to proof.

On 30th December 1904 Mrs Isabella M'Kinlay, wife of Alexander M'Kinlay, with her husband's consent, and Alexander M'Kinlay as tutor for his pupil child Mary M'Kinlay, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against John M'Clymont to recover damages for personal injuries.

The pursuers averred that the pursuer, Alexander M'Kinlay, a labourer, resided at 81 Lambhill Street, Glasgow; that the female pursuer, his wife, resided there with him; and that the defender, who resided at 91 Pollock Street, Southside, Glasgow, was the owner of the house in which the pursuers resided.

The pursuers further averred—"(Cond. 2) The house in question is a single apartment, with a small sleeping apartment off it, and is occupied by the pursuers and their young family. Pursuers, Alexander M'Kinlay and his family, have resided in said house for over four months, and defender's father, James M'Clymont, who held himself out as proprietor, and with whom pursuer, Mr

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M'Kinlay, had all his dealings, usually called for the house rent. (Cond. 3) The ceiling of the said house was old and rotten and dangerous to the inmates, and defender or his father, the said James M'Clymont, who acted as factor of pursuer's house, and for whom the defender is responsible, on the occasions of his calling for the rent, saw, or ought to have seen, that the ceiling was old and needed renewing, or at least repaired: but he negligently failed to have it renewed or repaired. The said James M'Clymont was continually about the tenement in the tenants' houses, in particular in the house of the pursuers. (Cond. 4) On the morning of Saturday, 10th December 1904, a portion of the ceiling, about two feet square, fell and gave the female pursuer and her family a severe shock, besides causing the pursuers' family great annoyance and inconvenience. Later on the same day the said James M'Clymont called at the house on his usual rounds for the rent. Mr M'Kinlay pointed out to him what happened, and urged him to have the ceiling at once repaired. The said James M'Clymont, notwithstanding that he saw the condition of the ceiling and indicated that the matter would be attended to, walked out muttering that what he wanted was rent. Mr M'Kinlay was daily expecting to have the ceiling repaired, but nothing was done. He relied on its being put into a condition of safety every moment, and accordingly he did not remove from the premises. On the Thursday following, a further fall of the ceiling took place. Large pieces of the falling plaster struck the female pursuer and the daughter Mary, a girl of about eleven years of age. It struck them on the head, neck, and shoulders, and severely injured them. They were then under the necessity of receiving medical treatment, and are so still. They are, each of them, suffering from nervous shock, and it will be a considerable time before either has recovered. The girl Mary M'Kinlay is unable to go to school, and will not be able to do so for a further considerable time. The female pursuer is unable to attend to her domestic duties, and her children suffer in health in consequence. . . ."

The defender pleaded that the action was irrelevant.

On 10th February 1905 the Sheriff-Substitute (DAVIDSON) repelled this plea and allowed a proof.

The defender appealed to the Sheriff (GUTHRIE), who on 7th April 1905 recalled the Sheriff-Substitute's interlocutor of 10th February and dismissed the action as irrelevant.

Note.—"The pursuer's averments in article 3 of the condescendence show that he was aware that the ceiling of his house was dangerous (see *Fraser* v. *Hood*, 1887, 15 R. 178, 25 S.L.R. 164, a case decided in the best days of the First Division), and yet he continues to live in it. The alleged fall of part of the ceiling, 'two feet square,' on Saturday 10th December last, was a pregnant proof of the state of rottenness which he sets forth. He is told the same afternoon by the factor that it would be attended to: but although it is not attended to, no further complaint is made, and he and his family remain in the house till another serious fall of plaster took place on the following Thursday. They still remain there, or at all events he describes himself as residing there on December 30th when this action was served, and after a summons of sequestration for rent had been served on December 22nd, and, it must be presumed, on January 25th, when the record was closed on a statement that the defender had obtained a warrant to eject the pursuer 'after a long process.' No doubt it is averred that the pursuer's wife and children could not remove on account of their health, and by reason of the *nexus* placed on the furniture by the defender's sequestration. These, perhaps, are not averments of much importance to the present question of relevancy, but point to the dilemma either that the pursuer's averments as to the dangerous and dilapidated condition of his house, or his averments as to the state of his wife and child's health, must be grossly exaggerated.

"It is enough, however, for the decision of the question of relevancy that the pursuer and his family remained in the rotten and dangerous house, which had already begun to fall about their ears, for four days, instead of betaking themselves to a place of refuge, and that without again demanding that the house should be made habitable. The recent decisions on this subject have become rather numerous and a little bewildering. Yet, I doubt not, through these cases one consistent purpose runs, viz., that men are not to get damages for injuries which they should have foreseen, and could have avoided by moderate prudence."

The pursuers appealed to the Court of Session, and argued—The pursuers had complained that the ceiling was unsafe, and the defender had undertaken to repair it. The averment that the defender's factor "indicated that the matter would be attended to" was sufficient averment of an undertaking to repair it. It was relying on this undertaking that pursuers continued to occupy the house. The present case was very like but more in pursuer's favour than that of *Shields* v. *Dalziel* (May 14, 1897, 24 R. 849, 34 S.L.R. 637), where the pursuer was held entitled to rely on the factor's promise in spite of his continued procrastination for many months. If the pursuer had removed in face of this offer to repair he would have been, on the authority of *M'Kimmie's Trustees* v. *Armour* (November 23, 1899, 2 F. 156, 37 S.L.R. 109), acting unreasonably, and probably would have been liable in damages for breach of contract.

The defender (respondent) argued—The averment in this case "indicated that the matter would be attended to" was not a sufficient averment of a promise; it fell far short of the averment in *Shields* v. *Dalziel* (*cit. sup.*), which was "undertook and promised to put it right." The shorter interval here between the promise (if it were a pro-

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mise) and the fall of the ceiling was really in defender's favour. The pursuer on his own statement had occupied the house for four months apparently without complaint; in view of this he was not entitled to rely on a mere indication that the matter would be attended to, especially if it were so urgent that the ceiling fell only five days after the complaint. The present case was analogous to the cases of *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631; *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5, 36 S.L.R. 8; *M'Manus* v. *Armour*, July 10, 1901, 3 F. 1078, 38 S.L.R. 791.

At advising—

LORD JUSTICE-CLERK—No doubt there are several reported cases in which a person has been held not to be entitled to claim damages from his landlord in respect of injury suffered owing to a defective condition of the premises. In all these cases the danger was visible and the tenant was held to have undertaken the risk of the injury which he suffered. In these cases of visible danger it also required some action on the part of the person himself to cause the accident which did the injury. That was so in each of the cases cited to us by the defender's counsel. There was some act by which the party claiming damages turned what had been a visible risk into a real danger, and doing so caused the injury to himself.

I think this case is very like *Shields* v. *Dalziel*, 24 R. 849. It is alleged that there was a dangerous condition of the ceiling, but in itself it was not such a palpable danger as to make it obvious that there was great risk in remaining in the house. It is said that the defender or his factor on his behalf "indicated that it would be attended to," and the pursuer relied on this being done. In the course of a few days the accident happened. I must say that this is much too delicate a case to allow it to be decided on mere relevancy, and that we ought to remit it to the Sheriff Court for proof.

LORD KYLLACHY—I am of the same opinion. I say nothing for or against the decisions which have been cited to us, each of which of course depended on its own circumstances. Having regard to the alleged circumstances of the present case I think it enough to say that it appears to me to be too delicate a case to be decided without proof.

LORD LOW—I agree. I think the case is a very narrow one, but I do not think it would be safe to dispose of it without inquiry.

LORD STORMONTH DARLING was absent.

The Court sustained the appeal and remitted to the Sheriff-Substitute to allow a proof.

Counsel for Pursuers (Appellants)—J. A. Christie. Agents—M'Nab & Hart, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Campbell, K.C.—Hunter. Agents—Carmichael & Miller, W.S.

Friday, July 21.

OUTER HOUSE.

[Lord Johnston.

RUTHVEN AND OTHERS *v.* RUTHVEN.

(*Ante*, vol. xlii, p. 562.)

International Law—Jurisdiction—Foreign Heritage Owned by Domiciled Scotsman—Refusal of Owner to Implement Order of Court to Convey Foreign Heritage—Motion for Order on the Principal Clerk of Court to Execute Conveyance in Owner's Name Considered and Refused.

In an action where the defender had been ordered by the Court to execute a conveyance of a certain heritable subject in Ireland in favour of the pursuers, but had refused to do so, a note craving the Court to authorise and ordain the Principal Clerk of Court to execute the required conveyance on behalf of the defender *refused*.

This was an action raised against Lord Ruthven at the instance of (1) the Master of Ruthven, and (2) Charles James George Paterson, chartered accountant, and Archibald Robert Crawfurd Pitman, Writer to the Signet, trustees acting under a certain agreement. By said agreement Lord Ruthven had, *inter alia*, undertaken to execute and deliver to the said trustees a valid and sufficient conveyance of the estate of Harperstown, in the county of Wexford, Ireland, but when called upon to do so he had refused to implement the said agreement by executing the required conveyance.

By interlocutor of the Lord Ordinary dated 30th May 1905 Lord Ruthven was ordained to execute and deliver to the trustees the conveyance required by them. Having failed to do so, and the days of charge having expired without his having rendered obedience thereto, a note was presented to the Lord Ordinary craving the Court to authorise and ordain the Principal Clerk of Court to execute the required deed on behalf of Lord Ruthven, and to deliver the same to the trustees, and further to authorise the Keeper of the Seal of the Court to affix the said Seal to the conveyance.

The Lord Ordinary refused the note.

The circumstances of the case and the arguments of the parties sufficiently appear from the opinion of the Lord Ordinary.

LORD JOHNSTON—"In this case Lord Ruthven has been, after some months litigation, by my judgment of 30th May 1905, following on a judgment of my predecessor Lord Stormonth Darling of 16th May 1905, corrected (owing to an accidental error) by their Lordships of the Inner House on 25th May 1905, ordained to execute and deliver to the trustees under the agreement of 1892, to which Lord Ruthven by his constituted attorneys was a party, a conveyance, with memorial and abstract for registration affixed thereto, of certain

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Irish real estate comprised in the aforesaid agreement. The engrossment of the conveyance, &c., which he has been ordained to execute is No. 6 of the process before me.

"The recognised form of diligence or distress to compel implement of my order has been adopted. Lord Ruthven has been regularly charged to comply with my order upon a formal extract of the judgment. The days of charge have expired without his having given obedience to the charge, and as the order is not for payment, &c., but for performance of an act within the power of Lord Ruthven and of him alone personally to perform, Lord Ruthven is now exposed to the legal compulsitor of imprisonment. He is in fact in plain contempt of Court.

"But his son and the trustees under the aforesaid agreement, who are the pursuers, not unnaturally desire to avoid the extreme, though legal and proper, course of imprisoning Lord Ruthven until he yields obedience to the Court, and accordingly, after obtaining advice from Ireland, they presented to me a note accompanied by an affidavit by Mr Henry Daniel Conner, K.C., at the Irish Bar, craving me to authorise and ordain the Principal Clerk of Court to execute the required deed on behalf of Lord Ruthven, and on his behalf to deliver the same to the foresaid trustees, and further to authorise the Keeper of the Seal of Court to affix said Seal to the conveyance and memorial.

"I regret that I do not see my way to grant this motion, and that, unless with the assistance of the Irish Courts I do not see how the pursuers are to attain their end except through the reasonable compliance of Lord Ruthven with the order of the Supreme Court of the country in which he lives, or under the compulsitor of his imprisonment.

"The difficulty which arises in the case, but which I feel convinced it is not beyond the competence of the courts of the two countries to overcome, is that Lord Ruthven is domiciled and generally resident in Scotland, whereas the property which is the subject of the required conveyance is real property situated in Ireland, with relation to which the Scottish Courts have no jurisdiction *in rem*. Were the real property in Scotland, the deadlock would be very simply removed by the application of the process of adjudication, which has existed in Scotland for several centuries. The property could, on the trustees taking out the necessary summons, be adjudged by the Court from Lord Ruthven to his trustees. The extract of the decree of Court would be an effectual equivalent of a conveyance, registerable under our system of titles to land, and become a perfect link in the progress of titles. Originating, as the process did, several centuries ago, it is somewhat more formal than the vesting order which appears now to have been adopted in England and Ireland, but as far as I can venture to read the statute to be immediately referred to, the vesting order of these countries is just the Scots adjudication writ short. But then it is not within the competence of the Scots Courts to apply their decree of adjudication to real property beyond their jurisdiction. Their decree would not form an effectual link in the progress of titles to foreign real estate.

"It would, indeed, appear at first sight to be a very reasonable escape from the dilemma that on the recalcitrancy of the defender the Court should as craved authorise and ordain the Clerk of Court or other official to sign on behalf of the recalcitrant defender. But there are two matters to be kept in view.

"First, it is a principle of all jurisdiction that a court, at least a Supreme Court, has power to see that its exercise of its jurisdiction is not rendered futile by the conduct of a party. But it will not adopt any novel method of enforcement unless the necessity is absolutely established. And in the present case I am not persuaded of the necessity, by reason that there exists the well established diligence of imprisonment in Scotland and because I am not satisfied that resort to the Irish Courts will not supplement the jurisdiction of the Scottish Courts in a manner much more consistent with the international law of real property.

"Second, the remedy asked is novel in that the course so far as I am aware has never yet been taken except under the authority of special statutes, of which there are a few examples both in bankruptcy and in entail law. I may give as one specimen the Entail Act 1882 (45 and 46 Vict. cap. 53), sec. 18, by which the Court has special statutory warrant for authorising the execution of the deed by the Clerk of Court.

"There is in Scotland no such general statutory power as has been conferred on the Supreme Court of England by the 14th section of the Supreme Court Judicature Act 1884 (47 and 48 Vict. cap. 61), which provides exactly for the present situation in England, empowering the Court to order a conveyance, contract, or other document, in circumstances such as the present, to be executed by the Court's nominee, and further provides that such conveyance, contract, or document shall 'operate and be for all purposes available as if it had been executed . . . by the person originally directed to execute . . . it." I am not prepared to say that under its recognised *nobile officium* the Court of Session could not, without statutory power, in a case of clear necessity, adopt the same course and make it effectual within its own jurisdiction, where to it would belong the power to recognise and give effect to the deed executed by its orders by its nominee as well as the deed had it been executed in compliance with its orders by the proper person. But it would depend upon the views of the courts of other countries whether such execution would receive effect when the deed came to be enforced under their jurisdiction. Where the *comitas gentium* is recognised, I think that where the person originally directed to execute the deed was clearly at the time within the jurisdiction of the court of the country ordering its vicarious execution, the courts

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of other countries would recognise it, except in the special circumstances of its relating to real property over which they alone have jurisdiction—a jurisdiction of which the courts of no country are more jealously regardful than those of Scotland.

"I therefore come to the inquiry whether the pursuers have not open to them a course more consistent with the international law of real property and having the prospect of success.

"I am not aware whether there is any analogous statute to the Judicature Act 1884, to which I have referred, applicable to Ireland. From the affidavit of Mr Conner, head 3, I gather that there is not, as he states, a practice founded not on the Act of 1884 but on the Trustee Act 1893. And as the Act of 1893 does not contain a provision so wide as the Act of 1884, I gather that the Irish Court have, in accordance with Mr Conner's statement, ingrafted upon the Act of 1893 the more extended practice of the Act of 1884.

"If this be correct, then it appears to me that the course which the pursuers should have taken if they wanted to avoid the imprisonment of Lord Ruthven was to apply to the Irish Courts for a decree conform to the decree already pronounced in Scotland, on failure to obtemper which the Irish Courts would doubtless follow their own practice of ordering a conveyance by an officer of court or other appointee. Where the subject-matter of the suit is real property within their jurisdiction, I conceive that they will hold, as would the Courts of Scotland *in pari casu*, that they have jurisdiction over the defender by reason of his being the proprietor of Irish real property in relation to that real property though he may not be actually resident in Ireland, and that they are the Court and the only Court, competent to deal with that property *in rem* and where the matter involved relates to the title to that property. But if I am wrong in my conception of the practice of the Irish Court and of Mr Conner's meaning, I think, if I may presume to interpret it, that the Trustee Act 1893 (56 and 57 Vict. c. 53), part 3, exactly meets the situation.

"If the Irish Court are not prepared to recognise my judgment as 'a judgment given for the specific performance of a contract' concerning land, &c., in the sense of section 31 of the statute, it is open to them, as it appears to me, to make their own order conform. It is then open to them under the same section to declare that any of the parties to the action are trustees of the land within the meaning of the Act, and thereupon to make a vesting order as if they had been trustees.

"To a constructive trustee under such declaration by virtue of section 31 the provisions of section 6 at once apply. And under sub-section (*b*) and under sub-section (vi) it would be open to the Irish Courts, were Lord Ruthven dealt with as I suggest, to make an effectual vesting order.

"The effect of such vesting order is provided for in section 32, and the provision is exactly applicable to the present situation. The Trustee Act of 1893, although it does not apply to Scotland, does, I understand, apply to Ireland.

"I cannot presume to speak with authority in this matter, which is one entirely of Irish law, but I am at least prepared to say that on one hand the Scottish Court will not adopt a novel practice where the recognition of their action as effectual in Ireland in the matter of Irish real property would be more than doubtful, at least until every proper step had been taken to invoke the assistance of the Irish Courts, but that on the other hand they will do anything consistent with their practice, in supplement to the action of the Irish Court, to make effectual the due rights of parties in this Irish real property, which in the present circumstances fall somewhat under the combined jurisdiction of the courts of the two countries."

Counsel for the Pursuers—Fleming, K.C. —Pitman. Agents — J. & F. Anderson, W.S.

Counsel for the Defender—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 25.

OUTER HOUSE.

[Lord Ardwall.

THE NATIONAL BANK OF SCOTLAND, LIMITED *v.* MACKIE'S TRUSTEES AND OTHERS.

Donation—Mortis causa—Deposit-Receipt—Deposit-Receipt Taken in Name of One of the Favoured Persons and of Another Person "in Trust"—Donation mortis causa or Nuncupative Will.

A person in contemplation of his death, being desirous of benefiting four persons, members of one family, took a deposit-receipt for £500 in the names of one of them and of another person "in trust." A question having arisen after his death as to whether the £500 was a donation *mortis causa* or was merely a nuncupative will, *held* (following *Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, 4 S.L.R. 184) that there was here a donation *mortis causa*, and (following *Mitchell* v. *Wright*, 21st November 1759, M. 8082) that the fact that the money had not been handed over to the persons favoured but to two persons, one of whom only was one of the donees and the other not, did not affect the validity of the donation.

Trust—Proof of Trust—Proof of Purposes of Trust—Writ.

At the request of A, B lodged with a bank a sum of money belonging to A, and took a deposit-receipt therefor in his own name and that of another person "in trust." On A's death, *held* that the deposit-receipt bearing that the sum of money was held by the persons named in it "in trust" was sufficient writ of B to establish the trust as against him, and that the

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objects and purposes of the trust might be competently proved by parole.

This was an action of multiplepoinding raised to determine how a deposit-receipt for £500 by the National Bank of Scotland, which formed the fund *in medio*, should be distributed amongst the claimants, who were (1) the testamentary trustees, and (2) certain relatives of the deceased James Mackie.

The £500 contained in the deposit-receipt was the property of the deceased James Mackie, and had been deposited upon his instructions by his brother George Mackie in the names of his said brother and his nephew Thomas Cunningham "in trust, payable to either of them or the survivor." The testamentary trustees of James Mackie claimed the money as forming part of the trust estate. Thomas Cunningham and three of his brothers and sisters claimed it as a donation *mortis causa* to them, and pleaded, *inter alia*, "(1) The said deposit-receipt having constituted an effectual donation *mortis causa* to the present claimants they are entitled to be ranked and preferred in terms of their claim."

The Lord Ordinary allowed a proof, which was mainly directed to the question of the said James Mackie's intentions as regards the division of this sum of money among his relatives, and as to whether his brother George should have any share in it.

The legal question involved in the case was whether in the circumstances established by the proof the deposit-receipt constituted a donation *mortis causa* of the sum of £500 contained in it in favour of the claimants Thomas Cunningham and the other three children of James Mackie's deceased sister, or whether it fell to be regarded as a nuncupative will or trust settlement in favour of those four persons.

The purport of the proof together with the arguments for the claimants sufficiently appear from the Lord Ordinary's opinion.

The Lord Ordinary held that it was proved that James Mackie intended that the £500 should be divided equally amongst the said four children of his deceased sister Mrs Cunningham, and further that he had made a valid donation in their favour.

LORD ARDWALL—"James Mackie, a retired coachman who apparently had saved a good deal of money, died on 28th August 1904. He had a number of relatives, but it appears both from his will and from what he said to the parties, and also to a neighbour Nathan Gibson, that there were eight of them whom he intended specially to benefit, viz., his brother George and George's three sons on the one hand, and four of the children of his deceased sister Mrs Cunningham on the other, these four being Thomas Cunningham, William Cunningham, Mrs Janet Cunningham or Watson, and James Meek, a son of Mrs Cunningham's by her first marriage. He had a will drawn up by a law-agent in regular form on 26th February 1898, and in that will, *inter alia*, he gave a double portion to the four Cunninghams already referred to in order to make up to them the sum of £50 each which they had failed to get from their deceased uncle John, who had left a legacy of £200 to their mother which lapsed by her predeceasing the testator. It is quite apparent that the testator desired an equality of division of his estate among these favoured relatives. Things were in this state when James Mackie had a paralytic stroke in July 1903, and although he could walk about a little after that yet he was for the most part bedridden up to the date of his death, and had been told by his doctor that he might die at any time. A good deal of his money had been placed on deposit-receipt with various banks, and after he got ill he seemed to become possessed of a desire to divide a considerable amount of that money between the members of the two families above referred to in his lifetime, but *mortis causa*, apparently because he hoped thereby that his estate might to a certain extent escape paying Government duties and also because he said it was too much money for his agent to handle, presumably because that would cause more expense. After his shock he went to live with his brother George in Fauldhouse and paid a board of 10s. a-week up to the time of his death. In pursuance of the scheme above alluded to, James Mackie gave George a deposit-receipt for £1000 on 4th August 1903, directing him to cash it, and with the proceeds to get two deposit-receipts for £400 each and to bring the balance of £200 back in cash. George Mackie says that he was told to take one of the deposit-receipts in his own name and that that was to be his at once, and that the other was to be taken in his own name along with Thomas Cunningham in trust payable to either of them or the survivor. George says that what was intended by this was that he should get half of the second deposit-receipt and that the other half should go to the three Cunninghams and James Meek. I do not believe this, as I think the whole evidence in the case, except George's own evidence, is against it, but I think it not unlikely that what George at first said to the Cunninghams may have been true, viz., that James Mackie agreed to George having put his name in the second receipt as he was the leading trustee under the will, and would see that Thomas Cunningham distributed it properly. According to the evidence of Nathan Gibson, a witness not interested in the result of this case, he heard George explain to his brother James that he had taken the second receipt in his own name as well as Thomas Cunningham's because he was one of the 'heid trustees' (*i.e.*, under the will), and this explanation, says Gibson, 'seemed to satisfy James.' Still James continued to refer to that receipt as Tammie's receipt. Those receipts remained in this position till 18th March 1904, when George Mackie uplifted the interest on these two deposit-receipts, amounting to £11, 15s. 6d., for the purpose of handing it to James Mackie, redeposited the £400 which was in his own name, and added £100 to it, making it £500, and redeposited

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the other £400 in the same terms as before. This £100 apparently he had got from a deposit-receipt that had been in the Bathgate bank, and this action on George's part, if we are to believe what Mrs Watson says James Mackie told her (in which she is corroborated by other witnesses), led to a disturbance between George and his brother James, with the result that George was sent back the next day to equalise the deposit-receipts by uplifting the deposit receipt for £400 which he had got the day before, adding a £100 to it, and getting a new deposit-receipt for £500 in the same terms as the old receipt for £400. This receipt for £500 is the one in dispute in this action. I have no doubt upon the evidence that what Mrs Watson says James Mackie told her was true, and that George Mackie, who I think was an unscrupulous person, was trying to get an advantage over his relatives by putting £500 in the deposit-receipt in his own name, and I think the evidence is distinctly to the effect that the £500 in name of George Mackie and Thomas Cunningham was intended for the four members of the Cunningham family above named. There is a conflict of evidence regarding the place where the second of the deposit-receipts for £500, viz., that in the joint names, was kept, and I think the weight of the evidence is to the effect that it was kept along with George's deposit-receipt in George's own drawer, and not in James Mackie's chest, and the minute of meeting of executors and others held after the death supports this, because I think that the words, "the receipt was lying in the deceased's chest" were evidently added after the minute was drawn up and signed. I think there is no serious doubt upon the evidence that the deceased James Mackie intended the contents of the one deposit-receipt to belong to George Mackie and his three sons, and the contents of the other to belong to the four children of the deceased's sister Mrs Cunningham, and although George Mackie gave his evidence with a great show of confidence and certainly very distinctly, I must say that I do not believe him. He is evidently a man of considerable ability and with a keen sense of what is for his own interest. The witnesses for Thomas Cunningham and others, on the other hand, seem to me not so clever people, with the exception perhaps of Mrs Watson, but they all impressed me with the belief that they were speaking the truth, although a little confused on some points.

"The difficulty in this case, I think, lies in its legal aspects, the question being whether the facts amount to a *donatio mortis causa* of the £500 equally to Thomas and William Cunningham, Mrs Watson, and James Meek, or whether the evidence amounts merely to an attempt on the part of James Mackie to make a will or trust-settlement in favour of these four persons, in which case it would fail except to the extent of £100 Scots.

"I am of opinion that the facts amount to a donation *mortis causa* of the £500 contained in the deposit-receipt in question to the four persons just mentioned. In the case of *Morris* v. *Riddick*, 5 Macph. 1041, Lord President Inglis defines a donation *mortis causa* to be a 'conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the granter so long as he lives subject to his power of revocation, then for the grantee on the death of the granter.'

"The principal difficulty in applying this definition to the present case is that instead of money being handed over to the four grantees, it was handed over to two persons, one of whom was one of the grantees and the other not, for their behoof, and this raises the question whether the requirements of a donation *mortis causa* are satisfied by money being handed over by a person to one or more other persons for behoof of the donee or donees. I see no reason for holding that a donation may not be made in this way. Supposing a donee to be abroad, it can hardly be doubted that the handing over of money to a person to hold for his behoof would be a valid gift of that money to the donee, and what was done in the present case was really not in an essentially different position. In the present case, although for convenience the deposit-receipt was taken in name of Thomas Cunningham, and George Mackie got his name put in too, giving as a reason to the donor that he was one of his trustees and that his name should be put into the deposit-receipt, yet the donor expressly told every one of the donees that he had given this money to them and that they were to get it at his death, that being the time when all *mortis causa* donations truly take effect. I think this point is of so much importance that I shall quote the passages of the evidence that bear upon it, as they are not very long.

"Mrs Watson says—'On that occasion' (29th July 1904) 'he said he was going to put £400 in Thomas's name to be divided among the four of us—myself, William, Tom, and my half-brother James Meek;' and again, 'he said he had put £400 in the bank in my brother Thomas's name to be divided at his death among the four of us, naming us all by name, namely, the same four as he had named on the previous occasion. He said he had put £400 in George's name too, and made both families alike.' Thomas Cunningham, whose name was in the receipt, says—'I visited my uncle James about two weeks after that' (Monday 27th July 1903). 'He was in bed on that occasion. We were alone. He told me then that he had put £400 on deposit-receipt in my name which I was to divide at his death between my brother William, my sister Janet, my half-brother James Meek, and myself. He said my sister Ann was out of it; she was not to get any, because she got a share of her uncle John's money;' and again, 'he told me about the deposit-receipt every time I was there, and always in similar language;' and again, 'he referred in the presence of the three of us to the money deposited in the bank. He told my brother William

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about it. He said that he had left £400 on deposit-receipt in my name, and he would get £100, Janet £100, James Meek £100, and £100 to myself. He told me that the receipt was in my own name alone at that time.' William Cunningham, the third donee, says—'I remember visiting my uncle James on one or two occasions after he took the illness the year before he died. I had a holiday on Saturday 12th September 1903. I went along that day. I was with my brother Thomas and Mr Watson, my brother-in-law. The three of us were all in the room together. On that visit my uncle James spoke about his money.' *By the Court*—'My uncle James addressed himself to me when he began to speak about his money. The others were sitting beside me, and he told them to sit down and they would hear what he was going to say.' *Examination continued.*—'That was the first time I had seen him after he had taken his illness. He said he had put £400 on deposit in Thomas's name. He told me I was to get £100 and my half-brother James Meek £100.' James Meek, the fourth donee, says—'After he turned ill in July 1903 I paid him some visits down to the date of his death. I saw him alone except once. He told me he had £400 put in my brother's name to be divided among the four of us.' And James Watson, the husband of Mrs Watson, says—'That was the first time' (12th September 1903) 'I had seen him since he took the paralytic stroke. He told William that he had left £400 on deposit in Tom's name, and it was to be divided into four shares, £100 for himself, £100 for Tom, £100 for my wife Janet, and £100 for Jamie Meek.'

"It will be noticed that the sum referred to in all those passages is £400, but it is sufficiently explained that £500 was substituted, and the reason why that was done. There is accordingly no doubt in my opinion that it was James Mackie's intention to make a gift of this sum of £500 to the four above-mentioned persons equally between them, and unless that intention is to be held to be frustrated by the money being handed over to George Mackie and Thomas Cunningham for their behoof instead of to themselves, the donation must hold good. I am of opinion that it ought not to be held that the donation is made of non-effect by the fact that the money was not directly handed over to the donees, and I find an authority in favour of this view in the case of *Mitchell* v. *Wright*, M. 8082, in which case a donation was sustained although the 1000 merks which constituted it had been put into the hands, not of the donees, but of their father, to be delivered to them equally betwixt them by way of gift, and the money was accordingly delivered to them about six months after the donor's death. The Sheriff in that case held the facts to amount to a nuncupative testament and effectual only to the extent of £100 Scots, but the Court recalled that decision and held that the 1000 merks constituted a donation *mortis causa*. This decision was approved of in the case of *Morris* v. *Riddick* above quoted, and indeed may be said, so far as authority was concerned, to have formed the principal ground of that decision. The fact that the money was not directly handed to the donees in *Mitchell's* case was adverted to in the Lord President's opinion in *Morris* v. *Riddick*, and without any suggestion that that fact interfered to prevent the 1000 merks being considered a donation.

"I therefore arrive at the conclusion that these two cases may be viewed as authorities for the proposition that a donation *mortis causa* may be validly made by handing over money or corporeal moveables to one person for behoof of another. The decision in the case of *Thomson* v. *Dunlop*, 11 R. 453, was strongly pressed on me as an authority to the contrary, but the facts of that case were different in several material respects from the present, and the fact that there the alleged donation was held not to be a donation at all, but a verbal appointment of an executor to administer, does not seem to me necessarily to come into conflict with holding in the present case that there was a proper donation. It was further urged, however, that the donation could not be held to be proved here because on the face of the deposit-receipt either the money fell to be divided between the two persons therein named, or assuming it to be a trust, it was incompetent to prove the objects of the trust by parole, and *separatim* that when the trustees differed in their evidence as to what was the purpose of the trust no trust could be held to be proved. I cannot assent to this reasoning. I do not regard this, strictly speaking, as a trust at all. It was the selection of two persons to hold for some others for the reasons already pointed out; but undoubtedly there was a *quasi* trust, just as it might be said that any person is a trustee who gets money to hold for behoof of another person, and taking it to be a trust in this limited sense, the question comes to be, must it be held void because the *quasi* trustees differ in their account of the objects of the trust, or can other evidence be admitted to prove what the trust purposes were. I adopt the latter view. The fact that the money did not belong in property to the persons named in the deposit-receipt is proved by the words 'trust' which follow their names, and as the deposit-receipt must be viewed as the writ of George Mackie, it follows that it is proved as against him that he held that money not for himself but for behoof of other persons. The fact of a trust being once established by writ, the objects and purposes of the trust may be proved by parole—Bell's Principles, par. 1995; Dickson on Evidence, par. 587; *Miller* v. *Oliphant*, 5 D. 856; *Wood, Small, & Company* v. *Spence*, 12 Shaw 42; and *Buchan* v. *Livingstone & Allan*, 3 F. 233. This being so, it is, as I have already said, clearly established by evidence as against both Mackie and Cunningham what was the purpose for which they held the money in question, and accordingly on the whole case, both in fact and in law, I am of opinion

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that the first plea-in-law for the claimants Thomas Cunningham and others must be sustained, and that they are entitled to be ranked and preferred to the whole fund *in medio* to the extent of £125 each in terms of their claim."

Counsel for James Mackie's Trustees as Real Raisers and as Claimants—M'Lennan, K.C.—Constable. Agent—Thomas Liddle, S.S.C.

Counsel for Claimants, Thomas Cunningham and Others—Orr, K.C—W. T. Watson. Agents—Reid & Crow, Solicitors.

Wednesday, October 18.

FIRST DIVISION.

[Lord Johnston, Ordinary.

CUTHBERTSON *v.* MAXTONE GRAHAM (LIQUIDATOR OF IRVINE AND FULLARTON PROPERTY INVESTMENT AND BUILDING SOCIETY).

Company—Building Society—Winding-up—List of Contributories—Forfeiture of Shares in case of Failure to Pay Instalments—Automatic Forfeiture of Shares Entitling a Member who had Failed to Pay Instalments to have his Name Removed from the List of Contributories.

The rules of a building society provided, *inter alia*, as follows—"16. Every member failing to pay his monthly instalments shall be fined 1d. per share for every month such instalments are in arrears, and such fines may be liquidated from the first monies paid in by the defaulter, or deducted from the amount already paid in by him, and, so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society. . . ." This rule also made provision for intimation to a member who was in arrear.

An order having been pronounced for the winding up of the society, the liquidator presented a note for settlement of the list of contributories. C objected to his name being placed on the list on the ground that he had several years before ceased to be a member of the society. It was admitted that the instalments paid by C in respect of shares were 10s. in all; that if rule 16 operated automatically, the amount of 10s. standing at the credit of C would have been extinguished by fines in 1882; and that no intimation had at any time been given to C that he was in arrear.

Held (*aff.* the interlocutor of Lord Johnston, Ordinary) that rule 16 automatically operated a forfeiture of shares; that C had accordingly ceased to be a member of the society in 1882; and therefore that his name fell to be removed from the list of contributories.

Moore v. *Rawlins*, 1859, 6 C.B. (N.S.) 289, *distinguished.*

This was a note to the Lord Ordinary for James Maxtone Graham, C.A., Edinburgh, official liquidator of the Irvine and Fullarton Property Investment and Building Society, for settlement of the list of contributories.

From the statements made in the note it appeared that on 14th November 1903 the Court, on the petition of certain creditors, ordered the society to be wound up as an unregistered company under the provisions of the Companies Acts 1862 to 1900, and appointed the petitioner to be official liquidator thereon.

The objects of the society were (1) to provide a mode of safely and profitably investing the savings of its members, and (2) to advance to its members money to erect or purchase dwelling-houses or other real or leasehold estate, or pay off burdens affecting such property.

By the 3rd article of the rules of the society it was provided that the capital of the society should be raised in shares of £25 each, payable by monthly instalments of 2s. per share, or by fortnightly instalments of 1s. per share, and by interest arising thereon.

Articles 16, 17, and 18 were as follows:—"*Article* 16. *Instalments in Arrears.*—Every member failing to pay his monthly instalments shall be fined 1d. per share for every month such instalments are in arrears, and such fines may be liquidated from the first moneys paid in by the defaulter, or deducted from the amount already paid in by him, and so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society. Intimation shall be given by the manager to every shareholder who may be in arrears for a period of not less than six months, stating the amount of his arrears then due, by letter addressed to such shareholder to his registered address, and having a postage label thereto attached, put into the post office at Irvine, when, if not paid, the notice shall be repeated every three months thereafter until he shall either pay his arrears or cease to be a shareholder, as before provided. The expense of these notices, which shall be assessed at 3d. each, to be paid by the shareholders to whom they are sent. *Article* 17. *Temporary Suspension of Instalments.*—The directors shall have power in special cases, where application is made for that purpose, and under such conditions as they may think fit, to allow members to suspend payment of their instalments for a limited period, not exceeding six months, without exaction of the before-mentioned fine. *Article* 18. *Withdrawal of Shares.*—Any member who has not received an advance on the shares held by him may, at any time after twelve months from the date of his joining the society, on giving one month's notice to the manager in form No. 4 of appendix, withdraw his instalments on such shares,

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with interest thereon at the average rate allowed by banks on open accounts since the date of last allocation of profits. Members so withdrawing shall forfeit all right to any share of the profits not yet allocated. Applications for withdrawal shall be considered and granted by the directors, and payment shall be made to such applicants as the state of the funds will permit, in the order of priority of their dates."

The note further stated that so far as the liquidator had been able to ascertain the claims of outside creditors amounted to upwards of £4100, and that he believed that these claims with the costs of the winding-up would exceed the sum likely to be realised from the sale of the security subjects and that a call upon the members would therefore be necessary. That in virtue of the provisions of sec. 200 of the Companies Act 1862 he had framed a list of contributories, consisting, *inter alios*, of *investing members who did not appear to have withdrawn from the Society*; that owing to the defective way in which the register of members had been kept, he had had great difficulty in ascertaining who were now contributories, and that he had accordingly lodged the present note in order that the list might be settled by the Court.

Objections and answers to the note were lodged by James Cuthbertson, contractor, Wellpark Road, Saltcoats, who objected to his name being placed on the list of contributories in respect that he was not a member of the society. He averred that he had never been a member of the society, but that, assuming he had been, he must in terms of article 16 of the rules have ceased to be a member many years before.

The liquidator lodged answers in which he averred that in November 1878 Cuthbertson had applied for shares, that he had paid entry-money and instalments, that he was duly entered on the register of members, that thereafter he was treated as a member of the society, that profit in respect of his shares was allocated to him up to and including the year 1886, and that no notice of withdrawal was ever given by him to the society. He further averred that the society did not enforce the 16th article of the rules in regard to the shares in question.

On 29th June 1905 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor:—"Finds that the name of the objector, the said James Cuthbertson junior, should not have been put in the list of contributories appended to the said note, No. 89 of process, and orders the liquidator to remove his name from said list, and decerns: Finds the said objector entitled to expenses in connection with his said objections and answers out of the funds of the liquidation: Allows an account thereof to be given in," &c.

Opinion.—"Under this note for settlement of the list of contributories in the liquidation of the Irvine and Fullarton Property Investment and Building Society, the objector, James Cuthbertson junior, seeks to have his name removed from the list in these circumstances.

"The shares in the society are of £25 each, payable by monthly instalments of 2s. each, or fortnightly instalments of 1s. each per share, and the rules make provision for application, registration, and issue of certificates. The voucher for payment of instalments is (article 14) to be the member's pass-book. But with regard to instalments in arrear it is provided (article 16)—(1) Every member failing to pay his monthly instalment shall be fined one penny per month for every month such instalment is in arrear; (2) such fines may be liquidated from the first moneys paid in or deducted from the moneys already paid in; (3) when the moneys paid in, or at the credit of the member, are exhausted by fines, the said amount 'shall then be forfeited to the society and carried to the contingent fund, and the member shall thereupon cease to have an interest in the society'; and (4) certain notices are provided to be given to the member in arrear, and to be repeated every three months 'until he shall either pay his arrears or cease to be a shareholder as before provided.'

"Now, James Cuthbertson is alleged to have become a member in respect of three shares in 1878, and to have paid up in all only 10s. on these shares, which, if the rule of article 16 operated automatically, would have been extinguished by fines by 1882, or, at any rate, long before the liquidation of the society commenced in 1903. But the society continued him on its register, regularly credited him with a share of profits so long as profits were divided, *i.e.*, down to 1886, sent him no notices in terms of article 16 of the rules, did not debit his account with fines, and did nothing to declare the forfeiture.

"Cuthbertson, the objector, denies his identity with the Cuthbertson registered as a member, and states other objections requiring proof. But he asks judgment on the question, which would avoid proof, whether article 16 of the rules does not work automatically, so that he ceased, *ipso facto*, on exhaustion of his payments in, to be a member of the society, and therefore cannot be settled on the list of contributories.

"The liquidator maintains that the forfeiture is not automatic, and that the society, it being solely for its benefit, may elect to exercise the power of forfeiture or not as it pleases; that the forfeiture is in fact in the discretion of the society, acting through its directors.

"The Scottish case of *Bidoulac*, 17 R. 144, decided that an analogous forfeiture in a lease was in the discretion of the landlord, and the decision in one branch of *Dalrymple* v. *Herdman*, 5 R. 847, is based on the same principle.

"Further, the English case of *Moore* v. *Rawlins*, 1859, 6 Scott's C.B. Reports (new series) 289, was quoted as having decided the very point under the rules of a building society in favour of the liquidator's contention. It is true that the rubric bears it to have been held that a similar clause operated a forfeiture of the member's

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shares only at the option of the directors: But I cannot find that the judges, except Mr Justice Byles in an interjected remark during the argument, make any reference to the point. But assuming the Court to have dealt with it as disposed of by Mr Justice Byles' remark, I cannot hold that case conclusive of the present. The building society there in question was in its constitution much more akin to a joint-stock company. All shares taken out were to be paid up to completion, and there was no provision for paying out except on a regular winding-up when the objects of the society were attained. There was no provision for retiring or withdrawing while shares were only partly paid up, as here under article 18 of the rules, or for paying out on demand where shares were fully paid up, as here under article 20 of the rules.

"*Moore* v. *Rawlins* may, I think, be quite well referred to the same principle as applies where there is a power of forfeiture of shares in a registered company for default of payment of calls—Lindley, 6th ed., p. 728. But it seems to me that the circumstances of the present case lead to an opposite conclusion. When the general scope of the rules is considered, it is found that in the Irvine and Fullarton Society it was not the intention to retain the member permanently or for a definite time. He came in and he went out at his own discretion, subject, it might be, to sacrifice or to delay. He might allow his contributions to be forfeited under article 16. He might apply to withdraw when only partly paid up under article 18, and, on notice to withdraw, any obligation under which he lay to pay instalments would appear to me to cease. He might apply to be paid out when fully paid up under article 20. And it is to be noticed that, while completed withdrawal under article 18, or completed payment out under article 20, must depend on the state of the funds of the society for the time being, it is provided that they shall be treated as on the same footing. Fully paid shares under article 20 'shall only be payable along with the withdrawals (under article 18) in their order, and as the funds will permit.'

"There does not appear to me, therefore, to be the same bond of obligation between the members of the society here as there is in the case of a registered company, or as there was in the particular society involved in *Moore* v. *Rawlins*. There is here a voluntary element which makes the relation of the member to the society severable at will, and prevents the society, in my opinion, enforcing the payment of instalments by any other compulsitor than the exaction of fines, while the incurring of future instalments can be ended on his own motive by the member giving notice of withdrawal under article 18.

"Accordingly, I cannot hold that the provisions of article 16, for determining the members' connection with the society, is for the benefit of the society merely, and requires to be declared by the society through its directors, and may be so declared or not, according to discretion. I think that the article gives an alternative in regard to the liquidation of arrears, but that, while the 'may' infers the option, it becomes 'must' as regards the choice of one or other of the alternatives, and that the working of the rest of the provision is automatic. The amount at credit, so soon as exhausted by fines, '*shall then* be forfeited,' and the member '*shall thereafter* cease to have an interest in the society.' And this is quite explicable if it is kept in mind that the society had no right of action—no means of enforcing payment of the full nominal amount of the shares—except indirectly by means of fines.

"Of course, if liquidation finds a member in arrear, but with his share still alive so to speak, the order for liquidation will fix his obligation there and then as a contributory, the provisions of article 16 will cease to be effective, and exhaustion of the sums at his credit will not liberate him from his liability as a contributory. But what the measure of that liability will be it is not for me at this stage to consider. But where the liquidation finds a member in the position of his interest having been already automatically determined, and particularly where, as here, the society has for a long series of years made no demand on the member *qua* member, and has so departed from its own regulations in dealing with the entries in its books relating to the member's shares, as they have done here, outwith his knowledge, I cannot hold that there is any ground for deciding that, contrary to the express terms of the articles, the former member has still an interest in the society, and that therefore he must be settled on the list of contributories.

"Accordingly, I shall order the name of the objector to be removed from the list of contributories, and shall find him entitled to the expenses of his objection."

The liquidator reclaimed.

A joint minute of admissions was thereafter lodged by the parties, in which, *inter alia*, the following facts were admitted:—"(2) That no intimation or notice was given by the society to the said James Cuthbertson junior, in terms of the 16th article of said rules or otherwise; (3) that the instalments paid by the said James Cuthbertson junior in respect of shares were 10s. in all; and (4) that if rule 16 operated, the amount of 10s. standing at the credit of the said James Cuthbertson junior would have been extinguished by fines about the month of April in the year 1882."

Argued for reclaimer—The Lord Ordinary was in error in thinking that the society had no right to proceed against Cuthbertson. Article 16 did not work automatically. None of the other articles did, and neither did 16. All members of the society were liable to the full extent of their means to outside creditors. No withdrawal had ever been intimated to the society. In terms of article 18 notice of withdrawal or intimation of some kind was essential—*Moore* v. *Rawlins*, May 5, 1859, 6 C.B., N.S. 289; Lindley on Com-

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panies (6th edition) 728; Buckley on Companies (8th edition) 534; *Bigg's* case, December 19, 1865, L.R. 1 Eq. 309; *North British Building Society* v. *M'Lellan*, June 23, 1887, 14 R. 827, 24 S.L.R. 600; *Bidoulac* v. *Sinclair's Trustee*, November 29, 1889, 17 R. 144, 27 S.L.R. 93.

Argued for respondent—Article 16 operated automatically and no active step was necessary on the part of either party. The case of *Moore* v. *Rawlins* was different. In that case the rule relied on (viz., rule 45) was qualified by the two immediately following rules (rules 46 and 47), which gave the directors a discretionary power. In the present case there was an entire absence of any such discretionary power. The effect of article 16 was that membership was forfeited *ipso facto* on default of payment—*Liquidators of The Scottish Savings and Investment Building Society* v. *Russell*, March 9, 1883, 10 R. (H.L.) 19, 20 S.L.R. 481; *Smith's Trustees* v. *Irvine and Fullarton Property Investment and Building Society*, November 14, 1903, 6 F. 99, 41 S.L.R. 66.

At advising—

LORD PRESIDENT—This is a case in which James Cuthbertson junior seeks to have his name removed from the list of contributories which has been made up by the official liquidator of the Irvine and Fullarton Property Investment and Building Society. This building society is constituted under a set of articles, which in general scope are not unlike the articles of similar societies which your Lordships in this Court have had occasion to consider from time to time.

The general scheme of this class of building society may be described as a method by which persons can make contributions of money, which when they arrive at a certain figure are denominated a "share." The value of the share is not payable at once but by instalments. When the value of the share is "matured," that being the expression used when the instalments *plus* the interest and *plus* any bonuses accruing arrive at the nominal value of the share, the member gets the value standing at his credit. He may interrupt the process at any time by withdrawing the share or instalment and going away with any money he has contributed *plus* interest and bonuses. Or, further, he may have impignorated his share to the society for an advance made to him in respect of his house, in which case the society hold the value of his share as it matured, and also have a security over the heritable property upon which the house was built. Such was the general scheme of the society.

James Cuthertson's name was found by the liquidator in the books of the society as a person who had applied for three shares. For many years nothing had been done upon these shares, and the whole sum paid by him amounted to 10s. on the three shares. The point is, whether he is now to be put upon the list of contributories.

Cuthbertson has put forward several defences, but he has obtained judgment from the Lord Ordinary on a defence of what may be called a purely legal character. He has got an admission from the liquidator that if certain fines had been imposed in respect of his non-payment of instalments, the fines would long ago have amounted to more than 10s., which is all he ever contributed. That being so, he says that under article 16 of the rules of the society he has long ago ceased to be a member of the society. The Lord Ordinary has given effect to this contention, and it is against his Lordship's judgment that the present reclaiming note is presented.

The reclaimer's counsel founded strongly on *Moore* v. *Rawlins*. 1859, 6 C.B. (N.S.) 289, and the commentaries on that case in the works of Lord Justice Lindley and Lord Justice Buckley. I have no doubt that your Lordships would be prepared to follow that case, because the case, in so far as it decided a general principle, is merely an illustration of the well-known maxim that a man cannot take advantage of his own wrong. Where it was provided in the articles of association of an ordinary limited company that in default of proper payment the shares belonging to a shareholder should be forfeited to the company, the Court held, I think quite rightly, that that was a stipulation in favour of the company, and that, although the company might take advantage of it, the defaulting shareholder could not take advantage of his own default so as to free himself from liability. The Court, in short, held that forfeiture was in the option of the company and not in the option of the shareholder. I am very far from throwing doubt on the soundness of that doctrine, but at the same time I think the Lord Ordinary has taken the right view when he holds that it does not apply to this case.

I ventured to give a general sketch of the arrangements of this society really in order to bring out the contrast between it and a joint-stock company. A share in a limited liability company is part of the capital, and is something which cannot be got rid of. It may be transferred to someone else, but it cannot be put out of existence. Comparing it with the so-called shares of this building society the difference is apparent. A share in this building society represented no proportionate quota of the company's capital. There might be as many shares in this society as people liked to apply for. The share here represented no more than an earmarked application for a contribution of £25. The share might never come to maturity; it might be withdrawn long before it was matured. It might either be paid back or it might be wiped out in an advance. Accordingly, though the word is the same, there is nothing more than a faint analogy between it and a share in a joint-stock company.

When I come to the rules of the society I am confirmed in this view. The article on which the question principally turns is article 16—[*his Lordship read this article*]. Monthly instalments are the only way in

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which a member is to pay his contribution, and there is no trace in the articles of any method of recovering the contribution except the provision in this article that on such failure he should be fined. The fines might be liquidated from the first moneys paid in by the member. The provision as to forfeiture seems a proceeding which is in no way akin to the case of a forfeiture of shares in a joint-stock company. It is simply one of several covenanted ways in which a person may cease to be a member of the society. The shares might be taken out before maturity, they might be exhausted by advances for building, or fines might be allowed to run up until they reached the limit of the sums paid in, and then the member's connection with the society came to an end. I think the judgment of the Lord Ordinary does not in the slightest degree trench upon what I consider the perfectly sound law laid down in *Moore* v. *Rawlins*.

LORD ADAM—I concur.

LORD M'LAREN—This society is being wound up under the Companies Acts, and there must be some rules and principles common to the liquidations of building societies and joint-stock companies, though in applying these principles we may take into consideration the peculiarities of the constitution of building societies. Your Lordship pointed out some considerations which make it difficult to apply the decisions in regard to forfeiture of shares to a case of this kind. But there are two fundamental rules which are common to both cases—(1) the question whether a man is or is not a member of the company must be fixed as at the date of the liquidation, and as if the company was a going concern; (2) when it has once been established that a person has been a member of the company in liquidation, it lies with him to show that he has ceased to be a member.

As regards article 16 of the rules of the society, it consists of two paragraphs, the second being an amplification of the first and introducing certain conditions. If we had only the first paragraph to consider, then, without difficulty, I should concur in all that the Lord Ordinary has said as to the automatic working of the article. But the second part of the article makes provision for notice being given to each shareholder who may be not less than six months in arrears, such notice to be repeated every three months until the member either pays the arrears or ceases to be a shareholder. It is argued that we must read the provision for intimation as a condition of the right given to the society to cancel the shares. It may be that if a member had not received intimation and afterwards learned that his shares had been cancelled by reason of his failure to pay his instalments, he would have a claim against the society to have his name restored. That is clear, provided the claim were made within such an interval of time as the shareholders might excusably be in arrear. But in the present case twenty years have elapsed since any communications passed between the society and the member, and no application to be restored to the register of shareholders was ever made.

In a recent case in the House of Lords one of the noble and learned Lords made the observation that *mora* was not a separate plea, but that lapse of time was of great moment in determining questions of fact, where the state of the evidence was not the same when the question came up for consideration as it was when the cause of action arose. Are we to assume that the appellant desired to continue a member, and that it was only through want of notice that he did not pay up his arrears, or are we to assume that with the assent of the society and the member the relation of membership was dissolved? It is very improbable that a member who wished to remain on the register would allow twenty years to elapse without doing anything in the nature of taking an interest in or inquiring as to his shares. No notice was sent him by the society, so that on their part also no attempt was made to claim him as a member. In such circumstances it would, in my opinion, be most inequitable to put the appellant on the list of contributories, when it is in the highest degree improbable that he could have successfully asserted his right to be a member had he been so minded. I am therefore of the same opinion as your Lordship.

LORD KINNEAR—I also concur.

The Court adhered.

Counsel for Liquidator and Reclaimer—Wilson, K.C.—Wilton. Agent—George A. Munro, S.S.C.

Counsel for Objector and Respondent—Hunter—Lippe. Agent—W. Croft Gray, S.S.C.

Thursday, November 2.

SECOND DIVISION.

SHAW'S TRUSTEES *v.* ESSON'S TRUSTEES AND OTHERS.

Succession — Trust — Uncertainty — "Such Charitable, Benevolent, or Religious Objects or Purposes within the City of Aberdeen" as the Trustees shall Institute or Select.

A testator by her trust-disposition and settlement directed that the residue of her estate should be applied by her trustees "at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select." *Held* that the bequest was void from uncertainty. *Macintyre* v. *Grimond's Trustees*, March 6, 1905, 42 S.L.R. 466, and *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212, *followed*.

Mrs Anne Adam or Shaw, residing at 31 Albyn Place, Aberdeen, widow of the late

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Lachlan Campbell Shaw, who resided there, died on 20th December 1900, leaving a trust-disposition and deed of settlement dated 11th May 1889. By said trust-disposition and deed of settlement and codicils Mrs Shaw conveyed her whole means and estates, heritable and moveable, to trustees for the purposes therein specified. She thereby, *inter alia*, bequeathed a number of legacies and annuities, and with regard to the residue of her estates she, by said trust-disposition and deed of settlement, directed her trustees as follows:—"And with regard to the residue and remainder of my said estates, both heritable and moveable, I hereby direct my trustees as under, viz.—Subject to such further bequests as I may hereafter make by any codicil hereto, I hereby appoint that said residue shall be held and invested by my trustees in their own names as my trustees, and that the whole or such part of the capital and revenue, or of the revenue only, as they may think proper, shall be applied by them at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select: Declaring that in so far as said revenue shall not be expended by my trustees annually for the purposes or objects foresaid it shall be added by my trustees to the capital of the trust funds: Declaring further, that the power of my trustees of instituting or selecting said objects or purposes shall be absolute and without appeal or power of challenge at the instance of any society, association, or body, or others, who may allege that they have an interest in said residue or in the revenue thereof."

Upon Mrs Shaw's death the question arose as to whether the directions for disposal of the residue were valid and effectual or void from uncertainty, and a special case was submitted for the opinion of the Court, the first parties to which were the trustees under Mrs Shaw's trust-disposition and deed of settlement, the second and third parties the legal representatives *ab intestato* of Mrs Shaw. The first parties contended that the directions for the disposal of residue were valid and effectual, the second and third parties that they were void from uncertainty, and neither valid nor effectual to dispose of the residue.

The questions of law submitted to the Court were—"1. Are the said directions in Mrs Shaw's trust-disposition and deed of settlement as to the disposal of the residue and remainder of her estates, heritable and moveable, valid and effectual? 2. Are the said directions void from uncertainty, and invalid and ineffectual to dispose of said residue and remainder of Mrs Shaw's estates, and does said residue and remainder form intestate succession of Mrs Shaw, falling to her representatives *ab intestato?*"

Argued for the first parties—The directions were not void from uncertainty. A testator was entitled to select a particular class or classes of individuals and objects for his bounty and then give to some particular individual or individuals a power after his death of appropriating his property to any particular individuals among that class—Lord Lyndhurst in *Crichton* v. *Grierson*, July 25, 1828, 3 W. & Sh. 329, at 338. The only question therefore was, had the testatrix here selected a class. She had. In *Macintyre* v. *Grimond's Trustees*, March 6, 1905, 42 S.L.R. 466, founded on as an adverse authority, there was no local limitation. Here there was, and that was a consideration of the greatest importance—*Miller* v. *Black's Trustees*, July 14, 1837, 2 Sh. & M'L. 866; *Hill* v. *Burns*, April 14, 1826, 2 W. & Sh. 80. Similar bequests for educational purposes had been held valid by the Court, and a bequest for charitable, benevolent, or religious objects with a local limitation was no vaguer than one for educational purposes with a similar limitation—*Ferguson* v. *Marjoribanks*, April 1, 1853, 15 D. 637; *Andrews* v. *Ewart's Trustees*, May 27, 1885, 12 R. 1001, 22 S.L.R. 660. It could not be said that the trustees here had a completely free hand, and that was the *ratio* of *Grimond*. It must be assumed that they would act reasonably.

Argued for the second and third parties—The directions were void. *Grimond*, in which all the authorities quoted above were considered, following *Blair* v. *Duncan*, December 17, 1901, 4 F. (H. L.) 1, 39 S.L.R. 212, settled the question. The words here were vaguer than in *Grimond*, "objects' or "purposes" being wider than "institutions." The so-called local limit was really no limit, as it did not apply to the objects which might be selected, but only to their *locus*. Had the trustees been confined to objects and purposes already existing in Aberdeen it might have been different. As matters stood they were free to make a will for the testator, which was declared illegal in *Grimond's* case. In *Brown's Trustees* v. *M'Intosh*, May 26, 1905, 13 S.L.T. 72, the most recent case on the subject, *Grimond*, was followed.

LORD STORMONTH DARLING—The question is whether the bequest in this lady's will of the residue of her estate to be held by her trustees and applied at their discretion from time to time "towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select" is valid and effectual, or void from uncertainty. The trustees now acting under the will support the validity of the bequest; the representatives *ab intestato* dispute it.

I am of opinion that the bequest must be held void from uncertainty. The case seems to me to be governed by the judgments of the House of Lords in *Blair* v. *Duncan* (1902), App. Cas. 37, and *Grimond* v. *Grimond* (1905), App. Cas. 124. In the former of these effect was refused to a bequest for "such charitable or public purposes as my trustee thinks proper," and in the latter to a direction to trustees to divide a portion of residue among "such charitable or religious institutions and societies as they might select." Here, as

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in both of these cases, the enumeration of the two classes of objects or purposes among which the trustees are to select is clearly disjunctive, so that they might competently apply the whole to a religious object or purpose. So far the case of *Grimond* is precisely in point.

But then it is said that the adjection of a local limit—"within the city of Aberdeen"—makes all the difference. It is unnecessary to decide whether the definition of a local area within which existing organisations were to be found would save such a bequest. Something might perhaps depend on the extent of the area; but where it is no larger than a single city, the argument would be that the class of religious organisations existing there at the death of the testatrix was a definite and ascertainable class. But this argument loses all its force when it appears that the trustees are not restricted to such religious objects or purposes as they may find in Aberdeen, but that they may "institute" any religious object or purpose at their discretion so long as they set it up in Aberdeen. This seems to me to throw the whole definition loose, and to leave the trustees free to make a will for the testatrix as were the trustees in *Grimond's* case, which, of course, is the thing struck at by the rule which makes a bequest void from uncertainty.

I am therefore for sustaining the contention of the second and third parties, and answering the questions of law as they propose.

The LORD JUSTICE-CLERK and LORD KYLLACHY concurred.

LORD LOW was absent.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the First Parties—Macfarlane, K.C.—Cullen. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second and Third Parties—Campbell, K.C.—Grainger Stewart. Agents—Boyd, Jameson, & Young, W.S.

Friday, November 10.

FIRST DIVISION.

[Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen.

ARGO *v.* PAULINE AND OTHERS.

Succession—Will—Meaning of Bequest—Description of Class—"My Relatives of Like Degree in Scotland Living at the Time of My Death."

A testatrix made this bequest—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Held that a relative in the same degree of relationship as Mr Argo, but whose home and ordinary residence were in Australia, though she happened to be in Scotland on a visit at the time of the testatrix's death, was not within the class whom the testatrix intended to benefit.

Expenses — Multiplepoinding — Appeal — Will—Uncertainty—Unsuccessful Claimant in Sheriff Court Allowed Expenses of Appeal out of the Fund in medio.

Expenses of appeal allowed to an unsuccessful claimant in an appeal from the Sheriff Court out of the fund *in medio*—there being doubt as to the meaning of the bequest, the Sheriff and Sheriff-Substitute having differed, and the action being a multiplepoinding to which the appellant had been called *nominatim*.

By a codicil to her will, dated 1st October 1889, the late Rebecca Elmslie of Philadelphia, U.S.A., who died on 20th March 1900, made this provision—"In regard to the residue of my estate I add the name of Gavin E. Argo of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Thirty-one persons, all of whom were in the same degree of relationship to the testatrix, claimed right to participate equally in this bequest. In regard to the rights of twenty-nine of these claimants there was no dispute—they being all permanently resident in Scotland as well as being all equally related to the testatrix. In regard, however, to the two remaining shares a dispute arose, the said two shares being claimed (1) by the twenty-nine claimants above referred to, equally among them, and (2) by two ladies, Isabella Janet Elmslie and Annie Elmslie, both residing in Melbourne, Australia, one of whom, however, happened to be in Scotland at the time of the testatrix's death, and the other shortly thereafter.

In these circumstances Argo raised the present multiplepoinding in the Sheriff Court at Aberdeen to have the right to the said two shares determined.

In their condescendence and claim the Misses Elmslie averred—"(Cond. 4) The free amount of residue remitted to Mr Argo for division between himself and the other claimants was £6903, 2s. 5d. To each of twenty-nine of the present claimants he has paid £215, 14s. 6d., being one thirty-second part thereof. The balance in his hands, therefore, is £647, 3s. 6d., which, with interest amounting to £12, 1s. 7d., makes up the fund *in medio*, namely, £659, 5s. 1d. Further interest has accrued thereon, and the sum consigned by the real raiser in Court amounts at this date to £663, 2s. 5d. These claimants being related to the deceased in the like degree to Mr Argo, are entitled to participate in the said bequests, and there being thirty-one claimants in all, their share of two thirty-first parts of the said sum of £6903, 2s. 5d. is £445, 7s. 2d., which amount, with interest

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thereon since August 1903, they now claim out of the fund *in medio*. (Cond. 5) These claimants have resided in Australia for many years, but the claimant Annie Elmslie was residing in Scotland on 20th March 1900, the date of the deceased's death. The other claimant, Isabella Janet Elmslie, resided in Scotland from 18th April 1900 to 27th December 1901. (Cond. 6) The deceased, being herself of Scotch origin, intended by said bequest to favour the whole of her relatives of the degree of relationship designated by the said codicil, who were likewise of Scotch origin, and these claimants are included in the class so favoured."

They pleaded, *inter alia*—"(3) On a sound construction of the said will and codicil these claimants are entitled to be ranked and preferred to the fund *in medio* in terms of their claim. (5) In any event, these claimants should be found entitled to their expenses out of the fund *in medio*."

On 13th December 1904 the Sheriff-Substitute (HENDERSON BEGG) sustained the claim of Miss Annie Elmslie to participate in the bequest, but repelled that of Miss Isabella Janet Elmslie, for the reasons stated in the following note:—"The only claimants whose right to participate is disputed are Miss Isabella Janet Elmslie and Miss Annie Elmslie. It is admitted by the former that she did not come to Scotland till after the death of the testatrix. She is therefore not entitled to participate unless the codicil can be read as if the words 'in Scotland' were dropped out (which is plainly inadmissible) or held as equivalent to some such words as 'of Scottish descent,' and I do not think that this can be held without doing violence to the plain grammatical meaning of the codicil. The case of Miss Annie Elmslie is, however, different, for she admittedly came to Scotland on 1st July 1899, and remained in Scotland till some weeks after the death of the testatrix on 20th March 1900. She therefore is one of the relatives favoured by the codicil, unless the words 'in Scotland' are to be read as equivalent to some such words as 'having a domicile of succession in Scotland.' But I see no warrant for so reading them. Whatever may have been the motive of the testatrix, I think that the words of the codicil are sufficiently satisfied by the claimant having been alive in Scotland at the time of the death of the testatrix,"

The other claimants appealed to the Sheriff (CRAWFORD), who sustained the appeal and repelled the claims of the Misses Elmslie, finding that the bequest fell to be divided among the 29 claimants above referred to.

Note.—"By the codicil in question the testatrix desires to benefit her relatives of like degree (that is, of like degree with the Reverend Gavin E. Argo) in Scotland, living at the time of her death. These words are somewhat ambiguous. But if the meaning were adopted that the legacy included and was confined to persons who happened to be in Scotland at the time of the death of the testatrix, the result would be extremely capricious. It would inevitably follow that if one member of a family of several brothers and sisters were absent for a few days in London or even Carlisle he would be cut out. It appears on the pleadings that the testatrix had relatives in other parts of the world. This clause is intended to benefit her relatives in Scotland as distinguished from others, and I think that the true meaning of the words, the most natural as well as the most reasonable meaning, is those settled in Scotland and having their home in Scotland."

The Misses Elmslie appealed.

(The claimant Miss Isabella Janet Elmslie, however, withdrew her appeal before the case was heard.)

Argued for the appellant Miss Annie Elmslie—The Sheriff-Substitute was right. This claimant was actually resident in Scotland at the time the testatrix died. That was the meaning of the words "in Scotland at the time of my death."

Counsel for the respondents was not called upon.

LORD PRESIDENT—The testatrix, who lived in America, by her will divided the residue of her estate among various persons, some of whom I suppose may have been resident in America. By a subsequent codicil she made this provision—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

Mr Argo has raised this multiplepoinding to have it judicially determined who are the persons entitled to share with him in the bequest. A variety of persons have come forward who are in the same degree of relationship as he is, and as to all of whom, with one exception, viz., that of Miss Annie Elmslie, the appellant, there is no question.

Miss Elmslie is an Australian, her home and ordinary residence being in Melbourne. She is alive and she is a second cousin of the testatrix, that is to say, of the same degree of relationship as Mr Argo.

Now at the time of the testatrix's death Miss Elmslie happened to be in Scotland on a visit of several months' duration, and she says that she is entitled to participate in the bequest because she was a relative of like degree in Scotland at the time of the testatrix's death.

There are three conditions to be satisfied to entitle a person to share in this bequest, namely, "a relative of like degree," "in Scotland," and "living at the time of the testatrix's death." Undoubtedly Miss Elmslie satisfies two of these; she is a relative of like degree, and she is alive. The whole point, therefore, turns on the condition that the persons who are to take are to be relatives of like degree "in Scotland." Does it mean merely that at the moment when the testatrix expired the persons were to be bodily present in Scotland, or does it mean some more permanent connection with Scotland which may fairly enough be expressed by the word "in"?

The Sheriff-Substitute has taken the first

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view and the Sheriff the second view. I am bound to say that without any hesitation I think the view taken by the Sheriff is right. I think that that is so not only because the effect of the other construction of the words would be fantastic and capricious—admitting those who had no connection with Scotland at all but who happened to be there by chance when the testatrix died, and excluding those who had spent all their life in Scotland but who happened on the day of the testatrix's death to be out of Scotland on a visit of, it might be, only twenty-four hours—but also because if you take the words in their ordinary sense only one conclusion is possible.

The testatrix knew that Mr Argo was a second cousin, and she knew that he lived in Scotland somewhat permanently, for she says, "Gavin Argo of Scotland." She singles out others in the same degree of relationship and in the same circumstances as Mr Argo himself, and that I think is equivalent to saying "my Scotch cousins."

I am therefore of opinion that the interlocutor of the learned Sheriff is right, and that it ought to be affirmed.

LORD ADAM—I am of the same opinion. I think the lady meant this bequest to go to her relatives living in Scotland at the time of her death.

I think that is the right view to take of the meaning of this bequest. Mr Anderson says the words must be taken as meaning my relatives actually in Scotland at the time of my death, but he does not admit that a relative whose ordinary residence was in Scotland but who happened to be out of Scotland for a few hours would be excluded. I think the view taken by the Sheriff is right.

LORD M'LAREN—There are two points which I think may be noticed. The first is, What is the time at which the class to be benefited falls to be ascertained? Parties here are agreed that it must be the time of the testatrix's death, and that would seem to be sound, as the bequest is to be shared by persons who were living at the time of her death. It would be a very arbitrary construction to hold that residence in Scotland was to be determined at one point of time and the fact of survivance at another. It is in accordance with the general practice that the opening of the succession is the time at which a bequest to a class must be ascertained.

The second point is as to the meaning and effect of the words "in Scotland," regarded as descriptive words in a legacy. The expression is elliptical, for there is no verb or participle governing the words "in Scotland," and we may supply the word "living," or "resident," or as Mr Anderson suggested, the word "present." In the absence of anything to show that mere casual presence in Scotland was intended, I think we must accept the more reasonable construction and hold that the words mean being resident in Scotland.

I do not say that a domicile in Scotland would be necessary, and if this lady had come over and taken a house in Scotland for an indefinite period she might fairly be held entitled to the benefit of the legacy. But as she came to Scotland on a visit to friends, and with the intention of returning to Australia, she cannot, as I think, be held to fall within the description of "my relatives of like degree in Scotland at the time of my death."

LORD KINNEAR—I concur.

The Court refused the appeal and affirmed the judgment of the Sheriff.

Counsel for the appellant moved for the expenses of the appeal out of the fund *in medio*.

Argued for the appellant—The codicil was ambiguous. There was a difference of opinion between the Sheriffs, and the appellant was reasonably justified in bringing this appeal. This was not a case of making one claimant pay for determining the meaning of the codicil, as the two shares would fall to be divided among all the other claimants equally. Further, this was an action of multiplepoinding, and the appellant had been called *nominatim*.

Argued for the respondents—This was not a case for expenses out of the fund. The meaning of the codicil was clear. This was just the ordinary case of a dispute between two claimants, one of whom had been unsuccessful.

The Court found the parties entitled to their expenses out of the fund *in medio*, and pronounced this interlocutor:—

> "Refuse the appeal; affirm the interlocutor of the Sheriff, dated 3rd February 1905; and decern, and remit to the Sheriff to proceed as accords: Find the appellant Annie Elmslie and the respondents entitled to their expenses in the appeal out of the fund *in medio*," &c.

Counsel for the Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Cullen, K.C.—A. R. Brown. Agents—Ronald & Ritchie, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

M'LAUGHLAN *v.* THE CLYDE VALLEY ELECTRICAL POWER COMPANY.

Process—Appeal for Jury Trial—Proof or Jury Trial—Trifling Nature of Case—No Definite Injuries Specified.

In an action of damages for personal injuries alleged to have been sustained through falling into an excavation on the side of a street made by the defenders while engaged in laying an electric cable, the pursuer, a miner, averred

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that he "sustained very severe injuries: Amongst other injuries he is suffering from very severe bruises on the chest and right down the right leg. He has also sustained a severe nervous shock. He has been confined to bed as a result of his injuries, and has been incapacitated from carrying on his work."

The pursuer having appealed for jury trial, *held*, in accordance with the rule laid down in *Sharples* v. *Yuill*, 42 S.L.R. 538, that the case fell to be remitted to the Sheriff.

This was an appeal from the Sheriff Court of Lanarkshire at Glasgow in an action of damages for personal injuries at the instance of William M'Laughlan, a miner residing at 31 Drumpark, Old Monkland, against the Clyde Valley Electrical Power Company, 52 Bothwell Street, Glasgow.

The sum sued for was £250.

The pursuer averred—"(Cond. 2) On or about Thursday 10th August 1905 the defenders were engaged laying an electric cable in Shettleston. In connection therewith they had made an excavation in the north side of Main Street there, a few yards to the east of Station Road. Said excavation, which was about four feet in depth and two and a half feet wide, was situated two feet or thereby from the footpath on the north side of said street. (Cond. 3) On said date, about eleven o'clock at night, the pursuer was on his way home from Shettleston to Drumpark, and was in the act of crossing from the footpath on the north side of said street, in order to catch a tramcar for Barrachnie, when he fell into said excavation. The night was dark at the time and the pursuer did not see the excavation, which was uncovered and without any guard rope or protection of any kind. There was no light at the excavation, nor was there any warning given to the pursuer of its existence. . . . . (Cond. 4) In consequence of falling into said excavation the pursuer sustained very severe injuries. Amongst other injuries he is suffering from very severe bruises on the chest and right down the right leg. He has also sustained a severe nervous shock. He has been confined to bed as a result of his injuries, and has been incapacitated from carrying on his work. The pursuer has suffered much on account of his injuries, and it will be a considerable time before he recovers from their effects."

He further averred that the injuries sustained by him were entirely due to the fault and negligence of the defenders or their servants, in respect that the excavation was neither covered nor fenced nor lighted; that it was the duty of the defenders and the usual course to have had the excavation securely fenced and properly lit; that the defenders, though aware of the dangerous condition of the excavation in question failed to take such precaution, and that they were therefore liable.

The defenders denied that the place was not properly fenced, and averred that "the pursuer's fall and consequent injuries (if any) were entirely due to his own fault and recklessness while under the influence of drink. The excavation was well lighted and properly and sufficiently fenced and guarded, a watchman also being in attendance, and with the exercise of ordinary care and precaution the accident could easily have been avoided."

The Sheriff-Substitute (FYFE) having allowed a proof the pursuer appealed for jury trial.

When the case appeared in the Single Bills counsel for the defenders moved the Court to send the case back to the Sheriff in accordance with the rule laid down in *Sharples* v. *Yuill*, May 23, 1905, 42 S.L.R. 538.

Argued for the defenders—The injuries alleged to have been sustained were trifling. The pursuer averred no definite injuries with the exception of an injury to his leg, which was not a serious injury. He did not aver how long he had been laid up or confined to bed, or prevented from going to his work. The case ought to be sent back to the Sheriff.

Argued for the appellant — The mere matter of amount was not conclusive — *Sharples* v. *Yuill*, *cit. sup.* The injuries sustained by the pursuer were similar to those alleged in the case of *Sharples*, and in that case an issue was allowed. The pursuer had sustained "very severe bruises" and a "severe nervous shock."

LORD PRESIDENT—I think on the face of it this is so trumpery a case that it ought to be remitted.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sent the case back to the Sheriff.

Counsel for Pursuer and Appellant—A. M. Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders and Respondents—Horne. Agents—Webster, Will, & Company, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, June 27.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Kinnear, Lord Kyllachy, and Lord Kincairney.)

TODD *v.* MAGOWAN.

Justiciary Cases—Jurisdiction—Civil or Criminal — Suspension — Competency — Sentence of Imprisonment not Authorised by Act Founded on—Summary Procedure (Scotland) Act 1864 (*27 and 28 Vict. cap.* 53), *sec* 28.

Where the Court in a suspension of a conviction in a summary prosecution for a statutory penalty under which the accused had been sentenced to imprisonment for a specified period, were of opinion that under the Act imposing the penalty it was not com-

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petent on conviction to grant warrant of imprisonment for a specified period, *held* that as the jurisdiction was civil and not criminal, as defined by sec. 28 of the Summary Procedure Act 1864, suspension of the conviction in the High Court of Justiciary was incompetent.

Justiciary Cases—Summary Procedure—Sentence — Imprisonment — Summary Procedure Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 18 (6) *and Schedule K*, 6.

Opinion that in a summary prosecution for a penalty it is not competent to grant warrant of imprisonment for a specified period in the second alternative form of warrant in Schedule K, 6, appended to the Summary Procedure Act 1864, unless the Act imposing the penalty expressly authorises such imprisonment.

Murray v. *Jones*, June 17, 1872, 2 Couper 284, disapproved.

Justiciary Cases — Jurisdiction — Review — Revenue Prosecution — Suspension — Oppression—Refusal of Adjournment—Excise Management Act 1827 (7 *and* 8 *Geo. IV, cap.* 53), *sec.* 79.

A person who had been convicted and sentenced in an Exchequer prosecution by a Court of Justices without appealing to Quarter Sessions brought a suspension, *inter alia*, upon the ground that he had been oppressively refused an adjournment and convicted in absence. *Opinion* that the suspension was incompetent.

Circumstances in which *observed* that the Justices ought to have granted an adjournment.

The Passage Vessels Licences Act 1828 (9 Geo. IV, cap. 47) enacts—Sec. 3—"If any person shall retail or sell on board any packet, boat, or other vessel employed for the carriage or conveyance of passengers from one part of the United Kingdom to another part thereof, any foreign wine, strong beer, cyder, perry, spirituous liquors, or tobacco, without having taken out such licence as is by this Act required, every such person shall for every such offence incur and be liable to a penalty of ten pounds."

The Passenger Vessels Licences Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 66), which enacts that licences for the sale by retail of intoxicating liquors on board vessels employed for the carriage of passengers from one part of Scotland to another, or going from and returning to the same place in Scotland on the same day, may be indorsed with a condition that no intoxicating liquor shall be sold on board such vessels during any voyage commenced and terminated on the same Sunday, enacts—Sec. 2—"If any person holding a licence having such a condition as aforesaid indorsed thereon shall sell . . . or shall permit to be sold . . . any intoxicating liquor on a Sunday on board any such vessel in contravention of the said condition, such contravention shall be deemed and taken to be a retailing or selling intoxicating liquors without having taken out a licence, and such person shall be guilty of an offence within the meaning of the third section of the first recited Act (9 Geo. IV, cap. 47), and shall be liable to the penalties therein provided."

The Excise Management Act 1827 (7 and 8 Geo. IV, cap. 53), enacts—Sec. 79—"No writ of certiorari or other writ or process shall be issued at the suit of any defendant out of any of His Majesty's Courts of Record in England, Scotland, or Ireland, nor shall any bill of suspension, advocation, or reduction be passed, nor shall any letter or letters of suspension, advocation, or reduction, or any other proceeding, be issued out of the Court of Session or Court of Justiciary in Scotland to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise . . . or before any justice or justices of the peace in the United Kingdom in pursuance of this Act or any other Act or Acts of Parliament relating to the revenue of Excise or any judgment thereupon."

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), enacts—Sec. 18—"In cases of conviction or judgment against the respondent in prosecutions and proceedings under this Act, the sentence of the court may be in one or other of the forms contained in the Schedule K to this Act annexed, or as nearly as may be in such form, according to the nature and circumstances of the complaint, viz. . . . (6) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment, and also in all cases where, under the authority of any Act of Parliament, such penalty is or shall be recoverable by action, civil process, or diligence, the judgment of the court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said schedule; and the warrant of imprisonment to be granted in pursuance of any such judgment may be in the said form No. 6, and shall authorise the detention of the respondent until liberated in due course of law, and in all cases where, under the authority of any Act of Parliament, such penalty is or shall be declared to be recoverable by arrestment, poinding or distress and sale, or imprisonment, or by any combination of those forms of diligence other than as above provided for, the judgment of the Court may be expressed in the said form No. 6, so far as applicable, and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in the said form No. 6."

Schedule K (6)—*Judgment for a Penalty Recoverable by Diligence*—(after form of conviction and sentence and form of warrant for

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imprisonment upon officer's report) "[*If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say:* And in respect it is inexpedient to issue a warrant of poinding and sale [*or* of arrestment, poinding, and sale], ordain instant execution by imprisonment, and grant warrant to officers of court to apprehend the said *J K*, and convey him to the prison of , and to the keeper thereof to receive and detain him for the period of from the date of his imprisonment, unless the said penalty and expenses shall be sooner paid.] [*This form only to be used where the Acts founded on authorise imprisonment for a specified period.*]"

Section 28 . . . "In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil. . . ."

James Magowan, Officer of Inland Revenue at Brechin, brought a complaint under the Summary Jurisdiction (Scotland) Acts, in the Justice of Peace Court at Montrose, against John Todd, master of the vessel "Thistle" of Dundee.

The complaint set forth that a licence for the retail of intoxicating liquors on board the "Thistle," for the period from 8th April 1904 to 31st March 1905, had been issued to Todd in terms of the Acts 9 Geo. IV, cap. 47, 4 and 5 Will. IV, cap. 75, and 43 and 44 Vict. cap. 20; that on this licence a condition was indorsed against the sale of intoxicating liquors on Sunday in terms of the Passenger Vessels Licences Amendment (Scotland) Act 1882; that Todd, holding a licence having such a condition indorsed thereon, had been guilty of an offence within the meaning of the 3rd section of the Act 9 Geo. IV, cap. 47 (the Passage Vessels Licences Act 1828), as amended by the Passenger Vessels Licences Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 66), in so far as on board said vessel during a voyage from and to Montrose, commenced and terminated on Sunday 7th August 1904, he did sell certain intoxicating liquors libelled to a passenger on board said vessel; and that for such offence he was liable to forfeit the penalty of £10 provided by the 3rd section of the Act 9 Geo. IV, cap. 47.

On 22nd September 1904, the Justices having heard the case in absence of the accused, pronounced the following conviction and sentence—"At Montrose, the 22nd day of September in the year 1904, the Justices, in respect of the evidence adduced, convict the said John Todd of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £10 sterling of penalty; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after the lapse of three days from this date; and grant warrant to Officers of Court to apprehend the said John Todd and convey him to the prison of Montrose, and to the keeper thereof to receive and detain him for the period of one month from the date of his imprisonment, unless the said penalty shall be sooner paid."

Todd without appealing to Quarter Sessions brought a suspension in the High Court of Justiciary.

The complainer in the suspension averred —"(Stat. 3) As" the owner of the "Thistle" "had arranged . . . that the 'Thistle' should be employed at the visit of the Channel Fleet in the Tyne, it was absolutely necessary for the complainer and his crew to leave Dundee on the 21st September to permit of the 'Thistle' being inspected by the Board of Trade for the necessary certificate. It was accordingly impossible for the complainer to attend the calling of the complaint in the J. P. Court at Montrose on the 22nd, and he instructed his agents to explain to the Court that he denied the charge and to move for an adjournment. The complainer's agents thereafter saw Mr Ferguson, collector of Inland Revenue, Dundee, who had granted the complainer's, certificate and explained the position of the complainer, and Mr Ferguson said that he was agreeable so far as he was concerned to the adjournment being granted. . . . (Stat. 4) The complaint was called in Court on the 22nd, and" the complainer's agent "moved on the complainer's behalf for an adjournment, and explained the complainer's position and the power which the Court had, under the Summary Jurisdiction Acts, of granting an adjournment, but the Court, who consisted of Messrs J. William Japp, Robert J. Lyle, W. F. Melvin, and James Allan, without consulting their clerk, refused the motion and insisted on the trial proceeding. . . ."

The complainer pleaded, *inter alia*—"The said pretended conviction ought to be suspended in respect— . . . 2. The refusal of the complainer's motion for adjournment was oppressive and illegal. . . . 4. The conviction is irregular and incompetent."

The respondent objected to the competency of the suspension.

Argued for the respondent—*On Competency.*—Suspension in the High Court of Justiciary was not competent in such a case as the present, which was an Exchequer prosecution—Excise Management Act 1827 (7 and 8 Geo. IV, cap. 53), sec. 79; *Evans* v. *M'Loughlan*, February 19, 1861, 4 Macq. 89; *Mackenzie* v. *Martin*, January 26, 1891, 2 Wh. 589, 18 R. (J.C.) 16, 28 S.L.R. 331, and cases there cited; *Young* v. *Townshend*,

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November 24, 1856, 2 Irv. 525; *Lazenby* v. *M'Arthur*, November 9, 1874, 3 Coup. 23, 2 R. (J.C.) 6. *On the Merits.*—(1) It was no doubt true that the Passage Vessels Licences Act 1828 did not itself authorise imprisonment, but reading together the Excise Management Act 1827 (7 and 8 Geo. IV, cap. 53), secs. 3, 28, 89, and 90, the Customs and Inland Revenue Act 1888 (51 and 52 Vict. cap. 8), sec. 8, and the Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sec. 11 (which applied the Summary Jurisdiction Acts to Revenue prosecutions), and sec. 6 (*b*), and the Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), secs. 18 and 19, the sentence pronounced here was quite competent. [The LORD JUSTICE-GENERAL referred to *Murray* v. *Jones*, June 17, 1872, 2 Coup. 284.] That case was directly in point in the respondent's favour. (2) The granting or refusing of an adjournment was a matter entirely within the discretion of the Justices.

Argued for the complainer—*On Competency.*—Notwithstanding the provisions of the Excise Management Act 1827, sec. 79, suspension was competent in this case, because what was complained of here was (1) that the sentence was wholly *ultra vires*, being a sentence of imprisonment for a specified period, where the Act founded on did not authorise such a sentence, and (2) oppression in the refusal of an adjournment under the circumstances—*Simpson* v. *Board of Trade*, February 3, 1892, 3 Wh. 167, 19 R. (J.C.) 66, 29 S.L.R. 603; Moncreiff on Review in Criminal Cases, 283–286, and authorities there cited; *Schulse* v. *Steele*, March 20, 1890, 2 Wh. 449, 17 R. (J.C.) 47, 27 S.L.R. 350; *M'Kenzie* v. *M'Phee*, January 28, 1889, 2 Wh. 188, 16 R. (J.C.) 53, 26 S.L.R. 272. The case of *Mackenzie* v. *Martin*, *cit. sup.*, did not turn upon a general rule but upon the circumstances of that case. *On the Merits.*—The refusal of an adjournment under the circumstances averred by the complainer amounted to oppression. The Passage Vessels Licences Act 1828, section 3, which was the enactment imposing the penalty here sought to be recovered, did not authorise imprisonment for a specified period. Therefore the second alternative form of warrant for imprisonment in Schedule K, 6, of the Summary Procedure Act 1864 could not competently be used. A sentence of imprisonment for a specified period had been imposed upon the complainer without any statutory authority for such a sentence. Section 3 of the Act of 1828 simply authorised recovery of a penalty of £10 as a debt. The effect of that section read along with the Excise Management Act 1827, sec. 90, the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 4, and the Summary Jurisdiction (Scotland) Act 1881, secs. 6, 8, and 11, was that this penalty was recoverable as a debt, with imprisonment as a civil debtor. The only warrant of imprisonment competent was a warrant of imprisonment in default of recovery of sufficient goods. What should have been done was to grant warrant for diligence by poinding and sale, &c., and imprisonment in default of recovery by poinding, &c.

At advising—

LORD JUSTICE-GENERAL—This is a suspension at the instance of John Todd, captain of the vessel named the "Thistle," against a conviction for a contravention of the conditions of a licence certificate granted to him under certain Acts, the contravention being that upon the steamer which was making a coast voyage on a Sunday spirits were sold. The complaint was served upon the suspender, and for perfectly good reasons he was not able to be present at the date which was originally fixed for the trial. He communicated with the prosecutor upon that matter, and was led to understand that there would be a postponement of the inquiry. But the postponement was, as matter of fact, not granted, and he was convicted without an opportunity of being heard in his own defence. I cannot disguise from myself that I think that was a somewhat hard measure upon this person in respectable circumstances at the time. He had perfectly good reasons connected with official business for being away, and I think this postponement ought to have been granted. But I am not of opinion that upon that ground we should have interfered with the conviction, because this is an Exchequer prosecution, and there are, as your Lordships are aware, and as was pleaded in the suspension, very minute provisions as to appeals under Exchequer prosecutions which in a matter of this sort I think ought to have been taken advantage of if the point were to be raised, and therefore on the question raised there I do not think the conviction could be disturbed.

But there is another objection of a more formidable nature which arises on the sentence. The conviction is given in the print, and it is in these terms—"The Justices, in respect of the evidence adduced, convict the said John Todd of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £10 sterling of penalty; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after the lapse of three days from this date, and grant warrant to Officers of Court to apprehend the said John Todd and convey him to the prison of Montrose, and to the keeper thereof to receive and detain him for the period of one month from the date of his imprisonment, unless the said penalty shall be sooner paid." Now, the section of the statute under which the conviction is sought is the third section of the Act 9 Geo. IV. cap. 47, applied to the particular case by certain other sections of other statutes which are set forth in the complaint, and which I need not specify, because they are only sections of application. The point is that the section which creates the offence and provides for the penalty of £10 does not authorise any imprisonment, and does not provide any method for recovering the penalty. Accordingly, when we turn to the Summary Procedure Act of 1864, under

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which these proceedings are brought, the section which deals with these matters is section 18, and there are various sub-sections. I do not read the earlier sub-sections because your Lordships are familiar with them, but it is sufficient to say that they provide for a variety of cases which are not this. And then we come to sub-section 6, and the beginning of sub-section 6 is this—"In complaints for the contravention of any Act of Parliament, under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment." Now that is the case on hand. Then the section goes on to say—"The judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said schedule," (namely Schedule K) and I ask your Lordships' particular attention to these words—"and the warrant of imprisonment to be granted in pursuance of any such judgment may be in the said form No. 6, and shall authorise the detention of the respondent until liberated in due course of law." I need scarcely point out to your Lordships that here there is no authorised detention until liberated in course of law, but, on the contrary, there is a specified term of imprisonment. The prosecutor has been probably, I think, misled here by the construction of Schedule K in regard to No. 6, and also by a judgment which I shall have occasion to comment on in a moment. Going back to form No. 6—that is the authorised form—form No. 6 provides for the penalty and for the authorisation of poinding, and then there is a warrant of imprisonment to be granted to the Officers of Court on their seeing that the penalty has not been recovered under the arrestment and poinding. And that is an echo of what the statute said, viz.—authorising the detention of the respondent until liberated in due course of law; because the form is "grants warrant to Officers of Court to apprehend the said J.K., and convey him to the prison of , and to the keeper thereof to receive and detain him until liberated in due course of law." Then there is an asterisk appended to that form of the schedule which is, "If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say." And then comes the warrant which is incorporated in the sentence in this case, but there is an addendum at the end of it—"This form only to be used where the Acts founded on authorise imprisonment for a specified period." Now of course it is quite clear that the Act here founded on does not authorise imprisonment for a specified period, and accordingly I should have thought that perfectly clear had it not been for the judgment in *Murray* v. *Jones*, which is reported in 2 Couper, p. 284, in which the late Lord Moncreiff in giving the leading judgment of the Court held that "authorise" was equivalent to "did not exclude." Of course we are in a position, having sat here as a larger Bench, to review that judgment, and I am bound to say I do not think it can be supported. Doubts are thrown on it in a text book written by Lord Moncreiff, now no longer with us on the Bench, and I think the doubts there expressed are well founded. After one reads the judgment of the late Lord Moncreiff in *Murray* v. *Jones* it is perfectly clear—for his Lordship so expresses it—that he came to the conclusion he did because he thought that if you read the word "authorise" in its natural sense, then there would be no prosecution under sub-section 6 to which the form with the asterisk could apply. In coming to that conclusion I think his Lordship omitted for the moment to read the latter portion of sub-section 6. If the form of sub-section 6 was limited to the portion I have read, that proposition would be true; but sub-section 6 not only deals with a case such as this where there is no special provision made for the recovery of the penalty or substitution of imprisonment, but it also goes on to deal with cases—I am now reading the concluding portion of sub-section 6—"In all cases where, under the authority of any Act of Parliament, such penalty is or shall be declared to be recoverable by arrestment, poinding or distress and sale, or imprisonment, or by any combination of those forms of diligence other than as above provided for, the judgment of the Court may be expressed in the said form No. 6 so far as applicable; and no warrant of imprisonment shall be issued after a judgment in such form until after the period allowed for execution by arrestment or poinding except in the event mentioned in the said form No. 6." So that it is quite clear that what I might call the latter or alternative portion of the schedule of the form No. 6 is really applicable and useful to the concluding portion of sub-section 6 and not to the first portion at all. That being so, it seems to me that this conviction is clearly bad.

But while I think that, at the same time it has a somewhat peculiar result, which is this, that if you turn to sec. 28 of the Summary Procedure Act it seems to me to be perfectly clear that having arrived at the view that I have done on the conviction, the complainer here has mistaken the Court for his remedy. Under sec. 28 it is perfectly clear that this conviction ought to have been attacked by civil suspension, because the criterion under sec. 28 which determines civil and criminal review goes not according to what is done but according to what ought to be done or can be done by the magistrate; and, considering as I have done what ought and could be done under this section, I am at once led to the conclusion that the suspension here is civil.

The result of course would be that I do not think this Court has jurisdiction to quash the conviction, but as at the same time I think the conviction undoubtedly

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bad, and as sitting in another Court I would be prepared to suspend the conviction to-morrow, I put it to the Solicitor-General, as the Court has held so strongly as to this person not having a chance to defend himself, whether he would not undertake to recommend the Crown to repay the fine and make a moderate award of expenses.

LORD JUSTICE-CLERK—Your Lordship has expressed the view I entertain most fully, and I have nothing to add.

LORD KINNEAR—I agree.

LORD KYLLACHY—I entirely agree.

LORD KINCAIRNEY—And I agree.

The Court refused the suspension.

Counsel for the Complainer—T. B. Morison. Agents—Elder & Aikman, W.S.

Counsel for the Respondent—Solicitor-General (Salvesen, K.C.)—Young. Agent—Solicitor of Inland Revenue.

COURT OF SESSION.

Wednesday, October 25.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

KENNEDY *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway—Agreement—Siding—Agreement "to Maintain and Uphold in Full Efficiency"—Question whether Obligation Confined to Structural Maintenance of Siding or whether it Extended to the Working of the Siding as well.

By agreements dated in 1858 and 1878 between A (the proprietor of an estate) and a railway company, the company undertook "to maintain and uphold in full efficiency in all time coming" a siding of the said railway for the accommodation of A and his tenants.

In 1905 A raised the present action against the company for decree (1) that they were bound to accept delivery at the said siding of all parcels, goods, merchandise, &c., duly tendered by him or his tenants, and (2) that they were bound to do everything necessary to maintain and uphold the said siding in full efficiency, and in particular to supply a sufficient staff of servants, plant, machinery, waggons (including a "sundries" waggon when required), as well as a crane, for use at the said siding.

Held that the agreement referred only to the structural maintenance of the siding and works connected therewith (which were not alleged to be inefficient), and did not extend to the working of the siding or to questions as to facilities for traffic, and action *dismissed*.

Opinion (*per* Lord President) that such an agreement could not be expiscated by *contemporanea expositio*.

Lytton v. *Great Northern Railway Company* (1856), 2 K. & J. 394, *followed*.

Railway—Jurisdiction—Court or Railway Commissioners—Siding—Agreement "to Uphold and Maintain in Full Efficiency"—Construction of Agreement.

Held that the question whether a siding was or was not being maintained in full efficiency in the sense of an agreement was one of construction of the agreement, and so within the jurisdiction of the Court of Session.

Opinions that questions of proper railway facilities were not for the Court but for the Railway Commissioners.

This was an action at the instance of John Campbell Kennedy of Dunure, proprietor of the estate of Dunure, Girvanmains, and others, in the county of Ayr, against the Glasgow and South-Western Railway Company.

The pursuer averred that in connection with the construction of the Maybole and Girvan Railway a minute of agreement was entered into between the then proprietor of the said estate on the one hand and the Maybole and Girvan Railway Company on the other, by which it was, *inter alia*, provided that the company should make and maintain in full efficiency a siding of the said railway for the accommodation of the proprietor of Girvanmains and his tenants.

By a further agreement, dated 2nd and 4th February 1878, between the defenders (who by that time represented the said Maybole and Girvan Railway Company) and the said proprietor, the defenders acquired additional land, and agreed to fulfil the obligation in his favour, as follows:—"The company agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding (*i.e.*, the Bridgemill siding), with a suitable and convenient access thereto from the Kirkoswald turnpike road, but with power to them, if they see fit, to deviate the said siding and access, but so that the deviated access shall join the said Kirkoswald turnpike road at the point where the present access joins that road, and that for the accommodation of the proprietor of the estate of Girvanmains and his tenants, and also the public, if and when the company so incline."

The pursuer further averred that in 1873 the proprietor of Dunure raised a question with the defenders as to their not maintaining the said siding for his tenants in the sense of the first agreement, that ultimately it was agreed that the siding should be worked by the defenders, and that it should be available for the carriage of merchandise, parcels, goods, produce, minerals, and stock belonging to the proprietor and his tenants; that thereafter matters worked smoothly between them until a new stationmaster was appointed to Girvan station, who declined to receive small

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parcels of goods from the pursuer's tenants, and threatened to charge extra rates for their carriage; that since then the defenders had declined to furnish a sundries waggon for the despatch of goods, or to accept receipt at the siding of small parcels of goods duly tendered for consignation except upon payment of prohibitive rates, and that they refused to supply a crane for use at the siding.

The pursuer further averred—"(Cond. 6) In order to maintain the said siding in full efficiency in the sense of said agreement, and in accordance with the practice following upon it which prevailed between the pursuer and defenders prior to 1902, it is necessary that a sundries waggon should be made available at least once daily for the purposes of the traffic in small consignments of merchandise. A crane for use in connection with heavy traffic is also essential. Contrary to the said agreement the defenders leave the siding between the hours of 8 and 9 a.m. and 1 and 2 p.m. without anyone present during these hours for the receipt and despatch of traffic, and this has occasioned considerable inconvenience to the pursuer and his tenants. At all sidings on the defenders' system (in common with those of the other railway companies) which are maintained in full efficiency, a sundries waggon is provided at least once daily, and a crane is also set up for convenience in loading and discharging heavy merchandise, and at least one man is present in charge of the siding during the ordinary business hours of each lawful day. In particular, at the defenders' siding of Clune, near Monkton, where the traffic is insignificant compared with that of Bridgemill, an engine and van are sent out from Monkton station at least once daily, and the defenders accept and forward and deliver all goods from the smallest parcels upward. (Cond. 7) As the defenders, in breach of the obligations under the said agreement, and the practice following thereon, refuse to provide a sundries waggon once daily for small parcels, to keep attendants at the siding during ordinary business hours, and to furnish a suitable crane for the siding—these being necessary to the maintenance of the siding in full efficiency—this action has become necessary."

In answer the defenders denied that the siding had not been maintained by them in full efficiency in the sense of the agreement, or that they had failed to attend to the regular working of the traffic at the siding.

They further averred—"(Ans. 6) The defenders have a man at the siding who does all that lies upon them in connection with the siding. He is off from eight to nine in the morning for breakfast, and from one to two in the afternoon for dinner. The attendance of a man at the siding during these hours is not required for the work at the siding. (Ans. 7) None of the provisions mentioned are necessary for the maintenance of the siding in full efficiency within the meaning of the agreement. Further, they are not required for the proper working of the siding—a matter not dealt with in the agreement. Explained that until the raising of the present action the pursuer had made no demand for a crane. Explained that the defenders are willing to provide a sundries waggon once daily at the siding, provided the pursuer guarantees daily traffic, and that such traffic will either amount to a full truckload or will be paid for as such. They are also prepared to keep a man at the siding during the whole day whenever the traffic warrants it. The defenders are also prepared to erect a crane when the traffic warrants it, or to give facilities to any trader for the erection of a crane if they find it necessary to have one."

The conclusions of the action were, *inter alia*, as follows:—"(*First*) that . . . the defenders were bound to maintain and uphold in full efficiency in all time coming the siding known as Bridgemill siding, situated on the defenders' line of railway, and that for the accommodation of the pursuer and his tenants of the lands of Girvanmains; and (*Second*) that the defenders were bound to receive or accept delivery at the said siding of all parcels, goods, merchandise, produce, or stock duly tendered by the pursuer, his tenants, or others acting under his authority, and timeously transmit the same on being paid for the carriage thereof the ordinary rates legally exigible therefor, according to the weight and character of same, and the defenders ought and should be decerned and ordained by decree foresaid to do every act or deed necessary to maintain and uphold the said siding in full efficiency, and in particular to provide a staff of servants or employees reasonably sufficient to arrange for the despatch and receipt of traffic at said siding during the usual business hours on every lawful day, and to supply thereat sufficient plant, machinery, engines, waggons, and whole appliances necessary for this purpose, and without prejudice to said generality the defenders ought and should be decerned and ordained by decree foresaid to supply a sundries waggon when required for the transmission of all parcels of merchandise and goods, and especially of parcels of small size or weight at said siding at least once daily, or at such further or other times as may be determined in the course of the process to follow hereon as may be necessary for the due and reasonable maintenance of the traffic of the pursuer and his said tenants at said siding, to station at least one of their servants at said siding for the receipt and discharge of traffic during the hours from 8 a.m. to 9 a.m., and from 1 p.m. to 2 p.m. on every lawful day, and to erect or provide on a convenient site at said siding a good and sufficient crane, with all the necessary appliances thereof, capable of being used for the discharge of all heavy goods, merchandise, or produce duly consigned to the said siding for the pursuer and his said tenants, or for receipt of such heavy goods, merchandise, or produce duly tendered to the defenders at said siding by the pursuer and his said tenants."

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The pursuer pleaded—"(2) In respect it is necessary for the maintenance of said siding in full efficiency in the sense of said agreements that the defenders should work the siding at all reasonable times, that a sundries waggon should be transmitted daily thereto, and that a crane should be erected thereat, the pursuer is entitled to decree of implement in terms of the conclusions of the summons."

The defenders pleaded—"(1) The first declaratory conclusion being unnecessary, and the Court having no jurisdiction to deal with the other conclusions, the action ought to be dismissed. (2) The action as laid is incompetent. . . . (4) The defenders having made and maintained said siding in a state of full efficiency, and any question as to the working of the siding being outside the agreement, the action ought to be dismissed."

On 8th July 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Repels the first and second pleas-in-law for the defenders, and before further answer allows to the parties a proof of their averments, said proof to proceed before the Lord Ordinary on a day to be afterwards fixed, reserving all questions of expenses."

Opinion.—"The principal question which has been argued before me is whether the obligation 'to maintain and uphold in full efficiency in all time coming a siding of the said railway for the accommodation of the proprietor of the estate of Girvanmains and his tenants' undertaken by the defenders in the minute of agreement between the Maybole and Girvan Railway Company and the pursuer's author dated May 1858, and the subsequent agreement between the defenders and the pursuer's author, dated 1878, is an obligation confined to the structural maintenance of the siding and works connected therewith, or whether it extends to and includes the working of the siding in an efficient manner. It was argued for the defenders that it had been decided in the case of *Sir E. B. Lytton* v. *The Great Northern Railway Company*, 2 K. and J. 394 (1856), that the words 'construct and maintain,' as applied to a siding, meant structural maintenance only, and that the addition of the words in the agreement under consideration 'in full efficiency' merely qualified the obligation of structural maintenance, and that accordingly there was nothing in the said agreement applicable to the working of the siding. It was admitted for the pursuer that he had no ground for complaint regarding the structural maintenance of the siding in question, and the result is that if the defenders' construction of the contract is sound the action would fall to be dismissed as irrelevant. I am not prepared to accept the defenders' construction of the agreement. In the case cited no such words occur as 'in full efficiency,' and my opinion is that these words put a meaning on the obligation to maintain and uphold, and show that it includes both structural and working maintenance. The words 'in full efficiency' are, I think, wholly inapplicable to structural maintenance; indeed they are absurd when applied in such a way. Any conveyancer would smile at a draft lease which purported to lay an obligation on a tenant to maintain the farm, houses, and buildings 'in full efficiency,' and the very etymology of the word 'efficiency' shows that it is inapplicable to the mere maintenance of a material structure. I am accordingly of opinion that the obligation under consideration binds the defenders to maintain the siding, both as regards structure and working, in an efficient condition, that is, so as to make it in all respects efficient for the conduct of such goods traffic as is proper to a siding of that description.

"But the defenders further maintained that assuming that what I have above said to be the true construction of the agreement, the question of efficient working of the siding in the particulars concluded for by the pursuer is a question not for this Court but for the Railway Commissioners, on the ground that it is really a question as to what reasonable facilities should be given to traders at that siding by the defenders, and that in such a question the Railway Commissioners have an exclusive jurisdiction. I may say at once that my own view is that the questions presently at issue between the parties are exceedingly suitable for the decision of the Railway Commissioners, but the parties have not chosen to submit these questions for the decision of that tribunal, and I am unable to hold that the jurisdiction of this Court is ousted, or that I am entitled to send the questions at issue in the present case to the Railway Commissioners for their decision. I may refer to the case of the *Barry Railway Company* v. *Taff Vale Railway Company*, L.R. 1895, 1 Ch. D. p. 128, where it was held in a matter similar to the present that the Railway Commissioners had no exclusive jurisdiction, and that the jurisdiction of the ordinary courts of law was not ousted. But further, I have doubts as to the competency of the Railway Commissioners to deal with the present questions, because the pursuer is not here asking as a member of the public for reasonable traffic facilities; he is claiming his rights as an individual under a private agreement with the defenders. Beyond deciding as I have done on the general construction of the agreements I do not think it right to go further at present in deciding upon the relevancy of the action. Without a proof I am not prepared to say that under the said agreements the pursuer is entitled to succeed in the specific demands he makes in the summons. Further, the second of the two agreements above alluded to proceeds on the narrative that the siding mentioned in the first agreement was constructed 'and is now being worked and maintained by the company,' and then the first article provides as follows—'the company (*i.e.*, the defenders) agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding.' I think that considering this clause it is only

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right that before deciding further on the relevancy of the action there should be a proof to show (first) what construction the parties themselves put upon the agreements as shown by the past working of the siding, and (second) for what kind of traffic and to what extent it is reasonable that the defenders should provide facilities at the siding in question. To illustrate what I mean I may say that it would appear to be doubtful for instance whether the defenders were bound to provide facilities at the said siding for ordinary parcel traffic, and whether the traffic at the siding was so large as to make it reasonable that the defenders should keep two men constantly at said siding simply to avoid the slight interruption between 8 and 9 a.m. and 1 and 2 p.m. when the single man whose services as a rule would appear to be enough was absent at his breakfast and dinner.

"I accordingly think the proper course is not to deal with the defenders' third plea at present, but to allow a proof before answer."

The defenders reclaimed, and argued—They were not bound to do more than maintain the physical structure of the siding. A proof was unnecessary, for the real question was as to the construction of the agreement. The case of *Lytton* v. *The Great Northern Railway Company*, 1856, 2 K. & J. 394 (cited by the Lord Ordinary), was in favour of the reclaimers. Any inquiry as to the practice was irrelevant. The action should therefore be dismissed. Questions in regard to the working of the siding, or as to the provision of proper facilities for traffic, were for the Railway Commissioners and not for the Court—Railway and Canal Traffic Acts 1854 (17 and 18 Vict. cap. 31), secs. 2 and 3; 1873 (36 and 37 Vict. cap. 48), sec. 6; and 1888 (51 and 52 Vict. cap. 25), sec. 8. [The Lord President referred to the case of *Cowan & Sons, Limited* v. *North British Railway Company*, March 19, 1901, 3 F. 677, 38 S.L.R. 514.]

Argued for the respondent—The agreement referred both to the structure and the working of the siding. It had not been maintained in full efficiency. Evidence as to the working would be competent evidence, in the light of which the Court might construe the agreement. In *Lytton's* case (*ut supra*) proof was allowed. The Lord Ordinary had only allowed a proof before answer and the Court would not readily interfere with a limited allowance of proof. The question as to the efficiency of the siding was one for the Court and not for the Railway Commission—*Darlaston Local Board* v. *London and North Western Railway Company* [1894], 2 Q.B. 694; Brown and Theobald on Railways, p. 112.

At advising—

Lord President—In the year 1858 the Maybole and Girvan Railway Company wished to make a deviation from the precise line which had been authorised by Act of Parliament, and in order to do so they entered into an agreement with the Right Honourable Thomas Francis Kennedy and Primrose William Kennedy, who were at that time infeft proprietors of the estate of Dunure, so as to obtain land for the deviation. The first article of that agreement was in these terms—"The said first party hereby agree to purchase land for and at their own expense to make at the same time that the main line of railway is constructed, and to maintain and uphold in full efficiency in all time coming, a siding of the said railway for the accommodation of the proprietor of the estate of Girvanmains and his tenants, and also, if the first party so incline, and when they so incline, the public to be admitted to the use of the said siding, which siding shall be made conform to the plan thereof signed as relative hereto, and any details as to the execution of the said plan, in the event of difference arising between the parties, are hereby referred to the decision of the arbiters after-mentioned, in the same way as the accommodation works for the said estate of Girvanmains."

In 1878 the Glasgow and South-Western Railway Company, who by this time had become vested in the undertaking of the Maybole and Girvan Railway Company, wishing additional land, entered into an agreement with the Right Honourable Thomas Francis Kennedy of Dunure, who was then heir of entail in possession of that part of the estate called Girvanmains, which agreement recites the old agreement of 1858 and states that in pursuance of the said agreement the siding had been constructed by the company, and this agreement goes on to stipulate in section 1 thereof—"The company agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding, with a suitable and convenient access thereto from the Kirkoswald turnpike road."

The present action is brought by Mr Kennedy of Dunure, who is the present proprietor of the estate and in right of the agreements above mentioned, and it embraces several conclusions directed against the Railway Company. The first conclusion is a mere echo of the words of obligation which I have read, but the further conclusions particularise the various things which the pursuer conceives he is entitled to have the Railway Company decerned to do. Summarising these conclusions in popular language, without reading them, I think they come to this, that the pursuer asks your Lordships to declare that the Railway Company are bound to receive and accept delivery of all goods tendered to them at the said siding, to transmit them at ordinary rates, and to provide a sufficient staff of servants and employees at the siding, which staff should be present at the siding, at least to the extent of one man, during the period from 8 a.m. to 9 p.m.; to arrange that from the siding there should every day be despatched what is called a "sundries" waggon for small parcels, and to provide the siding with a crane.

The Lord Ordinary has allowed parties proof of their averments before answer, and

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against that interlocutor the defenders, the Railway Company, have reclaimed, their contention being that the obligation in the agreements upon a proper construction of them is limited to the maintenance of the structural efficiency of the siding, and that as the pursuer does not make any averment that the siding itself is structurally inefficient, the demands made and the conclusions which I have summarised are really irrelevant demands.

Before I come to consider what is the true construction of the obligation, it may be as well to inquire what was the position of parties under the general law of the land in 1858. At that time two statutes had been passed which deal with these matters. There was the Railway Clauses Act of 1845, which in section 69 provides that any person who has lands adjoining a railway company's line may ask for a junction with that line, and an opening through the hedges or boundaries of the railway, in order to put traffic upon the railway. And there was also passed the earliest of the series of Traffic Acts with which your Lordships are familiar, namely, the Act of 1854, which made certain provisions as to the obligations upon railway companies to afford reasonable facilities in favour of the public for forwarding traffic. It therefore becomes apparent that, that being the state of the law, undoubtedly the proprietor of Girvanmains got something under this obligation more than he was entitled to under the general law. That something more he got whichever view of the agreement we take, because upon the narrower view he certainly got this, that whereas under the general law if he wanted a siding he would have to make the siding for himself at his own expense, and would merely be entitled to demand a connection from the Railway Company; under the agreement the whole of the expense of the making and maintenance of the siding falls upon the Railway Company—he in fact being really paid for the land on which the siding itself was to be made. Of course I am not meaning that there may not be a *quid pro quo* in other stipulations of the contract. The result of this examination shows this, that we are just brought back to the question of what is the proper construction of the words used, because I do not think we gather any light from finding what people were entitled to at that time.

Now, when I come to the words, it is the fact, as noticed by the Lord Ordinary, that there was a case decided by the high authority of Lord Hatherley, when he was Vice-Chancellor Sir William Page Wood, reported 2 K. and Johnstone, p. 394—*Lytton* v. *Great Northern Railway Company*. The words of obligation which were there used and upon which the controversy arose were singularly like the words we have here. The words of obligation there were that it was agreed between the parties that the Great Northern Railway Company should make, form, and construct and thereafter maintain a siding connected with their railway, "together with all necessary approaches thereto for public use, for the reception and delivery of goods, wares, merchandise, and other matters and things to and from the surrounding neighbourhood, including tenants and other persons on the estate of the said Sir Edward Bulwer Lytton." The parties quarrelled as to what under that obligation the railway company were bound to do and put up. The railway company said that they did enough if they made an ordinary siding with approaches, but the other party asked that certain things, which he said were the ordinary concomitants of a siding, such as sheds and so on, should be put down, and he also asked for certain personal services in the way of railway servants being provided to work the siding. Lord Hatherley held that the words of obligation dealt with structure and with structure alone, and that the siding meant a siding only and did not include other things such as sheds and a crane and so on, which although very convenient accommodations in connection with a siding, were not generally understood in the use of the word siding itself.

Now, the Lord Ordinary has not attacked the authority of that case, but he distinguishes it from the present case on this ground—In that case there were no words corresponding to the words which we have here, "in full efficiency," and his Lordship's view is that these words really alter the whole situation. His Lordship says—"In the case cited no such words occur as 'in full efficiency,' and my opinion is that these words put a meaning on the obligation to maintain and uphold, and show that it includes both structural and working maintenance. The words 'in full efficiency' are I think wholly inapplicable to structural maintenance; indeed, they are absurd when applied in such a way. Any conveyancer would smile at a draft lease which purported to lay an obligation on a tenant to maintain the farm, houses, and buildings 'in full efficiency,' and the very etymology of the word 'efficiency' shows that it is inapplicable to the mere maintenance of a material structure. I am accordingly of opinion that the obligation under consideration binds the defenders to maintain the siding, both as regards structure and working, in an efficient condition, that is, so as to make it in all respects efficient for the conduct of such goods traffic as is proper to a siding of that description."

I am bound to say that I cannot find myself in accordance with the Lord Ordinary's views upon the precise meaning of the word "efficiency." So far as etymology is concerned, I am not sure that I follow his Lordship. The etymology of "efficiency" is undoubtedly from the latin *efficiens*, which is the present participle of *efficio*, which means to make fit. It is quite true that if we take the first use of the word *efficient* we shall find it used in a philosophical sense as meaning and as applied to efficient cause. But I take it that it is very unlikely that either the representatives of Mr Kennedy or the Maybole and Girvan Railway Company in 1858 were to be ranked among the schoolmen. I think we must come down to rather more

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modern times and find out what the ordinary use of "efficiency" in common language is. It is quite true that "efficiency" is mostly used of persons, but it is equally certain that it is very often used of composite entities, such as the army or navy, which include the idea of both man and material, and I cannot help thinking that by an ordinary change it also very often has come to be used of things that are entirely inanimate, no doubt always in the sense of considering whether that inanimate thing is fit for the purposes for which it is made. You can certainly in ordinary language talk, as Lord M'Laren suggested, of an efficient engine, and you can also certainly talk of an efficient weapon, and the meaning of efficient and efficiency in such collocation seems to me to be no more than this, that it is in such a condition as to be able to perform the purposes for which it is intended. Accordingly, when I come to the words of obligation here, and read that this siding is to be maintained "in full efficiency," I think the words are amply satisfied by considering that the words mean that the siding is not to be put up and then left as a derelict structure, but that it is to be put in proper working order, in other words, that its rails are to be so settled and in place that waggons can be put over them without danger of derailment, and that its points should be in such working order that admission can be got to the siding from the main line, and that its signals in the same way should be so workable as to make it matter of ordinary every day business to use the siding if required. That seems to me ample satisfaction of the words used. Accordingly, I confess that I am perfectly willing, *quoad ultra*, to adopt the reasoning of Lord Hatherley in the case I have cited. I agree with him that the use of the word siding means a siding provided with the necessary appurtenances of a siding, but not including many other things which it may be convenient to have in connection with a siding.

As regards the conclusion that we should direct the Railway Company that they were to have one man present at such and such hours, and that they were to have what is called a "sundries waggon" at the siding, I have arrived at the conclusion without much difficulty that these demands of the pursuer are untenable. The only point on which I did have some hesitation was this matter of the crane, because I could imagine that it might have been averred in such a way as at least to admit the pursuer to proof that the crane was really of the essence of a siding just as much as points and rails are. But I am satisfied that no averment of that sort is made. On the contrary, according to the pursuer's own statement, the demand for a crane is only a recent demand, and is based upon the fact that a different class of traffic is now going to the siding. I think when one considers the merits of the matter, apart from the mere question of how the pursuer should frame his pleadings, one comes to the same conclusion, because one can see well enough that the necessity of putting a crane at the siding must really depend on the class of traffic that the siding usually has. In other words, it ranks with other things among the category of facilities. I am therefore not surprised that it has been decided by the Railway Commissioners that undoubtedly a crane is a facility which, upon a proper case being stated to them, they would order the Railway Company to provide.

I confess also that I am fortified in the result which I have reached when I look to what the Lord Ordinary says he expects the proof which he has ordered to do for him. He says he thinks there should be a proof to show (first) what construction the parties themselves put upon the agreements as shown by the past working of the siding, and (second) for what kind of traffic and to what extent it is reasonable that the defenders should provide facilities at the siding in question. I think it is out of the question that an agreement of that kind could be expiscated by the doctrine of *contemporanea expositio*—a doctrine which applies to quite a different kind of case. Supposing your Lordships had proof and were told the various things which in the past the Railway Company had done at this siding, what is there, or could there be, to show to what that has reference? To say that it is necessarily referable to the agreement in question begs the question, because it may be equally referable to the fact that the Railway Company for their own profit would be inclined to encourage traffic and might do whatever they chose for the convenience of the public who use the siding. Then as regards the second point—a question of facilities pure and simple—that is a demand for facilities, and is a demand which I do not say this Court could not make good if provision for it were made in the contract, but which undoubtedly, unless contained in a contract, is dependant on the general law, and that general law as it stands at present has made the proper tribunal for that the Railway Commission.

For these reasons I am of opinion that we should recal the Lord Ordinary's interlocutor and dismiss the action, because I think, on the proper construction of this agreement, the pursuer has got a siding in full efficiency, and that so far as he may not have all proper facilities he cannot make application to the Court unless these facilities are found in a contract, his proper application being to the Railway Commissioners.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think the interlocutor is right in so far as it repels the first and second pleas-in-law for the defenders, because these are pleas to jurisdiction and competency. We have heard nothing at all, so far as I recollect, against the competency of the action, and as to jurisdiction I can see no room for doubt that this Court has jurisdiction to entertain an action for specific implement of the contract between Mr Kennedy and the Railway Company; and indeed, if the

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Railway Company proposed to abandon the siding contrary to the contract, it is probably this Court alone that could enforce their obligation to maintain it. But then the defenders have no intention of giving up the siding; on the contrary, they say that they have maintained and are maintaining it, and are now regularly working it according to their own conception of the requirements of their traffic. In these circumstances, it appears to me that the first declaratory conclusion of the summons, although in itself it may be sound enough, is unnecessary, and would be futile unless it could be followed by an operative decree in terms of the remaining conclusions, and therefore that the question comes to be whether the specific demands which are made in the remaining conclusions are or are not within the contract.

It is an action upon contract, and upon contract alone. The contract is to maintain and uphold a siding in full efficiency, and by virtue of this obligation the pursuer maintains that the company are bound to maintain a staff of servants for the dispatch and receipt of traffic during business hours on every lawful day, and that they are bound to supply what is called a "sundries" waggon for the transmission of all parcels of merchandise and goods, and especially all parcels of small size or weight, and that they are bound to station at least one of their servants at the siding for the receipt and discharge of traffic during the hours from 8 a.m. to 9 a.m., and from 1 p.m. to 2 p.m. on every lawful day, and to erect or provide on a convenient site at said siding a good and sufficient crane, with all the necessary appliances thereof, capable of being used for the discharge of all heavy goods. Now, I am of opinion with your Lordship that all these things are outside the obligation of the Railway Company. They are not within the contract. The contract is to maintain and uphold a siding, and I agree with your Lordship in accepting the authority of Lord Hatherley in the case of *Lytton* v. *Great Northern Railway Company*, 1856, 2 K. & J. 394, that under these words of obligation the railway company is to construct and maintain a material thing, and that the words do not go beyond that obligation and bind them to work the siding, nor for the purpose of working it in a particular manner to provide conveniences which may be very useful for expediting traffic, but which are not parts of the thing to be constructed. I rather think the Lord Ordinary would have held that that case is in point, and would have followed it were it not for the single ground of distinction which he says is implied in the words "in full efficiency." These words, according to his Lordship, imply an obligation not merely to maintain a siding but to work it in all time in an efficient manner, and therefore enable the pursuer to obtain the specific decrees he asks for if he can show that the things he demands are proper and necessary for the working of the siding. I am, with your Lordship, unable to accede to his Lordship's reasoning as to the meaning of the word efficiency. The learned Judge founds mainly upon what he calls the etymology of the word. I rather think that both in legal and literary construction it has been pointed out that etymology is a very misleading guide in interpretation, and it must be so, because derivative words have different meanings from the primary words from which they are derived. I do not much doubt that the Lord Ordinary's suggestion is perfectly right when he seems to say that the primary meaning of the words "efficient" and "efficiency" imply an operative agency of some kind. But still it appears to me that the real force of the words "in full efficiency" in this contract is simply that the railway siding is to be maintained in a perfectly fit condition for its use as a siding. It is the condition of the siding which is the subject of the contract, and not the method of working the siding after it has been constructed and is being maintained. The words in question do not, in my mind, add any new term to the obligation, but simply draw out what is already involved in it, and I am confirmed in my reading of the contract in that respect when I come to consider what it is that the pursuer demands of the Railway Company as a consequence of his construction—that the Railway Company should bind itself to continue in all time to work this siding as part of its lines whether it is for its advantage to do so or not, and further, that it binds itself in all time to allow a single trader to interfere with its discretion in the management of that part of the line. That seems to me so improbable that we could not force such an obligation upon the company unless it were expressed in perfectly clear words. All these things which the pursuer says he desires may be extremely convenient for the use of that siding or they may not, but the provision for what is called a "sundries" waggon and the provision for the constant attendance, even during the meal hours, of railway servants at the siding, the provision of a crane for heavy traffic—all these things are matters of discretion. They may be extremely desirable where there is a great quantity of traffic being handled, but they may be perfectly unnecessary and useless where there is a small quantity of traffic. That is a matter for the discretion of the company managing its own undertaking, and I should not be prepared to hold that it had abandoned that discretion in favour of a single trader unless there were perfectly clear and explicit words in the contract to that effect. I agree with your Lordship that here there is no relevant case to support the operative conclusion of the summons, and that is probably all that is necessary to say upon the matter.

But then we have heard an argument on a different point as to which I shall advert only for the purpose of saying that I think the question raised is entirely outside the question now before us. The question is whether these are or are not reasonable facilities in the sense of the Railway and Canal Traffic Act. That is not a question

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for this Court. It may very well be that notwithstanding the judgment which your Lordship proposes the pursuer may be quite entitled to go to the Railway Commissioners and have these or similar facilities provided for his accommodation at this siding, but that will be if he thinks it necessary to make an application under the Railway and Canal Traffic Act. The law as to the jurisdiction of the Railway Commissioners in such a matter is very clearly brought out in the case cited to us at the bar—*Darlaster Local Board* v. *London and North Western Railway Company*, [1894] 2 Q.B. 694, and by Lord Selborne in the Hastings case, 6 Q.B.D. 586—that a railway company is in general under no obligation to establish a station or I presume a siding at any particular place unless it thinks fit to do so, but when a company has in fact opened a siding at a particular place on its railway and used it for the purposes of traffic it is bound to afford at that siding to the best of its powers all reasonable facilities for receiving, forwarding, and delivering goods, and if anybody having a title to complain thinks that such reasonable facilities are not afforded he may go to the Railway Commissioners. Now, the defenders admit that they have a siding at this part of their line; and the pursuer may have a title to maintain that so long as they keep it open for traffic they must provide him with the facilities he claims. But that is not a question which arises for our consideration in this action at all. I cannot agree with the Lord Ordinary in thinking that the case of the *Barry Railway Company*, L.R. 1895, 1 Ch. D. 128, which he cites, is in point on the present matter at all, because that was a decision on the construction of a particular section in a special Act of a railway company, and the decision of the Court was that by the terms of a particular clause in the Act the jurisdiction of the ordinary courts of the country to entertain a suit for injunction and damages was not ousted, even although under another clause in the same Act the party complaining might have gone to the Railway Commissioners as arbitrators. That has nothing to do with the question which is supposed to be involved in this case. Lord Herschell points out that the ground of judgment does not apply to the question whether the jurisdiction of the Commissioners under the Railway and Canal Traffic Act is exclusive or not, because he points out that where a special tribunal has been created for the disposal of matters which may not at the time be proper subjects for the jurisdiction of the ordinary courts of law there may well be exclusive jurisdiction, although in the particular case there was no such exclusive jurisdiction because the question in dispute was one which the ordinary courts of the country in virtue of their general jurisdiction had power to entertain. That case appears to me to have no bearing upon the point now in dispute. But then I think there is no question of the jurisdiction of this Court at all. The pursuer does not ask that these accommodations should be given to him as facilities under the Railway and Canal Traffic Act. This is an action on contract and nothing else, and that we have jurisdiction to dispose of it seems to me beyond all doubt, and it is in exercise of that jurisdiction that we say the pursuer's construction of the contract is wrong and that he has no right under the contract to compel the Railway Company to provide these accommodations. Whether he may go to the Railway Commissioners to obtain the same things or something like them as facilities is a totally different matter with which we have nothing to do. Therefore I agree with your Lordship that the action should be dismissed.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer and Respondent—Lord Advocate (Scott Dickson, K.C.)—T. B. Morison. Agent—F. J. Martin, W.S.

Counsel for Defenders and Reclaimers—Guthrie, K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Wednesday, October 25.

FIRST DIVISION.

[Lord Johnston, Ordinary on the Bills.

GLENDAY *v.* JOHNSTON.

Diligence—Meditatio Fugæ Warrant—Aliment—Arrears of Aliment—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 4 *—Civil Imprisonment (Scotland) Act* 1882 (45 *and* 46 *Vict. c.* 42), *secs.* 3 *and* 4.

A woman who seventeen years before had given birth to an illegitimate child, presented a petition in the Sheriff Court craving warrant for committing to prison a man against whom she was about to raise an action of filiation and aliment. She had not previously taken any steps to enforce her claim for aliment. The *in meditatione fugæ* warrant having been granted, and imprisonment having followed thereon, *held* in a suspension (1) that the debt in question was not a "sum decerned for aliment" excepted from the operation of section 4 of the Debtors (Scotland) Act 1880, which abolishes imprisonment for debt; (2) that by the Civil Imprisonment (Scotland) Act 1882, sec. 3, imprisonment was no longer a competent diligence even for alimentary debts; (3) that imprisonment on an *in meditatione fugæ* warrant, being merely an ancillary diligence, was therefore here incompetent; and (4) that the note should be passed *simpliciter*.

Cain v. *M'Colm*, May 31, 1892, 19 R. 813, 29 S.L.R. 735, *distinguished*.

Diligence—Meditatio Fugæ—Conformity of Warrant for Imprisonment to Prayer.

The prayer of a petition for imprisonment on an *in meditatione fugæ* warrant craved that the defender should be com-

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mitted to the prison of Forfar. The Sheriff committed him to the prison of Dundee. *Opinion* that in the circumstances this disconformity did not render the warrant invalid.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 4, enacts—"*Abolition of Imprisonment for Debt.*—With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. There shall be excepted from the operation of the above enactment—(1) Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed. (2) Sums decerned for aliment—provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months. Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."

The Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42), sec. 3, enacts—"From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment. (Sec. 4) Subject to the provisions hereinafter contained, any sheriff or sheriff-substitute may commit to prison for a period not exceeding six weeks or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the sheriff or sheriff-substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent court. . . ."

This was a note of suspension and liberation brought by James Glenday, vanman, Toronto, Canada. The complainer had been incarcerated at the instance of the respondent Agnes Johnston, Dundee Loan, Forfar, under an *in meditatione fugæ* warrant, granted in the Sheriff Court at Forfar, on the allegation that seventeen years before she had given birth to an illegitimate child of which he was the father; that he before the birth had fled the country to escape his obligation to aliment the child; that he was due and owing to her the sum of £2 of inlying expenses, and the sum of £93, 12s. (exclusive of interest), being aliment for the first twelve years of the child's life at the rate of £7, 16s. per annum; that she was about to raise an action of filiation and aliment against him for recovery of these sums; and that he was about to return to America. The crave of her petition was that he should be apprehended and committed to the prison of Forfar till he should find caution *de judicio sisti*. The Sheriff-Substitute had committed the complainer to the prison of Dundee, the prison at Forfar no longer being available for that class of prisoner.

The complainer brought the present note of suspension and liberation, denying that he was the father of the said child, and alleging (as was admitted) that no legal proceedings had been taken against him by the respondent since the date of the child's birth, and that any action which might now be raised against him by the respondent must be for repayment of advances made for aliment, *i.e.*, for an ordinary debt.

At the date of the discussion herein the respondent's action of filiation and aliment had been raised and a copy of the record was produced.

The complainer pleaded, *inter alia*—"(1) The proceedings complained of being incompetent in respect that imprisonment cannot follow upon any decree obtained for the alleged debt, suspension and liberation should be granted as craved. (2) The warrant to imprison in Dundee being at variance with the prayer of the petition, suspension and liberation should be granted."

The Lord Ordinary (JOHNSTON) passed the note and on caution *de judicio sisti* granted liberation.

Opinion.—"A warrant of imprisonment as *in meditatione fugæ* has been granted against the complainer James Glenday at the instance of the respondent Agnes Johnston in somewhat peculiar circumstances. The respondent alleges that seventeen years ago she bore an illegitimate child, of which the complainer is the father; that to escape fulfilment of his obligation to contribute to the aliment of the child he absconded shortly before its birth, and that she has now for the first time the opportunity of suing him in an action of filiation and aliment, he having returned to this country for a temporary purpose. As he admits that he is on the point of leaving the country she is entitled to her warrant, provided the debt she claims is one on which personal diligence may follow.—*Kidd* v. *Hyde*, 9 R. 803; *Hart* v. *Anderson's Trustees*, 18 R. 169. But the complainer has brought a suspension and liberation on two grounds.

"(1) He says that the petition craved his committal to the 'prison of Forfar,' whereas the Sheriff has granted warrant to imprison him in the 'prison of Dundee,' and he maintains that the warrant is bad because it does not literally follow the prayer of the petition.—*Garrioch* v. *Wilson*, 13 D. 1377. I am not prepared to sustain this contention. Forfar prison has under the Prison Commissioners been deprived of its status as an ordinary prison. It is now reduced to a place of detention merely for fourteen day sentences, and cannot be used for civil prisoners unless temporarily, and even of that I am not sure. But Dundee prison now does duty for the whole county in anything other than sentences of the above nature, and I do not think that when the Sheriff very properly granted warrant for imprisonment in the prison of Dundee, which is legally and administratively, though not locally, the prison of Forfar he was granting what can be fairly

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said to be *ultra petita*, and therefore to vitiate his warrant.

"(2) The complainer maintains that the respondent's claim against him is not one for aliment but only for repetition of outlay, and therefore for an ordinary debt, a decree for which could not now be enforced by personal diligence. If this be so, arrestment on such a claim as *in meditatione fugæ* is undoubtedly incompetent.

"There have been several cases touching on the point, but none I think which solve the exact question raised. The claim of a parochial board to recover from a son their expenditure in alimenting his father was held not to warrant imprisonment under the Act 1882.—*Tevendale* v. *Duncan*, 10 R. 852; *Mackay* v. *Parish Council of Resolis*, 1 F. 521. And it is true that there are observations made in these cases which, if not restricted to the subject-matter, would lead to the conclusion that the present claim, which is not for the present or future aliment of any particular individual, but wholly for recovery of aliment already supplied, was no better ground for such personal diligence than the claim of a parochial board. But in the case of *Cain* v. *M'Colm*, 19 R. 813, the mother of a bastard was held entitled to enforce by imprisonment payment of arrears of aliment for which she had obtained a decree. It is true that there is this distinction that the obligation to aliment was still current and had not as here come to an end.

"I should myself have been prepared to say that 'a sum decerned for aliment,' Act 1880, sec. 4, and 'a sum of aliment,' Act 1882, sec. 4, both had reference to the *de presenti* and *de futuro* aliment of an individual. But the authority of *Cain's* case would warrant personal diligence for arrears where the mother of a bastard had been able to secure her decree even in the last year of the period during which contribution can be exacted, and I am not so clear that the fact that she has failed to secure her decree till the expiry of that period makes such a difference that I would be justified in the Bill Chamber in granting liberation without caution, which would be an irreparable step.

"I am farther influenced by the consideration that the woman's claim must be in the form of an ordinary action of filiation and aliment, in which, if the paternity is established, the decree will be for aliment as from a past due date.

"I shall therefore pass the note and grant liberation on caution."

The complainer reclaimed, and argued—(1) Arrestment on an *in meditatione fugæ* warrant was an ancillary diligence, and was not competent unless for a debt which might be enforced by imprisonment—*Marshall* v. *Dobson*, December 18, 1844, 7 D. 232; *A B* v. *C D*, June 6, 1843, 5 D. 1116; *Kidd* v. *Hyde*, May 19, 1882, 9 R. 803, 19 S.L.R. 609. Imprisonment as a method of civil diligence had been abolished. Even in the case of an alimentary debt imprisonment was not competent on the decree *de plano*, but only on a finding by the Sheriff that failure to pay had been wilful (Debtors (Scotland) Act 1880, sec. 4; Civil Imprisonment (Scotland) Act 1882, secs. 3, 4). Imprisonment on an *in meditatione fugæ* warrant was incompetent in cases where imprisonment had been rendered incompetent by the Acts cited—*Hart* v. *Anderson's Trustees*, November 28, 1890, 18 R. 169, 28 S.L.R. 133. Moreover, the debt here sued for was not an alimentary debt. Aliment was not current at the date of the action. The pursuer's action was one for repayment of advances, and under it there could be no sum decerned for aliment in the sense of the Civil Imprisonment (Scotland) Act 1882, sec. 3, and for this reason also imprisonment was incompetent—*Tevendale* v. *Duncan*, March 20, 1883, 10 R. 852, 20 S.L.R. 558. (2) The warrant of imprisonment was bad because it was not conform to the prayer—*Garrioch* v. *Wilson*, July 17, 1851, 13 D. 1377; *M'Cubbin* v. *Fulton*, June 23, 1852, 14 D. 908.

The respondent argued—(1) The warrant was substantially in accordance with the prayer; (2) diligence by imprisonment for arrears of aliment was competent—*Cain* v. *M'Colm*, May 31, 1892, 19 R. 813, 29 S.L.R. 735; *Davies* v. *Duncan*, February 9, 1861, 23 D. 532.

LORD PRESIDENT—In this case the respondent alleges that seventeen or eighteen years ago she had an illegitimate child of which the complainer was the father. She also alleges that no money was ever paid by the complainer for her inlying expenses or for the aliment of the child, and that she was never in a position to sue him for such expenses, as he left the country before the birth of the child. Now, seventeen or eighteen years later, the complainer having returned to this country, the respondent asked and obtained a warrant to imprison him as *in meditatione fugæ*. The complainer brought the present suspension and liberation, and the Lord Ordinary has passed the note and granted liberation on caution *de judicio sisti*. The complainer reclaimed and asks the Court to pass the note without caution.

The grounds on which the reclaimer urges liberation are three in number, two of which are dealt with by the Lord Ordinary in his opinion, while the third, though argued before his Lordship, is not dealt with.

(1) The first ground is that the warrant of incarceration issued by the Sheriff is bad, in that it is disconform to the prayer of the petition to imprison. The Sheriff granted warrant to imprison the reclaimer in the prison of Dundee, while the petition craved his committal to the prison of Forfar. Now we are told that there is no provision made in the building known as the prison of Forfar for the detention of civil prisoners, and I should hesitate to disagree with the view of the Lord Ordinary on this point. But it is unnecessary to go into the matter as either of the two other grounds are, in my opinion, sufficient to justify the Court in passing the note and granting liberation *simpliciter*.

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(2) The Debtors (Scotland) Act 1880, section 4, abolished imprisonment for debt with two exceptions, one of which was "sums decerned for aliment." Now, I adopt the general reasoning of Lord Young in the case of *Tevendale* v. *Duncan*, 10 R. 852. That case is not a direct precedent, but many remarks in it apply to the present case. A "sum decerned for aliment" implies that there is some one waiting to be alimented. But here the child is almost grown up, and the claim is really one for reimbursement and does not fall within the exceptions to section 4 of the Act.

(3) The third objection is an equally formidable one. Under section 3 of the Civil Imprisonment (Scotland) Act 1882 imprisonment for alimentary debts is abolished, and section 4 gives a new power to imprison for wilful failure to pay any sums of aliment for which decree has been pronounced. This Act thus abolishes the old personal diligence for alimentary debts, and so the warrant to imprison *in meditatione fugæ* falls with it. The remarks of Lord Rutherfurd Clark in the case of *Kidd* v. *Hyde*, 9 R. 803, are in point, where he says at page 806, "The result is that the *meditatio fugæ* warrant is directed against the person only, and that its proper office is to secure that the creditor shall have all the remedies which the law gives him against the person of his debtor. It is an ancillary and not an independent diligence and can never by its own power lead to the recovery of the debt." So when the *meditatio fugæ* warrant was saved in express words by the Act, it was only saved for its own purposes, *i.e.*, as an ancillary diligence. So the Act of 1882 in sweeping away personal diligence for alimentary debt, swept away with it the ancillary diligence of the *fugæ* warrant.

LORD ADAM—I am of the same opinion. The first objection taken here is that while the petition craved for committal to the prison of Forfar, the Sheriff granted warrant to imprison in the prison of Dundee. I do not think that where an application of this sort is made in that form it is incompetent on the part of the Sheriff to alter the place of incarceration. I do not think that under the old form it was necessary to specify the particular "Tolbooth" or "next sure prison" in which incarceration was desired, and I therefore think with your Lordship that this objection should be repelled. I also think that the prison of Dundee being the only available prison for Forfar, the objection is in itself hypercritical.

I also agree with your Lordship on the other points. It appears from the authorities that a *meditatio fugæ* warrant is merely an ancillary diligence, and accordingly it is not of avail except in cases where failure to implement the order pronounced would be followed by imprisonment. I do not think that that is the case here, for the decree pronounced against the suspender is not one which could of itself be followed by personal diligence. It would require a supplementary application to the Sheriff, and imprisonment could only follow on a warrant from the Sheriff pronounced after the debtor had failed to satisfy him by proof that his failure to pay the sum decerned for was not wilful. That does not appear to me to be an instance of a decree that is followed by personal diligence. But, further, I do not think that this is an alimentary debt. It is not "a sum decerned for aliment." If the action had been brought seventeen or eighteen years ago and decree for aliment had been pronounced then, it might have been different. But that was not done, and so I do not think the case of *Cain* applies here, for in that case a sum of aliment had actually been decerned for. I think, on the contrary, that this is merely a claim for an ordinary debt and one on which imprisonment cannot follow, and if that is so it appears to me that a *meditatio fugæ* warrant is clearly incompetent.

LORD M'LAREN—The hypothesis on which every such application as this proceeds is that the petitioner has a good claim, and that if the respondent is detained in this country decree will be obtained against him. So the first question comes to be—supposing the pursuer's case is well-founded, what is the nature of the decree she will obtain; will it be a decree for aliment or only for an ordinary debt? In other words, will it be a decree for a debt which falls within the exceptions in section 4 of the Debtors Act of 1880, or will it not? Now, I see that although the Lord Ordinary has granted liberation only on caution *de judicio sisti* being found, he has expressed an opinion as to the meaning of the Debtors Act which is entirely consistent with the reasons which your Lordships have given for the judgment we are to pronounce. The Lord Ordinary says—"I should myself have been prepared to say that 'a sum decerned for aliment' (Act 1880, sec. 4) and 'a sum of aliment' (Act 1882, sec. 4) both had reference to the *de presenti* and *de futuro* aliment of an individual." But he goes on to say that the authority of *Cain's* case, 19 R. 813, makes him hesitate, and that he does not feel justified in granting liberation without caution. The Lord Ordinary was sitting in the Bill Chamber, and I think that he was quite right not to pass the note without caution, which, as he says, would be an irreparable step. I was one of the Judges who took part in the decision in the case of *Cain*, 19 R. 813, and I desire to say that in giving that decision we did not feel that we were trenching in any way on the judgment in the case of *Tevendale*, 10 R. 852, that where aliment has been furnished by a person who is not the primary obligant, the claim for relief is not an alimentary claim. But, the aliment being current, we could not limit the effect of an alimentary decree to the one term's payment, but its effect must draw back to and include the whole aliment which is due and unpaid. It would be giving a very wide extension to the principle of that decision were we to hold that where a child has passed the age when aliment has to be given, a claim

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for reimbursement of sums applied for the benefit of the child is such an urgent and necessary claim as to warrant this summary method of enforcing it. I agree with your Lordships that the decree here is not for an alimentary debt, and that consequently imprisonment under a *meditatio fugæ* warrant is incompetent.

LORD KINNEAR was not present.

The Court recalled the interlocutor of the Lord Ordinary, and passed the note simpliciter.

Counsel for the Reclaimer—The Solicitor-General (Clyde, K.C.)—Findlay. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — Gunn. Agents—Mackay & Young, W.S.

Thursday, November 2.

SECOND DIVISION.

[Lord Low, Ordinary.

TASKER *v.* GRIEVE.

Jurisdiction—Foreign—Domicile—Citation—Scotch Domicile of Origin and Personal Service in Scotland without Forty Days' Residence there.

Held (*aff.* judgment of Lord Low) that a Scottish domicile of origin coupled with personal service in Scotland without forty days' residence there does not found jurisdiction against one who has abandoned his original domicile.

Opinion (*per* the Lord Justice-Clerk) that a Scotch domicile of succession coupled with personal service in Scotland but without forty days' residence there would not found jurisdiction in Scotland.

An action for recovery of a debt alleged to be due was raised by Mrs Marion Jack Tasker, widow, 40 Union Street, Greenock, against Walter Baine Grieve, of St John's, Newfoundland, merchant and shipowner, residing at 70 Bruntsfield Place, Edinburgh.

The pursuer averred—"(Cond. 1) By power of attorney dated 4th March 1876 the pursuer made and appointed the defender her attorney, to attend to her interests and act on her behalf in the control and management of certain lands and tenements belonging to her, and situated in St John's, Newfoundland. The defender was then and at the date of the transactions hereinafter mentioned, and still is, a member (1) of the firm of Baine, Johnston, & Company, and B. Johnston & Company, merchants in St John's, Newfoundland, and Greenock; (2) of Baine & Johnston, merchants in Greenock; (3) of the Glebe Sugar Refining Company, Greenock; and (4) of the firm or trading concern carrying on business under the name of Thomas Crawford, merchant, Greenock, at 19 West Blackhall Street, or elsewhere in Greenock. The defender is also vested as a trustee for himself and his co-partners, and is beneficially interested in heritable properties in Greenock. The defender is also proprietor of a lair or lairs of ground in Greenock Cemetery, Greenock, in which his wife Mrs Helen Marion Grieve, and his daughter Annie Charlotte Grieve, are interred. The defender is a son of the late ex-Provost James Johnston Grieve of Greenock, who was a native of Scotland, and continued down to the date of his death to be a domiciled Scotsman. The defender's domicile of origin is Scottish, and, notwithstanding frequent visits to his place of business in Newfoundland, he has never abandoned that domicile. Further, the defender is subject to the jurisdiction of the Scottish Courts in respect that prior to the personal service upon him of the summons in the present action at 70 Bruntsfield Place, Edinburgh, on 1st July 1904, he had resided continuously in Scotland for a period of over forty days."

The pursuer, *inter alia*, pleaded—"(1) The defender is subject to the jurisdiction of the Scottish Courts in respect that, *inter alia*, (*a*) his domicile is Scottish; (*b*) he had resided continuously in Scotland for a period of over forty days prior to the personal service within Scotland upon him of the summons in the present action; and (*c*) he is also vested as a trustee for himself and his co-partners, and is beneficially interested in heritable properties in Greenock."

The defender, *inter alia*, pleaded—"(1) No jurisdiction."

Proof was allowed on the question of jurisdiction.

It was proved that the defender arrived in Scotland on 25th May, and that the summons was personally served upon him in Edinburgh on 1st July 1905, and that between these dates he had paid two visits of five or six days' duration to London. It was further proved that the defender's domicile of origin was Scotch, but that he had abandoned his original domicile. (The evidence is reviewed in the Lord Ordinary's note).

On 9th May 1905 the Lord Ordinary (LOW) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—"The question upon which proof has been taken in this case is whether the defender is subject to the jurisdiction of the Court.

"It is not now disputed that the domicile of origin of the defender was Scotland, although he was born in Newfoundland. He has, however, had his home and been resident in Newfoundland for some thirty years, and he maintains that he has lost his domicile in Scotland and acquired a domicile in Newfoundland.

"Until 1895 the defender was a partner of the firm of Baine & Johnston, merchants in Greenock, and also of Baine, Johnston, & Company, merchants in Newfoundland, which, I understand, was a branch of the Greenock firm, and in other ways he appears to have kept up his connection with Scotland — sending his children to be

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educated there, maintaining a house in Greenock for their accommodation, and himself visiting Scotland practically every year. In 1895, however, both the Greenock firm and the Newfoundland firm became bankrupt, and their estates were sequestrated under the Bankruptcy Acts. Since that event the defender has carried on business on his own account in Newfoundland, and he is not connected with or interested in any business in Scotland, and he appears to have no property of any kind there. In these circumstances, while it might have been a delicate question whether the defender had lost his domicile of origin so long as he continued to be a member of the Greenock firm, I think that now that that firm has ceased for many years to exist, and the defender has given up all business connection with this country, he must be regarded as having abandoned his original domicile there. He is resident and has his home in Newfoundland, and there, and there only, he conducts his business. Further, there appears to be no reason to suppose that he has any intention of returning permanently to this country, and indeed I think that it may be inferred that he is not likely to be in a position to do so.

"I am therefore of opinion that the defender is not now a domiciled Scotsman.

"The pursuer, however, avers that prior to the personal service of the summons upon the defender he had resided continuously in Scotland for a period of over forty days. That averment has not been established. The defender arrived in Scotland on 25th May 1904, and the summons was served upon him on the 1st of July, and in the interval he had twice paid a visit of five or six days' duration to London. If, therefore, forty days' residence in Scotland prior to citation was necessary, jurisdiction has not been established.

"The pursuer however also contended that in the case of a person whose domicile of origin was Scotland, forty days' residence was not required, and personal service in Scotland was sufficient.

"At one time there seems to have been a disposition to regard the mere fact that a person was a Scotsman by birth as sufficient to give jurisdiction, but that view was negatived by the House of Lords in *Grant* v. *Peddie* (1 W. & S. 716). It was argued, however, that the fact of Scottish origin still continued to be an element to be taken into consideration, and that when coupled with personal service in Scotland it was sufficient to confer jurisdiction. That argument undoubtedly receives support from the opinions which were given in *Ritchie* v. *Fraser* (15 D. 205). What was actually decided in that case was that where there had been sixty days' residence in Scotland, followed by personal service, jurisdiction had been established, although the continuity of the residence had twice been interrupted by short absences from Scotland. No doubt the learned Judges did give weight to the fact that the defender, although he was settled in America, was a Scotsman by origin, and I think that the majority would have been prepared to hold that the Scottish origin, coupled with personal service, would have been sufficient without forty days' residence. There is no case, however, at all events since the judgment of the House of Lords in *Grant* v. *Peddie*, in which jurisdiction has been held to have been established against a person originally Scotch, but who has acquired a domicile in another country, merely by personal service in Scotland, without residence there, nor, so far as I can find, have the opinions indicated in *Ritchie* v. *Fraser*, that in such a case jurisdiction would be established, ever been followed or approved.

"I think, therefore, that to introduce such a jurisdiction would be a novelty, at all events in more modern practice. It seems to me that if a person originally domiciled in Scotland abandons that domicile and acquires another, he is to be regarded as being just as much a foreigner as if he had never had a Scottish domicile, and that personal service upon him in Scotland will not give jurisdiction unless there has also been residence for the requisite period.

"I shall therefore sustain the plea of no jurisdiction and dismiss the action."

The pursuer reclaimed, and argued—The defender had failed to discharge the onus of proving a change of domicile—*Steel* v. *Steel*, July 13, 1888, 15 R. 896, Lord President at p. 908, 25 S.L.R. 675; *Brooks* v. *Brooks' Trustees*, July 15, 1902, 4 F. 1014, Lord President at p. 1033, 39 S.L.R. 816. The defender's domicile of origin therefore being Scottish, he was amenable to the jurisdiction of the Court after personal service in Scotland—*Ritchie* v. *Fraser*, December 11, 1852, 15 D. 205; *Wilkie* v. *Muirhead*, 1629, M. 4814; *Dickie* v. *Dick*, December 20, 1811, F.C. vol. 16, p. 449, Ersk. i, ii, 19, footnote p. 38 *et seq.* Interruption of the defender's residence in Scotland was immaterial—Judicature Act 1825 (6 Geo. IV, cap. 120), secs. 51 and 53; personal service on one whose domicile of origin was Scottish operated independently of forty days' residence—Bar, 2nd ed. 909, Mackay's Manual, p. 54; *Peddie* v. *Grant*, June 14, 822, F.C. vol. 20, p. 640; *Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174. The defender would be within the jurisdiction of the Court in questions of status or succession, and jurisdiction for actions on such questions was also jurisdiction for actions of debt.

Argued for the respondent—The defender's abandonment of his domicile of origin had been amply proved—*re Steer*, 1858, 28 Law Journ. Ex. 22; *Brooks* v. *Brooks' Trustees*, *cit. sup.*; Fraser, Husband and Wife, vol. ii, 1257; *Armitage* v. *Armitage*, February 26, 1904, 11 S.L.T. 697; *Dombrowitzki* v. *Dombrowitzki*, July 16, 1895, 22 R. 906, 32 S.L.R. 681; *Fairbairn* v. *Neville*, November 30, 1897, 25 R. 192, 35 S.L.R. 178; *Donaldson* v. *M'Clure*, December 18, 1857, 20 D. 307. The defender's domicile of origin, *per se*, did not subject him to the jurisdiction of the Court—*Colonel Brog's Heir*, 1639, M. 4816; *Johnston* v *Strachan*, &c., March 19, 1861, 23 D. 758. Scotch domicile of origin

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and personal service in Scotland was not effectual without forty days' residence—Ersk. i, ii, 16; *Joel* v. *Gill*, June 10, 1859, 21 D. 929; *Grant* v. *Peddie*, July 5, 1825, 1 W. & S. 716.

At advising—

LORD KYLLACHY—I entirely agree with the Lord Ordinary. In particular, I agree with him in rejecting the pursuer's contention to the effect that although, as decided by the House of Lords in the case of *Peddie* v. *Grant*, jurisdiction cannot arise simply *ratione originis*, it may yet do so if there is combined the circumstance of personal citation within the territory. That is a doctrine which has been often propounded—sometimes approved and sometimes challenged. But it has never yet been the subject of decision. In the present case it comes up in circumstances which make a decision necessary; and having had, with your Lordships, the benefit of a citation of such authorities as there are, and also some discussion from the standpoint of principle, I am glad to be able to concur as I do with, as I understand, both your Lordships, that the Lord Ordinary's conclusion is right, and should be affirmed.

For myself I must own that I have never been quite able to understand how a jurisdiction bad in itself can become good by being combined with a particular form of citation. I can quite understand that where there is, to begin with, a proper basis of jurisdiction, personal citation may be in some cases a subsidiary requisite. That happens, for instance, where the jurisdiction primarily rests on obligation contracted, or delict or *quasi* delict committed, within the territory. In such cases it seems right and just, and in accordance with established principle, that, with due safeguards as to notice, a foreigner so contracting or acting should be bound to answer in the courts of the territory. In other words, it is only right and just that, if, for example, a foreigner buys or sells goods, or commits a spuilzie, or a trespass, or a slander or other wrong, in Scotland, he should not be allowed, if duly cited, to refuse the jurisdiction of the Scotch Courts—a jurisdiction which he has in effect prorogated. The only difficulty is as to notice, and that difficulty is removed by the subsidiary requirement of personal citation. All that is intelligible enough—intelligible enough where there is to begin with a proper basis of jurisdiction. But it is a different matter altogether, where, as here, the question is as to building up a jurisdiction based simply upon Scottish birth or Scottish parentage. *Ex hypothesi* the supposed foreigner has no property in Scotland — no property, heritable or moveable, capable of being attached. *Ex hypothesi*, also, the question can only arise —as it arises here—with respect to actions founded upon obligations undertaken or wrongs committed abroad. Except in such cases, the supposed ground of jurisdiction —the ground here asserted—is altogether superfluous. It is not required, and can be of no use where there is already jurisdiction *ratione contractus* or *ratione delicti*. And with respect to actions founded on transactions (contracts or delicts) occurring abroad, I have failed to discover any stateable reason—either of justice or convenience—why the birthplace or birth domicile of the defender should be even important. The question is not one of allegiance. It is a question as to the application of a general rule of jurisprudence, viz., *Actor sequitur forum rei*. And although exceptions to that rule are admitted, as in the instances to which I have referred, it is a quite different thing to extend those exceptions to actions founded on foreign transactions, and where the supposed defender, being a foreigner by residence, has no connection with the proposed forum, except that he was born within its territory, or that, being born abroad, his father had at the time of his birth a domicile of succession in the territory. It certainly seems to me to be rather a strong proposition that a person who, although born of Scotch parents, has and has had all his life his residence, domicile, property, and all his interests, say in Australia, may yet become liable to be sued in the Scotch Courts for a debt contracted say to a Canadian in Canada, merely because, while on a visit to Europe, he happens to land say in Glasgow, and passing through Scotland *en route* say to France, is served with a summons, say at some railway station between Glasgow and Carlisle. That, however, is really the proposition which seems involved in the pursuer's contention.

I may add, so as to prevent misunderstanding, that while agreeing with the Lord Ordinary that in the present case the defender's domicile of succession, as well as his actual residence, is in Newfoundland, I am not to be held as suggesting by implication that it would have made any difference in the result if his domicile of succession had been in Scotland. It was argued to us (alternatively) that whatever may be the effect as regards jurisdiction, of a Scottish origin, a Scottish domicile of succession is always sufficient to found jurisdiction—at all events is so if combined with personal citation within the territory. But negativing, as we here propose to do, the existence of a Scottish domicile of succession, it is not necessary to decide anything as to its effect. For myself, I have always understood that while domicile of succession is important for certain purposes—for determining, for instance, the *forum competens* in actions of divorce—the only domicile to be regarded in ordinary civil actions is the ordinary forensic domicile—the domicile held to be constituted by forty days' residence—and so held, as Erskine explains, "by custom, and in order to prevent disputes." But while that has been hitherto my understanding—or perhaps I should say my assumption—I do not desire to express any final opinion upon the point. It may come before us upon some future occasion, and may then have to be fully argued and carefully considered.

LORD JUSTICE-CLERK—I am of opinion that the judgment of the Lord Ordinary is

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right and ought to be affirmed. It was strenuously contended in the debate that if a party was personally cited within the territorial jurisdiction of the Scottish Courts, that it was sufficient to give validity to that citation that the defender should be a person who had his origin in this country, either by being born in it or being of Scottish parentage, apart from any question of residence. I am unable to assent to that proposition.

The principle of the law is, as regards the proper *forum* for judicial inquiry, that it is the *forum rei*, and that the person suing must follow him there. To that rule there are, of course, exceptions. One who is not a resident in Scotland is nevertheless liable to be cited there to answer for his obligations undertaken in the country, or his wrongful act of delict or *quasi* delict committed within the territory; and if he can be cited within the territory, and thereby receives due intimation, he must answer. But I am quite unable to hold that one who is resident abroad can be cited effectively for acts done abroad and made responsible before the Scottish Courts because his origin is Scottish, he having no other association with the country than that of origin, or that although born abroad, his parent had a domicile of succession in Scotland.

In this case there cannot be any doubt that the defender's present domicile is outwith Scotland, and therefore there can be no ground for holding a citation to be good against him for acts done not within the territory of Scotland. I should be prepared to hold this, even if it could be maintained, as I think it cannot, that the defender's domicile of succession was in Scotland. But that question of law does not arise here for decision.

The sole question here is whether the defender was, at the time of the citation, a person having a forensic domicile in Scotland. Now, that he could not have unless he had resided in the country for the space of time which practice has long established as necessary, where the actual domicile has previously been elsewhere.

I would move your Lordships to affirm the interlocutor submitted for review.

LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defender and Respondent — M'Clure, K.C. — Spens. Agent — Hugh Patten, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 14.

(Before the Lord Justice-Clerk.)

H.M. ADVOCATE *v.* COGGANS AND HARWOOD.

Justiciary Cases — Indictment — Aggravation—Previous Conviction—Conviction of being Found with Intent Libelled as Aggravation—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 63—*Prevention of Crimes Act* 1871 (34 *and* 35 *Vict. c.* 112), *sec.* 7—*The Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 409—*The Glasgow Police (Further Powers) Act* 1892 (55 *and* 56 *Vict. c. clxv*), *sec.* 25.

Held that it is not competent under the Criminal Procedure (Scotland) Act 1887, sec. 63, to libel as an aggravation of the crime of dishonest appropriation of property a previous conviction of being found with intent to commit a crime.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. c. 35), sec. 63, enacts—"Extracts of previous convictions obtained in any part of the United Kingdom of robbery, theft, southrief, reset, forgery and uttering forged documents, falsehood fraud and wilful imposition, housebreaking with intent to steal, assault with intent to rob, breach of trust and embezzlement, burglary, larceny, obtaining goods or money by false pretences, swindling, cardsharping, and of attempts to commit any of these crimes, and of crimes contrary to the Acts of Parliament relating to the Queen's coinage, and of crimes relating to the Queen's coinage at common law, and of crimes inferring dishonest appropriation by post office officials, or of attempts to commit such crimes, whether such convictions be under the Post Office Acts or at common law, and of all other crimes inferring dishonest appropriation of property by a person not the owner thereof, or attempts to commit such crimes, whether in contravention of any Act of Parliament or at common law, may be lawfully put in evidence as aggravations against any person accused on indictment of any of the crimes, or attempts to commit crimes above set forth, and any aggravation of the crime or attempt which such extract conviction bears to have been found proven, may be lawfully used in evidence to the like effect."

The Prevention of Crimes Act 1871 (34 and 35 Vict. c. 112), sec. 7, enacts—"Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence against this Act, and be liable to imprisonment with or without hard labour for a term not exceeding one year, under the following circumstances or any of them

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. . . Thirdly, If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction. . . ."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 409, enacts—"Every known or reputed thief, or associate of known or reputed thieves, who is found in any house or building, or part of a house or building or other enclosed place, or who is found frequenting any street, court, house, or building, or place adjacent, with intent to commit any crime . . . may be apprehended and, on conviction, be committed to prison for any term not exceeding sixty days. . . ."

The Glasgow Police (Further Powers) Act 1892 (55 and 56 Vict. c. clxv), sec. 25, enacts—"Every known or reputed thief, or associate of known or reputed thieves, who is found in or on any house or building or part of a house or building, or enclosed space, or in any street or place adjacent, with intent to commit any crime . . . may be apprehended and, on conviction, be imprisoned for a term not exceeding sixty days. . . ."

Thomas Coggans and Harry Harwood were charged with three cases of housebreaking on an indictment which contained the statement, "and you have been previously convicted of dishonest appropriation of property, and of attempt to appropriate property dishonestly." A number of previous convictions were libelled in the schedule appended to the indictment, including, *inter alia*, convictions under the Prevention of Crimes Act 1871, sec. 7, the Burgh Police (Scotland) Act 1892, sec. 409, and the Glasgow Police (Further Powers) Act 1892, sec. 25, of being found with intent to steal. The accused both pleaded guilty at a pleading diet in the Sheriff Court at Dundee, and were remitted by the Sheriff to the High Court for sentence.

When the accused appeared for sentence before the Lord Justice-Clerk, objection was taken on their behalf to the putting in evidence of the extract convictions of charges under the Prevention of Crimes Act 1871, sec. 7, the Burgh Police (Scotland) Act 1892, sec. 409, and the Glasgow Police (Further Powers) Act 1892, sec. 25.

LORD JUSTICE-CLERK—I hold that a conviction of being in a place with intent to commit a crime does not fall within the requirement of section 63 of the Criminal Procedure (Scotland) Act 1887, relating to the libelling of previous convictions as aggravations of the crime of dishonest appropriation of property.

The objection was sustained.

Thereafter the accused Coggans was sentenced to five years' penal servitude, and the accused Harwood to three years' penal servitude.

Counsel for the Crown—Graham Stewart, (A.-D.). Agent—W. J. Dundas, Crown Agent.

Counsel for Accused—Taylor. Agent—R. Pitman, W.S.

Wednesday, November 15.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

PATRICK *v.* WOOD.

Justiciary Cases—Suspension—Burgh—Entertainment—"Public Show or other Like Place of Public Entertainment"—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 397.

The Burgh Police (Scotland) Act 1892, by section 397, which prohibits the opening or setting up within the burgh, without the permission of the magistrates, of a "public show of any description whatever, whether in open ground or in any house or building, or caravan or tent," enacts that "if any person shall open or set up . . . any such public show or other like place of public entertainment, without the sanction or permission of the magistrates, . . . all such persons" shall be liable to a penalty.

A musician having been convicted of a contravention, sought to have the conviction suspended on the ground, *inter alia*, that he did not open a public show within the meaning of the section. He stated that, permission having been refused him by the magistrates, he "placed on the foreshore a portable platform eighteen inches in height, and put thereon a piano, upon which accompaniments were played to the songs given by members of his concert party."

Held that the accused's actings amounted to a contravention of the section, and suspension *refused*.

Justiciary Cases—Suspension—Complaint—One or Two Charges—"Prohibition"—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 397.

The Burgh Police (Scotland) Act 1892, section 397, which prohibits the opening of any public show without the permission of the magistrates, and also gives power to the magistrates to make "regulations and prohibitions" dealing with such shows, enacts:—"If any person shall open . . . any such public show . . . without the sanction or permission of the magistrates, or shall contravene any such regulation or prohibition, all such persons shall" be liable to a penalty.

A having been convicted under a complaint which charged him with having set up a public show without the sanction of the magistrates, "and in direct violation of the prohibition of the said magistrates," brought a suspension, *inter alia*, on the ground that there were two branches to the charge, both requiring to be established, viz.,

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giving an entertainment and disregarding a prohibition, and that such prohibition had not by competent evidence been established.

Held that inasmuch as the prohibition referred to in the complaint was not a "regulation or prohibition," but was merely the refusal of an application by the accused for permission, for the proof of which the evidence produced was sufficient, there were no two branches to the charge requiring to be separately established, and suspension *refused.*

Justiciary Cases—Suspension—Evidence—Competency of Witness—Clerk of Court Giving Evidence qua Depute Town-Clerk.

Held that in a complaint under section 397 of the Burgh Police (Scotland) Act 1892, the officiating clerk of court, who was the depute town clerk, was a competent witness to prove by parole evidence that the accused had applied for permission to give entertainments, which permission had been refused.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 397, enacts—"No public show of any description whatever, whether in open ground or in any house or building, or caravan or tent, and no swings or hobby-horses, and no shooting-gallery, singing or dancing saloon, or bowling or nine-pin alley, and no place for playing skittles (all which are hereinafter shortly described or referred to as public shows and other like places of public entertainment), shall be opened or set up within the burgh without the permission of the magistrates; and it shall be lawful for the magistrates to regulate, restrain, remove, or prohibit all such public shows and other like places of public entertainment, and to make and establish regulations and prohibitions to that effect; and if any person shall open or set up, or be concerned in opening or setting up, any such public show or other like place of public entertainment, without the sanction or permission of the magistrates, or shall contravene any such regulation or prohibition, all such persons shall for every such offence be liable to a penalty not exceeding five pounds, and also to a continuing penalty of five pounds for every day during which the offence is committed or continued."

Andrew Patrick, a musician, wished to conduct performances on the beach at Largs during the summer, and on 27th June 1905 applied by letter to the Town Council for permission, but the Town Council after considering the application refused permission. The refusal was intimated to him by the police, but in spite of this intimation he "did not altogether abandon his performances, but placed on the foreshore a portable platform 18 inches in height, and put thereon a piano, upon which accompaniments were played to the songs given by members of his concert party."

On 4th July Patrick was served with a complaint in the following terms—"That Andrew Patrick, musician, presently residing at No. 26 School Street, Largs, in the burgh of Largs and county of Ayr, did, on Monday the 3rd day of July 1905, on the open ground situated between Gallowgate Street, Largs, and the sea beach or strand, all in the burgh of Largs and county of Ayr, and at a part thereof situated opposite or near to the White Hart Hotel, Largs aforesaid, open or set up, or was concerned in the opening or setting up, of a wooden platform or other erection, from which a public show or other like public entertainment, consisting of vocal and instrumental music, was given by or under the direction of the said Andrew Patrick, without the sanction or permission of the magistrates of the burgh of Largs aforesaid, and in direct violation of the prohibition of said magistrates, contrary to the Act 55 and 56 Vict. cap. 55, entituled 'The Burgh Police (Scotland) Act 1892,' and particularly section 397 of said Act; whereby the said Andrew Patrick is liable, upon conviction, to a penalty. . . ." On 8th July he was tried, convicted, and fined £1.

He now presented a bill of suspension, in which he averred—"Further, improper evidence was admitted at the trial, although objected to by the complainer, and the trial was irregularly conducted. In particular, Mr Peter Morris, who was acting as legal assessor to the magistrates, is not a qualified law agent. Further, although acting as legal assessor at the complainer's trial, he was put into the witness-box by the burgh prosecutor, though objection was taken by the complainer. The evidence which he gave was also incompetent. It was necessary to prove that the complainer had not the permission of the magistrates and had acted in direct violation of their prohibition as set out in the complaint. This could only be proved by the town clerk (who was not called) proving and producing the correspondence between him and the complainer, and this was not done. Also the assessor when examined as a witness spoke to various regulations and prohibitions made by the magistrates under section 397, which he said the complainer had contravened, as set out in the complaint. He did not produce these regulations and prohibitions, though called on to do so by the complainer, nor any minute of the magistrates relative thereto, though he stated that these existed. The evidence of the assessor, thus improperly given and allowed, prejudiced the magistrates against the complainer."

He, *inter alia*, pleaded—"The conviction of the complainer was unjust, nimious, and oppressive, and ought to be suspended in respect that—(1) The complainer did not open a public show within the meaning of the section 397. . . . (6) the assessor ought not to have been allowed to go into the witness-box; (7) the evidence as to the refusal of leave to the complainer and the existence of prohibitions was incompetently allowed to be given parole by the assessor, who knew nothing about it, except by hearsay, instead of being given *scripto* by the production by competent officials of the documents themselves."

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Argued for the complainer—The section would not strike at a man singing in the streets, and the complainer's entertainment was of that nature. The mere setting up of a movable platform was not enough to make it a public show or place of public entertainment—*Linton* v. *Beaumont*, July 18, 1883, 5 Coup. 303, 10 R. (J.C.) 80, 20 S.L.R. 826. The complainer was charged with contravening not merely the section itself but the prohibitions made by the magistrates under that section, and these prohibitions should have been formally proved—*Gemmell* v. *Weir & Patrick*, January 28, 1897, 2 Adam 227, 24 R. (J.C.) 23, 34 S.L.R. 424. It was incompetent for the clerk of court, who was adviser to the court, to act also as a witness—*H. M. Advocate* v. *Robertson*, February 19, 1849, Shaw's Justiciary Cases 186.

Argued for the respondent—The complainer's entertainment had the element of organisation, which was sufficient to bring it within the section. The prohibition referred to was nothing more than the refusal by the magistrates to grant the complainer's application, and this could be competently proved by parole evidence. There is no mention in the Act of an "assessor," and there was no objection to the clerk of court giving evidence on a formal matter.

LORD JUSTICE-GENERAL—This is a bill of suspension against a conviction by the Magistrates of the burgh of Largs of a Mr Patrick for a contravention of section 397 of the Burgh Police (Scotland) Act 1892. Mr Patrick seems to have organised a sort of concert party with which he gave entertainments on the beach, and it is now admitted, although it was at first denied, that the *locus* is within the jurisdiction of the magistrates. His paraphernalia seems to have consisted of a platform on which he put a piano and from which they sang. Various objections were stated to the proceedings, but in the course of the discussion they have been narrowed down to the following:—

The first is that the *species facti* which I have stated is not really struck at by the 397th section of the Burgh Police Act. That section is in these terms—[*his Lordship then read the section*]. It is admitted that no permission was here got, and therefore the question is reduced to the point of whether his entertainment was a "public show or other like place of entertainment." It is perhaps difficult to give an exact definition of these words, but on the whole matter I have come to the conclusion that this was a public show within the idea of the section. I think the idea connotes something in the way of arrangement of a performance—something more than a mere itinerant singer. It may come to be a question of degree; but treating it as a matter of degree I cannot but think that a man who comes with a platform and a concert party, the attractiveness of whom is enhanced by fancy dress, and gives a regular singing entertainment, does set up a show or something of a like character. I think that this objection fails.

The next objection is to the form of the complaint, inasmuch as it complains that the accused did set up "a wooden platform or other erection from which a public show or other like public entertainment, consisting of vocal and instrumental music, was given by or under the direction of the said Andrew Patrick without the sanction or permission of the magistrates of the burgh of Largs aforesaid, and in direct violation of the prohibition of the said magistrates," and it is said that the prohibition is not proved in proper form because it was proved not by the production of the document but by the oral evidence of Mr Morris. I at first thought that the prohibition of the magistrates referred to certain regulations and prohibitions, but I have come to the conclusion that we were misled by the use of the same word in two different senses, and I think that it merely refers to the refusal of the magistrates to give their permission, and that it does not relate to what is called in section 397 of the Burgh Police Act "Regulations and Prohibitions," which would make a charge of a separate offence. If that had been the meaning of the words I think it would have been necessary to show that such "regulations and prohibitions" had been made.

The only other point is that it has been made a ground of complaint that Mr Morris, the depute town-clerk, who was also acting as assessor, went into the witness-box and proved orally the refusal of the magistrates to grant permission for the show. I do not think there is any substance in this objection. There is nothing in the statute about any assessor to the court, and there is no reason why the town-clerk should not give such evidence.

I am therefore for refusing the bill of suspension.

LORD ADAM—This is a bill of suspension of an alleged contravention of section 397 of the Burgh Police (Scotland) Act 1892. The question is whether the complainer has contravened that section. He is charged with setting up a wooden platform from which a public show, or other like public entertainment, consisting of vocal and instrumental music, was given without the sanction or permission of the magistrates, and in direct violation of the prohibition of said magistrates. And we have set forth in art. 2 of the statement of facts a description of what was done. I think that such an entertainment as is described in the complaint does fall within the description of a public show or other like public entertainment, opened or carried on on the foreshore, and I think that falls within the description of a show in section 397 of the Act. Therefore I think that the complaint is relevant.

The next objection is that the charge contains two separate offences, viz., setting up this show without the permission of the magistrates, and doing so in direct violation of the prohibition of the magistrates. I thought at first that the latter words referred to certain "regulations and prohibitions" which they are entitled to make

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under the Act. But it is explained that there are no such "regulations and prohibitions," and that all that is meant is that their permission was refused. If that is all, I agree with your Lordship that there is no separate charge. Otherwise the "regulations and prohibitions" should have been proved.

I think the only other objection is that the assessor went into the witness-box and proved that application had been made to the magistrates and their sanction refused. I see nothing in that to warrant suspension.

LORD M'LAREN concurred.

The Court refused the bill.

Counsel for the Complainer — Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Respondent — Horne. Agents—Simpson & Marwick, W.S.

Wednesday, November 15.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

ANGUS *v.* H. M. ADVOCATE.

Justiciary Cases—Suspension—Complaint—Relevancy — Nomen juris — "Wilful Fire-Raising" — Setting Fire Wilfully to a Stack of Hay.

An indictment charged the accused with setting fire to a stack of hay, "and this you did wilfully." Objection was taken to the relevancy of the complaint on the ground that it charged no crime either at common law or under the statutes, inasmuch as "wilful fire-raising" was a *nomen juris* signifying a crime which could only be committed in connection with heritage and certain kinds of moveables, but not hay.

Held that though it might have been more usual to have had the words "culpably and recklessly" instead of the word "wilfully," still the indictment relevantly averred a crime.

Justiciary Cases—Suspension—Conviction—Conviction not Agreeing with Charge—Charge of Setting Fire to a Stack of Hay Wilfully—Conviction of "Wilful Fire-Raising as libelled."

Held that a conviction for "wilful fire-raising as libelled" referred back to the indictment, and was therefore good under an indictment which did not charge the accused with the crime of "wilful fire-raising," but with setting fire wilfully to a stack of hay.

William Angus, the complainer in this bill of suspension, was apprehended on a warrant granted on 28th September 1905 by the Sheriff-Substitute of Caithness-shire, and he was afterwards served with an indictment in the following terms:—"William Angus, crofter, residing at New Road, Westerdale, Halkirk Parish, Caithness-shire, you are indicted at the instance of the Right Hon. Charles Scott Dickson, His Majesty's Advocate, and the charge against you is, that on the night of the 23rd or morning of the 24th day of September 1905 you did set fire to a screw or stack of hay at Achalone, Halkirk Parish aforesaid, belonging to Angus Morrison and Angus Morrison junior, crofters there, and the fire took effect on said screw or stack, and also on an adjacent screw or stack of hay belonging to the said Angus Morrison and the said Angus Morrison junior, and this you did wilfully."

The accused pleaded not guilty, and at the second diet, before pleading, stated the following objection to the relevancy of the indictment—"That wilful fire-raising is confined to certain specific articles, of which a hay stack is not one, and, therefore, that there is no crime known to the law charged against the accused."

The Sheriff-Substitute (HARVEY) repelled the objection.

The accused having again pleaded not guilty, the case went to a jury, who by a majority found the panel guilty of "wilful fire-raising as libelled."

Angus having been sentenced to three calendar months' imprisonment with hard labour, now presented a bill of suspension and liberation, and pleaded — "(1) The complainer is entitled to suspension and liberation in respect that the indictment upon which the conviction was obtained was irrelevant, and did not set forth any offence, either at common law or under the statutes. (2) The charge of having wilfully set fire to a screw or stack of hay not constituting the crime of wilful fire-raising, the said indictment was irrelevant, and the sentence and warrant following thereon were incompetent, wrongous, and unjust, and the complainer is entitled to suspension and liberation as craved."

Argued for the complainer—Under the old law wilful fire-raising was a *nomen juris*, and the offence, which involved capital punishment, could only be committed on heritable property of a certain description. The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), Schedule A, gave two forms of indictment for setting fire to property, one of which, including the word "wilful," was intended to cover the offences previously indicted as "wilful fire-raising." This form, which was used in the present case, was inept, since the crime alleged was that of setting fire to moveable property, and was therefore not the crime of "wilful fire-raising." *H.M. Advocate* v. *MacBean*, April 15, 1847, Arkley, 262; *H.M. Advocate* v. *Arthur*, March 16, 1836, 1 Swinton, 124; Hume on Crimes, i, 125, 131, 135; Alison's Criminal Law, i, 432, 433. Further, the conviction was bad because of the discrepancy between it and the indictment, the complainer having been convicted of a crime different from that with which he was charged.

Argued for the respondent—The question of discrepancy between the conviction and the indictment was not one of the pleas stated by the complainer in the bill of suspension. No objection could have been

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taken if the accused had been simply found "guilty as libelled." As it was, the conviction of the accused "as libelled" involved a reference to the indictment, where the *nomen juris* "wilful fire-raising" did not appear. The two classes of fire-raising referred to in Schedule A of the Criminal Procedure Act of 1887 were not distinguished through either the punishment or the property burnt, but depended upon the act being (1) wilful, or (2) culpable and reckless. The present charge relevantly covered acts which amounted to a crime by the law of Scotland.—Hume on Crimes, i, 126; Thomson's Acts, i, 342, 347.

LORD JUSTICE-GENERAL—This is a suspension brought by William Angus, a crofter, of a conviction obtained against him upon a charge that upon a certain day in September 1905 he set fire to a screw or stack of hay, described as at a certain place and belonging to certain persons, and that the fire took effect on the said screw or stack of hay, and also on an adjacent screw or stack of hay, and that this he did wilfully. On this followed a verdict of "guilty of wilful fire-raising, as libelled," and he was sentenced to three months' imprisonment with hard labour. Now, the objection put forward for the suspender is that the crime of wilful fire-raising, as settled by the authoritative institutional writers, cannot be committed by setting fire to a stack of hay, and that, accordingly, the conviction here is of a crime of which the suspender was not accused, or, if it is of the crime of which he was accused, then that was not a crime according to the law of Scotland.

There does not seem to be any doubt as to how the old law on this subject stood, and although from a modern point of view it may seem in many respects to have been almost absurd, yet, as in most such cases, if the matter is considered from an historical point of view, the reason for it existing in that form will become manifest. In old days the crime of wilful fire-raising was a capital offence, and not only was it a capital offence at common law, but there was a series of statutory enactments by which it was sought to restrain the judges from any remission or modification of the capital penalty. That being so, and the crime being of so serious a nature and visited by the heaviest sentence known to the law, it is easy to see why care was taken that the subject-matter of the crime should not be unduly extended. And so it was that the crime, which would be charged in the major as "wilful fire-raising," could only be committed by setting fire to heritable property or to certain special forms of moveable property. But there was always another crime known to the law—an innominate crime and visited by an arbitrary penalty—which consisted in setting fire or attempting to set fire to anything. It is true that the epithet in that case was not "wilful," but of doing so "culpably and recklessly"; but I think that this is of no moment, for I do not doubt that the element of wilfulness was always present—*i.e.*, that no conviction could have followed if it were shown that the fire-raising had been caused by mere accident and in entire absence of set intention.

In modern times the materiality of this distinction between the two crimes has been swept away, for it is no longer possible to visit with a death penalty the crime of wilful fire-raising, and under the quite modern procedure, since the Act of 1887, there is now no major, so that it is no longer necessary to set forth the crime under a *nomen juris*, but only the facts on which the charge is based. All that is necessary is that the facts set forth do in fact constitute a crime.

Now, on this view of the matter I have come, though not without some hesitation, to the conclusion that this conviction must stand. I am averse to setting aside what appears otherwise to be a just conviction on a mere technicality, unless it can be urged that it has in some way prejudiced the accused in his trial. Here the technicality which we are asked to consider obviously cannot have done so, for it is merely in the phraseology of the verdict. The crime charged is the crime of setting on fire wilfully—a very serious crime, and one which deserves a heavy punishment—and I should have been reluctant to have quashed a conviction for such a crime on a technical point based on a mere matter of form. But I do not think we are driven to such a course. As I have already pointed out, it is no longer necessary to specify a major, so all we have to consider is whether the facts set forth in the indictment—that the accused set fire to a stack of hay, that the fire took effect, and that he did it wilfully—amount to a crime. I think that they do. It seems that in drawing this indictment the word "wilfully" has been used instead of the words "culpably and recklessly," and that is perhaps unfortunate, as it seems to have given rise to some confusion. But it would really be absurd to say that what would amount to a crime if it were done culpably and recklessly is not a crime if it is done wilfully. I therefore think that the facts set forth in this indictment amount to a relevant description of a crime, and a crime known to the law of Scotland.

Now, as to the verdict, it was as follows—"The jury, by a majority, found the panel guilty of wilful fire-raising as libelled." An examination of the actual words of this verdict shows that the conviction was not for "wilful fire-raising," but for "wilful fire-raising as libelled." That throws us back to the indictment to see what the crime libelled was, and we find that it was the crime of wilfully setting fire to a stack of hay. I am of opinion that the verdict was a proper conviction for the crime set forth in the indictment, and was not a conviction merely for the crime known under the old law by the *nomen juris* of wilful fire-raising. I am, therefore, of opinion that the conviction here sought to be suspended must stand.

LORD ADAM—I am of the same opinion. The charge here is that William Angus set

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fire to a screw or stack of hay, that the fire took effect on the said screw or stack, and that he did this wilfully. I would beg to point out that there is no charge here of the crime of "wilful fire-raising" in the technical sense of these words. The facts libelled here of setting fire to a stack of hay cannot amount to the technical crime of wilful fire-raising. I do not know if in old days the offence here charged would not have been libelled as having been done culpably and recklessly, but I am quite clear that as it stands it is a perfectly good charge of the innominate crime of fire-raising. I do not know that wilful fire-raising and culpable and reckless fire-raising are quite the same, but I have no doubt that the setting fire to a stack of hay wilfully is in Scotland a crime, and that that crime has been relevantly libelled here.

As to the verdict—if the conviction here had been for wilful fire-raising without qualification, there might have been difficulty in sustaining it. But here that difficulty does not arise, for the conviction is for wilful fire-raising "as libelled"; and when we look back to the libel we see that setting fire to a stack of hay wilfully is what is libelled. So I do not think that the sentence here purports to be for the technical crime of wilful fire-raising but is only for the crime of setting fire to a stack of hay wilfully. I therefore agree with your Lordship that we have no grounds for quashing the conviction in this case.

LORD M'LAREN — The difficulty which seems to have arisen in this case largely disappears when we consider that the malicious setting fire to a stack of hay has always been treated as an offence punishable in this Court or by the Sheriff, though it did not amount to the technical category of wilful fire-raising. Under our present code of procedure it is not necessary to specify the category of crime with which the accused is charged. It suffices that the description of the acts alleged to be done amounts to the statement of a crime. I agree with your Lordships that we have in this complaint a relevant description of the crime of maliciously setting fire to moveable property.

There remains the consequential question whether the terms of the verdict apply with sufficient distinction to the crime set forth in the indictment. The Solicitor-General has urged that this point does not arise for consideration, as no plea is taken in the suspension with regard to the alleged discrepancy. There is force in the objection, but as our refusal to deal with this question might only result in another suspension being instituted, I think it is right, in the interests of parties, that they should have our opinion with regard to it. From what we know of records of this Court it appears that in Scotland verdicts have always been indulgently construed, and for this reason, that it seldom happens that an error in the verdict can be prejudicial to the accused, because the verdict must always be construed with reference to the indictment or complaint. It is only in the case where there are alternative charges that it is necessary that the verdict should be clear so as to show distinctly to which of the charges it is intended to apply. According to the authority of a case cited by Hume—with which I may say I would not be prepared to agree—an ambiguity in the verdict in such a case would justify a sentence passing on the lesser charge. That difficulty, however, does not arise here, for this libel has only one charge.

Hume says that where "a general verdict of guilty is returned, it is held to be sufficiently applied to the libel mentioned in the preamble, and it amounts in law to a conviction of all the charges, how numerous soever, in that libel, so far as they are consistent with each other, and under all their qualities as there set forth." Now, one of the qualities set forth in this libel is that the act complained of was done to moveable property and not to immovable, and the adverse contention is that the verdict when strictly read implies a conviction for a crime relating to immoveable property. I see that in old times the Court has gone very far in the construing of verdicts. In cases cited by Hume the jury found the panel "guilty of an arbitrary punishment," "liable to an arbitrary punishment," and "guilty of death," and in all these cases the verdict seems to have been upheld. Hume in commenting on them says—"It would not indeed be reasonable to exact of juries a minute and punctilious precision in their expressions." I do not consider that here the substitution of the word "wilful" for the word "malicious"—which would have been the better expression—can in any way prejudice the defence or create a difficulty as to passing sentence. I therefore agree with your Lordships that this conviction must stand.

The Court refused the bill.

Counsel for the Complainer—Watt, K.C. —D. Anderson. Agent—S. F. Sutherland, S.S.C.

Counsel for the Respondent—The Solicitor-General (Clyde, K.C.)—Graham Stewart, A.-D. Agent — W. J. Dundas, Crown Agent.

Wednesday, November 15.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

VELLUTINI *v.* FORSYTH.

Justiciary Cases—Stated Case—Ice-Cream and Aerated Water Shop—Sale of Aerated Water in Fish Restaurant—Registration—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, c.* 33), *sec.* 82, *sub-sec.* (1).

The Burgh Police (Scotland) Act 1903, section 82 (1), provides for a register of ice-cream and aerated-water shops, and imposes a penalty on any person who keeps such a shop without its being registered therein.

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Two persons having been supplied in a fish restaurant with aerated water, the keeper thereof was convicted of a contravention of the Burgh Police (Scotland) Act 1903, sec. 82 (1), in not having his premises registered in terms thereof. An appeal was taken.

Held that the sub-section did not strike at the supplying of aerated-water, but at the keeping of a certain class of shop, viz., aerated-water shops, and consequently that it did not apply to premises where the principal business carried on was, as here, that of a fish restaurant, although aerated waters might also be supplied to customers, and therefore that such premises did not fall to be registered under the Act.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), section 82, sub-section (1), enacts—"Every person who shall keep, or suffer to be kept or used or use, any house, building, part of a building, or other premises, as an ice-cream shop or aerated-water shop, without being registered in a register to be kept by the town council, who are hereby required to keep a register for that purpose, in which they shall enter the names of applicants without charge, shall be liable to a penalty not exceeding five pounds, and in the event of such premises being continued to be kept or used for such purpose after conviction, to a continuing penalty not exceeding five pounds for every day during which the offence is committed or continued."

This was an appeal by way of stated case from the Burgh Police Court of Airdrie, in which Pietro Vellutini, the appellant, sought to have a conviction quashed which had been obtained against him at the instance of Thomas Forsyth, Solicitor and Burgh Prosecutor, Airdrie.

The complaint, which was brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, the Criminal Procedure (Scotland) Act 1887, and the Burgh Police (Scotland) Acts 1892 and 1903, set forth—"That Pietro Vellutini, 28 High Street, Airdrie, did, on 15th July 1905, keep or suffer to be kept or used a shop at 28 High Street aforesaid as an ice-cream or aerated-water shop without being registered in a register kept by the Town Council, Airdrie, and did sell or supply therein aerated waters to Michael M'Fadyen, 3 Airdriehill Street, Airdrie, and Alexander Stevenson, baker, Rawyards, Airdrie, contrary to the Burgh Police (Scotland) Act 1903, section 82 (1), whereby the said Pietro Vellutini is liable to a penalty not exceeding £5."

The following were the facts as stated by the Magistrate:—"That the Provost, Magistrates, and Councillors of the burgh of Airdrie had, in terms of section 98 of the Burgh Police (Scotland) Act 1903, adopted Part II of said Act containing section 82 thereof. That the appellant kept a shop at 28 High Street, Airdrie, and that said shop was not registered in a register of ice-cream shops and aerated-water shops kept by the town council of Airdrie, specified in the Burgh Police (Scotland) Act 1903, section 82 (1). That the appellant became owner of the shop a few months ago, and carried on business first as an ice-cream and aerated-water shop, and when certain bye-laws made by the Provost, Magistrates, and Councillors under the Act came to be enforced he ceased to sell the ice-cream and bottled aerated waters, but continued the business as a fish restaurant. That on the date libelled, at about a quarter to eleven o'clock at night, the said Michael M'Fadyen and Alexander Stevenson were, along with others, in said shop. That the said Michael M'Fadyen asked the appellant for some aerated water, and that the appellant replied that he had none, but supplied him with and was paid for a drink which the appellant said was lemon and water but was compounded as after mentioned. That the said Alexander Stevenson also asked for a drink, and that the appellant supplied him with one similar to that supplied to M'Fadyen, and which was also paid for. That the drinks supplied to M'Fadyen and Stevenson were made by the appellant taking out of a cistern in the shop some lemon water (made by the addition of sliced lemons to water), and adding to said lemon water a powder composed of tartaric acid, sugar, and carbonate of soda. The addition of said powder made the drink an effervescing gaseous one, and which had the taste of lemonade manufactured in the ordinary way. At a continued diet on 25th July 1905 I found the appellant guilty of the offence charged, on the ground that the drinks supplied to M'Fadyen and Stevenson were aerated waters, and accordingly that the shop kept by the appellant was an aerated-water shop and should have been registered in said register, and fined him in the sum of one pound, or in default of immediate payment thereof sentenced him to be imprisoned for the space of fourteen days."

The question of law for the opinion of the Court was—"Do the facts proved warrant the conviction?"

Argued for the appellant—Section 82, sub-section (1), of the Act was intended to deal with ice-cream and aerated-water shops, not with fish restaurants. The case stated that it was proved that the shop in question was a fish restaurant, and therefore it did not fall under the Act. The aim of the Act was to regulate a certain class of shops which were well known as ice-cream and aerated-water shops. It was not directed against the sale of aerated waters at all. Even if it were held that the mixture supplied was aerated water in the sense of the Act, the sale of such waters in a fish restaurant was not struck at by the Act. If the Act were held to apply to the present case, then it would follow that all temperance restaurants and tea-rooms and all hotels and public-houses must be registered under the Act as ice-cream and aerated-water shops.

Argued for the respondent—The Act applied to the shop in question here if it were held that the mixture sold was aerated water. It was proved that originally this shop had been an ice-cream and aerated-water shop, and that in consequence of the

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Act being enforced by the Magistrates it had ceased to sell ice-cream and aerated waters but had continued the business as a fish restaurant. It was proved that it had resumed the sale of aerated water, and it would be a plain evasion of the Act that it should escape registration merely by changing its name, while at the same time it continued to deal in aerated waters. It was held proved here that the mixture sold was aerated water. That was a pure question of fact, and an appeal from the decision of the Magistrate on that point was incompetent.

LORD JUSTICE-GENERAL — This is an appeal by Pietro Vellutini, who keeps a shop in Airdrie, and is convicted of an alleged contravention of section 82 of the Burgh Police (Scotland) Act 1903.

This section provides—[*his Lordship read the section*].

It is admitted that this shop is not registered in terms of the above-quoted section of the Act. The case states that evidence was led to the effect that Airdrie had adopted Part II of the Act, which includes section 82. It then further states that the appellant originally kept the shop as an ice-cream and aerated water shop, and that when certain bye-laws, made by the magistrates under the Act, came to be enforced, he ceased to sell ice-cream and aerated waters, but continued the business as a fish restaurant. That on the date libelled, at about a quarter to eleven at night, Michael M'Fadyen and Alexander Stevenson were in the shop. That they both asked the appellant for aerated waters, and that he replied that he had none, but supplied them with, and was paid for, a drink which the appellant said was lemon and water. That the drinks thus supplied were made by the appellant taking out of a cistern in the shop some lemon water (made by the addition of sliced lemons to water) and adding to said lemon water a powder composed of tartaric acid, sugar, and carbonate of soda. The addition of this powder made the drink an effervescing gaseous one, which had the taste of lemonade manufactured in the ordinary way. That thereupon the presiding magistrate found the appellant guilty of the offence charged, on the ground that the drinks supplied were aerated waters, and that accordingly the shop kept by the appellant was an aerated water shop and should have been registered, and fined him in the sum of £1 sterling, or in default sentenced him to fourteen days' imprisonment.

It seems to me that on the facts there stated the conviction cannot be upheld. The object of the Act is not to strike at the selling of an isolated drink of aerated water but the keeping of an establishment of a certain class.

It is obvious that the Act does not turn a shop into an ice-cream and aerated water shop simply because ice-cream or aerated water happen to be supplied when the principal business is something else.

The effect of sustaining this conviction would be that all hotels, public-houses, and restaurants, and many tea shops and confectioners' shops, would have to be registered under the Act as ice-cream and aerated water shops, which was never intended, and would be absurd.

I further doubt very much whether the complaint in its second branch is relevant. I can quite understand that a person might be convicted under this section, although he called his shop a fish restaurant or anything else, if it were proved that he was really keeping an ice-cream and aerated water shop. But that is a question of fact, and cannot be established merely by proving that one sale of aerated water has been made.

If the prosecutor had proposed to prove that this was in reality an aerated water shop, and had proved that fact to the satisfaction of the magistrate, the magistrate would have been quite entitled to convict, and this Court could not have interfered with the conclusion he had come to on the facts.

But as this case stands I do not think the conviction can possibly be supported, and therefore the appeal must be sustained.

LORD ADAM and LORD M'LAREN concurred.

The Court answered the question of law in the negative and sustained the appeal.

Counsel for the Appellant—Crabb Watt, K.C. — T. B. Morison. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—Grainger Stewart—J. H. Henderson. Agents—W. & J. L. Officer, W.S.

Thursday, November 16.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

BELL *v.* MITCHELL.

Justiciary Cases — Suspension — Noting Documentary Evidence—"Documentary Evidence that May be Put In"—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 16.

The Summary Procedure (Scotland) Act 1864, sec. 16, provides as follows:—"It shall not be necessary in any proceeding under the authority of this Act to record or preserve a note of the evidence adduced, but the record shall set forth in the form of the Schedule (I.) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

A person was tried on a summary complaint and convicted by the Sheriff of reckless driving of a motor bicycle. During the course of the trial the Sheriff asked the accused for his licence, and on its being handed to him by the accused, looked at it, asked the accused

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some questions about it, and handed it back.

Held that the provision of the Act was imperative as to the necessity of a note being made of any documentary evidence put in, but that on the facts of the present case the licence was not documentary evidence put in in the sense of the Act.

Justiciary Cases—Suspension—Conviction and Sentence—Disconformity to Statute —Motor Car—Driver's Licence—Endorsation of Driver's Licence on Conviction—Motor Car Act 1903 (3 *Edw. VII, c.* 36), *sec.* 4, *sub-sec.* (1) *c.*

The Motor Car Act 1903, sec. 4, enacts —"(1) Any court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under this Act, (*a*) may, if the person convicted holds any licence under this Act, suspend that licence for such time as the court thinks fit, and, if the court thinks fit, also declare the person convicted disqualified for obtaining a licence for such further time after the expiration of the licence as the court thinks fit; and (*b*) may, if the person convicted does not hold any licence under this Act, declare him disqualified for obtaining a licence for such time as the court thinks fit; and (*c*) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the court made under this section, to be endorsed upon any licence held by him, and shall also cause a copy of those particulars to be sent to the council by whom any licence so endorsed has been granted."

The driver of a motor bicycle was convicted of reckless driving on a summary complaint, but, on the craving of the prosecutor, the Sheriff dispensed with the endorsation of the accused's licence. A suspension of the conviction was brought on the ground that the conviction was bad in respect that the Sheriff had not complied with the requirements of the Act by ordering the endorsation of the licence.

Held that endorsation of the licence, under section 4 (1) (*c*), was not in the meaning of the Act a part of the conviction, but merely a ministerial act which the court was directed to perform, and consequently that the conviction did not fall to be quashed in consequence of endorsation not having been ordered.

Observed that there were other orders which might be made under the section, which, if made at all, must form part of the conviction, viz., orders for suspension of a licence or disqualification from procuring a licence.

Justiciary Cases—Suspension—Refusal to Entertain Appeal—Statute—Application to Scotland — Right of Appeal Given Generally—Special Right of Appeal in Scotland also Given—Motor Car—Motor Car Act 1903 (3 *Edw. VII, c.* 36), *sec.* 11, *sub-sec.* (2), *and sec.* 18, *sub-sec.* (6).

The Motor Car Act 1903 section 11, sub-section (2), enacts—"Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction in the same manner as he may appeal if ordered to be imprisoned without the option of a fine."

Section 18 enacts—"In the application of this Act to Scotland . . . (6) Any person convicted of an offence under this Act and ordered to be imprisoned without the option of a fine, or adjudged to pay a fine exceeding ten pounds, shall have a right of appeal against the conviction. Such appeal shall lie to the sheriff-depute and shall be heard summarily. . . ."

Where a motorist was convicted of reckless driving under the Motor Car Act 1903, section 1, and was fined £9, he appealed to the Sheriff, who refused to entertain the appeal as being incompetent.

Held that the appeal was rightly not entertained by the Sheriff, inasmuch as the right of appeal given in section 11 of the Act, although that section was in the general part of the Act which applied both to England and Scotland, was only applicable to England, and the only right of appeal in Scotland was provided for in section 18, which did not cover the case.

This was a bill of suspension presented by Charles Edward Bell, Rosebank, Paisley, craving the Court to set aside a conviction obtained against him in the Sheriff Court at Dumbarton on 12th June 1905, at the instance of the respondent Robert Peter Mitchell, Writer, and Procurator-Fiscal of Court for Dumbartonshire.

The complaint under which the complainer in the suspension had been convicted was brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, and set forth, "That Charles Edward Bell, works manager, residing at Rosebank, Paisley, on 4th June 1905, on the public road or highway between Clydebank and Dumbarton, at a part thereof in the parish of Old Kilpatrick and county of Dumbarton, opposite and near Dumbuck farm-steading, occupied by Duncan Macfarlane, farmer, residing there, did drive a motor bicycle on said highway recklessly, whereby Malcolm Ritchie, marine engineer, residing at 391 Paisley Road, Glasgow, who was then cycling on said highway, was knocked from his bicycle by said motor bicycle, and seriously injured in his person, contrary to the Motor Car Act 1903, section 1; and such offence is a first offence; whereby the said Charles Edward Bell is liable to a fine not exceeding £20, and in default of payment of said fine to imprisonment in terms of the Summary Jurisdiction (Scotland) Act 1881, section 6, and further, to have the licence held by him

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under the Motor Car Act 1903 indorsed or suspended, or he may be declared disqualified for obtaining such a licence for such further time after the expiration of the said licence as the Court thinks fit."

The accused was convicted of the offence charged, the conviction being in the following terms—"At Dumbarton, the 12th day of June 1905.—The Sheriff-Substitute, in respect of the evidence adduced, finds the said Charles Edward Bell guilty of the offence charged, being a first offence, and therefore fines and amerciates the said Charles Edward Bell in the sum of £9 sterling, and in default of immediate payment thereof decerns and adjudges the said Charles Edward Bell to be imprisoned for the space of one calendar month from this date unless said fine shall be sooner paid, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey the said Charles Edward Bell to the prison of Glasgow, thereafter to be dealt with in due course of law. And on the craving of the complainer dispenses with any deliverance with regard to the endorsation or suspension of the licence held by the respondent under the Motor Act of 1903, or any declaration disqualifying him for obtaining such a licence for such further time after the expiration of the said licence as the Court may have thought fit."

The complainer in the suspension averred that during the trial his licence was produced in evidence, and that he was examined in regard thereto, and that no note of said licence was made as required by section 16 of the Summary Procedure (Scotland) Act 1864.

The complainer further averred—(1) that the Sheriff-Substitute had not complied with the provisions of section 4 of the Motor Car Act 1903, inasmuch as he had not ordered the particulars of the said conviction to be endorsed upon his licence; and (2) that after said conviction he had appealed to the Sheriff, who had refused to entertain his appeal.

The following note had, without any interlocutor, been issued by the Sheriff (Lees)—"Apart from section 18 of the statute I have no jurisdiction to entertain an appeal against the judgment of a Sheriff-Substitute in a criminal case. But that section unquestionably gives no appeal in the present case, and I therefore have no jurisdiction to pronounce any order on the appeal (*Shaw, Petitioner*, 11 R. 814, 21 S.L.R. 542) any more than I would have to appoint a diet for the disposal of an appeal presented to me against the decision of a J.P. Court. Counsel for the accused has, however, suggested that perhaps there may be an appeal under section 11 (2); but, as it seems to me, that would be so flagrant and deliberate a misreading of the statute that I should be usurping a jurisdiction I do not possess if I ventured to convene parties under it. Section 11 (2) provides no machinery for working out an appeal, and gives me no jurisdiction to entertain one unless section 18 is also taken into consideration; and the moment that latter section is taken into consideration its provisions must be obeyed. As there are no means of stating my views orally without first issuing an incompetent order on the appeal, and as counsel told me he wishes to bring a suspension of the conviction which was obtained, and to be in a position to state that he was unable to get redress under his appeal, I have agreed to follow the course sometimes adopted in the civil court in the exceptional case of an appeal being taken which is *ex facie* incompetent, and issue a memorandum or note without a judgment."

The parties agreed to the following statement of facts, viz., that in the course of the examination of the accused the Sheriff asked him if he had a licence. He replied that he had, took it from his pocket, and handed it to the Sheriff, who looked at it, asked some questions in regard to it, and returned it direct to him. It was never in the hands of the clerk of court.

The complainer pleaded—"The said conviction should be suspended, with expenses, because (*a*) No note of the certificate was made as required by section 16 of the Summary Jurisdiction Act 1864. (*b*) The Sheriff-Substitute in said conviction fails to comply with the provisions of the Motor Car Act 1903. (*c*) The appellant was wrongfully refused his right of appeal under the Motor Car Act 1903."

Argued for the complainer—(1) The Sheriff had failed to comply with the Summary Procedure (Scotland) Act 1864, as he had failed to note an essential document. It did not matter whether the document was material to the decision of the case or not; it was produced in evidence, and that being so, the Act provided that it must be noted. It was settled that the Act was imperative on that point, and there were a number of decisions to that effect—*Powdrell* v. *Galloway*, December 15, 1904, 42 S.L.R. 200; *Strachan* v. *Watson*, July 17, 1893, 1 Adam 55, 20 R. (J.C.) 76, 30 S.L.R. 891; *Marshall* v. *Phyn*, December 10, 1900, 3 Adam 262, 3 F. (J.C.) 21, 38 S.L.R. 171; *Provan* v. *Malloch*, June 8, 1891, 3 White 18, 18 R. (J.C.) 53, 28 S.L.R. 725; *Oliphant* v. *Wilson*, December 12, 1889, 2 White 403, 17 R. (J.C.) 12, 27 S.L.R. 203. In the conviction the Sheriff-Substitute held that the complainer had a licence, and whether the licence was material evidence in the case or not, that fact was sufficient to make it necessary that the licence should be noted. (2) Section 4 of the Motor Car Act 1903 was imperative that the licence should be endorsed on conviction, but the Sheriff said in the conviction that that was not to be done in this case. The conviction was therefore bad, because it was not in conformity with the provisions of the statute—*M'Callum* v. *Barrowman*, November 3, 1896, 2 Adam 197, 24 R. (J.C.) 15, 34 S.L.R. 58; *Fraser* v. *Neilson*, February 6, 1903, 4 Adam 139, 5 F. (J.C.) 51, 40 S.L.R. 543. The matter of endorsing the licence having been dealt with in the complaint, the conviction ought to have followed in the same terms. There must be an authority given by the magistrate *in gremio* of the conviction for endorsation of

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the licence, otherwise the provision of the Act could not be carried out, there being no warrant to enforce production of the licence for endorsation afterwards. (3) Section 11 of the Motor Car Act 1903 was quite general in its application, and gave a right of appeal both in England and Scotland where the fine imposed exceeded 20s. Section 18 in providing for the application of the Act to Scotland did not take away this general right of appeal already given.

[The Court intimated that they only desired to hear counsel for the respondent on the second point.]

Argued for the respondent—Under section 4, sub-section (1), the only orders contemplated as forming part of a conviction under the Act were those referred to in heads (*a*) and (*b*). If made, such orders must form part of the conviction. Under head (*c*) the only orders referred to were those mentioned in head (*a*), and there was no provision in any part of the section for any order of court for endorsation of the licence. The endorsing of the licence, and also the sending a copy of the particulars of the conviction to the council who granted the licence, were purely administrative matters which ought not to form part of the conviction at all. What the Sheriff said in the conviction about dispensing with endorsation was quite superfluous, and the complainer might still be called upon to produce his licence for endorsement in spite of the Sheriff's dispensation.

LORD JUSTICE-GENERAL—This is a suspension of a conviction obtained under section 1 of the Motor Car Act of 1903. The suspender was convicted and fined a sum of £9.

Three points have been taken against the validity of the conviction. The first point is that the conviction is bad in respect that no note of the driver's licence was made, as required by the 16th section of the Summary Procedure (Scotland) Act 1864.

That section provides that it shall not be necessary to record or preserve a note of the evidence adduced at the trial, but that the record shall set forth the respondent's plea, if any, the names of the witnesses, if any, and also a note of any documentary evidence which may be put in.

There have been frequent decisions upon this section of the Act, and it is settled beyond doubt that its provisions are imperative and cannot be dispensed with. Therefore if there was not a note made of any documentary evidence put in, undoubtedly the conviction must be quashed.

It appears, however, from the statement of facts, which counsel at the bar have accepted on behalf of both parties as representing what actually took place, that in the course of the examination of the accused in the witness-box, the Sheriff-Substitute asked him if he had a licence, and he replied that he had. The Sheriff-Substitute then asked to see it. Whereupon the accused took it out of his pocket and handed it to the Sheriff-Substitute, who looked at it, asked him some questions about it, and handed it back to him directly.

Now, on that statement of facts I am clear that the licence is not a piece of documentary evidence in the sense of the Act. In a summary proceeding in an inferior court there is no regular inventory of documents put in evidence made up, and therefore it is more difficult to arrive at whether a document has been actually put in evidence or not. But on the facts disclosed here by the parties, and on the consideration that the licence here was not a piece of evidence in a case of reckless driving, because the holding of such a licence makes that offence no better or no worse, it is, in my view, not necessary that the licence should be noted.

The next point is, that under the provisions of section 4 it is provided that any court, before whom a person is convicted of an offence under the Act, shall, if such person holds a licence, cause particulars of the conviction to be endorsed upon his licence, and also cause particulars to be sent to the council by whom the licence so endorsed was granted. Now, the Sheriff-Substitute, after finding the complainer guilty, went on thus—"And on the craving of the complainer dispenses with any deliverance with regard to the endorsation or suspension of the licence held by the respondent under the Motor Car Act of 1903, or any declaration disqualifying him from obtaining such a licence for such further time, after the expiration of said licence, as the court may have thought fit." Accordingly, up to the present, we are told that the complainer has not had his licence endorsed.

Counsel for the complainer cited certain cases where the Court had suspended convictions upon the ground that the conviction did not contain all that, according to the statute under which it was obtained, it ought to have contained. In particular there was the case of *M'Callum* under the Vaccination Act, where the Court held that the conviction was bad on the ground that it was not warranted by the statute. The ground of judgment in that case was that the only penalty authorised by the statute was the penalty of paying a fine to the poor inspector, while the man had in fact been fined *simpliciter*, which meant that the fine would go to the Exchequer. It is quite obvious that the result there would have been, if it had been allowed to stand, quite different from that authorised by statute.

The complainer in the present case seeks to establish an analogy between his case and that one, and he says that because there was in the conviction here no order as to endorsation of the licence therefore the conviction is bad. I am clearly of opinion that his argument on the analogy between the two cases is ill founded, and that the endorsation here is no part of the conviction but a purely ministerial act which the court is to perform after the close of the trial.

It is true that there are orders which do form part of a conviction under the Act,

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if they are made at all, viz., orders under the section which provides that the court may suspend the licence of a person convicted, or declare him disqualified from obtaining a licence for such further time after the expiration of his licence as the court may think fit, or if he does not hold a licence may declare him disqualified from obtaining such a licence for such time as the court thinks fit. But this is quite a different matter.

Although I am bound to decide the case on the statute as I find it, and as it applies to our practice, I am fortified in the view of the Act which I now put before your Lordships by knowing that the universal practice in England in carrying out the provisions of the Act has been in accordance with the construction I now put upon it, and which I think is the correct one. The usual procedure in England is that there is no order in the conviction, but that afterwards the clerk of court writes to the person who has been convicted asking for his licence in order that it may be endorsed with the particulars of the conviction and authenticated with the ordinary stamp of the court.

I now come to the third point which is raised, viz., that the accused appealed to the Sheriff, who refused to entertain the appeal on the ground that it was incompetent. This depends upon section 18, subsection 6, which says—"Any person convicted of an offence under this Act, and ordered to be imprisoned without the option of a fine, or adjudged to pay a fine exceeding ten pounds, shall have a right of appeal against the conviction. Such appeal shall lie to the Sheriff-Depute, and shall be heard summarily."

Now, it is plain that this case did not fall within that provision, but it was argued that what gave the right of appeal was section 11, sub-section 2. That section is in the general portion of the Act, which of course applies to England as well as Scotland. Now, the reason why an appeal is given in this section to a person who is adjudged to pay a fine exceeding 20s. in the same manner as there is when imprisonment is ordered without the option of a fine, is that in the English Summary Procedure Act an appeal to quarter sessions is given in cases of that character.

The question is, whether that provision applies to Scotland. I think it quite evident that when the Act goes on to say in section 18 that "in the application of this Act to Scotland . . . any person . . . adjudged to pay a fine exceeding £10 shall have a right of appeal against the conviction," it would be talking nonsense if there were already an appeal given in Scotland under section 11.

The present case does not fall within section 11, sub-section 2. I therefore move your Lordships to dismiss this bill of suspension.

LORD ADAM—I agree with your Lordship. The first point on which the counsel for the complainer relied in this case is founded on the provisions of section 16 of the Summary Procedure Act of 1864. That section provides that "It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the Schedule (I) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

It is said here that a certain document, namely, the licence held by the suspender had been used in evidence at the trial, but that no record has been made of the production in evidence of that document as required by the section I have just quoted. Now, the words of the Act are "a note of any documentary evidence that may be *put in*." As your Lordship in the chair has said, there is no technical formality of "putting in" documents in evidence in the summary courts of this country such as we find in the inventory of documents which is required in a trial in the Court of Session. To my mind the phrase "put in" as used in this Act means that where a document has been used in evidence in a summary trial it must be noted. In some previous cases there has been difficulty in arriving at a sound judgment on the question of fact as to whether the document under discussion had or had not been used in evidence. In this case we are saved all such discussion. We have the facts very frankly and properly admitted in writing by the parties in the statement read by your Lordship. From that statement it appears that the licence was not a document put in or used in evidence by either of the parties to the case. It appears that when the examination of the accused had ended the Sheriff himself asked certain questions, and upon hearing that the witness had his licence in his pocket asked to see it. The document was then handed by the witness to the Sheriff, who looked at it and then handed it back to its owner, who replaced it in his pocket and took it away with him. It humbly appears to me that these facts do not constitute the putting in of this licence as documentary evidence at the trial.

On the second ground of objection, which is founded upon the terms of section 4 of the Motor Act, I have to say that upon fuller consideration I have come to the conclusion that the view which I indicated earlier in the case is not tenable, and that the procedure which we are told is usually followed in such cases is quite correct. I think that the court trying the complaint fulfils all its functions when it pronounces the conviction and leaves the marking of the licence to be carried out later by the clerk of court as a mere administrative Act under the statute. And that becomes plain by reading the further provisions of the Act, because the licence is not supposed to be present in court at the trial, or at least not to be necessarily present, because the next sub-section says that any person convicted under the Act "shall produce

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the licence within a reasonable time for the purposes of endorsement, and if he fails to do so shall be guilty of an offence under this Act." That is, that in order that the court may have an opportunity of endorsing the licence, a reasonable time after the trial is allowed to the accused to produce it, and failure on his part so to produce will constitute a further offence against the statute. Therefore it appears to me that the procedure which the Act contemplates is that the conviction is to be pronounced by the court in ordinary course, and then it is the duty of the clerk of court to see that the licence is produced to him within a reasonable time in order that he may endorse the conviction upon it.

On the third ground of objection taken I am of opinion that the plea is not arguable.

LORD M'LAREN—The point of the case which seems to me to call for careful consideration is the objection on the ground that the licence was either not produced as documentary evidence, or being so produced was not noted in the record of proceedings. That latter is always an important matter, because the requirement of the statute is imperative, and if a document is not noted, and it is averred or admitted that such a document was shown to the judge or witnesses, then it is impossible to say how far they may have proceeded on the document which has not been entered on the record.

We have to consider whether it was a necessary part of the case that the licence should be before the court. The statute has made various regulations or orders which are not of the nature of judicial procedure, and it has imposed penalties, and it seems to me that these two parts are clearly distinguished. Under head (c) of section 4 it is provided that in the case of the person convicted holding a licence under the Act, the judge shall cause the particulars of the conviction, and of any order of the court made under that section, to be endorsed upon the licence, and a copy of those particulars to be sent to the council by whom the licence was granted. I think the order is treated as something apart from the conviction, and the judge would be within his powers, if after convicting, he made a separate order directing how the licence should be dealt with. Of course he might do the two things together in the same conviction, but as regards the bearing of this clause on the question of the suspension or indorsation of the licence, it seems to me that if the Sheriff-Substitute were going to convict the party, and also to suspend the licence, and if he meant to include the whole sentence in one conviction, it was necessary that he should have evidence that the accused had a licence, and the admission of the accused that he had a licence would entitle the Sheriff to deal with it. But in the present case it was not intended that the licence should be dealt with at all, because the prosecutor moved the Court to take no action regarding the licence. Therefore I cannot see that it was necessary that there should be any evidence that the accused was the holder of a licence. That seems to me to be sufficient for the disposal of the case.

I agree that, even if the document were unnecessary for the proof, yet if it were produced it must be noted. But the parties have agreed on a statement of the facts as to this matter, and on that statement I cannot hold that the licence was in fact produced as evidence.

As to the alleged excess of power in not sending particulars to the council, and indorsing the licence, that may be done at any time and may be done now.

I agree that the bill of suspension should be refused.

The Court refused the bill of suspension.

Counsel for the Complainer—M'Lennan, K.C.—W. Thomson. Agent—A. Laurie Kennaway, W.S.

Counsel for the Respondent—Solicitor-General (Clyde, K.C.)—Orr Deas. Agent—The Crown Agent.

Thursday, November 16.

(Before Lords Ardwall and Johnston.)

SINGER MANUFACTURING COMPANY *v.* BEALE & MACTAVISH AND ANOTHER.

Justiciary Cases—Small Debt Appeal—Decree for Something Different from what Asked—Competency—Action of Damages—Sale under a Sequestration for Rent of Goods not the Property of the Debtor—Goods in Possession of Debtor on Hire and Sale System—Remaining Instalments Sued for—Value of Goods Given.

A manufacturing company raised in the Small Debt Court, against sheriff-officers and a landlord's factor, an action of damages because of the sale by them, under a warrant granted in a sequestration for rent, of a sewing machine belonging to the company, but in the possession of the debtor under a hire and sale agreement. The company sued for the amount still due to them under the agreement. The Sheriff-Substitute gave decree for the value of the machine shortly before the sale. An appeal having been brought, *held* that the Sheriff-Substitute's decree was incompetent, inasmuch as it was for a different thing from that asked in the summons, and appeal *sustained.*

Observed (*per* Lord Johnston) that the fact of the hire and sale system having become common, placed no onus of inquiring into the true ownership of goods upon sheriff-officers, who in the execution of their duty were entitled to rely on the protection of the statutory procedure.

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This was an appeal from the Small Debt Court at Glasgow to the Circuit Court held at Glasgow in September 1905. The hearing of the appeal, for the purpose of receiving a report on the measure of damages awarded, was adjourned to Edinburgh, and it was accordingly heard there on November 16, 1905.

In November 1904 a small-debt action was raised against Robert M'Callum, Glasgow, for £2, 2s. 8d., being the balance of a quarter's rent of a dwelling-house occupied by him, and for sequestration and sale. This action was at the instance of Robert Young, proprietor of the house, and John Templeton, younger, his factor. Decree was obtained and warrant of sale granted, and following thereon the effects in the house were duly inventoried, and the sale carried out by Beale & Mactavish, messengers-at-arms and sheriff-officers, Glasgow.

Among the goods inventoried and sold was a sewing machine which M'Callum had obtained from the Singer Manufacturing Company on a hire and sale agreement.

The company were the pursuers in the present action, which was raised in the Small Debt Court, Glasgow, against Beale & Mactavish and John Templeton, younger, jointly and severally, or severally, for £7, 7s. 6d., conform to the statement prefixed to the summons, which was in the following terms—"To loss and damage sustained by pursuers in consequence of the defenders, the said Beale & Mactavish, acting on the instructions of the other defender John Templeton younger, having, on or about this date, sequestrated and sold a Singer's sewing machine, No. R. 531,668, the property of the pursuers, and hired by them to Robert M'Callum, 154 St John Street, Port Dundas, Glasgow, per agreement, dated 26th October 1903, herewith produced, notwithstanding that the defenders, the said Beale & Mactavish or the sheriff-officer instructed by them, was informed before the sale thereof that the said sewing machine was not the property of the said Robert M'Callum and was only hired by him from the pursuers, made up as follows:—

To value of said sewing machine as per hire agreement . .	£11	0	0
Less hires received . . .	3	12	6
Balance	£7	7	6."

A proof was taken in the Small Debt Court, from which it appeared that no intimation was made to the defenders that the sewing machine in question belonged to the pursuers, or was not the property of M'Callum, until after the sale. The Sheriff-Substitute (BOYD), however, gave decree in favour of the pursuers for £5.

An appeal was taken by the defenders to the High Court of Justiciary, who remitted to the Sheriff-Substitute to report how he had arrived at the sum for which decree was given. His report was as follows—"In obedience to the remit by Lords Ardwall and Johnston of 7th September 1905, the Sheriff-Substitute begs to report that the value of the sewing machine as per hire agreement was £11 0 0
The pursuers received hires amounting to 3 12 6
And sued for the balance of . £7 7 6
James Grier (37), manager for the pursuers in their New City Road branch, deponed that his district included the sewing machine. It was his duty to inspect machines in the district, and he had had the machine under inspection and knew it well. He had seen it shortly before the sale, and he was of opinion that the reasonable value of the machine was £6. There was no rebutting evidence. In order to be within the mark I gave decree for £5. Humbly reported by John Boyd, Sheriff-Substitute of Lanarkshire at Glasgow."

The appellants argued that the Sheriff-Substitute's judgment should be recalled since he had ignored the facts (1) that no intimation was given to them of the pursuers' right of property in the sewing machine until after the sale; (2) that they were acting as officers of Court, under a warrant obtained after due compliance with all statutory provisions relative to the process; (3) that there was no evidence as to the amount of damage sustained.

LORD JOHNSTON—In this small-debt case the respondents, the Singer Manufacturing Company, sued Messrs Beale & M'Tavish, sheriff-officers, Glasgow, and John Templeton, house factor there, jointly and severally or severally, for £7, 7s. 6d. as loss and damages sustained by them through Messrs Beale & M'Tavish having on the employment of Mr Templeton, under a sequestration for rent due by Mr Robert M'Callum, 154 St John Street, Port Dundas, Glasgow, inventoried and sold a sewing machine which was their property though in the possession of the said Robert M'Callum. I have stated the case shortly, but shall subsequently return to the form of the claim.

Admittedly there was nothing to show that the sewing machine was not the property of M'Callum, and the appellants, Messrs Beale & M'Tavish and Mr Templeton allege that no hint was given to them till after the sale that it was not M'Callum's property but the property of the Singer Company.

The Sheriff decerned against Messrs Beale & M'Tavish and Mr Templeton, jointly and severally, for the sum of £5, and they have appealed.

Their main ground of appeal is that the Sheriff-Substitute ignored the fact that the respondents' own witnesses proved that there was no notice to them till after the sale that the sewing machine was not Mr M'Callum's, and that in selling they were proceeding under a warrant of Court, duly obtained, after all opportunity provided by the law to parties interested to have articles not the property of the debtor withdrawn from the sequestration.

It emerged that the sewing machine was in the hands of M'Callum on what is known as a contract of hire and sale, the instalments of the price not being yet fully paid, and if so, it was admittedly still the Singer Company's property. Sundry rather start-

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ling propositions were advanced regarding the convenience of such contracts of hire and sale to the poorer classes, and the respect they should consequently receive, and also regarding the onus placed by the frequency with which they are entered into, upon sheriff officers when they come to sequestrate or poind the effects of the poor —in fact it was almost represented that it was the "custom" of the poorer classes to possess articles on such contracts, a custom which sheriff officers must recognise as imposing a duty upon them of certiorating themselves as to the true proprietorship. It was even suggested that when a sheriff officer finds a piano or a sewing machine or perhaps other article in a poor man's house, he must presume that it is held on hire and sale, and inventory it at his peril. I have seen a good deal of these contracts of hire and sale in the Sheriff Court, and I am far from being persuaded that they are a blessing to the poor, or deserving of any exceptional respect. They enable the canvassing agents of such companies, as the Singer, to spread their nets abroad, and in the competition for business to draw in the unwary, by the temptation to buy that for which they are not asked to pay cash down, and according to my experience more of these poor customers come to rue the day they entered into the contract, than to bless the agent who persuaded them to undertake the obligation. But I have no idea that the law is going to step in for the protection of the Singer or other such company, and place them and their wares and contracts on any different plane from the world in general.

The sheriff officer is not a man who acts at his own hand. He is the officer of court, and proceedings for the recovery of rent are statutory proceedings. Where, as in the present case, sequestration is taken out for a rent under £12, the proceeding is a small-debt proceeding, every step of which is provided for by section 5 of the Small Debt Act and the relative forms in Schedule B. By these provisions everything is duly regulated for the protection of all concerned. The sequestration is on the warrant of the Sheriff, the appraisement is made and inventory returned, and a copy served on the debtor, who must be cited. And it is only on hearing parties where they appear, as in other causes, that the warrant of sale is granted. The debtor or anyone else interested has the statutory opportunity of appearing and protecting goods inventoried, which are not the property of the debtor, by having them withdrawn from the inventory. Instead of having thrust upon him any onus of suspecting that any particular class of articles are not the bankrupt's, and a liability for acting on the natural deduction from ostensible possession, I think that the sheriff officer is rather entitled to rely upon the protection of the statutory procedure, and to assume, if no one quarrels his inventory, that he has acted correctly. If the Singer Company and others peril their machines on contracts of hire and sale, they must either rely on the honesty and alertness of their customers, or themselves attend to their own interests. They cannot require the sheriff officers to act as detectives on their behalf. In my opinion, therefore, articles, whether sewing machines or others, given out on contracts of hire and sale, must be treated just like other things—the sheriff officer must be interpelled from proceeding on his inventory, or if it is too late to do that, very distinct notification must be made to him that a mistake has been made, and that before the sale. No particular onus is put upon him.

But this does not help the appellants to get the better of the Sheriff's judgment. I cannot assume that the appellants' statement that there was no prior notice is according to fact. And even if I did, I should be precluded from giving effect to that fact. For to do so would be to review the Sheriff's judgment on the merits, which I cannot do.

The next point taken was that the Sheriff had no evidence of value on which to assess damages. With a view to seeing how this stood, we remitted to him to explain how he had arrived at his award, and he has reported that the respondents' inspector said that he had seen the machine "shortly before the sale," and was of opinion that its reasonable value was £6, and that as there was no rebutting evidence he had accepted his statement, discounting £1 to be safely within the mark. Proof of value "shortly before the sale" is not proof of value at the date of sale. But I think the Sheriff, in the absence of any counter evidence, was entitled to proceed as he did, and that in any view his judgment arrived at in this way is beyond our power to review.

But there is a more difficult point behind, viz., was his judgment a judgment on the case presented to him? After careful consideration I am of opinion that it was not, and that it therefore was incompetent and falls to be recalled.

I intimated at the outset that the form of the claim required attention. It is peculiar. It is not simply for loss and damage occasioned to the pursuers by the wrongful sale, under M'Callum's sequestration, of property belonging to them. It is for loss and damage sustained by them through the defenders (appellants) having sequestrated and sold a sewing machine, the property of pursuers and hired by them to M'Callum per agreement produced, notwithstanding prior notice that it was not M'Callum's property but only hired to him by the pursuers. But then the claim proceeds "made up," that is, such loss and damage "made up as follows:—

To value of said sewing machine, as per hire agreement . . .	£11 0 0
Less hires received . . .	3 12 6
Balance . . .	£7 7 6"

This claim and statement is incorporated by reference into the small-debt summons. Now, this is to sue the appellants, not for the value of the sewing machine at the date of the alleged illegal sale, but for the value to the pursuers of their contract of hire and sale as at that date, measured by the instalments still exigible. I am of

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opinion that that was not their remedy. Their contract of hire and sale was a matter with which the appellants had nothing to do. They were concerned, if they received due notice, with the Singer Company's property, not with their contract. Now, if the Sheriff-Substitute has decerned in terms of the summons, though he would, in my opinion, have erred in matter of law, his judgment would not have been subject to appeal. But he has not done so. He has given decree for something not sued for, viz., the value at the date of sale, or rather "shortly before the sale," of the article itself. This, I think, on this summons, it was not competent for him to do, any more than it would have been in an ordinary action, for this very good reason among others. The defenders were brought into Court on a summons, their defence to which, in the last resort, was matter of law. If they failed in their first line of defence, and were held liable for the illegal sale, their second line of defence was an objection in law to the measure of damages tabled. The Sheriff-Substitute has transformed the conclusion against them in such way that their only defence on the measure of damages was in matter of fact. For this they were not called upon to be prepared, and apparently were not prepared, for the Sheriff-Substitute avowedly proceeds in the absence of rebutting evidence.

I am therefore of opinion that his judgment falls to be recalled on the ground of incompetency.

LORD ARDWALL—I concur in the judgment delivered by Lord Johnston. The ground on which we propose to recal the judgment of the Sheriff-Substitute does not merely involve a question of measure of damages; it is because the summons specifically asks for one thing, namely, the balance due to the pursuer on their hiring contract with Robert M'Callum—that and nothing else—and because the Sheriff-Substitute, as we now see from his report, has given decree for something totally different, viz., the value of the sewing machine. This may or may not have been the proper description of damage to award, but it is certain that it is not the description of damages asked in the summons.

In this state of matters it is not surprising that there was no rebutting evidence led as to the value of the sewing machine, with the result that the case has been decided on a one-sided proof.

I accordingly am of opinion that the judgment must be recalled on the ground of incompetency.

The Court sustained the appeal and recalled the judgment of the Sheriff-Substitute.

Counsel for the Appellants — Lippe. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Respondents — J. R. Christie. Agents—Adamson, Gulland, & Stuart, S.S.C.

Friday, November 17.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

DALZELL *v.* DICKIE AND MURRAY.

Justiciary Cases—Complaint—Relevancy—No Known Crime Charged—Dog—"Keeping and Allowing to Go at Large a Ferocious Dog to the Danger of the Lieges."

Held that a summary complaint which charged the accused with "keeping and allowing to go at large a ferocious, savage, or vicious dog to the danger of the lieges," with the result that another person was attacked and bitten by it, was irrelevant, inasmuch as no crime known to the common law of Scotland was charged, and no statute constituting such an offence was averred.

This was an appeal by way of stated case, presented by Allan Dalzell against a conviction obtained against him in the Justice of Peace Court at Irvine at the instance of James Dickie and John Norval Murray, Solicitors and Joint Procurators-Fiscal of Court for the Irvine District of the county of Ayr.

The complaint, which was brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 and the Criminal Procedure (Scotland) Act 1887, set forth—"That Allan Dalzell, public-house keeper, residing at the Cycle Inn, Loans, in the parish of Dundonald and county of Ayr, has been guilty of the crime or offence of keeping and allowing to go at large a ferocious, savage, or vicious dog to the danger of the lieges, in so far as on Monday, the 17th day of July 1905 years, or about that time, the said Allan Dalzell did, in the village of Loans, and more particularly at a part thereof situated at, opposite, or near to the Cycle Inn aforesaid, keep and allow to go at large there, without being under any proper care, restraint, or control, a ferocious, savage, or vicious dog belonging to him, or under his charge, or in his possession, to the danger of the lieges, he well knowing that the said dog was ferocious, savage, or vicious, whereby and in consequence whereof Annie M'Gregor, daughter of and residing with James M'Gregor, residing in the village of Loans aforesaid, was attacked, set upon, and severely bitten by the said dog on the right leg, or some other part or parts of her person."

The case stated that "the complaint was tried at Irvine on 31st July 1905 before two Justices of the Peace, and the facts then proved in evidence to the satisfaction of the Justices are as follows, viz.—(1) That on the date libelled (17th July 1905) the appellant was owner of a dog of the spaniel breed, trained to the gun. That this dog was not muzzled, nor confined, nor restrained in any way, but was allowed to go in and about the Cycle Inn, occupied by appellant, and had the free run of the village of Loans. (2) That on the date libelled Annie M'Gregor, designed in the complaint, a girl about fourteen years of age, had gone to the Cycle Inn

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on a message, and immediately after leaving the Inn, and while on the public road, she was attacked by the dog referred to, which bit her severely on the right leg, and the wound was cauterised by a medical man. (3) That on a previous occasion, in or about the end of March 1905, the same dog had attacked and bitten a girl, Richmond, daughter of James Richmond, gardener, Loans. That immediately after this occurrence the said James Richmond informed the appellant thereof, and the latter promised to bear any expense which might be incurred consequent on the injury arising from the attack made by the dog. On being asked to plead, the appellant, by his agent, Arnold Franz M'Jannet, solicitor, Irvine, stated 'that the complaint was irrelevant and incompetent in respect (1) that the offence charged is not an offence at common law; (2) that the complaint is void for want of specification.' After hearing Mr M'Jannet for the appellant and Mr James Dickie for the complainers, the Justices, in respect that the complaint set forth facts relevant and sufficient to constitute a crime or offence punishable on summary complaint, repelled the objections, and appellant having tendered a plea of not guilty the complaint went to proof. The Justices found the appellant guilty of the crime or offence charged of keeping and allowing to go at large a ferocious, savage, or vicious dog to the danger of the lieges, and fined him in 10s., and failing immediate payment, adjudged him to be imprisoned for seven days."

The question of law for the opinion of the High Court of Justiciary was—"Was the complaint relevant?"

Counsel for the appellant having opened the case and submitted that the offence charged was not a crime at common law, and that therefore the complaint was irrelevant, the Court called upon counsel for the respondents.

Argued for the respondents—There was sufficient averment in this complaint of criminal responsibility for what happened. It would be culpable recklessness to allow to be at large a mad dog which might cause injury and even death. It was the same in a less degree to allow a vicious dog to be at large. The Legislature had recognised the danger of this—Dogs Act 1871 (34 and 35 Vict. c. 56); Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 389. Pure and simple negligence which caused injury or damage was recognised as being criminal—Hume on Crimes, vol. i, p. 21, 22, and 23; Bell's Supplemented Notes to Hume, p. 74; *M'Kirdy* v. *M'Callum*, June 25, 1855, 27 Scot. Jurist 503; *Lord Advocate* v. *Ross*, April 14, 1847, Arkley 258; Macdonald's Criminal Law, p. 193.

LORD JUSTICE-GENERAL — This is an appeal on a case stated, and the question that is raised is as to the relevancy of a complaint against the appellant, the complaint not being preferred under any statute other than certain Procedure Acts, and requiring to set forth a common law crime.

What the complaint says is that the accused is guilty of the crime or offence of keeping and allowing to go at large a ferocious and vicious dog to the danger of the lieges, in so far as he did, date and place libelled, keep and allow to go at large a ferocious dog belonging to him, he well knowing the dog was ferocious, whereby a girl was bitten.

I do not think it necessary that I should say much about the complete and utter novelty of such a charge. I can quite understand that if the facts libelled can be proved, they may well found a civil action for damages, but criminal liability is quite another matter, and counsel for the prosecutor has after careful search confessed himself unable to produce any authority which would support such a libel as a criminal charge, and yet dogs that have bitten people must have been kept and allowed to go at large in the public street to the danger of the lieges beyond the memory of man.

It is not expedient that I should go into the much wider general discussion of whether it is possible to found a criminal charge on culpable recklessness apart from loss of life. In the complaint before us we have not a case of setting on or deliberately loosing a ferocious dog in circumstances which would necessarily lead to some one being injured. There is nothing of that sort in the case before us.

I am therefore of opinion that we should sustain the appeal.

LORD M'LAREN—I think all the cases in which convictions have followed upon acts resulting in injury, but without the intention of injuring, have been cases in which either something active was done which was in its nature calculated to do harm, or where some positive duty was undertaken which involved injury if it was not properly discharged. Of the first class is the reckless discharge of firearms. The second includes such cases as neglect of duty by masters of ships or railway signalmen resulting in disaster. But where no duty is undertaken and no positive act is alleged I am unable to see how a criminal charge is involved. This is a case of pure negligence. It is a case for a civil action of damages, not for a criminal prosecution.

It is no argument to say that something like this has been made punishable under certain police statutes, because what in the ordinary case is not a crime may well be made a criminal offence in towns or populous places. I agree that the complaint is irrelevant.

LORD ADAM concurred.

The Court answered the question in the negative, sustained the appeal, and quashed the conviction.

Counsel for the Appellant—J. H. Millar. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Respondents — Hunter, K.C.—T. B. Morison. Agents—Dove, Lockhart, & Smart, S.S.C.

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Friday, November 17.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

MACRORIE *v.* FORMANS.

Justiciary Cases—Fishing—Salmon Fishing—Weekly Close Time—Removal of Leaders of Bag-Nets—Duty to Remove Leaders as soon as Wind and Weather Permit—Reasonable Excuse—Salmon Fisheries (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 7—*Salmon Fisheries (Scotland) Act* 1868 (31 *and* 32 *Vict. c.* 123), *sec.* 24 *and Schedule D.*

The Salmon Fisheries (Scotland) Act 1862, sec. 7, enacts that "the weekly close-time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning."

The Salmon Fisheries (Scotland) Act 1868, sec. 24, enacts—"The proprietor, and when let the occupier, of every fishery at which . . . bag-nets are used shall, in regard to such nets, do all acts required by any bye-law in force within the district in which such fishery is situated, for the due observance of the weekly close-time;" and Schedule D contains a bye-law with regard to the observance of the weekly close-time, which requires—"3. That the netting of the leader of each and every bag-net shall be entirely removed and taken out of the water."

Where in a summary prosecution it was proved that the occupier of a salmon fishing had, owing to wind and weather, been unable to remove the leaders of his bag-nets on Saturday night, and it was admitted by the complainer that the accused was under no obligation to remove them on Sunday, but there was no proof that wind and weather or other obstacle, save the darkness of an early August morning, prevented their being removed on the Monday morning before the end of the weekly close-time—*held* (*reversing* the judgment of the Sheriff-Substitute) that the occupier of the fishery had been guilty of a contravention of the Salmon Fisheries (Scotland) Act 1868, sec. 24, and regulation 3 of bye-law Schedule D, in not removing the leaders of the bag-nets between 12 p.m. on Sunday and 6 a.m. on Monday, he having proved no sufficient excuse for not having done so.

Observations on the case of *Middleton v. Patersons*, January 30, 1904, 4 A 321, 6 F. (J.C.) 27, 41 S.L.R. 256.

This was an appeal by way of stated case presented by Wilfrid Clarke Macrorie, solicitor, Ayr, clerk to the Fishery Boards of the districts of the rivers Doon and Ayr, from a judgment of the Sheriff-Substitute (Shairp) in a complaint under which Robert Forman junior, Alexander Forman, and George Forman, salmon fishers, Peterhead, were charged with a contravention of the Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123), sec. 24, and regulation No. 3 of the bye-law Schedule D.

The complaint set forth that the accused "have contravened The Salmon Fisheries (Scotland) Act 1868, and specially section 24 of said Act and regulation No. 3 of the bye-law Schedule (D) incorporated with and forming part of said Act, in so far as they being the occupiers of the salmon fishings belonging to the Most Honourable Archibald Kennedy, Marquis of Ailsa, Earl of Cassillis, &c., residing at Culzean Castle, in the parish of Kirkoswald and county of Ayr, situated said fishings partly in the district of the river Doon and partly in the district of the river Ayr, and extending from a point opposite Saint John's Kirk in the citadel of Ayr, southward to a point opposite to the mouth of the Rancleugh Burn, which forms the march between the parishes of Maybole and Kirkoswald, and lying in the parish of Maybole and in the united parishes of Ayr and Alloway and county of Ayr, did (*First*) during the weekly close-time between six o'clock on the night of Saturday the 5th day of August 1905, and six o'clock on the morning of Monday, the 7th day of said last-mentioned month and year (said weekly close-time being in force within the said districts of the said rivers Doon and Ayr), omit to remove and take out of the water the netting of the leaders of twelve salmon bag-nets belonging to them, and set in the sea at the said salmon fishery occupied by them, and belonging to the said Marquis of Ailsa, as follows . . . whereby the said Robert Forman junior, Alexander Forman, and George Forman are liable to forfeit the said nets, and to pay in respect of each of said twelve nets to which such omission applies a sum not exceeding £10 together with the expenses of prosecution and conviction, and for which penalties and expenses warrant may be granted for the recovery of the same by poinding and imprisonment for any period not exceeding three months; and (*Second*) did during the weekly close-time between six o'clock on the night of Saturday the 19th day of August 1905, and six o'clock on the morning of Monday the 21st day of said last-mentioned month and year, omit to remove and take out of the water the netting of the leaders of eight salmon bag-nets belonging to them and set in the sea at the said salmon fishery occupied by them and belonging to the said Marquis of Ailsa, as follows . . . whereby the said Robert Forman junior, Alexander Forman, and George Forman are liable to forfeit the said nets, and to pay in respect of each of said eight nets to which such omission applies a sum not exceeding £10 together with the expenses of prosecution and conviction, and for which penalties and expenses warrant may be granted for the recovery of the same by poinding and imprisonment for any period not exceeding three months."

At the trial the first charge so far as regarded four of the salmon bag-nets was not insisted on.

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The following were the facts, as regards the first charge, stated in the case as proved:—"That the netting of the leaders of each of eight of the bag-nets mentioned in the first charge, viz., . . . were not entirely removed and taken out of the water, but, on the contrary, that the netting of the leaders of each of the said eight bag-nets were in position in the water from the hour of 6 of the clock on the night of Saturday the 5th, to the hour of 6 of the clock on the morning of Monday the 7th, both days of August 1905, that owing to high wind and surf on the shallow shore where the nets were situated it was dangerous for respondents or their men to remove and take out of the water the netting of the leaders of each of said eight bag-nets from the hour of 6 of the clock till the hour of 12 of the clock on the night of Saturday the 5th day of August 1905; and that the respondents made no attempt to remove and take out of the water the netting of said leaders until the hour of 6 of the clock on the morning of Monday the 7th day of August 1905, when they visited the nets and proceeded to remove the fish which they contained. It was admitted at the Bar by the appellant that the respondents were under no obligation to make any attempt to take the netting of the leaders of the nets in question out of the water between the hour of 12 of the clock on the night of Saturday the 5th and the hour of 12 of the clock on the night of Sunday the 6th, both days of August 1905. It was not proved that either wind or sea prevented the netting of the leaders of any of the said eight bag-nets from being removed and taken out of the water between the hour of 12 of the clock on the night of Sunday the 6th and the hour of 6 of the clock on the morning of Monday the 7th, both days of August 1905, or that there was any obstacle to the respondents removing the netting of the said leaders between these hours except the fact of darkness, which existed for a portion of the period between the hour of 12 of the clock on the night of Sunday the 6th and the hour of 6 of the clock on the morning of Monday the 7th, both days of August 1905."

The stated facts as regards the second charge were exactly similar.

The Sheriff-Substitute held that the respondents were not guilty of the contraventions charged in the complaint, and assoilzied them from the complaint.

The question of law, dealing with the first charge, submitted for the opinion of the High Court of Justiciary was—"Whether, it having been dangerous, on account of the high wind and surf on the shallow shore where the eight bag-nets in question in the first charge in the complaint were situated, for the respondents to remove and take out of the water the netting of the leaders of the said eight bag-nets between the hours of 6 of the clock and 12 of the clock on the night of Saturday the 5th day of August 1905, and the appellant having admitted that the respondents were under no obligation to take the netting of the leaders of the nets in question out of the water between the hour of 12 of the clock on the night of Saturday the 5th, and the hours of 12 of the clock on the night of Sunday the 6th, both days of August 1905, it was the respondents' duty to remove and take out of the water the netting of the leaders of said bag-nets between the hour of 12 of the clock on the night of Sunday the 6th, and the hour of 6 of the clock on the morning of Monday the 7th, both days of August 1905, and respondents not having done so, whether they were guilty of the contravention first charged in the complaint?"

The question of law dealing with the second charge was in similar terms.

Argued for the appellant—The respondents had plainly contravened the statute. The case of *Middleton* v. *Paterson*, January 30, 1904, 4 Adam 321, 6 F. (J.C.) 27, 41 S.L.R. 256, decided that the nets need not be put out of gear on Sunday if it were impossible owing to stress of weather to do so on Saturday evening. In that case the only question argued was the question of Sunday labour. Once the Sunday was over, it was the duty of the respondents to remove the leaders at once. In *Middleton's* case this was done. The statutory provisions were imperative, and a conviction must follow a breach unless reasonable excuse were proved. The burden of proving such an excuse was on the respondents, and here they had failed to discharge the onus.

Argued for the respondents—The only question here was whether an offence had been committed between Sunday night at 12 o'clock and Monday morning at 6 o'clock. This was a pure question of fact. It had been decided by the Sheriff, and his decision was not open to review. The question of reasonableness of the excuse was also a question of fact on which the Sheriff was final. The nets could not be removed here with reasonable safety in the darkness of the early morning.

LORD JUSTICE-GENERAL—This is a stated case in appeal from the Sheriff Court at Ayr, in which the prosecutor, who was the clerk to the Fishery Boards of the districts of the rivers Doon and Ayr, submits that a conviction should have been pronounced against the respondents in terms of the complaint. Both charges in the complaint deal with the same offence, committed at different times, namely, the failure to remove the leaders of certain bag nets during the weekly close-time, which was from 6 o'clock on Saturday night till 6 o'clock on Monday morning. With regard to both occasions the Sheriff finds similar facts to be proved, and they are that from the hour of 6 p.m. on Saturday till 12 p.m. that night, owing to high winds and surf, it would have been dangerous for the fishermen to attempt to remove the leaders during that time.

Now, in the case of *Middleton* v. *Paterson*, 4 Adam 321, 6 F. (J.C.) 27, 41 S.L.R. 256, it was decided by a bare majority of this Court, the Court consisting of three judges, that fishermen, in the position that the respondents were in here,

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were not bound to perform this statutory duty on Sunday; but in that case the fishermen had removed the leaders at the earliest moment they could after Sunday, which was between 2 a.m. and 3 a.m. on Monday morning. That, however, was not done in this instance, for here the respondents did not go out till 6 a.m. on Monday morning, when they went to the nets and proceeded to remove from them a large number of fish.

In the Sheriff's statement in this case he sets forth, as I have already pointed out, that owing to rough weather the fishermen could not safely remove the leaders on Saturday night, and that an admission was made at the bar on the part of the prosecutor that the respondents were under no obligation to remove the leaders on Sunday—an admission that it was quite proper to make in view of the decision in the case of *Middleton*. Then he goes on to say that there was nothing in the weather after 12 o'clock on Sunday night to prevent the removal of the leaders, nor was there any obstacle to the respondents removing them except the fact of darkness which existed for a portion of the period between midnight and 6 a.m. on Monday morning. On these facts the Sheriff found the respondents not guilty of the contravention charged.

On these facts I am clearly of opinion that the Sheriff-Substitute was wrong, and indeed I am at a loss to see on what view of the statute he proceeded in forming his judgment. It has been suggested to us that what may have been in the mind of the Sheriff and led him to give this decision was that owing to the want of light the removal could not be attempted with safety until 6 a.m. I cannot accept that suggestion, for at that time of year there is no such want of light as to justify such a conclusion. But anyone who is in the position of the respondent here finds himself *prima facie* in the wrong, and if he is going to excuse his breach of a statutory duty on the grounds of the state of the weather or the light, the onus is on him to prove these circumstances, and for his own protection he must see that these circumstances which excuse him are set forth in the stated case. No such circumstances are set forth here, the finding of the Sheriff as to partial darkness being no more than a statement of what we know from the almanac, which tells us that on the day in question the sun rose at a few minutes past 4. I am clearly of opinion that the decision of the Sheriff-Substitute was wrong, and that the respondents should have been convicted. I understand that a finding to that effect is all that the appellant asks for here.

LORD ADAM—I am clearly of the same opinion. These fishermen ought to have removed the leaders of their nets from 6 p.m. on Saturday till 6 a.m. on Monday, that being the weekly close-time, and this they failed to do; and they must therefore be convicted unless they can show good cause for their having failed to do so. If they were prevented by wind and weather, or other sufficient cause, from removing them at the proper time, they must show that they performed their statutory duty on the earliest possible opportunity. Now they have not got a finding in this case that there were any conditions of wind or weather, or other cause, to prevent the removal of the leaders at any time after Sunday at midnight, and as they delayed removing them until 6 o'clock next morning, I agree with your Lordship that no ground has been shown to us why they should not be convicted of this offence.

LORD M'LAREN—I agree with your Lordships, and with regard to the case of *Middleton*, on which for the decision of this appeal we do not require to proceed, I would desire to reserve my opinion. There was a sharp division of opinion in that case, and if the question that was there dealt with were again to come before the Court, I would desire a full discussion of the law as to Sunday labour before arriving at a conclusion. I may say that I have always regarded the question of Sunday labour as one depending mainly on contract, as, for instance, where you engaged a domestic or a farm servant for service that usually includes a certain amount of Sunday labour, the Sunday work would be held to be a term of the contract of service without the necessity of specifying it. But if the engagement were of a workman to be employed in a factory or a machine shop, where work is not usually done on Sunday, Sunday labour would not be held to be included in the contract. It is unnecessary to go into that question here, for the statutory duty was left unexecuted during at least a portion of the Monday morning. There are no facts stated in the case to excuse that omission, and therefore I agree with your Lordships that the respondents in this case should have been convicted.

The Court answered the questions in the affirmative.

Counsel for the Appellant—T. B. Morison. Agent—James Ayton, S.S.C.

Counsel for the Respondents—Hunter, K.C.—Valentine. Agent—Joseph Chalmers, S.S.C.

COURT OF SESSION.

Tuesday, November 7.

FIRST DIVISION.

[Court of Exchequer.

GRANITE SUPPLY ASSOCIATION, LIMITED *v.* THE SOLICITOR OF INLAND REVENUE.

Income Tax—Profits—Deductions—Cost of Transferring Business to New Premises—Property Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Schedule D*, *Case* 1, *Rule* 3.

A company engaged in the business of buying and selling granite found it

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necessary to acquire a larger yard. It removed stones and cranes from the old to the new yard, re-erecting the cranes there. *Held* that in estimating the annual profits for the purposes of the Income Tax Acts the company was not entitled to deduct the cost of the transference of stones to the new yard and the re-erecting of the cranes.

The Property Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, enacts—"And be it enacted that the duties hereby granted, contained in the Schedule marked D, shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment.

"*Schedule D.*

"The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules A, B, C, and to every description of employment of profit not contained in Schedule E, and not specially exempted from the said respective duties, and shall be charged annually on and paid by the persons, bodies politic or corporate, . . . receiving or entitled unto the same. . . .

"*Rules for Ascertaining the said last-mentioned Duties in the Particular Cases herein mentioned.*

"*First Case.*—Duties to be charged in respect of any trade . . . not contained in any other schedule of this Act.

"*Rules.*

"*First.*—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, . . . upon a fair and just average of three years . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed. . . . . .

"*Third.*—In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains, on account of any sum expended for repairs of premises . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; . . . nor for any sum employed or intended to be employed as capital in such trade . . . nor for any capital employed in improvement of premises occupied for the purposes of such trade. . . ."

The Granite Supply Association, Limited, 81 Union Street, Aberdeen, appealed against a deliverance of the Commissioners for General Purposes of the Income-Tax Acts, &c., for the County of Aberdeen.

The case stated by the Commissioners was as follows—"The Granite Supply Association, Limited (hereinafter referred to as the company), appealed against an assessment for the year ending 5th April 1905, on the sum of £1814 (less allowance of £75 for tear and wear of machinery) made upon it under Schedule D of the Income-Tax Acts in respect of the profits of the business carried on by it.

"The assessment was made under 5 and 6 Vict. cap. 35, sec. 100, Schedule D, first case; 16 and 17 Vict, cap. 34, sec. 2, Schedule D; and 4 Edward VII., cap. 7, sec. 7, and computed on the average of the balance of the profits of the three years ended 31st May 1903.

"1. The following facts were admitted or proved—

"(*a*) The company was incorporated on 1st June 1897, under the Companies Acts, and its registered office is situated at 81 Union Street, Aberdeen.

"(*b*) The object for which the company was established, as set forth in its memorandum of association, is the buying and selling of granite.

"(*c*) The company carried on its business in a yard at Palmerston Road, Aberdeen, until Whitsunday 1903. It was found necessary to acquire a larger yard. The company did so in January 1902 at Urquhart Road. Betwixt January and Whitsunday 1903 the company removed stones and cranes from the yard at Palmerston Road to the yard at Urquhart Road, re-erecting the cranes in the latter yard.

"(*d*) A sum of £444, 19s. of expenditure, termed 'flitting expenses,' appeared in the company's accounts for the year ended 31st May 1903, which sum is made up as follows—

"(1) Jan. 23. Expense of telephone at Urquhart Road, .	£9	10	0
"(2) Feb. 28. Mr Wisely, a/c carting to new yard, . . .	20	0	0
"(3) Mar. 28. Do. do.	50	0	0
"(4) April 7. J. M. Henderson & Co., taking down and re-erecting first crane, . . .	27	12	0
"(5) May . Do. do. second crane . . . . . (The cost of the concrete foundations for cranes is not included above, having been charged to capital account.)	27	12	0
"(6) May . Proportion of outward cartages directed by resolution of directors of 23rd May 1903, to be credited to outward cartages and charged to flitting account, . . .	135	5	0
"(7) May . Proportion of rent and taxes do. to be credited to rent and taxes account and debited to flitting account, .	100	0	0
"(8) May . Proportion of coals and wages do. to be credited to general expenses (say £25) and wages (£50), and debited to flitting account, . . .	75	0	0
	£444	19	0

"(*e*) The said sum of £444, 19s. was not allowed as a deduction in arriving at the amount of the assessment.

"(*f*) A copy of the company's report and accounts for the year ended 31st May 1903 is appended hereto and forms part of this case.

"2. The company maintained that the whole of the expenses were incurred solely

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in the carrying on of its business, and were properly and necessarily deductible before the profits could be ascertained.

"3. The Surveyor, Mr W. S. Kitton, offered no objections to the allowance of items Nos. (1), (6), (7), and (8) of paragraph (*d*) of 1, which, though termed 'flitting expenses,' represent the expense of carrying on the business of the new yard, but contended that the initial outlay in preparing the new yard for business, that is, the cost of transferring the stones from the old yard to the new yard and of the re-erection of cranes, items (2), (3), (4), and (5) of paragraph (*d*) of 1, was not an allowable deduction, as it was not incurred in carrying on business, but in preparing to carry on business.

"4. The Commissioners, on consideration of the evidence and arguments submitted to them, disallowed items Nos. (2), (3), (4), and (5), amounting *in cumulo* to £125, 4s., allowed items Nos. (1), (6), (7), and (8), amounting *in cumulo* to £319, 15s., and reduced the assessment to £1688, 16s.

"5. . . . . ."

Argued for the appellants—The whole of the items in the "flitting account" formed proper deductions from the gross receipts before ascertaining the profits for the year. They were all expenses necessarily incurred in earning the profits for the year, and should properly be debited against profit. They were incidents in the conduct of the company, and thus distinguished from expenses incurred in, for example, sinking a coal pit. A mine with new pits open had an increased earning capacity, but in this case, when the transference of stones, &c., was completed the earning capacity remained exactly as before—*Addie* v. *Solicitor of Inland Revenue*, February 16, 1875, 2 R. 431, 1 Tax Cases, 1, 12 S.L.R. 282; *Gresham Life Assurance Society* v. *Styles*, May 31, 1892, 3 Tax Cases, 185; Property Tax Act 1842, sec. 159.

Argued for the respondent—The expenditure was not necessarily incurred to secure the profits of one year. The outlay was part of the cost of acquiring new premises. By rule 3, case 1, no deduction was allowed for improvements. Here the improvement consisted in the removal to new and more commodious premises. The expense incurred in removing should properly be charged to capital—*Smith* v. *Westinghouse Brake Company*, June 29, 1888, 2 Tax Cases, 357.

LORD PRESIDENT—The point in this case is very short, and I think rightly determined by the Commissioners. The appellants, in January 1902, finding it necessary to acquire a larger yard changed their place of business. In their accounts they inserted a separate item called "flitting expenses," which they proposed to deduct before striking their profits for the year. I express no opinion as to whether this was not a proper book-keeping operation as between the company and its shareholders, but that is not the question before us. We have to decide whether these particular items form a proper deduction under the rules in the cases of the Income Tax Acts. The controversy has been narrowed to four particular items, all connected with the cost of the transference of stones to the new yard and the re-erection there of cranes which had been in the old. Now, I think that, looking to the phraseology of rule 3 of the first case, your Lordships can have no doubt that, supposing these parties had not had a crane, and in fitting up their new yard had found it necessary to buy one, its cost is not a deduction which would have been allowed. Such a deduction would clearly have been struck at under the words of rule 3. It seems to me to make no difference if, instead of having to buy a crane completely new, they had a crane at the old yard, but yet had to incur a certain expense in putting it up as a working crane in the new yard. The character of the expense seems to me to be unaltered from what it would have been if they had had to pay a larger sum for a new crane, and if this is so the question is at an end. I am therefore of opinion that the Commissioners were perfectly right.

LORD M'LAREN—I am of the same opinion. I think that the cost of transferring plant from one set of premises to other and more commodious premises is not an expense incurred for the year in which the thing is done, but for the general interest of the business. It is said that this transference does not add to the capital value of the plant, but I think that is not the criterion. These are costs which in a strict accounting would not be properly set against the income of the year and which yet do not add to the capital value. Suppose a person is so imprudent as not to insure his business premises or his goods and they are destroyed by fire and he has to replace them, he would not in a question with the Revenue be allowed to charge the reinstatement against the income of the year, even if such reinstatement did not add to the value of his property, but only sufficed to maintain it according to its original value. I agree, therefore, that the cost of re-erecting the cranes and the cartage of materials, being a thing not done for the benefit of the trade of the particular year, is not a proper deduction from income.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered to the determination of the Commissioners.

Counsel for the Appellants—Crabb Watt, K.C.—A. R. Brown. Agents—Paterson & Gardiner, S.S.C.

Counsel for the Respondent—Solicitor-General (Clyde, K.C.)—A. J. Young. Agent—Party.

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Thursday, November 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WEST CALDER PARISH COUNCIL *v.* BO'NESS AND CARRIDEN PARISH COUNCIL AND SHOTTS PARISH COUNCIL.

Poor — Settlement — Desertion — Acquisition of Residential Settlement by Husband Living Apart from Wife and Family — Constructive Residence — Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1.

S., having a residential settlement in West Calder, in September 1898 deserted there his wife and family, who became chargeable to that parish and remained so till March 1899, when the wife discovered S. residing in the parish of Shotts. She left the poorhouse and with her family returned to West Calder, where she was occasionally visited by her husband, at first surreptitiously owing to a warrant having been issued for his arrest, and was given by him small sums of money for her support. On 3rd June 1899 S. removed his wife and family to Shotts parish, where they remained till 15th May 1902, when he again deserted them, and on the 28th May they again received relief. West Calder maintained that S. had acquired a residential settlement in Shotts, having resided for more than three years prior to May 1902 in that parish. Shotts maintained that S. had not acquired a residential settlement in its parish, inasmuch as prior to 3rd June 1899 S. was constructively resident in West Calder, where his wife and family were, and where he was visiting them.

Held that S. had acquired a residential settlement in Shotts.

Poor — Relief — Admission of Liability — Continuance of Liability — Interruption of Relief — Poor Law Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 70.

With regard to a case of a wife and family, who had received relief owing to the husband's desertion, an inspector of poor wrote—"I am instructed to admit liability in this case." The wife and family remained in the poorhouse from their admission till 23rd November 1903, when they left of their own accord and "drifted up and down for four days in search of" the husband, when they again, on 27th November, applied for relief and were sent back to the poorhouse.

Held that as the wife and family had not become self-supporting during their absence from the poorhouse, there had been no interruption of liability, and that the admission was still binding.

The Poor Law Act 1845 (8 and 9 Vict. c. 83), sec. 70, makes provision that where an application for relief is made by any poor person entitled to relief, the relieving officer of the parish shall, notwithstanding such poor person may not have a settlement in the parish, "afford to such poor person such interim maintenance as may be judged necessary until the parish or combination to which such poor person belongs, be ascertained, and his claim upon such parish or combination admitted or otherwise determined, or until he shall be removed."

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. c. 21), sec. 1, enacts—"From and after the commencement of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after, the commencement of this Act, have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief. . . ."

In this action the Parish Council of the Parish of West Calder sued for the sum of £39, 17s. 6d. alleged to have been expended by them on behalf of a pauper, Jane Gordon M'Neil or Stone, wife of Robert Stone, a miner, and their four children, from 27th November 1903 to 3rd June 1904.

The action was directed against (1) the Parish Council of the Parish of Bo'ness and Carriden (Stone's birth parish), and (2) the Parish Council of the Parish of Shotts, in which it was alleged that Stone had acquired a residential settlement.

The pursuers averred—"(Cond. 1) On 27th November 1903 Jane Gordon M'Neil or Stone and her four children, who were then all proper objects of parochial relief, applied for relief to the inspector of poor at West Calder. The said inspector sent Mrs Stone and her four children on the same day to Linlithgow poorhouse, where they remained till 3rd June 1904. They were maintained in said poorhouse from said 27th November 1903 till 3rd June 1904 by the pursuers. An account is produced showing that the amount expended by the pursuers on behalf of said paupers from 27th November 1903 till 3rd June 1904 was £39, 17s. 6d., the sum sued for. (Cond. 2) The said Jane Gordon M'Neil or Stone is the wife of, and the said four children are the lawful children of, Robert Stone, miner, whose present address is Gavieside, West Calder. The said Robert Stone was born in the parish of Bo'ness and Carriden, and his birth settlement is there. Stone is able-bodied and capable of maintaining his said wife and children."

These averments were admitted by the defenders.

The pursuers further averred that when Mrs Stone and her children became chargeable on 27th November 1903 Stone had acquired a residential settlement in the parish of Shotts. The particulars of the residence in virtue of which he was alleged to have acquired this settlement were stated at the bar as follows:—In September 1898, Stone, who was living in West Calder (in which at that date he had a residential settlement), deserted his wife

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and family, who thereupon became chargeable to the parish of West Calder, and were maintained by the said parish till March 1899, when, having ascertained that the husband was living in Clelland in the parish of Shotts, they left the poorhouse and returned to West Calder. Thereafter Stone, who continued to live in Clelland, occasionally visited his wife at West Calder, and made occasional contributions towards her support and that of his family. In the meantime a warrant had been issued for Stone's arrest for deserting his wife and family and failing to provide for them, in consequence of which these visits to his wife were surreptitiously made. In the beginning of May 1899, Stone, when visiting his wife and family in West Calder, was informed that if he would remove them to Shotts no proceedings would be taken against him in respect of the warrant, and on 3rd June 1899 he accordingly took his wife and family to Clelland, in the parish of Shotts, where they remained till 15th May 1902, when he again deserted them.

After Stone's desertion in May 1902 his wife and family were maintained by the pursuers in Linlithgow poorhouse from 28th May 1902 till 23rd November 1903, and again from 27th November 1903 to 3rd June 1904. The sum sued for in the present action was the alleged cost of their maintenance during the latter period.

In their answers the Parish Council of Shotts denied that Stone had acquired a residential settlement in the Parish of Shotts. They maintained that at the time of his desertion in 1899 Stone had a settlement in West Calder, where he had resided since 1871, that his residence in the parish of Shotts did not commence till 3rd June 1899, when he removed his wife and family to Clelland, that it terminated on 15th May 1902, when he again deserted them, and that Stone therefore had not resided for three years continuously in the parish of Shotts.

They further averred (Ans. 3)—"From 3rd June 1899 till 15th May 1902 the said Robert Stone resided with his wife and family at Clelland, but on 15th May 1902 he deserted them, and on 28th May 1902 they became chargeable to the parish of Shotts. On the same day, 28th May 1902, the inspector of poor of the parish of Shotts sent to the inspector of poor of the parish of West Calder, the usual statutory notice claiming relief, and on 17th June 1902 particulars of the claim were sent. After due inquiry, the inspector of poor of the parish of West Calder admitted liability, and instructed the inspector of poor of the parish of Shotts to have Mrs Stone and her family removed to the combination poorhouse at Linlithgow, which was done on 20th January 1903, and chargeability to the parish of Shotts then ceased. Mrs Stone and family remained in Linlithgow poorhouse from 20th January 1903 till 13th February 1903. On 17th February 1903 Mrs Stone and her family turned up in Clelland, but were sent on by train to West Calder, and the parish of West Calder repaid to the parish of Shotts the railway fares. From 19th February 1903 until 23rd November 1903 Mrs Stone and her family were maintained in Linlithgow poorhouse at the charge of the parish of West Calder. On leaving said poorhouse on 23rd November Mrs Stone went to Motherwell, and from there on 27th November 1903 to Clelland, where she applied for relief. The inspector of poor of the parish of Shotts sent her and her family, as on former occasions, to West Calder, and the inspector of poor of the parish of West Calder on same date, 27th November 1903, sent her to the poorhouse at Linlithgow, where she was maintained at the charge of the pursuers until 3rd June 1904."

The pursuers pleaded—"The pursuers, as the relieving parish, are entitled to recover the sums expended by them upon the said paupers from the defenders to whose parish they may ultimately be found to belong, with expenses."

The defenders the Parish Council of Bo'ness and Carriden pleaded—"The said Robert Stone having acquired a residential settlement in Shotts Parish prior to 27th November 1903 which was subsisting at said date, or alternatively not having lost his residential settlement in the parish of West Calder at said date, these defenders are entitled to absolvitor, with expenses."

The defenders the Parish Council of Shotts pleaded—"(2) The said Robert Stone not having acquired a residential settlement in the parish of Shotts, these defenders are not liable in relief, and should be assoilzied. (3) *Et separatim*, the parish to whom the paupers are chargeable being (1) the parish of Bo'ness and Carriden as the birth settlement of the father, or, and alternatively, (2) the parish of West Calder as (*a*) the residential settlement, or (*b*) in respect of the admission founded on, these defenders should be assoilzied."

A proof was allowed.

The import of the evidence sufficiently appears from the following passages:—

(1) *On the Question of Residential Settlement.*

Robert Stone—*examined for pursuers*—"(Q) Did you visit your wife and the family after you first went to Clelland?—(A) No, I never visited her all the time until she came over to where I was stopping. I had never seen her from the time I left her until she came into the house. She was only looking for me at the time. I remember her and the family coming to live steadily with me at Clelland in June. (Q) Had she come to see you at Clelland before that?—(A) She came once on the Friday. (Q) Immediately before she came to stay?—(A) Yes. (Q) How long before the time she came over with the children to stay was it that she came to see you at Clelland?—(A) We were a week or two before we got a house. (Q) Was she living at Clelland with you before you got a house in Clelland?—(A) No, she only stopped one night, the night she found me out. That was a good two or three weeks before we got the house. I went to see her at West Calder a week after she came to see me. I think

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it was on a Friday night that I went. I just stopped that night with her. I went again two or three times to see her at West Calder. (Q) Over what period did the two or three times go, would it be three weeks or more?—(A) Yes. (Q) Was it just during the few weeks before she came to live with you at Clelland?—(A) Yes, it was weeks after she came to see me. On the occasions when I went to see her I went on the Friday night, and I stopped over the Saturday on one occasion. Until she found me out at Clelland I had never gone to West Calder to see her. . . . *Cross.*—I knew about a warrant being out for my apprehension at West Calder. That was a reason why I did not go back and see my wife and family till my wife came and saw me at the time of the Hamilton Fair. When she came in April and told me that the warrant would not be enforced I afterwards went and visited her at West Calder. . . . I visited her at succeeding week-ends till she came to Clelland in June. I stayed with her in her house at West Calder on these occasions. I gave her money from time to time for household purposes. . . . *Re-examined.*—The reason why I left West Calder in August 1898 was owing to a dispute in the house. I intended to go and find work elsewhere, and not to return to West Calder."

Mrs Stone—*examined for pursuers.*—"I was in the poorhouse up till March 1899. I then thought that I would make my way to Motherwell, where his folk belonged to. On a Friday in the month of April I went to Motherwell and saw his brother, who told me that he thought I would get him in Clelland. I walked to Clelland the same day, and I went to Cossar's house. My husband was not in, and I waited till he came in. This was the first time I had seen him after he left me in August 1898. I stayed all night, and came home to West Calder on the Saturday. He came to see me the following Friday, and he stayed till early on the Sunday morning. He came in through the window about eight or nine o'clock at night. I suppose he was feared to come any other way. He gave me some money at that time, but I cannot remember how much. He did not come to see me the next week-end, but he sent me some money. He came the following Saturday again, a week later, and went away on the Sunday morning. He came every Saturday for a time. The house I lived in at West Calder was one of the colliery houses. They never bothered me for any rent for it. My husband came to see me, I think, four or five times altogether. I think I went through once to see him at Clelland before I went to live with him."

(2) *As to the Admission of Liability.*

William Millar, Inspector of Poor, West Calder—*examined for pursuers.*—"On 14th January 1903, however, I admitted the claim made by Shotts, and removed the wife and family to Linlithgow poorhouse on the 20th of the same month. They left Linlithgow poorhouse on the 13th of February. They came to West Calder, went on to Shotts, and applied there. Shotts sent them back to West Calder, and on the 19th I sent them back to Linlithgow poorhouse. From that time Mrs Stone and her family were detained by my parish in the Linlithgow poorhouse till 23rd November 1903. She then left the poorhouse and went to Shotts. She left of her own accord. I cannot exactly say where she went when she left the poorhouse, but she landed in Shotts. Shotts sent her again to me on the 27th. . . . I sent them to the medical officer, got them certified, and had them removed to the Linlithgow poorhouse. They remained there till 3rd June 1904. The claim now made refers to the expense of the keeping Mrs Stone and her family during the period from 27th November 1903 to 3rd June 1904. . . . *Cross.*—When Mrs Stone and her family left the poorhouse on 23rd November 1903 they were struck off the poor roll. There is an entry in my roll book that she was struck off on 23rd November."

Statutory notices of chargeability were sent by the parish of Shotts to the Inspector of Poor for West Calder on 28th May 1902 (first chargeability), and 26th September 1902 (second chargeability). The notices were in the following terms—

"*Parish Council Office, Shotts, 28th May* 1902.

"Sir,—In terms of the 71st section of Act 8 and 9 Vict. cap. 83, I hereby give you notice that the above-named poor person has become chargeable to this parish, which claims relief from your parish as the parish of settlement. An early admission of liability is requested."

In the particulars of claim sent by the Inspector of Poor, Shotts, to the Inspector of Poor, West Calder, he stated—"Claim is made on your parish in respect of a retained residential settlement, for proof of which you are referred to your own books, and the rent-books of the owner of the house she occupied at Clyde Street, West Calder. Your admission of liability, with instructions, will oblige."

The admission of liability by West Calder was as follows—

"*Parish Council Office, Knowe Tap, West Calder, 14th January* 1903.

"*Jane M'Neil or Stone.*

"Mr King, Inspector of Poor, Shotts.

"Dear Sir,—I am instructed to admit liability in this case. Kindly have them sent on to Linlithgow poorhouse, and oblige.—Yours faithfully, WILLIAM MILLAR, *Inspector.*"

Following on this admission an account (£35, 17s.) was rendered by the Parish Council of Shotts to West Calder, and on 13th February 1903 it was duly paid.

On 16th February 1905 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"(1) Finds that Robert Stone was a pauper, and that his wife and family were maintained by the pursuers from 27th November 1903 to 3rd June 1904 at a cost of £39, 17s. 6d., being the sum sued for: (2) Finds that the pauper had not at 27th November 1903 a settlement by residence in the parish of West Calder: (3) Finds that the pauper

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had not at that date acquired a settlement in the parish of Shotts: (4) Finds that the parish of Bo'ness and Carriden is the parish of the pauper's birth: Sustains the second plea-in-law for the Parish Council of the Parish of Shotts, and repels the plea-in-law for the Parish Council of the Parish of Bo'ness and Carriden: Assoilzies the Parish Council of the Parish of Shotts, and decerns against the Parish Council of the Parish of Bo'ness and Carriden in terms of the conclusion of the summons: Finds the Parish Council of the Parish of Bo'ness and Carriden liable in expenses to the pursuers and to the Parish Council of the Parish of Shotts: Allows accounts," &c.

Opinion.—"In this action the Parish Council of West Calder sues for the sum said to have been expended in the maintenance of a pauper named Robert Stone from 27th November 1903 until 3rd June 1904. The conclusion is directed primarily against the parish of Bo'ness and Carriden as the admitted parish of birth. There is another conclusion which is thus expressed, 'or otherwise, and in the event of its being instructed that at and subsequent to the said 27th day of November 1903 the said Robert Stone had a settlement by residence in the parish of Shotts, then the other defenders, the Parish Council of the Parish of Shotts, should be decerned' to pay the sum sued for.

"The claim is made by West Calder as the relieving parish, and in the ordinary case would have raised no question except between Bo'ness and Carriden and Shotts. But these defenders have complicated the case by a plea that the pauper had a residential settlement in West Calder at and prior to 27th November 1903, and that therefore these defenders should be assoilzied.

"It is true that the pauper had a residential settlement in West Calder as far back as 1871, and seems to have retained it until 1898. But I think it manifest from the proof that he left West Calder in August 1898, and was absent from West Calder for greatly more than three or than four years. This is only a question on the proof and pleadings, and I do not think it capable of dispute or requiring discussion. It is, besides, admitted by Bo'ness and Carriden in the answer to condescendence 3. It appears to me, therefore, that decree must be pronounced in terms of the first conclusion.

"It may not be necessary to go further. But Bo'ness and Carriden pleads—'The said Robert Stone having acquired a residential settlement in Shotts parish prior to 27th November 1903, which was subsisting at that date, or alternatively, not having lost his residential settlement in the parish of West Calder at said date, these defenders are entitled to absolvitor with expenses.' I have already expressed my opinion that the alternative part of that plea is unfounded, because of the length of the absence of the pauper from West Calder, during a part of which time his actual residence appears to be unascertained. With regard to the part of the plea which affirms the acquisition of a residential settlement in Shotts, I am of opinion, on the principle of constructive residence, that the residence of the pauper with the effect of acquiring a settlement did not begin until June 1899, when the pauper's wife and family joined him in Clelland, and came to an end before June 1902, the full term of three years' residence not having been completed. The cases of *Deas* v. *Nixon*, June 17, 1884, 11 R. 945, 21 S.L.R. 637, and *Kilmarnock* v. *Leith*, November 25, 1898, 1 F. 103, 36 S.L.R. 107, seem to be in point, especially the latter.

"I shall therefore sustain the second plea for Shotts, and repel the plea for Bo'ness and Carriden, and decern against Bo'ness and Carriden for the sum concluded for."

The defenders, the Parish Council of Bo'ness and Carriden, reclaimed.

Argued for the reclaimers—*Settlement*—As Stone was in desertion after he left West Calder he could not be held to be constructively resident with his wife and family there. The present case was governed by that of *Greig* v. *Simpson*, October 25, 1888, 16 R. 1b, 26 S.L.R. 19. Stone had acquired a residential settlement in Shotts for the three years dated from September 1898, the date when he left West Calder. The case of *The Parish Council of Kilmarnock* v. *The Parish Council of Leith*, November 25, 1898, 1 F. 103, 36 S.L.R. 107, was also in point, for Stone could not while in desertion be held as regarding his wife's house as his home. The case referred to by the Lord Ordinary was distinguishable. So, too, was the case of *Beattie* v. *Stark*, May 23, 1879, 6 R. 956, 16 S.L.R. 544. The fact that Stone made occasional contributions towards the support of his wife and family in West Calder did not interrupt the acquisition of a settlement in Shotts. Neither did his visits to his wife. These visits were surreptitiously made. As soon as he could get a house he removed his wife and family from West Calder. Such element as might infer a constructive residence in West Calder was absent.

Argued for the respondents, the Parish Council of Shotts—(1) *Settlement*—Stone had not acquired a settlement in Shotts as he had not been continuously resident there during three years. Prior to his desertion in 1898 he had a settlement in West Calder. The reason why he left was on account of a dispute with his wife, and his absence at first was incidental and temporary. His home was then in West Calder though he himself had gone away. From 28th May 1899 he was contributing to the support of the West Calder home. In doing so he must have regarded it as his home. His wife and family and all his belongings were there. He visited there every week-end till June 1899, when he removed them to Shotts. The question turned on what was his home during the five or six days from 28th May 1899 to 3rd June 1899. The canons of construction laid down in *Beattie* v. *Stark* (*ut supra*) were in point. The *Kilmarnock* case (*ut supra*) was in

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the respondents' favour, for there it was held that the pauper's residence was where he was maintaining his wife and family. Though Stone was *de facto* in desertion he was resident, in the sense of the statute, in West Calder. After his wife found him he recognised his obligation to contribute to her support, and so set up of new his home in West Calder. The important period here was the interval from 28th May 1899 to 3rd June 1899, and he had then no home in Shotts, for he was living in lodgings. His home was in West Calder, and remained so till he removed his wife and family to Shotts on 3rd June. (2)—*Admission of Liability.*—Assuming Stone had acquired a settlement in Shotts, liability had been formally admitted by West Calder, and therefore West Calder was liable—Poor Law Act 1845 (8 and 9 Vict. cap. 83), sec. 70; *Beattie* v. *Arbuckle*, January 15, 1875, 2 R. 330, 12 S.L.R. 210; *Young* v. *Gow*, February 9, 1877, 4 R. 448, 14 S.L.R. 452. In *Brechin Parish Council* v. *Montrose Parish Council*, December 6, 1904, 7 F. 207, 42 S.L.R. 150, the circumstances were different.

Argued for the respondents, the Parish Council of West Calder—*Admission of Liability.*—The admission of liability given by West Calder was only binding so long as chargeability against them existed. That chargeability ceased on 23rd November 1903, when Mrs Stone and her family voluntarily left the poorhouse and went to Shotts. There had been a material change of circumstances since the admission was given. The test of change of circumstances was the cessation of chargeability, and that had happened here—*Brechin Parish Council* v. *Montrose Parish Council, ut supra.*

Lord President—The pauper's chargeability has happened in the parish of West Calder. The pauper is a miner who prior to the autumn of 1898 had acquired a residential settlement in West Calder, his birth settlement being in the parish of Bo'ness. In September 1898 he deserted his wife and family, who had resided with him in West Calder, and went to the parish of Shotts, where he found work. In the spring of the next year, 1899, in the month of April or May—the exact date is uncertain—his wife, who had started on a tour of discovery, found him in the parish of Shotts, and communicated to him the fact that a warrant for his apprehension had been issued. She promised to let him know what the authorities were likely to do in the matter of his apprehension. The authorities in West Calder seem to have told her that if he would put an end to his state of desertion, and take his wife and family to live with him in Shotts, the warrant would not be put in force. His wife having given him this information, he, being no longer in fear of apprehension, seems to have made two or three week-end visits to his wife in the parish of West Calder, and upon these occasions to have given her certain sums of money. He himself meantime continued to reside actually in Shotts and set about getting a house for his wife and family there. He secured a house on 3rd June 1899, and there and then removed his wife and family to Shotts.

Now, chargeability happened at such a date that in order to have the three years' residence which is necessary for the acquisition of a settlement, the 3rd of June will not do as the commencement of the three years. It is necessary for this purpose to draw back the residence for a few days previous to 3rd June, namely, the days between 28th May and 3rd June. The question therefore comes to turn upon this—where was this man resident between 28th May and 3rd June 1899.

It is somewhat difficult to reconcile all the decisions on the matter, and I do not think that any particular advantage would be served by going through these decisions. But the opposing views of the two parishes which are here concerned may be shortly stated.

The view of the parish of Bo'ness—which of course wishes to charge Shotts with liability in respect of a residential settlement—is very simple. They say that *de facto* he was resident in Shotts after 28th May—that indeed he had as a matter of fact resided there from the autumn of the preceding year. The parish of Shotts retort that he cannot be held to have resided in Shotts for the period between 28th May and 3rd June, because at that time his wife and family were established in West Calder, and that, consequently, according to the decisions, his home must be held constructively to be in West Calder and not in Shotts.

Upon the facts I do not think that the contention of Shotts can be upheld. It is true that there are many cases in which the place where a man is maintaining his wife and family is held to be the place of his true residence. But there is no such general proposition as this, that wherever a man's wife and family are, there he must be held to be. On the contrary, the real question is where he himself is, and the position of his wife and family is just one of the items of evidence which may go strongly to solve that question.

The case seems to me more near the case of *Greig* v. *Simpson*, 16 R., than any other. In that case a tailor in Leith had gone to Cupar, leaving his wife and family in Leith. He could not at the moment establish them in Cupar, and he took lodgings there for himself, but eventually removed them to a house in Cupar, and never came back to Leith. It was held that after he had gone to Cupar, leaving his wife and family in Leith, he had left Leith, and consequently that his residence in Leith was not continuous for the necessary period.

I think the facts here are substantially the same. I think when this man left West Calder in the autum of 1898 he never really went back again. He gave up his home then, and I cannot look upon those casual week-end visits to his wife after she discovered him, coupled with the giving her money, as a re-establishment of the

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home which *de facto* he had abandoned. If that is so, there can be no question of constructive residence at all. The man was himself resident in Shotts, and there he remained for the period of three years. Therefore upon these grounds I am of opinion that the Lord Ordinary's interlocutor ought to be recalled on this matter, and that, as between the birth-parish and Shotts, Shotts is liable, because the pauper acquired a residential settlement there.

LORD ADAM—The question in this case is whether the pauper Stone had acquired a residential settlement in the parish of Shotts when he became chargeable on 28th May 1902. The facts are very short and simple. It appears that the pauper had been residing for apparently a good many years in the parish of West Calder. He, deserting his wife and family, left West Calder about the end of August or September 1898. He left it intending finally to leave it, and he then took up his residence —in lodgings no doubt—in the parish of Shotts in the month of September, and in the parish of Shotts he continued to reside personally up to the date when he became chargeable. If he is to be held to have been resident in the parish of Shotts from August or September 1898 to the date of chargeability, of course that is sufficient length of time to give him a residential settlement in Shotts.

The facts in this case which raise the question are these, that from August or September 1898 to the 3rd of June 1899 he lived alone by himself in Shotts. During that time his wife and family continued to reside in West Calder, apparently in the house in which he had left them, and the controversy in this case is whether the three years are to run from August or September 1898, when the pauper himself ceased to reside in West Calder and came to live in Shotts, or whether they are to run from the 3rd of June 1899, when he was joined in Shotts by his wife and family.

I suppose if from August or September 1898 until chargeability in 1902 there had been no visits paid by him to his wife in the circumstances which your Lordship has stated, there would be no question about the settlement at all. What has raised the controversy between the parties is this, that in the month of April 1899 this deserted wife discovered that her husband was living in Shotts. After that date the pauper went back, apparently never to reside, but he went back and visited her, apparently several times, between May and 3rd June in the old house where she had been living with her family in West Calder, and it is said that these visits interrupted the acquisition of a residential settlement by the pauper in the parish of Shotts, and that he must be held to have been constructively living with his wife and family in the parish of West Calder. It is said that, being constructively living in West Calder, he could not acquire a residence in Shotts at the same time, and that therefore the requisite period of three years does not exist. That contention is supported in the first place by the *Kilmarnock* case. It is said that that case established that the man had a residence with his wife and family although he never went near them except to pay them his wages once a week. But that is a very different case from this. In the *Kilmarnock* case it was held, rightly or wrongly, but in obedience to prior authorities, that the man was truly living with his family in Ayr, because they could not reside with him at Kilmarnock where he was working, because he could not get a house for them, and he visited them regularly and paid them his wages. The Court held that he was constructively resident in Ayr. But that is a very different case from this. In this case the man left West Calder with the intention—the expressed intention—of never returning to West Calder. He personally had severed his connection with West Calder altogether, and when his wife discovered him what took place was that it was arranged there and then, not that he was to go back to West Calder, but that she and his family should join him in Shotts, and accordingly they did join him there on 3rd June 1899. I think on these facts, beyond doubt, the pauper was residing continuously in Shotts from August or September 1898 until he became chargeable. Therefore I agree with your Lordship that the interlocutor should be reversed.

LORD M'LAREN—I agree entirely with the observations made by Lord Kinnear in one of the cases—I think *Greig* v. *Simpson* —as to the limits and meaning of constructive residence. Constructive residence is not a separate thing distinct from actual residence, but only means this, that according to the ordinary use of language "residence" does not mean that a man is to be every moment of his life in one place, and therefore that he may still be resident notwithstanding absences more or less prolonged, the degree of absence that would destroy residence being a pure question of fact on which it is impossible to lay down any definite rule. In this view of constructive residence I hold that all the decisions that have been made the subject of argument, and particularly the two that were most referred to—the case of Kilmarnock and Ayr, and the case between Leith and Cupar—are perfectly consistent, because if you admit that a man has definitely abandoned his residence, *animo remanendi*, you cannot continue it by any theory of construction. That was the ground of decision as explained by Lord Mure in *Greig* v. *Simpson*, where his Lordship says he is unable to admit the supposition that a man who had definitely abandoned Leith as his residence, and was only waiting for a house to take his wife to, could be held to be constructively resident there. In the *Kilmarnock* case the ground of the decision was that the elements of residence in Kilmarnock were awanting during the period that the man's wife and family were obliged to live in Ayr, because the fact of his working in that place was not sufficient to make it his residence if his home was in another

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locality. The present case, I think, is really ruled, if authorities are to rule such cases, by *Greig* v. *Simpson*, because it is perfectly clear on the evidence that when the pauper left West Calder, after a disagreement with his wife, as he himself says, he had definitely abandoned his residence there, and had no intention of returning, so that he was neither there in fact nor in intention from the time that he went to Shotts. I cannot admit that his having paid occasional visits to his wife towards the latter end of this period, and while he was looking forward to her coming to Shotts, that these occasional visits, which were no doubt made under pressure, and apparently with the view of arranging for their coming together again, can be held to re-establish the residence at West Calder in any true sense of the term. I am therefore of opinion with your Lordships that we should alter the interlocutor and hold that Shotts is liable.

LORD KINNEAR — I am entirely of the same opinion.

As to the effect of the admission of liability given by West Calder—

LORD PRESIDENT—We now have to decide the question that was left over, namely, the question as between Shotts, whom we have just held to be the parish liable as in a question with the parish of birth, and the parish of West Calder. Now, the ground upon which Shotts says that West Calder is liable is not that the settlement is truly in West Calder, because that has really been determined as a matter of fact the other way, but that they have got an admission of liability in distinct terms. It is contained in the letter of 14th January 1903, which is in response to several applications for payment of relief and a request for an early admission of liability. In that letter the Inspector of West Calder, writing to the Inspector of Shotts, says—"I am instructed to admit liability in this case."

Looking to the terms of section 70 of the Act of 1845 and the decisions that have been given by the Court in *Beattie* v. *Arbuckle* (2 R. 330) and *Young* v. *Gow* (4 R. 448), it would be idle to say that this admission does not bind. Accordingly the only question really is not whether the admission binds, but whether it applies to the sum of £39 odds, which is the sum which was expended for the relief of the pauper after a certain date, 27th November, the point being that upon the 23rd November the pauper with her children left West Calder poorhouse of her own accord, drifted up and down for four days in search of her husband, turned up at Shotts on the 27th, asked for relief, and was promptly sent back by the Shotts Inspector to West Calder. It is said that interrupted the chargeability, and that consequently the admission which was made for the period before that does not apply to this period.

I cannot think that what was said in those cases which I have cited leads to any such result. It seems to me that once there is a proper admission of liability which binds, that liability must cease in a proper sense, that is to say, that the pauper in some way or other must be shown to have become self-supporting again or to have come to be supported by somebody else, as would be the case if she had married. But here there is nothing of that sort. There is merely four days' undeterminable absence during which she does not seem actually to have got parochial relief, and during which, as she herself says, she did not earn anything at all because she had too much to do with the children. I am clearly of opinion that the admission still binds, and that, as in a question between Shotts and West Calder, West Calder is liable.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I also am of the same opinion.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Find that Robert Stone acquired a residential settlement in the parish of Shotts which was subsisting at 27th November 1903: Sustain the first alternative of the plea-in-law for the defenders, the Parish Council of the Parish of Bo'ness and Carriden, and assoilzie said last mentioned parish from the conclusions of the summons; and in respect of the admission of liability by the Parish Council of the Parish of West Calder to the Parish Council of the Parish of Shotts, assoilzie also the said last mentioned parish from the conclusions of the summons: Find the Parish Council of the Parish of West Calder liable in expenses to both defenders; allow accounts thereof to be given in," &c.

Counsel for Pursuers and Respondents (The Parish Council of West Calder)—Watt, K.C.—A. M. Anderson. Agents—W. & J. L. Officer, W.S.

Counsel for Defenders and Reclaimers (The Parish Council of Bo'ness and Carriden)—Guthrie, K.C.—Orr Deas. Agent—Thomas Liddle, S.S.C.

Counsel for Defenders and Respondents (The Parish Council of Shotts)—Younger, K.C.—M. P. Fraser. Agent—D. Hill Murray, S.S.C.

Friday, November 17.

SECOND DIVISION.

[Sheriff Court of Perthshire at Perth.

STEWART *v.* HANNAH.

Reparation — Slander — Innuendo — Relevancy — Privilege — Malice — Facts and Circumstances Inferring Malice.

A law-agent, appointed to wind up an executry estate, but from whom the agency had been taken, and against

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whom an action of count, reckoning, and payment had been brought by the executrix, wrote a letter to an insurance company, the cautioners for the executrix, advising them to withdraw their bond, as a personal guarantee given by him to the company that the estate would be divided by him according to law, was, in the altered circumstances, useless.

In the letter he stated that the executrix's son "is demanding payment of the whole estate. . . . I have reason to suspect that if the son who is demanding the whole estate gets hold of it, the other beneficiaries will never receive the share they are entitled to."

In an action for damages for slander brought by the son against the law-agent, the pursuer proposed an issue in which he innuendoed the letter as meaning that he would dishonestly appropriate money that did not belong to him, and averred that the defender wrote it maliciously with the object of obstructing the executrix, retaining the funds and agency in his own hands, and inducing the company to withdraw their bond. The defender objected to the issue on the ground that the letter could not bear the proposed innuendo, and that the occasion being privileged it was necessary for the pursuer to aver facts and circumstances inferring malice, and that he had not done so.

The Court allowed the issue, *holding* (1) that the innuendo was admissible; (2) that the occasion was privileged; (3) that assuming the necessity for an averment of facts and circumstances, the pursuer's averments were sufficient.

James G. Stewart, commercial traveller, Forres, brought an action in the Sheriff Court of Perthshire at Perth against Alexander Hannah, law-agent, Union Bank House, Aberfeldy, in which he sued him for £500 as damages for alleged slander contained in a letter of 18th February 1905 written by the defender to the General Accident Assurance Corporation, Limited, Perth.

The pursuer's averments showed that after the death of his brother, Mr William Robert Stewart, a Mr Charles Munro, the local agent for the Union Bank of Scotland at Aberfeldy, solicited the agency in the executry estate, and that an arrangement was come to that Munro should wind up the estate, it being understood, however, that the actual conduct of the business was to be undertaken by the defender Alexander Hannah, who was associated in business with Munro. The pursuer understood that he and his mother were to be appointed joint-executors to his brother, but as a matter of fact the mother, a lady of nearly eighty years of age, was appointed sole executrix. The defender undertook the legal business connected with the winding up of the estate, but the pursuer and his mother being dissatisfied with the conduct of Munro and the defender made a demand for payment of all moneys belonging to the executry estate, and the mother, as executrix, ultimately brought an action of count, reckoning, and payment against the defender and Munro in the Sheriff Court at Perth. The defender thereupon wrote the following letter to the General Accident Assurance Corporation, Limited, Perth, who were cautioners in the executry:—

"*Union Bank House,*
"*Aberfeldy, 18th February* 1905.

"Dear Sir,—*W. R. Stewart's Exy.*—You will remember that your company recently became cautioners for the executrix in this case, and that before doing so I guaranteed to your company that the estate would be divided by me according to law. I am sorry to say that the executrix left here before I could divide the estate, and is now staying in Forres with her son. This son is demanding payment of the whole estate in name of his mother the executrix, and has employed an agent to recover it. Now, I do not think that we can very well keep the estate out of the hands of the executrix if she chooses to employ another agent, but I think it right to intimate to you that of course my personal guarantee in the circumstances is inept, and such being the case your position as cautioners is such that I think you ought to withdraw your bond of caution, and should intimate this, on receipt of my letter, to the Sheriff-Clerk, because I have reason to suspect that if the son who is demanding the whole estate gets hold of it, the other beneficiaries will never receive the share they are entitled to, and I am aware that the others interested are likely to take steps to compel a settlement of their claims. Meantime you must proceed to protect yourself.—Yours faithfully,

"ALEXANDER HANNAH."

This letter was lodged by the defenders in the process of the action of count, reckoning, and payment, already referred to, and in this manner came to the knowledge of the pursuer.

The pursuer further averred (Cond. 6)—"The following statements contained in the said letter of 18th February 1905, viz., 'This son is demanding payment of the whole estate. . . . I have reason to suspect that if the son who is demanding the whole estate gets hold of it the other beneficiaries will never receive the share they are entitled to,' were made by the defender of and concerning the pursuer to the said Assurance Corporation and to the officials thereof. The statements are false and slanderous, and were made maliciously and without probable cause, and by making these false, malicious, and libellous statements to said Assurance Corporation, and to the officials thereof, defender meant thereby that pursuer was a dishonest person who was not to be trusted, and that he would fraudulently misappropriate money that did not legally belong to himself, and that he would illegally withhold money belonging to other persons if any money were placed in his hands, and would cheat and defraud the other beneficiaries entitled to a share of his said late brother's estate.

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(Cond. 8) . . . Defender by so writing meant to falsely, maliciously, and slanderously charge the pursuer as a dishonest person who was not to be trusted with money, and that pursuer wanted to secure the possession of the funds of the executry estate of his said late brother, and to fraudulently apply them to his own purposes, and defraud and cheat the other beneficiaries of their legal shares, without the knowledge of the executrix, who had the legal control of said funds, and by said letters defender urged said corporation 'to protect' themselves against pursuer in consequence of the character given him by defender." [The following averments were added by way of amendment with the leave of the Sheriff, Christopher N. Johnston—] "The defender in writing said letter was not acting in the discharge of any right or duty incumbent on him, but he maliciously wrote said letters with the object of preventing the executrix obtaining the executry funds and papers, delivery of which she had lawfully demanded through another law-agent, and defender recklessly slandered the pursuer in the manner libelled in a malicious attempt to induce the said Assurance Corporation, whose guarantee premium had been paid by the executrix, to withdraw, if possible, their bond of caution, and thereby hinder and obstruct the executrix in the proper administration of the estate, and to prevent his own discontinuance as law-agent, and also prevent or delay the executry funds being taken out of his own hands, or out of the hands of the said Charles Munro with whom he was associated in business."

The pursuer pleaded, *inter alia*—"(2) The statements complained of by the pursuer being false and calumnious, he is entitled to *solatium* for the slanderous imputations thereby made by the defender in regard to him. (3) The said written words complained of by the pursuer having been uttered in regard to him by the defender, and intended and understood to bear the actionable meaning put upon them by pursuer in the condescendence, he is entitled to reparation from the defender. (6) The defender not having been privileged in making said false and slanderous statements regarding the pursuer, but having made the same maliciously, decree should be granted as craved."

The defender pleaded, *inter alia*—"(1) The pursuer's statements being irrelevant, the action ought to be dismissed. (2) The statements complained of not being in themselves slanderous, and not being capable of bearing the construction attempted to be put upon them by the pursuer, the defender ought to be assoilzied. (3) The statements complained of being privileged, the defender ought to be assoilzied."

The Sheriff-Substitute (SYM) on 19th June 1905 pronounced an interlocutor sustaining the first plea-in-law for the defender and dismissing the action.

The pursuer appealed to the Sheriff, who on 28th July 1905 pronounced an interlocutor allowing the pursuer to amend his record in the manner indicated in the averments quoted from Cond. 8, and allowing parties a proof before answer.

The pursuer appealed to the Court of Session, and proposed the following issue for the trial of the cause by jury—"Whether on or about 18th February 1905 the defender wrote and despatched the letter printed in the schedule annexed; whether the statements in said letter are of and concerning the pursuer, and falsely and calumniously represent that the pursuer would dishonestly appropriate money that did not belong to him, to the pursuer's loss, injury, and damage."

The defender opposed the granting of the issue, and argued—(1) The letter would not bear the proposed innuendo, as it did not necessarily, or even naturally, suggest a charge of dishonest appropriation. (2) In any case the letter was privileged, written as it was by one co-guarantor to another upon a matter in which they were jointly interested, and in circumstances conferring a duty—or at anyrate a right or interest—on the one side to make and an interest on the other to receive the communication—Odgers on Libel and Slander 264; *M'Dougall* v. *Claridge*, 1808, 1 Campbell 267; *Hunt* v. *Great Northern Railway Co.* (1891), 2 Q.B. 189, at 192; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781; *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11, 27 S.L.R. 26. (3) The letter being privileged, and malice having to go into the issue, there must be on record a relevant averment of "facts and circumstances inferring malice." There was none—*Farquhar*, *Innes*, and *Stevenson* v. *Wilson*, January 16, 1903, 5 F. 309, 40 S.L.R. 286.

Argued for the pursuer and appellant—(1) The statements complained of could reasonably bear the proposed innuendo; that was sufficient. (2) The occasion was not privileged, or if privileged the defender exceeded his privilege, he being only entitled to inform the company that he had ceased to act as agent. In any case the question of privilege was for the judge who might try the case. (3) Condescendence 8 contained a sufficient averment of "facts and circumstances" if such an averment were necessary—*Buchanan* v. *Corporation of Glasgow*, July 19, 1905, 42 S.L.R. 801.

LORD KYLLACHY—I understand that your Lordships are of opinion that the innuendo put into the first issue is not inadmissible. I am of the same opinion.

With regard to the question of privilege, although the question is narrow, I think, and I gather your Lordships agree, that on the pursuer's statement of facts a case of privilege is sufficiently disclosed. Malice must therefore go into the issue.

It was suggested in argument that no facts and circumstances inferring or suggesting malice are here averred. Assuming that the rule which requires the averment of such facts and circumstances is applicable to a case of this kind, it appears to us that the statement in the amendment made by the pursuer obviates any objection on this point.

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The result is that we approve of the first issue, malice being inserted, and disallow the second issue.

LORD STORMONTH DARLING and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court allowed the issue.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—A. M. Anderson. Agent—Alexander Ramsay, S.S.C.

Counsel for the Respondent—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Menzies, Bruce Low, & Thomson, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'GREGOR *v.* M'LAUGHLIN.

Reparation—Decree in Absence—Service of Wrong Summons—Regular Return of Citation — Damages for Decree being Taken in Absence when Summons had in fact not been Served—Malice—Relevancy.

In an action in the Sheriff Court at the instance of A against B for payment of an account, the sheriff officer instructed to serve the summons inadvertently served a wrong summons on the defender (the summons actually served by him being one at the instance of C against D), but returned a regular execution of citation. A took decree in absence against B, and having extracted the decree, was proceeding to do diligence when the decree was set aside. Thereafter B raised an action of damages against A for wrongfully taking the decree in absence against him, averring that the decree had been published in the "Black Lists," and that he had suffered thereby. B did not aver that A had acted maliciously or that the mistake had been caused otherwise than by inadvertence on the part of the sheriff officer.

Held (*rev.* judgment of Lord Ordinary (Dundas)) that as there was no averment of malice on record, the pursuer's statement disclosed no issuable matter, and action *dismissed* as irrelevant.

On 30th January 1905 Edward M'Laughlin, butter and egg merchant, Glasgow, raised an action against William M'Gregor, grocer there, in the Small Debt Court at Glasgow for payment of the sum of £3, 19s. 4d., being the amount of an account incurred in November and December 1904, and on the same date instructed Alexander M'Laren, a sheriff officer in Glasgow, to serve the summons. The execution of citation returned by M'Laren was as follows:—"Upon the 30th day of January 1905 years I duly summoned the within designed Mr W. M'Gregor, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification within set forth. This I did by delivering a full copy of the within summons or complaint with a citation thereto annexed and copy account for the said defender in his hands personally within his premises at 6 Steel Street, Glasgow. ALEX. M'LAREN, Sheriff Officer."

M'Gregor now raised an action of damages against M'Laughlin. He averred that no copy of the summons was ever served upon him; that on 30th January there was served upon him by the said sheriff officer a small debt summons at the instance of Alexander Cameron, tailor and clothier, 90 Jamieson Street, Glasgow, against Thomas M'Cartney, boilermaker, 39 Ralecut Street, Glasgow; that on 6th February 1905 the defender took decree in absence against him in said action for £3, 19s. 4d., with 4s. 4d. of expenses; that on 16th February he (the pursuer) was charged by the said Alexander M'Laren, sheriff officer, to pay the said sums within ten free days from said date under pain of poinding and sale and imprisonment, if the same be competent; that the said charge was the first notice the pursuer had that there were proceedings in Court against him; and that the said charge, proceeding as it did upon an illegal decree, was wrongous and illegal.

In answer the defender admitted that the execution of citation was in the terms quoted; that he had taken decree in absence against the pursuer, and that the pursuer had been charged to pay the said sum. He further averred as follows:—"Explained that the defender had no knowledge of the actings of the said sheriff officer in regard to the service of said small debt summons, except what appeared on the face of the execution of citation here quoted by the pursuer. The said execution is in all respects in regular and proper form, and the defender was, in these circumstances, within his right in taking decree in absence against the pursuer on 6th February 1905. If any mistake or irregularity occurred in regard to the service of the summons, such mistake or irregularity did not appear on the face of said execution of citation, and the defender had no knowledge thereof and no responsibility therefor. It was solely the act of the said sheriff officer, who was acting in the performance of his official duty as an officer of court, and for whose actings in such official capacity the defender is not responsible."

The pursuer further averred—"(Cond. 4) On said charge being given the pursuer applied for and obtained a warrant sisting execution in terms of section 15 of the Small Debt Act of 1837. The case was reheard on 6th March 1905, when the Sheriff-Substitute dismissed the action on the ground that it had not been served on the pursuer and awarded him 6s. of expenses. (Cond. 5) The said decree in absence taken by defender was published in *Stubb's Gazette* and other similar publications

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which are popularly known as 'Black Lists.' These publications contain records of bankruptcies, trust-deeds, cessios, and decrees taken in absence. The publication of a tradesman's name in said journals is highly injurious to him, and the pursuer's credit and trade reputation have been seriously prejudiced by the fact that his name appeared in said publications. (Cond. 6) For said publication and consequent injury the defender is responsible. Had said summons been served upon pursuer he would have paid said debt. By the defender's failure to have said summons served upon pursuer there was no process in said small debt action, and the proceedings therein were fundamentally null. The said decree in absence was thus obtained wrongously and illegally. For the injury caused to pursuer by said publication in said trade journals he is entitled to reparation."

In answer the defender stated—"(Ans. 6) Denied. The pursuer has sustained no injury whatever by the proceedings complained of. Before raising the said action against the pursuer the defender repeatedly endeavoured to recover the said account of £3, 19s. 4d. without resorting to legal proceedings. The pursuer, on three different occasions when requested for payment, asked for delay in the hope that he might be able to borrow some money from his brother. On the last of the said occasions the pursuer stated he had been unable to borrow the money from his brother, and that the defender could now do as he liked. Further, immediately the decree in absence was recalled a fresh summons for the said account of £3, 19s. 4d. was served, and although no exception was taken to the manner of service in this instance, no defence was put forward. The pursuer, or someone on his behalf, appeared in Court and consented to decree. The amount in the said decree is not yet paid."

The pursuer pleaded, *inter alia*—"(1) The defender having wrongously taken decree in absence against pursuer, and he having suffered damage through the publication of said decree in absence as condescended on, the defender is liable to the pursuer in reparation."

The defender pleaded, *inter alia*—"(1) No relevant case."

The issues proposed by the pursuer were as follows:—"(1) Whether on or about 6th February 1905 the defender wrongfully took decree in absence against the pursuer in the Small Debt Court, Glasgow, to the pursuer's loss, injury, and damage? (2) Whether on or about February 16th, 1905, the pursuer was wrongfully charged at the instance of the defender to pay the sums of £3, 19s. 4d. and 4s. 4d. of expenses, to the pursuer's loss, injury, and damage? Damages laid at £500 sterling."

On 6th June 1905 the Lord Ordinary (DUNDAS) pronounced this interlocutor:—"Disallows the second of said issues; approves of the first of said issues; appoints the same to be the issue for the trial of the cause."

Opinion.—"This action appears to me to be of a very paltry and unsubstantial character. The defender's counsel urged that it ought to be dismissed *de plano* as irrelevant. I agree with him to this extent, that I consider that the second issue proposed by the pursuer should be disallowed. I find no relevant averment in support of it, because it is not alleged upon record that any damage resulted to the pursuer in consequence of the charge set forth in Cond. 3, nor (in spite of the challenge thrown out in the defender's answer) that the charge proceeded upon instructions given by the defender. But, as regards the first of the proposed issues, I am not prepared to hold that the pursuer's averments are so clearly irrelevant as to justify me in throwing out the action at this stage, and the cases referred to by the defender do not, in my judgment, warrant me in arriving at that result. I shall therefore allow the first, and disallow the second, of the issues proposed."

The defender reclaimed, and argued—This was a case where malice and want of probable cause ought to be put in issue. It was neither in issue nor on record, and the case was therefore irrelevant—*Davies & Company* v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842, 4 S.L.R. 58; *Rhind* v. *Kemp & Company*, December 13, 1893, 21 R. 275, 31 S.L.R. 223. The pursuer had not averred that the defender had acted in knowledge of the facts averred, nor was it alleged that the defender had acted maliciously. The defender had done all he could be expected to do. He had acted on a regularly returned citation made by an official of court, and that was sufficient to excuse him. This was not a case falling within the category of *Beattie* v. *M'Lellan*, June 29, 1846, 8 D. 930, which was a case as to the proper use of diligence. The cases of *M'Robbie* v. *M'Lellan's Trustees*, January 31, 1891, 18 R. 470, 28 S.L.R. 322; and *Gibson & Company* v. *Anderson & Company*, February 23, 1897, 24 R. 556, 34 S.L.R. 435, were cases of breach of agreement. The appropriate remedy for the mistake which had happened here was that provided by the Small Debt Act—viz., a rehearing and recall of decree That had been done. In order to support this action very pointed averments of malice would have been necessary. In the cases of *Rhind* v. *Kemp* and *Davies* v. *Brown and Lyell*, *cit. sup.*, malice was put in the issue. In the case of *Ormiston* v. *Redpath, Brown, & Company*, February 24, 1866, 4 Macph. 488, 1 S.L.R. 183, no issue at all was allowed.

Argued for respondent—The Lord Ordinary was right. The decree here was wrongfully taken, and damages had been sustained, for the publication in the "Black List" was the consequence of the decree—*Gibson & Company* v. *Anderson & Company*, *cit. sup.* [The LORD PRESIDENT referred to the case of *Wolthekker* v. *Northern Agricultural Company*, December 20, 1862, 1 Macph. 211.] The whole proceedings were bad, so that it was unnecessary to aver malice on record or to put it in the issue. The issue

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allowed in *Gibson* v. *Anderson, cit. sup.*, was right. The present case was within the authority of *Beattie* v. *M'Lellan, cit. sup.* The case of *Ormiston* v. *Redpath, Brown, & Company, cit. sup.*, was not in point, for in this case there was no proper process. To take decree without citation was a legal wrong for which the defender was liable. In these circumstances the onus of proving malice ought not to be put on the pursuer—Graham Stewart on Diligence, 761, notes 1 and 2.

At advising—

LORD PRESIDENT—This is a reclaiming note against an interlocutor of Lord Dundas, in which he has disallowed the second issue asked for by the pursuer, but has approved the first. The circumstances which have given rise to the action are these. The pursuer, who is a grocer, seems to have owed the sum of £3, 19s. 4d. to the defender, who is a wholesale butter and egg merchant. He failed to pay the account, and an action was raised against him in the Small Debt Court. The summons in this action was taken round by a sheriff officer, who on that day had a good many small debt summonses to serve, and it appears that he served the wrong summons on the pursuer—the defender in the small debt action—giving him, in point of fact, a summons intended for someone else. It is said—but it is only a matter of averment and is not admitted—that within two hours the sheriff officer found out his mistake, and returned and served the right summons upon the pursuer. But however that may be, there is no doubt that he returned an execution of citation, and on that return of execution decree was taken in the undefended roll. The pursuer—the defender in the small debt action—then applied for a rehearing, producing the summons which was really intended for someone else, and telling the Sheriff that that was the summons which had been served upon him and in respect of which the execution of citation had been given; and the Sheriff there and then recalled the small debt decree and found him entitled to a small sum of expenses. Perhaps I should say that the defender states—though it is only a matter of averment—that another action for the same debt was at once raised against the pursuer, in which decree was obtained, but that the debt has not yet been paid.

In these circumstances this action has been raised against the pursuer in the small debt summons, and £500 are asked for as damages against him in respect of the decree in absence which was wrongfully taken as shown by the fact that the Sheriff recalled the decree, and for the charge that followed thereon. Nothing followed on the charge, for the decree was got out of the way by being recalled; and therefore I think the Lord Ordinary was quite right in disallowing the issue in respect of the charge, as no damage is averred to have resulted from it.

But the Lord Ordinary has allowed an issue on the taking of the decree in the undefended roll, the issue being in these terms, whether "the defender wrongfully took decree in absence against the pursuer in the Small Debt Court, Glasgow, to the pursuer's loss, injury, and damage." I should point out that damage is relevantly averred with regard to this, for the pursuer says that the undefended roll in which his name appeared was printed in certain publications that publish these things, and that his credit has consequently suffered. I am of opinion that the issue that has been allowed here is not, in the circumstances of this case, the right one.

There have been many cases dealing with this matter, and there is a well-recognised distinction between issues allowed for misuse of the forms of process and those allowed for misuse of diligence. Everyone is perfectly entitled to have recourse to the forms of process, and the mere fact that in the end his action turns out to be wrong will not subject him to a claim for damages without the averment of something further. Everyone is entitled to have what the forms of process will give him, and if he obtains a decree which is eventually held to have been a wrong decree—as happens in every instance of the reversal of a Sheriff on appeal, or of a Lord Ordinary on a reclaiming note—that alone will not give rise to an action for damages. But it is otherwise with diligence, and if it be shown that diligence has been wrongly used, that alone will amount to a legal wrong. When I say wrongly used, that gives rise to a further distinction which does not exist in the case now before us, but which was clearly pointed out by Lord Justice-Clerk Inglis in the case of *Wolthekker* (1 Macph. 211), where he showed the distinction between diligence that follows in the ordinary course of process—such as arrestments on the dependence—and diligence that can only be obtained on *ex parte* application and on the strength of *ex parte* statement—such as interim interdicts or *meditatione fugæ* warrants. In the latter case the mere want of success will show that the use of the diligence was wrongous, for it was employed *periculo petentis*, and was based on the truth of *ex parte* statement. But in the former case it is otherwise, though even there, if there is some flaw in the steps of process, and if, in spite of it, diligence is persisted in, it may amount to a wrongous use of it and give rise to an action for damages. But the unsuccessful use of diligence in the ordinary course of process is not necessarily a wrong on which damages will follow.

I have stated shortly the results of the decided cases on these matters, as I do not want to go through them at length, but I have examined them myself, and I think they follow the lines I have just laid down. So here the taking of decree in absence clearly falls within what I have called the misuse of the forms of process. I find that *Davies* v. *Brown & Lyell* (5 Macph. 842) is an illustration of an action for damages for taking decree in the undefended roll, and in that case an issue was only allowed on an insertion of malice. So, too, in the case

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of *Rhind* v. *Kemp* (21 R. 275). Now these cases seem to me in point, for they are in the same category with this case. The only distinction is that in these cases the wrong consisted in decree being taken after the debt had been paid. But that is a distinction without a difference, for here the wrong alleged is that the pursuer was put in the undefended roll without any warrant for it, the execution of citation on which the decree was taken being in reality no execution at all. It can make no real difference whether the decree taken was unwarrantable on account of the debt being paid or on account of the defender not being duly cited.

The distinction between this class of case and those that arise through the wrongous use of diligence was shown to be quite in the mind of Lord President Inglis, than whom there can be no higher authority, in the case of *MacRobbie* (18 R. 470). That case was an instance of the wrongous use of diligence, but still the observations of the Lord President show that he had this class of case also clearly in view. *MacRobbie's* case was a claim for damages that arose out of an action for mails and duties, in which there were conclusions for expenses only in the event of the defenders appearing and offering opposition. Appearance was entered for the proprietor of the subjects, but only for the purpose of watching the case in his own interests, and no further step in the proceedings was taken by him. In spite of that, however, the pursuer's agent took decree for expenses against the proprietor, charged him in the extract decree, and threatened proceeding for cessio. Damages were sought for these wrongous actings, but your Lordships will observe that in that case diligence had actually been proceeded with. Lord President Inglis, after pointing out the circumstances under which the decree for expenses had been taken, says — "There cannot be a doubt that that was a very wrongful and improper proceeding, because the pursuer's agent had asked for something which was beyond the prayer of the petition, and which the present pursuer had no reason to apprehend would be asked for. The prayer of the petition, so far as regarded expenses, was only directed against those who might appear and offer opposition, which MacRobbie had not done, and accordingly a wrongful act was committed by the defender Carrick as agent for Peter M'Lellan's trustees." I pause to point out that that is absolutely *in pari casu* with the present case. There was no foundation for that decree because it was *ultra petita*, as here there was no foundation for the decree because there had been no valid execution of citation. The Lord President proceeds — "But this action is not brought to recover damages for that wrong, for which indeed no action would lie, but for the wrongful use of diligence." Now that is entirely in point, for when he says no action would lie he means on the bare statement of this kind of wrongful act, though an action might lie if there were averments from which malice could be inferred.

I therefore think that the issue appropriate for the trial of this class of case is not the one that has been allowed here, but is an issue containing an insertion of malice. But malice cannot be put in issue unless there are averments of malice on record, and there are no such averments here, and indeed the facts set forth negative the idea of malice altogether. I therefore think that, for the reasons which the Lord Ordinary has given, the second issue should be disallowed, and, for the reasons which I have just stated, the first issue should be disallowed also, and the action dismissed.

LORD ADAM was absent.

LORD M'LAREN—It is a principle of our constitutional law that the courts are open to all His Majesty's subjects without restriction, and it is a consequence of that principle that no person who prosecutes a suit shall be liable in damages for the consequences of an innocent or inadvertent mistake.

In applying that principle there is no distinction that I can see between a decision in absence and a decision obtained where all parties are present in court, and I wish to say emphatically that the defender in a proceeding in absence is just as much under the protection of the judge as he would be if he were present, for if a decree is wrongly taken against him in his absence he can always be reponed.

In this case the mistake was that the sheriff officer served a wrong paper on the present pursuer. That was an innocent mistake so far as the defender was concerned, and falls within the principle that parties are not to be held liable for the consequences of errors committed in the course of legal proceedings.

Of course if the failure to serve the writ were the result of malevolent intention, or of design to impose upon the Court, it would be a different matter, but there is no such case here.

I agree with your Lordship in holding that there is a clear distinction between proceedings in court and proceedings out of court for the purpose of enforcing decrees. When we come to the stage of execution the functions of the judge are at an end, and the litigant must be answerable for the consequences of proceedings taken under his instructions. The case also stands clear of the rule that a party obtaining interim interdict on statements of fact which are afterwards found to be untrue is answerable for his representations. The present claim is not founded on representations but on negligence, and I agree that no issue ought to be granted, because the facts as stated by the pursuer exclude the supposition of malice or malevolent intention.

LORD KINNEAR—I am of the same opinion. I think the cases which have been quoted proceeding on liability for wrongous use of diligence afford no authority for the decision of this question, because in this case no diligence was done on the decree. Every

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man has a right to call his debtor into Court and ask decree against him, and if he does so and follows out in good faith the ordinary forms of process he is not liable in damages, though he may be for costs, because he obtains a mistaken judgment in his favour. What is complained of here is that the defender obtained decree against the pursuer upon a mistaken ground. The defender is not liable in damages for that mistake any more than if he had obtained a mistaken decision upon the merits. The defender, no doubt, moved for decree in absence, and he was only entitled to do so if he proceeded on a formal and regular execution of citation showing that the defender had been called. Now, in making the motion, the defender did proceed on a regular return of execution from the sheriff officer, and I do not think that there was any duty on him to inquire further whether the sheriff officer had performed his duty rightly or not. The sheriff officer was not an agent or servant of his own selection, but the officer of the law appointed for the purpose of serving writs which the party interested can not effectually serve for himself. I think that in the circumstances he was warranted in proceeding to take a decree in absence.

I say this on the assumption that in doing so the defender acted in good faith. If he did not—if, knowing his summons had not been properly served, he nevertheless proceeded to ask for decree in absence—then that would be a totally different case. But if the pursuer in this action wished to have an issue on such a case as I have supposed, it was essential to aver malice on record. But not only has he abstained from averring malice, but he makes averments which exclude the possibility of malice, as he sets out the return of execution on which the defender acted, and does not suggest that he had any reason to distrust, or did in fact distrust, the truth and accuracy of that return, and that seems to imply that the defender's action was taken in good faith.

I therefore agree with your Lordships that there is no issuable matter in the case.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer and Respondent—Crabb Watt, K.C. — A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender and Reclaimer—Orr, K.C.—J. Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BROWN *v.* MAGISTRATES OF KIRKCUDBRIGHT.

Public Health — Burgh — Formation of Sewer—Power Conferred by Two Statutes with Different Procedure—Procedure—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 103—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 219.

The Public Health (Scotland) Act 1897 confers powers on local authorities to construct sewers. The Burgh Police (Scotland) Act 1892 confers cognate powers. Objection having been taken to the proceedings of the local authority in a burgh with regard to the formation of a sewer in respect that it had not complied with the requirements of the latter statute. *Held* that the powers conferred by the Public Health Act were independent of those conferred by the Burgh Police Act, and consequently that it was sufficient for the local authority to have complied with the requirements of the former statute.

Opinion (*per* Lord M'Laren) that the safe course for the local authority was to follow the more recent statute.

Public Health—Burgh—Sewer—Construction of Sewer through Private Property—Procedure—Notice to Owner—Report of Surveyor—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 103 *and* 109.

The Public Health (Scotland) Act 1897, sec. 103, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained . . . and may carry such sewers . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ." Section 109 provides that in the event of the owner of premises refusing access "the local authority may, after written notice to such owner, . . . apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant. . . ."

The owners of a close, under which a local authority proposed to construct a sewer, having brought a suspension on the ground that the requirements of the Act had not been complied with, *held* that written notice given 16 days before application to the Sheriff for warrant to enter, together with a report by the burgh surveyor, a retired sea captain, in which he stated that for the scheme of drainage proposed, which he considered best for the district, it was necessary to carry the sewer through the close in question, was sufficient compliance with the requirements of the Act.

Public Health—Burgh—Sheriff—Construction of Sewer through Private Ground—Discretion of Local Authority—Power of Sheriff to Order Inquiry if Course of Sewer be Necessary—Public Health (Scotland) Act 1897, *sec.* 109.

The Public Health (Scotland) Act 1897, sec. 103, confers power on a local authority to carry sewers, "after reasonable notice in writing (if upon the re-

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port of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ."

Sec. 109 enacts—"In case it shall become necessary to enter . . . any lands or premises for the purpose of making plans . . . or other purposes ancillary to the powers herein given as to sewers, . . . and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority . . . to enter and do all or any of the works . . . at all reasonable times in the daytime."

Opinion (*per* Lord M'Laren) that in an application for authority to enter premises for the purpose of forming a sewer, the sheriff in a suitable case has power to allow a proof or to call for a report from an expert as to the proposed course of the sewer being necessary.

Opinion (*per* Lord Adam) that no inquiry as to that matter is competent, as all discretion or judgment as to the proper course of the sewer is left to the local authority.

Opinion of Lord President *reserved.*

The Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), enacts, section 103—"The local authority shall have power to construct within their district, and also when necessary for the purpose of outfall or distribution, or disposal or treatment of sewage, without their district, such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any public or other road, or any street or place, or under any cellar or vault which may be under the foot-pavement or carriageway of any street or road, and after reasonable notice in writing—if upon the report of a surveyor it should appear to be necessary—into, through, or under any lands whatsoever. . . ."

Section 109—"In case it shall become necessary to enter, examine, or lay open any lands or premises for the purpose of making plans, surveying, measuring, taking levels, examining works, ascertaining the course of sewers or drains, making or repairing, altering or enlarging sewers or drains, or other purposes ancillary to the powers herein given as to sewers and drains, and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in the daytime."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), enacts, section 219—"The commissioners shall from time to time, subject to the restrictions herein contained as to notice to be given and the plans and estimates to be prepared, cause to be made, under the streets or elsewhere, such mains and other sewers as shall be necessary for the effectual draining of the burgh. . . ."

Section 220—"Twenty-eight days at the least before making any new sewer where none previously existed, or altering the course or level of or abandoning or stopping any sewer, the commissioners shall give notice of their intention, by posting a notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the names of the streets and places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places at the beginning and the end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time when and place where all persons interested in such intended work may be heard thereupon."

Section 221—"The commissioners shall meet at the time and place mentioned in the said notice, to consider, in the presence of the surveyor of the commissioners, any objections made against such intended work, and all persons interested therein, or likely to be aggrieved thereby, shall be entitled to be heard before the commissioners at such meeting, and thereupon the commissioners may, at their discretion, abandon or make such alterations in the said intended work as they judge fit, and no such work to which any objection is made at such meeting shall be executed unless the burgh surveyor, after the person making such objection, or his agent, has been heard, shall certify that the work ought to be executed, nor shall such work be begun until the end of seven days after an order for the execution thereof has been duly made by the commissioners, and entered in their books."

This was a note of suspension and interdict at the instance of Mrs Janet Brown, widow, 22 Leven Street, Pollokshields, and Elizabeth Jane Stark, 57 St Mary Street, Kirkcudbright, against the Provost, Magistrates, and Councillors of the burgh of Kirkcudbright, as Local Authority thereof, under the Public Health (Scotland) Act 1897, and John Gibson, town clerk of Kirkcudbright, as clerk to said Local Authority.

The complainers sought suspension of certain proceedings complained of, and also craved the Court to interdict the respondents, or those acting by their authority, from entering upon and interfering in any way with certain lands belonging to them in the burgh of Kirkcudbright, and from constructing a sewer therein; and further, to interdict the respondents or their servants from acting upon or carrying into execution (first) certain resolutions of the Town Council of Kirkcudbright with regard to the construction of the said sewer; (second) the

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intention expressed in certain notices following upon these resolutions and served upon the complainers; and (third) the warrant granted by the Sheriff-Substitute authorising the respondents to construct the sewer.

In the statement of facts annexed to the note the complainers stated that they were respectively the proprietors of adjoining premises situated at 53 and 55 St Mary Street, Kircudbright; that in September 1904, the respondents instructed the Burgh Surveyor of Kirkcudbright, a retired sea captain, to prepare a plan with a report showing how the area in which the complainers' property was situated could be drained by means of sewers in the public streets; and that the said report referred to a sewer which could be laid through the complainers' property, but contained no recommendation thereanent. They averred—"The surveyor's report did not bear that it was either necessary or advisable to lay the sewer through the complainers' property, and no report to that effect was ever presented to the respondents by the said surveyor or any skilled adviser. At said meeting" (held on January 25) "the respondents decided to abandon the proposal to lay the main sewer in the public streets, and passed a resolution to lay it and a tributary sewer through the premises of the complainers. They instructed the surveyor to prepare a plan giving effect to their resolution and also a specification of work. Said plan, . . . and relative specification, were presented to the meeting of the respondents, held on 22nd February 1905, and approved, and the respondents decided to proceed with the work in accordance with their said resolution of 25th January 1905. Following on said approval, John Gibson, town clerk, on behalf of the respondents, served notices on the complainers, dated 6th March 1905, and intimating that the respondents, in terms of section 103 of the Public Health (Scotland) Act 1897, proposed to lay down a sewer from Millburn Street to St Mary Street, which would run through part of the complainers' property. . . . Said resolutions did not proceed upon the report of a surveyor, as required by section 103 of the Public Health Act. . . . Denied that the said Burgh Surveyor considered what was the best course in which to lay the new sewer, or decided in favour of the course complained of, or presented a report as stated in answer hereto. The respondents made the resolutions complained of without any such report, and the said surveyor merely carried out their instructions in the whole matter."

In answer the respondents stated—"Before preparing his report the Burgh Surveyor took levels of various routes for the new sewer, and after submitting it to the respondents he explained fully to a committee of their number upon the ground on January 24, 1905, the reasons which had led him to report as he had done, and his reasons for adopting the route now objected to by the complainers. Thereafter, at a meeting held upon 22nd February, the respondents again considered the question, and resolved to proceed with the new sewer along the line as laid down upon the plan by the surveyor, being of opinion, after full consideration, that that line would be the best in the interests of the public, least likely to cause inconvenience to private individuals, and necessary for keeping the district properly drained. Before reaching this conclusion the respondents considered an alternative scheme for draining the houses towards a main sewer to be laid in the street, but were satisfied that this would be impracticable and undesirable. . . ."

The complainers further stated that they had objected to the operations proposed, but thereafter on 22nd March 1905 the respondents had presented a petition to the Sheriff-Substitute at Kirkcudbright craving power to enter the complainers' premises and construct the sewer without having sent the reasonable written notice required by section 109 of the Public Health (Scotland) Act 1897; that the respondents had failed to conform to the procedure laid down in sections 220 and 221 of the Burgh Police (Scotland) Act 1892, with the result that the complainers had had no opportunity of stating and proving their objections to the proposed operations; that after the complainers' answers to the petition had been lodged, the respondents had lodged in process a report by the Burgh Surveyor relating to the said operations, which report was undated, and was believed and averred to have been obtained by the respondents after their meeting on 22nd February 1905.

The complainers further averred—"(Stat. 9) . . . The Burgh Surveyor of Kirkcudbright is not a trained and qualified surveyor in the sense of the statute. Moreover, his report does not bear that the sewage scheme of the respondents, including that part affecting the complainers' property, is necessary. This question was never submitted to him by the respondents or considered by him, and he was never asked by the respondents to advise them in regard to the drainage of the area in question or to recommend any scheme to them. Averred that it is usual and necessary for a local authority which wishes to exercise the powers conferred upon them by section 103 of the Public Health Act 1897, to get the report of a duly qualified surveyor to the effect that the proposed works are necessary. . . . (Stat. 10) . . . The said scheme of the respondents is neither necessary nor advisable. The existing track of the sewer is the one best fitted for the drainage of the district and would cause the least inconvenience and damage to private individuals. Moreover, the proposed track along the public streets is superior to the scheme now supported. The operations on the complainers' property are very prejudicial to their rights and interests. . . ." [The complainers specified in detail the injuries which they alleged, and objected that the respondents had failed to comply with the provisions of sections 145 of the Public Health (Scotland) Act 1897, and 57 of the Burgh Police

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(Scotland) Act 1903, in regard to the acquisition of premises otherwise than by agreement.]

In answer the respondents averred that on 6th March 1905 notice was duly served on the complainers; that the respondents had all along proceeded under the powers conferred upon them by the Public Health (Scotland) Act 1897; that they were not bound to conform to the regulations referred to by the complainers; and that the complainers were entitled to full compensation for any damage which they might have sustained.

In regard to the procedure before the Sheriff-Substitute when the warrant was granted, and what had followed on the warrant being granted, the complainers averred as follows—"(Stat. 11) . . . The Sheriff-Substitute refused to reject the said surveyor's report or to allow the complainers a proof in regard to the said scheme and the unnecessary invasion of the complainer's rights, although required to hear evidence by the said statute [the Public Health Act], and decided the petition adversely to the complainers on the one-sided report of the respondents' surveyor, which the complainers never had an opportunity of answering or rebutting by evidence, as they were by law entitled to do. Reference is made to sections 154 and 155 of said Public Health (Scotland) Act 1897. (Stat. 12) On 3rd April 1905 the Sheriff-Substitute at Kirkcudbright granted warrant in terms of the respondents' petition. . . . Since said date the respondents have begun their operations in connection with the construction of the said sewer. By said operations the complainers' property will be irreparably and unnecessarily damaged. Denied that the operations in connection with said sewer are completed. . . . The respondents have made no offer of compensation for the injury proposed to be done to the complainers' property; nor have they offered to buy wayleave or property, as they are bound to do. The present note of suspension and interdict has thus been rendered necessary. Reference is made to section 219 of the Burgh Police (Scotland) Act 1892, and section 164 of the Public Health (Scotland) Act 1897."

In answer the respondents stated—"Explained that under section 157 of the said Act of 1897 the said interlocutor is final, that the sewer has been completed without injuring the fabric of the complainers' properties, and that the present note is incompetent. Delay in putting in the new sewer would have been prejudicial to the public health, and the respondents completed the work so as to permit of the new drainage system being in working order before the summer commenced."

The report by the Burgh Surveyor was in the following terms:—"I beg to report that I now produce a plan showing depths and levels for a new main and tributary sewer to Saint Mary Street through between Miss Gourlay's and Miss Stark's close or properties, and, as far as my experience goes, it seems the best and most practical way of taking it, with the tributary sewer, through the lane connecting the main at a certain point, to take all private drains within the area. To carry out this plan it is necessary that the sewer be carried through the above close. This way is a great saving of expense, as it leaves most of the existing private drains to remain the same. All the work must be carried out in accordance with the Burgh Police (Scotland) Act 1892, or any other Act in force.—Yours truly,

"R. E. M'Cleare, *Burgh Surveyor.*"

The notice served on Mrs Brown was as follows:— "*Town Clerk's Office,*

"*Kirkcudbright, 6th March* 1905.

"Madam,—I am directed to intimate that the Provost, Magistrates, and Councillors of this burgh, in terms of section 108 of the Public Health (Scotland) Act 1897, propose to lay down a sewer from Millburn Street to St Mary Street, which will run through part of your property in St Mary Street occupied by Miss Gourlay. The plan and specification of the sewer can be seen at my office. The work will be proceeded with on the expiry of ten days from this date. The Town Council will make good any damage done to your property through their operations.

"I will be glad to hear that you have no objections to this work being carried out.—Yours truly, John Gibson, *Town Clerk.*"

The interlocutor granting the warrant was in the following terms:—"*Kirkcudbright, 3rd April* 1905.—The Sheriff-Substitute . . . finds that the answers lodged by the defenders do not contain any relevant defence to the petition, therefore grants warrant in terms of the prayer thereof, &c. Lawrence T. Napier."

The complainers pleaded, *inter alia*—"(1) The said proceedings ought to be suspended, in respect that (*a*) the said statutory enactments were not observed; (*b*) the said warrant of the Sheriff-Substitute proceeded on said *ex parte* report, but upon no evidence, as required by the said statute; (*c*) the prayer of said petition and warrant following thereon are not sufficiently specific. . . . (4) No report of a surveyor having been obtained in accordance with the requirements of the Public Health (Scotland) Act 1897, sec. 103, the complainers are entitled to interdict, with expenses. (5) The respondents having failed to comply with the provisions of the Burgh Police (Scotland) Act 1892, secs. 220 and 221, *et separatim*, of the Public Health (Scotland) Act 1897, sec. 109, interdict should be pronounced in terms of the prayer."

The respondents pleaded—"(2) The complainers' averments being irrelevant, the note should be refused. (3) The note should be refused in respect (*a*) that the whole proceedings have been regular and proper, and (*b*) that under section 157 of the Public Health Act 1897 the warrant of the Sheriff-Substitute is not subject to review."

On 8th April 1905 the Lord Ordinary officiating on the Bills (Kincairney) granted interim interdict. Thereafter on 25th April 1905 the Lord Ordinary on the Bills (Stormonth Darling) passed the note and recalled the interim interdict.

On 25th October 1905 the Lord Ordinary

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(SALVESEN) pronounced this interlocutor:—"Before answer, allows to the parties a proof of their respective averments on the closed record, and to the complainers a conjunct probation, to proceed on a day to be afterwards fixed, and reserves the question of expenses."

Opinion.—"The complainers in this case are owners of premises situated at Nos. 53, 55, and 57 St Mary Street, Kirkcudbright, and they seek to interdict the respondents from acting on, or carrying into execution certain resolutions of the Town Council of Kirkcudbright with reference to the construction of a sewer through their property, and a warrant granted by the Sheriff-Substitute of Kirkcudbright, dated 3rd April 1905, authorising the respondents to construct a sewer through their land. The interim interdict originally granted was recalled on 25th April 1905 after a hearing, and it appears that the sewer has now been constructed. This, however, does not relieve me from deciding the questions which have been raised in the present suspension.

"The respondents asked that the note should be refused as incompetent, and they also argued that the complainers' averments were irrelevant. I heard a full and interesting debate, which has satisfied me in the end that it would not be desirable to decide this case without inquiry; and accordingly I refrain from expressing any opinion as to the points on the construction of the statute, or as to whether the procedure prescribed by section 220 of the Burgh Police Act applies where advantage is taken of the powers conferred by section 103 of the Public Health (Scotland) Act 1897. It is sufficient to say at present that the power to carry sewers through private property, which is conferred by section 103, is subject to two conditions—(1) that reasonable notice in writing shall have been given, and (2) that it shall appear, on the report of a surveyor, to be necessary to carry the sewers through such property. The complainers offer to prove that no such invasion of their property is in fact necessary, and that no surveyor has so reported. There is a good deal of argument in the pleadings as to the construction to be put on a report which has been produced by the respondents, but the report is undated, and I think it would be premature to pronounce any opinion as to its true construction until its history has been ascertained. It follows that if there is a relevant averment of a failure to comply with the conditions prescribed by the statute, as I think there is, the Sheriff-Substitute's warrant, although declared to be final and not subject to review, is not a bar to the present suspension. I shall accordingly allow a proof before answer."

The respondents reclaimed, and argued—Proof was unnecessary. The complainers' statements were irrelevant. *Esto* that the procedure set forth in the Burgh Police Act had not been followed, the local authority was entitled to act on the Public Health Act alone. A local authority had ample powers under the Public Health Act 1897 and the Burgh Sewerage and Drainage Act 1901. The terms of section 103 of the Act of 1897 were very wide. "Lands" included "buildings" (section 3). There was no appeal except in certain specified cases (section 157), of which this was not one. The Act provided for compensation (section 164), so that the complainers were not without a remedy. Under section 103 a local authority had power to make sewers where it pleased, and section 109 provided for the Sheriff's sanction being obtained. The Burgh Sewerage and Drainage Act 1901 extended the powers given by the Act of 1897. The Act of 1897 was meant to be drastic, otherwise the exemptions allowed by section 107 (railways, canals, &c.) would have been unnecessary. The Burgh Surveyor had duly reported, and the report was considered before the warrant was granted. That being so, the Court would not interfere—*Lewis* v. *Weston-Super-Mare Local Board*, August 8, 1888, L.R., 40 C.D. 55. It would have been impossible to proceed both under the Act of 1892 and the Act of 1897. These Acts were in many respects antagonistic, and did not form one code, as was maintained by the complainers. Reasonable notice was all that was required under the Act of 1897, and that had been given. There was nothing in the Act to declare that the report must be got before the local authority resolved to make a sewer. Appeal by way of suspension was incompetent without averments of a departure from the statutory forms. There was no appeal on the merits, for the decision of the Sheriff was final.

Argued for the complainers—The regulations laid down for the complainers' protection had not been complied with. The provisions of the Act of 1897 were not inconsistent with those of the Act of 1892, and therefore they fell to be read together. Section 5 of the Burgh Sewerage and Drainage Act of 1901 modified the provisions of the Act of 1897 so as to meet those of the Act of 1892—that showed that these statutes were to be read together. They were really one code, the essential provisions of which had not been followed. Further, the provisions of the Act of 1897 itself had not been duly complied with, *e.g.*, those of section 103. A report from a surveyor was essential before any resolution to make a sewer through private property could be effectual. No such report had been obtained here. What was acted upon here was not a report in the sense of the Act. What the Magistrates did was first to pass a resolution to make a sewer and then to get a report from the surveyor as to how it should be made. That was not in accordance with the procedure laid down in the Act. The case of *Lewis* v. *Weston-Super-Mare Local Board, cit. supra*, was different, the subject in question there being vacant ground. There was no "necessity" in the sense of the Act. The question of "necessity" was considered in *Hayward* v. *Lowndes*, February 16, 1859, 28 L.J., Ch. 400. The surveyor here was not a qualified surveyor in the sense of the Public Health Act. The notice required by section 109 had not been given. It

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was not enough merely to give notice of the resolution to make the sewer, notice of intention to take proceedings was also necessary—*Campbell* v. *Leith Police Commissioners*, June 21, 1866, 4 Macph. 853, 2 S.L.R. 150, *rev.* February 28, 1870, 8 Macph. (H.L.) 31, 7 S.L.R. 441; *Taylor* v. *Corporation of Oldham* (1876), L.R., 4 C.D. 395. Section 157 was not final and did not exclude appeal—*Phillips* v. *Dunoon Police Commissioners*, November 21, 1884, 12 R. 159, 22 S.L.R. 127.

At advising—

LORD M'LAREN—This case comes before us on a reclaiming note against an interlocutor of the Lord Ordinary allowing a proof in an action of suspension and interdict, seeking to interdict the Magistrates and Council of the Burgh of Kirkcudbright from entering on the complainers' lands situated in St Mary Street, and from constructing therein a sewer or part thereof conform to notice, and plans and specifications there referred to.

The first objection to the action of the Magistrates is that they have not complied with the requirements of section 220 of the Burgh Police Scotland Act 1892, according to which, before making any new sewer or altering any existing sewer, the Burgh Commissioners shall give notice of their intention by posting a notice in a conspicuous place at each end of every street through or in which such work is to be undertaken. It is further provided by section 221 that all persons interested in or likely to be aggrieved by the work in question shall be entitled to be heard before the Commissioners.

It is admitted that notice by posting a description of the proposed diversion of the sewer was not given; but the answer is that the reclaimers did not proceed under the powers of the Burgh Police Act 1892, but under the powers of the Public Health Act 1897.

I think it is impossible, on a fair reading of the provisions of the Public Health Act 1897, to come to any other conclusion than that the procedure there authorised was intended to be complete in itself. In the case of non-burghal districts this is necessarily the case, because there is no other subsisting legislative authority for carrying through drainage operations except that of the Public Health Act itself. The Act applies to burghs as well as to landward districts, and I cannot conceive that in applying the powers of the Act to burghs the Legislature intended to put upon the administrators of the burgh the impossible task of carrying out constructive works under the provisions of two codes, each of which deals completely but in a different way from the other with the subject in hand. In availing themselves of the powers given by the Public Health Act 1897 I think that the Magistrates and Council are within their rights if they comply with the requirements of that statute, and that they are not required as part of their duty under that Act to refer to the provisions of previous Acts of Parliament under which cognate powers are conferred.

We may think that it would have been better when a new code was passed to repeal the provisions of the Burgh Police Act having reference to the same matter. But we cannot inquire into the reasons which influenced the Legislature in allowing the old code to stand without express and specific repealing words. Nor can we in the present case determine whether it was intended to give burgh authorities an option to proceed under the one Act or the other; or whether the provisions of the Burgh Police Act as to drain construction are to be taken to be repealed by implication.

In this case the local authority took the safe course of proceeding under the later statute, and having done so, it is not a good objection to the exercise of their powers that they have not also given notice to the public of their intentions in the manner prescribed by the Burgh Police Act 1892.

Passing now to the objections that have been stated to the procedure followed in the assumed exercise of the powers of the Public Health Act 1897, I observe that under section 103, which is the enabling section, the local authority is empowered to construct sewers within their district, and also when necessary, and subject to the approval of the Local Government Board, without their district. We are not in this case concerned with powers to be exercised without the district. The work in question is nothing more than the diversion of a street sewer to a line which was considered to be more convenient. I understand that the line of the new sewer passes between the houses of the two respondents. Each of them objected to the sewer as calculated to affect her property injuriously, and in consequence of their objections the reclaimers were under the necessity of applying to the Sheriff, in terms of saction 109, for authority to enter on the lands and to execute the work. The case was heard by the Sheriff-Substitute, and determined in favour of the Local Authority. As a matter of form it was determined on relevancy, and while I do not doubt that in a suitable case the sheriff has power to allow a proof, or to call for a report from an expert, it is evident from his note that the Sheriff-Substitute did not consider that the objectors had any substantial complaint, or any ground of complaint at all, except the general objection which any proprietor may take to a sewer being constructed through his land without his consent. This objection, in the view of the Sheriff-Substitute, was met by the statutory provision that the local authority must make good any damage they may do to the objectors' lands. On this part of the case I shall add nothing, because the judgment of the Sheriff Court is final.

The objections maintained in this process of suspension—other than those founded on the Burgh Police Act, which I have already considered—are founded on the terms of the 103rd section of the Public Health Act 1897, which empowers the local authority to construct and carry sewers through, across,

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or under any public road or street, or under any cellar or vault which may be under the foot-pavement, &c., and also "after reasonable notice in writing—if upon the report of a surveyor it should appear to be necessary—into, through, or under any lands whatsoever." It is said that sufficient notice in writing was not given, and that the resolution to carry the sewer through the complainers' lands did not proceed on the report of a surveyor. The notices given seem to be quite sufficient, and the only objection that was pressed was that the scheme, so far as it affected the complainers' lands, did not proceed on the report of a qualified surveyor.

The local authority produce a report by the Burgh Surveyor which appears to me to be in terms of the statute, and nothing is said against it except that it is undated and that the Burgh Surveyor is not a person highly qualified for the discharge of this statutory duty. I am not sure whether the Lord Ordinary had this report before him or whether he considered that he was not entitled to look at it, because his Lordship in allowing a proof proceeds on the ground that the existence of a report by a surveyor is denied in the record. Now, if this were an ordinary action, it may be that on a strict view of the relation of pleading to proof the local authority might be called on to prove their report. But interdict to stop the execution of a work authorised by Parliament is an extraordinary remedy, and if inquiry were to be granted in every case as a matter of course, I do not see how works such as we are considering could be executed within reasonable limits of time and expense in face of an active opposition. Especially when jurisdiction is given to the Sheriff to control the proceedings of the local authority, I conceive that it is not consistent with the practice of this Court to institute an inquiry into matters of fact unless a *prima facie* case is made. So far from this being done we have a *prima facie* case in favour of the regularity of the proceedings, because the report of the Burgh Surveyor is before us, and it states that the work is necessary. We have no duty to inquire into the qualifications of the surveyor. I have already said that if the Sheriff were dissatisfied with the report he might have remitted to a neutral surveyor. But he was not dissatisfied, and we are not sitting as a Court of Review on his judgment. In all the circumstances I am of opinion that the note of suspension does not disclose any case for inquiry and that the application should be refused.

LORD ADAM—The proceedings in this case were taken by the Local Authority under the Public Health Act of 1897, and the powers conferred under that Act are, I agree with Lord M'Laren, entirely independent of any powers that may be granted under the Burgh Police Act or other Acts. Accordingly, I think this question depends upon what is the proper construction of section 103 of the Public Health Act of 1897, and it is to be observed in connection with that Act that the powers given to the local authority of constructing such sewers as they think necessary are conferred upon them by that Act in various circumstances. They have power by section 103 to construct sewers not only within their district, but also without their district, in respect of the matter of the outfall or distribution of the sewage. Then power is given to them to construct such sewers as they may think necessary under public roads and public streets and places, and finally there is given to them the power of entering on lands, "any lands whatsoever," upon complying with the conditions set forth in the Act.

Now, to return for a moment to the matter of the outfall or distribution of sewage, it will be seen that what I am going to state does not give the local authorities a free hand in the matter of constructing sewers. There are provisions in this Act by which, in section 104, they have to give three months' notice of their intention, with a description of the course of the sewers and the nature of the intended work, and of the parishes, roads, and streets through, across, or under which the works are to be made. Notice has to be given to the parties whose lands are to be affected, and these parties have three months within which to lodge objections. If objections are lodged, the Local Government Board may appoint an inspector to report on the matter, and it is only with the sanction of the Board that the work can proceed. Therefore when they go out of their own district they have not a free hand to construct sewers, though as the local authority they may consider them necessary.

But when we come to the next power given with regard to sewers within their own locality, they may carry such sewers through, across, or under any public road, street, or place, and so far as I see there is no restriction whatever upon the powers given by this clause to the local authority to construct such sewers as they may think necessary, and for the obvious reason that these very roads and public streets are under the local authority, and therefore it was not intended that in making such sewers they need consult anybody or require any authority.

Then we come to the clause which most concerns us, and as I said before it is a clause which entitles them to carry the sewers into, through, or under any lands whatsoever. Now, we are told, and it is so, that "any lands whatsoever" includes tenements, and therefore under this clause they are authorised to construct a sewer under the passage between these two houses, but that only on two conditions. These conditions are that "the local authority shall have power to construct such sewers as they think necessary"—that is, as the local authority and nobody else think necessary—"after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever."

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It appears to me that the question here arises, have the local authority in this matter complied with these two conditions? If they have complied with these two conditions, if it appears from the report of the surveyor that he considered such sewers to be necessary, if their own opinion is backed up by that of the surveyor, then if they give proper notice they may enter on any lands whatsoever for the purpose of making the drains. It seems a very drastic power, but there it is. But it is alleged here by the appellants that they have not complied with these two conditions because they have not given notice, and particularly not a notice in writing as provided for in the clause of the Act, and in the next place that they have not shewn that such sewers are necessary in terms of the Act.

Now, in reference to the first of these conditions, viz., the condition of reasonable notice, I think there was perfectly reasonable notice here, because the notices which the town clerk or burgh clerk served on each of these ladies were served on 6th March, and they did not apply to the Sheriff to grant authority to enter on the subjects for the purpose of carrying out the construction of the drains until 22nd March. That is more than a fortnight's notice, which I think is reasonable notice.

The next question is, did they get a report on the sewers, and does it appear from the report of a surveyor that these sewers were necessary? Now, from the way in which these words are put it appears to me to settle that that makes the surveyor the judge whether these things are necessary or not. Therefore if they had got a report from a surveyor, and if it appears from the report of that surveyor that he thinks that such sewers are necessary, I think the conditions on that matter as required by the statute are fulfilled, and if that is so, if the opinion of the local authority is backed up as to the necessity of these drains by the report of the surveyor to that effect, then they have fulfilled the conditions required by the statute and are entitled to form the drains.

But the appellants here say that the local authority have not got a report from a surveyor, in the first place, because they say the surveyor here is not a proper surveyor or a surveyor in the sense of the Act. Now, he is the burgh surveyor, duly appointed by the respondents the local authority, and in my opinion it is not the intention of the statute that we are to inquire into that matter, or that we are to inquire into the competency of this gentleman, and to say that because the report is by him it is not in the sense of the Act the report that is to be made. I think nothing need be said on that matter.

But the appellants further say it does not appear on the face of the report that these sewers or drains are necessary, and that the report does not bear that. Now, we have the report printed in the appendix, and there is no doubt that the report does not bear in so many words that the sewers are necessary; but then this word "necessary" is certainly subject to construction, because in one sense no sewer can be said to be necessary; it is no doubt always possible, though perhaps only by the expenditure of a great amount of money on engineering works, to take the sewer in another direction.

We have in the case of *Lewis* a statement of what appears to be a reasonable construction of the word "necessary" in such cases. In that case it is stated that "necessary may well mean necessary for the efficient discharge of the duty in the way which is most for the benefit of the public." I think these are the words used in the case of *Lewis;* and if you apply them here I think this report is sufficient, for the report distinctly says that what the local authority propose is, so far as his, the surveyor's, experience goes, the best and most practical way, and that is to take the sewer, "with the tributary sewer, through the lane connecting the main at a certain point, to take all private drains within the area." He says that is the best and most efficient way to take this drain; and he then says—"To carry out this plan it is necessary that the sewer be carried through the above close." It seems to me that, as the Act says that if upon the report of a surveyor it should appear to be necessary, the local authority shall have power to construct drains, then it does appear here that these drains or sewers are necessary in the sense of the Act. Therefore it seems to me that on the construction of the 103rd section, the respondents, the local authority, have power given to them to construct such drains as they think necessary, and that, having complied with the conditions, they have power to construct the sewers on the lands of the respondents.

If that be so, the next step is to apply under section 109 for authority to enter on the land for the purpose of constructing these sewers. Now, the Act says that, if it is necessary to enter upon any lands, they are to apply to the Sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority to enter into all or any of the lands. Now, it appears to me that under the application it would have been quite competent for the Sheriff-Substitute to have inquired whether or not all the provisions necessary to give a right of entry on the part of the local authority had been complied with. I think that is a proposition he ought to have had before him, but I demur altogether to the view that it is the duty of the Sheriff to inquire whether or no this drain is necessary. If the local authority thinks it necessary, and if they are backed up by the report of their surveyor that it is necessary, then I think you cannot inquire before the Sheriff whether this is necessary or whether the drain might be made to follow some other course, which would be equally good or better, or anything of that sort. I think all discretion or judgment on the matter as to the proper course of the sewers is left to the local authority, but always under these conditions — that when they are

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acting under the section that provides for the outfall and have to make the sewer on ground outside their own limits, they must have the authority of the Local Government Board, and when, as in this case, they are acting within their own limits, they must have as their authority the opinion of a surveyor, who must in his report state that the sewer which they think best is necessary.

The Sheriff here has taken the same view as I have taken, so that the question of the application of the finality clause of the Act does not arise, and it is unnecessary to say anything about it. I therefore concur with Lord M'Laren that the reclaiming note must be allowed, and the suspension be refused.

LORD KINNEAR concurred in the judgment proposed.

LORD PRESIDENT—I was so familiar with and so much engaged in the preparation of the Act at present under discussion that I confess I have considerable diffidence as to my power of putting a judicial interpretation upon it. I therefore content myself with saying that I agree with the judgment your Lordships propose. But I should like to reserve my opinion on that one matter, which I do not think is necessary for the disposal of this case, on which there has been a difference of judicial opinion between my two brethren on the bench who have given opinions.

I should like to add this also in regard to the drastic power conferred, and I do not hesitate to express an opinion upon it, because the section is not a new section; it will be found to be a repetition of a section in the old Act of 1867. It is, no doubt, very true that at first sight it looks against the practice of Parliament to give such a drastic right to local authorities, whether absolutely or with that modicum of control which Lord M'Laren thinks the clause possesses. In the one way or the other it is drastic to give this power of interfering with private rights without going through the ordinary proceedings for the compulsory acquisition of land. But I think if the subject comes to be examined, it is such a very exceptional case that there was good reason why Parliament should do it. We are dealing with sewers, and sewers of course do not mean house drains, but the general system by which the general drainage of a town or community is to be taken away, and, as Lord Adam has shewn, the power is in the section which begins by giving powers to go through streets. Now, it is scarcely conceivable that a local authority would ever wish to put a drain under a building instead of along a street, unless where it really could not be helped, because under a building is the most inconvenient place to put a sewer, there is such great difficulty in getting at it if anything goes wrong. So the use that would probably be made of this particular section, so far as going under people's houses, would be of a limited character; it would only be where you practically could not take the sewers along a street without in some place making a junction or cut between, one street and another. More than that, when it is done, from the very nature of a sewer which is put under ground, a man's property is not taken away altogether, though no doubt considerable injury and inconvenience is inflicted, for which, all the same, compensation is provided in the damages section.

I have thought it necessary to make these observations, for I have always been one of those who think that people's property should not be taken away by Act of Parliament without the very clearest indication that that is meant. But this power is not really so drastic an invasion of the rights of private parties as would at first sight appear.

The Court recalled the Lord Ordinary's interlocutor, refused the note of suspension and interdict, and decerned.

Counsel for the Complainers and Respondents—Crabb Watt, K.C.—W. T. Watson. Agent—Alex. Stewart, S.S.C.

Counsel for the Respondents and Reclaimers—Crole, K.C.—Pitman. Agents—Tait & Crichton, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Lord Dundas, Ordinary.

TYRRELL *v.* PATON & HENDRY.

Reparation—Negligence—Master and Servant—Ship—Defective Hatchway—Injuries Sustained by Falling Down a Hatchway—Defect Existing Prior to Voyage and not Obviously Reparable by Crew—Relevancy.

In an action of damages for personal injuries brought by a ship's engineer against the owners of the ship, the pursuer made averments to the effect that his injuries had been caused through the hatches not being on, which state of matters was due to the defective condition of the beam on which they should have rested, and that this defect had, unknown to him, existed prior to that voyage, and for a considerable period, and was or ought to have been known to the defenders.

Held that the action was relevant, inasmuch as the defect (1) was alleged to have existed prior to the commencement of the voyage, and (2) was not one which it was self-evident the crew could have repaired.

Gordon v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23, *distinguished.*

This was an action at the instance of Samuel Tyrrell, engineer, 310 Baltic Street, Bridgeton, Glasgow, against Paton & Hendry, shipbrokers, 142 St Vincent Street, Glasgow, managers of the s.s. "Turtle," as representing her owners, in which he sued for the sum of £500 in name of damages for personal injury.

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The pursuer made the following averments—"(Cond. 2) On or about Tuesday, 16th February 1904 the pursuer was engaged by the defenders at Glasgow as engineer on the 'Turtle.' The boat left for Warrenpoint in Ireland with a cargo of coal, and having discharged her cargo there she left for Maryport on or about Thursday night, 18th September. (Cond. 3) On Friday morning, 19th February 1904, about 4 a.m., the pursuer was requested by the mate, who was at the wheel, to go forward and call a sailor to relieve him from his duty. The pursuer went forward as desired, and in the course of doing so he fell into the hold of the vessel through the middle hatches, which were uncovered. . . . Explained and averred that it was very dark at the time of the accident to the pursuer. (Cond. 4) The mouth of the hold or hatchway is about 30 feet long by 12 feet broad or thereby, and in it there are two iron thwartship beams and three fore and aft beams, and the hatches were placed on the top of the latter. At the time of the accident the aft hatches were on, but not the middle hatches. The reason why the hatches were off was that, as the pursuer has since learned, the forward thwartship beam was bent and twisted, with the result that the centre fore and aft beam, which is interposed between the two thwartship beams, was too short and would not catch in the socket in the forward thwartship beam. In these circumstances the middle hatches could not be put on, but the pursuer was unaware of this at the time. . . . It is admitted that the hatches were laid on the top of the coal cargo during the voyage from Glasgow to Warrenpoint, being supported by the coal. . . . (Cond. 6) For the pursuer's injuries the defenders are responsible. It was their duty to see that the boat and its equipment were in a proper, safe, and seaworthy condition. In particular, it was their duty to see that the hatches, and the thwartship and fore and aft beams on which they rested, were in good and sufficient order. This the defenders culpably failed to do. The thwartship beam was, as already stated, bent, twisted, and defective, and the centre fore and aft beam was too short. This state of matters rendered it impossible to put the centre hatches on, with the result that a trap existed on the boat, which particularly during the night formed a danger to which the defenders' employees were exposed. It was the duty of the defenders to have repaired the beams referred to, or in any event to have warned their employees of the danger which this defective condition created. This the defenders culpably omitted to do. They knew, or should have known, the defective state of their boat, as the pursuer has ascertained and avers that it had been in the same condition for a considerable time previously, and that an accident of a similar nature had in consequence thereof occurred on a previous voyage. The pursuer's injuries were a natural and probable result of the defenders' negligence. After the pursuer was injured the thwartship beams and the fore and aft beams were altered. One thwartship beam and two fore and aft beams in good condition were used, instead of the two thwartship and three fore and aft beams in use previously. These formed a good and sufficient support for the hatches."

In answer the defenders averred that the accident happened through the pursuer's own fault; that appliances were on board for covering the hatches; that they had been used on the voyage from Glasgow to Warrenpoint referred to in Cond. 2, and that if they were not on the hold at the time of the accident it was owing to the fault of the master or of the fellow-servants of the pursuer.

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant."

On 25th February 1905 the Lord Ordinary (DUNDAS) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion—"The pursuer states that on 16th February 1904 he was engaged by the defenders as an engineer on board the cargo-boat 'Turtle,' of which the defenders, who are shipbrokers, are admittedly managers and represent the owners. About four a.m. on 19th February, the pursuer, being as he avers requested by the mate, who was at the wheel, to go forward and call a sailor to relieve him from his duty, went forward as desired, and in the course of doing so fell into the hold of the vessel through the middle hatches, which were uncovered, and sustained injuries in respect of which he now sues for £500 of damages. The pursuer explains, and there seems to be no doubt, that the reason these hatches were off was that the forward thwartship beam was bent and twisted, which rendered it impossible to utilise the system of beams upon which the hatches ought to rest. This defect in the beam had, the pursuer says, existed 'for a considerable time previously,' and had caused an accident on a previous voyage. The nature of the 'fault' with which the pursuer charges the defenders is set out in article 6 of the condescendence. He says it was their duty to see that the boat and its equipment were in a proper, safe, and seaworthy condition, and in particular to see that the hatches and the beams on which they rested were in good and sufficient order. He alleges that the defenders culpably failed in this duty, the said thwartship beam being bent, twisted, and defective, and that the impossibility of putting the centre hatches on resulted in the existence of a 'trap,' particularly at night. It is averred that the defenders' duty was to have repaired the beam or to have 'warned their employees of the danger,' and that they 'knew or should have known the defective state of their boat.'

"In my opinion these averments fall distinctly short of relevancy. It seems strange that a seaman who had been on board the vessel for several days, during which the said hatch lay uncovered, should not have been able to avoid any chance of danger there might be in the existence of such a patent condition of affairs. But apart from

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that, I hold the pursuer's averments to be irrelevant upon the authority of *Gordon* v. *Pyper*, 20 R. (H.L.) 23, which is not, in my judgment, distinguishable in any material particular from the present. There a seaman on board a trawler alleged that while helping to raise the trawl he was injured in consequence of the breaking of a rope or ropes, which was due to defective splicing. The action was dismissed by the Court as irrelevant, and the House of Lords affirmed. There was nothing in the pursuer's statement to show that the splicing was defective at the time when the vessel was equipped. In the present case no such suggestion is made in regard to the bent beam, and the fact that the twist is said to have been in existence before this particular voyage began seems to me to make no difference. I refer to the opinion of the Lord Chancellor (Herschell) in *Gordon's* case and also to the additional observation of Lord Watson, that 'even if that allegation had been made' (viz, that the splicing was originally defective) 'I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with proper material for correcting the defect in the course of the voyage.' In the present case the pursuer makes no suggestion, and it would seem difficult to make such, that the master and crew had not on board the means either of straightening the obvious twist in this beam, or of protecting the edge of the hold if their combing was not of a sufficient nature to secure those on board from danger. It seems to me that the pursuer has not set forth any relevant case against the brokers as representing the owners, and I shall therefore sustain the defenders' first plea and dismiss the action with expenses."

The pursuer reclaimed.

Argued for the reclaimer—The pursuer's averments were clearly relevant. He averred a defect in the permanent condition of the ship—a defect existing during the previous voyage. It was also averred that the defenders were aware of its existence. It was clearly a case for inquiry. The judgment of the Lord Ordinary proceeded on two grounds—(1) that the defect was patent to the pursuer, and was an obvious defect. The Lord Ordinary was in error in so thinking, for the defect could not be discovered till the accident happened. The statement of the pursuer was that the accident happened at 4 a.m. on a very dark morning in February, so that the danger was not, on the pursuer's statement, a patent one. Moreover, whether a danger was patent or not was a subject for inquiry. (2) The Lord Ordinary was in error in thinking that this case was governed by that of *Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. That case was clearly distinguishable. The defect which caused the accident there was obvious, and it had emerged during the voyage. Here the ship was alleged to have been defective before the voyage in question began, for the hatches could not be put on owing to the state of the forward thwartship beam. That was a defect for which the owners were liable, and was not the fault of a fellow-servant.

Argued for respondents—The duty of the respondents was to supply a seaworthy ship. That had been done. The defects alleged were such as the crew could and ought to have remedied. The owners were not responsible for such defects—*Steel & Craig* v. *State Line Steamship Company*, July 20, 1877, 4 R. (H.L.) 103, 14 S.L.R. 734; *Hedley* v. *Pinkney & Sons' Steamship Company*, [1894] A.C. 222. If there were fault here it was fault on the part of a fellow-servant, for which the owners were not responsible—*Hedley* v. *Pinkney*, *cit. sup.*

LORD PRESIDENT—This is an action at the instance of a seaman, who was an engineer on board the "Turtle," of which the defenders represent the owners, and it is an action of damages for injuries which the pursuer alleges he sustained through falling down the mouth of the middle hatchway.

The Lord Ordinary has dismissed the action as irrelevant, and he has done so on the authority of the case of *Gordon* v. *Pyper*, 20 R. (H.L.) 23, which was decided in the Second Division and affirmed on appeal in the House of Lords. That was an action of damages at the instance of a seaman against the owners of a steam trawler, in which the pursuer averred that he had received injuries owing to the defective splicing of two ropes.

The Lord Ordinary holds that the present case is governed by that decision. I cannot help thinking that the Lord Ordinary has been misled by an expression which the Lord Chancellor uses in his judgment in that case. What the Lord Ordinary says is this—"The action"—*Gordon* v. *Pyper*—"was dismissed by the Court as irrelevant, and the House of Lords affirmed. There was nothing in the pursuer's statement to show that the splicing was defective at the time when the vessel was equipped. In the present case no such suggestion is made in regard to the bent beam, and the fact that the twist is said to have been in existence before the particular voyage began seems to me to make no difference."

That, I think, shows that the Lord Ordinary has read "equipped" as meaning the equipment of the vessel when she first put out from dock, and not as meaning equipped when the particular voyage began.

In the report of *Gordon* v *Pyper*, during the argument, the Lord Chancellor makes this observation—"There is no statement that the rope was in this condition when the vessel started on the venture." That shows in what sense the Lord Chancellor uses the word "equipped" in the judgment. Lord Watson says—"I concur. There is no allegation in this record that at the time when this vessel sailed the tackle was defective so far as regarded this splicing."

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When you consider that the point you have referred to in the passages I have quoted is the starting of the venture or the sailing of the ship, it is clear that there is in the present case a clear averment that matters were wrong when the vessel started on the voyage, and that consequently *Gordon* v. *Pyper* does not warrant this action being dismissed as irrelevant.

There remains the second point, however, as to which the Lord Ordinary says that he agrees with the dictum of Lord Watson in *Gordon's* case, that "even if that allegation had been made"—viz., that the splicing was originally defective—"I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with proper materials for correcting the defect in the course of the voyage."

I have no doubt that all that is perfectly sound, but it must be taken *secundum subjectam materiam*, which is the splicing of a rope. That is a thing within the ordinary education of every seaman, and a defect in a rope is not a structural defect which the crew could not be expected to put right for themselves. Here the pursuer says that he fell down the hold, not because there were no hatches, but because the hatches were off, and the reason which he alleges for that is this, that "the forward thwartship beam was bent and twisted, with the result that the centre fore-and-aft beam, which is interposed between the two thwartship beams, was too short and would not catch in the socket in the forward thwartship beam."

I am not giving any opinion whether these defects could be put right by the crew. All I do say is that it is not a defect which, like the splicing of a rope, is self-evident — to be capable of immediate removal. Therefore I think that this is not a matter which can be disposed of on relevancy. It may well be that the case may afterwards be found to fall within Lord Watson's dictum, but that will depend on the facts. Where the matter is not, as the pursuers stated, self-evident as capable of cure by the crew, it is not, I think, necessary as matter of pleading that he should aver that it was not so capable.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled, but of course all such questions as contributory negligence must remain open, for I cannot help thinking that there are many actions where pursuers come into court hoping that juries will find in their favour and disregard the rule of law—a perfectly sound rule of law—that a man must take the risks of the employment in which he is engaged.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship. If it turns out that there was a ship's carpenter on board who was competent to mend this hatch, and that there was material on board for mending it, the defenders would not be liable.

I say so not on any specialities applicable to ships but on general grounds, for if an employer provides competent material and proper use is not made of it by his servants, that is a fault on the servants' part for which the employer would not be liable.

I agree in thinking that this is a case for inquiry, and that proof should be allowed.

LORD KINNEAR—I am satisfied that the facts here must be ascertained in the ordinary way before the question of responsibility can be decided.

The Court recalled the Lord Ordinary's interlocutor and ordered issues.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—Munro. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Ure, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

CONVERY *v.* LANARKSHIRE TRAMWAYS COMPANY.

Foreign—Reparation—Conflict of Laws—International Private Law — Lex loci delicti commissi—Action in Scotland by Domiciled Irishman for Solatium.

A domiciled Irishman living in Ireland raised an action in a Sheriff Court in Scotland against a tramway company operating there, to recover damages, by way of solatium, for the death of his son, who had been killed, he averred, by their negligence. The law of Ireland recognising no claim for solatium, the defenders pleaded, *inter alia*—(1) The action is irrelevant; (2) no title to sue.

Held that the pursuer's remedy was regulated by the *lex loci delicti commissi* irrespective of his domicile, and an allowance of issues *granted*.

Kendrick v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62, *explained and distinguished*.

Expenses—Appeal for Jury Trial—Summar Roll Discussion—Preliminary Pleas—Allowance of Expenses in Interlocutor Deciding Preliminary Pleas.

In an action of damages for solatium in which the pursuer had appealed for jury trial, the defenders pleaded, *inter alia*, no relevant case and no title to sue. After a discussion in the Summar Roll, the Court, in the interlocutor repelling the preliminary pleas, *allowed* the pursuer the expenses of the discussion.

On 28th March 1905 James Convery, Maghara, County Londonderry, Ireland, raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Lanarkshire

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Tramways Company, carrying on business at Power Station, Edinburgh Road, Motherwell. In it he sought to recover a sum of £1000 as reparation and solatium for the death of his son, Andrew Convery, who had died from injuries received by being run over by an electric car at Wishaw on 29th October 1904, the car being the property of the Tramways Company.

The pursuer averred that the accident was caused through the fault and negligence of the defenders, or of their servants, for whom they were responsible, in driving the electric car in a reckless and careless manner and at an excessive rate of speed, and in failing to keep a proper look out, and in not giving the deceased warning of the approach of the car. He made no averment of his having been dependent on the deceased man or of any patrimonial loss.

The defenders, *inter alia*, pleaded—"(1) The action is irrelevant. (2) No title to sue."

On 13th June 1905 the Sheriff-Substitute (THOMSON) allowed a proof before answer, and on 23rd June the pursuer appealed to the First Division of the Court of Session for jury trial. The case was sent to the Summar Roll for the discussion of the question of relevancy and title.

Argued for the defenders and respondents—By the law of Ireland there was no obligation on a son to support his father, and the doctrine of solatium being based on such an obligation did not obtain in Ireland. Though the case of *Goodman* v. *London and North-Western Railway Company*, March 6, 1877, 14 S.L.R. 449, turned on Lord Campbell's Act 1846 (9 and 10 Vict. cap. 93), sec. 3, which provided that all such actions must be raised within twelve months of the death of the person in respect of whose death they were brought, still the case set forth the principle that the law of the *forum* and the law of the *locus delicti* must coincide in affording the remedy sought. Here the injury, consisting of wounded feelings only, was purely personal, and was suffered in Ireland. The claim, moreover, was put forward by one domiciled in Ireland, where the law did not recognise the alleged injury as a wrong, and the law of the domicile of one who seeks reparation must recognise the claim—*Kendrick* v. *Burnett*, November 17, 1897, 25 R. 82, 35 S.L.R. 62; *Rosses* v. *Bhagdvat Sinhjee*, October 29, 1891, 19 R. 31, 29 S.L.R. 63. *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, had decided that solatium could not be sued for apart from patrimonial loss, of which there was none here; and *Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910, that it was a peculiar remedy which should be kept within very strict limits. The action was irrelevant and should be dismissed. (The cases of *Eistend* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638; *Joseph Evans & Sons* v. *John G. Stein & Company*, November 17, 1904, 7 F. 65, 42 S.L.R. 103, were also cited.)

Argued for the pursuer and appellant—The action was good, irrespective of the *lex domicilii*, if admited by the *lex fori* and the *lex loci delicti*. These laws, *i.e.*, the law of Scotland, concurred in allowing the remedy. The case of *Eistend*, *ut supra*, was distinguished by the fact that the obligation arose out of a contract, and that of *Kendrick*, *ut supra*, by the fact that the delict occurred on the high seas, and the *forum* was only attained by the use of arrestments. The principles governing the present case were set forth in *Horn v. North British Railway Company*, July 13, 1878, 5 R. 1055, 15 S.L.R. 707. The action was relevant.

At advising—

LORD PRESIDENT—The point in this case is a very sharp one. The late Andrew Convery was killed by an electric car belonging to the Lanarkshire Tramways Company in Wishaw. The present action is at the instance of the father of the deceased man, on the allegation that the accident was due to the fault of those for whom the defenders are responsible. The pursuer is an Irishman, and does not allege that he was in any way dependent on his deceased son, and accordingly he is met with the pleas that the action is irrelevant and that he has no title to sue. The meaning of these pleas is that as he cannot on his own showing have any claim except for *solatium*, and as that is not given by the law of Ireland to a father for the death of his son, this action cannot be maintained against the defenders.

The point, so far as I know, is not covered by Scottish decision, and though the cases quoted at the bar dealt with the law round about it, none dealt directly with it. There is, for instance, the case of *Greenhorn* v. *Addie* (17 D. 860), with which your Lordships are familiar, but there this actual point was not raised. Indeed, the only case where anything was said that really touches the point is that of *Goodman* v. *The London and North-Western Railway Company* (14 S.L.R. 449), though even there the decision of the case did not turn on this point. The point in *Goodman* was that a pursuer in an action raised in Scotland in respect of an accident in England had no right of action when there was no liability in the place where the accident occurred. The accident had taken place in England, and it was admitted that if the action had been brought in England the pursuer could not have recovered damages owing to the terms of Lord Campbell's Act (9 and 10 Vict. c. 93), because the time limit imposed by that Act had expired before the action was raised. So the point came to be, could the pursuer by founding jurisdiction in Scotland succeed in recovering damages for an accident which occurred in England when no action would have lain in England. But Lord Shand makes an observation which, though a mere dictum, and accordingly to be read *secundum subjectam materiam*, yet, when examined with its context, makes it plain that his Lordship had this very point clearly in view. What his Lordship says is—"But just as the *lex loci contractus* must be

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applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the *lex loci* must be applied with reference to the acts committed in order to ascertain whether there be liability." The *intuitus* of that was whether you could have liability in Scotland for an act committed in England. But there is no doubt that the proposition is wider and covers the present case. That, however, alone would not be sufficient as an authority, as the dictum was *obiter*.

But there is much other authority not cited at the discussion of the case. The matter is dealt with by the well-known authors on international law. I can quote conveniently from Wharton's Conflict of Laws, section 475, where the authorities are collected—"By the Roman law, wherever a delict is committed, whether the stay of the delinquent is permanent or transient, there is the *forum delicti*. And the local law applicable is and continues to be that of such special *forum*." The author then goes on to point out that Savigny, almost alone of famous jurists, takes, as he thinks, the erroneous view that "the law of the place of process is to obtain, not that of the place where the delict was committed." Then at section 477 he continues—"Bar distinguishes delicts which call for the restoration or reparation of an injury, and those which call for a fine or penalty payable to the injured party. The first he subjects to the law of the place where the delict was committed. Every person, foreigner or subject, is bound to repair any damage done by him according to the local law." He adds that the same rule applies in the United States.

We have therefore in these passages a satisfactory general statement of the rule in accordance with Lord Shand's dictum, though no doubt he did not lay down the rule with so wide an application.

This would be sufficient to decide the case, but there is more. In English law we get further light on the position of Englishmen under Lord Campbell's Act. In the case of "*The Explorer*" (L.R. 3 A. & E. 289) there is the high authority of Sir Robert Phillimore, and though there is not much said in the judgment, as the point was not the main one in the case, yet the point is decided in terms. Then in the case of *Davidson* v. *Hill* ([1901] 2 K.B. 606), where there had been a collision on the high seas owing to the negligence of a English ship, it was held that the personal representative of an alien seamen was entitled to recover damages. There is, if I may say so, a very satisfactory judgment by Kennedy, J., assented to by Phillimore, J., but too long to quote. He points out, however, that in the case of "*The Bernina*" (1887, 12 P.D. 58; 1888, 13 A.C. 1), which was a case which went to the House of Lords, the point though not raised was necessarily involved in the judgment. One of the two successful claimants there was Habiba Toeg of Baghdad, the mother of Moses Aaron Toeg, who was killed in an accident at sea owing to the fault of a British ship. The lady got her damages, and though her right was not disputed on the ground of the nationality of herself or her son, it was assumed in her favour that in a case of delict the party in fault must pay for it according to the local law.

The only countenance for any other view rests on nothing better than a misunderstanding of a remark of Lord President Robertson's in the case of *Kendrick* v. *Burnet* (25 R. 82). That was a case of a collision on the high seas in which an English ship was at fault. The relatives of the persons killed raised actions against the owners, concluding both for solatium and damages. In the discussion it was assumed that all the pursuers were English, and the Court decided that claims could only be for damages alone and not for solatium, as solatium was unknown to the English law. But after the advising some of the defenders put in a minute stating that the assumption was erroneous, as some of the pursuers were Scotch, and accordingly asked for solatium. The Lord President points out that that made no difference. He says—"I may say at once that, as your Lordships know, I had considered the question which we have now to deal with, the question, namely, of the liability of the party doing the injury, where damage results from a collision on the high seas, and there is a difference between the law of the country of the party doing the injury and the law of the country of the party injured, as to the liability arising from the injury. That question, as I have said, was considered by the Court, and if in the opinion I formerly delivered I did not discuss it, it was not from any doubt on the point, but because, misled by the record, I thought the question did not arise in the circumstances of this case. I may now say that I think the true view of the law where a conflict arises in such a case between the law of the country of the person injured and the person doing the injury is that which is stated in one of the articles of the Antwerp Congress of 1885, and the rule is that to found a claim there must be a concurrence between the law of the country of the injurer and the injured—that the person convened as defender cannot be made liable unless these two factors concur: first, that he is liable to the claim made against him by the laws of his own country, and in the second place that the injured would be entitled by the laws of his own country to what he claims." The article of the Antwerp Congress is as follows:—"L'abordage en plein mer, entre deux navires de même nationalité, est réglé par la loi nationale. Si les navires sont de nationalité différente, chacun est obligé dans la limite de la loi de son pavillon et ne peut recevoir plus que cette loi lui attribue." That is all quite right, but the mistake arises from the idea that Lord Robertson was speaking of the law of the domicile of the pursuer. But he was speaking of no such thing, but of the law of the flag of his ship. Of course when the collision takes place at sea it is difficult to say on what territory the injury occurs.

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But that which Lord Robertson means and the Antwerp Congress says gives no countenance to the view that when a collision occurs between two Scotch ships through the fault of one of them, what a pursuer on the other would recover by way of damages would depend on whether he was English, French, or Scotch.

These remarks of Lord Robertson's are the sole foundation for the quite erroneous view that has been put forward, and there is no trace in the great authorities that the law of the pursuer's domicile has anything to do with it.

I therefore hold that the preliminary pleas should be repelled and the action take its ordinary course, which will be an allowment of issues.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the defenders' preliminary pleas-in-law, Repel said pleas and appoint the issue or issues proposed for the trial of the cause to be lodged within eight days: Find the pursuers entitled to expenses of the discussion in the Summar Roll, and remit," &c.

Counsel for the Pursuer and Appellant—Burt. Agents—M'Nab & MacHardy, S.S.C.

Counsel for the Defenders and Respondents—Horne. Agent—Patrick & James, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

TAIT (TOWN-CLERK OF MOFFAT), PETITIONER.

Burgh — Police Burgh — Town Council — Absence of Quorum through Resignation of Councillors — Petition by Town-Clerk — Procedure — Town Councils (Scotland) Act 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 36, 38, 58, 61, 66, 71, *and* 113—*Burgh Police Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 17, 25, *and* 26,

A police burgh was governed by a town council consisting of nine councillors, including a provost and two bailies. In November 1905 there fell to be elected four councillors, but no nominations being lodged, no election took place. Thereafter three of the remaining five councillors intimated their intention to resign, with the result of leaving, when their intention should be given effect to, no quorum of the council, which under sec. 71 of the Town Councils (Scotland) Act 1900 consisted of three. Attempts were made to hold a meeting of the council, but the councillors who had intimated their resignation refused to attend, and the business of the burgh was in consequence brought to a standstill.

The town-clerk presented this application, in which he craved the Court either (1) to appoint a special election of seven councillors to be held in manner provided by the Town Councils (Scotland) Act 1900, sec. 36, or (2) alternatively to declare that the burgh was without a legal council, and to remit to the Sheriff of the county to proceed with an election in the manner provided by the Burgh Police (Scotland) Act 1892, secs. 25 and 26, and by the Town Councils (Scotland) Act 1900.

The Court *appointed, hoc statu,* a special election of seven councillors to be held.

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 113, enacts—"Wherever it has, from a failure to observe any of the provisions of this Act or any other Act, or from any other cause, become impossible to proceed with the execution of this Act or any part thereof, or wherever difficulty or dubiety exists as to the procedure to be followed in any case, or where any case arises in connection with the election of councillors or magistrates not provided for by this Act, it shall be lawful for the town council, or any seven electors or householders within the burgh, . . . or the town-clerk, to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon said petition, and the court to whom the same is presented shall have the same powers as is provided by the said section in regard to applications presented thereunder."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict, cap. 55), sec. 17, enacts—"Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh, or in any burgh the boundaries of which have been determined in terms of this Act, it has, from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act, the following provisions shall have effect—(1) It shall be lawful for any seven householders within the burgh to present a petition to the Court of Session, or to the Sheriff Court, setting forth the failure which has taken place to observe the provisions of this Act, or any other Act, or other cause which has made it impossible to proceed with the execution of this Act, and praying the Court to pronounce an order in terms of this Act as hereinafter mentioned. . . ."

William Tait, solicitor, town-clerk of the burgh of Moffat, presented a petition to the Court, in which he stated—"That the burgh of Moffat is a police burgh, originally formed in the year 1864, under the provisions of the General Police and Improvement (Scotland) Act 1862, and is governed by a town council, consisting of nine coucillors including a provost and two bailies. The burgh is not divided into wards. At and for some time subsequent to the first Tuesday of November, in the year 1904, the full number of the town council and

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magistrates was in existence.

"That the election of the town council and magistrates is regulated by the Town Councils (Scotland) Acts 1900 and 1903, and in terms of these said Acts there fell to be elected on the first Tuesday in November in the year 1905 two councillors in place of Messrs William Knight and Thomas Murray, who retired by rotation; one councillor in place of Mr Alexander Thomson, who retired as a councillor *ad interim;* and one councillor in place of Provost James Ritchie MacGibbon, who had died on the 19th September 1905. Accordingly a notice was duly issued on the 16th of October 1905 by the petitioner as town-clerk, intimating the above vacancies, and also intimating that no person could be elected to the office of councillor whose name was not intimated to him before four o'clock afternoon of Tuesday 31st October, and giving the further intimations required by the Town Councils (Scotland) Act 1900. . . . No nominations were lodged with the petitioner, and accordingly no election of councillors took place. On the 3rd day of November 1905 William Somerville, one of the remaining councillors, intimated to the petitioner his resignation as a member of the council, and on the same date James Davidson, another councillor, made a similar intimation, and on the 4th November John Plant, another councillor, took the same course. . . . Under the Town Councils (Scotland) Act 1900, sec. 38, the said resignations take effect three weeks after the respective dates of intimation. The effect of the said resignations, when they take effect, will be to leave only two councillors, namely, Bailie William Edgar and Bailie George M'Cubbin.

"That by section 36 of the Town Councils (Scotland) Act 1900 it is provided that, in the event of the full number of councillors not being elected at any election, the vacancy so occurring shall be filled up *ad interim* by the town council at a meeting of which notices shall be sent out by the town-clerk within three weeks of the occurrence of such event, and which shall be held not sooner than five days and not later than ten days from the date of such notice. By section 71 of said Act it is provided that one-third of the town council shall constitute a quorum at any meeting thereof. On 3rd November 1905 the petitioner called a meeting, in terms of section 36 aforesaid, to be held on Friday the 10th November 1905 at 11·30 a.m. The aforesaid William Somerville, James Davidson, and John Plant abstained from attending. The said Bailie William Edgar and Bailie George M'Cubbin attended according to said notice, but as they did not constitute a quorum of the council no business could be done. The petitioner called upon the said William Somerville the evening before the said meeting and urged him to attend, but he declined to do so. The petitioner also wrote Messrs Davidson and Plant urging them to attend, but they made no reply. The petitioner also called a special meeting of council, in terms of section 58 of said Town Councils (Scotland) Act 1900, to be held on the said 10th day of November at 12 o'clock noon, for the purpose of electing a provost, as therein provided, but the said William Somerville, James Davidson, and John Plant abstained from attending this meeting also, and consequently no election could take place. The aforesaid 36th section also provides that, in the event of the said meeting failing to elect, it shall be in the power of the provost, or of any councillors forming among them one-third of the whole council, at any time thereafter to call a meeting for the same purpose and on the same notice. By section 61 the senior bailie is empowered to act as chief magistrate failing the provost. No steps to call any such further meeting have been taken, as in view of the attitude of the resigning councillors it is not probable that they would attend any such further meeting.

"That the said resigning councillors, although their resignation has not yet actually taken effect, abstain from taking any action to enable the business of the burgh to be conducted or any meeting of the Town Council to be held. Their doing so, as they well know, renders it impossible to proceed with the execution of the provisions of the aforesaid Acts. In addition to abstaining from attending the said meeting on Friday, 10th November, they have abstained from attending the monthly meeting of the Council on Monday, 13th November, at which important business required to be transacted. . . . The business of the burgh is accordingly brought to a standstill, and it is impossible to proceed with the execution of the said Acts and of the other Acts under which the business of the burgh is regulated. There is also difficulty or dubiety existing as to the procedure to be followed in the present case, and the case is one not provided for by the said Acts. Section 113 of the Town Councils (Scotland) Act 1900 provides that in these circumstances it shall be lawful for, *inter alios*, the town clerk to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon the said petition, and the court to whom the same is presented shall have the same powers as is provided by the said section in regard to the applications presented thereunder. Section 17 of the last-mentioned Act empowers a petition to be presented to the Court of Session setting forth a failure which has taken place to observe the provisions of that Act or any other Act, or other cause which has made it impossible to proceed with the execution of that Act, and praying the Court to pronounce an order in terms thereof, and empowers the Court to pronounce any order which in their judgment will enable the proceedings for the execution of the Act to be continued as nearly as possible as if the said failure or other cause had not taken place, and empowers the Court to pronounce any order as to the expenses and as to the persons or assessments against which they shall be chargeable.

"That section 66 of the Town Councils (Scotland) Act 1900 provides that where

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any burgh shall from any cause be at any time without a legal council, any seven electors of the burgh may present a petition to the Sheriff requesting him to conduct an election of a council, and thereupon the sheriff is directed to proceed with an election in the manner therein specified. The said section makes provision, however, solely for the case of an election being required of the whole number of the council, and makes no provision for the removal from office of councillors who, though forming less than a quorum, have been legally elected and legally retain office, and it is doubtful if any case has arisen falling under that section. Moreover, no steps have been taken, or, so far as the petitioner is aware, are in contemplation, by any electors to put the machinery of the said section in operation, and the situation created is one of urgency.

"That very great inconvenience arises from the present state of matters. The ordinary administration of the burgh is at present brought to a standstill from the impossibility of meetings of council being held. The assessments for the current year are always imposed at a special meeting of the council in the month of November, and are made payable on the 1st of January following. No authority can be given to impose and levy same, nor to borrow money temporarily from the bank to meet tradesmen's accounts, outstanding instalments of principal and interest on loans shortly falling due, wages of employees, and other current expenditure, nor to order any other work or thing requiring to be done on an emergency. It is of importance therefore that prompt provision should be made for continuing the ordinary administration of the burgh."

The prayer of the petition was as follows:—"May it therefore please your Lordships, to appoint this petition to be intimated on the walls and in the minute book in common form, and to be advertised once in the *Moffat News* and *Annandale Herald*, and to grant warrant for serving the same upon each of the said William Edgar and George M'Cubbin and the said William Somerville, James Davidson, and John Plant, and appoint them or any one desiring to oppose the prayer of the petition, if so advised, to lodge answers hereto within eight days from the date of publication or service, or within such other short *inducias* as your Lordships may direct; and thereafter, upon resuming consideration of the petition, with or without answers: In the first place, in the event of and after the said resignations coming into effect, to appoint a special election of seven councillors, to be held on the first Tuesday of December, in the year 1905, or on such other date as the Court may appoint, by the electors in manner provided by section 36 of the Town Councils (Scotland) Act 1900, and to appoint the said William Edgar, being the senior Bailie and acting Chief Magistrate of the burgh, to be returning officer at the said election, with power to him to fix the dates for the issue of all necessary notices, and for lodging and withdrawing nomination papers subject to the provisions of said section, or, alternatively, to find and declare that in the event of and after the said resignations coming into effect, the said burgh is or will be without a legal council, and the said Bailie William Edgar and Bailie George M'Cubbin will have ceased respectively to hold the office of councillor of the burgh, and thereafter to remit to the Sheriff of the county of Dumfries, to conduct an election of a council and to proceed with an election in the manner provided by sections 25 and 26 of the Burgh Police (Scotland) Act 1892, and by the Town Councils (Scotland) Act 1900, relating to the conduct of elections: In the second place, until a sufficient number of the council to form a quorum is elected under either of the alternative modes above specified, to authorise the said Bailie William Edgar and Bailie George M'Cubbin to do all such acts and deeds, and exercise all such authority, as may be necessary to keep in operation the ordinary machinery of the burgh, and for that purpose to make all necessary payments, sign and endorse cheques upon all bank accounts of the Town Council, employ all necessary officers, workmen, or other employees, and order on the credit of the Town Council all such supplies of goods, and issue all such notices or orders on owners, occupiers, or others as may in their opinion be necessary, and to declare that all such payments and supplies shall, so far as they are within the power of the Town Council be a proper charge, and be defrayed from the funds thereof, as also to authorise them to overdraw the Town Council's bank account to any extent which may be necessary for the purpose of paying instalments of loans and interest, or meeting other obligations of the burgh or other expenditure incurred as aforesaid, until assessments to defray the same can be imposed; and further, to find and declare that the whole expenses incurred by the petitioner and by the Court or by the Sheriff in the present petition, and in the carrying out of the proceedings thereof, shall be defrayed out of the assessments leviable within the burgh for the current financial year, in proportion to their respective amounts in the same manner as other general expenses of administration defrayed and apportioned among them, and to find any person appearing to oppose the prayer of the petition liable in expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper."

No answers were lodged to the petition.

Counsel for the petitioner stated that the present application was made under section 113 of the Town Councils (Scotland) Act 1900. Section 17 of the Burgh Police (Scotland) Act 1892, did not meet the circumstances of this case, for the power therein given was confined to seven householders. Under the Act of 1862 applications had in fact been made, but they had been refused—*Anderson* v. *Widnell*, November 6, 1868, 7 Macph. 81, 6 S.L.R. 92; *Tod* v. *Anderson*, January 23, 1869, 7 Macph. 412, 6 S.L.R. 265; Muirhead's Police Government in Burghs, p. 33, note. So far as counsel

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could discover, there had been no applications under the Burgh Police (Scotland) Act of 1892. Section 113 of the Act of 1900 had been passed to meet such a case as the present. The prayer of the petition was alternative, and the first alternative might in the meantime be granted. Reference was also made to *Newhaven Local Board* v. *Newhaven School Board*, June 12, 1885, L.R. 30 C.D. 350.

[LORD M'LAREN—Might not the Court in such a case as the present appoint managers?]

The Court pronounced this interlocutor:—

". . . Appoint *hoc statu* a special election of seven Councillors to be held on Tuesday, 19th December 1905, by the electors in manner provided by section 36 of the Town Councils (Scotland) Act 1900, and appoint William Edgar, being the Senior Bailie and acting Chief Magistrate of the burgh, to be returning officer at the said election, with power to him to fix the dates for the the issue of all necessary notices, and for lodging and withdrawing nomination papers subject to the provisions of said section; and decern: *Quoad ultra* continue the petition. . . ."

Counsel for Petitioner—W. J. Robertson. Agents — Cuthbert & Marchbank, S.S.C.

Thursday, November 23.

FIRST DIVISION.

WEMYSS COLLIERIES TRUST, LIMTD. *v.* MELVILLE AND OTHERS.

Company—Articles of Association—Construction—Rearrangement of Capital—Powers of Directors—Payment to Reserve Fund—Detriment of Preference Shareholders.

The directors of a company, whose capital consisted of preference shares entitled to a cumulative preferential dividend as well as ordinary shares, had power under the original articles of association to apply out of the profits, before recommending any dividend, such sum as they thought proper to reserve fund. On a rearrangement of the capital, whereby the ordinary shares were divided into preferred ordinary and deferred ordinary, the preference shareholders received under certain new and additional articles of association, a right to, *inter alia*, an additional non-cumulative dividend of 1 per cent. if the profits were sufficient to meet certain other interests to which they were postponed *quoad* this increase of dividend. In 1904 the profits were sufficient to provide for these prior interests and to leave a surplus of £2884, 0s. 6d. The directors, however, proposed to apply to reserve fund £2500, the exact amount required to pay the additional non-cumulative 1 per cent. to the preference shareholders.

In a question with the preference shareholders as to the construction of the articles of association, *held* that the new articles of association giving the preference shareholders the increase of dividend did not derogate from the directors' power under the original articles to apply profits to reserve, and that the directors were entitled so to apply this sum, although thereby the preference shareholders were deprived of their additional 1 per cent. of dividend.

The Wemyss Collieries Trust, Limited, a company incorporated under the Companies Acts 1862-1890, for the purpose, *inter alia*, of acquiring the minerals and mineral rights in the estate of Wemyss, and having its registered office at East Wemyss, in the county of Fife, (*First Party*), and James Melville, accountant, Alloa, and others, holders of a number of the company's preference shares, (*Second Parties*), presented this special case for the opinion and judgment of the Court.

As originally constituted, the capital of the company was 25,000 4½ per cent. cumulative preference shares of £10 each and 25,000 ordinary shares of £10 each.

Article of association No. 7 was—"The holders of the preference shares shall be entitled to receive out of the profits, after payment of interest on debentures or debenture stock, and providing for a sinking fund for the redemption of such debentures or debenture stock in terms of any trust deed thereanent, a preferential cumulative dividend at the rate of 4½ per centum per annum on the amount for the time being paid up on the preference shares held by them respectively."

No. 8—"The surplus profits in each year, after providing for all interest due on any debentures or debenture stock, the said sinking fund for the redemption of debentures or debenture stock, and the dividend upon the said preference shares, shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the capital paid up, and in proportion to the time during which such capital shall have been paid up."

No. 128.—"In the case of both ordinary and preference shares no larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend."

No. 129—"No dividend shall be payable except out of the profits arising from the business of the company, and the declaration of the board as to the amount thereof shall be conclusive. The directors shall out of profits, in the first place, pay the preferential cumulative dividend. And before declaring any dividend on the ordinary shares, the directors shall also provide out of profits for renewals and for depreciation. In cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one

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year, the amount of such item may be so distributed."

No. 138—"The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund for meeting contingencies, or for improvements or losses, or for equalising dividends, or for distribution by way of bonus among the members of the company for the time being, or for any other purpose whatsoever. Further, the directors, in borrowing money on the security of mortgage debentures or mortgage debenture stock or otherwise, may undertake to provide a sinking fund to redeem or more effectually secure such loans, and to pay thereto out of profits such sum or sums annually as they may think fit."

The case stated—"The following special resolution was passed on 29th July 1898, and confirmed on 16th August 1898, viz., 'That in conformity with an extraordinary resolution of the ordinary shareholders of the trust, passed on 20th July 1898, two new articles in the following terms be added to the articles of association, viz.—6-1. Of the 25,000 ordinary shares, 12,000 shall be called preferred ordinary shares and 13,000 deferred ordinary shares; and as between such preferred and deferred ordinary shares, the preferred ordinary shares shall have right to a preferential non-cumulative dividend yearly, at the rate of 5 per cent. per annum; but in no event shall said preferred ordinary shares be entitled to any higher dividend than 5 per cent. The deferred ordinary shares shall be entitled to the remainder of the surplus annual profits, subject to prior burdens, including the cumulative and non-cumulative dividends payable on the preference shares in the company, in terms of articles 7 and 7-1 of the articles of association. 7-1.—The holders of the preference shares shall also, after provision for a sinking fund, and payment of the interest and dividend referred to in article 7, and payment of a dividend of 5 per cent. on the whole ordinary shares, both preferred and deferred, be entitled, in the event of there being sufficient profit remaining, to such extra dividend not exceeding ½ per cent., as the balance of profit remaining will permit; that is to say, so much of the balance of profit remaining as is required to make up the above ½ per cent. shall be applied and divided among the whole preference shareholders according to their respective holdings; and on the foregoing provision being satisfied, and should the profits be sufficient to enable the payment of a dividend of 7 per cent. on the deferred ordinary shares—that is, an increase of 2 per cent. on the deferred ordinary shares after paying 5 per cent. on the whole ordinary shares, both preferred and deferred, and the extra ½ per cent. on the preference shares as before mentioned—then and in that event the preference shareholders shall be entitled to such additional dividend, not exceeding 1 per cent., as the balance of profit remaining will permit, and that in addition to and over and above the extra dividend of ½ per cent. before specified. The said extra and additional dividends of ½ per cent. and 1 per cent, respectively shall in no case be cumulative, but shall be contingent on the profits of the year.'

. . . . . .

"At the last ordinary general meeting which was held on 13th December 1904, the directors submitted to the meeting a report, and also a profit and loss account and balance-sheet made up as at 11th November 1904. The statements submitted to the meeting shewed that, after payment of the fixed dividend of 4½ per cent. on the preference shares, and 5 per cent. on the preferred ordinary shares, there remained a balance of £13,234, 0s. 6d.

"The following is the report submitted by the directors:—

"'Herewith are submitted the accounts for the year 1903-4.

"'It will be seen from the balance-sheet that after payment of all dividends due on the preference shares and the fund for the redemption of the debentures, there remains a balance of . . . £13,234 0 6

"'This sum your directors had intended to recommend should be dealt with as follows:—

Place to reserve a sum of .	2,500 0 0	
		£10,734 0 6

"'And that the balance should be dealt with as follows:—

Dividend of 5 per cent. on the deferred ordinary shares . . .	£6,500 0 0	
Additional dividend of ½ per cent. on the preference shares .	1,250 0 0	
Dividend of 2 per cent on the deferred ordinary shares . . .	2,600 0 0	
		10,350 0 0
Leaving to be carried forward to next year		£384 0 6

"'But in view of a legal question which has arisen as to the rights of the preference shareholders to receive the additional 1 per cent payable in terms of section 7-1 of the articles, they now recommend as follows:—

(1) Dividend of 5 per cent. on the deferred ordinary shares . . .	£6,500 0 0
(2) Additional dividend of ½ per cent. on the preference shares	1,250 0 0
(3) Dividend of 2 per cent. on the deferred ordinary shares	2,600 0 0
	£10,350 0 0

And that the balance of £2884, 0s. 6d. be carried to a suspense account — it being understood that the company will arrange for a special case to be adjusted between Messrs Carmichael & Miller, W.S., on behalf of certain preference shareholders, and the company, under which it is to be decided whether the extra 1 per cent. must

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be paid to the preference shareholders—the expense of the special case to be paid by the company.'

"The sum of £2500 is the amount required to pay to the preference shareholders the dividend of 1 per cent. mentioned in the foresaid agreements and in article 7-1 of the articles of association."

The report was unanimously adopted, and thereafter there was presented to the Court this special case, in which the company was the first party and the preference shareholders the second parties.

The first party maintained that the whole provisions of the articles of association must be considered, and that by clause 138 the directors were authorised, before recommending any dividend, to set aside out of the profits of the company such sum as they might think proper as a reserve fund; further, that by clause 128 it is provided that no larger dividend shall be declared than is recommended by the directors; and further, that in any view clause 7-1, giving preference shareholders the right to payment of 1 per cent. must be read along with and qualified by clause 138, which provided for setting aside a sum to reserve.

The second parties maintained that the said balance of profits amounting to £2884, 0s. 6d. remaining after paying (1) the dividend of 4½ per cent. on the preference shares; (2) the dividend of 5 per cent. on the ordinary shares, preferred and deferred; (3) the extra dividend of ½ per cent. on the preference shares; and (4) the increased dividend of 2 per cent. on the deferred ordinary shares, fell to be applied now or hereafter to the extent of £2500 in payment to the preference shareholders of the additional dividend of 1 per cent. mentioned in article 7-1 of the articles of association. Alternatively they contended that the said balance fell to the extent of £384, 0s. 6d. to be applied towards payment of such additional dividend.

The following questions were submitted for the opinion and judgment of the Court:—"With reference to the disposal of the said sum of £2884, 0s. 6d., meantime carried to suspense account, are the preference shareholders entitled to have the same applied *primo loco* in the payment of the said additional dividend of 1 per cent. mentioned in the foresaid agreement and in article 7-1 of the said articles of association? Are the directors entitled before applying the said sum or any part thereof in payment of said additional dividend to place the same to the extent of £2500 to reserve?"

Argued for the first party—The directors had power to set money apart to reserve fund by article of association 138. Between it and the new article 7-1 there was no repugnancy. The rules to govern such a case as this had already been laid down—*Fisher* v. *Black and White Publishing Company*, [1901] 1 Ch. 174, opinion of Rigby (L.J.); *Burland and Others* v. *Earle and Others*, [1902] App. Cas. 83. The course proposed by the directors was within their power, and the questions of law should therefore be answered, the first in the negative and the second in the affirmative.

Argued for the second parties—The course proposed by the directors was *ultra vires*. If the opposite view was correct, in any year when 7 per cent. was paid on the ordinary shares the directors might defeat the preference shareholders' rights. The additional dividend of 1 per cent. to the preference shareholders was not cumulative, and was not to be diminished, by increasing a reserve fund, except for the necessities of that particular year—*Dent* v. *London Tramways Company*, 16 Ch. D. 344. Romer (L.J.) in the case of *Fisher, ut supra*, laid it down that the advantage of one class of shareholders could not be secured by the loss of another as was attempted here. Article 129 purposely put the preference dividend before renewal and depreciation out of design to favour the holders of preference shares, whose rights were enlarged by article 7-1, which impliedly overruled article 138. The preference shareholders were not to be affected by the reserve fund rule though ordinary shareholders might be.

LORD PRESIDENT—This is a special case between the Wemyss Collieries Trust, Limited, and certain of their own preference shareholders. The company as originally constituted had a capital of 25,000 4½ per cent. cumulative preference shares of £10 each and 25,000 ordinary shares, also of £10 each; and the arrangement as to the payment of dividends on these shares was as their names denote—that is to say, the ordinary shareholders only got a dividend after the preference shareholders were paid their 4½ per cent. At a subsequent period the holders of the ordinary shares wished to split their shares into preferred ordinary and deferred ordinary, and they proceeded to do that in the way allowed by the articles of the company, viz., by special resolution. In order to effectuate their purpose they had to take the preference shareholders with them, and a bargain was come to between the preference shareholders and the ordinary shareholders. This bargain was finally expressed in two new articles of association, which are numbered 6-1 and 7-1. Article 6-1 effectuated the splitting of the ordinary shares into 12,000 preferred ordinary and 13,000 deferred ordinary, and provided that as between them the preferred should have a 5 per cent. dividend and nothing more, and that any other dividend which effeired to them should go to the deferred. Article 7-1 dealt with the provisions of this bargain as between the holders of preference shares and the holders of deferred ordinary shares. It is in these terms.—[*His Lordship read the terms of Article* 7-1].

In the year which ended on 13th December 1904 there was a sufficient profit to admit of paying the fixed dividend of 4½ per cent. on the preference shares and 5 per cent. on the preferred ordinary shares. There remained a balance of a considerable sum, of which the directors proposed to put aside £2500 to a reserve fund, and to pay an addi-

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tional dividend of ½ per cent. on the preference shares and 2 per cent. on the deferred ordinary shares, which would exhaust the profits with the exception of a trifling balance which it was proposed to carry forward to the next year. The effect of carrying that £2500 to a reserve fund was on the particular figures of the year to prevent the preference shareholders from getting their additional dividend of 1 per cent. The preference shareholders raised the question whether the company was entitled to deal with the money in this way. The money was put in a suspense account, and it was agreed that it should be paid according to the decision in the special case now before the Court.

The point comes to be a very sharp and short one. By article 138 of the articles of association it is provided that the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they should think proper as a reserve fund for meeting contingencies, or for improvements or losses, &c. And the directors appeal to that article as the warrant for what they have done. The preference shareholders say that at the time that article was written there was nothing more than the common position of 4½ per cent. cumulative preference shareholders and the ordinary shareholders, who got the balance after satisfying the preferential dividend; and that it never could damnify the preference shareholders that a sum should be carried to a reserve fund either because it would not trench on their dividend, or if it did trench on their dividend, then inasmuch as it was used for the preservation of the company's assets, it would benefit them primarily by enabling the company to earn greater profits in succeeding years. and so it, in respect that their dividend was cumulative, would come back to them to the extent of supplying the *lacuna* in previous years. But, they say, that is altered by article 7-1, inasmuch as under that article they now have right to come in after the ordinary shareholders and get extra dividends in the event of the profits being enough in any particular year. That, they say, is really inconsistent with article 138, and their covenant being altered in this way, that article (138) ought not to be used to defeat their right to their additional dividend.

I have come to be of opinion that the directors are within their powers in putting this money in a reserve fund. In the first place, it is not disputed that, if it is *intra vires*, it is a right and proper thing to do. We are not inquiring whether they are doing a right thing in the sense of a prudent thing, and we must begin in the view that what they propose is what any prudent person would do if it were the business of an individual in place of a company. The only question is whether it is *intra vires*. It can only be *ultra vires* if there is something inconsistent in article 7-1 with the terms of article 138. Technically speaking, I think the directors set aside this sum for the reserve fund at the wrong time, because their right to set aside a reserve fund arises before recommending any dividend whatever. But the apportionment being within the terms of article 138, is there anything in article 7-1 which is inconsistent with it. I think not. There is no difficulty in reading the two articles together. Article 7-1 provides for certain ways in which profits are to be divided if they amount to a sufficient sum. The particular obligation of that article will vary from year to year according as the profits are more or less. They may pay none of the additional dividends or one or all of them. And the sum which will be available for this purpose will vary according as the directors have set aside a sum to reserve or not. When we consider the question whether an article in a document is inconsistent with another article in the same document we are bound to make the whole document read together if we can, and only have recourse to the maxim *posteriora derogant prioribus* when there is a true contradiction between the two.

I am fortified in my view by the case of *Fisher* v. *Black and White Publishing Company* ([1901] 1 Ch. 174). The question there was not actually the same as this, but it is very near it. The point arose in this way. There were two classes of shareholders and a covenanted distribution of the whole profits between them in a specified way, but there was a general clause which said that, in so far as not excluded or modified, the regulations contained in Table A of Schedule I of the Companies Act 1862 should be deemed to be the regulations of the company. That table by article 74 has a reserve fund clause practically identical with the clause in the present case, and the question was whether article 74 of Table A was so inconsistent with the covenanted provisions as to make it necessary to say that it did not apply. Their Lordships said that no doubt the practical effect of setting apart money for the reserve fund would be to take away money which would otherwise be available for dividends; but, they said, this is a power which has been given to the directors which is not in itself inconsistent with the ultimate division of the available profits, and which they are entitled to act upon so long as they do so in good faith. I think the case of *Fisher* is really in point.

The only case which was cited for the other view was *Dent* v. *London Tramways Company* (16 Ch. D. 344), but that, I think, is clearly distinguishable. That was a case of a tramway company which had preference and ordinary shareholders; and it had power to form a reserve fund for maintenance, repairs, renewals, and depreciation. The company had prospered and had paid large dividends to the ordinary shareholders, but they had done this at the expense of letting their line go down and become unfit for use, and the day came when they had to spend a large sum in putting matters right. They seem at first to have been inclined to go on in their old ocurse and give

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dividends out of what was really the capital of the company, because the first branch of the case consists in an application to restrain them from paying away their whole gross profits in dividends without making any provision for depreciation, and Sir G. Jessel, M.R., gave an injunction against them. That judgment seems to have been misunderstood, and this gave rise to the other branch of the case. The company refused to pay the preference shareholders a dividend until the reserve fund had reached what ought to have been its proper position if it had been kept up all along. But Jessel, M.R., explained that his judgment did not go to that. It did not lay down that since they had fairly made profits this year they were not only to set aside a sum for depreciation out of these profits but also to apply the whole of them to making up deficiencies in the reserve fund. Accordingly he held they were not entitled to injure the preference shareholders by making up in one year what was necessary to put the line in condition. No question arose in that case as to the possibility of creating a reserve fund at all. The class of question that arises here did not and could not arise in *Dent*.

I am of opinion that we should answer the first question in the negative and the second in the affirmative.

LORD ADAM—I concur.

LORD M'LAREN—In considering the construction of power given to directors by articles of association it is well to bear in mind that directors are almost always substantial holders of shares in the company whose affairs they are administering, and that they are selected by the other shareholders as men of capacity and honesty to manage their affairs. Directors as such are not expected to take part in the mechanical details of the business, but only to give their attention to matters of general administration, and it is necessary that they should be entrusted with considerable powers. Any power may, of course, be proved unworkable if it is supposed that the directors are incompetent or untrustworthy. But the answer is that in such a case the shareholders would not continue such a body in the control of their affairs.

When we come to clause 138 in these articles of association—a very usual clause in articles of association—we find that this clause gives the directors such powers of dealing with the reserve fund as a reasonable man might be expected to use in the conduct of his own affairs. Before recommending a dividend they are to consider the wants of the undertaking, the amount of depreciation, and the future contingencies to be provided for. When the articles were amended by the introduction of 6-1 and 7-1 there is nothing in the language of either of these clauses to suggest that it ever was in the minds of the shareholders to interfere with the directors' powers as to reserves.

As I have said, such powers may be abused. But even if these additional provisions had not been introduced into the articles of association the directors might have put the whole profits into the reserve fund without declaring a dividend at all. It is probable, indeed, that they would not be able to do so more than once. That being so, I think the directors were within their powers in carrying these sums to the reserve fund, even though the effect of that was to deprive the preference shareholders of the additional one per cent. to which they would otherwise have been entitled. They could, of course, not be permanently deprived of this one per cent. if the increase in the profits became so large that the directors, acting in good faith, could not refuse to increase the dividend according to the rule prescribed. I think that the discretion of the directors under section 138 is not interfered with by the new articles, and that the decision to which your Lordship has referred is clearly in point.

LORD KINNEAR was not present.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—Ure, K.C. —Hunter, K.C.—J. B. Young. Agents—Mitchell & Baxter, W.S.

Counsel for the Second Parties—Dean of Faculty (Campbell, K.C.)—Horne—J. M. Hunter. Agents—Carmichael & Miller, W.S.

Saturday, November 25.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles at Edinburgh.

MACPHERSON *v.* DRUMMOND (MACPHERSON'S TRUSTEE).

Bankruptcy — Sequestration — Beneficium Competentiæ — Working Tools — Implements of Livelihood—Tools of a Practiser of Dentistry—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102—*Relevancy.*

A, who practised dentistry, brought an action against the trustee on his sequestrated estate, in which he prayed the Court to interdict the defender from selling, removing, or otherwise interfering with certain articles. Pursuer averred that the articles in question were absolutely necessary and essential for his carrying on the business of dentist, and so earning his livelihood, and pleaded that these articles in consequence remained his property, and did not fall under the sequestration.

Held that the rule exempting working tools from being attachable for debt was not necessarily confined to labouring men, and proof allowed.

Observed that where "a dentist does

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his whole work himself with his own hands, the tools and implements he so uses are, then, the tools and implements of his trade."

Process — Summons — Designation — Error in Designation—Party Illegally Designed seeking Equitable Remedy—Dentists Act 1878 (41 *and* 42 *Vict. cap.* 33), *sec.* 3.

The Dentists Act 1878, section 3, enacts—"From and after 1st August 1879 a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is specially qualified to practise dentistry, unless he is registered under this Act. Any person who . . . not being registered under this Act, takes or uses any such name . . . as aforesaid shall be liable, on summary conviction, to a fine not exceeding twenty pounds."

A, who practised dentistry, but was not registered under the Dentists Act 1878, raised an action to prevent the trustee on his sequestrated estate from selling certain implements alleged to be working tools of his profession, in which he was, through the error of his agent, designed as dental surgeon. His agent had simply followed the designation in the sequestration proceedings, and pursuer had never in his practice maintained that he was a qualified dentist or designed himself as dental surgeon.

Held that pursuer was not barred by the error in designation from stating a relevant case.

Observed that the practising of dentistry by an unregistered person was not of itself illegal.

The Bankruptcy (Scotland) Act 1856, sec. 102, enacts—"The Act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him or any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:—1st, the moveable estate and effects of the bankrupt wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null and reducible. . . . ."

John Andrew Macpherson, 5 Eskgreen, Musselburgh, brought a petition in the Sheriff Court of the Lothians and Peebles at Edinburgh against William John Allan Drummond, C.A., 37 George Street, Edinburgh, trustee on the sequestrated estate of the petitioner. In this petition he designed himself as John Andrew Macpherson, dental surgeon, 5 Eskgreen, Musselburgh, and prayed the Court "to interdict the defender from selling, disposing of, removing, or in any manner of way interfering with the following articles, presently in house No. 5 Eskgreen, Musselburgh, viz.—*A—In Surgery*—(1) Dental operating chair; (2) Dental operating chair attachment; (3) Dental operating chair spittoon; (4) Set of forceps, two gags, one mouth opener, two elevators, catch forceps, tongue forceps, scissors, artery forceps, absolutely necessary for operating purposes, all lying in righthand drawer of bookcase; (5) Burring engine and burrs; (6) Gasometer with two gas bottles attached and face piece; (7) Set of scaling, excavating, and filling instruments; and *B—In Glass House*—(1) Lathe; (2) Work bench; and (3) Set of workroom tools, all of which articles are absolutely necessary and essential for the pursuer carrying on the business of dentist, and so earning his livelihood, and which articles are the pursuer's property; and to grant interim interdict; and to find the defender liable in expenses in the event of his appearing and opposing the prayer of the petition."

The petitioner averred that his sole means of subsistence had always been and still was the practice or business of dentistry, and that he had no training for any other occupation or business, and that he had practised dentistry for over twenty years successfully and skilfully. He admitted, however, that he was not registered under the Dentists Act 1878.

He further averred—"(Cond. 2) The defender, as trustee foresaid, has intimated his intention of taking possession of the articles enumerated in the prayer hereof, for the purpose of realisation and sale. These articles are the necessary working tools of the pursuer, who could not follow his business, and so earn a livelihood without them. They are absolutely essential to his carrying on his business as a dental surgeon. They consequently do not fall under the sequestration, and they accordingly remain the property of the pursuer. (Cond 3) In consequence of the defender's intimation referred to in the preceding article, the present petition has been rendered necessary. In the urgent circumstances interim interdict is respectfully sought, as if the defender were to sell them the pursuer would be deprived of the working tools by which he is able to follow his vocation and earn his living."

The defender did not admit that the instruments mentioned in the prayer of the petition were necessary to the pursuer's business, but averred that in any case they were moveables attachable for debt and had vested in him in virtue of his act and warrant. He pleaded, *inter alia*, that the action was irrelevant.

The Sheriff-Substitute (HENDERSON) on 27th March 1905 repelled this and certain other pleas and allowed the parties a proof of their respective averments.

Note.—"The pursuer here, who alleges that he is a dental surgeon in practice, has become bankrupt, and the trustee under his sequestration has claimed certain articles enumerated in the prayer of the petition with a view to realising them for the behoof of the pursuer's creditors.

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"The pursuer avers that the articles which he has enumerated are necessary working tools and that he cannot follow his business and earn a livelihood without them. He therefore craves for interdict against the trustee taking possession of and selling the same.

"The Vesting Clause of the Bankruptcy Act 1856 (sec. 102) carries to the trustee the moveable estate and effects of the bankrupt 'so far as attachable for debt.' Anything, therefore, which could not be poinded or arrested for debt is not conveyed to the trustee, and what has been decided as regards poinding has therefore a direct bearing upon what the trustee may claim.

"This question of what constitutes 'working tools' has not been, so far as I have been able to find out, the subject of judicial consideration in the Court of Session since 1814, although there has been at least one case in the Sheriff Court within recent times.

"The earliest case is that of *Reid* v. *Donaldson*, July 11th 1778, M. 1392, where the opinion was expressed that a creditor under a *cessio* was not entitled to attach 'the tools by which the suspender, as an artificer, gains his daily bread.' It is not mentioned in the report of this case what sort of an artificer the suspender was or what kind or quantity of tools he possessed. The next case is that of *Pringle* v. *Neilson*, August 5, 1788, M. 1393. There again the Court in like manner suspended as regarded wearing apparel and 'working tools.' Here also there is no allusion to what the 'working tools' consisted of, and it is somewhat difficult to figure what they can have been, as the suspender is described as, after having obtained *cessio bonorum*, 'a retail dealer in the town of Dalkeith,' being employed as a merchant's clerk. From this case to that of *Gassiot, Petitioner*, November 12, 1814, F.C., there is no reported case. In *Gassiot's* case a teacher of foreign languages was held not entitled to retain furniture which he had purchased after being liberated from prison in virtue of a decree of *cessio bonorum*, but the Lord Justice-Clerk expressed a clear opinion that books or desks would be considered implements of the profession of a teacher of languages. In this view Lord Robertson concurred, and Lord Meadowbank was inclined to find him entitled to furniture suitable to his station in life.

'The law remained in the position defined by the decisions in these cases—at all events as regarded reported judgments—until 1890, when the late Sheriff Cowan decided the case of *Macmillan* v. *Barrie and Dick*, February 25, 1890, 6 S.L. Review 103. Proceeding on the authority of *Pringle* v. *Neilson, supra cit.*, the Sheriff-Substitute held that a sewing-machine, the property of a dressmaker, was a tool or implement by which her livelihood was earned, and could not be poinded or sold for debt. In his judgment in that case Sheriff Cowan refers to a previous decision of his own (unreported) in which he made a similar finding as to a piano belonging to a teacher of music.

"In this state of the decided cases it becomes a matter of great difficulty to define, with any approach to certainty, what do and what do not constitute 'working tools' or 'implements for earning livelihood.'

"From a perusal of the list of articles annexed to the petition it seems as if some of them, such as forceps, &c., are really such 'working tools' as would fall under one or other of the above decisions.

"I confess I feel myself unable to distinguish among the enumerated articles as to which are 'necessary' to the bankrupt in order that he may earn his daily living and what are unnecessary for that purpose. As the parties are, moreover, also at issue as to the value of the articles claimed by the trustee—the petitioner's counsel assessing their value at about £20, and the counsel for the trustee stating that they are worth upwards of £100—I have considerable hesitation in handing the whole of these articles over to the bankrupt without knowing what their value is.

"I have, therefore, come to the conclusion that it is essential, before an intelligent judgment can be given in this case, that evidence of an expert or experts be led as to the necessity to the bankrupt of retaining all or any of the articles, and also as to their value, as this latter point must necessarily enter into the decision of the case.

"The trustee, by letter from his agent dated 22nd February 1905, indicates that he is prepared to leave the 'forceps, instruments, and workroom tools' in the possession of the bankrupt, but I do not think that such a concession is sufficient to settle the questions raised in this case.

"Some light as to the kind of articles which have been left with bankrupts in such circumstances is to be gathered from what is stated in a recent judgment by Lord Pearson in the Outer House in the case of *Thom* v. *Caledonian Railway Company*, February 25, 1902, 9 S.L.T. 440. The Lord Ordinary there states that a confectioner was allowed to retain certain dies used in his trade of the value of £50.

"Some doubts were thrown upon the petitioner's status as a dentist both on record and at the bar, and it might be as well that this point be cleared up also at the proof. Counsel for the trustee moved that caution should be found by the bankrupt before any steps be taken in process. I have repelled the plea on which that motion is based. It seems to me that a bankrupt is entitled to vindicate to himself property which he maintains is not carried by the vesting clause of the Bankruptcy Act to his trustee without finding caution. To hold otherwise would be to open a wide door to possible oppression and denial of justice. *Thom's* case, *supra cit.*, illustrates this view."

The defender appealed against this interlocutor to the Sheriff (MACONOCHIE), who sustained the appeal, recalled the interlocutor appealed against, and dismissed the petition as irrelevant.

Note.—"In this case the Sheriff-Substitute allowed parties a proof of their

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averments, but since he did so the defender has amended his record by stating that the pursuer is not only not a registered dentist, but that he is not 'a legally qualified medical practitioner,' and holds no special licence to practise dentistry from the General Medical Council. It is admitted that these averments are true, so that the pursuer admittedly cannot design himself 'dental surgeon,' or by any other words suggesting that he is qualified to practise dentistry in terms of the Dentists Act 1878. The statutory rule under the Bankruptcy Act is that the bankrupt must give up all his property, except wearing apparel, to his trustee, but the Court has to some extent relaxed that rule by allowing certain bankrupts to retain the tools which are necessary to enable them to carry on the trade by which they earn their livelihood. The question, then, is whether the pursuer is under that rule entitled to retain the articles mentioned in the prayer of the petition, the value of which, I am told, is over £50. The practice which has grown up is, as I have said, a relaxation of a statutory rule founded primarily on humanitarian grounds, and the first remark which I have to make is that the pursuer here is by no means in a position to have his request that the relaxation should be given effect to in his case favourably considered. In the first place he designs himself in the instance and in his condescendence as 'dental surgeon,' a designation which he has no legal right to assume, and the assumption of which lays him open to prosecution for penalties. I am by no means sure that I am entitled to consider at all a petition so brought, as to do so is to countenance an illegal act on the pursuer's part, but I do not wish to rest my judgment solely on that ground. It is, however, clear to my mind that the primary object of the Dentists Act was to protect the public from the tender mercies of quack dentists, whose opportunities of doing serious injury would otherwise be large, and what I am asked to do is on grounds of humanity to the pursuer to give him, contrary to the terms of the Bankruptcy Act, power to carry on his unauthorised trade. It is true that for an operator to pull out or stop teeth without being registered or being a qualified medical practitioner is not rendered illegal by the Dentists Act, but such a practice is not, in my opinion, to be fostered by the courts. The general question whether such a trade or profession as that of a dentist is one to which the relaxation of the statutory rule should apply is a difficult one, and I do not find anything to assist me in previous decisions. In various cases artisans and such persons as sempstresses have been allowed to keep the articles necessary for carrying on their trade—articles as a rule of no great money value—and the dicta in *Gassiot's* case, Fac. Coll., November 12, 1814, seem somewhat to extend the class which is to have the benefit of the relaxation, but until some definite rule is laid down by the Legislature or the Supreme Court, each trade or profession must be considered on its own merits. The line must be drawn somewhere, as it would, for instance, be absurd to say that a large manufacturer who carried on his business by means of very expensive machinery should be allowed to withhold it from his trustee, and in like manner I do not think that a minister would be allowed to retain his divinity library or a lawyer his law books, though such aids are highly necessary for the successful exercise of their respective professions. Here the value of the articles is very considerable; the trade of dentist is a highly skilled one, and is one which the Legislature has seen fit to fence about with strict regulations if it is to be exercised under the authority of the law. In such circumstances I do not see my way to extend the benefit of an equitable relaxation to an unauthorised practitioner of a profession to which it has never yet been extended, but I wish to reserve my opinion as to what should be done in the case of a duly licensed dentist."

The pursuer appealed to the Second Division of the Court of Session, and argued—(1) The articles mentioned in the prayer of the petition were not attachable for debt. The vesting clause of the Bankruptcy Act 1856, section 102, only carried to the trustee the moveable estate and effects of the bankrupt, "so far as attachable for debt." The Sheriff was inaccurate, for the rule that means of livelihood could not be attached for debt was not a relaxation of the Bankruptcy Act but a rule of common law. The exemption from diligence of working tools and implements of livelihood was not confined to tools of little value of ordinary labouring men.—*Reid* v. *Donaldson*, July 11, 1778, M. 1392; *Pringle* v. *Neilson*, August 5, 1788, M. 1393; *Gassiot, Petitioner*, November 12, 1814, F.C. (Reference was also made to the following Sheriff Court case—*Macmillan* v. *Barrie and Another*, 1890, 6 S.L. Review 103). (2) The pursuer had never in his practice used the name of "dentist" or "dental surgeon," or any description implying that he was registered under the Dentists Act. The designation "dental surgeon" was due to a mistake of his agent, who had taken the designation from the act and warrant in the sequestration proceedings. The practising of dentistry by an unregistered person was not illegal—*Emslie* v. *Paterson*, June 12, 1897, 24 R. (J.) 77, 34 S.L.R. 674.

The defender (respondent) argued—(1) The cases of *Reid* v. *Donaldson* and *Pringle* v. *Neilson* gave no help as to what were working tools. The decisions referred to by pursuer were under the old law of *cessio*, which was as much for the benefit of the creditor as the debtor, and consequently the interpretation of the rule of exemption of working tools should not at any rate be extended. The width of the terms of the oath to be taken by bankrupts in section 95 of the Bankruptcy (Scotland) Act 1856, seemed to point in the same direction. Again, the question of value was of much importance, and the line must be drawn somewhere. In this case some of the articles were of great value. That value was a very important element was indi-

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cated by the Wages Arrestment Limitation (Scotland) Act 1870 (33 and 34 Vict. cap. 63), which did not save from arrestment the surplus of wages above 20s. a-week. The pursuer could not recover in any court of law his earnings at dentistry, and therefore for him it was not properly a trade or livelihood at all. (2) What was a humanitarian rule should not be extended to the practice of dentistry by an unregistered practitioner, for though this was not illegal, it was not regarded with favour by the law.

LORD JUSTICE-CLERK—This case has got into a somewhat unfortunate position. The Sheriff says that the petitioner designs himself in these proceedings as a dental surgeon, but his agent simply followed the designation given in the application by those seeking his sequestration. Now, the petitioner never in his practice maintained that he was a qualified dentist, or designed himself as dental surgeon, which would have made him liable to certain penalties. It seems, then, a strange thing to say that because these words occur in his designation in the petition, the petitioner should be shut out from stating a relevant case. If he had come forward calling himself a surgeon dentist, and saying he had a degree which he had not, that would have been a different case.

I think the case must be remitted to the Sheriff for proof, and so holding, that it is advisable to say a few words further as to the nature of the case.

The practising of dentistry is not illegal though performed by a person who has not the qualifications of the Dentists Act 1878. This was expressly observed in *Emslie* v. *Paterson*, 1897, 24 R. (J.) 77. Therefore the petitioner in practising dentistry was not acting illegally. Is he then entitled to have excluded from the sequestration those implements, or any of them, mentioned in the prayer of the petition? That depends on questions of fact. Whether a person uses the tools himself, or carries on a trade where he makes other persons use the tools, is a question of fact which is very important. It is also a question of fact what are the ordinary implements and tools of every trade, and this the Court cannot be expected to know. I think, therefore, the Sheriff-Substitute was right in allowing proof. It may be that a dentist does his whole work himself with his own hands—the tools and implements he so uses are, then, the tools and implements of his trade. It was said by the respondents that only the tools and implements of an ordinary working man were exempt from being attachable for debt, but opinions were expressed in *Gassiot, Petitioner*, November 12, 1814 (F.C.), that books or even desks would be implements of trade of a teacher of languages, and so not attachable for debt.

I think, therefore, it is proper to have the facts ascertained, and therefore that it is necessary to recal the Sheriff's interlocutor.

LORD KYLLACHY, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court sustained the appeal, and remitted to the Sheriff to allow parties a proof of their averments.

Counsel for Pursuer (Appellant)—Thomas Trotter. Agents—Struthers Soutar & Scott, Solicitors.

Counsel for Defender (Respondent)—Cullen, K.C.—Ingram. Agent—J. Dunbar Pollock, Solicitor.

Thursday, November 30.

FIRST DIVISION.

JOHN NIMMO & SON, LIMITED, PETITIONERS.

Witness—Foreign—Arbitration—Witness and Haver in England—Appointment of English Commissioner—Letters of Diligence to Cite Witness—Form of Interlocutor.

An arbiter having ordered a proof and appointed a commissioner in England for taking the deposition of a witness and haver who was resident there, the party at whose instance the commission had been granted presented a petition, *inter alia*, for approval of the appointment of the commissioner and for letters of diligence for citing the said witness to appear before him.

The Court *refused* to grant letters of diligence but *confirmed* the appointment of the commissioner.

By deed of submission dated 8th, 10th, 18th, and 21st January 1904, entered into between John Nimmo & Son, Ltd., 163 Hope Street, Glasgow, and the Collieries Consolidation Syndicate, Limited, and the United Collieries, Limited, both incorporated under the Companies Acts 1862 to 1890, it was agreed that all questions arising under or relating to the adjustment of a certain minute of agreement should be referred to the Right Hon. Charles Scott Dickson, Lord Advocate for Scotland, as arbiter.

The arbiter having accepted office, in the course of the proceedings under the reference allowed a proof, and it was found necessary for Nimmo & Son to recover certain documents mentioned in a joint specification. The arbiter accordingly pronounced the following orders:—On 13th November 1905.—"The arbiter . . . before answer allows both parties a proof of their respective averments and to each a conjunct probation; appoints the proof to proceed before him on . . . Further respectfully recommends to the Lords of Council and Session to grant warrant for citing witnesses and havers on the application of either party."

On 25th November 1905:—"The arbiter, having considered the note for John Nimmo & Son, Limited, appoints the Mayor or Town-Clerk of Rotherham his commissioner in Rotherham for taking the deposition of D. W. Rees, secretary of the North Central Wagon Company, Limited, Rother-

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ham, a witness for the said John Nimmo & Son, Limited, and as a haver in terms of the joint specification, and the arbiter respectfully recommends the Lords of Council and Session to sanction and confirm the appointment of the said commissioner named by the arbiter, and to require and enforce the attendance of the said D. W. Rees before the said commissioner."

"The arbiter, having considered the joint specification of documents for which diligence is craved by the parties, respectfully recommends the Lords of Council and Session to grant diligence against havers at the instance of both or either of the parties for recovery of the documents called for in the said joint specification, and the arbiter grants commission to J. Wright Forbes, Esquire, Advocate, Edinburgh, to take the oaths and receive the exhibits of the havers, to be reported *quam primum*."

John Nimmo & Son, Ltd., accordingly presented this petition.

The petitioners stated that in order to carry the said orders into effect it was necessary that diligence should be granted for citing witnesses and havers, and that authority should be interponed to and the appointment of the said commissioner in Rotherham named by the arbiter sanctioned and confirmed, and warrant granted for letters of diligence for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, and that in common form of law at the instance of the petitioners.

The prayer of the petition craved (1) warrant to cite havers, (2) warrant to cite witnesses, and (3) in particular "to interpone authority, sanction and confirm the appointment of the said commissioner in Rotherham named by the writer, and to grant warrant for letters of diligence at the petitioners' instance for citing the said D. W. Rees as a haver and a witness to appear before the said commissioner, or to do otherwise or further in the premises as to your Lordships shall seem proper."

The petition was unopposed. Counsel for the petitioners cited the following cases in support of the application:—*Blaikies Brothers* v. *The Aberdeen Railway Company*, July 8, 1851, 13 D. 1307; *Highland Railway Company* v. *Mitchell*, May 30, 1868, 6 Macph. 896.

[The LORD PRESIDENT referred to the Act 6 and 7 Vict. c. 82, cited in the two cases above referred to.]

Counsel moved the Court to grant the prayer of the petition.

LORD PRESIDENT—We shall appoint your commissioner to be the commissioner and he can cite his witnesses. If the witnesses do not obey his citation he can apply to the Court in England. We shall adjust an interlocutor.

The Court pronounced an interlocutor which *quoad* the first two craves of the prayer was in the usual form, and as regards the remaining crave was as follows:—"and (3) interpone authority to and sanction and confirm the appointment of the Mayor or Town Clerk of Rotherham as commissioner for citing D. W. Rees, Secretary of the North Central Wagon Company, Limited, Rotherham, as a haver and witness to appear before the said commissioner, and for his examination as a witness in the matter of the said reference."

Counsel for Petitioners—Horne. Agents—Drummond & Reid, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles, at Edinburgh.

MITCHELL (ALEXANDER'S EXECUTOR) *v.* MACKERSY.

Executor—Eadem persona cum defuncto—Compensation—Debt Due by Law-Agent to Executor in respect of Executry Estate Compensated with Debt Due to Law-Agent by Deceased in respect of Business Account.

The law-agent of a deceased lady, who at her death was his debtor for the amount of a business account, was employed by her executor to realise her estate. The estate turned out to be of less value than the amount of the business account.

In an action by the executor against the law-agent for payment of the amount realised by the deceased's estate, *held* (1) that the executor was not a trustee for the creditors of the deceased, but was simply the representative of the deceased and debtor to her creditors and creditor to her debtors, and (2) that consequently the pursuer's claim was extinguished by compensation.

Globe Insurance Company v. *Mackenzie*, August 5, 1850, 7 Bell's App., 296; and *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R.. 570, *followed*. *Gray's Trustees* v. *Royal Bank*, November 27, 1896, 23 R. 199, 33 S.L.R. 140, *disapproved*.

Expenses — Process — Appeal — Failure to Inform Sheriff as to Position of Authoritative Decisions a Ground for Refusing Successful Party Expenses of Appeal.

A Sheriff in an action before him granted pursuer decree following a decision of one of the Divisions of the Court of Session founded on by the pursuer. That decision was contrary to a previous decision of the House of Lords, which had not been quoted to the Division. The defender failed to point out this omission to the Sheriff.

In an appeal, the Court, while following the House of Lords decision and recalling the Sheriff's judgment, allowed no expenses in the Court of Session to either party, both being responsible for the position which made the appeal necessary.

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On 17th December 1904, James Mitchell, residing at 4 Picardy Place, Edinburgh, executor of the late Mrs Catherine Mitchell or Alexander, who resided at Bowman Cottage, Liberton, raised in the Sheriff Court at Edinburgh an action against William Robert Mackersy, Writer to the Signet there.

The following narrative of facts in the case is taken from the opinion of Lord Kyllachy—"The pursuer in this action, which comes up from the Sheriff Court, is the brother and executor-dative of a lady who died in 1904 leaving a very small estate—an estate consisting only of some policies of insurance and household furniture, the whole being valued at about £44. The defender had been the lady's law-agent, and was, or claims to have been, at her death, her creditor for a sum of about £52—a sum arising upon a business account which has not yet been taxed but is otherwise not disputed. There are, it appears, some other creditors whose claims are of small amount, but sufficient—along with the defender's claim—to make the estate insolvent. This, however, was not at first realised, and the pursuer employed the defender, who had made the deceased's will, to ingather the estate such as it was. The defender thus became debtor to the executry in a sum of £28 odds, which it is now admitted was the net sum realised after deducting the expenses of realisation. For this sum he is now sued by the executor, the summons being restricted to the amount mentioned."

The pursuer stated, *inter alia*, the following pleas—"(1) The defence stated is irrelevant. (2) The defender being due and resting-owing to the pursuer the sum sued for, decree should be pronounced for same, with interest and expenses as craved."

The defender stated, *inter alia*, the following plea—"The said deceased . . . at the time of her death, and the defender, being mutually debtor and creditor, the defender pleads compensation to the extent of the sum sued for, in partial extinction of her said indebtedness to him."

The Sheriff-Substitute (HENDERSON), on 3rd March 1905, pronounced an interlocutor sustaining the first plea-in-law for the pursuer, and granting him decree for the sum sued for.

Note.—" . . . The pursuer . . . refuses to recognise the defender's right to retain the balance to meet to any extent the business account said to be due by the deceased. In taking this view of his rights I think the pursuer is quite correct. On the authority of the case of *Gray's Trustees* v. *Royal Bank*, November 27, 1895, 23 R. 199, it seems perfectly clear that the executor here never was a debtor to the defender for the earlier account. The funds now claimed are executry funds ingathered by the defender as agent for the executor, and as such cannot be retained by the defender in compensation of any claim which he may have against the deceased. . . ."

The defender appealed to the Sheriff (MACONOCHIE), who on 31st March pronounced an interlocutor adhering to the interlocutor appealed against.

Note.—" . . . With regard to the question argued to and decided by the Sheriff-Substitute, I am clearly of opinion that the view of the law stated in the note to the interlocutor appealed against is sound; indeed, no argument was seriously stated against the decision. On these grounds I dismiss the appeal, but in respect it is admitted that the defender has recently paid £9 towards the sum for which decree has been granted, the decree must be varied to that extent."

The defender appealed to the Court of Session, and argued—An executor being *eadem persona cum defuncto*, the defender here, as a creditor of the deceased, was entitled to set off the deceased's debt to him against his debt to the executor—*The Globe Insurance Co.* v. *Mackenzie*, February 16, 1849, 11 D. 618, and August 5, 1850, 7 Bell's Appeals 296; *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739, 33 S.L.R. 570; Erskine, bk. iii. tit. ix. 46. The case founded on by the Sheriff (*Gray's Trustees* v. *Royal Bank*, November 27, 1895, 23 R. 199, 33 S.L.R. 140) was a bad decision, in which the *Globe Insurance Co.* was not cited to the Court.

Argued for the pursuer and respondent—The maxim *eadem persona*, &c., was not applicable to a case of this sort. *Gray's Trustees*, a Second Division case, was authoritative in this Division, and must be followed in preference to *Stewart's Trustee*, a First Division case. *Gray's Trustees* had been followed by Lord Stormonth Darling in *Hewitt* v. *Symons & Macdonald*, January 10, 1896, 3 S.L.T. 234 and 333.

LORD KYLLACHY—[*After narrating the facts as given above*]—Now in this position of matters—the defender being creditor of the deceased for say £52, and debtor to the executry for say £28—there would not seem to be much doubt as to the defender's rights, if we are to apply the law settled in 1850, after a good deal of controversy, in the leading case of *The Globe Insurance Co.* v. *Mackenzie* (11 D. 618, *aff.* 7 Bell's App. 296), a case which received very careful consideration and in which the judgment of this Court was affirmed by the House of Lords. That law was, as I understand it, this—that an executor in the pursuer's position is not a trustee for the deceased's creditors, but simply the representative of the deceased, that he stands simply in the deceased's shoes, being debtor to her creditors and creditor to her debtors, and, in short, that he is (subject to one limitation not here important) *eadem persona cum defuncto*. Applying that law, it would seem to be not doubtful that the defender here has, as against the pursuer, all the rights which he would have had against the deceased had she been alive, and that he is therefore entitled to cross accounts with the pursuer, and so to extinguish the latter's claim.

The pursuer, however, not accepting this view of the matter, brought, as I have said, the present action, and on the defender

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pleading that he was entitled to cross accounts, maintained in reply that that was incompetent. He did so on the authority of a certain judgment of this Division pronounced in 1895 in the case of *Gray's Trustees* v. *Royal Bank* (23 R. 199). The defender somehow omitted to point out, as he should in answer, that in that case the ruling case of the *Globe Insurance Co.* had been overlooked and was not in view of the Court. And the result was that the Sheriff-Substitute and the Sheriff, considering quite naturally that they were bound by the later decision, repelled the defender's plea and gave decree for the amount claimed.

Now, in these circumstances, we might perhaps have had some difficulty as to our procedure if there had been no judgment of this Court subsequent to the case of *Gray's Trustees*—no judgment reaffirming the law as laid down in the case of *The Globe Insurance Company*. I am not sure that even on that assumption we should have been justified in ignoring, or hesitating to give effect to, a judgment of the House of Lords, a judgment plainly applicable and of indisputable authority. But we are I think relieved of any difficulty on that head by the fact that, in a case which shortly followed the case of *Gray's Trustees* (I refer to the case of *Stewart's Trustee* v. *Stewart's Executrix*, May 21, 1896, 23 R. 739) the decision in the *Globe Insurance Company's* case was considered and its authority recognised. Having regard to that circumstance, we are I think not only entitled but bound to recal the Sheriffs' judgments and to remit for further procedure.

As to expenses, these, so far as incurred in the Sheriff Court, may depend upon the ultimate issue of the cause—that is to say, upon the question how far the defender's claim is well founded on its merits. But as regards the expenses in this Court, I should be for allowing no expenses to either party, both parties being responsible for the position which made the appeal necessary.

LORD STORMONTH DARLING—I concur.

LORD LOW—I have had the advantage of reading the opinion which your Lordship has just delivered and I entirely concur.

The LORD JUSTICE-CLERK was not present.

The Court sustained the appeal.

Counsel for Pursuer and Respondent—Hunter—Monro. Agent—John Forgan, S.S.C.

Counsel for Defender and Appellant—Maclennan, K.C.—A. M. Anderson. Agent—W. R. Mackersy, W.S.

HOUSE OF LORDS.

Thursday, June 8, 1905.

(Before Lord Macnaghten, Lord Davey, Lord James, and Lord Robertson.)

GRANT *v.* GRANT AND ANOTHER.

Expenses — Divorce — Wife's Expenses—Taxation as between Agent and Client.

It is a rule of the law of Scotland that where a wife is successful in her defence to an action of divorce she is entitled to her expenses as between agent and client.

This was an appeal from a judgment of the Second Division of the Court of Session in an action of divorce on the ground of adultery brought by James Grant, distiller, Glengrant, against his wife, Mrs Fanny Seivewright or Grant, and a co-respondent. The Lord Ordinary (STORMONTH DARLING) assoilzied the defenders on the ground that the evidence for the pursuer did not carry conviction to his mind. On 2nd February 1904 the Second Division of the Court of Session (The LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER, with LORD MONCREIFF *dissenting*) adhered, holding that the adultery was not proved. On 11th April 1905 the House of Lords (LORD MACNAGHTEN, LORD DAVEY, LORD JAMES, and LORD LINDLEY, with LORD ROBERTSON *dissenting*), on appeal, affirmed with costs the decision of the Court below, stating that the question was one of fact only.

A petition with regard to the respondent's costs now came before their Lordships. The appellant (pursuer) argued that the respondent (defender) was not entitled to her costs as between agent and client owing to the suspicious character of her conduct, the respondent arguing that she was so entitled, and that it was a rule of the law of Scotland—*Mackenzie* v. *Mackenzie*, May 16, 1895, [1895] A.C. 384, at p. 416, 22 R. (H.L.) 32, 32 S.L.R. 455; *Collins* v. *Collins*, February 18, 1884, 9 App. Ca. 205, at p. 242, 11 R. (H.L.) 19, 21 S.L.R. 579.

Costs between agent and client given as being the rule in Scotland.

Counsel for the Pursuer and Appellant—The Dean of Faculty (Asher, K.C.)—M'Clure. Agents—Hagart & Burn Murdoch, W.S.—Trinder, Capron, & Co., London.

Counsel for the Defender and Respondent—Clyde, K.C.—Cooper, K.C.—W. A. Fleming. Agents—Forbes, Dallas, & Co., W.S.—Burchell, Wilde, & Co., London.

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Monday, July 31.

(Before the Lord Chancellor (Halsbury), Lord Ashbourne, and Lord Robertson.)

FISHERROW HARBOUR COMMISSIONERS *v.* MUSSELBURGH REAL ESTATE COMPANY LIMITED.

(*Ante*, January, 23, 1903, 40 S.L.R. 296, and 5 F. 387.)

Harbour—Statute—Construction—Fisherrow Harbour Act 1840 (3 *Vict. cap. lxxii*), *secs.* 2, 49, and 76—"*Precincts of Harbour*"—"*Along the Shore*"—*Foreshore.*

The Fisherrow Harbour Act 1840 in section 2 provides that where in the Act the word "harbour" occurs it shall be understood to mean the harbour of Fisherrow, and shall include "the whole precincts thereof as after specified, and the piers, quays . . . presently existing or which are hereby authorised to be made or maintained, . . . unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." Section 49 enacts "that it shall not be lawful for any person to throw . . . any ballast, dirt, ashes, rubbish, . . . into the said harbour . . . nor shall it be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast, or any other purpose, except from such place or places as shall from time to time be appointed for that purpose, under the authority of the said commissioners . . ." The word "precincts" is not defined in the Act, but section 76 provides that "for the purposes of this Act, and for no other purposes whatever, the said harbour shall be deemed to extend along the shore from the M burn on the west to the R burn on the east, and to seaward to the extent of 100 yards below low-water mark opposite to the shore between the foresaid burns."

Certain parties owned lands abutting on the sea between the burns M and R, and claimed right to remove sand therefrom from below the line of high-water of ordinary spring tides. In an action of declarator brought against them by the Harbour Commissioners, *held* that the terms "harbour and its precincts" were not to be read as meaning only the harbour proper and the ground in close proximity where any operations might do damage to its works, but included the whole foreshore between the said burns, *i.e.*, up to the line of high-water of ordinary spring tides, and consequently that the defenders were not entitled to remove the sand without the Commissioners' authority.

This case is reported *ante ut supra.*

The defenders and reclaimers appealed to the House of Lords.

The judgment of the House does not deal with the question of the limits of the foreshore, but the authorities on that point quoted in the courts below were referred to in argument. The burns M and R are about one mile on each side of the harbour of Fisherrow.

At the conclusion of the arguments

LORD CHANCELLOR—In this case I confess I have not been able to entertain any doubt that the judgment of the Court below is right and ought to be affirmed.

It appears to me that the provisions of the statute are too plain to raise any ambiguity. If one thinks that the words "the precincts" require exposition they are in my opinion explained by the statute itself. It is clear from what has been said that the statute does draw a distinction between two different areas—one is the harbour and the other is the precincts—and while it prohibits any "person to throw any ballast, dirt, ashes, rubbish, shingle, sand, stones, and other things into the said harbour, or to do any other act, matter, or thing to prejudice or injure the same or any part thereof," it also, as a separate part of the section and distinguishing between the harbour and what it then deals with, prohibits any person "to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast or any other purpose except from such place or places as shall from time to time be appointed for that purpose under the authority of the said Commissioners."

It is said by the statute itself that the precincts are defined in the statute. Now, unless the limits of a mile on each side of the harbour are the precincts referred to there is no such definition as the statute itself alleges to exist in it, the inference from which is that those must be the precincts. It is manifest also, I think, when one looks at the language of the statute, that whether or not the framers of the statute were right in their view, it was intended to prohibit, except with the permission of the Commissioners, to whom discretion was entrusted, anybody—"any person," to use the language of the statute—taking away sand, gravel, shingle, or stones from somewhere other than the harbour itself, and if it had been intended only to protect what I have described as the immediate vicinity of the harbour, it was easy to say so, or to say "so near the harbour as shall be injurious to its foundations or what not." Instead of which the statute uses the word "precincts," which it professes to define, and makes those precincts extend for a mile on each side of the harbour. It seems to me that in order to construe it as the learned Lord Advocate would have it construed, you must read into the statute words which are not there, and indeed he has not denied that that is so. That is the first objection—and it appears to me to be a very cogent one—to construing the section as he suggests, that you must introduce words which are not there.

Now, it is said, and I think justly said,

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that it is contrary to the policy of Parliament to take away rights—to give anything in the nature of property to others without giving compensation for it. But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security Parliament does sometimes do that. As it has been pointed out, it does it with respect to roads, and I think it does it with respect to harbours also. This is one of those provisions which must be construed in connection with the particular subject-matter with which Parliament was then dealing. It might well be that in the view of Parliament, although the giving of those rights, not a proprietary right at all, but a right to prohibit something which in their view would interfere with the harbour, might to some extent restrain the complete liberty of the proprietors in respect of the use of that which was their own property and prevent the proprietor of the shore taking away his sand, yet, on the other hand, the construction and maintenance of the harbour would in itself be an advantage to the adjoining proprietors. One cannot doubt that it would add to the value of their adjacent land; and it might well be that in view of that additional value and the advantage conferred upon their land, Parliament would take away, not absolutely, their property but the right of taking sand from any part within these two miles. But even that right is not absolutely taken away, for discretion is confided to the Commissioners, so that they may permit sand to be taken if they think right. Parliament has confided a discretion to them in the view that as they are the persons who are interested in the maintenance of the harbour, nothing would be permitted by them which would interfere with the security which that harbour is intended to afford to all vessels frequenting that port.

Therefore it seems to me that the only thing we have to do with is the construction of the 49th section. I do not understand why we should extend our inquiries to a wider field than that mere question. Neither the pleadings, nor indeed the facts as they are put before us in this case, appear to me to raise any other questions than these. First, what are the precincts? The answer to that I have already given, namely, those that are indicated by the statute. If they are not those, there are none other, and yet the statute says there are precincts indicated in the statute. Secondly, when the question of public advantage is considered, it seems to me to displace the argument—I admit a very cogent one very often—that no compensation is provided for the proprietors. That objection is answered, as I endeavoured to answer it, by saying that Parliament may have considered the advantage conferred as equivalent to the disadvantage enforced upon them. But really the whole truth, in my view, is that the statute is plain and unambiguous, and I cannot and will not introduce words into the statute which are not there. I must read the statute according to its plain and simple meaning, and, so construing it, I think the judgment of the Court of Appeal is right, and I move your Lordships therefore that the interlocutors be affirmed and the appeal be dismissed with costs.

Lord Ashbourne — I concur entirely with the views which have been expressed by my noble and learned friend on the Woolsack.

The case has been very fully and very ingeniously argued, and our attention has been directed to every syllable of the statute which has the slightest relevancy to the subject-matter, and also the bye-laws have been prayed in aid, and we have been asked to consider them. It is quite right that our attention should have been so directed to these matters, but, after all, the entire question comes back to what is the construction of section 49. If the question had been argued at even greater length than it was, legitimately, presented to us, it would always come back to that question. The bye-laws can give no substantial assistance here in arriving at any conclusion in respect of the matter before us. They may show the opinions from time to time held as to how the discretion should be exercised by those who were responsible for making those bye-laws, but the bye-laws get their authority from, and their origin must be found in, section 49; if they are suggested to be incomplete the answer must always be given—"We will try again under the power and discretion as vested in us by section 49."

When one comes to section 49, one finds that it is about as clear a section as was ever framed by the Legislature. It is absolutely distinct and unqualified in all its terms. If one is not to place upon section 49 the meaning which was placed upon it by the Lord Ordinary in his clear and well considered judgment, it is only by praying in aid the possible introduction of other topics, other considerations and other words. Of course that is not a legitimate way of interpreting any Act of Parliament. I therefore set aside the bye-laws as throwing no substantial light, giving no assistance to us in construing section 49, and I look entirely to the construction that is to be given to the clear words of the section, the one important section that has to be construed upon the present occasion.

The Act was passed as far back as the year 1840; its sections shew that notices must have been given to the parties concerned—that there were plans and books of reference which it is stated comprised actually the name of one of the Lord Advocate's clients. There are no people now to tell us exactly what occurred on that occasion, but I assume that the passing of the Act of Parliament was a matter of very common knowledge, and that the parties interested in it had every opportunity of considering and knowing and being thoroughly acquainted with all that was being done. That being so, the Act of Parliament was passed, comprising in its terms the section which has been so often referred to. Every person interested had

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every possible opportunity, I assume, of considering the bearings and the possible constructions which might be given to the operations under that section. That being so, the presentation of the case to us by the Lord Advocate and his learned and very able junior colleague is this, that no matter how clear, no matter how unqualified it may be, it is to be read as excluding by the introduction of words which are not found there, a class of persons who are to be regarded as private owners—their contention is that it must be so read that it will not interfere with or in the slightest degree disturb any of the discretion that might be exercised by a private owner. On the other hand this must be borne in mind that, as has been pointed out to us upon the other side with great force, the statute is clear and unqualified, that it does not suggest the possibility of the introduction in the construction of any words or meaning which are not to be found upon the face of it. I think there is immense weight in the words quoted to-day from the judgments of Lord Justice Bowen in the case of the *London and North Western Railway Company* v. *Evans*. Here we find words which are clear and distinct. We find that the Legislature, knowing what it was doing, thought proper to introduce those words; they are not words which expropriate; they are words which give a discretionary power of control and management in the exercise of what we must conceive to be the honest discretion of honest and capable administrators. That was done, not for a private or personal purpose, but for a public purpose which we must assume to have been worthy of being protected by words as clear and unqualified as those we find in section 49 of this Act.

For those reasons I entirely concur in the conclusion announced by my noble and learned friend on the Woolsack.

LORD ROBERTSON—I agree in the judgment which has been proposed and also in all that has been said.

Appeal dismissed with costs.

Counsel for the Pursuers and Respondents — The Solicitor-General (Salvesen, K.C.)—Haldane, K.C.—F. Watt. Agents—M'Gregor & Purves, W.S.. Edinburgh—John Richardson, Town-Clerk, Musselburgh—Pritchard & Sons, London.

Counsel for the Defenders and Appellants—The Lord Advocate (Dickson, K.C.)—S. C. Rankine. Agents — Beveridge, Sutherland, & Smith, S.S.C., Leith—H. S. M. Grover, London.

Thursday, December 14.

(Before the Lord Chancellor (Halsbury), Lord Robertson, and Lord Lindley.)

HUNTLY AND ANOTHER *v.* BROOKS' TRUSTEES.

(*Ante* July 15, 1902, 39 S.L.R. 816, and 4 F. 1014.)

Domicile—Change of Domicile—Abandonment of Domicile of Origin—Proof.

In order to lose his domicile of origin mere change of residence is not sufficient, but a man "must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile."

An English banker acquired an estate in Scotland, where for many years he continued chiefly to reside, and which he described as his "home," but he continued to conduct his business in England, to hold his real property there, and to live for short periods from time to time in two residences which he continued to keep up in that country. *Held* that he had not lost his domicile of origin in England.

Observed, per Lord Chancellor, that "the nature of the man himself, the sort of character he had, and what he was endeavouring to settle," were elements to be taken into consideration in deciding the question.

This case is reported *ante ut supra.*

The Marchioness of Huntly, pursuer and reclaimer, appealed to the House of Lords.

At the conclusion of the appellant's argument, counsel for the respondents not being called upon—

LORD CHANCELLOR — Notwithstanding the length to which this case has gone, and the exhaustive learning that has been brought to bear upon it in the Courts below and at your Lordships' Bar, it appears to me that it turns upon a very small point, and I myself have not been from the first able to entertain the smallest doubt that the judgment of the Lord Ordinary in the first instance, and the Inner House afterwards, was not perfectly correct. More than once in the course of the case I have had occasion to observe that I do not believe that there is any question or doubt about what the law on the subject is. It is very often a question of complicated facts from which the tribunal which is called upon to determine the question has to infer a variety of things with reference to the domestic and commercial life of the person whose status is being inquired into, and naturally, when that is the case, there has been a great variety of forms of expression, sometimes figurative, which the learned judges from time to time have used in order to indicate what the particular facts then in debate before them point to as the principle upon which the question should be decided. I myself have entertained no doubt what

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that question is, and the way in which it should be decided, but, of course, other minds take different views about the mode in which it should be expressed. I myself think, in my view of the law, that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel*, reported in 15 Rettie—"It is," says the learned Judge, "by no means an easy thing to establish that a man has lost his domicile of origin, for, as Lord Cranworth said in the case of *Moorhouse* v. *Lord*, 'in order to acquire a new domicile a man must intend *quatenus in illo exure patriam*,' and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *M'Clure*. He says—'To abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence.'"

I do not believe that it could be expressed more clearly or distinctly than it is in that judgment, and applying that principle to the question now before your Lordships, I say that I regard with something like amazement the fact that the question should have been debated so long under the circumstances which are in proof before your Lordships. I should have thought that it was very difficult indeed to suggest with respect to this particular testator that there was the slightest indication in any part of his career of an intention to abandon his domicile of origin. He was an Englishman, his property in great measure was in England, his constituency which he represented in Parliament was in England, and I should have thought that it was impossible to doubt that there were at least three residences which he had, about which it might have been equally said he made his home there. It does not follow that they were all three equally popular with him, or any one of the three the main abiding place for the greater part of the year during which he lived in each of them in turn. But what is the inference to be derived from that? I should have thought that the obvious inference which anybody would draw would be that there was no intention to change his domicile. That he had three residences is true, but unless you can show something else than the fact that a man of great wealth who had three residences preferred one rather than another, either in respect of sport at the earlier period of his career, or in respect of the state of his health, at a later part of his career clearly he found that Glen Tana agreed with him better and that the air was better, are you to infer, or is there any evidence from which you can infer, an intention to change his civil status? It seems to me that every part of his career points to the same conclusion. Being a very wealthy man, and doing whatever he liked to do, he might go to Antibes—at one time with as much idea of change in the sense of changing his status at Antibes as at Glen Tana, but the real truth was that no change of any sort or kind is suggested by what he did. It is admitted that mere residence is in itself nothing. There may be continuous residence, or what I think has been appropriately suggested as being the most satisfactory word to use, "settling" somewhere, which of course involves residence as part of it, and if it was suggested that a man had gone to settle at some particular place and had abandoned all other connection and all other country, I think that inference might be natural and just, but to suggest in the case of a man of great wealth who is wandering from one place to another from time to time, although he may spend a larger part of his time in Scotland than elsewhere, that that of itself should be anything from which anybody could draw an inference that he meant to change his domicile, seems to me to be a very monstrous proposition.

Now, upon one part of this case I confess it appears to me that sufficient reliance has not been placed by those who have had this matter under discussion, and that is the nature of the man himself, the sort of character he had, and what he was endeavouring to settle. These are all elements to be taken into consideration when you come to this question. The idea had occurred to him during his lifetime that some question might arise as to his domicile; he had seen some case in the Scotch law reports which suggested to him that there might be some question raised after his death, and he had been dealing very accurately and carefully with the question of how he was to settle his affairs. He applies to a lawyer whom he had great confidence in, and says, "Now, is it true that I am a domiciled Scotchman?" Can anyone doubt what the meaning of that was? I must say I infer, together with all the other learned Judges who have dealt with this question, that what he meant was to satisfy his own mind, because he thought some question, which unfortunately has notwithstanding his care arisen, might arise after his death. He wanted to be advised whether there was anything he could do in order to prevent such a question arising, upon which he is assured, and I think accurately assured, by the learned gentleman who was advising him, that there was no doubt whatever that he was an

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Englishman, and that he need not trouble himself about any questions which might arise on the difference between Scotch and English law and the suggestion that he was a Scotchman. More than once he has this assurance given to him. Now, is there the slightest evidence that after that he did, or said, or desired to do or say, anything which could raise any doubt upon the matter about which he had been so completely assured by his legal adviser? Of course the answer must be that there was nothing. What is the inference which your Lordships must draw from that? To my mind it is perfectly clear that he knew, because it had been explained to him—he was not without advice—what the distinction was, and what domicile meant, and the assurance that he was an Englishman contented him, and satisfied him, and he did no more.

For my own part I cannot entertain the smallest doubt that from that moment he had satisfied himself that he was, as he intended to be, an Englishman, and retained his English domicile. Under those circumstances it appears to me, notwithstanding the enormous length to which this case has gone, that there is a very plain and obvious answer to the appellants' case.

I do not think it is necessary to go through all the different points of fact which have been called to our attention by the learned counsel who has with great diligence and care presented every fact that could be appropriately presented to your Lordships for consideration, because I must say, having read the Lord Ordinary's judgment and the judgment of Lord Kinnear, I have come to the conclusion that every topic that could be invoked and discussed has been satisfactorily invoked and discussed by the different learned Judges who have given their attention to this subject, and speaking for myself I say most sincerely that I do not think there is anything more to be said about it. They have exhausted the whole topic. Every portion of this gentleman's life has been examined with the minutest care, and the only inference, I think, that I can possibly draw from the picture that has been presented to us by this accurate historical narrative of this gentleman's life is that he never had the slightest idea of abandoning his domicile of origin, and least of all, that he intended by a domicile of choice to make Scotland his home, or Scotland the place of his domicile, so as to put in peril the question which he obviously was disturbed about at one time, namely, whether or not the laws of Scotland and the difference between English and Scotch law might interfere with his testamentary dispositions.

Under the circumstances I move your Lordships that this appeal be dismissed. It appears to me that the question lies now in a very narrow compass indeed, and we have satisfactorily, I think, come to a conclusion, in accordance with that of every other judicial authority which has been appealed to, that there is no doubt whatever that the domicile of origin of Sir William Cunliffe Brooks was England, and that accordingly this appeal must be dismissed.

LORD ROBERTSON—I think the present a very clear case.

In the first place, it is not a case like *Bell* v. *Kennedy*, where a man has severed all ties with the country of his birth except the inseparable one of birth, where accordingly there is but one question to consider, and that is the adequacy of the residence in the new country to constitute domicile. In the present case, not only was the appellant's father, Sir William Cunliffe Brooks, born in England, but he remained to his death deeply rooted in England by business which he continued to carry on, by large real property which he retained, and by two residences which he never ceased to keep open and periodically to stay in. It may truly be said of him that he severed none of his ties to England; and the only point made is that having, like many Englishmen, bought a house in Scotland, he, being very rich and master of his own time, spent much the greater part of the year there. Even on this point it is well to observe that his buying Glen Tana was due to compelling circumstances and was not an act of election. No doubt at all he was very fond of the place, and being a person of emphatic and florid speech, he spoke of it occasionally—especially, although not always, when addressing Deeside people—as his true home, and the place where he felt at home. But it is a fallacy to regard this as an election of one home in substitution for another. A great many people who have a house in town and a house in the country have two homes—they speak of them as such—each is the home when the household gods are there; and the country house being the place of recreation, is generally the object of the more exuberant expressions of attachment.

But, speaking of the present case, it seems to me that this attempt to turn a strenuous English banker and great landed proprietor into a Scotchman is, on the face of the broad facts, hopeless. The good sense, as well as the law of the matter, was, as has been mentioned by my noble and learned friend on the Woolsack, expressed by Mr Wood in answer to what clearly was the alarmed inquiry of Sir William, "Am I a domiciled Scot?" "No; your domicile of origin is English. Although you have a residence in Scotland you have not abandoned your English domicile." And in Sir William's own considered descriptions of himself for books of reference, the true perspective of his English and Scotch connections is restored.

I think it wholly unnecessary once more to examine the authorities on the law of domicile, as the facts of this case do not come near any question of delicacy. I have only to add an expression of regret that the parties should have brought on themselves such enormous expenses by exploring and presenting minute and complicated details when the broader facts are conclusive.

LORD LINDLEY—I am entirely of the same opinion. I have listened with grea

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attention and great pleasure to the extremely able arguments addressed to us by Mr Eve, but the conclusion which I have arrived at, after carefully considering the whole of the evidence to the best of my ability, is that the only intention which is consistent with the whole of this gentleman's conduct and with what he said, is an intention not to abandon his English domicile. I quite agree. I think the case is quite exhausted by the Scotch judgments, and the only conclusion is that the appeal ought to be dismissed.

Appeal dismissed with costs.

Counsel for the Pursuers and Appellants—Eve, K.C.—Ward Coldridge—Lord Kinross. Agents—Alexander Morison & Co., W.S., Edinburgh—L. Weatherley, London.

Counsel for the Defenders and Respondents—Sir Edward Clarke, K.C.—The Lord Advocate (Shaw, K.C.)—Cullen, K.C.—C. G. Church—J. Adam. Agents—J. & A. F. Adam, W.S., Edinburgh—Church, Rockham, & Co., London.

Monday, December 4.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Robertson, and Lord Lindley.)

SUTHERLAND *v.* STANDARD LIFE ASSURANCE COMPANY.

(*Ante*, July 3, 1902, 39 S.L.R. 769, and 4 F. 957.)

Title to Heritage—Right in Security—Sale—Heritable Securities (Scotland) Act 1894 (57 *and* 58 *Vict. c.* 44), *secs.* 8 *and* 10—*Sheriff—Citation—Irregularity in Service of Writ not Affecting Title Depending on Decree following thereon.*

The Heritable Securities (Scotland) Act 1894, by section 8, provides means whereby a creditor who has exposed for sale under his security the lands held in security and has failed to find a purchaser, may, by applying to the sheriff, obtain a decree and have his disposition in security made irredeemable, but before such application can be granted it must be served upon the proprietor. Section 10 enacts—"No purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor."

A creditor having had his application under section 8 granted by the Sheriff, and having followed thereafter the procedure necessary to make his disposition irredeemable, disponed the lands to third parties. The proprietor brought an action to have reduced the dispositions and whole proceedings upon the ground that the service of the application upon him had been made by a messenger-at-arms, not a sheriff officer. *Held* that assuming the service of the application was irregular, such irregularity was within the meaning of section 10.

Question whether a misdescription of the property in the advertisement prior to the exposure for sale would be covered.

Process—Appeal—Appeal to House of Lords—Point on Record Requiring Proof not Raised in the Division.

A former proprietor of an estate sought to have reduced proceedings in the Sheriff Court under section 8 of the Heritable Securities (Scotland) Act 1894, whereby a creditor had had his disposition in security made irredeemable, and so become proprietor. He averred on record that in the advertisement of the property prior to the exposure for sale it had been wrongly described, so that it had appeared less than it really was. This point was not raised in the Division, but was taken on an appeal to the House of Lords.

Held that the point, inasmuch as it went to an allowance of proof which had not been asked for in the Division, could not now be entertained, and that it must be presumed to have been abandoned.

This case is reported *ante ut supra*.

Sutherland, the pursuer and reclaimer, appealed to the House of Lords. In addition to the question as to the regularity of the service of the application to the Sheriff, he raised a point not taken when the case was before the Division. On record there was averment to the effect that the property in the advertisement prior to the exposure for sale was not correctly described. If correctly described, might it not have secured a purchaser? This was an irregularity which could not be covered by section 10 of the Heritable Securities (Scotland) Act 1894, and must render the proceedings void, for the Act said "the lands," which must mean "the whole lands," and there was no power, as under the Titles to Land Consolidation (Scotland) Act 1868 (*v.* sec. 119), to sell as a whole or in lots.

The material portion of the averment on record was—"In the plans of the estate of Skibo, and others exhibited to the public in connection with the said exposures, the boundary line (being the undefined boundary line of the parish of Creich) between the Duke of Sutherland's farm of Torboll, wholly situated in the parish of Dornoch, and the estate of Skibo was wrongly shown on the plan and excluded from the subjects exposed a considerable extent of the estate disponed in the bonds and dispositions in security referred to. . . . There was thus excluded from the sale a large tract of land which formed part of the security subjects, amounting to about 400 acres. A valuable piece of ground between the glebe of Creich,

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on the south-west boundary, and the sea was also omitted from said particulars. . . ."

The plea-in-law was—"(5) The said pretended decree or interlocutor ought to be reduced in respect that . . . (c) The lands and others described in the said advertisement and particulars made by the bondholders prior to the exposure of the security subjects, as condescended on, materially differed in extent from the security subjects, and, separately, were not properly and sufficiently advertised, as required by the Titles to Land Consolidation (Scotland) Act 1868 and the Heritable Securities (Scotland) Act 1894."

At the conclusion of the appellant's argument, counsel for the respondents not being called upon—

LORD CHANCELLOR—It seems to me that the judgment of the Court below is perfectly right. Assuming what does not appear to be quite satisfactorily established, that the regular course would have been that this writ should have been served by a sheriff officer, not by a messenger-at-arms, it seems to me that that is an irregularity strictly within the meaning of the 10th section of the Act of Parliament, and therefore whatever question there may be about the regularity of the officer, it does not affect the validity of what was done. It is very obvious that if an irregularity of that sort could set aside the whole proceedings, it would be impossible for a person to buy with any sense of security; it was obviously with the intention of preventing such questions arising afterwards that the 10th section was passed. Even if the facts supplied material for arguing the question I cannot entertain a doubt that it is an irregularity covered by the Act and does not render the proceedings null and void. The procedure was right. The writ arrived at the right person, who had an opportunity of making a defence if he had thought proper, but according to the learned counsel he took upon himself to say—"This writ has been served by the wrong person; I shall not attend to it at all." It seems to me to be an irregularity which the 10th section covers.

I should have felt more difficulty about the other point if it had been raised in the Court below. I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the Court below, because this House ought to make such an order as ought to have been made originally. But the peculiarity of this case is that this is a question which could only have been settled by proof, and we are asked to overrule the judgment of the Court of Session by a suggestion on which, if it was well founded, the Court might have been asked to reverse the proceedings before the Lord Ordinary and to order a proof. It is not merely a question of a point which is a good point and remains a good point, not being argued, but here something was to be done. If the objection was a good one, what the parties complaining ought to have done was to have put it before the Court of Session and asked the Court to do that which ought to have been done by the Lord Ordinary, namely, to allow a proof. The appellant never did ask that, the question never has been raised, and I think now it is impossible for him to ask us to do that and overrule the Court of Session in not doing that which that Court was never asked to do. My judgment certainly proceeds upon the theory that the parties have abandoned that part of their complaint. They never asked it to be done, and it would be impossible for us, I think, under these circumstances to do that which the Court, which we are asked to overrule, were never asked to do. The appellant ought to have asked for it in the Court below, and if then it had been refused we could have entertained the question. At present it appears to me that he is put out of Court by the course he has pursued, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN—I am of the same opinion.

LORD ROBERTSON—I entirely agree.

LORD LINDLEY—I have nothing to add at all. It seems to me that the judgment is obviously right.

Appeal dismissed with costs.

Counsel for the Pursuer and Appellant—Ure, K.C.—J. A. Kemp. Agent—Party.

Counsel for the Defenders and Respondents—The Solicitor-General (Clyde, K.C.)—Shaw, K.C. Agents—Dundas & Wilson, C.S., Edinburgh—Taylor, Son, & Humbert, London.

Friday, December 15.

(Before Lord Halsbury, Lord Robertson, and Lord Lindley.)

WHITE AND OTHERS *v.* WHITE AND SONS.

(*Ante*, January 20, 1905, 42 S.L.R. 330.)

Water — River—Mill Dam—Abstraction—Title to Abstract — Right to Increase Amount Taken.

A Crown charter dated in 1738 granted a mill "cum stagnis lie Dammie Inlairs et acqueductis aliisque integris privilegiis et pertinentiis ejusdem quibuscumque." The mill was on a river and was so described. The dam from which it drew water was a pool in the river formed by a natural barrier of rock which had been slightly raised with wood.

Held (*rev.* judgment of the Second Division of the Court of Session, *aff.* that of the Lord Ordinary (KINCAIRNEY)) that the mill owners had no higher right to abstract water for the mill than that of a riparian proprietor, and consequently that in a question with another millowner who derived his water from

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the same source, they were not entitled to abstract more water than they had been in use to abstract for the prescriptive period.

The case is reported *ante ut supra.*

John White & Sons, the defenders and respondents, appealed to the House of Lords.

At delivering judgment—

EARL OF HALSBURY—A grant of a tract of a natural river, and apparently of all the waters in it, is a novelty in the law, and one which, upon the facts in this case, it seems impossible to insist upon. The rights *inter se* of the different millowners are capable of being ascertained without much difficulty. Lord Kingsdown, in *Miner* v. *Gilmour* (12 Moore P.C.), stated the rule in terms that have generally been adopted ever since. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land. Further, he may, subject to the condition that he does not thereby interfere with the rights of other proprietors either above or below him, dam up the stream for the purpose of a mill.

Of course, rights may be acquired by prescription which to some extent do interfere with what would otherwise be the natural rights of other proprietors both below and above; and I have no doubt that it is here proved that the Old Mill has acquired the right which has been popularly known as the first water, and enjoyed it for a very long period. The extent of that right and the measure of what this involved is in this case one of the questions which have been debated at the bar and in the Court below, but, as it appears to me, without sufficient reason. The question here is whether the Old Mill is entitled to the whole of the waters?

Apart from the extraordinary and to my mind impossible right suggested, which I have first mentioned—I will say no more about it than that there is not the least evidence to support it here—the question comes in this case to the ordinary controversy between proprietors of the banks of a running stream when their operations respectively interfere, or are alleged to interfere, with the operations of each other. In some curious manner—a manner which it is very difficult to understand—it seems to have been assumed in some of the arguments here that the artificial addition to the natural rock, which to some extent forms the dam, has made some difference to the rights of the parties. The right to maintain that artificial addition to the rock may be assumed, but it does not follow that the addition to the rock has in any respect altered the legal relations of the parties, and made what has been part of a running stream hitherto, less a running stream, or turned it into a pond, so that the water enclosed within that pond should become not *publici juris* but water with somewhat of a proprietary right.

A controversy not at all unlike to the present arose in the county of Lancashire just 100 years ago. The cause was tried before Baron Graham in 1805. It appeared that mills had been erected a very long time before—in 1724—and that additions had been made to them at successive periods of forty and twenty years by the defendants. In 1787 the plaintiffs erected their mills, but in 1791 the defendants altered their works, and the sluices by which their works were supplied from the river Irwell were considerably widened and deepened, so that nearly double the quantity of water was drawn from the Irwell than had ever before been taken. This was proved to have materially impeded the plaintiff's works; it interfered with the working of the comparatively new mills which had been erected in 1787. An action was brought before Baron Graham, and in dealing with the rights to which I have referred, that learned judge said this to the jury—"The important period for them to attend to was 1791, when it was clear that an increased quantity had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluices, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much water as had not been appropriated by those under whom the defendants claimed. As a matter of law, I tell you that persons possessing lands next to the banks of rivers have a right to the flow of the water in its natural stream, unless before a right had been acquired in others to enjoy or to divert any part of it to their own use—that every such exclusive right was to be measured by the extent of its enjoyment."

This direction was objected to, and it was urged that the enjoyment by the defendants from 1724 downwards was evidence to be left to the jury of the defendants' right to the whole of the water. The Court of Queen's Bench, with Lord Ellenborough presiding, held unanimously that Baron Graham's direction was accurate, and some of them added that if the verdict had been the other way they would not have allowed it to stand. The case to which I refer is *Bailey* v. *Shaw*, 6 East. 215.

It appears to me that this principle which has been thus laid down, and has been well recognised and acted upon as law for 100 years, is decisive of the present case. According to that principle there is no ground for the contention of the pursuers that they have a right of property in the dam and the water, and that consequently they are entitled to increase the extent of the use thereof as occasion requires. That is a proposition for which it appears to me there is no legal foundation whatever, and I think that the pursuers are not entitled to any preferable right to the use of the waters of the dam to a greater extent than is in accordance with prescriptive usage.

This is sufficient for the decision of this case; we are not trying the exact proportion in which each mill may be entitled to draw water. That which the pursuers claim is an absolute and exclusive right to withdraw all the water. I think that claim is unfounded. I am unable to understand

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what one of the learned Judges—Lord Moncreiff—says at the end of his judgment—"It is not necessary to say how matters would have stood if the pursuers had proposed to add so materially to the machinery of the mill as really to alter its character and deprive the defenders of any water for their mill." I do not understand this proposition as a matter of fact, because that is what I understand the evidence to prove that the pursuers have actually done; nor do I understand it as a matter of law, since if the ground of judgment is right the pursuers here have a right to take all the water.

I think the Lord Ordinary's judgment is perfectly right and ought to be restored, and I move that the judgment of the Court below be reversed and the judgment of the Lord Ordinary restored, with the usual consequences as to costs.

LORD ROBERTSON—I cannot say that I think this is a doubtful case, and it is permissible to believe that less difficulty would have been found in the Court of Session if it had been remembered that this is a question between riparian proprietors as to the water of a river.

The claim of the respondents is to withdraw from the river Kelvin in preference to everybody else 6000 cubic feet of water per minute for the use of their mill. They fix on this figure because that is the requirement of their existing machinery, but they avow that if in the future their requirements increased so would their claim. Now the 6000 cubic feet per minute only began to be abstracted in 1900, when they got some new machinery, and before that they used very much less water. Their claim therefore is not supported by prescriptive use.

Now, the theory of the respondents' case is that the water from which they abstract the water is the dam of their mill, but it is in fact a pool in the river Kelvin, the water of the river moving slowly through the pool owing to a natural obstruction of rock. Owing to this natural storage of the water this part of the river has served the purpose of a dam for the respondents' mill, and the natural barrier of rock has been a little heightened by a ledge of wood. The central fact in the case, however, is that this pool, while it may be called a dam rightly enough in relation to the respondents' mill, is not the less, in juridical quality, a part of the river, and its water is subject to the common law of rivers.

Regarding this stretch of the Kelvin, the respondents' case is stated in condescendence 2 with a frankness which might well have excited the suspicion of the learned Judges, for there the assertion is made that the respondents (whose frontage to the river is only a fraction of the frontage of the pool) have a grant not only of the (so-called) "dam in question" and "*solum* thereof" but of the "water therein." This proposition is, of course, opposed to elementary ideas about the water of a river, for the water would not be the property even of the exclusive owner of the *solum* and of both banks at the place in question. And yet when the present controversy is examined it will be found difficult to support the respondents' case on any other theory.

The claim being one of property, we look to the respondents' titles, and it is unnecessary to refer to more than two, the title of 1738 and the title of 1897. The former is a Crown charter; it grants the mill, which it describes as "super aquam de Kelvin," and then, after granting the thirlage and multures and other things, goes on, "cum stagnis lie Dammie Inlairs et acqueductis aliisque integris previlegiis et pertinentiis ejusdem quibuscumque," and so on. The respondents found on the words "cum stagnis lie Dammie" as embracing a grant of the water of this part of the river Kelvin. It would certainly be strange if so specific and so unusual a right were meant to be described or comprehended in the general plural expression *stagnis*, especially when the river Kelvin has, three lines before, been spoken of as a living river. It seems to me that the words in question, occurring as they do in the ordinary parlance of a grant of a Scotch mill, mean nothing more than that the disponee was to have such dams and such rights in those dams as pertained to the mill (whether in property or by subordinate right), and this construction is justified by the words "and other privileges" which almost immediately follow. They certainly cannot be construed as including a right of property in something essentially and juridically different from ordinary dams or *stagna* as the plural is used of a word which in its ordinary sense applies to other things than rivers.

The title of 1897 (an ordinary disposition) gives the property as bounded by a red line which excludes the river, but then it is added, "declaring, however, that the said red line, so far as bounding the said subjects hereby disponed along the river Kelvin, shall not limit or exclude our said disponees' right in and to the said river so far as we have power to grant same, nor to the water and water power and dam from which said mill is supplied." It is superfluous to say that this does not advance the respondents' case, and it is substantially an echo of the Crown charter of 1738.

The view of the Lord Justice-Clerk is that the Crown charter has made the respondents so completely masters of the situation that they can use the whole of the water if they require it, to the exclusion of the other riparian proprietors. His Lordship does not expressly describe this right as a right of property in the water; but there is no other theory suggested. But that theory is so repugnant to the general law of rivers that it is surprising that there is no discussion of this difficulty.

If, then, the titles do not support the respondents' claim they have really no other case. The truth is that from time immemorial the respondents' mill was in use to abstract water from the river to the extent of the capacity of the sluices of their existing mill; and in law they thus acquired a legal right by prescriptive use to continue that abstraction. This historical fact was crystallised—in the later titles and in the pleadings in various actions—in the expres-

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sion that they had the first water; and it having been ascertained that the amount per minute actually abstracted was 1200 cubic feet, that figure was stated as the amount of their rights. Here we are on the solid ground of a predial servitude by possession, and the rule is *tantum prescriptum quantum possessum*. In this region there is, of course, no room for the maxims about *res merce facultatis* which have been applied to rights constituted by grant. On the other hand, it is equally obvious that the conception of a mill as a growing concern with expanding requirements has no place in a discussion with other riparian proprietors about a servitude constituted by use; and the discussion of this topic by the learned Judges is, of course, due to their holding the respondents to have a grant of the water of the river. Taking, as I do, the opposite view, I hold that the respondents have no right to abstract the water of this river except to the extent to which they have had prescriptive use. It follows that their present claim wholly fails.

In what has been said no examination has been made of the rights of the appellants, and this seems to me entirely unnecessary to the argument. It happens that they, too, have abstracted water, and, like their opponents, seem to have acquired prescriptive right to do so, subject to the earlier and preferable right of the respondents which I have described. But the exact measure of the appellants' servitude rights seems to me immaterial to the present controversy. Their sufficient *locus standi* is as riparian proprietors resisting encroachment on their common law interest in the river Kelvin.

I have only to add that the suggestion that the respondents can piece on the rights of the Slit Mill to the rights of the Old Mill was so completely refuted by the Solicitor-General for Scotland that it is unnecessary to refer to it.

I am clearly of opinion that the judgment ought to be reversed.

LORD LINDLEY—I am entirely of the same opinion. I have studied these judgments with care, and the judgment of the Lord Ordinary convinces me.

Interlocutor appealed from reversed, with costs of the appeal and in the Courts below.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—Younger, K.C. Agents—Macpherson & Mackay, W.S., Edinburgh—John Kennedy, W.S., Westminster—Brown, Mair, Gemmell, & Hislop, Glasgow.

Counsel for the Defenders and Appellants—Clyde, K.C.—Cullen, K.C. Agents—A. Morrison & Co., W.S., Edinburgh—Ingle, Holmes, Sons & Pott, London—Donaldson & Alexander, Glasgow.

Tuesday, December 19.

(Before Lord Halsbury, Lord Robertson, and Lord Lindley.)

INLAND REVENUE *v.* OLD MONKLAND CONSERVATIVE ASSOCIATION.

(In the Court of Session November 22, 1904, *ante* 42 S.L.R. 121, and 7 F. 119).

Revenue—Income-Tax—Exemption from Income-Tax Claimed by a Society—Statute—Construction—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 163.

The Income-Tax Act 1842, section 163, grants exemption to "any person charged or chargeable with the duties" who shall prove that his income does not exceed a certain amount. *Held* (*rev.* the judgment of the Court of Session) that this exemption applied only to persons proper and not to societies.

Expenses—Crown Case—Test Case.

The Inland Revenue brought an action to recover income-tax in a case where exemption was claimed, and, being unsuccessful, appealed to the House of Lords. At the discussion the respondents asked that they, whether successful or not, should be granted their expenses inasmuch as it was a test case. Counsel for the appellant (pursuer) consented. On judgment being given for the appellant their Lordships made an order granting the respondents their expenses both in the appeal and in the Courts below.

The case is reported *ante ut supra.*

The Inland Revenue (pursuer) appealed to the House of Lords.

At delivering judgment—

LORD ROBERTSON—The section primarily and directly under construction is the 163rd of the Act of 1842, and it purports to confer an exemption upon persons. "Any person charged" is the recipient of the exemption. This of course carries us straight to the charging sections, and in that section which hits the respondents, viz., section 40, we find that while societies (I use this term for shortness) meet the same fate as persons, the scheme of the section is to do this by express enactment, the section holding the two notions, of societies and persons, as antecedently separate and requiring enactment to bring about their identic treatment in the matter of charge.

In full view of this structure of this charging section, the exempting section, instead of either expressly applying both to persons and to the bodies which are charged in the same way as if they were persons, or adopting some neutral term common to both persons and societies, deliberately adopts one only of the two contrasted classes and confers the exemption on "persons." It seems to me that this is decisive of the construction; that societies are purposely left out; and that the per-

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sons favoured are persons in the primary sense of the term—the same sense in which the word is used in the 40th section itself.

In this view the Act has not left the scope of the exemption to inference from a *prima facie* probability that the exemption would square (as regards the class affected) with the charge. But I am not sure, when the subject-matter is looked to, that there is any such *prima facie* probability, for it is at least conceivable that the needs or poverty of the individual should be viewed in a different light from the needs and the poverty of a society. And this view is supported by the machinery provided for the individuals of, *e.g.*, a partnership, working out their own relief.

I am unable to think that the present question is affected or elucidated by those provisions which place on the officers of societies the duties in relation to the charge which in the ordinary case fall on the individual to be charged. And (to mention another argument relied on in the Court of Session) the view that the 192nd section which makes "person" read as "persons" seems to prove too much. If it were sound, the charge on the Conservative Association is wrong, and the charge ought to have been made on the individual members of the association. I think the charge was rightly made on the association, and that the true question is whether the association is entitled to the exemption. I think it is not, and therefore I am for allowing the appeal, and I move accordingly.

LORD HALSBURY—I have had an opportunity of reading the judgment which has been delivered by my noble and learned friend Lord Robertson; and my noble and learned friend Lord Lindley, and I, both concur in what he has said, and we desire to add nothing.

Counsel for the respondents here reminded their Lordships that he had in the discussion asked for expenses both of the appeal and in the Court below, and that counsel for the appellants had agreed to the request as it was a test case.

LORD HALSBURY — Well, that the Crown should win and that you should get the costs both here and below strikes me as a very odd thing, but if the parties have agreed to that the House will make the order.

Interlocutor appealed from reversed and costs in the House of Lords and the Courts below granted to the respondents.

Counsel for the Pursuers and Appellants—The Attorney-General (Sir R. Finlay)—The Lord Advocate (Scott Dickson, K.C.)—A. J. Young. Agents—Sir F. C. Gore (Inland Revenue), London—P. J. Hamilton Grierson (Solicitor of Inland Revenue), Edinburgh.

Counsel for the Defenders and Respondents—C. N. Johnston, K.C.—R. S. Horne—H. W. Beveridge. Agents—A. & W. Beveridge, London—Gray & Handyside, S.S.C., Edinburgh—Bishop, Milne, Boyd, & Russell, Glasgow.

COURT OF SESSION.

Friday, November 17.

FIRST DIVISION.

[Lord Low, Ordinary.

ROBB *v.* GOW BROTHERS & GEMMELL.

Fraud—Principal and Agent—Stockbroker—Fraud by Stockbroker's Accredited Clerk—Stockbroker not Liable for Certificates of Stock Misappropriated by Clerk nor for Sums of Money Credited to Client in Monthly Account Receipted by Clerk.

An "accredited" clerk in a stockbrokers' office obtained possession of certificates of stock belonging to a client whose brother-in-law he was, which had been left in the office, and, executing forged transfers, sold the stock and appropriated the proceeds. On another occasion in the fortnightly account rendered to the client he credited him with the amount of a cheque and receipted the account, although the stockbrokers had not received the cheque, which he had appropriated to his own use. It was not proved that he had any authority to grant receipts.

Held (*affirming* judgment of Lord Ordinary (Low)) that the rule of law established in *Barwick* v. *English Joint Stock Bank* (L.R. 2 Ex. 259), and *Clydesdale Bank* v. *Paul* (March 8 1877, 4 R. 626, 14 S.L.R. 403), whereby an innocent principal is only held liable for his agent's fraud where the fraud is committed within the scope of the service and for the principal's benefit, applied, and that the stockbrokers were consequently not liable.

Contract—Breach of Contract—Stockbroker—Purchase of Shares—Certificates not Delivered to Client but Allowed to Remain in Stockbrokers' Office—Failure of Client to Demand Certificates—Negligence—Delay—Liability for Loss.

A instructed a firm of stockbrokers to purchase shares. In his transactions with the firm he invariably dealt with C, a confidential and "accredited" clerk in the firm's employment, and also his brother-in-law. A duly paid for the shares, and became the registered holder, but the certificates sent by the companies to the stockbrokers were not sent on to him but remained in the office, and as he was going on with a series of other transactions A did not ask for them. C executed forged transfers, sold the shares, and pocketed the proceeds.

The first of the transfers in favour of A was dated November 1901, and the last December 1902. C absconded in September 1903. In April 1904 A brought an action for delivery of the certificates (or otherwise for damages).

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Held that as A's claim had not been timeously made, the defenders were not liable for the loss.

Opinion (*per* Lord President) that in ordinary stockbroking transactions the contract with the stockbroker included the delivery to the client of the certificates for the stock purchased.

Payment—Proof—Bearer Cheque—Entry in Fortnightly Account—Forged Entry of Receipt of Cheque—Fraud by Clerk in Employment of Intended Payee—Liability for Loss.

In payment of shares bought for him by a firm of stockbrokers, A drew a bearer cheque for the price, which he either sent by post to the firm or handed to C, a confidential clerk in the firm's employment. C stole the cheque, made a forged entry of the receipt of the money in the fortnightly statement which the firm were in the habit of sending to A, and discharged the account. C had no power to bind the firm for receipt of money. A having brought an action against the firm for delivery of the shares, the firm pleaded that they had not received payment. *Held* that as A's method of transmitting the money was not a reasonably safe method to adopt, and as C had not *de facto* power to grant receipts on behalf of the firm, the defenders were not liable for the loss.

Opinion (*per* Lord M'Laren) that "to send a cheque which is not only not crossed, but is made payable to bearer, is, according to modern ideas, not a payment in the ordinary course of business."

This was an action at the instance of Andrew Robb, cattle and sheep dealer, residing at Flemington Farm, Newton, Lanarkshire, against Gow Brothers & Gemmell, stock and share brokers, 21 West Nile Street, Glasgow.

The action, brought in April 1904, concluded for delivery of the certificates of certain shares which the pursuer alleged had been purchased by the defenders on his instructions and on his behalf, and also for a count and reckoning in regard to the shares and the dividends thereon. Alternatively, the pursuer claimed payment of £2500 in respect of the loss sustained through the non-delivery of the shares.

The pursuer pleaded, *inter alia*—"(1) The defenders having purchased the said shares on behalf of the pursuer, and having received payment of the price thereof, the pursuer is entitled to delivery of the necessary share certificates as concluded for. . . . (3) In the event of the defenders failing to deliver the certificates for said shares to the pursuer, they are bound to account to the pursuer for the value or proceeds thereof. (4) Alternatively, the pursuer having, through the actings of the defenders, suffered loss and damage to the amount concluded for under the fifth conclusion of the summons, decree should be granted for the sum sued for."

The defenders pleaded, *inter alia*—"(4) The pursuer not having suffered loss and damage through the actings of the defenders, the defenders ought to be assoilzied. . . . (6) The pursuer is barred by his actings, as referred to in the defenders' answers and statement of facts, from insisting on his present claim."

A proof was allowed. The facts are given in the opinions of the Lord Ordinary and the Lord President.

On 23rd February 1905 the Lord Ordinary (Low) assoilzied the defenders from the conclusions of the summons.

Opinion.—"The pursuer is a cattle dealer and the defenders are stockbrokers in Glasgow. For a number of years prior to September 1903 one William Cook was clerk in the defenders' office. He and the pursuer were intimate, and in March 1901 Cook married the pursuer's sister. Cook asked the pursuer to employ the defenders in Stock Exchange transactions (of which the pursuer seems to have had a great number), giving as his reason that he obtained a commission upon any business which he brought to the defenders. That was not strictly true, because there does not seem to have been any agreement between Cook and the defenders that he should be entitled to a commission upon business introduced by him, but he was given to understand that his services in that way would be recognised, and in the last year during which he was in their service he received from the defenders a bonus or honorarium of £1000.

"The pursuer accordingly did employ the defenders in a number of transactions between September 1901 and February 1903. In September 1903 Cook absconded, and it was then found that he had carried through a series of frauds in regard to stocks and shares which the pursuer had instructed the defenders to purchase for him. The pursuer now seeks to have the defenders made liable for the loss which he has thereby suffered.

"Until Cook absconded no one seems to have suspected that he was dishonest, and he possessed the complete confidence both of the pursuer and the defenders. When the pursuer desired to give instructions for the purchase of stock he appears generally to have gone to the defenders' office, and upon these occasions he invariably saw Cook and gave his instructions to him. The pursuer says that he also sometimes communicated his instructions by telephone to the Stock Exchange. It is, of course, impossible to say who answered his call on these occasions, but it is not proved that anyone ever took instructions from him except Cook. I may here mention that Cook was one of the defenders' accredited clerks upon the Stock Exchange—that is to say, he was authorised to make bargains upon the Stock Exchange which would be binding upon the defenders.

"The summons refers to nine lots of shares, the first four of which are in the same position. These are (1) one hundred shares of the British South African Company, (2) thirty shares in the same Company, (3) thirty shares in the Johannesburg

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Investment Company, and (4) thirty shares in the same company.

"In regard to all these shares it is admitted that the pursuer instructed the defenders to purchase them, that the defenders did purchase them, that the pursuer duly paid the price and the defenders' commission, that transfers in favour of the pursuer were obtained, and that the respective companies sent share certificates in favour of the pursuer to the defenders. If the pursuer had obtained possession of the certificates, the transactions, so far as the defenders were concerned, would have been closed and completed. The pursuer, however, says that he never obtained the certificates, and whether he did so or not it is certain that they ultimately came into Cook's possession, because the latter sold the shares through other brokers, pocketed the price, and forged transfers in the pursuer's name. Cook could not have carried out these sales unless he had had possession of the certificates.

"I think that it is established that the certificates were not sent to the pursuer by post in the ordinary way, because in that case the defenders would have got receipts for them, and they have no receipts. It was suggested that Cook might have handed the certificates to the pursuer when he was calling at the office. The pursuer, however, says that Cook did not do so, and, further, if Cook had given the certificates to the pursuer I see no reason why the latter should have handed them back to Cook. The pursuer further says that he asked Cook why he had not received the certificates, and that Cook told him the defenders had them. That answer seems to have satisfied the pursuer, because he says that he thought the certificates would be quite safe in the defenders' keeping.

"The plain inference from the circumstances seems to me to be that when the certificates were sent to the defenders' office Cook took possession of them. I think that he was in a position to do so without exciting suspicion. He evidently held a good position in the office, and I suppose that every one there knew that it was through him that the pursuer had come to employ the defenders, and that he was the person whom the pursuer always saw when he came to the office, and to whom he gave his instructions. If, therefore, Cook said that he would take the certificates and deliver them to the pursuer I do not think that anyone in the office was likely to be surprised or suspicious.

"The question is whether in these circumstances the defenders are liable to indemnify the pursuer for the loss which he has sustained through Cook's fraud?

"I think that the rule of law applicable is that which was laid down in the case of *Barwick* v. *English Joint Stock Bank* (L.R. 2 Exch. 259). It was there held that 'no sensible distinction can be drawn between the case of fraud and the case of any other wrong,' and that the general rule is 'that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit.' That rule has been repeatedly recognised and acted upon both in this Court and in England.

"Now, I doubt very much whether Cook's fraud can be said to have been committed in the course of his service. No doubt it was the fact that he was in the defenders' service, which enabled him to get possession of the certificates, but he had no authority to take possession of the share certificates of any client of the firm, and to do so was entirely outside the scope of his duties. Even, however, if it should be held that Cook was acting within the scope of his employment, that is not enough to impose liability upon the defenders, because it must also be shown that when Cook committed the fraud he was doing something in furtherance of his employment and for his employers' benefit. I think that it is plain that that was not the case here. Cook was not doing anything for the defenders, nor could what he did in any circumstances have been for their benefit. I am therefore of opinion that as regards the first four lots of shares the defenders are not liable to the pursuer.

"The shares referred to in the ninth place in the summons—namely, thirty shares in the East Rand Proprietary Mines—are in exactly the same position as the first four lots with which I have dealt. Cook obtained possession of the share certificate, sold the shares under a forged transfer, and embezzled the price. For the reasons which I have given I do not think that the defenders are responsible.

"The shares which are referred to in the fifth place in the summons are one hundred shares of the Barnato Consolidatad Mines. The pursuer on 14th February 1902 instructed the defenders, through Cook, to purchase these shares, and they did so for settlement on the 27th February. On the 24th February, however, Cook informed the defenders that the pursuer desired that the shares should be sold, and accordingly they were sold at a loss of £35, 1s. The pursuer had not instructed Cook to have the shares sold, but intended to take them up. The defenders' books record the sale of the shares on the 24th February, but the pursuer never received a sold note. He did, however, receive an account dated 24th February bringing out a balance of £574, 1s. 6d. as due by him, and which included the price at which the hundred Barnatos had been purchased for him. That account is in Cook's handwriting. On 4th March the pursuer handed to Cook a cheque for the amount of the account (£574, 1s. 6d.), and Cook discharged the account—'For Gow Bros. & Gemmell, W.C.' The cheque was drawn in favour of the defenders, but it was a bearer cheque, and Cook paid it into his own bank account.

"I think that there can be no doubt that Cook intercepted the sold note which in ordinary course of business should have been sent to the pursuer, and which according to the defenders' books was sent to him. Of course, if that sold note had

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reached the pursuer, Cook's fraud would have been exposed. There can also be no doubt that the account sent to the pursuer was an account fabricated by Cook to lead the pursuer to believe that the shares had been duly purchased, and to induce him to pay the price. The account appears to have referred to other shares besides the Barnatos, and I do not know what happened in regard to them. They are not, however, included in this action.

"Now, the initial step of this fraud was Cook's representation to the defenders that the pursuer did not intend to take up the shares, but desired that they should be sold. In making that representation it is plain that Cook was not acting in the course of his employment as the defenders' clerk—indeed he was not acting as their clerk at all, but ostensibly as the pursuer's agent. In regard to the subsequent steps by which the fraud was accomplished, Cook was plainly not acting within the scope of his employment when he intercepted the sold note which in ordinary course would have reached the pursuer. Then in making out an account as if for a purchase of the shares, Cook may have been acting within the scope of his employment in this sense, that he may have had authority to make out and render accounts due by clients, but he did not act in any way for the benefit of the defenders. I may here refer to two cases which illustrate very well what is meant by the proposition that to render a master liable for the fraudulent or wrongful act of his servant the latter must be acting for the benefit of the former. In the case of *Clydesdale Bank* v. *Paul* (4 R. 626) it was held that a stockbroker was liable for money which had been fraudulently obtained by his accredited clerk, because the money was used to pay a debt upon the stock exchange for which the master was in law liable, although it had been fraudulently incurred by the clerk acting in his name.

"The other case is *Dyer* v. *Munday* (L.R. 1895, 1 Q.B. 742). There the servant of a furniture dealer who had given out an article of furniture upon sale and return, went to recover the article from the customer (who had not implemented the terms of the agreement), and in doing so committed an assault upon him. The latter claimed reparation from the master, and the Court held that the claim was relevant, because when the servant committed the assault he was acting in his master's employment, and was seeking to recover the article of furniture for his master's benefit.

"Now, in rendering the account in question to the pursuer, Cook was not seeking to recover anything or to obtain any benefit for the defenders. That being so, the mere fact that it was Cook's position as the defenders' clerk which made it possible for him to commit the fraud is not enough to render the defenders liable for the loss which the pursuer has sustained.

"The shares referred to in the sixth place in the summons are twenty ordinary shares in Nobel's Dynamite Trust Company. These shares were purchased by the defenders for the pursuer upon the 16th September 1902 for settlement on the 26th September, but they were sold on the 22nd September. That must have been done upon Cook's representation that the pursuer wished them sold. Here again Cook appears to have prevented the fact of the re-sale coming to the pursuer's knowledge, and upon the settling day he presented an account to the pursuer, which included the price of the shares upon the footing that the purchase had been carried through, and obtained from the pursuer a bearer cheque for the amount (£341, 6s. 8d.), which he appropriated to his own use.

"The circumstances in this instance therefore are practically the same as in the case of the Barnato shares, and for the reasons which I have given in the latter case I am of opinion that the defenders are not liable for the loss which the pursuer has sustained.

"There are two other lots of shares included in the summons, being in both cases twenty shares in Nobel's Dynamite Trust. The defenders had nothing to do with these two lots of shares, and there is no entry relating to them in their books. What happened was this. The pursuer instructed Cook to purchase the shares. Cook did not do so, but without any purchase being made he sent bought notes to the pursuer, then upon settling day he fabricated accounts, obtained bearer cheques from the pursuer, and applied the proceeds to his own purposes.

"It was argued for the pursuer that Cook having been the defenders' accredited clerk, and having accepted the pursuer's instructions to purchase the shares, the defenders thereby became bound to do so, and must either obtain the shares for the pursuer now, or indemnify him for the loss which he has sustained.

"Now, Cook was only an accredited clerk of the defenders on the Stock Exchange and in regard to Stock Exchange transactions. Otherwise he was in no better position than any other clerk in the office, and it seems to me that if a client of a stockbroker chooses to give his instructions to a clerk in the office, who forgets or neglects to pass them on to his employer, the client has no claim against the stockbroker. But further, I do not think that, in relation to the pursuer, Cook can be regarded as nothing more than a clerk in the defenders' employment. The pursuer admittedly did business with the defenders in order to benefit Cook, to whom he was related, and in whom he had complete confidence, and he employed Cook as his agent to convey his instructions to the defenders. In the case of the last two lots of shares, Cook, instead of conveying to the defenders the instructions with which the pursuer had entrusted him, took advantage of the fact that he had received the instructions to perpetrate a fraud against the pursuer on his own account, and without bringing in the defenders in any way whatever. In such circumstances I think that the defenders have not incurred any liability to the pursuer.

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"I am therefore of opinion that, as regards the whole of the shares which form the subject of this action, the pursuer has failed to establish his claim."

The pursuer reclaimed, and argued—The action was laid upon contract and not upon fraud. The conclusions of the action were for delivery conform to contract notes. It was the function of a broker to make an enforceable contract for his client—*Maffett* v. *Stewart*, March 4, 1887, 14 R. 506, at p. 517, 24 S.L.R. 402. *As to Lots* 1, 2, 3, 4 *and* 9—It had not been proved that these shares had been delivered. The pursuer was therefore entitled to decree. *Quoad* these shares, Cook was the defenders' and not the pursuer's agent. There was no evidence to show that the pursuer had given the shares to Cook. *Esto* that the pursuer gave his instructions to Cook, that did not make him his agent. Failure to deliver the scrip was due to the defenders' negligence, and they were therefore liable—*Farquharson & Company* v. *King & Company*, [1901] 2 K.B. 697. The certificate was not, as the respondents contended, a mere voucher; it was a document under the seal of the company, and was equivalent to a property title as between the company and the holder. It was a most important document—*In re Bahia and San Francisco Railway Company*, 1868, L.R. 3 Q.B. 584; *Shaw* v. *Port Philip Gold Mining Company*, 1884, L.R. 13 Q.B.D. 103; *Dixon* v. *Kennaway & Company*, [1900] 1 Ch. 833. The cases cited by the respondents were based on section 31 of the Companies Act 1862. The pursuer was not barred by the notices of transfers sent by the various companies, as he never got them. In any event, the pursuer was entitled to proceed against the defenders—Addison on Torts (7th ed.), 750; *Swan* v. *North British Australasian Company*, 1863, 2 H. & C. 175. The pursuer was not barred by delay. Any delay on his part was due to his trust in the defenders. *As to Lots* 5 *and* 6—The pursuer had paid for these shares. Payment was sufficiently proved. The cheques sent by the pursuer were entered in Gow & Gemmell's account, and that implied payment to them. He had either handed them the cheque in their office or had sent it by post. If Cook got hold of it the defenders were liable. Cook was their servant, and if he was put in a position which entitled him to sign receipts, the defenders were responsible for his conduct. On the question of payment reference was made to *Wilmot* v. *Smith*, 1828, 3 C. & P. 453 (note); *Barrett* v. *Deere*, 1828, 1 M. & M. 200. *As to Lots* 7 *and* 8—These shares were in the same position as lots 5 and 6, although there was no genuine contract note. Contracts made by Cook were binding on the defenders, as he was their agent. In the whole circumstances the pursuer was entitled to delivery of his shares, or alternatively to get his money back.

Argued for respondents—The Lord Ordinary was right. The defenders had all along treated Cook as the pursuer's accredited agent. *As to Lots* 1, 2, 3, 4 *and* 9—Cook received the certificates as Robb's agent. The pursuer had been put on the register, and the defenders had therefore fulfilled their obligation to make him owner. Notices of transfers were regularly sent to the pursuer, but he had disregarded them. The pursuer had mistaken his remedy. His remedy was to have the register rectified, as forged transfers could not be recognised, and the pursuer could vindicate his right to the shares against the transferee—Lindley on Companies (6th ed.), pp. 667-671; *In re Bahia and San Francisco Railway Company, cit. supra*; *Johnston* v. *Renton*, 1870, L.R., 9 Equity 181; *Balkis Consolidated Company* v. *Tomkinson*, [1893] A.C. 396; *Sheffield Corporation* v. *Barclay*, [1903] 1 K.B. 1, 2 K.B. 580. *rev.* 1905, W.N. 118. The pursuer had sustained no damage, for he had not lost his shares—he had merely lost the voucher. He was entitled only to the expense of removing the forged transfers, probably also to damages, but not to the value of the property. Assuming the shares had been deposited with the defenders, they were in the position of a gratuitous bailee, and were not liable for theft — *Giblin* v. *M'Mullen*, 1868, L.R. 2 P.C. App. 317. The defenders had exercised reasonable care, and they were not bound to do more. The pursuer was guilty of negligence in not looking after his scrip, and he was therefore barred from suing for its recovery. *As to Lots* 5 *and* 6—Payment had not been proved. It had not been proved that payment was made to the firm, or to Cook in the firm's office. The probability was that Cook was instructed to pay, and if during the transit Cook stole the money, he did so while acting as pursuer's agent, and the defenders were not liable. In any event, a bearer cheque was not equivalent to payment until money had been got for it. *As to Lots* 7 *and* 8 — The same argument applied to this group as to the preceding group. There was no contract note, and no evidence of payment. Cook must have kept the money, as the defenders never got it. There was no evidence that the money was handed to Cook in the defenders' office. The probability was that it was given to him either at Robb's house or his own.

At advising—

LORD PRESIDENT—This is an action in which Mr Robb sues a firm of stockbrokers in Glasgow. The conclusions of the summons are for delivery of the certificates in respect of five different parcels of shares which are numbered in the conclusions of the summons 1, 2, 3, 4, and 9, and for delivery of two other parcels of shares, which are numbered in the summons 5 and 6, and 7 and 8.

The circumstances out of which the transactions arose were these. The pursuer is a cattle dealer, and seems to have had a taste for Stock Exchange speculations. In March 1901 his sister married a Mr Cook, who at that time was a clerk in the defenders' employment. Cook was not then, and never became, a partner of the defenders' firm, but he was what was

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called an accredited clerk. Now, although the proof upon this matter is not, perhaps, quite so full as it might have been, still I think the meaning of an accredited clerk is this, that he is a person who on the Stock Exchange has right to bind his firm; further than that I do not think the proof goes. But Mr Cook undoubtedly brought to the defenders as much business as he could in a way which is quite familiar, and to anyone who knows the proceedings of the Stock Exchange not in the least unusual. He does not seem to have been paid by any actual covenanted commission; in particular, he was not on what is called the half-commission arrangement—a well-known arrangement—but at the same time he did get a certain amount of gratuity or acknowledgment from his employers in respect of the business he brought, and the business he brought must have been considerable, as shewn by the fact that in one year he seems to have got no less than £1000 by way of commission, his regular salary being £200 a-year. The sum of all that comes to this, that Cook's position was that of an accredited clerk, that it was a confidential relationship, that he did a large amount of business for his employers, but that he never was a partner.

Now, Cook having become the brother-in-law of the pursuer, naturally enough suggested to the pursuer that he should leave the brokers whom he had hitherto employed in the conduct of his Stock Exchange speculations, and should transfer his business to the firm of which he (Cook) was an accredited clerk. That was natural, because of course Cook would get the benefit of the business he thus introduced. Accordingly the pursuer did so, and he entered upon a long series of Stock Exchange speculations which he carried through by means of the defenders' firm. The pursuer seems to have been a man of some means, making money in his own business of cattle dealing, and accordingly his transactions were of what may be called a mixed character. He sometimes took up his shares and sometimes he did not, but merely paid on differences in the ordinary way. Cook was trusted by everybody, and in particular, as far as the pursuer was concerned, Cook seems to have been the man that he always saw. The pursuer sometimes gave his instructions by going to the office, in which case Cook was generally the person that met him. He sometimes gave them by telephone, in which case, though not invariably, Cook's was the voice that he heard. But it was, I think, quite clearly recognised, both by the pursuer on the one hand, and by the defenders' firm on the other, that Cook was the person in the defenders' office who attended to the pursuer's business.

Now, as I have said, Cook was a trusted man, but in September 1903, that is to say, about two and a half years after he had become the pursuer's brother-in-law, Cook absconded. It was then discovered that he had committed a number of frauds upon his employers, and it is owing to Cook's absconding that the trouble has arisen which caused the present action.

As I have already indicated, the shares in question fall into three separate batches, the first of which, viz., lots 1, 2, 3, 4, and 9, specified in the summons, are all in this position. There is no doubt that Robb ordered the buying of them, there is no doubt that they were bought, there is no doubt that the price was paid, and there is no doubt that the shares themselves were duly delivered, because in each and all of them there was a transfer duly executed by the transferror, and by Robb, the pursuer, as the transferee, and, accordingly, Robb became the registered holder of these various shares. The certificates of the shares were duly sent by the companies in which the particular shares were to the stockbrokers, and of course in ordinary circumstances those certificates would have been sent on to the pursuer, but as a matter of fact he never got them, in the sense, at least, of taking them away from the stockbrokers' office, the consequence of which was that these certificates being left in the brokers' office, Cook in some way or other got hold of them, executed forged transfers, sold the shares on the Stock Exchange to innocent buyers on his own behalf, and pocketed the proceeds.

Now, the Lord Ordinary has dealt with this group of the shares in this manner. After a narration of the facts, which for all practical purposes is identical with the view that I have indicated, his Lordship treats the matter as depending upon the rules of law which are laid down in the well-known cases of *Barwick* v. *English Joint Stock Bank* (L.R. 2 Ex. 259), and *Clydesdale Bank* v. *Paul* (4 R. 626), which are cases dealing with the question how far an innocent principal may be made liable for his agent's fraud. The Lord Ordinary thinks that that is the law applicable to this case, because, after pointing out that Cook had got hold of these certificates and used them for fraudulent purposes by means of fraudulent transfers, he then inquires whether these principals are liable for Cook's fraud, and applying the law laid down in those cases he arrives at the conclusion that they are not.

In that aspect of the case I think the Lord Ordinary is perfectly right, and if that were the whole case I should entirely agree with his Lordship in the law which he has applied, and in the results which that law leads to. But when the case came to the Inner House it was argued upon another ground, which I am bound to say is outside the Lord Ordinary's judgment. As far as I can see, his Lordship was not asked to determine this matter, because what I am now going to say does not in any way displace the Lord Ordinary's judgment, but is simply another view of the case which is outside of and does not touch or controvert his Lordship's judgment in any way.

That view of the case is this, that the action is not really laid upon fraud at all, but that it is simply an action based upon breach of contract, being an action for de-

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livery. Now, of course if we are to look at it in that way the first point is, what is the contract? The contract here was the ordinary contract which a man makes with his stockbroker when he instructs him to buy shares. If any question were going to be raised as to this, I think that here again the proof is somewhat defective, because although persons from the Stock Exchange were examined, very little attention was directed to the rules of the particular Stock Exchange in which these transactions took place, or as to the general practice of the Stock Exchange, so that your Lordships were left to decide what after all is really a commercial matter merely on your own experience and without any direct evidence of commercial men.

It is, I think, common knowledge that a stockbroker who is acting for a buyer, after having got the transfer from the transferror, and sent it to his buyer to execute as transferree, gets back the transfer and procures from the company a certificate for the shares. Undoubtedly we know that this was done on this occasion, because there is no dispute that the certificates of these shares were duly sent by the secretaries of the various companies to the defenders. I am bound to say I should be prepared to hold, without further evidence, that it is part of the stockbroker's bargain—part, I mean, of the duties which he undertakes to do for a commission which he charges and which he is paid—to see the transaction to its end; and the end of the transaction is when he duly forwards the certificate of the shares to his buying client. Accordingly I am not surprised that one of the stockbrokers, who is one of the defenders, says, no doubt casually and incidentally, without perhaps realising what the full strength of what he was saying was, but yet undoubtedly quite plainly does say, that "delivery of the certificate closes the transaction." Therefore when I consider the contract I do think the defenders here did bind themselves to deliver the certificates of these various shares to the pursuer. That of course lays upon them the onus of howing that they have fulfilled their contract. I confess that if this matter had been recent I should have held that it was for the defenders to show that they had done so, and that it would have been no excuse on their part to say, "Oh, well we do not know, but we suppose that Cook in our office must have stolen the certificates." I do not think it would be an excuse for the non-performance of a contract to deliver an article to say, "Oh, I cannot perform it, for somebody stole the article before I delivered it," any more than it would be for a shopkeeper from whom you had bought a thing in a shop, and who had undertaken to send it home by his own message boy, to say that he could not deliver it because the message boy had run away with it. I confess at one time I was somewhat impressed with that view of the case, but upon more mature consideration I have come to be of opinion that I cannot take that view here because of the dates. The shares of which I have been speaking, namely, lots 1, 2, 3, 4 and 9, were all bought some time ago. The transfer of No. 1 was on 8th November 1901; of No. 2, 21st January 1902; of No. 3, 14th February 1902; of No. 4, 2nd February 1902; and of No. 9, 16th December 1902. Cook did not abscond until September 1903, and the summons in this action is dated April 1904. That being so, it seems to me that looking at the whole evidence of what took place—and here I may say I have looked very carefully at the proof—it is perfectly clear that the pursuer knew or might have known that he could have got these certificates; but he simply chose to leave them in the stockbrokers' office, because he was going on with a series of transactions, and because he trusted Cook. To shew how this matter stands I would ask your Lordships' particular attention to one small passage in the evidence of the pursuer himself. As I have already said, this gentleman sometimes took up his shares, and sometimes he just went on with his speculative transactions. On one occasion, however, he seems to have been a little pressed for money, and not being able either to take up the shares, or to provide the stockbrokers with a proper margin to keep them safe, some sort of arrangement had to be made. I read now from the pursuer's evidence. He says—"Cook mentioned to me that South African shares were dropping in value, and that the defenders were requiring a bigger margin. (Q) Did that mean that the bank wanted more security, and you had to give more to Gow Brothers & Gemmell?—(A) That is what I understood. I did that by taking in scrip for other shares which I bought through the defenders. I saw Cook about this in the office. It was suggested that I should hand back those shares. (Q) The scrip you had already got?—(A) Yes, and it would be transferred to the bank. I was to sign transfers. I understood they were to be placed along with the others with Gow Brothers & Gemmell's bank. I had never done anything of this kind myself before. (Q) Did you rely entirely upon the defenders carrying the transaction through for you?—(A) That is so. I had no meetings at this time about this matter except with Cook. I called afterwards at the defenders' office with scrip. I saw Cook and gave him the scrip. He told me to sign some transfers, and he produced the transfers. I do not think they were filled up. They described what the stock was. I signed them. (Q) Did he say what this was for?—(A) Yes, to convey the stock to the bank. It must have been about two months after I had bought the stock—August 1902. I cannot exactly say what scrip I had left. I have no note of it. There were Chartereds. I cannot say what the value of them was. I should say it was roughly about £2000. I saw Cook after I had given him this scrip and signed the transfers, and he said Gow Brothers & Gemmell had arranged the matter for me. He told me that in Mr Gow's office." I am not reading that evidence as proving in any way exactly that these particular shares were transferred to the bank for what is a

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very ordinary security transaction, but I am reading it as shewing what was the course of business that was going on at this moment between the pursuer and Cook. It is perfectly clear that he was leaving the general management of his affairs with Cook, because to his knowledge transfers were being signed from time to time, and scrip was being left with the defenders, no doubt being retransferred as soon as the course of the speculation permitted, and it was no longer necessary to borrow money from the bank. In the face of that it seems to me impossible to allow the pursuer to lie by for a period of three or four years, and then to say, "You have never delivered these certificates," which I quite agree under the contract they were bound to deliver at first.

Accordingly, in regard to this first parcel of shares, I do not think this new argument makes any difference, because I do not think that in such circumstances Cook's absconding with the shares can be treated as a failure to deliver. I think the practical effect of the evidence is to shew that there was delivery to the pursuer in this sense, that it was entirely with the pursuer's assent that the particular scrip was left in the office of the defenders. That being so, if Cook got hold of it, he got hold of it in one or other of two ways, either with the absolute knowledge and connivance of the pursuer himself, in which case he acted for the moment as his agent, or if he did not, then he got hold of it fraudulently, and then the Lord Ordinary's law comes in, as I think perfectly correctly. Accordingly upon the first batch of shares I arrive at the same conclusion as the Lord Ordinary.

I pass now to the second and third groups of shares. The second batch, consisting of lots 5 and 6, are in this position. There is no doubt as to the order to purchase having been given, for the pursuer bought the shares, and there is no doubt that these shares themselves—observe I am using the word "shares" and not "certificates"—were never transferred to the pursuer, because in this case there are no transfers extant in his favour. As a matter of fact, I think the shares were bought, but were afterwards sold by Cook before the transfer was ever made to the pursuer. The answer of the defenders here is that they were never paid for them. Now that matter depends upon this. The pursuer believed honestly that he did pay for them, and there is no doubt about this, that he drew a cheque intending to pay for them. The cheque which he signed, however, was a cheque payable to bearer. What he did with the cheque is a little uncertain. I should say that I think the pursuer throughout this matter has been perfectly straightforward in his evidence. He deponed—and I think it is greatly to his credit that he did so—that he really could not tell what he did with the cheque. "But," he says, "from my course of dealing I am sure I did one of two things—I either handed it to Cook, which I think exceedingly likely, or, if I did not hand it to Cook, I put it in an envelope and addressed it to the defenders." No one can tell which of these two things happened, but practically it does not much matter in the result, because if Cook did not get the cheque handed to him, he doubtless knew his brother-in-law's handwriting, and he must have opened the letter addressed to the firm and taken the cheque out, because it is quite certain that these cheques, which were bearer cheques, were cashed by Cook at his own bank, and that the proceeds went into Cook's pocket and not into the firm's.

The question that first of all arises is—was this payment by the pursuer to the defenders' firm? Counsel for the pursuer argued very strenuously that it was, and cited a class of cases in which it has been held that where you have to give notice to a person, it is enough if you prove that the notice was posted. The pursuer's argument is this—either the defenders got the cheque through the post, in which case, if one of their clerks stole it, that is not the pursuer's affair, or else they allowed Cook to be the proper recipient of their cheques, in which case they virtually sanctioned his getting it, and they pray in aid of that last proposition a class of cases of which there have been several, in which it has been held that if a person goes into a shop and pays his money across the counter, it will not do for the shopkeeper to turn round afterwards and say he was never paid for the article sold because his servant stole it—the reason being that it is enough for the buyer to show that he paid his money in the ordinary way at the ordinary place of business. I am not throwing any doubt upon this branch of law, which is really based upon a common-sense view of the ordinary course of business. It would be impossible to carry out ordinary ready-money transactions which take place in a shop if you were to be afterwards told that the money was never paid. So, too, with regard to the present arrangements of the Post Office, if one can show that a letter has really been posted, then certainly the onus is upon the person who says he never got it to show that it was not delivered.

But that does not seem to me to solve this question. I do not propose to try, by way of definition, to state precisely what payment consists in, because I think it always must be a question of circumstances. There is no doubt that in the conduct of modern business comparatively few payments nowadays are made in hard cash—they are very often made by cheque. At the same time it must always be remembered that a cheque is not legal tender—it is only a way of paying money; but without going into the question of what might have been the result if this cheque had been sent in a way that procured its being safe, namely, by being drawn to order and crossed, I may say that I do not consider that it is a proper way of sending money, or a way which would entitle you to charge an intended recipient, who *de facto* has never got it, with its receipt, when all that you do is to send him a bearer cheque in an envelope. A bearer cheque is no more than

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payment in bank notes, and it seems to me if one is going to send money in a form which makes it so extremely easy of appropriation, he must take it upon himself to see that it gets properly to the hand for which he designed it, either that of the payee himself or of some recognised person who is there for taking payment, such, for instance, as a cashier, part of whose regular duty it is to receive money on behalf of his principals. Accordingly, it seems to me that, as the defenders here never really got the money, the pursuer cannot say that they must be held to have got it simply because he posted a bearer cheque or handed that cheque to a clerk, not a partner, whether that was inside or outside the office.

But the matter does not quite end there, because there is something more than the mere question of the cheque as regards some of the shares. In accordance with the ordinary practice of stockbrokers when dealing with a person who is carrying through a number of transactions, the defenders were in the habit of sending to the pursuer fortnightly statements as to how the accounts stood, and accordingly I take by way of illustration one that relates to the fifth batch of shares. That is an ordinary fortnightly statement for settlement, and bears to be "Andrew Robb, in account with Gow Brothers & Gemmell, for settlement 27th inst." It is in ordinary form. On the debtor side there are 200 Chartereds, 50 Oceanas, and 100 Barneys, and on the other side there is—By 200 Chartereds. This, of course, shows that that is a carrying-over transaction so far as the Chartereds are concerned. Then there is a balance of £570, and there is another entry, "By cheque £574, 1s. 6d.," and that represents the figures on one of those cheques which were sent. Therefore the pursuer argues that, even although he might not be able to prove the receipt of the money by the mere fact of sending a cheque, at least he has proved the receipt of money, because here in the stated account between him and the stockbrokers they acknowledge to have received the proceeds of the cheque. I need scarcely say this account is just Cook again, because it is written in Cook's handwriting, and indeed it is signed by Cook, who simply puts —"*For* Gow Brothers & Gemmell, W. C."

Therefore it really does not represent anything the defenders have done except in so far as they are bound by Cook. I confess I had some doubt on this part of the case, because, as I have said, Cook was obviously in a confidential relation and was allowed to do business for the defenders' firm; but I have come to be of opinion that, if this is to be treated as a receipt, then I think it is incumbent on the person who got the receipt to show that he got it from persons who are empowered to bind the firm. It is going very far to say that the firm would be bound where the signature which is alleged to bind them is neither that of a partner nor that of a person who has an admitted right to bind the firm for the receipt of money. This document is not, in the true sense of the word, a receipt at all. It is not a receipt duly authenticated with a receipt stamp. It is really an item in a statement of account. It might be a complete mistake, and supposing it were a complete mistake, I cannot suppose that it would be a bar to an action, in the way that a regular receipt would be a bar, in order to get rid of which an action of reduction would be necessary. Therefore, as this entry is not in itself, in the true sense of the term, a receipt, and still more because if it were to be read as a receipt, it would have to be clearly proved that the person who granted it was authorised to bind the firm, I do not think it can be held to charge the defenders with the receipt of money which *de facto* they admittedly really never got.

The third group of shares is in the same position, except that here there was no contract at all. That, of course, really does not much matter, because I do not think it makes any difference. If it did make a difference, it would be, *a fortiori*, against the pursuer.

Therefore upon the whole matter I have come to the conclusion that the Lord Ordinary came to a right decision. It is, of course, as I had occasion to say in a recent case, one of those cases where we have to perform the unpleasant duty of saying on which of two innocent parties the loss is to fall. The pursuer here has been perfectly upright all through, and it is, no doubt, hard that he does not get his shares which he truly bought and which he truly paid for. At the same time the perpetrator of the fraud, who has got the money in his pocket, is not Messrs Gow Brothers & Gemmell, but is Cook, who has absconded. For these reasons I do not think the pursuer can charge the defenders with the loss which has fallen upon him.

I would therefore advise your Lordships to adhere to the Lord Ordinary's interlocutor and to refuse the appeal.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I entirely agree with your Lordship in the exposition of the law of the case, and I shall confine myself to one or two general observations. I agree with the Solicitor-General that the primary duty of the stockbroker is to obtain an enforceable contract of sale for his client, and that this duty would be fulfilled by his obtaining a transfer duly signed. It is in evidence that it is also the duty of the broker to obtain a certificate of the shares. It is admitted by the defenders that this is part of their business, and that the transaction is not closed until the certificate has been obtained. I therefore think, agreeing with your Lordship, that if, within a reasonable time after the transfer had been signed, the pursuer had written desiring that his certificates should be sent to him it would have been no defence to his demand to say that the certificates were misappropriated by the defenders' clerk. But in this case two years were allowed to elapse —two years did elapse before the fraud was discovered—and the pursuer has no better explanation to offer than that he thought

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the certificates were in safe keeping in the defenders' office. It is not alleged that there was any special contract made with the defenders under which they were to have the safe keeping of these certificates; their contract was merely the ordinary contract of brokers. A person who wishes to establish responsibility for loss sustained through the negligence of another, must be able to show that he has observed the ordinary rules of business in his relations with that person. I do not think it would be fair that a party who has allowed two years to elapse without looking after his certificates, should be enabled to throw the loss upon persons in no way responsible for that negligence. With regard to lots Nos. 5 and 6 I also agree with your Lordship, and upon the same grounds. As regards lot No. 5, what actually happened was this, that while the pursuer had given instructions to purchase the shares, intending, as he now says, to take them up as an investment, Cook, who was on friendly terms with both parties, informed the defenders that the pursuer meant to sell them. The shares were sold through a broker upon that false representation, and Cook appropriated the money, and we know that by sending a certain account he obtained the price of the shares without delivering them. No doubt the pursuer might have said that as a matter of fact no transfer was sent to him, and that he was entitled to restoration of the money which he had paid in error. In my opinion he would have been within his rights if the payment had been made in the ordinary course of business. It is not necessary to determine whether and in what circumstances all possible precautions should be taken for the safe transmission of money where the course of dealing between the parties is not payment by legal tender; but this I take to be clear, that if the recipient of money directs that payment shall be made only in a certain way, and the sender does not follow that direction, the loss, in the event of the money going amissing, will fall upon the sender. We know that many houses put upon their invoices cheques to be crossed with the name of a bank indicated. If the sender does not cross the cheque for payment through the bank named, and a clerk of the payee purloins the money, I think the sender would stand a very poor chance of succeeding in an action for repayment. But here no specific instructions were given as to the mode in which payment through the medium of bankers was to be made, and therefore we must consider whether reasonable precautions were taken to secure safe transmission. Perhaps the safest way of payment is by means of a bank order. But a cheque made payable to the creditor who is to receive it, by name, or to order and crossed, is accepted by all commercial men as a good payment, for if the letter is stolen or lost the bank will not pay the cheque unless to the party to whom it is made payable. But to send a cheque which is not only not crossed, but is made payable to bearer, is, I think, according to modern ideas, not a payment in the ordinary course of business. The result is that it was by the pursuer's negligence that Cook was enabled to perpetrate the fraud by paying these bearer cheques into his own bank account, and, as the loss is due to the pursuer's negligence, then, in accordance with the rule that it is the person whose negligence enables another to commit a fraud who should suffer, the pursuer ought to bear the consequences of that fraud.

I also agree with your Lordship with regard to the Nobel's shares. They are in the same position, subject to this additional observation, that as the order for the purchase of the shares was never executed, there was no contract, and therefore the pursuer could not in any case recover any profit that might be made on the transaction; and it is not said that any profit was made. I think they must be dealt with as being exactly in the same position as the other shares. For these reasons I agree with your Lordship in your fuller statement of the case, and I think the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordships.

The Court adhered.

Counsel for Pursuer and Reclaimer—Solicitor-General (Clyde, K.C.) — R. S. Horne. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Ure, K.C. — Hunter. Agents — Miller, Robson, & M'Lean, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

TIGUE *v.* COLVILLE & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (3), *and First Schedule*, 12—*Compensation — Agreement — Arbitration — Competency of Arbitration where Subsisting Unrecorded Agreement — Agreement to Pay Compensation during Incapacity — Termination of Incapacity — Refusal of Farther Payments—Arbitration at Instance of Workman.*

A workman, who had been injured in his employment in August 1903, entered into an agreement with his employers under which they bound themselves to pay him 12s. 5d. weekly during the period of his incapacity as compensation under the Workmen's Compensation Act 1897. The agreement was not recorded. The employers continued the weekly payments down to 14th December 1903, when his incapacity ceased; but from that date they refused further payments.

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In March 1905 the workman brought an arbitration before the Sheriff of Lanarkshire, in which he asked decree against his employers for the sum of 12s. 5d. weekly from 21st December 1903 until the further orders of the Court. The Sheriff granted decree for the sum sued for from 14th December 1903 till the date of his award.

In a stated case on appeal at the instance of the employers, in which the question of law was whether the appellants were liable to pay compensation from the date at which the incapacity ceased to the date of the Sheriff's award, the Court answered the question in the negative, *holding* (1) that the arbiter could pronounce no decree for payments, either by way of arrears or otherwise, based upon the agreement, as the Act conferred no jurisdiction upon the statutory tribunal to deal with agreements except with regard to their statutory registration and the review of their terms in an application under Schedule I, 12; (2) that this being an arbitration under section 1 (3), he could only under the statute award compensation during incapacity.

Steel v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherston Oil Company, Limited*, v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 785, 41 S.L.R. 609, *commented on.*

Master and Servant — Workmen's Compensation Act 1897 — *Payment of Compensation under Unrecorded Agreement —Cessation of Incapacity—No Necessity to have Recovery Judicially Ascertained before Stopping Payment — Recorded Agreement Distinguished.*

Opinion, per Lord Low, that the rule that an employer paying compensation under a recorded agreement cannot cease payment until the fact of the workman's recovery has been formally ascertained, as by the certificate of a medical referee, or the decree of an arbiter, does not apply in the case of an unrecorded agreement, there being nothing in the Act compelling him in that case to continue payment for a single day after the incapacity has ceased.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) provides as follows (sec. 1, sub-sec. 3):—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

First Schedule, 12—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

The following case was stated by one of the Sheriff-Substitutes of Lanarkshire (M. G. DAVIDSON) in a stated case on appeal in an arbitration under the Workmen's Compensation Act 1897, brought at the instance of Martin Tigue, respondent, against David Colville & Sons, Limited, Dalzell Steel and Iron Works, Motherwell, appellants:—"This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, at the instance of the respondent, the first deliverance in which is dated 15th March 1905, in which the Sheriff was asked to grant a decree against the appellants ordaining them to pay to the respondent the sum of 12s. 5d. weekly, beginning the first weekly payment as on the 21st December 1903, and continuing the same until the further orders of Court, in terms of the Workmen's Compensation Act 1897, with expenses.

"Parties were heard before me on this date (March 22, 1905), on a plea stated on behalf of the appellants that the application was incompetent in respect that proceedings had not been taken within six months from the date of the accident as provided by the said Act.

"I repelled that plea, and allowed parties a proof. The case was heard before me, proof being led on this date (June 27, 1905), when the following facts were established—

"1. That on or about 24th August 1903 the respondent, while in the employment of the appellants, was injured, and lost one joint of his left thumb.

"2. That the appellants admitted liability to pay him compensation in terms of the Workmen's Compensation Act 1897, and agreed with him to pay him compensation at the rate of 12s. 5d. per week during the period of his incapacity.

"3. That the said agreement was not recorded as permitted by the said Act.

"4. That the appellants continued to pay 12s. 5d. per week in terms of the said agreement until 14th December 1903, when they ceased to pay any further sums.

"5. That the appellants, when settling with the respondent for compensation at 14th December 1903, offered the respondent work at full wages.

"6. That at that time he had so recovered from his injury as to be capable of earning full wages.

"7. That he declined the offer of work.

"8. That he has been, since that date, capable of earning full wages, and has in point of fact been working for some period at lobster fishing.

"9. That a correspondence took place between the appellants and the respondent's agents concerning their liability to make further payment, the first communication being on 16th February and the last being at the end of July 1904, but that the

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appellants declined to admit liability. The correspondence resulted in no agreement between the parties.

"In these circumstances I found that the appellants were liable to pay compensation to the respondent at the rate of 12s. 5d. per week from 14th December 1903 till the date of my award (July 12, 1905).

"I also found that the appellants were under no liability to pay the respondent any further sum as compensation, and assoilzied them from any claim for future compensation.

"I found the respondent entitled to expenses.

"The agent for the respondent objected to a case being stated, in respect that the questions in law proposed in the minute lodged by the appellants requiring a stated case were not determined by me, and that the questions in law hereinafter stated were not set forth in said minute. I repelled said objections.

"The questions in law for the opinion of the Court are—(1) Are the appellants liable in the circumstances above set forth to pay compensation to the respondent from the date at which the incapacity ceased to the date of my award? (2) Was the respondent precluded from taking proceedings under the Workmen's Compensation Act 1897, in respect of his failure to take the same within six months from the accident in terms of said Act?"

The second question was dropped at the hearing.

The appellants argued—The appellants were not liable to pay compensation after the cessation of the workman's incapacity. To hold the contrary would be obviously unjust and unreasonable, and therefore *a priori* an improbable construction of the statute, which was, where possible, to be reasonably construed—*Lysons* v. *Knowles & Sons*, (1901) A.C. 79. The parties had come to an agreement which definitely fixed the amount and period of compensation, and arbitration was accordingly excluded—*Dunlop* v. *Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146; *Field* v. *Longden & Sons*, [1902] 1 K.B. 47. Under the agreement he could get no compensation after 14th December, as by that time his incapacity ceased—a fact proved by his being at that time capable of earning full wages—*Husband* v. *Campbell*, July 15, 1903, 5 F. 1146, 40 S.L.R. 822. But assuming that arbitration was competent he could get nothing under it, the arbitration being one at the instance of the workman under sec. 1, sub-sec. 3, and the statute only providing for compensation during incapacity. This was not a process for review of an agreement under Schedule I, 12. The Sheriff had probably been misled by such cases as *Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609; *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; but in these cases the period during which compensation was payable was indefinite, and *Steel* and *Jamieson* were cases of review under Schedule I, 12. *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R 113, illustrated the way in which the Court would deal with a question of this nature. If the incapacity had in fact ceased, there was no rule which compelled an arbiter, even if he could consider the agreement, to treat it as enforceable up to the time of his decision if the incapacity had ceased—*Morton & Company, Limited* v. *Woodward*, [1902] 2 K.B. 276.

Argued for the respondent—The appellants were liable to pay compensation down to the date of the Sheriff's award. The agreement fixed no period of payment, the words "during incapacity" being simply an echo of the provisions of the statute, and upon this point arbitration was necessary. The agreement continued in force until it had been judicially reviewed (Schedule I, 12) or until a new agreement had taken its place, and in this respect there was no distinction between a recorded and an unrecorded agreement—*Steel* v. *Oakbank Oil Company, Pumpherston Oil Company, Limited* v. *Cavaney, Jamieson* v. *Fife Coal Company, Limited, cit. sup.* These cases also were authorities for the proposition that although the incapacity had in fact ceased prior to the arbiter's award he was bound to award compensation down to its date.

LORD KYLLACHY—This is an appeal from an award by the Sheriff-Substitute of Lanarkshire at Hamilton under an application presented to him by a workman under sec. 1, sub-sec. 3, of the Workmen's Compensation Act of 1897. The Sheriff finds that there was an agreement between the workman and his employers, made at the time of the accident, whereby the workman was to receive a certain weekly payment "during the period of his incapacity." He also finds that at the date when this weekly payment ceased, in December 1903, the applicant had completely recovered, and that he still continues in that condition. But he has nevertheless held the employers liable in a continuation of the weekly payment, from the date when it ceased, down to the date of his (the Sheriff's) award.

In dealing with the question thus raised it is necessary to have in view certain points which are, as it seems to me, fairly clear upon the terms of the statute.

I. The first point is this, that while extra-judicial agreement is recognised by the Act as a mode of determining questions of compensation arising under it, the provisions of the Act do not touch or affect such agreements, except in (I think at most) three particulars.

The particulars I refer to are these:—

(1) The Act provides certain summary means of enforcing agreements, that is to say, agreements made with reference to notices given and claims intimated under the Act. (*a*) Such agreements may, if in writing and probative, be recorded "in the Books of Council and Session or Sheriff

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Court Books," and execution may follow in the same manner as if they had been recorded decreets-arbitral. (*b*) Such agreements may also, whether in writing or not (it has been so decided), be set forth in statutory memoranda, which (if the Sheriff-Clerk is satisfied as to their genuineness) may be recorded in the Sheriff Court Books, and have thus all the effect of Sheriff Court decrees, not necessarily decrees *in foro*, but at all events decrees in absence.

(2) The Act further seems to attach to such agreements this incident—that while subsisting, the payments under them may be reviewed, and either increased, diminished, or terminated by an application to the statutory tribunal under the 12th section of the First Schedule.

(3) The Act further seems to require as a condition of the validity of agreements, or at least of their recognition under the Act, that the compensation stipulated shall not exceed the maximum allowed under the Act. That is expressly provided in one case (Schedule I, sec. 1, sub-sec. 2), and may perhaps be implied in others. But for present purposes this requirement is not important.

Except in the above particulars, agreements following on notices and claims for compensation under the Act retain all their common law incidents. They are apparently just in the same position as, say, agreements made between masters and workmen before the Act passed, with respect to compensation for accidents occurring before the Act passed.

II. This being so, the next point—and it seems to follow—is this, that where an agreement exists and remains in force, there is no room for arbitration under the Act. In other words, there is no jurisdiction conferred upon the statutory tribunal to deal with subsisting agreements, or with the rights and remedies of parties under them, except (as before indicated) with respect to such matters as—(1) admission to the statutory register; (2) rectification of that register; (3) review of the terms of such agreements under section 12 of the First Schedule. Of course the statutory tribunal, like all other statutory tribunals, has to determine in each case, and at least in the first instance, what is the extent of its jurisdiction. It may, for example, have to decide incidentally whether some agreement submitted to it as excluding its jurisdiction, is a real agreement and a subsisting agreement. But when that is once admitted or found, the agreement must be accepted, and left, so far as the tribunal is concerned, to take care of itself. I may have overlooked some provision on the subject, but I have failed to discover any clause of the Act expressing any authority to any committee, or arbiter, or county court judge or sheriff acting as arbiter, to exercise, except to the extent mentioned, any jurisdiction with respect to agreements.

III. Lastly, the third point (which is really a corollary of the preceding) is this, that the statutory tribunal has in particular no power to pronounce decree for sums claimed to be due under agreements. The tribunal may find an agreement to be expired, and so finding may proceed to arbitrate, under section 1, sub-section 3. It may also, on application for review under the 12th section, revise an agreement, or refuse to revise, or while revising refuse to revise except as from a particular date. But beyond that it cannot I apprehend go. It can no more, for instance, decern for arrears due under an agreement than it could decern for arrears due under one of its own decrees-arbitral. Agreements, like decrees-arbitral, must (with respect both to the past and to the future) be enforced in the appropriate manner, that is to say, either by proceedings at law or by the special methods of execution which the Act provides.

Now, all this being so, what in the present case was the Sheriff's duty, taking the facts as he himself finds them?

He had an application presented to him by a workman—an application founded on an alleged agreement assumed (I suppose) to be still current—whereby he was asked, as statutory arbiter, to decide—(1) that the alleged agreement subsisted, that is to say, on its just construction remained in force, until the applicant's recovery was ascertained by the reviewing tribunal under section 12 of Schedule I; (2) that nevertheless the employers had failed to pay the stipulated weekly payment as from 14th December 1903 downwards; and (3) that arrears being thus due, the workman was entitled to have a decreet-arbitral to that effect under which the arrears might be recovered. The Sheriff also, I think, conceived that he was asked (4) to decide (and to decide as if applied to by the employers under the 12th section of Schedule I) that the alleged agreement had now at all events come to an end by reason of the entire recovery of the workman, and that therefore no compensation was due for the future. I think that was in substance what the Sheriff was asked to do, or conceived that he was asked to do—I mean if we accept the narrative in the stated case as interpreted by the respondent's counsel at the discussion.

In these circumstances what the Sheriff did was, if I rightly understand his judgment, this—

(1) Assuming apparently that he had jurisdiction to decide all questions between the parties, he sustained the application as an application for arbitration under section 1, sub-section 3, of the Act.

(2) So assuming, he proceeded to find that there was in fact a subsisting agreement between the parties; his view apparently being, that although on its terms terminated by the complete recovery of the applicant, the agreement was yet still in force, because not brought to an end by a judgment under section 12 of Schedule I of the Act.

(3) So finding, he proceeded to decern for the arrears claimed up to the date of his decree.

(4) Lastly, holding it proved that there had now been complete recovery (and indeed complete recovery so far back as Dec-

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ember 1903), he assoilzied the employers from all claims with respect to the future.

Now, it humbly appears to me that, in so dealing with the matter, the Sheriff went outside the Act and beyond his authority. He had at the outset to make up his mind whether there was or was not a subsisting agreement. But having done that he had only two courses open to him. If he thought—as I infer he did—that there was a subsisting agreement, his duty, I apprehend, was to throw out the application and leave the agreement to take its course. If, on the other hand, he thought (as perhaps he might) that there was no subsisting agreement—that on its just construction the alleged agreement came to an end when the incapacity in fact ceased—his duty was to proceed to arbitrate (under section 1, sub-section 3); but doing so, to reject the applicant's claim as wholly unfounded. There was no third course open to him. In particular, it was not, I apprehend, open to him to decern for arrears as due under a subsisting agreement, any more than it was open to him, apart from agreement, to award compensation for a period which he found to have been in fact a period of complete capacity.

I am therefore of opinion that we should sustain the appeal, and find in answer to the first question that the Sheriff was not entitled to find the respondents liable in the payments mentioned. As to the second question, we had no argument, and it does not seem to require an answer.

I may add that, taking the above view of the case, I do not, as will be observed, express any opinion as to whether or not the agreement here was a subsisting agreement such as, on the one hand, sufficed to exclude arbitration under section 1, sub-section 3, and, on the other hand, to open the door to application for review under section 12 of Schedule 1. It was argued to us that an agreement to pay to a workman compensation "during the period of his incapacity" was necessarily indefinite, and must therefore, recorded or unrecorded, be held to remain in force until terminated by a finding of the tribunal under section 12 of Schedule I. It was, on the other hand, maintained to us *contra*, that such an agreement necessarily came to an end when incapacity in fact ceased, and that there was no room for prolonging its subsistence beyond that date, at all events when, as here, it was unrecorded and had not obtained the force of a decree. I find it, as I have said, unnecessary to express an opinion upon any of those questions.

LORD STORMONTH DARLING—To my mind the solution of the only question of law which we have to answer, lies in the fact that this was an arbitration instituted by the workman. As such it had nothing to do with agreement, for under the statute arbitration and agreement are mutually exclusive. It is only where any question as to the liability to pay compensation, or as to the amount or duration of it, is not settled by agreement that the provisions for arbitration take effect.

I do not read the stated case as implying that the workman founded on the agreement which the employers and he had made immediately after the accident, as a subsisting agreement. It was of course part, and an important part, of the history of the case, and according to his crave the weekly payments for which he asked decree were to run from the date when the last weekly payment under the agreement had been made. If the payments had been purely voluntary on the part of the employer, and not under agreement, the workman must equally have given credit for these in any proceedings under the Act. It appears that evidence was led before the Sheriff that the parties had tried to make a new agreement and had failed, because one of the facts which the Sheriff holds to be established is that between February and July 1904 there had been a correspondence which "resulted in no agreement between the parties." Except therefore in a historical sense, I do not understand the workman as having founded on the original agreement at all. If he or his advisers had intended to do so, their course would have been obvious. They would have applied to have the agreement recorded, whatever the effect of that might have been. Instead of doing that, they applied for arbitration.

Now, proceedings for arbitration (where, as here, no question either as to dependants or as to payment of a lump sum is involved) can only be instituted under section 1 (3) of the Act or under section 12 of the first schedule. The latter is a proceeding for review of a weekly payment, and is open to either the employer or the workman, but when it is brought by the workman it must plainly be brought for the purpose of having the weekly payment "increased," for he has no interest to have it either "ended" or "diminished." Here he did not ask to have it increased, he only asked to have it paid at the rate of 12s. 5d. weekly, being the full rate which the employer had paid him under the original and unrecorded agreement. It seems to me therefore beyond all doubt that the arbitration was, and could only be, instituted under section 1 (3).

It is quite true that the employers might have taken proceedings to have the weekly payments "ended" under the 12th section of the first schedule. But I do not see that they were in any way bound to do so, or that they ought to be made to suffer for not doing so. They had, in point of fact, stopped the weekly payments as at 14th December 1903, and had offered the workman work at full wages, alleging that his incapacity had ceased. This offer was declined, and, if they were right as to the fact of his complete recovery, they had fully implemented their agreement, which was to pay him 12s. 5d. per week "during the period of his incapacity." They no doubt took the risk of its turning out that he had not fully recovered, and if their position had been merely that he had partially recovered, and that the weekly payment ought therefore to be "diminished," it might have been proper for them to take the initiative in order that an arbiter should

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assess the amount of the diminution. In such a case it may be reasonable that the original rate of payment should hold good until the diminished rate takes its place—at all events when the original rate stands upon a recorded agreement having the force of a decree. That was the point decided by the cases of *Steel* (5 F. 244) and *Cavaney* (5 F. 963), the only difference of opinion among the Judges being as to the precise date when the diminished rate was to take effect—whether at the date of the award or at the date of the application for review. With that minor question we are not here concerned, because, as I have endeavoured to explain, this is not an application by the employer under section 12 of the First Schedule, but an application by the workman under section 1 (3) of the Act.

Now, the arbitration having been thus set agoing, what does the Sheriff find as to the facts? He finds that on 14th December 1903, when the last weekly payment was made, the workman had so recovered from his injury as to be capable of earning full wages, and that he has been since that date capable of earning full wages. In short, he finds that the employers' attitude on 14th December 1903 was well founded, and that they are under no liability to pay compensation for any period after the date of his award.

But, strangely enough, the Sheriff also finds that the employers are liable to pay compensation at the rate of 12s. 5d. per week from 14th December 1903 till the date of his award on 12th July 1905, or, in other words, that, under a statute which allows compensation to an injured workman "during the incapacity," a workman may be entitled to receive compensation for more than eighteen months after the incapacity has entirely ceased. A construction of the statute which involves a result so inconsistent with its main purpose is to be avoided if at all possible.

I cannot help thinking that the Sheriff (whose experience of the working of the statute is large) has been misled by some decisions which are applicable to a different set of circumstances, and particularly by those which I have mentioned. While holding himself free, and rightly free, to determine upon the facts placed before him whether the workman had suffered from any incapacity since the date of the last weekly payment, and answering that question in the negative, he yet seems to have felt bound to award full compensation for the past. He can only have reached that result by holding that his hands were tied by the original agreement. If that was his view he ought to have dismissed the application for arbitration as incompetent. On the other hand, if he entertained the arbitration as competently brought (and, in my opinion, it certainly was) he was bound to proceed on his own view of the facts, and he was not entitled to award any compensation for the period after incapacity had entirely ceased. It is impossible under the statute to combine, as the Sheriff has done, the province of arbitration with the province of agreement.

Perhaps I ought to notice the case of *Jamieson* (5 F. 958) as having possibly conduced to the Sheriff's misapprehension. The facts of that case were very special, and as unlike the present as can be imagined. The workman (a miner) had become totally incapacitated for work by an injury to his only remaining good eye, and the sole question of law which the Court found it necessary to answer was whether the Sheriff, in slightly diminishing the weekly compensation, was entitled to take into account that there had been a general reduction of miners' wages in the district, and that the applicant was 64 years of age. In holding that it was not competent to take these facts into account, Lord Adam and Lord M'Laren expressed the opinion, that although the payments by the employer had been voluntary, the application was to be regarded as an application for review under section 12 of the First Schedule. The Lord President and Lord Kinnear said nothing about this, and Lord Kinnear's opinion in the subsequent case of *Strannigan* (6 F. at p. 793) shows, I think, that he would not have agreed in the view, if it had been necessary to deal with it, that the application was to be regarded as brought under section 12. It follows, from what I have already said, that I cannot regard the application here as having anything to do with section 12. At all events the opinions on that point, though entitled to all respect as applied to the circumstances of that particular case, were *obiter*, and cannot affect a case which on its proved facts is so completely distinguishable.

With regard to the 2nd question of law, the argument against the workman was not pressed. I am therefore for answering both questions in the negative.

LORD LOW—On 24th August 1903 the respondent was injured while in the employment of the appellants. An agreement was then come to between the parties, the purport of which the Sheriff-Substitute states as follows:—"The appellants admitted liability to pay him" (the respondent) "compensation in terms of the Workmen's Compensation Act 1897, and agreed with him to pay him compensation at the rate of 12s. 5d. per week during the period of his incapacity."

That was a complete agreement, because it dealt with all the matters which are necessary for the settlement of a claim for compensation under the Act, namely, (1) the liability of the employers to pay compensation, (2) the amount of compensation, and (3) its duration.

It is also to be observed that the duration in the agreement is for the full period allowed by the Act, which provides that where total or partial incapacity for work results from the injury, the compensation shall be a weekly payment "during the incapacity."

A memorandum of the agreement was not registered in terms of section 8 of the second schedule of the Act, which gives to a registered agreement the force of a Sheriff Court judgment.

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The appellants continued to pay the respondent the agreed-on sum weekly until the 14th December 1903, after which date they made no further payments.

The Sheriff-Substitute finds that at that date the respondent "had so recovered from his injury as to be capable of earning full wages."

I read that (and it was so treated in argument) as a finding that at 14th December 1903 the respondent's incapacity for work had terminated, or, in other words, that the period during which the appellants had agreed to pay compensation had come to an end.

Notwithstanding that fact, however, the Sheriff-Substitute has found that the appellants are liable to continue payment to the respondent of the agreed-on weekly amount until 12th July 1905, that is to say, for more than eighteen months after the respondent had, by recovery from the effects of the accident, ceased to have any right to compensation either under the agreement or in terms of the statute.

What happened was this. When the respondent recovered from the injury the appellants offered him work at full wages. The respondent however declined the offer, and the appellants ceased payment of compensation. Some correspondence, which led to no practical result, then took place between the agents of the parties, but the respondent took no active step to enforce the claim which he made for a continuance of the compensation until March 1905, when he instituted arbitration proceedings before the Sheriff in which he sought decree against the appellants, ordaining them to pay to him compensation at the same rate as that fixed by the agreement (which I take to have been the maximum amount allowed by the statute) from the date when they stopped payment in December 1903 until the further orders of the Court. The Sheriff-Substitute disposed finally of the proceedings on 12th July 1905, when, as I have said, he found the appellants liable to pay compensation down to the date of his interlocutor.

The Sheriff-Substitute's view appears to have been that an employer who was paying compensation to a workman, either under an agreement or under a decree, was not entitled to stop payment on the ground that the workman had recovered and was no longer incapacited for work, even although that was the case, unless and until the fact of recovery had been ascertained and declared in a formal way, as by the certificate of a medical referee or the decree of an arbiter.

I think that that view—and also the Sheriff-Substitute's finding in regard to the date to which the payments must be continued—would have been justified by certain decisions of the Court, to which I shall refer presently, if the agreement had been registered, and had thus been equivalent to a judicial decree. In my judgment, however, the agreement not having been registered, the Sheriff-Substitute had no power to order compensation to be paid after the date when the respondent in fact ceased to be incapacitated for work.

Questions of compensation under the Act may be settled either by agreement or by arbitration. Section 1 (3) of the Act makes that clear, and therefore, where there is an agreement, arbitration is excluded as regards all matters which are settled by the agreement. It is clear, however, that where, as here, the agreement is to pay compensation during incapacity, the question whether the obligation to pay has come to an end by reason of the condition of incapacity having terminated, is a question of fact outside of the agreement, which must be determined in some way apart from the agreement. The method which the respondent took to have that question settled was to institute an arbitration under section 1 (3) of the Act.

It was argued that that was not a competent method to adopt, and I do not think that it was, if the respondent's object was to enforce the agreement. If that was his object, he ought to have recorded the agreement and proceeded upon the decree implied in registration. The appellants, however, having ceased to make payments under the agreement, and the parties having failed to come to a new agreement, I am not prepared to say that the respondent was not entitled to institute proceedings under section 1 (3) on the ground that he was a workman who was entitled to compensation, and who had no subsisting agreement with his employers. But if that was the nature of the application, it seems to me that it failed upon the merits, because the fact, as found by the Sheriff-Substitute, was that the respondent was not, and never had been, during any part of the period covered by the application, entitled to compensation, because during the whole period the statutory requisite of incapacity for work had been awanting.

It was argued, however, that when liability has been admitted and weekly payments made, whether under an agreement or under a decree-arbitral, the employer is not entitled to stop or diminish the payments on the ground that the workman's incapacity has wholly or partially ceased, until the fact that the incapacity has ceased is ascertained or declared by a decree in an application for review under Schedule I, section 12, or the certificate of a medical referee under Schedule I, section 11, or a settlement of the question by agreement.

In support of that argument the respondent relied upon the cases of *Steel* v. *Oakbank Oil Company*, 5 F. 244, and *Pumpherston Oil Company* v. *Cavaney*, 5 F. 963.

In *Steel's* case the circumstances were these—There had been an agreement which was registered under the Act, fixing the amount of compensation. The employers stopped payment of compensation on 14th October 1901, on the ground that the incapacity of the workman had ceased, or partially ceased, and on 8th April 1902 they lodged an application under Schedule I, section 13, in which they sought to have the compensation ended or diminished

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The Sheriff-Substitute found that on 14th October 1901 the workman had to a large extent, but not wholly, recovered from the injury, and that therefore the employers were entitled to have the weekly payments diminished. He also held that the diminished payments should only come into operation from the date (23rd July 1902) when he finally disposed of the application.

In these circumstances the questions of law submitted to the Court were whether the diminution in the rate of compensation should take effect from 14th October 1901, the date of partial recovery, or from 8th April 1902, the date of the application to the Sheriff, or from 23rd July 1902, the date of the Sheriff-Substitute's judgment. The Court held unanimously that the diminution did not take effect from the date of partial recovery, and, by a majority, that the Sheriff-Substitute was right in diminishing the payments only from the date of his final interlocutor.

The main ground of judgment was that the agreement having been recorded was equivalent to a decree, and that that decree must remain in force until it was recalled.

Thus, Lord Young said that "the payment which was ordered by the Court must be continued at least until the application for review of that judgment," and that "when a judgment is pronounced fixing the amount of payment, that payment must be continued so long as the judgment subsists." In like manner Lord Adam (who was sitting in the Second Division) said—"Once an order for weekly payment has been obtained by a workman under the Act, and the memorandum of agreement duly recorded, that continues in force until it is altered by some other order." The case of the *Pumpherston Oil Co.* v. *Cavaney* was substantially the same as that of *Steel*, and was decided in the same way.

In both these cases the fact that the agreement had been recorded and was an equivalent to a decree was an essential element in the judgment which was pronounced, and in that respect these cases differed entirely from the present case, in which there was no decree, express or implied, but only an unrecorded agreement.

It was further argued, however, that in those cases it was laid down that in no circumstances did the Act allow an employer to stop weekly payments which he had been making, at his own hand, but that he must obtain authority to stop them in one or other of the ways provided by the Act. There are, no doubt, dicta to that effect, both in the case of *Steel* and in that of the *Pumpherston Oil Co.* These dicta, however, must, I think, be read as being applicable to the circumstances of the cases with which the Court was dealing, and cannot be regarded as extending to entirely different circumstances which the learned Judges had no occasion to consider.

I can find nothing in the Act which, when there is only an unrecorded agreement to pay compensation during incapacity, compels the employer to continue payment after the incapacity has in fact ceased. The Act recognises agreements for payment of compensation, and it nowhere provides that such agreements shall, as regards the rights and liabilities of parties, be in a different position from any other agreement. Now, the fact in this case is that the appellants have fully implemented their agreement with the respondent, because they have paid compensation to him during the whole period of his incapacity, and, in my judgment, they cannot be compelled to do anything more.

I am therefore of opinion that the first question of law should be answered in the negative. In regard to the second question the appellants did not maintain in this Court, as they did before the Sheriff-Substitute, that the application was incompetent in respect that it was not brought within six months of the accident. I therefore think that that question also should be answered in the negative.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the negative.

Counsel for Appellants—The Dean of Faculty (Campbell, K.C.)—Spens. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Younger, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Saturday, December 23.

WHOLE COURT.

[Lord Pearson, Ordinary.

WRIGHT *v.* BELL.

Jurisdiction—Justices of the Peace for County of Midlothian—Jurisdiction within County of City of Edinburgh—Edinburgh Extension Act 1896 (59 *and* 60 *Vict. cap. cciii*).

Held (by the Whole Court unanimously) that the Justices of the Peace for the County of Midlothian have jurisdiction in small debt actions within the area of the existing City or Burgh of Edinburgh as defined prior to the passing of the Edinburgh Extension Act 1896.

Question—whether their previously existing jurisdiction has been determined by force of that statute within the districts annexed to the City by that Act.

On 2nd January 1903 an action was raised in the Justice of the Peace Small Debt Court of the Shire of Edinburgh, at the instance of Mrs Isa Bell, residing at 30 Earl Grey Street, Edinburgh, against Adam Wright, for payment of £1, 2s. 6d. as the rent of a house at 5 West Adam Street, near the Pleasance. At the date when the summons was served Wright had left West Adam Street and was residing at 17 Tron Square, a house within the ancient

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royalty of the burgh of Edinburgh, where the summons was duly served upon him. The case was heard on 9th February before two Justices of the Peace, Messrs Mouat and Hutchison, who were Justices of the County of Midlothian but not Justices of the County of the City of Edinburgh. The defender appeared and pleaded that the Court, as Justices of the Peace for the County of Midlothian, had no jurisdiction to try and decide the matter in dispute between him and the pursuer; that he resided within the County of the City of Edinburgh and had no domicile within the County of Midlothian; that the County of the City of Edinburgh was a distinct and separate county from the County of Midlothian; and that the Justices on the bench had no jurisdiction to try any civil action against persons domiciled in the County of the City of Edinburgh. The Court repelled this plea, and gave decree for the sum concluded for.

Wright thereupon brought the present action against Mrs Bell for suspension of the decree in question. The Justices for the County who pronounced the decree, and the Clerk and Depute-Clerk of the Peace for the County, were also called for their interest but did not compear. The suspender pleaded—"(1) Suspension should be granted *simpliciter* in respect that the respondents Alexander Mouat and Thomas Hutchison as Justices of the Peace for the Shire of Edinburgh had no jurisdiction over the complainer, and were not entitled to consider the small debt summons against him and give decree thereon. (2) The threatened poinding should be suspended in respect that the decree on which it proceeds was pronounced by the respondents Alexander Mouat and Thomas Hutchison, who had no jurisdiction to give decree against the complainer. (3) Suspension should be granted in respect that (*a*) the Justices of the Peace of the Shire of Edinburgh have not and never had jurisdiction within the City; and (*b*) any right ever claimed by them to exercise jurisdiction within the City is excluded (1) by the decision of Lord Advocate Dalrymple, and (2) by the City Extension Acts."

Defences were lodged by Mrs Bell, who pleaded—"(4) The said decree having been pronounced by a Court of competent jurisdiction, suspension ought to be refused. (5) The Justices of the Peace of the Shire of Edinburgh having from time immemorial enjoyed and exercised jurisdiction within and without the Burgh or City or County of the City of Edinburgh in small debt causes, the note of suspension should be refused."

The following minute of admissions was lodged for the suspender:—"(1) that prior to 1767 the Justices of the Peace of the County of Midlothian had jurisdiction over all parts of the present County of the City excepting the ancient royalty; (2) that prior to 1856 the Justices of the Peace of the County of Midlothian had jurisdiction over all parts of the present County of the City excepting the ancient royalty and the extended royalty, but that that jurisdiction, so far as exercised within the limits of the 1848 Act (exclusive of the ancient and extended royalty) was cumulative with that of the Justices of the Peace of the City appointed under the 1848 Act; (3) that prior to 1709 the Justices of the Peace of the County of Midlothian attempted to exercise jurisdiction within the ancient royalty; (4) that after 1709 the Justices of the Peace of the County of Midlothian may have exercised jurisdiction within the ancient royalty, and after 1767 within the ancient royalty and extended royalty, and after 1856 within the ancient royalty, extended royalty, and limits of the 1848 Act, but such exercise of jurisdiction if it took place was unknown to the Justices of the Peace of the County of the City; (5) that the Sheriff of Midlothian has (*a*) under various Acts conferring the jurisdiction upon him exercised civil jurisdiction within the ancient royalty and extended royalty as well as within the parts of the existing County of the City outside the ancient and extended royalty for more than 40 years; (*b*) has exercised jurisdiction in civil cases at common law within the whole County of the City for many years; and (*c*) has exercised criminal jurisdiction over all parts of the existing County of the City, excepting the ancient royalty and extended royalty, beyond the memory of man, and has exercised jurisdiction for many years in criminal matters not tried summarily within the ancient and extended royalty."

After a debate in the Procedure Roll the Lord Ordinary (PEARSON), on 28th April 1904, refused the note.

Opinion.—[*After narrating the facts above stated*]—"It is convenient to ascertain first how the matter stands upon the existing Commissions of the Peace; for, after all, it rests *prima facie* with the Crown in issuing a Commission of the Peace, to assign the limits within which it shall be operative.

"The subsisting Commission for the shire was issued in 1878. It bears—'Know ye that we have assigned you jointly and severally, and every one of you, our Justices, to keep our peace in the County of Edinburgh, and to keep and cause to be kept all the ordinances and statutes for the good of our peace, and for the preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same.'

"The City Commission was issued in 1884. The limits are thus expressed—"To keep our peace in the County of the City of Edinburgh and limits of the 'Edinburgh Police Act 1848,' and also of the burgh of Edinburgh, as defined by the 'Edinburgh Municipal and Police Extension Act 1882'"; and the Justices are 'to keep and cause to be kept all the ordinances and statutes . . . in our said county (as well within liberties as without), and within the limits aforesaid.'

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"Upon these two documents I observed, in the first place, that in 1878, when the Commission for the shire was issued, the City had not been designated or recognised in any Commission as 'The County of the City.' It may have had some of the attributes of a county. The Lord Provost had held the office of Sheriff for a very long period, and had been designed in one or two local Acts as Sheriff-Principal within the County of the City. He had held commission as Lord Lieutenant 'within the said town of Edinburgh' since 1794; and prior to the first Special Commission of the Peace for the City (which was issued in 1823) the Provost and Magistrates had acted as Justices under old grants from the Crown. But I understand parties to be agreed that Edinburgh was not designed 'The County of the City' in any Commission of the Peace until 1884; and that its status as the County of a City was never formally and explicitly affirmed by Parliament until 1896, as after mentioned. This being so, the subsisting Commission for the shire granted in 1878 must be construed in the light of the facts existing at its date, and, when so regarded, it is a Commission for a county having burghs within its bounds, one of which had a Special Commission of the Peace for its own limits and liberties, but none of which was a county in itself. Where that is the position the County Commission of the Peace is held to extend over the whole county, including all the burghs therein, even where a burgh has a Special Commission of the Peace within its own bounds. Indeed, that is just the meaning and intention of the clause in a County Commission, 'as well within liberties as without.' The situation is quite a familiar one, and results in a cumulative jurisdiction, unless there is an express clause of exclusion. Erskine (i. 4, 21) in dealing with the jurisdiction of magistrates of royal burghs, shews, first, that where a sheriffship has been granted to a burgh, the jurisdiction is only cumulative with, and not exclusive of, that of the county sheriff. He then deals with magistrates as justices thus—'The magistrates of some burghs are, by their charter, constituted justices of the peace within the bounds of their erection, in which case they have also a cumulative jurisdiction with the county justices.'

"Nor, in my opinion, would this state of things, if it existed in 1878, when the subsisting County Commission was granted, be altered adversely to the County Justices by the subsequent recognition of the City as a county within itself, or by the issue of a later Commission of the Peace for the County of the City, unless these acts were accompanied with an express restriction of the scope of the County Commission.

"But it is said that the creation of Edinburgh as a County of a City, so far from being of that recent date, was a thing which happened centuries ago, that it has ever since been a 'county within itself,' and that the Commission of the Peace for Mid-Lothian must be construed in the light of that fact, according to a rule which has been developed in English practice, where county boroughs are more familiar than in Scotland. It is contended that the rule I have stated above as to the County Commission being held, *prima facie*, to extend over all burghs within the county, even where they have a Special Commission of the Peace, suffers an exception in the case of a burgh which is a county of itself. In that case, it is said the presumption is reversed, and the county justices are presumed to be excluded unless there is a 'concurrent' clause. It will be observed—(1) that upon this statement of the rule the possession by a burgh of a separate or Special Commission of the Peace is not, *per se*, enough to make it a county of itself; and (2) that it is only a presumption, to be used as a guide to the meaning and effect which the Crown intended its Commission to have, in the absence of other circumstances determining its construction.

"On this part of the case both parties appeal to facts, remote enough to be called historical, as concluding the matter in their favour—the suspender founding on a series of grants to the burgh as conferring exclusive privileges, and the respondent appealing to usage in support of the claim for concurrent jurisdiction. Neither party renounces probation, but neither moves for a proof; and both concur in asking a judgment upon the documents, with the admissions contained in the two minutes lodged.

"I consider first the suspender's position, which is, that the history of the relations of the Crown and Parliament to burgh and county, as set forth in the print of documents, with the relative statutes, shews conclusively that the county was excluded from the rights and jurisdictions conferred on the burgh, and has no concurrent jurisdiction in these matters. The substance of the argument is, that the burgh of Edinburgh has for centuries been a county in itself, having within itself a sheriffdom and afterwards justices, and still later a lieutenancy, and that the grants are from the first in such terms as to confer exclusive rights.

"The result of a careful consideration of these documents and of the argument submitted upon them is that, in my opinion, the suspender has entirely failed to make good his contention on this head. Of course, a grant of the lieutenancy (a thing of comparatively recent date within the city) stands by itself as being fundamentally a military office, and therefore not admitting of a severance of the command. But, subject to one rather significant exception, to which I will advert presently, I hold that all the documents founded on are quite consistent with the idea that the burgh, while obtaining added powers and privileges within its bounds, remained part of the county to such extent and effect as to preclude its being regarded as a separate county. The earliest and most significant of all, the grant of sheriffdom, which was conferred by James III in 1482, is not so expressed as excluding the Sheriff of the county; and certainly it has not been so interpreted, for the position of the two

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Sheriffs down to the present day furnishes a typical instance of concurrent jurisdiction.

"The next class of documents consists of Commissions of Justiciary in 1550 and 1589, constituting the Provost, or Provost and Bailies of the burgh, 'our Justices in that part.' But they do not appear to me to advance the matter. I think they must be regarded simply as giving additional powers for suppressing crime, and certainly not as substituting the Provost and Magistrates in any way whatever in place of the existing criminal authorities.

"Then follow the documents relating to the appointment of justices of the peace, properly so called. The Act 1609, c. 7, provided for yearly Commissions of the Peace in every shire, whereby the ordinary magistrates and officers within the shires may be the better assisted. And by charter of the same year King James VI appointed the Provost, Bailies, Treasurer, and Dean of Guild of the burgh to have 'full power and jurisdiction of conservators, justiciars, and commissioners of our peace,' and this was confirmed in 1612, and again in 1636. But again, in none of these do I find anything to suggest exclusive jurisdiction, or any abridgment of the powers and rights of the county officials, except to the extent to which they would necessarily be abridged by the creation of concurrent jurisdictions.

"The exceptional document to which I have referred is styled, 'An Epitome of a Signature of Confirmation subscribed by King William, dated 8th June 1698,' as contained in the burgh records. This was evidently intended as the warrant for a charter of novodamus of the grant of sheriffdom and crownership to the Provost and Bailies of Edinburgh within the bounds of the burgh, and it bears the significant words, 'and that exclusive and privative of the Sheriff of Mid-Lothian or his deputes, or any other point of sheriffship within the bounds of the said burgh and liberties thereof that have been or can be pretended by them or any others.' The signature also contains 'a dispensation and separation of the sheriffship from the jurisdiction of Mid-Lothian in all time coming, in manner and in the case respective above specified'; and the reddendo is expressed to be 'the administration of justice in the foresaid offices of sheriffship and crownery, and keeping and preserving of the Justice of Peace Court within the said burgh used and wont.' His Majesty promises further to ratify and approve the charter and new grant at the next session of Parliament. Now, in the first place, the 'exclusive and privative' clause in this epitomised signature bears to apply only to the offices of Sheriff and Crowner, and does not apply to the office of Justice of the Peace. Then as to the Sheriff of Mid-Lothian, it appears to have been a *brutum fulmen*, for there is no trace, so far as I have heard, of any such abridgment of his functions. And the explanation of it all, I suppose, is that a signature is not a charter, and a charter is not a parliamentary ratification; that the proposed changes were stopped in time, and that the Signature must either be disregarded or be regarded as an attempt which failed.

"Accordingly, when in 1707 one of the Acts passed at the Union (1707, cap. 6) enacted that justices of peace should be appointed in every shire, and also in such cities, burghs, &c., as Her Majesty should think fit, the position of Edinburgh and other royal burghs 'having the right of being justices within their bounds' was saved to them; but no attempt was made to repeat the important declaration contained in the Signature of 1698, or to make it applicable to the Justices of Edinburgh.

"In 1709 appears a document of considerable interest, namely, a reasoned opinion by Sir David Dalrymple, Lord Advocate, upon certain disputes between the Justices of the City of Edinburgh and the Justices of Mid-Lothian. The disputes had been laid before the Government, and by order of the Queen the matter had been transmitted to the Lord Advocate for his opinion. The opinion is clear and emphatic, 'that the City of Edinburgh hath always been reckoned as a shire or county within itself, distinct from the shire of Mid-Lothian, called the shire of Edinburgh; and these two are in effect as distinct in all respects as any other two shires in the kingdom.' Further, the two jurisdictions of the Justices of the City and of the shire 'are distinct both in their constitution and nomination, and in the bounds of their jurisdictions'; and 'they have no concurrence, nor is there any ground for a cumulative jurisdiction.' One would have liked to know more of the occasion of the dispute, and of the Magistrates' 'proposals' which are referred to in their minute of 6th April 1709. For although the opinion speaks of 'jurisdictions,' the minutes of the Town Council of 2nd March and 6th April 1709, which are in the print, show (as I read them) that the occasion of dispute was so purely administrative a matter as the impressing of recruits from among the citizens by the county constables. It is evident that the burgh and the county were vying with one another as to the number of recruits they could send in, I suppose, for service in Marlborough's campaigns, and that in the course of this rivalry the Magistrates as the Justices for the City complained of 'encroachments made upon their jurisdiction by the Justices of the sheriffdom,' and of 'disorderly deeds done by such as call themselves their constables.' I can well understand that there could be no 'cumulative jurisdiction' of that nature, particularly if it led to disorderly deeds by the constables in the course of the impressment. Still the opinion stands clear and proceeds on general grounds. All that can be said is—(1) that its grounds do not seem very convincing, particularly the observation that it follows from the Magistrates having been appointed perpetual Sheriffs within the City, for that is an instance of cumulative jurisdiction; (2) that, so far as I know, the opinion stands absolutely alone; and (3) that it has never been acted on, so far as appears. In Hutcheson's

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Justice of Peace (3rd ed. i, 57) this matter is referred to in a note, in which he refers to the Justice of Peace records as showing that the point was very warmly disputed, and that the Magistrates went the length not only of disowning the sederunts of the Justices, but even of preventing the execution of their sentences within the City. Speaking of Sir David Dalrymple's opinion, he adds—'This opinion appears not to have been regarded in practice. The County Justices have continued to exercise a concurrent jurisdiction within the liberties. This dispute died away, and does not seem to have ever existed in the case of any other burgh. Indeed, the opinion seems not easily reconcileable to the immemorial jurisdiction of the Sheriff of the County within the City. A city being a county within itself would exclude the jurisdiction of that Judge Ordinary as much as of the Justices of the Peace.' It may not be out of place to quote an expression of opinion (though it be *obiter dictum*) by the Lord Justice-Clerk in the case of *Harvey* v. *Forrest* (1841, 4 D. page 108) to which I was referred. The case had to do with the validity of the acts of a clerk, who, not being clerk of the peace, had acted in that capacity in the Leith Justices' Small-Debt Court. After saying that the case would not, in his opinion, be rendered at all different by the supposition that Edinburgh and its liberties could be regarded in law as a separate county, he adds—'I do not believe that either by the Legislature or by the Crown has Edinburgh been recognised as a separate county in the sense in which cities are separate and distinct counties in England from the general districts called counties in which such towns are apparently situated. Neither do I imagine that the Crown could make Edinburgh for any purpose a separate county, although it may be and is quite competent to appoint justices of the peace to act for any portion of a county, and therefore for the town of Edinburgh.'

"Hitherto we have had to do with the ancient royalty of the burgh. I now consider briefly the later legislation, beginning with 1767, introducing extensions of the City boundaries for various purposes, mostly to the northwards, and beginning with lands in that quarter belonging to the Corporation. The view taken of these later Acts, as importing a complete transference of rights and jurisdictions from the County to the City in the extended area, or as importing merely the admission of the burgh authorities to a concurrent jurisdiction, largely depends on the view adopted as to the ancient royalty. If I am right in the view I have expressed as to that, then I think the later legislation must be regarded not as ousting the county authorities from the annexed districts, but merely as restricting their previously exclusive jurisdiction to a concurrent one. I have carefully considered the statutes referred to, and in my opinion their language is quite capable of such an interpretation, which I regard as the true one. Take for an example the first Extension Act, passed in 1767, 7 Geo. III, cap. 27. It expressly provides that it shall be competent for the Sheriff and the Justices of Midlothian to exercise the same powers and jurisdictions within the lands annexed 'as are competent to them within the present royalty.' I note in passing that this seems a curious mode of expression to use as regards the Justices of the County, if (as the suspender contends) they had no powers or jurisdictions at all 'within the present royalty.' But, apart from that, I hold that the language used aptly expresses what I take to be the fact and the intention, that these Justices had concurrent jurisdiction within the old royalty, and that they were to have the same within the extended area.

"Then followed the three statutes of 1822, 1848, and 1856. The first of these introduced the Police Commissioners; the second continued them, with an enlarged area; and the third, while enlarging the area to the full Parliamentary limits of 1832, abolished the Police Commission, and reinstated the Magistrates and Council in police administration. These police areas were somewhat anomalous creations, and remained really county territory in all respects except mere policing. And it does not appear to me that much light can be got upon the question now raised from the provisions of these statutes. The most important change brought about by these Acts touching the present dispute was the enlargement of the body of City Justices by the issuing of a Commission of the Peace for the City in 1823 in pursuance of the powers conferred by the 1822 Act, section 136. It must be kept in mind that until then the Magistrates, and they alone, were the City Justices, and this not by Commission in usual form but by virtue of the old grants. But section 136 declared it should be lawful for His Majesty from time to time 'to nominate and appoint Special Justices of the Peace for the City of Edinburgh and the liberties thereof.' I have a strong impression that the phrase 'Special Justices of the Peace' has a technical meaning, and imports a Special Commission for a prescribed area within a county, not exclusive of, but concurrent with, the justices of the county acting within this area. Accordingly, I note that the Commission issued in 1823 in express pursuance of this statutory power uses the peculiar style 'We have nominated and appointed you . . . our Special Justices . . . to keep our peace in the City of Edinburgh and liberties thereof.' But be that as it may, section 135 of the 1822 Act expressly saves and reserves to the Justices of the County all and every jurisdiction of whatever kind or nature 'which they have had or are any ways entitled to use or exercise, in the same way and manner as if this Act had never been passed.' I would further refer to sections 251 and 252 of the Act of 1848, and sections 3 and 4 of the Act of 1856, as showing how carefully the rights of the Justices were reserved.

"Of the later statutes I need say but little. I do not think they affect the

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question; but it is right I should notice the points which were made upon their provisions. I have already mentioned that it was not until 1896 that the status of Edinburgh as a County of a City received formal statutory recognition. The Act of that year, which included the extension to Portobello, bears in its preamble that the City of Edinburgh is a county of itself and has a separate Court of Quarter Sessions and a Commission of the Peace'; and section 6 of the Act defines the area of the County of the City, but leaves the powers and jurisdiction of the Sheriffship and Justices of the Peace precisely where they were before, except that the area is extended. Section 7 disjoins the annexed districts from the county of Midlothian, but only for the purposes of the Act. Section 31 contains a general repeal of all laws, statutes, jurisdictions, powers, privileges, and usages 'in so far as inconsistent or at variance with the provisions of this Act.' But this seems to me quite consistent with leaving concurrent jurisdictions as they were, and extending them, as such, so far as the limits of the Act extended. There is one set of clauses common to the more recent Extension Acts, upon which the suspender strongly founds, namely, those which enjoin the Corporation to pay compensation to the Clerk of the Peace and the Procurator-Fiscal of the County Justices in respect of any loss they may sustain by diminution of salary or emoluments consequent upon the extension of the boundaries (1896, section 57; 1900, section 34; 1901, section 45). I can only say that such a provision appears to me as appropriate where an exclusive jurisdiction is reduced to a concurrent one, as it is where the exclusive jurisdiction is altogether abolished, though of course the scale of compensation would be different.

"The significant thing about all this mass of legislation is that there is not a single clear and unambiguous enactment declaring or creating a privative jurisdiction in the City Justices. It is all left upon clauses of reservation, and upon dubious and by no means necessary inferences from language, which seems to me at least equally appropriate to a case of concurrent jurisdiction. In this respect (as was pointed out at the discussion) the course adopted, if it was really meant to have the effect contended for, is in strong and unfavourable contrast to 'The County of the City of Glasgow Act 1893,' where the whole thing is done in a short Special Act devoted to the purpose, and containing an express clause (section 4) cutting off the jurisdiction of the county justices from the county of the city, while saving the jurisdiction of the Sheriff of Lanarkshire.

"In the view I take, it is not necessary for the respondent to prove that the jurisdiction which is claimed, and which I think exists, has been exercised. But, of course, the construction of the documents which I venture to think the correct one is greatly strengthened if the facts are so. Now, it is well known that the Justices of the Peace exercised a customary jurisdiction in respect of small debts long before the legislation of 1795 which regulated it and made the amount uniform, namely £40 Scots. At that time the Magistrates of Edinburgh (who were then the City Justices) were in use to hold what was then known as the Ten-merk Court weekly, and this was expressly taken in to the scheme of the Act and raised to a limit of £40 Scots (£3, 6s. 8d.). But it is noticeable that in the next Small-Debt Statute passed in 1800 (39 and 40 Geo. III, c. 46), while the Magistrates' jurisdiction as Justices was declared to extend to £3, 6s. 8d., they were not, as I understand it, entrusted with the jurisdiction up to the increased limit of £5 introduced by that Act. If that be so, it shows inferentially that the benefit of the enlarged limit, which I understand Edinburgh undoubtedly shared, was obtained not through the medium of the Magistrates' Court but through the County Justices. Then it is certain that whatever the actual occasion of the dispute in 1709, already mentioned, the Magistrates had in fact been objecting to what they deemed to be encroachments on their jurisdiction by the Justices of the county, and we have it distinctly stated by Mr Hutcheson in 1815, as the result of his researches, that although the Lord Advocate's opinion was adverse to the county, it appears to have been disregarded in practice, and that the County Justices had continued to exercise a concurrent jurisdiction within the liberties. Again, I was referred to the official report of 1823 upon the working of the Justice of Peace Courts in Scotland, a document to which it is quite legitimate to refer in a matter of old practice, and it shows the arrangements in Midlothian to be as contended for by the respondent, and that a very large number of causes had been tried by the County Justices on that footing during the previous quarter of a century in the exercise of what is now represented by the suspender to have been in many cases a usurped jurisdiction. Reading article 4 of the suspender's minute of admissions in the light of this historical testimony, I feel entitled to draw the inference that the jurisdiction, which the suspender admits the County Justices 'may have' exercised since 1709, has been in fact exercised by them. The suspender, it is true, adds that such exercise, if it took place, was unknown to the City Justices, and I must take the admission with the qualification. But the exercise of jurisdiction in a public court over a long series of years is a public fact which they ought to have known if they did not. This point is not to be treated as if the two bodies of Justices were two private persons, competing about a matter of private right, and subject to pleas of bar and acquiescence. It is a matter in which the public have the main interest, involving the active and open assertion of a concurrent jurisdiction in a public court, and if the public have found it convenient, I do not think that the knowledge or ignorance of the City Justices has anything to do with the question. It is easy to see that if the thing were pressed unduly, difficulties might arise in various

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directions which I need not advert to. But the thing has worked well down to date, and if a change is to be made now, it ought to be done either by an alteration in the limits of the Commission of the Peace or by an Act of Parliament."

The suspender lodged a reclaiming note, which was heard before the Second Division (the Lord Justice-Clerk, Lords Young, Trayner, and Moncreiff) on 27th and 28th October 1904. In the course of the debate the following minute of admissions was lodged for the suspender—"That for a century the Justices of the Peace for the County of Midlothian have, without objection being taken, exercised jurisdiction within the limits of the County of the City of Edinburgh, including the ancient and extended royalty." Upon these admissions both parties stated that they renounced probation.

On 7th December 1904 the Court, "in respect of the importance of the questions involved," appointed the parties to prepare, print, and box to the Judges of the First and Second Divisions, and to the permanent Lords Ordinary, mutual minutes of debate, "in order to the opinion of the whole Judges being obtained on the questions raised by the record."

The following note of argument for the suspender is taken from the minutes of debate lodged by him:—"(1) The original County of the City, consisting of the ancient royalty or royal burgh, constituted under royal charters, existed as a shire, and had Justices of the Peace, exercising jurisdiction therein, separate and disjoined from the shire of Edinburgh or Midlothian before Justices of the Peace for the latter shire existed. When Justices of the Peace were first appointed for the shire of Midlothian in 1609, their judicial jurisdiction could not extend over or include any part of the ancient royalty or Shire of the City which had thus been previously disjoined. This being so, the onus is on them of showing how the severed lands came under their jurisdiction. (2) When a particular area forms part of a county, it is the inherent attribute of every part of an area of sufficient value that its owner is eligible for the office of Commissioner of Supply in the county in which such area is situated. This attribute would remain even under concurrent jurisdiction. If it can be shown that such area is not eligible for that purpose, that fact proves that it is not part of the county, and is inconsistent with the existence of concurrent jurisdiction on the part of the county authorities over the area. The Commissioners of Supply were appointed according to shires, and the ownership of land in one shire did not qualify its owner for the office of Commissioner of Supply in another shire; but the qualification might be held in any part of the county in which the office was to be exercised. The Commissioners of Supply for the County of Midlothian have always been separate from the Commissioners of Supply for the County of the City; and the possession of property in the City does not and never did qualify its owner for the office of Commissioner in Midlothian. Accordingly, when the County of the City was extended by the Act of 1896 (Edinburgh Extension Act 1896, 59 and 60 Vict. cap. 203), it was by section 65 of that Act provided—'Any Commissioner of Supply of the County of Midlothian whose qualification as such arises from property situated or from office held within the districts annexed shall from and after the commencement of this Act be disqualified from acting as such Commissioner of Supply unless he possess a qualification as a Commissioner of Supply in the said county in respect of property or office held beyond the districts annexed.' This proves that the area so disqualified was no longer part of the County of Midlothian. It is inconsistent to say that territorially the County of Midlothian underlies the County of the City, and its Justices have concurrent jurisdiction with the City Justices, and at the same time hold that property within the concurrent jurisdiction cannot qualify its owner for an office which requires the possession of property within the county. (3) Throughout the statutes which extended the boundaries of the County of the City, there are express provisions that the lands annexed shall be disjoined from the County of Midlothian for the purpose of adding them to the County of the City as one of the purposes of the Act. When the statute disjoins certain lands from the County of Midlothian for the purposes of the Act, and has as one of its purposes to annex them to the County of the City, with the intention, as expressed in the preamble, of causing the functions of the Midlothian Justices to cease within the annexed territory, it is impossible to reconcile this with the proposition that no change has taken place as affecting the County of Midlothian or its Justices, and that all that is intended is to bring in some additional Justices from another jurisdiction. (Edinburgh Extension Act 1896 (59 and 60 Vict. cap. 203), preamble, secs. 6, 7, 8, 31, 65; Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. 133), preamble, secs. 8, 9.) It is submitted that the combined effect of these sections, read in the light of the terms of the preambles above referred to, is, (*a*) to define the area of the County of the City; (*b*) to recognise it as a separate county from that of Midlothian; (*c*) to extend, *inter alia*, the jurisdiction of the Justices of the County of the City over the whole area defined as the area of the County of the City; and (*d*) to exclude, *inter alia*, the jurisdiction of the Justices of Midlothian within what is defined as the County of the City. Reference is made to the case of *Turquand* v. *Board of Trade*, May 28, 1886, 11 A.C. 286, and to the Lord Chancellor's opinion, at p. 288, as to the use that may be made of the preamble of an Act in interpreting the sections. The Act of 1896 also provides in section 57 (1) for compensation being paid to the Clerk of the Peace and to the Procurator-Fiscal of the Justices of the Peace of the County of Midlothian in respect of any loss sustained by diminution of salary or emoluments consequent upon the extension of the boundaries of the City. . . .

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It is submitted that this provision must be read in the light of the preamble and preceding sections, and that it provides for compensation because the Clerk and Procurator-Fiscal were being deprived of an area from which they would formerly draw fees. (4) Under the Licensing Acts the Justices of the Peace of the County of the City have exclusive jurisdiction for the purposes of these Acts within the area of that county as defined in the Act of 1901. The Justices of the County of Midlothian do not possess or exercise concurrent or other jurisdiction under these Acts within the County of the City. (5) The Lord-Lieutenant, Deputy-Lieutenants, Justices of the Peace, and the other authorities of the County of the City hold all the courts and exercise all the functions and perform all the duties competent to the lords-lieutenant, deputy-lieutenants, justices of the peace, or other authorities of or within any other county. There is no necessity or reason for the Justices of the Peace or any other authorities of the County of Midlothian exercising or being allowed to exercise any judicial jurisdiction within the County of the City over persons who are not domiciled within the County of Midlothian outside the boundaries of the City. Hence the statutes of 1896, 1900, and 1901, which define the limits of the County of the City and disjoin the areas within these limits from the County of Midlothian, with the expressed purpose or intention of causing the Justices of the Peace and other authorities of Midlothian to cease their judicial functions within the City, do not contain any reservation in favour of the Justices of Midlothian. (6) No usage prior to 1896, and no document or statute dated prior to 1896, can alter, qualify, or override the expressed provisions of the said Acts of 1896, 1900, and 1901. . . . Moreover, it is submitted that an examination of the earlier statutes and charters (under which the original County of the City was formed, and the several statutes under which the boundaries of the City were extended) supports the same view and shows that the Justices of the County of Midlothian have no concurrent or other jurisdiction within the County of the City as the same existed at any particular time."

(Royal Charter, November 16, 1482; Commissions of Justiciary, 1550 and 1589; Charter of Confirmation, March 15, 1603; Act of Parliament, June 14, 1609; Royal Charter, November 10, 1609; Charters of Confirmation, 1612, 1613, and 1636; Royal Charter, May 11, 1647; 6 Anne, cap. 30, sec. 3; 20 Geo. II, cap. 43, sec. 26; Commissions of Lieutenantry, 1794 and 1837; 52 Geo. III, cap. 173, sec. 85; 3 Geo. IV, cap. 78, sec. 110; Report and Memorial by the Lord Advocate, 1709; 7 Geo. III, cap. 27, *cf.* 56 and 57 Vict. cap. 187, (Local Acts), secs. 3, 4; 3 Geo. IV, cap. 78, secs. 135, 136; Commission of the Peace for the City of Edinburgh, September 25, 1823; 2 Will. IV, cap. 87, secs. 77, 78; 11 and 12 Vict. cap. 113, secs. 251, 252; 19 and 20 Vict. cap. 32, secs. 4, 5; 42 and 43 Vict. cap. 132, secs. 364, 365, 366; 45 and 46 Vict. cap. 161, secs. 6, 26; Commission of the Peace for the County of Edinburgh, July 6, 1878; Commission of the Peace for the County of the City of Edinburgh, 1884; Commission of the Clerk of the Peace for the County of Edinburgh, 1896, *cf.* 15 Chas. II, cap. 11; Hutcheson on Justices of the Peace, v, 14, 4; *Kerr*, 1851, 14 D. 244, and 1852, 14 D. 864, and cases there cited.)

The following note of argument for the respondent is taken from the minutes of debate lodged by her:—(1) The Justices of the Peace for the County or Shire of Edinburgh have, from time immemorial and under powers conferred on them by statute, exercised jurisdiction in small debt cases, originally within the areas embraced by the ancient and extended royalty of the burgh of Edinburgh, and in more recent times within areas withdrawn from the County of Midlothian and added to the boundaries of the City by various Edinburgh Municipal Extension Acts, and all now comprehended within the County of the City of Edinburgh. "(2) No statute, down to and including those of 1879 and 1882, interferes with the jurisdiction of the County Justices; indeed it is expressly reserved in all the statutes. (3) Whilst Edinburgh had long been recognised as being in certain relations a county by itself, and had possessed a separate lieutenancy, it was not formally recognised in Parliament as a county until 1879. (4) The recognition of the City as a county in 1879 was treated by Parliament as not incompatible with the continued exercise of jurisdiction by the Midlothian Justices, and they in fact continued to exercise it. (5) The preamble of the Act of 1896, upon which the complainer mainly founds, sets forth an intention to suppress certain jurisdictions within the areas thereby annexed to the City. No intention is expressed of dealing in any way with the subsisting jurisdictions within the area already within the City. Had there been such an intention it would certainly have been set forth in the preamble. Again, the enacting words deal not with the subsisting area but with the area thereby annexed. Had there been any intention that the Act should affect jurisdictions within the subsisting area, this would have been explicitly provided. (6) If the Midlothian Justices were deprived of the jurisdiction hitherto exercised by them in the ancient royalty, and in the districts annexed to the City by any legislation prior to 1896, it must be possible to point out the Act and section. This has not been done. On the other hand, if the jurisdiction subsisted down to 1896, and was taken away by the Act of that year, it must be possible to point out the operative section by which this was effected. This again has not been done."

The following authorities were referred to:—Commission of the Peace for the County of Edinburgh, 1823; Forbes on Justices of the Peace (1707), part ii, pp. 5, 181, 185; Hutcheson on Justices of the Peace (1815), i, 57, 129; Barclay on Justices of the Peace (1894), p. 657; Justice of the Peace Small Debt Acts, 1795, 1800, 1825,

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1847; Report of Commission on Small Debt Acts, 1820-1823; Edinburgh Town Council Minutes, 2nd March and 6th April 1709; Ersk. Inst., i, 4, 1, and i, 4, 21; Bankton, iv, 19, 9; *Spottiswood*, 1701, M. 4790; *Culross Girdle Makers*, 1725, M. 1924; *Ayr Justices*, 1712, M. 7599; *Tailors of Edinburgh*, 1778, M. 7623; *Craigie*, 1826, 2 W. & S. 642; *Craig*, 1772, M. 7518, 5 B.S. 488; *Dowie*, May 30, 1817, F.C., 1 S. App. 125; *Harvie*, 1826, 5 S. 14; *Neilson*, 1828, 7 S. 182.

The statutes and other authorities founded on in judgment are quoted in the opinion of the Court, *infra*.

The Consulted Judges returned the following opinions:—

LORD PRESIDENT, LORD M'LAREN, LORD KINNEAR, LORD ARDWALL, LORD JOHNSTON, LORD SALVESEN, and LORD MACKENZIE—The question which the Court has to consider is whether the Justices of the Peace of the County of Midlothian continue to have jurisdiction within the boundaries of the City of Edinburgh, or whether their jurisdiction is now restricted to the limits of the County excluding those of the City.

The question is truly one between the County and the City, or between the County Justices and the City Justices, but it is raised under the guise of a note of suspension for Adam Wright, residing in Tron Square, Edinburgh, of threatened diligence upon a small debt decree for the rent of a house in West Adam Street, Edinburgh, pronounced against him by the Justices of the County of Midlothian, at the instance of Mrs Bell, residing in Earl Grey Street, Edinburgh. For convenience we shall deal with the matter as if it were one between the County and the City, without seeking to inquire into the question of the real *domini litis*.

As the decree was for past due rent on a summons raised after Wright had left the house, the jurisdiction depends on the residence of the defender Wright at the date when the summons was served. Now, Tron Square is in the ancient royalty, though West Adam Street and Earl Grey Street are neither in the ancient nor in the extended royalty, but were first included within the Edinburgh Police boundaries as extended in 1848, and are now within the still further extended boundaries of the City. The plea put into the mouth of Wright, which the Court are asked to consider, is formally that of "no jurisdiction." It is impossible to dispute, and indeed we hardly think it is disputed, that the Justices for the County of Midlothian have exercised jurisdiction in their Small Debt Court within the bounds of the City of Edinburgh, whatever these bounds for the time may have been, from the time when civil jurisdiction in small debt cases was first formally conferred on Justices of the Peace, if not indeed by usage from an earlier date. It is for the City to show that that jurisdiction was neither (1) conferred, nor (2) acquired by usage, or (3) that it has been withdrawn.

On a review of the whole information before us we come without doubt to the conclusion that jurisdiction was (1) conferred on, and (2) has been exercised by the County Justices according to a consistent usage, although there has been throughout, up to a certain point, a concurrent jurisdiction in the Magistrates, and afterwards in the Special Justices appointed for the City. The City is, therefore, in our opinion, driven to establish that the jurisdiction so conferred on and exercised by the County Justices has been withdrawn from them, leaving that of the City Justices privative, and if so, when and by what enactment? On a full consideration of all the grants, statutes, &c., we find that the case for the City comes ultimately to turn upon the Extension Act of 1896, and on the determination of the question whether that statute withdraws the present City limits from the jurisdiction, which, it may be concurrently with the Special City Justices, the County Justices exercised over them, and makes the jurisdiction of the Special City Justices privative. Prior to that date they have, in our opinion, no justification for their claim, and the crucial question in the case therefore is whether the Act of 1896 supports it.

Could that question be answered in the affirmative, the discussion of a number of difficult preliminary questions might be avoided; but as in our opinion that question falls to be answered in the negative, and as the case has been remitted to the consideration of the Whole Court as one of general importance, we think it proper, before giving special consideration to the Act of 1896, to deal with the numerous other matters upon which the City have based their contentions. But for the general importance of the case we should have contented ourselves with referring to the ably reasoned opinion of Lord Pearson as Lord Ordinary.

It is, we think, convenient to deal with these preliminary matters under the following four heads:—

I. How far is the question affected by the general statutes instituting the office of Justice of the Peace?

II. How far by charters, statutes, or other grants peculiar to the City of Edinburgh?

III. How far by the terms of the various statutes enlarging the boundaries of the Burgh and City of Edinburgh prior to 1896? and

IV. How far, in particular, by the erection of the City and Burgh of Edinburgh into a County of a City?

Before dealing with

V. The special bearing of the Act of 1896 upon the question at issue.

1st. Then, how far is the question affected by the general statutes instituting the office of Justices of the Peace?

The term Justices was occasionally applied to Commissioners of the Crown appointed for special purposes or to enforce special provisions, as, for instance, when certain persons were appointed "His Highness' Justices in that part" for execution of an Act for Protection of Salmon Fishings, 1581, chap. 15 (Th. iii. 217). But the first Commission to Justices with a general criminal jurisdiction is by the Act 1587,

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chap. 57 (Th. iii. 458). The prior purpose of this Act was to rehabilitate the supreme administration of criminal justice by restoring to efficiency the system of justice ayres. And it may be noted that the system was to be worked entirely by shires. The country was to be divided into circuits, as nearly as might be of seven shires each. The circuit judges were to take their districts shire by shire, and the stewardries and bailieries were directed to come "to the head burrowes of the schireffedomes whairin they lie." This was really the institution of Circuit Courts of Justiciary. But by the second part of the Act it was provided that the Crown should nominate and give commission to "honourable and worthy persons actuall indwellers in the same schires to the number hereafter limited, according to the boundes and quantitie of every schire"—and the particular number for each shire respectively is then named—"Quilks sall be the King's commissioners and justices in furtherance of justice, peace, and quietnes, togidder with foure of the counsall of every borough within the selff." The functions of the commissioners were twofold—first, the preparation of criminal cases for the justice ayre, embracing something of the duties of the procurator-fiscal, and something of the functions of the grand jury of England; second, the administration of justice by themselves in criminal cases of minor degree, always sitting four times in the year, or in quarter sessions, in the tolbooth of the head borough of the shire. They are not formally styled justices of the peace. But it is clear that they are so constituted in the sense in which that term is now used, and as in the first part of the Act relating to justiciary circuits, so in the second relating to justices, the shire is the unit, and the boroughs are not excepted. But there is included in the Act the ambiguous phrase, "together with four of the council of every burgh 'within the selff.'" It can hardly have been intended that every burgh should be represented by four members on the general commission, else in some counties—*e.g.*, Fife—the commission would have been swamped by burgh members. What we think was intended was that in cases from any burgh the burgh should be represented at the sessions by four of its council.

The next Act, that of 1609, chap. 14 (Th. iv. 434), has frequently been regarded as the first institution of the Commission of the Peace, though we think that that must be referred to the Act already mentioned of 1587. But the maintenance of the peace was a more prominent cause of legislation in 1609 than the administration of criminal justice, and accordingly the statute proceeds on a preamble narrating the feuds and disorders of the kingdom, and the King's initial success in suppressing them; but otherwise it does no more than ratify the former Act of 1587, though leaving it to the Crown to determine the number which "the boundes of the shyre shall require" to be commissioners for keeping His Majesty's peace, and with the latter object the Act superadds to the power of trial and punishment, the power of taking security to keep the peace.

Up to this point there was nothing statutory to define the limits of the jurisdiction and the practice of the justices, but by the Act 1617, chap. 8 (Th. iv. 535), there was ratified a set of articles and instructions, formerly apparently by royal authority prepared, for the justices appointed under the Act of 1609. It codifies in articulate form the jurisdiction, powers, and procedure of the justices. There is, as might be expected from the terms of the previous Acts of 1587 and 1609, no distinction between landward and burgh. On the contrary, by articles 15 and 17 the General Commission of Peace for the shire is given power and authority in the matter of jails and prison-houses within burgh, while article 24 provides as follows—"The said justices of peace als well to burgh as land shall convene and be present at the court of sessions of the shire where the burgh and land lies, give their oath to the bench at their admission, make their record, and make payment of the fines intromitted with by them as justices of peace of that shire and to the collector." The same Act also contains articles and instructions regarding the appointment and duties of constables. These are to be made choice of by the justices in their quarter sessions throughout the whole country, two or more for each parish, and also for the greater towns, not being cities or free burghs. But in all burghs, royal and free cities, the constables are to be chosen by the magistrates of the same. This is the only indication up to this point of any separateness in the case of cities and royal burghs.

The Act 1633, chap. 25 (Th. v. 42), is a mere ratification of the Act 1617.

By the Act 1661, chap. 338 (Th. vii. 306), Charles II, concurrently probably with the issue of a new Commission of the Peace, substantially re-enacted the articles and regulations of 1617, while at the same time committing to the justices certain additional duties. But as regards the present question, there is nothing to distinguish the provisions of the Act of 1661 from those of the Act 1617. Before leaving the Act of 1661 it may be noted that among the protests which were in use to be recorded in the use of the Scottish Parliament there is found this entry on the occasion of the passing of that Act (Th. vii. 314)—'Sir Robert Murray, in name of the royal burghs, protested that the power of the justices of the peace should not be prejudicial to the rights, liberties, and jurisdictions belonging to the town of Edinburgh or any of the royal burghs conform to their rights.'

So far as appears, there has been no further general Act defining the position of justices of the peace in Scotland, though they have had at various times sundry statutory additions to their duties.

In the Treaty of Union, as embodied in the Act 1707, chap. 7 (Th. xi. 406), there is no special reference to justices of peace, though they may be covered by certain of

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the general terms used in article 19, to the effect that matters were to remain as they were, subject to alteration by the Parliament of Great Britain, and though article 21 specially provides "that the rights and privileges of the royal burghs in Scotland as they now are do remain entire after the Union, and notwithstanding thereof." But in the first Parliament of the United Kingdom, held in 1707, it was enacted (6 Anne, chap. 40, sec. 2)—"And to the end the publick peace may be in like manner preserved throughout the whole kingdom, be it further enacted by the authority foresaid that in every shire and stewartry within that part of Great Britain called Scotland, and also in such cities, boroughs, liberties, and precincts within Scotland as Her Majesty, her heirs or successors, shall think fit, there shall be appointed by Her Majesty, her heirs or successors, under the Great Seal of Great Britain, a sufficient number of good and lawful men to be justices of the peace within their respective shires, stewartries, cities, boroughs, liberties, or precincts, which persons so appointed, over and above the several powers and authorities vested in justices of the peace by the laws of Scotland, shall be further authorised to do, use, and exercise over all persons within their several bounds whatever doth appertain to the office and trust of a justice of peace by virtue of the laws and Acts of Parliament made in England before the Union in relation to or for the preservation of the publick peace: Provided nevertheless that in the Sessions of the Peace the methods of tryal and judgment shall be according to the laws and customs of Scotland."

And section 3—"Provided that nothing in this Act contained shall be construed to alter or infringe any rights, liberties, or privileges heretofore granted to the City of Edinburgh or to any other royal borough of being justices of peace within their respective bounds."

From this two things are clear, 1st, from section 3, that prior to the Union the privilege had presumably been granted, as will afterwards appear, to the City and Royal Burgh of Edinburgh, as well as to certain other burghs (*i.e.*, to their magistrates), of acting as justices within the boundaries of the city and burgh; and 2nd, from section 2, that subsequent to the Union the Crown had express power conferred on it to issue Commissions of the Peace for cities and burghs, liberties and precincts, as well as for shires and stewartries. But there is nothing to indicate, particularly when the enactment is read in conjunction with the consistent practice of two to three centuries to the contrary, that the jurisdiction (1) of such magistrates or (2) of such limited commissions was to be privative and not merely cumulative with that of the General Commission for the County. If it was so, this must appear from something *dehors* the Act, for there is nothing within the Act to lead necessarily to that conclusion; and further, it must have applied not merely to Edinburgh, but generally to all burghs to which the special privilege had been granted or for which a special commission was issued.

Up to this point the whole legislation relative to justices of peace had reference properly to the peace of the country, and their jurisdiction was criminal in its nature. But it was found expedient to vest in justices of the peace in Scotland, by a general Act, a civil jurisdiction in small causes, to be exercised in a summary way; and accordingly in 1785 the temporary Act 35 Geo. III, c. 123, was passed, conferring on justices a small debt jurisdiction up to £40 Scots, or £3, 6s. 8d. This was followed in 1800 by the Act 39 and 40 Geo. III, c. 46, entitled "an Act for the more easy and expeditious recovery of small debts, and determining small causes in that part of Great Britain called Scotland." This Act was repealed in 1825 by 6 Geo. IV, c. 48, which extended its provisions and reconstituted the justices' civil jurisdiction. It was at the same time extended to £5 in value; and by section 2 it was made 'lawful and competent for any two or more of his Majesty's justices of the peace in that part of Great Britain called Scotland within their respective counties and stewartries,' to hear, try and determine such causes, and a code of procedure was provided. By section 21 the justices of the peace for each county were given power in quarter sessions to make suitable divisions of their counties or stewartries into districts, so that distinct courts might be held at stated times and places 'in order to carry the purposes of the Act into execution.' In this Act, which is still in force, and is the foundation of the present justice of peace small debt jurisdiction, there is no reference to cities or burghs or to the jurisdiction of special burgh justices, or any limitation of the county justices' powers, in the case where there existed within the county burghs having a special commission of their own.

The case for the City therefore gains in our opinion no more support from the general statutes bearing upon the civil jurisdiction of the justices of the peace in Scotland than it does from those bearing on their criminal jurisdiction.

II. How far is the question affected by charters, statutes, or other grants peculiar to the City of Edinburgh while it remained the ancient royalty?

A number of excerpts from such documents have been laid before us, but we think it sufficient to refer to those mentioned in statement 4 annexed to the note of suspension.

The first two—viz., the Ordnance of the Queen Dowager during the reign of Queen Mary, dated in 1550, and the Commission of Justiciary to the Provost and Bailies of Edinburgh by King James VI in 1589—may be dismissed, for if they prove anything, they prove too much. They would rather justify a claim on behalf of the Magistrates to a jurisdiction privative of the High Court of Justiciary than of the Midlothian Justices. The latter grant, for instance, expressly confers on them the power of capital punishment, and to appoint 'dempstaris,' and had it taken effect according to its terms, which there is nothing to show that

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it ever did, would have been an interference with the system introduced by the first part of the Act 1587, c. 57, already referred to.

The next is the charter of King James VI, of date 1609, conferring upon the Provost and Magistrates of Edinburgh within the bounds of their liberties full power and jurisdiction of Conservators, Justiciars, and Commissioners of the Peace. It may be assumed that a similar charter was granted in 1612, though only an epitome of it from the burgh books is produced, as both these charters are confirmed by the Act 1621, c. 78 (Th. iv, 669).

But it is unnecessary to consider these, as the charter of King Charles I of 1636 confirms them, and renews the grant in more distinct and express terms—viz., 'We also make and constitute the said Provost and Bailies, both present and to come, conjointly and severally, Justices and Commissioners of our Peace within the said City and bounds aforesaid.' In 1661 King Charles II, confirmed in general terms this and other grants of offices to the burgh.

It may therefore be accepted that, whatever the value and effect, the Lord Provost and Magistrates of Edinburgh had conferred upon them, from the time when the justice of peace system was beginning to take the shape which it more or less still retains, the office of justice of the peace. But it does not follow that this Commission was exclusive, and not merely supplementary to that for the whole county.

If exclusive, we should expect to find that it had been so interpreted and acted on. But the contrary has been the fact. There is indeed nothing in these grants to distinguish Edinburgh from many of the burghs of Scotland, small as well as great, in this matter of the justiceship.

Further, that it should not have been exclusive, but merely supplementary, is not inconsistent with the conception of the office as disclosed in the general statutes of 1587, 1609, 1617, and 1661. The only reason that can be given in favour of the exclusive nature of the grant, which is nowhere expressed, is that it must be implied *ex necessitate rei* from the gift of shrievalty to the Lord Provost in 1482, and renewed subsequently, involving the alleged consequence that the City of Edinburgh became a separate county, severed for all purposes from the County of Midlothian. This question we shall deal with subsequently.

Subject to that question, we find nothing in the series of grants prior to the extension of the ancient royalty, which first occurred in 1767, which supports the idea that the Commission to the Lord Provost and Magistrates was privative and exclusive of the County Justices.

III. How far is the question affected by the terms of the various statutes enlarging the boundaries of the Burgh and City of Edinburgh?

The bounds of the ancient royalty were fixed long before the first general institution of the justice of peace system in 1587, and these bounds remained unaltered until 1767. The ancient royalty was confined to the area between the Castlehill and Grassmarket on the west, and St John's Wynd on the east, and between Heriot's Hospital and the College on the south, and the present Waverley Station on the north. But subordinated to the ancient royalty were the regality of the Canongate and the baronies of Calton and Portsburgh with the liberties of the Pleasance, &c.

In 1767, by 7 Geo. III, c. xxvii, the ancient royalty was extended over certain disconnected areas chiefly to the north, the larger of which included the original new town from Princes Street to Fettes Row and from the Calton Hill to Charlotte Square. The extension was apparently based upon rights of superiority or property or otherwise which the City and the Governors of George Heriot's Hospital had in the lands included. By this Act of 1767 it was provided that the Magistrates and Town Council shall thereafter 'have and enjoy the same privileges, rights, and jurisdictions over the said grounds hereby annexed to and comprehended in the said royalty as they do now enjoy and exercise over and within the limits of the present royalty by any law, statute, and established custom.' But it was at the same time specially enacted 'that it shall be competent to the Sheriff of the County of Midlothian and the Justices of the Peace for the said county to exercise the same powers and jurisdictions within the said lands hereby annexed to and comprehended within the said royalty as are competent to our said Sheriff and Justices of Peace within the present royalty, anything in this Act to the contrary notwithstanding.'

There were further minor extensions of the royalty in 1785, 1786, 1809, and 1814, but in each case the provisions of the Act 7 Geo. III, c. xxvii, immediately above quoted, were incorporated by reference, as by 25 Geo. III, c. xxviii, sec. 66, 26 Geo. III, c. cxiii, sec. 22, 49 Geo. III, c. xxi, sec. 4, and 54 Geo. III, c. cxxx, sec. 18.

This concludes the series of Acts specifically extending the royalty. Those which follow either created a police jurisdiction over an extended area, without extending the municipal boundaries, or were modern municipal extension Acts. But a consideration of the above Acts extending the royalty between 1767 and 1814, make it perfectly plain that those who, living much nearer the time when the justice of peace system was instituted, were responsible for the framing and obtaining of the Acts, were perfectly aware that the Justices of Peace for the County of Midlothian, as was apparently the fact, did exercise powers and jurisdiction within the ancient royalty, and expressly reserved to them the enjoyment and exercise of the same powers and jurisdiction within the extended royalty. Otherwise the clause of reservation would be unmeaning. This confirms the view which we have already expressed, that the charters and other grants on which the City founds, whatever they do confer, do not confer on the Magistrates of the City of Edinburgh any exclusive justice of peace jurisdiction, but at most create in them a jurisdiction

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concurrent with that of the Midlothian County Justices.

The next Acts to be considered are police and not municipal Acts. They are the Act of 1822, 3 Geo. IV, c. xxxviii, and the Act of 1848, 11 and 12 Vict. c. cxiii.

But though dealing merely with police matters, they contain references which have an important bearing upon the question.

The Act of 1822 created a police district much wider than the extended royalty, and placed it under special Police Commissioners, both *ex officio* and elected. Section 110 created a Police Court, the constitution and jurisdiction of which may be noted. It provided that all police offences were to be tried by the Magistrates, so far as regarded offences committed within the City of Edinburgh and liberties of the same, but by the Sheriff of the County or his Substitutes so far as regarded offences committed "within all parts of the limits" specified in the Act. That is to say, while the Magistrates' jurisdiction was confined to the extended royalty, the Sheriff's jurisdiction was recognised over the extended royalty as well as over the additional county area included in the police boundaries of the Act. But there is this saving clause (section 135), saving and reserving "to the Lord Provost, Magistrates, and Council of the City of Edinburgh, as well as His Majesty's Sheriff-Depute and the Justices of the Peace of the County of Edinburgh, . . . all and every jurisdiction of whatever kind or nature, civil as well as criminal, which they have had or are any ways entitled to use or exercise, in the same way and manner as if this Act had never been passed."

Then (by section 136) it is enacted that it shall and may be lawful for His Majesty and His royal successors from time to time to nominate and appoint special Justices of the Peace for the City of Edinburgh and the liberties thereof. This marks the transition from the Lord Provost and Magistrates with the functions of Justices of the Peace to a Special Commission for the City of Edinburgh which was immediately afterwards issued, and it must be remembered that in this Act the City was only the ancient and extended royalty.

The Police Act of 1822 was superseded by that of 1848, which largely extended the police boundaries. It was framed much on the same lines as the Act of 1822. In section 251 it contained a similar saving to that contained in section 135 of the Act of 1822 of the existing jurisdiction of the Lord Provost and Magistrates of the City, the Sheriff of the County, and the Justices of the Peace for the County, and in section 252 a similar power to nominate special Justices, not only for the City of Edinburgh, but henceforth also for "the limits of this Act." It is apparent that Justices so appointed would, so far as the police limits outwith the ancient and extended royalty were concerned, be acting in an area still part of the county and concurrently with the County Justices.

The combination in each of these Acts of the saving of the jurisdiction of the County Justices, with the power to issue a Special Commission, is conclusive that the jurisdiction of such Special Commission was not to be exclusive.

These two Acts were followed by the Act of 1856, 19 and 20 Vict. cap. xxxii, which again extended the police boundaries, but transferred the powers of the former Police Commissioners to the Lord Provost, Magistrates, and Council. But while it was substantially only a third Police Act, it at the same time extended the "limits and boundaries of the Royal Burgh of Edinburgh" so as to make the area of the Parliamentary and police and royal burgh coincide.

It was declared (section 3) that the Lord Provost, Magistrates, and Council should possess the same rights, powers, and jurisdictions of every kind over the whole territory of the City, as extended by the Act, as they possessed "within the royalty and present limits of the City, any charter, law, or usage to the contrary notwithstanding," and the subordinate magistracies and jurisdictions of the regality of Canongate and baronies of Calton and Portsburgh were abolished. By section 4, however, the jurisdiction of the Sheriff and the Justices of the Peace of the County of Edinburgh is very amply saved, while by the next section (section 5) the exercise of their functions by the City Justices is provided for.

The Act of 1879, 42 and 43 Vict. cap. cxxxii, is of the nature of a repealing and consolidating statute, and need not be further noticed than to say that section 322 saved, *inter alia*, the jurisdiction of the Justices of the Peace of the County of the City of Edinburgh, and of the Sheriff and of the Justices of the Peace for the County of Midlothian, civil as well as criminal, "which any of them has had or is in any ways entitled to use or exercise," except so far as might be inconsistent with the provisions of the Act. It can hardly be maintained that, in face of this reservation, the jurisdiction of the County Justices was impliedly excluded from the limits of the City, and particularly from the limits of the extension.

Section 365 further enacted that, "notwithstanding the repeal of the Edinburgh Police Act 1848, Her Majesty and Her Royal Successors from time to time as heretofore may nominate and appoint special Justices of the Peace for the County of the City of Edinburgh and the limits of the said Act," and section 366, "that such Justices should hold their sessions in the same manner as justices of the peace of shires and other districts in Scotland."

But, as was said of the Acts of 1822 and 1848, the combination of the saving clause, with the power to the Crown to issue a Special Commission, is conclusive that the jurisdiction of such Special Commission was not intended to be privative.

A further extension was made in 1882 by the Act 45 and 46 Vict c. clxi, when the police boundaries were still further extended, and the municipal boundaries made

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co-extensive. While by section 24 the Crown was empowered to nominate special Justices "for the County of the City of Edinburgh, and the limits of the Edinburgh Police Act 1848," by section 26 it was enacted that, "except by this Act otherwise specially provided, nothing in this Act contained shall alter, diminish, or affect the authority and jurisdiction of the Sheriff or Justices of the Peace of the County of Edinburgh."

In 1885 and again in 1890 there were further extensions, but in terms which call for no remark.

From this examination of the various Acts, from the last proper extension of the royalty in 1814 down to 1890, whatever changes were made and new jurisdictions conferred, the utmost care was taken to preserve the existing jurisdiction of the County Justices within the boundaries of the City and Burgh of Edinburgh, though setting up a jurisdiction in a Special Commission of Justices concurrent with it. And it is incontrovertible that prior to, and throughout the whole period covered by these Acts, the County Justices in fact had and exercised the jurisdiction they now claim.

IV. How far is the question affected by the erection of the City and Burgh of Edinburgh into a County of a City?

Down to 1890, at any rate, this erection is an assumption merely or at best an implication.

We cannot better express the view on which this assumption or implication is founded than in the words of Sir David Dalrymple in his report to Queen Anne's Government in 1709, where he says—"But the City of Edinburgh being the capital of the kingdom, and its magistrates from the time of King James III having been perpetual Sheriffs within the City, and also appointed to be Justices of the Peace within the bounds thereof, some years before any Justices of Peace were appointed for the shire, the City of Edinburgh hath always been reckoned as a shire or county within itself, distinct from the shire of Midlothian; and these two are in effect as distinct in all respects as any other two shires in the kingdom, save that the City of Edinburgh being situate in the said shire, the whole courts of the shire are held and kept within Edinburgh, and have the use of the Parliament House and of the prisons there." In our opinion the learned Lord Advocate is guilty of rather hasty generalisation and deduction, and practically begs the question before him. But the foundation of his opinion is evidently the gift of Sheriffship to the Lord Provost and Magistrates, coupled with the grant to them of the office of Justice of Peace, assumed to be prior in date to the issue of the Commission for the County.

Having regard to the statutes and grants which have already been examined, we think that it may safely be concluded that the grant of a separate Commission of the Peace in itself neither creates the district for which the appointment is made a county, nor precludes a cumulative jurisdiction in the County Justices. But, *prima facie*, there is more in the gift of the Sheriffship. The conception of the office of sheriff—theoretically, at least—involves the severance of his shrievalty or shire from the rest of the county; but a consideration of the history of the Sheriffship of the City of Edinburgh leads us to the conclusion that the grant of Sheriffship to the Lord Provost and Magistrates did not carry all the theoretical incidents of such grant, and cannot be founded upon as creating a shire or county for all purposes separate from and independent of the County of Midlothian. Had the grant been followed in practice by such severance and independence, it might have been otherwise, but, as has been the fact, the grant, if it did not partake much of the nature of a titular dignity, has certainly not had the consequence of severing the City of Edinburgh from the jurisdiction of the Sheriff of Midlothian or its area from the county.

The original grant of Sheriffship to the Lord Provost and Magistrates as representing the City by King James III in 1482, King James VI's charter of 1603, and King Charles I's charter of 1636, make no express severance of the City area from the County, contain no erection of that area into a County of a City, but speak of it always as a burgh royal or as a city and burgh royal; and further, even if their effect could be carried as high as the City maintains, they only apply to the ancient royalty, and do not help to make a County of a City of the extended areas.

Perhaps we should at this stage refer to another document produced, viz., the Epitome of a Signature of Confirmation alleged to have been superscribed by King William III in 1798. Had a charter been granted of such tenor and been acted upon the position might have been different. The Lord Provost would have been Sheriff exclusive and privative of the Sheriff of the County, and the reddendo for the grant would have been the administration of justice "in the aforesaid offices of sheriffship and crownery, and keeping and preserving of the Justice of Peace Court within the said burgh, used and wont for all other burden," &c. But, in the first place, we cannot assume that any such charter ever was granted, or that before it was executed other counsels did not prevail. It is not conceivable that a charter of such importance should have disappeared, leaving behind only an epitome of its signature. But, secondly, we regard the terms of the Epitome of the Signature as an admission that the express recognition of the grant of sheriffship as exclusive and privative, was needed to give to the charters of 1482, 1603, and 1636 the effect which the burgh (throughout the Signature the word "'burgh' is consistently used, and neither the term 'city or county of a city'") desired.

But then, lastly, it is alleged that there has been recognition by the Crown, of Edinburgh as a County of a City. Now, it is true that there have been some instances of the use of the term, but we think, if explanation was obtainable, they would probably be traced in their origin to the burgh

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and its officials, whose wish was father to the thought, but who have never, even in their Act of 1896, fairly faced the question so attempted to be indirectly compassed.

The first statutory use of the expression "County of a City" which we have found is in the Police Act of 1822, 3 Geo. IV, c. 68. Incidentally, in empowering him to grant deputations to certain councillors, termed old bailies, who were not magistrates *ex officio*, the Lord Provost is styled "Sheriff-Principal within the County of the said City." In the same way, in the City's Act of 1879, sections 322 and 365, and in that of 1882, section 24, the same words are used, particularly where the power is conferred upon the Crown of appointing special Justices of the Peace for the County of the City of Edinburgh. And these are, we think, all the cases where, even in the local and private Acts of the City, the expression is used. We cannot accept that the Crown is thereby committed to the erection of the City of Edinburgh into a county separate in all respects from the County of Midlothian, or to a recognition, *ex post facto*, that it had been so erected, particularly when the saving clauses of these very Acts are regarded which take the whole edge of the alleged recognition.

Still less can we give the effect contended to the various commissions of lieutenancy and commissions of the peace which are to be found among the productions. The Grant of Lieutenancy of 1794 speaks of the sheriffship, but not of the County of the City, and so does that of 1837. But we should have thought the Commission of the Peace granted for the special district of Edinburgh on the 25th September 1823 by virtue of the powers contained in the Police Act of the preceding year 1822, a more important document, yet at the transition from the Lord Provost and Magistrates as *ex officio* Justices to a Special Commission of the Peace, we have the special Justices appointed to keep our peace merely in the City of Edinburgh and liberties thereof, and not in the police district created by the Act.

In the Commission by Queen Victoria in 1884, however, the style is altered to that of our City and County of our City of Edinburgh, and the Justices are appointed to keep our peace in the County of the City of Edinburgh and limits of the Edinburgh Police Act 1848, and also of the burgh of Edinburgh as defined by the Edinburgh Police and City Municipal Extension Act 1882, but so little is the reality of the style recognised that the Commission concludes by commanding "by the tenor of these presents our Sheriff of the County of Edinburgh that at certain days and places which you or any such two or more of you (as is aforesaid) shall make known to him, he cause to come before you or such two or more of you (as is aforesaid) so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premises shall be the better known and determined;" and it further proceeds—"We also command the Lord Provost of our City aforesaid to bring before you at the day and places aforesaid the writs, precepts, processes, and indictments aforesaid, that they may be inspected and by due course determined as is aforesaid." From this document it does not very well appear what, even in the estimation of the draughtsman, the County of the City was. But far from the style affecting the reality, recourse is had not to the Lord Provost as Sheriff of the County of the City but to the Sheriff of the county (*as well within liberties as without*) for assistance to effectuate the jurisdiction.

On the other hand, the Commission of Peace for the County in 1810, on which no modification has apparently subsequently been made, makes no exception from the county area, but speaks of the county as well within liberties as without, and in so doing, as we think, exactly defines the situation, which was, that the so-called County of the City was of the nature of a liberty within the county not separate or independent, but having certain offices with jurisdictions and functions not exclusive or privative but concurrent.

We now come to the question—

V. What is the special bearing of the Extension Act of 1896 upon the question at issue?

As we stated at the outset, we think that the case for the City comes ultimately to depend on the interpretation to be placed upon this Act. This is rendered a matter of considerable difficulty by the apparent unwillingness of the City and their advisers to face directly what they were aiming at. To what this is to be attributed we of course do not know, but there can be no doubt that the City desired to obtain recognition of the erection of the extended area, as fixed by that Act, into a County of a City, its entire severance from the county, and the exclusion from its bounds of all other inferior or cumulative jurisdictions. But then, unfortunately, the Act goes on the tack of assuming that much had been done which it was wished should be done. Thus the preamble commences by the statement, which assumes a prior erection for which we find no express warrant, "whereas the City of Edinburgh is a County of itself, and has a separate Court of Quarter Sessions and a Commission of the Peace," and so proceeds to set forth the expediency of an extension of the boundaries of the City and Royal Burgh of Edinburgh and County of the City of Edinburgh, and of the relative expediency of "all franchises, rights, privileges, and immunities of the said City and Burgh and the Royalty thereof and County of the City, and the powers, jurisdictions, authorities, and privileges of the Lord Provost and Magistrates and of the Magistrates and Council, and of the Police and the Burgh and Dean of Guild Courts thereof, and all other jurisdictions whatsoever being extended over and made applicable to and within the extended City and Royal Burgh," and of the provisions of the Edinburgh Municipal and Police and other local Acts, in force for the time, being extended and applied "to the City and Royal Burgh and to

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the County of the City as so extended." It then narrates, omitting to note that there had been no disjunction of the ancient royalty or of the previous extensions, that it would be necessary that the *districts to be annexed* should be disjoined from the County of Midlothian for the purposes of the Act, and that "all matters of administration and management, and all jurisdictions, powers, and authorities within the districts annexed," should be devolved upon and vested in the Corporation.

And then the preamble proceeds with this important, or rather essential, statement "that it is expedient that the said burgh of Portobello and the other districts added to the City under this Act should be and be deemed to be part of the County of the City of Edinburgh, and should be within the jurisdiction of Quarter Sessions of the said County of the City of Edinburgh and of the Commission of the Peace thereof, and that the power of the existing and future lords-lieutenants, deputy-lieutenants, and justices of the peace, and licensing courts, and courts of quarter session, and all other courts, jurisdictions, and functions of and within the county of Midlothian, should cease *within the districts annexed*."

What we have italicised, it must be noted, assumes that the powers, jurisdictions, &c., have already ceased in the existing City and Royal Burgh or in the County of the City, if it was properly so styled, to which the annexation is made, and that the existing City and Royal Burgh had already been disjoined from the County of Midlothian, neither of which, in our opinion, was the case. But at the same time it is clear that what the promoters of the Act intended was an entire disjunction of the whole area, original and extended, of the City from the County of Midlothian, its erection into a County of a City, and the exclusion from it of the jurisdiction of the Midlothian County Justices. The question really is whether the intention, which is manifest, though marred by the above inaccuracy of statement in the preamble, is carried out in the operative portions of the statute, and it is necessary to examine these with some minuteness.

Now the interpretation clause (section 4) provides that "the existing burgh" should mean the existing City and Royal Burgh of Edinburgh within the limits defined by the last Extension Act; that "the City and Royal Burgh" and "the City" should respectively comprehend the whole area within the limits of the City and Royal Burgh of Edinburgh as extended and defined by this Act.

Section 5 defines the extended boundaries.

Section 6 provides that the County of the City of Edinburgh shall be, and be deemed to be, and shall include, the City and Royal Burgh as extended and defined by this Act, and that "all existing charters, statutes, enactments, laws, customs, and usages with respect to the lieutenancy, depute lieutenancy, and the sheriffship, and with respect to Justices of the Peace and general Quarter Sessions of the Peace," &c., "all as the same are at the passing of this Act applicable within the County of the City of Edinburgh, shall be applicable within the County of the City of Edinburgh as extended by this Act."

Section 7 expressly disjoins from the County of Midlothian *the districts annexed to the City by the Act*, but it omits to disjoin, and we are unaware of any precedent or subsequent express disjunction of the area to which the annexation is made.

Section 8 empowers the Crown to nominate additional Justices or to issue a new Commission of the Peace for the County of the City as extended by the Act.

Section 28 provides that the Lord Provost, Magistrates, and Council, in any capacity whatsoever, shall have, possess, and may exercise the same powers, duties, and functions and powers of assessment respectively in and over the City and Royal Burgh (*i.e.*, as extended) as they now have, enjoy, and possess within the royalty or within the existing burgh.

And then there follows (section 30) the crucial clause—"Subject to the provisions of this Act, and in so far as necessary to give full effect thereto, all separate magistracies, councils, commissions, authorities, and jurisdictions, and all rights, powers, and functions heretofore exercised or exerciseable by any town council, commissioner, county council, district committee, local authority, or other authority *within or over the districts annexed, or any part thereof*, so far as necessary for effecting the purposes of this Act, shall cease and determine from and after the first election of magistrates and councillors after the commencement of this Act; and the several persons by whom such offices were held shall be freely discharged from all liabilities which may have attached to them in connection with these offices." The italics are ours. We pause here to note that, though Justices of the Peace are not specially enumerated, they might possibly be included under the term "separate Commissions," provided the preamble, though it cannot add to the enactments of the statute, can be prayed in aid of the interpretation of any such doubtful provision. But even were this so, the result would be to exclude the jurisdictions in question, and therefore the jurisdiction of the County Justices from the annexed area, while leaving them still in force over the area to which the annexation is made, and this would not aid the City in the present question, which arises, not even within the area of one of the previous annexations, but within the limits of the ancient royalty itself, regarding which there is not in the statute under review, and has not been in any prior statute, any clause, either of disjunction from the county or of exclusion of the County Justices' jurisdiction.

But even as regards the annexed area, the interpretation, in aid of which the preamble is thus prayed, is rendered more than doubtful by the context of the concluding part of the section, which provides that all actions or processes "in dependence before the courts of such jurisdictions, other than

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the Dean of Guild Court, shall be adjudged and disposed of by the Magistrates of the City and Royal Burgh" (that is, the extended City and Royal Burgh), "to whom all such actions and processes shall, according to the subject-matter thereof, by authority of this Act, be transferred." Now, no action or process pending before the County Justices could in ordinary course be adjudged and disposed of by the Magistrates, and the inference therefore is that the jurisdictions referred to in the earlier part of the section, and thereby determined, do not cover the jurisdiction of the County Justices.

The matter is not advanced by section 31, which provides that 'all laws, statutes, jurisdictions, powers, privileges, and usages now in force with relation to or within the districts annexed, in so far as inconsistent or at variance with the provisions of this Act, are, subject to the provisions of this Act, hereby repealed, put an end to, and extinguished.' The jurisdiction of the County Justices within the districts annexed may be inconsistent or at variance with the *preamble*, but, unless section 30 can be interpreted as is sought, is not inconsistent or at variance with the *provisions* of the Act.

We have, therefore, come to the conclusion that Edinburgh has now for the first time, in 1896, been expressly created a County of a City, but that, while the determination of the jurisdiction of the County Justices by force of this statute is more than doubtful even within the area of extension, there is no question that it has *not* been determined within the area of the existing City or Burgh as defined prior to the passing of this Act. And that is sufficient for the purposes of the present case.

We are, therefore, of opinion that the judgment of Lord Pearson should be adhered to and the note refused.

LORD PEARSON—I remain of the opinion which I expressed in my judgment as Lord Ordinary. I observe, however, that the reclaimer's argument on the later statutes, and particularly on the Act of 1896, has been considerably developed since the case was before me. It was then used rather as corroborating the reclaimer's case on the earlier documents, and not as an alternative argument, which I think it truly is. Regarded as an alternative argument, it does not aid the reclaimer's contention in this particular case which has arisen within the limits of the ancient royalty. But even as regards the districts annexed to the City by the Act of 1896, I am of opinion that that Act has not, on a sound construction, the effect of determining the previously existing jurisdiction of the Midlothian County Justices.

LORD DUNDAS—I concur in the opinion expressed by Lord Pearson as Lord Ordinary, and also in the additional opinion returned by his Lordship as one of the Consulted Judges.

At advising—

LORD JUSTICE-CLERK—I concur in the judgment of the Consulted Judges.

LORD KYLLACHY—I am of opinion with all the Consulted Judges that the Lord Ordinary's judgment should be affirmed.

LORD STORMONTH DARLING—I have read and re-read with entire satisfaction the opinion of the Lord Ordinary, along with the additional opinion which he has sent in as one of the Consulted Judges, and I agree in the unanimous view of the Consulted Judges, that the Lord Ordinary's judgment should be adhered to.

LORD LOW—I concur.

The Court unanimously adhered.

Counsel for the Suspender and Reclaimer—Cooper, K.C.—Hunter, K.C. Agents—Allan Lowson & Hood, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Wilton. Agents—Dalgleish & Bell, W.S.

HOUSE OF LORDS.

(COMMITTEE FOR PRIVILEGES.)

Tuesday, July 4.

(Before the Chairman of Committees (Earl of Onslow), the Lord Chancellor (Earl of Halsbury), Earl Spencer, Viscount Cross, Viscount Knutsford, Lord Ashbourne, Lord Macnaghten, Lord James, and Lord Robertson.)

KINROSS.

Administration of Justice — Advocate—Peer—House of Lords — Right of an Advocate who is a Peer to be Heard at the Bar.

A Peer may be heard as counsel on an appeal at the bar of the House of Lords, but this does not include his appearing before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case.

This was an application by Lord Kinross, who—admitted as Mr Patrick Balfour a member of the Faculty of Advocates in 1881—had succeeded his father, the late Lord Justice-General, as Baron Kinross in the Peerage of the United Kingdom, in January 1905, to be allowed to argue on appeals to the House of Lords sitting as a Court of Appeal. The circumstances of the case are stated by the Lord Chancellor (Halsbury).

LORD CHANCELLOR—I think it right to mention the circumstances under which I have asked that your Lordships should give us your assistance. The son of the late Lord Justice-General of Scotland has been called to the bar and is a practising barrister. There is a case coming before your Lordships' House in which he is de-

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sirous, and his client is desirous, that he should appear and represent him as counsel at the bar of your Lordships' House. I did not think it was very desirable that without an appeal to your Lordships' Committee we, who are a comparatively small number practically constituting the Court of Appeal, should decide the question as to hearing him for ourselves, because although practically those who are sitting for that purpose are merely a Court of Appeal, theoretically it is your Lordships' House. Therefore I have asked your Lordships' assistance in determining what answer should be returned to the noble Lord who desires to appear as counsel.

I do not conceal that I am myself strongly of opinion that he ought to be allowed to appear. I think the theoretic view that he is a member of your Lordships' House and so a member of the tribunal is not one which ought to prevail in practice. The House when sitting on appeals is confined to the legal members of the House of Lords, including the Lords of Appeal who are appointed for that purpose. A Court of Appeal has been specially constituted, before which no appeal can be entertained unless three of those members are present. Theoretically I can imagine that a good many things might be said against the view which I entertain; but it seems to me that practically the question is not one which ought to create much difficulty. I do not see why a Peer should be precluded from appearing before the final Court of Appeal.

Two things strike one at once with reference to the general question. In the first place, Lord Coleridge, who is a member of this House, is continually practising before the Courts, and therefore it may be assumed that there is nothing in the position of an advocate before the courts to prevent a Peer from practising at the bar. Then the question arises, is there anything to exclude him from appearing also before the highest Court of Appeal? Whatever may be said about that now, there is no doubt that in earlier times there was not a strong partition between the bench and the bar. If anything is to be said about the traditions of the bar, my impression derived from the old reports is that in the times of our early legal history a man was one day an advocate and the next day a judge. In fact, when you use the old reports for the purpose of authority, it is difficult, without making some sort of antiquarian inquiry, to ascertain whether or not the words you quote are words of authority coming from one of the judges, or whether they are merely the argument of counsel which may have been uttered the day before in his capacity as counsel, and not as a judge at all. From time to time they went from the bench to the bar and from the bar to the bench during all those years. And then I may refer to the present state of things in the Privy Council. We have a distinguished member of the House of Commons and of the bar—Mr Asquith—who is also a member of the Privy Council, practising before the Privy Council. It may be said that he is not a member of the Judicial Committee of the Privy Council. That is true; but it would be strange if that circumstance were to affect the question whether or not he ought to be heard as an advocate before the tribunal. It is plain that circumstances might arise any day in which the Sovereign might appoint him a member of the Judicial Committee. I only desire to make this motion in order to start the discussion, that we may receive your Lordships' help and countenance, whatever view we take of the matter, and that the noble Lord who wishes to appear should, before he formally makes his application to be heard, be informed whether he will be heard or not. I propose to move, with a view to starting the discussion—That according to the practice of the highest Court of Appeal, the House of Lords, there is no reason why a Peer should not be heard as an advocate to argue questions of law before your Lordships' House.

Lord James—As one of the older members of your Lordships' Committee, I should like to say, with very great deference, that I entirely differ from the view that has been presented by my noble and learned friend, and I trust your Lordships will consider well before you accept this motion. I am not for a moment suggesting that a Peer should not practise as a barrister in the courts of law. Until the case of Lord Coleridge occurred the question had never arisen; but it appears to me that the course taken by the noble and learned Lord was perfectly justifiable. If I may say so respectfully, I think the more the members of this House associate themselves with the profession the better. In my opinion Lord Coleridge was well within his right in practising at the bar. But that is not the question now before your Lordships. The question is, whether a man who is a member of a tribunal can practise before that tribunal. If we accept this motion, that Lord Kinross should be allowed to practise at the bar of the House, I cannot understand how we can refuse him the right to appear before committees of the House also. I cannot see any distinction, and the very important question arises whether we shall not by giving this permission be encouraging the House of Commons to determine that its members may practise before the committees of that House. There is a very thin partition between practising before committees of the House and before the House generally. What is there to prevent a Peer who practises before the House itself from practising before one of its committees? And let me refer to a recent case. Three or four years ago we had a Peer on his trial for a felony. If this permission is granted, what will there be to prevent a Peer from being heard as an advocate at the bar and then coming in and taking part in the decision of the very case in which he has been an advocate?

We must not forget that when we are sitting to hear appeals we are sitting as the House of Lords. According to the theory

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of the Constitution we are the House of Lords, determining the question as such, and whether we sit as a limited number of legal Peers to hear appeals in civil causes, or as a judicial tribunal to determine the guilt or innocence of one of our Peers, we are in any case the highest court of law in the land. My noble and learned friend's motion involves this, in principle at least, that a member of this House may appear before the House and argue before it, with a right afterwards to take part in the decision. I say that would be a scandal. We have some analogy to guide us upon the principle as to whether a member of a tribunal can practise before it or not. As your Lordships are aware, there was a time when the House of Commons decided upon election petitions by its own committees, but in the year 1868 the determining of those petitions was placed in the hands of the Judges. Then because that tribunal (the Judges) reported to the House of Commons, those who had the care of the interests both of Parliament and the bar in their hands had to consider whether a barrister who was also a member of Parliament had a right to appear before that tribunal. If I recollect rightly, the determination of that question was chiefly in the hands of Sir John Coleridge and Sir John Karslake, and a few months later, in the spring of 1869, I was a party to it, We determined that no member of the House of Commons should appear before an election Judge, because the election Judge had to report to the House, and therefore the barrister practising before him would be practising before the same tribunal of which he was a member. I may remind my noble and learned friend, who was engaged in nearly all the election petitions until he took his seat in the House of Commons in 1876, that that rule was fully accepted. Some members of the House gave up appearing on a considerable number of petitions, and we maintained the principle that a member of the House of Commons should not practise before the tribunal which would have to report to the House.

One word as to the analogy which my noble and learned friend has spoken of in respect to the Privy Council in the case of Mr Asquith. The rule of conduct was that a barrister should not practise before the Judicial Committee if he became an ordinary Privy Councillor. Sir John Karslake, for one, entertained this view. Acting upon that rule in 1885, when I had the honour of being made a Privy Councillor, I refused to appear before the Judicial Committee because I could not bring myself to practise before that tribunal, although there was a strong partition between the general body of Privy Councillors and the members of the Judicial Committee. That was formerly accepted and acted upon as the proper rule which should guide those who practised before the Privy Council until very recently, and although my friend Mr Asquith has a right to do what he has done—and I have not a right or a desire to criticise him in the least—still there can be no doubt that that right was not acted upon, and had never been acted upon by anyone except Mr Asquith, in the long period which had elapsed before he chose to take that course. For the reasons I have given I am very strongly against breaking down this barrier, which in my opinion rightly exists, preventing any member of a tribunal from practising before it, although I daresay this motion might not in fact have a wide operation. I feel bound to express my opinion against it in the interests both of the dignity of this House and of the members of the bar who practise before it.

LORD ASHBOURNE—I must say the inclination of my mind is not in accord with my noble and learned friend Lord James. Nor am I impressed with his arguments, although I recognise their interest and the the great fairness with which he has presented them. My noble and learned friend has used an expression to the effect that members of your Lordships' House are members of the tribunal that hears appeals, and indeed he has referred to that fact more than once. It is true only in a historical and remote sense, for in all the years that any of your Lordships now present recall no Peer not learned in the law according to the technical description has attempted to take any part in a decision of your Lordships' House in legal matters. I venture to say that if, when an appeal was being heard in your Lordships' House upon a point of law, any member of the House not learned in the law sought to take part in the proceedings, those who were specially responsible for the legal business of your Lordships' House would feel compelled to animadvert very strongly upon it, if not to adjourn the hearing of the case. I can hardly imagine a step more inconvenient, more entirely opposed to constitutional usage, than for any member who had not held one of the qualifying offices which would justify him in taking part in hearing appeals to come here and seek to discuss the important questions of law which are from time to time coming before your Lordships' House. I admit, of course, that the House of Lords is the House of Lords for all purposes, and every member of it is a Peer of Parliament entitled to be present on every occasion when it sits, but I cannot but think it is putting a technical point into undue prominence when you speak of every Peer as being a member of your Lordships' House for the decision of important legal questions.

Then my noble and learned friend says this would be only introductory to wider claims, and if a Peer were permitted to come and appear for a client at your Lordships' Bar it would be competent for him then to appear for a client before a committee of the House. I am disposed strongly to question that. No doubt if he were selected by the Lord Chairman of Committees as a member of a committee of your Lordships' House he would be entitled to sit upon that committee. But this is not a matter of technicality, it is a matter of substance. If he sought to appear on behalf of a client before a committee, he

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might be a member of that committee or a member, if not of that particular committee, of another committee in another room, there being no technical bar against his sitting on a committee. I see therefore a great difference, a vital difference, between practising in your Lordships' House and appearing before a committee, when he might have sat on that very committee or on another committee the day before in another room. My noble and learned friend Lord James spoke of a "thin partition." I am unable to see any thinness about the partition at all. If you get away from mere technicalities and come to substance it is an extremely thick partition. If a Peer who had not held a qualifying legal office would be unable to sit here without violating your Lordships' practice as a matter of constitutional usage, I do not call it a thin partition but a substantial one—one that could only be overcome after very serious discussion, and perhaps some inconvenient interruption of the ordinary business of the House.

Then my noble and learned friend refers to an assumed analogy between what is sought on the present occasion and the action of the House of Commons in reference to election petitions. I was not myself able to follow that. It is quite true that for purposes deemed wise by Parliament the hearing of election petitions was transferred to the Judges, but the report comes back to the House of Commons, and therefore every member of that House has a right, and if there was a call of the House it would be his duty, to be present at whatever proceeding might take place in reference to that report.

I do not think the analogies and reasons mentioned by the Lord Chancellor have been displaced by what has been said by my noble and learned friend Lord James in his very interesting remarks. The practice of the Privy Council is, I think, important, and has a significant bearing on the present discussion. My noble and learned friend says that when he was made a member of the Privy Council he did not practise before that tribunal, although we all know that he was a very leading and distinguished member of the Bar. But we are aware that a very distinguished or prominent member of the Bar, also a Privy Councillor, now practises there, and no doubt to the assistance of the tribunal and the advantage of his clients. Therefore we find that the existing practice of the Judicial Committee of the Privy Council is not to question the right of the Privy Councillor to appear and argue for his clients in cases in which he may be instructed. I think that is a matter of very considerable importance when we are considering analogies. It must be borne in mind also, as was pointed out by the Lord Chancellor, that by an exercise of the royal prerogative it might come about that any barrister practising before the Judicial Committee might be placed on that Committee itself; therefore what my noble and learned friend opposite has called a thin partition would vanish, and a Privy Councillor who was also an advocate would, by the removal of that partition, be sitting as a member of the tribunal on the very next day.

My noble and learned friend the Lord Chancellor has mentioned the fact of Peers practising in other Courts. I think that is a matter of considerable importance. The question is not a large one, because none of us have a right to suppose, or can expect, that there would be any substantial number of Peers practising their profession at your Lordships' Bar or seeking to avail themselves of the right to appear there; but the fact that a Peer is permitted, and as I think rightly and fairly permitted, to appear before the tribunals of this country is a fact of considerable importance. What does it mean? Assuming that he is entitled to be regarded as a member of the House of Lords, and therefore technically within the description of one who could hear appeals, is it not a step in the argument to find that he is allowed without question to discuss and to take part in cases which have come before tribunals lower than that of your Lordships' House, it may be on Circuit, it may be in one of the Divisions, it may be in the Court of Appeal? All that he does without question; and yet it is suggested—those being inferior courts—that when an appeal from them comes up to this House he is not to be allowed to stand at your Lordships' Bar to argue it; that he must remember that when your Lordships hear an appeal he is no longer in an inferior court where he can be heard but in a Court where he cannot be heard. This is a new question; it has never been presented before for decision as regards the Bar of this House or its committees. I admit that there is something in what my noble and learned friend Lord James has said—there are certainly considerations to be weighed on both sides; but I must say that the balance in my own mind is in favour of what has been said by my noble and learned friend the Lord Chancellor.

EARL SPENCER—I am rather reluctant to say anything among a body almost entirely composed of Law Lords, but as this is a matter which affects the House at large perhaps I may have some little right to say some thing upon it. Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was, in my opinion, one of the best of reforms. According to the statement we have heard, not only from the Lord Chancellor and Lord Ashbourne, but from Lord James, it is well understood that of late years lay peers no longer take any part in the procedure of hearing appeals before the highest tribunal of the land.

I have listened with the greatest care to the arguments which have been addressed to the House this morning. I confess my sympathy is very strong in favour of

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making this concession to Lord Kinross. I followed the precedents and analogies which were brought forward by Lord James, and I confess I did not think that some of them exactly applied. One of the strong points he made was with regard to the Privy Council. Lord Ashbourne has met that. It seems to me that the Crown has that matter entirely in its own hands, because until a Privy Councillor is called to sit on the Judicial Committee he is not a member of the tribunals. Then comes the question of practising before committees of this House. I think what is proposed now could hardly be a precedent for that. I at once admit that it is not right that anyone pleading before a tribunal should also sit upon that tribunal as judge. No doubt any Peer might sit on a committee, but it does not follow that he would be put on a committee by the Lord Chairman. It is not likely that he would put a legal Peer upon the committee if he has been in the habit of practising before committees. The only precedent which certainly does throw a little difficulty in my way is the precedent of the House sitting as it did a few years ago—[1901] A.C. 446; trial of Earl Russell—when the Lord Chancellor presided over a trial of a peer for what I may call a criminal offence. There of course the whole House did sit. I remember on that occasion being appealed to by several of my friends and others to make a motion; but I declined to do so, as I thought it was more right that the question should be decided by the Law Lords than by the lay Peer. At the same time there we were, and I should have had a perfect right to make a motion with reference to the sentence. That is a case in which there might be a difficulty. Lord James was present there I think. I was going to throw out this suggestion: Is it possible that in passing the resolution in the Committee of Privileges or in the House that Lord Kinross may practise, to confine it to your Lordships' House when sitting as the highest Court of Appeal? If that could be done, it would sweep away the only difficulty I have.

LORD CHANCELLOR—My motion was so intended.

LORD MACNAGHTEN—I am very glad that the Lord Chancellor has submitted this question to the Committee for Privileges, and I am very glad to hear the opinion that has been expressed by a member of the House who is not a member of the legal tribunal. I entirely agree with everything the Lord Chancellor has said. One consideration which weighs practically with me a good deal—possibly because I spent a good part of my life at the bar—is this. If you recognise that a barrister may practise before other tribunals you place him at a great disadvantage if you say he may not appear here, and you place his clients at a great disadvantage also, because they may have his services in the Court of first instance and up to the Court of Appeal, and if you say that he may not follow the case when it comes by appeal to this House you are placing both him and his clients at a very great disadvantage.

VISCOUNT KNUTSFORD—As we were summoned here, perhaps I may be allowed to say a very few words to express my complete concurrence in the views which have been stated by the Lord Chancellor and the Lord Chancellor of Ireland. It seems to me that we are dealing in this case with a matter of substance and not of technicality. There may be difficulties, but substantially there can be no doubt that the Lord who now seeks to appear before you would have no right, and could under no circumstances have a right, to sit also as a member of the Court in the case; therefore he would not be pleading before a Court in which he could be a judge. That seems to me to be substantially the view of the question we ought to adopt. With the view entertained by Lord Spencer as to defining more clearly in the resolution the particular point we are engaged upon, I desire to express my hearty concurrence, and I understand that the Lord Chancellor agrees to that suggestion.

LORD ROBERTSON—I am not one of the habitual orators of this House, and therefore you will not be surprised to know that I merely rise to put one particular point. It is this—I do not see any technical difficulty at all in what is proposed, and for this reason. The suggestion is made that the noble counsel, having pleaded upon his case, could constitutionally come into the House and vote on that very case. That is not so. No man is entitled to sit and take part in a decision in this House or anywhere else unless he has heard the cause, and heard it as a judge. Now the Bar is outside the House of Lords altogether. Therefore a Peer who has heard the cause at the Bar has not heard the cause. Consequently that difficulty entirely vanishes. I fully concur with the view taken by Lord Spencer.

LORD JAMES—Of course I accept the view that has been expressed almost unanimously, adding as a rider to the motion that the resolution is not intended to apply to the appearing of barristers who are Peers before the Committee of this House, or before the House when sitting as a full Court in a criminal case.

LORD CHANCELLOR—With reference to the case of Lord Russell, it was not a trial before this House. It was a trial before the Lord High Steward of England, the House sitting as the judges of fact. It was not a sitting of the House within the language of my resolution. The resolution I propose is—"That according to the present practice of the House of Lords there is no reason why a Peer should not be heard as an advocate to argue questions of law before your Lordships' House; but this resolution is not intended to apply to the appearing of barristers who are Peers before committees of this House."

LORD JAMES—Could we add such words as "or before this House when sitting for the trial of criminal cases?"

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LORD ASHBOURNE — "Or when sitting under the presidency of the Lord High Steward on a criminal case?"

VISCOUNT CROSS—I agree, subject to the remarks made by Lord Spencer, and now that that point has been met I entirely agree with the motion.

Report from the Committee for Privileges:—"That according to the present practice of the House of Lords there is no reason why a Peer should not be heard as counsel on an appeal at the Bar of this House; but that this resolution is not intended to apply to the appearing of barristers who are Peers before committees of this House, or before this House when sitting under the presidency of the Lord High Steward on a criminal case." Made and agreed to, and resolved accordingly.

Tuesday, November 21.

FIRST DIVISION.

SYMINGTONS, PETITIONERS.

Company — Statute — Winding-up — Grounds for — Construction of General Words in Separate Sub-section of Act— Ejusdem Generis—"Just and Equitable" Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79, *sub-sec.* 5.

Section 79 of the Companies Act 1862 enacts—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances, that is to say, (1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year of its incorporation or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Held that sub-sec. (5) was a substantive enactment to which effect would be given although the conditions present might not be *ejusdem generis* with those enumerated in sub-secs. (1), (2), (3), and (4) of that section.

Observations (*per* Lord M'Laren) as to when in the construction of a statute general words are to be confined to things *ejusdem generis* with those enumerated.

Company — Winding-up — Grounds for — "Just and Equitable"—Deadlock—"Substratum" Gone—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79 (5).

A limited company was formed to take over a business formerly carried on by two brothers A & B as partners. A, B, and C (another brother) were appointed directors. B was appointed managing director. No shares, however, were issued, and the assets of the firm were never formally transferred to the company. Owing to continuous quarrelling on the part of A and B, who between them had the whole substantial interest in the company, no business was done. Finally, with the support of four members of the company, who, however, had merely a nominal interest in it, B was made sole director. A and C having petitioned the Court to wind up the company, *held* that it was just and equitable that a winding-up order should be pronounced, and petition *granted.*

This was a petition at the instance of David Kennedy Symington, Belmont, Dunbeth Avenue, Coatbridge, and John Symington, tube manufacturer, Airdrie, contributories of Symingtons' Quarries, Limited, incorporated under the Companies Acts 1862 to 1900, and having its registered office in Bank Street, Coatbridge, for winding up of the company.

The company was formed in September 1899 to take over from the firm of D. K. & H. Symington the working of two quarries, Kipps and Annanlea, then held on lease by that firm. No formal agreement to do so was ever entered into between the firm and the company. The members of the firm, however (who were two brothers, Hugh Symington and the petitioner D. K. Symington), signed a memorandum dated 15th August 1899 by which they agreed to transfer the quarries to a limited company to be registered under the name of Symingtons' Quarries, Limited. No formal transfer of the quarries ever took place, no assignation of the leases was ever granted, and neither leases nor plant were ever vested in the company.

By the said memorandum it was also agreed that the nominal capital of the company should be £20,000 in ordinary shares of £1 each, of which £15,000 were to be issued, one-half to D. K. Symington and the other half to Hugh Symington. By the articles of association it was provided that Hugh, John (another brother), and D. K. Symington should be the directors of the company, and that Hugh Symington should be appointed managing director for the first three years. It was further provided that the business of the company should be conducted by the directors, and that managing directors should be bound to observe the orders of the directors. At the first meeting of the directors, held on 24th January 1900, it was agreed to allot one share to each of the subscribers as well as to the petitioner D. K. Symington. No share certificates were, however, issued to them, and no payment was ever made to the company for shares. No other shares were ever allotted.

The petition further stated that the said Hugh Symington, as managing director of the company, from the first appropriated to himself the management and control of the company, and failed to obey the instructions of the directors. In particular, he sent away materials from the quarries to

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contracts which he himself was executing without pricing them at the time, and used the company's plant and horses on his own account. He also failed to submit to the directors for sanction numerous accounts incurred by him in name of the company, and contracted an overdraft debt with the company's bankers without the instructions or approval of the board of directors. At the meeting, on 24th January 1900, above referred to, it was agreed that meetings of the directors should be held monthly, for the purpose of submitting accounts, &c., but since 11th March 1901 no meeting of the directors had been held owing to Hugh Symington's refusal to take part therein. Moreover, on or about that date, he changed the company's bank account from the name of the company into his own name, and since then he had operated with the monies of the company solely through that account. The petitioners had repeatedly objected to his so dealing with the affairs of the company, and their protests were duly set forth in the minutes. The balance-sheet of the company as at 31st December 1904 showed a loss for the year of £3954, 2s. 10d. No dividend had been paid by the company, but Hugh Symington as managing director had regularly drawn from the company a yearly salary of £500. At a meeting on 12th April 1905 Hugh Symington moved that the number of the directors should be reduced to one. The motion was carried against the petitioners, and thereafter it was in the same manner determined—in spite of the petitioners' protests—that he should be the sole director. The said resolutions were carried in order to enable Hugh Symington to oust the petitioners from all control over the company's assets and affairs, and to place him in a position of unrestricted authority. Matters had now come to a complete deadlock, and the carrying on of the business in its present condition must inevitably end in the loss of the company's assets, one-half of which belonged to the petitioner D. K. Symington. In these circumstances it was "just and equitable" that the company should be wound up, in terms of section 79, sub-section (5), of the Companies Act 1862.

The company lodged answers, in which they admitted that the capital of the company and the subscribers to the memorandum of association were correctly stated; that no formal transfer of the quarries had been made to the company; that no share certificates had been issued to the subscribers; that no payments had been made to the company for these shares; that no other shares had been allotted; that no dividends had been paid by the company; that Hugh Symington had drawn a salary of £500 annually; and that on 12th April 1905 he had become sole director. *Quoad ultra* the averments of the petitioners were denied. Explained that the company had carried on business at the quarries as provided for by the agreement. The assignations or other deeds necessary to vest the company in the quarries would have been granted but for the action of the petitioners, who declined to sanction them. The fact that the share certificates had not been issued was also due to the conduct of the petitioners, who had declined as directors to sign them. Hugh Symington was entitled to manage the affairs of the company, as he was the managing director. At a meeting of the directors, held on or about 1901, the petitioner (D. K. Symington) refused to sign cheques as a director in order to meet trade accounts and wages, and intimated that he would sign none in future. The business of the company was thus brought to a standstill, and it was in order to save its position that Hugh Symington had opened the bank account referred to, and had since conducted the banking business of the company through that account. Since the meeting on 1901 the petitioners D. K. and John Symington had declined to take any part in the business of the company. The debit balance carried forward in 1904 was not a trading loss for that year, but the accumulated loss carried forward from year to year since the formation of the company, and consisted chiefly of depreciation and interest on capital. Apart from the obstruction caused by the petitioners, the business of the company had been satisfactory. Its affairs were now being managed in an efficient manner, and there was no reason why it should not in future be worked at a profit. The petition ought therefore to be refused.

In addition to the facts admitted by the respondents, it appeared from the minutes that owing to continuous quarrelling on the part of D. K. and H. Symington little or no business was done; that Hugh Symington had from the first appropriated to himself the management of the company; that matters had gone from bad to worse; that, finally, with the support of four nominal members of the company—viz., the members of the legal firm who floated the company—Hugh got himself made sole director; that John and D. K. Symington had no longer any share in the management of the company; and that matters had therefore come to an absolute deadlock.

Argued for petitioners—There was no assignation in favour of the company, and therefore the company had no title to the business. No balance-sheet was ever prepared, nor had any statement been produced to show that any assets had been transferred to the company. The minutes showed that the company was unable to carry on business owing to disputes between the directors. The managing director had got himself made sole director. In these circumstances it was "just and equitable" that the company should be wound up. It was not necessary that the circumstances founded on should be *ejusdem generis* with those specified in subsections (1), (2), (3), and (4) of section 79 of the Companies Act 1862. The former rule to that effect had been relaxed by more recent decisions—*In re Amalgamated Syndicate*, [1897] 2 Ch. 600. [Lord Presi-

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DENT—Are you not under sub-section (4) as well? How can this company pay its debts?] *In re Suburban Hotel Company*, 1867, L.R. 2 Ch. App. 737; *in re Sailing Ship Kentmere Company*, W.N., 1897, p. 58. Sub-sections (1) and (2) were also applicable—viz., ceasing to do business and being insolvent. Both these conditions were present here. Moreover, the company had no directors, no bank account, no assets. The whole substratum of the company was gone. Winding up was competent. Where the effect of a successful action against the company would result in its being brought to an end, then a winding up was competent.

Argued for respondents—The petitioners' averments were irrelevant. In any event, there would have to be inquiry, for the petitioners' averments were denied. The company had assets, viz., the beneficial interest in the leases and the stock-in-trade. It was not necessary to have a legal title, seeing that the company was in possession with the consent of the previous owner. The company had also possession of the machinery and plant in virtue of agreement. The company was able and willing to carry on business. It was also ready to issue the shares referred to in article 8 of the petition. The case of the *Amalgamated Syndicate* cited by the petitioners was not in point, for the ratio of that decision was that the company had really come to an end. The earlier decisions as to the necessity for the circumstances being *ejusdem generis* with those mentioned in the preceding sub-sections had not been modified and were still binding — Buckley on Companies, 257; *in re Anglo-Greek Steam Company*, (1866) L.R., 2 Eq. 1. [The LORD PRESIDENT referred to Lindley on Companies, pp. 862, 863.] In the case of the *Suburban Hotel Company* (*cit. supra*) the section was very narrowly construed. The recent cases relied on by the petitioner were based on specialties. [The LORD PRESIDENT referred to the case of *in re Brinsmead*, [1897] 1 Ch. 45, 406.] The winding-up of the company might entail an action of damages against the company at the instance of the landlord of the quarries in the event of the company giving them up. The other reasons now alleged for winding-up the company were not set forth in the petition. The averments that the company had no business and no assets were denied, so that in any event there would have to be inquiry.

At advising—

LORD PRESIDENT—This is a petition for the winding up of a company called Symingtons' Quarries, Limited, and the circumstances under which the proceedings arose are these:—The two brothers Symington carried on a partnership of D. K. & H. Symington for the working of two quarries. Some time ago the brothers seem to have had certain difficulties, and after an attempt to arrange for a dissolution by means of buying one or the other out by sealed tenders they ultimately brought matters to a conclusion by entering into an agreement on 15th August 1899. One of the articles of that agreement is in these terms—"The parties agree to make over lots 2 (Kipps), 3 (Annanlea), and 6 (furniture) to a private limited company, to be registered under the name of Symingtons' Quarries, Limited. The nominal capital of the company to be £20,000 in ordinary shares of £1 each, and £15,000 to be issued, one half to David and the other half to Hugh or their respective nominees. Hugh to be managing director for three years at an annual salary of £500, and David and John to be ordinary directors. John Symington to take £100 in shares to enable him to hold balance for voting." Following upon that the company was created and registered and the subscribers to the memorandum of association consisted of just the number that are necessary by law, viz., seven, who were Hugh Symington and John Symington, mentioned in this memorandum, a Chartered Accountant, who by a further term of the agreement was proposed as the auditor of the company, and four legal gentlemen who were members of the firm who managed the floating of the company. All these seven subscribers were put down in the memorandum for one share each. The memorandum of association is in perfectly general terms, that is to say, it puts as the object of the company that it is to work quarries with a great many other allied particulars, but the peculiarity of it is that it has no reference *in gremio* to the taking over of the particular business of D. K. & H. Symington, and in particular there is no reference to any document which could be held as an assignation of the rights of either of the contracting parties in the memorandum which I have quoted.

The company held its first meeting on 24th January 1900. There were present only the three Symingtons, John, David, and Hugh. It was agreed to appoint John Symington the chairman of the company, and then the minute of meeting goes on thus:—"In the meantime it was arranged to allot one share to each of the subscribers to the memorandum of association, and to Mr David K. Symington, Belmont, Dunbeth Avenue, Coatbridge. After the balance-sheet of the late company is prepared and the various assets transferred, it was agreed to allot the balance of the shares." That meeting is followed by a set of other meetings of which we have the minutes, but with which I do not propose to trouble your Lordships. It is perfectly clear that these two brothers, David and Hugh, began to quarrel from the very outset. David at first seems to have taken exception to what he considered the improper use of the company's plant and material by Hugh for other purposes. Hugh was engaged in other business, and David seems to have conceived that Hugh was using this business to help his own. It is evident that the quarrel began at once, and that this quarrelling was directed, as quarrelling often is between members of a family, to points not only of substance but to points of an absolutely trivial description. The

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only fact which I think your Lordships need to notice is that nothing more was ever done as to really constituting the company. The shares were never allotted and the assets of the old partnership were never as a matter of fact transferred to the company. The company as such simply entered into possession of the quarries and worked them, and indeed the gravamen of one of the charges of Mr David Symington was that the old name of D. K. & H. Symington continued to be used to the outside public instead of the name of the company. The quarrel went on from bad to worse until at last in 1905 Mr Hugh Symington executed what I really cannot call anything less than a *coup d'etat*. The four members of the firm of law-agents seem to have been on the one side, and accordingly, reinforced by his four friends, Hugh had a meeting of the company after proper notice. Notice was given of a motion that the number of directors should be reduced to one, and that that one should be Hugh. They carried that motion, and David was turned out, and John was turned out, and Hugh became the imperator of the company, and that is the present condition of affairs.

This petition is accordingly brought by David Symington and John Symington to have the company wound up under the 79th section of the Companies Act 1862, which provides that a company may be wound up by the Court "(5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up." We were quoted at the bar a considerable amount of decision and dicta upon this section. I do not think it necessary to go minutely into the cases further than to say this, that everybody concedes, and it is stated by a very high authority on this branch of the law, viz., Mr Justice Buckley in his book on the Companies Act, that a rather wider co struction had been given by the courts to this section than was given in the earlier decisions. At first it was held that it was to be construed somewhat strictly in reference to matters *ejusdem generis* as those in the previous clauses of the section, but later decisions have rather enlarged that view. I think I am not wrong in saying that what the decisions have come to is this; that if the Court finds that the real substratum of the company has gone, or if the company has come to a deadlock, they will consider themselves justified in acting under that sub-section. On the other hand they certainly will not allow the aid of that section where all that has happened is merely what you may call a domestic quarrel between two sets of shareholders. The company itself is the proper forum for the settlement of domestic differences according to the powers of the majority under the constitution of the company.

Taking that view of the general powers of the Court, I confess I have come clearly to be of opinion that this is a case where your Lordships ought to exercise jurisdiction and ought to wind up this company. The present position is really quite an impossible position. In the first place, it is not truly a controversy among various sets of shareholders, because it is impossible to say that this company has in any, except a technical sense, at the present moment any shareholders at all. There are these three brothers, and there are these legal gentleman and the auditor, who of course were merely brought in for the purpose of forming the company, and doubtless are liable to pay £1 for their shares—whether they *de facto* have ever paid that sum, I am more than doubtful. They were never meant to hold any real stake in the company at all. The true scope of the company was what is contained in the articles of association by which these two brothers were to have 7500 shares each, both brothers being directors, the third brother being there to see fair play between the other two. That is the only company to which under the agreement the private partnership was bound to make over the assets, and that company has been put out of possible existence by the *coup d'etat*. I think, accordingly, that the case comes strictly within the set of cases in which the substratum of the company is gone. For this reason I am of opinion we should grant the petition.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—If I were forming an opinion for myself upon the true meaning of the clause in the Companies Act which defines the conditions under which the company is to be wound up, I should not have come to the conclusion that the general reference to the discretion of the Court was to be confined to things *ejusdem generis* with those conditions which precede it. I apprehend that the true rule for determining whether general words are to be confined to things *ejusdem generis* is this, that if the general words are bound up with the enumeration by proper words of relation then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other. One familiar instance is the case where the general words precede the enumeration, in which case it was pointed out by Lord Westbury in one of the entail cases that the *ejusdem generis* rule of construction does not apply, and on the contrary the general words may be taken in the wider sense, the enumeration being regarded as illustrative. But of course the inversion of the order of arrangement is not the only way in which it is possible for the writer to show that he means the general words to be taken in their comprehensive sense. In this Act of Parliament the general words have reference to the discretion and judgment of the Court. The case put is "whenever the Court shall be of opinion that it is just and equitable that the company should be wound up." That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the Court, but are defined

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in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or the other category. I have made these observations, because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction of this clause, yet I think it desirable, at least for my own satisfaction, to see upon what grounds the true construction can be maintained and defended. Coming to the application to the facts of this case, one of the grounds on which it has been the practice of the Court to decree a dissolution is where there is a small number of partners equally or nearly equally divided so that it is impossible that the business of the company can be carried on. That is a rule that would very seldom be applicable to a company under the Companies Act—never certainly where the company appeals to the public for subscriptions to its shares—because if the directors are equally divided, or if there is such a division as makes it difficult to carry on the company's affairs, the remedy of the shareholders is to turn them out and to elect a harmonious board of directors. But then this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company, the only real partners being the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies on the grounds of incompatibility between the views or methods of the partners would be applicable in terms to the division of the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound up and the partners allowed to take out their money and trade separately.

LORD KINNEAR—I agree with your Lordship that the judgment proposed is in accordance with the views taken in the Court in England to the authority of which we must always attach the greatest possible weight since their experience of the operations of the statute is so much larger than ours. I think it is just and equitable that this company should be wound up on two grounds which have separately been considered sufficient in former cases, and which in the present case occur in combination. The first is that the affairs of the company have been brought to an absolute deadlock, which can only be relieved, so far as we can see, by winding up; and the second is that the entire administration of its affairs is now concentrated in one director, who is enabled by the assistance of subscribers to the memorandum, who have only a nominal interest in the company, to overrule at his pleasure the judgment and opinion of his co-directors, the other members who have a real interest in the concern. I do not think that it is just or equitable that this state of things should be allowed to continue, and I therefore agree with your Lordships.

The Court pronounced this interlocutor—

"Order that Symingtons Quarries, Limited, be wound up by the Court under the provisions of the Companies Acts 1862 to 1900, and appoint John M. Macleod, Esq., C.A., Glasgow, to be official liquidator of the said company, he always finding caution for his intromissions and management before extract, and decern," &c.

Counsel for Petitioners—Ure, K.C.—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents—Younger, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

WESTERMAN (WESTERMAN'S EXECUTOR) *v.* SCHWAB AND OTHERS.

International Law—Succession — Will — Revocation by Marriage—Will of Englishwoman subsequently Marrying Domiciled Scotsman—Wills Act 1837 (1 *Vict. c.* 26), *secs.* 18 *and* 35.

Held that a will dealing with moveable estate, which was duly executed by a lady domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman.

The Wills Act 1837, section 18, provides —"And be it further enacted that every will made by a man or woman shall be revoked by his or her marriage. . . ." Section 35 provides—"And be it further enacted that this Act shall not extend to Scotland."

This was an action of multiplepoinding, raised in the Sheriff Court at Aberdeen, at the instance of Thomas Collette Westerman, executor-dative of the late Mrs Sarah Ann Scott or Westerman, wife of the deceased Edward Westerman, soap manufacturer, 104 Leslie Terrace, Aberdeen.

Mrs Westerman died at Aberdeen on 25th March 1904. Her husband, who had survived her, died on 27th April 1904 without having expede confirmation of her estate. The pursuer, who was a son of the late Mr Westerman by a prior marriage, thereafter gave up an inventory of her estate, and was duly confirmed executor-dative. After paying preferable claims the free residue of her estate amounted to £272, 2s.—one-half of which was paid to the husband's representatives as *jus relicti*, and the remaining half (£138, 11s.) formed the fund *in medio* in this action. To this fund claim was made (1) by Frederick Schwab and others, the executor and legatees under a will dated 4th June 1897, made by Mrs Westerman prior to her marriage to Westerman, and while she was a spinster and

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a domiciled Englishwoman; and (2) by George Worth and others, Mrs Westerman's next-of-kin.

The claimants Schwab and others pleaded — (2) "Mrs Sarah Ann Scott or Westerman becoming by her marriage a Scotswoman, her will was not revoked by her marriage, but remained valid and effectual."

The claimants Worth and others pleaded —"(1) The will founded on having been executed before the marriage of the said Sarah Ann Scott or Westerman, who continued domiciled in England down to the date of her marriage, was, by her marriage, revoked."

On 28th December 1904 the Sheriff-Substitute (ROBERTSON) found that the will executed by Mrs Westerman on 4th June 1897 remained valid notwithstanding her subsequent marriage, and accordingly ranked and preferred the claimants Schwab and others in terms of their claim.

The claimants Worth and others appealed to the Sheriff (CRAWFORD), who on 11th February 1905 recalled his Substitute's interlocutor, found that the will executed by Mrs Westerman was revoked by her subsequent marriage, and that the claimants Worth and others were entitled to the whole fund *in medio*.

The claimants Schwab and others appealed, and argued—The Sheriff-Substitute was right. The law of the husband's domicile at the time of the marriage governed the legal results of the marriage—Dicey, Conflict of Laws, 684, 694. And whether a will made by a lady prior to marriage would be revoked by her subsequent marriage, depended on the domicile of the husband at the date of the marriage—*Loustalan* v. *Loustalan*, [1900] P. 211, at p. 236. The husband's domicile here was Scotch, and by the law of Scotland marriage did not revoke a prior will. Further, when there was no marriage-contract the law of England implied an agreement that the law of the husband's domicile would govern the property relations of the marriage—Jarman on Wills, 112; Theobald on Wills, 41. Such implied agreement was to be given effect to—*De Nicols* v. *Curlier*, [1900] A.C. 21. Alternatively, as Mrs Westerman died domiciled in Scotland, her succession was regulated by the law of Scotland, and half of the residue had already been paid as *jus relicti* to her husband's representatives. The validity of the will, therefore, was not affected by the Wills Act (1 Vict. c. 26), as that statute did not apply to persons not domiciled in England — *Bremer* v. *Freeman*, 1857, 10 Moore's P.C. Rep. 306; *In re Reid's Estate*, 1866, L.R., 1 P. & D. 74; Westlake's Private International Law, 4th ed. 71, 112, 114; Wills Act, sec. 35.

Argued for respondents (claimants Worth and Others) — The decision of the Sheriff was right. At the date of the will there was an implied condition that the will was only to last till marriage. The rule of English law that marriage revoked a will was based "on a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family"—*per* Tindal, C.-J., in *Marston* v. *Roe*, 1838, 8 A. & E. 14, at p. 58; *Israell* v. *Rodon*, 1839, 2 Moore's P.C. Rep. 51. The will was therefore revoked. The case of *Loustalan* (*cit. sup.*), which impliedly overruled *Bremer* (*cit. sup.*), was decided on the ground that there was an implied assignation to the husband which was inconsistent with the will made by the lady. That was independent of the Wills Act. That case, moreover, was a decision as to effect of marriage on the proprietary rights of the spouses, and not as to the effect of marriage, apart from the Wills Act, on a will previously executed. In the case of *De Nicols* (*cit. sup.*) the question was between contractual and testamentary rights, and the Code Civil was read in as equivalent to a marriage-contract. Section 18 of the Wills Act (*cit. sup.*) should similarly be read in here.

At advising—

LORD PRESIDENT — Miss Scott was a domiciled Englishwoman, and she executed a will—properly executed it according to the law of England—by which she disposed of her whole estate. Some years thereafter she married Mr Westerman of Aberdeen, a domiciled Scotsman. Some years after that she died, having continued to live with her husband in Scotland. She left no will behind her except the will which she had made while she was a spinster. Her husband claimed and has received one-half of her moveable estate in respect of his *jus relicti*, and a competition has arisen as to the other half, the competitors being the executors under her will which I have referred to, and her next-of-kin, upon the assumption that she died intestate.

The argument for intestacy turns entirely upon the fact that by the 18th section of the Wills Act 1837 it is enacted that every will made by a man or woman shall be revoked by his or her marriage. It is admitted by the parties that the Wills Act does not apply to Scotland, but it is contended on the one side that, being an Englishwoman, the moment she married her will was cut down, whereas, on the other side, it is maintained that the moment she married she became a Scotswoman, and that therefore the Wills Act had no effect, and the will was not cut down. The Sheriff-Substitute and the Sheriff have taken different views upon the matter. The point is a novel one, as to which I do not think that, in this country at any rate, there is any authority. The Sheriff-Substitute held that the will was good. His view is very well expressed. He says—"It is the law of the testatrix's domicile at the time of her death that determines the validity of the will. The testatrix died a Scotswoman, and by the law of Scotland, a will valid when made according to the law of the testator's then domicile remains in force, notwithstanding a subsequent marriage, unless, of course, revoked. No doubt, if the testatrix here had married an Englishman, the will would have been, *ipso facto*, revoked as if it had never been, and could not have been

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resuscitated even though she afterwards acquired a Scottish domicile. But the case here is different. The act that would otherwise have revoked the will exempted the testatrix from the provisions of the revoking statute." The Sheriff, on the other hand, while agreeing with much that the Sheriff-Substitute says, states this, and this is the keynote of his judgment—"All three things are simultaneous and occur at the same moment—the marriage and its two results—the revocation of the will and the change of domicile. The important point is that the two results are strictly simultaneous with each other. The same stroke which cuts off the English domicile cuts off the will. It is impossible to say that the testatrix had acquired a Scottish domicile before the event which revoked the will. For these reasons I am of opinion that the will was revoked, and that the claimants under it cannot succeed."

In these circumstances it cannot but be said that the question is one of nicety. If I may venture a criticism upon the learned Sheriff's judgment, it would be this, that I do not think the case can be well disposed of upon what I may call metaphysical considerations as to the precise moment of time at which these things happened.

I think the way to dispose of the case is to begin at the beginning of the elementary principles that govern such matters. The first question undoubtedly is this—what is the domicile of the alleged testatrix at the time when she died? There is no doubt about that; everybody agrees that she died Scottish. Therefore you have first the undoubted proposition that it is the law of Scotland that will regulate the distribution of the effects which she left behind her; and indeed it is conceded not only in argument at the bar, but it is conceded *de facto* by what has happened, because, of course, it is under the law of Scotland that one-half of her moveable estate has been given to her surviving husband in name of *jus relicti*, which is a purely Scottish right. But further, the law of Scotland goes on to say that the half which is not affected by the *jus relicti*, the half which is the dead's part, shall be carried by a will if she left one; and accordingly it is the law of Scotland which will first of all decide whether she did leave a will or whether she did not. A certain document is produced which upon the face of it bears to be a will; and here the law of Scotland, although completely keeping to itself the right of pronouncing whether anything is a will or is not, will often have to have recourse to other systems of law in order to know whether a particular document is or is not a will. Take the case that the will in question was a will, which undoubtedly was badly executed according to the law of Scotland, but of which it was alleged that it was quite properly executed according to the law of the country where the person was domiciled at the time that he executed it. The law of Scotland will always go to that system of law and will inquire—"Is this will well executed according to the forms of that other country, or is it not?" If the answer is in the affirmative, then it will give effect to it according to the law of that country. We had a very excellent argument upon both sides of the bar, but I cannot go the whole length that Mr Brown wished us to go in the second portion of his speech, when he urged that the moment we say that this lady was a domiciled Scotswoman then the question ended. The question does not end, because once you have to go to another system to find out whether this is a will or not, you have got, of course, to take the history of the document. I am assuming you are answered at once that according to English law the will was well executed; but then it would be pointed out, that although it is well executed, it was put out of existence by something else happening, and we are bound to look into that. Now, what is that something? That something is the fact of the marriage, and accordingly it seems to me that we are bound to consider as the next question what was the state of the law which arose upon the marriage. By what law is that to be determined?

It seems to me that the real principle is that when you come to consider the effect of the marriage upon the patrimonial rights of the persons who were married, you must, apart of course from questions of special contract, always consider that according to the law of the domicile of the married persons, and the law of the domicile of married persons is the law of the domicile of the husband.

I am confirmed in this view, because I think it is directly in accordance with the views that were taken by the Master of the Rolls, now Lord Lindley, in a case which does not seem to have been cited before either of the learned Sheriffs—*Loustalan* v. *Loustalan*, L.R. [1900] P. 211. The judgment itself does not touch this case, and there was so much difference of opinion among the learned Judges who disposed of the case upon the precise import of the facts, that one has to look at the case with considerable care in order to extract from it what was really laid down in it. The question was, whether a will made by an unmarried Frenchwoman was or was not revoked by her subsequent marriage. The lady in question was undoubtedly French in origin. She came over to England and entered domestic service with an English family. While she was in England she made this will. It was not executed according to the law of England; it was executed according to the law of France. About four years after that she left domestic service and established a laundry business in London. In the same year she married a French refugee, who was flying from France at that time in order to escape from a prosecution for some offence which he had committed. Indeed, he had been sentenced in absence to ten years' imprisonment. The parties lived together for some time in England, and then, the ten years having run out, the husband seemed to have thought it safe to go back to France again, which he then did. He and his wife parted company, she

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remaining in England and he going to France. In that state of matters she died, leaving no will behind her except the old will which she had made as a spinster. The point in that case, as in this, was simply whether that will had been revoked by her marriage. The case was first disposed of by the late President of the Probate Division, Lord St Helier, and it subsequently went to the Court of Appeal, composed of Lord Lindley, Master of the Rolls, and Lords Justices Rigby and Vaughan Williams. The learned Lords took very different views upon the facts. The President held that at the date of her death her domicile was in France, because, in his opinion, her husband was domiciled in France at her death, but he held that when they married, at the moment of marriage they intended that the matrimonial regime should be in England, and upon that he came to certain conclusions. The Master of the Rolls did not take that view at all. He thought that the domicile of both parties was French all along, that is to say, he thought that she had not lost her French domicile when she married, and that he did not lose his French domicile when he married her, in respect that he went back to France, and accordingly she was French from beginning to end. The other two Lords Justices, on the other hand, thought that the husband's domicile at the time of the marriage was English, and upon that view they held that the will was not good. But I am bound to state that I do not think they put their judgment nearly so much upon the operation of the marriage, in respect of the Wills Act, as they did upon this, that if the husband was a domiciled Englishman at that time, which was before some of the recent Married Women's Property Acts, the result was simply to transfer the lady's whole estate to the husband, and that consequently it was not so much a question of whether the will was good or not, as a question of there being nothing for the will to operate upon. I think Mr Watson's observation was well founded, that although the case looks, upon the mere reading of the rubric, to be an authority against him, it is not really an authority upon this point, and I agree with him.

There are certain observations of both Lord Justice Rigby and Lord Justice Vaughan Williams to the effect that this 18th section of the Wills Act is part of the matrimonial, and not of the testamentary, law, with which I find it difficult to agree. I am not sure that I quite understand what they mean by that, because I cannot see that you can divide the law into chapters, and say that such a thing belongs to one portion of the law and not to another. Of course in many cases it may be convenient to do so for the purposes of discussion or reference, but I do not see how the effect of a thing can depend upon that division into chapters. What I take from the case of *Loustalan*, accordingly, is not the decision, but rather certain observations of Lord Lindley, which I think are absolutely in point in the view of the law which I am suggesting, although as a matter of fact they did not receive application in that case owing to the view of the facts that Lord Lindley took.

Now, Lord Lindley begins, just as I have ventured to begin, by saying you must first of all begin at the death of the alleged testatrix, and find what the domicile then was. He held that her domicile at her death was French; but he goes on to say—"The validity of a will of moveables made by a person domiciled in a foreign country, at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made." Here it is agreed that the will was valid when made. But then he goes on to say, not only that it depends on the validity of the will when made, but on its subsequent revocation if that question arises. "These questions," he says, "may or may not turn on the domicile of the testator as understood in this country;" and then he goes on to state the facts, and says—"By whatever court this question is to be decided, the English law of marriage, which in such a case involves, and indeed turns on, English views of domicile, must be considered. If this view be ignored the effect of the marriage will be inadequately, and indeed erroneously, ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must therefore depend on the English view of his domicile." That is exactly what I have suggested to your Lordships. Further on, in a later portion of his judgment, his view is made perfectly clear, if your Lordships keep in mind what I have said upon the facts of the case, because at page 233 the learned Lord says this—"The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her moveable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will, and if in order to ascertain this it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English Court would take of the domicile, in the English sense, of the husband, and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will."

Your Lordships will notice that I have emphasised the fact that he always speaks of the husband and his domicile. He excludes altogether the consideration of what was the domicile of the wife. He says it is quite enough if you settle, one way or another, what was the domicile of her hus-

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band at the time of the marriage, because the moment you do that, you settle what her domicile is; and then, if you settle what the domicile of the parties at the time of the marriage is, you at once settle the law according to which the proprietary effects of the marriage are to be judged—either French law, if he is a domiciled Frenchman, or English law, if he is a domiciled Englishman. And, accordingly, he further goes on to say—"It was not necessary, or indeed proper, on this occasion to pursue the inquiry further, and to see what matrimonial regime the parties intended to adopt. It was not necessary to cite authorities to show that it is now settled that according to international law, as understood and administered in England, the effect of marriage on the moveable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. . . . This being clear, the will was not revoked." That would be a *non sequitur* unless the whole point depended upon the domicile of the husband at the time of the marriage.

Accordingly, I think that, carefully looked into, it will be found that I certainly have the great authority of Lord Lindley for the proposition that I am putting, that when you come to consider what the effect of the marriage is upon the will, which you have already started with as being properly executed, you must consider that in the light of the law of the domicile of the married persons at the date of the marriage, and the law of the domicile of the married persons is the law of the domicile of the husband. Here the domicile of the husband at the date of the marriage was Scottish; and therefore you have to consider the effect of the marriage upon the will in the light of the Scottish law and not of the English. That being so, there is no question whatsoever that by the Scottish law the will of this spinster, being valid before her marriage, was not revoked, and accordingly I think the will stands.

That disposes of the case; but I ought to mention a very ingenious argument Mr Watson pressed upon us, which was this, that the effect of the English Wills Act was really, so to speak, to read a clause into every English person's will to the effect that his will shall be revoked on marriage. He cited authorities in which certain expressions were used that are consistent with that view. I am not in any way controverting the authority of these cases, because they do not touch the point at all. It would be quite a convenient way of speaking to say that every will has got that read into it; but if you are to press that form of expression to more than a convenient way of speaking, then I do not agree. I do not think we need go further on this point than to cite the case of *Loustalan*, where the Court held the will was revoked. The lady in that case married a person whom the Court held to be a domiciled Englishman. Of course it does not matter whether the facts were rightly or wrongly decided. The husband in that case was a domiciled Englishman according to the majority of the Court, and that revoked the will. That could only be by the operation of the Act at the time of the marriage, because it is evidently absurd to suppose that that French spinster's will had ingrafted into it a condition that revoked it upon marriage, because everybody agrees that, at the time she made the will, the will was a French document and not an English document. Accordingly, I think that shows that what Mr Watson says is no more than a convenient form of expression, and did not really go to the root of the matter. On the whole matter, I am of opinion that we should recal the judgment of Sheriff, and revert to the judgment of the Sheriff-Substitute.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—This is said to be a new point, but it depends on well-settled principles, and I think it has been rightly decided by the Sheriff-Substitute. The testatrix died in 1904 a domiciled Scotswoman, leaving a will which, while she was still a spinster, she had executed in 1897 in England, which was the place of her domicile at that time. There is no question that the validity of the will, since it affects only moveable property, must be determined by the law of the domicile at the time of her death, that is, by the law of Scotland; and the parties are agreed that by that law it was originally a perfectly good will, since it was duly executed according to the forms required for the authentication of wills by the law of the place of execution. But it is said to have been revoked, because by the law of England, embodied in the Wills Act of 1837, every will made by a man or a woman is revoked by his or her marriage. It was maintained that the question of revocation, like every other question as to the efficacy of a will, must be determined by the law of Scotland, and, so far as it goes, that is probably a sound proposition. But it does not much advance the argument, because in order to decide whether the will has been revoked, the law of Scotland must take into account facts occurring in England, and the law incidentally operating upon those facts; and if the will were once revoked in England, it can hardly be held that it would be revived by a mere change of domicile.

The question therefore is, what effect, according to those principles of what is called international law, which form part of the law of Scotland, is to be ascribed to the rule of the law of England that marriage revokes a will. The rule upon which that depends appears to me to be well settled; and it is this, that the effect of marriage on the civil rights of the married persons, and in particular on their rights in moveable property, depends upon the law of the domicile of the husband. Without referring to the text writers upon this subject, I think it is enough for the purposes of this case to cite the highest authority in law—the decisions of the House of Lords in cases

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appealed from this Court—*Warrender* v. *Warrender* and *Munro* v. *Munro*. In *Warrender* it was assumed that a marriage in England of a domiciled Scotsman was to be considered a Scottish marriage; and the same doctrine formed the ground of judgment in *Munro* v. *Munro*. It is thus stated by the Judges in the minority in the Court of Session, whose opinion was upheld in the House of Lords—"Assuming Sir Hugh Munro to have been a domiciled Scotsman at the date of his marriage, we are of opinion that the marriage, though celebrated in England, must be considered as in law a Scotch marriage in respect of all the incidents and consequences of marriage. It cannot in our opinion be of any consequence that before the marriage the lady may have been a domiciled Englishwoman, for in the moment and in the act of marriage, the wife necessarily adopts and becomes attached to the domicile of her husband. . . . It is of no consequence what was the domicile of the wife; and it is of just as little consequence where the marriage was celebrated. The law of the domicile of the husband is the law of the marriage." The same law was stated in two sentences by Lord Chancellor Cottenham in the House of Lords—"It was hardly contended that the country in which the marriage took place was material. It was considered as immaterial by the writers upon civil law. . . . The law of the country where the marriage is celebrated ascertains its validity. The law of the country of the domicile regulates its civil consequences." Lord Brougham states his opinion to the same effect.

It is true that the main question involved in that case was one of status, but that makes no difference for the present purpose. It only created a difficulty which does not arise in the present case, by reason of the conflict between the English law of bastardy and the Scottish law of legitimation *per subsequens matrimonium*. The point decided was that the marriage of a domiciled Englishwoman in England to a domiciled Scotsman was, as regards all its civil consequences, a Scottish marriage. The question must have been decided obviously exactly in the same way if it had concerned only a question of property and not a question of status; and, indeed, the question of status was considered only as a step towards the decision of a question of property, because the real point in dispute was whether the child whose legitimation was in question was or was not entitled to succeed to the estate of Fowlis. Lord Brougham says—"I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that the party is legitimate, but it is a judgment finding according to the conclusions of the libel, which proceeds upon the statement of facts, that she ought to be found and declared, as lawful daughter, entitled to succeed under the entail as next heir." The application of that doctrine to the question now in dispute seems to me to be perfectly clear. Without considering the question which seems to have been discussed in England, as to whether the rule of the Wills Act is part of the testamentary law or part of the matrimonial law, I think this at least is certain, that if the revocation of the will is the direct consequence of the marriage, then if it is an English marriage its effect in law will be to revoke this will, and if it is a Scottish marriage it will not. I apprehend there can be no reasonable doubt, and I think it was not disputed in argument, that if the law be as I hold it to be, that the civil consequences of a marriage are fixed by the law of the husband's domicile, then the whole moveable property of the wife, although she was a domiciled Englishwoman until the marriage, must be regulated by the law of the husband's domicile which she then adopts. If this marriage had taken place before the passing of the Conjugal Rights Act and the Married Women's Property Act, there could be no room for doubt that the whole moveable property of the wife, in the absence of contract, would have been carried to the husband by the assignation implied in marriage. And there seems to me to be just as little doubt, that if the law of England now were that the marriage vested the whole of the wife's property in the husband, the wife in this case would, notwithstanding, have been entitled to the benefit of the Scottish Married Women's Property Act. I refer to the language of that Act for the purpose of observing that it assumes the law of Scotland to be, as in my opinion it is, that the civil rights of the spouses must be determined by the domicile of the husband—"Where a marriage is contracted after the passing of this Act, and the husband was at the time of the marriage domiciled in Scotland, the whole moveable or personal estate of the wife shall be vested in the wife as her separate estate, and shall not be subject to the *jus mariti* of the husband." By the law of Scotland, therefore, the personal estate of this testatrix became vested in her on her marriage as her own separate estate, to the exclusion of any right in her husband, and the same law which determines her right to the property, must determine her capacity to dispose of it by testament. That the law of England should be called in to revoke a will already made, as one civil consequence of the marriage, and then make way for the law of Scotland to regulate all the other civil consequences of the same marriage, seems to me to be contrary to all legal principle and sound reason. I think, with your Lordship, we may be confirmed in this view, not, indeed, of the rule of law as settled by the decision of the House of Lords, which needs no confirmation, but of its application to the particular question before us, by the opinion of Lord Lindley in the case of *Loustalan* v. *Loustalan*. It seems to me that our decision might be expressed in the exact words which are used by Lord Lindley, substituting only the name Scotland for the name France, for his Lordship says this—"If the domicile of the testatrix is to be treated as English when she became a married woman her will was revoked by

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her marriage, for such is the law of England whatever the intentions of the parties may be, but if her domicile was French her will would not be revoked by the English law, and still less by the French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him." Now, in the exposition of the case which your Lordship has been good enough to give us, you showed how the Judges there had differed upon certain points, and especially they differed on the question of fact as to whether the domicile was in truth French or English, but I do not find that any of these learned Judges dissent from this general statement of the law which is given by Lord Lindley, and in accordance with that statement I say that the question here is simply whether the domicile of the husband at the time of the marriage was Scottish or English. If it were Scottish, then the question of the subsistence or revocation of the will, will depend upon the law of Scotland, and according to that law this will is a perfectly good will. If it had been English, the will would no doubt have been revoked by English law. I am therefore of opinion that we cannot sustain the judgment of the Sheriff-Depute, but that we should revert to that of the Sheriff-Substitute.

The Court recalled the Sheriff's interlocutor, found in terms of the interlocutor of the Sheriff-Substitute, affirmed the said interlocutor, and decerned.

Counsel for the Appellants—A. R. Brown. Agents—Horne & Lyell, W.S.

Counsel for the Respondents—Hon. W. Watson. Agents—Dalgleish & Dobbie, W.S.

Friday, October 27.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'COSH *v.* MOORE.

(See *ante* June 9, 1906, 40 S.L.R. 691, and 5 F. 946.)

Arbitration—Lease—Clause of Reference—Application to Claims Advanced after Termination of Lease.

A mineral lease contained a clause of reference of disputes between the parties as to, *inter alia*, "the rights or obligations of either party, or in any way in relation to the premises." It also stipulated that the tenant should be bound "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish so as to restore the land occupied by them and their said predecessors, . . . and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with."

A claim having been made by the landlord, after the termination of the lease and removal of the tenant, for the fulfilment of this stipulation, and the tenant having denied liability, *held* that the decision of the dispute fell within the reference clause.

Andrew Kirkwood M'Cosh, ironmaster, residing at Cairnhill, Airdrie, was the proprietor of the lands of Garrockhill and Bankhead, in the county of Ayr, including the minerals, conform to a disposition in his favour, dated 14th, and recorded 30th June 1900. By the disposition there were assigned to him all arrears of rents and royalties due by the tenants prior to his term of entry, and all claims against them under their leases and relative agreements for restoration of land, &c. By lease, dated in 1884, his predecessors had let, with a small exception, the whole coal seams in and under the lands, and to this lease Alexander George Moore, coalmaster, St Vincent Street, Glasgow, had acquired right by assignation, dated 15th September 1893, and under it Moore had taken possession of the subjects and had worked the mineral field. On 12th November 1897 the tenant gave notice that he would terminate the lease at Whitsunday 1898, which notice was accepted by the landlords, but owing to there being negotiations for a renewal of the lease the tenant did not remove till some time subsequent to that term. Thereafter the landlords called upon Moore to fulfil certain prestations under the lease, and M'Cosh, after acquiring the property, insisted in these demands, and on Moore denying liability, he invoked the aid of the arbiter named in the lease, James M'Creath, civil engineer, Glasgow. The nature of the demands is disclosed in the decree-arbitral, *infra*.

On 14th February 1905 M'Cosh raised the present action against Moore to have it found and declared that he was bound to implement the decree-arbitral, dated 2nd November 1904, pronounced by the said arbiter. The summons also contained conclusions that the defender should be ordained (1) to make payment of a sum in name of damages caused by a sit, and to drains and watercourses, (2), (3), and (4) to execute certain work required of him by the decree-arbitral, and (5) to make payment of certain sums of expenses.

The lease provided, *inter alia*, as follows —"And further, the second parties (the lessees) shall be bound, and they hereby bind themselves and their foresaids, all jointly and severally as aforesaid, before the expiry or sooner termination hereof, to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections, in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish, so as to restore the land occupied by them and their said predecessors, or in any way

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used or taken up in connection with the colliery, and to render the same arable and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with; and the lessees shall also be bound to restore all fences, drains, and watercourses which may be or may have been broken down, altered, or removed in the course of their said predecessors' operations; declaring, however, that the lessees shall not be entitled to fill up any pits which may be abandoned by them during this lease without the express permission in writing of the first parties (the proprietors) or their foresaids, but shall be bound to leave the same open and securely and properly fenced by a stone and lime wall of at least 6 feet in height. . . . Further, it is hereby agreed that in the event of misunderstandings or disputes arising between the parties as to the true intent and meaning of these presents, or any of the terms or provisions hereof, or in regard to the conduct by the second party of their coal workings or of their surface operations under the lease, or in regard to the condition of the engines, machinery, plant, and others, or the value thereof when handed over by the second party to the first party, or the rights or obligations of either party, or in any way in relation to the premises, all such shall be and are hereby referred to the amicable decision and final sentence of Alexander Simpson, civil and mining engineer in Glasgow, whom failing, of James M'Creath, civil and mining engineer in Glasgow, as sole arbiter in the premises, whose decision both parties bind themselves to implement and abide by."

On 2nd November 1904 the arbiter pronounced his decree-arbitral, finding and determining—"[(1), (2), and (3) dealt with a sit and damage to drains and watercourses in certain places marked on a map in process, finding Moore liable to pay damages therefor]. (*Fourth*) That the engine-seat at Garrockhill Pit, and the areas marked on the said plan A, B, C, D, to the respective extents following, namely, . . . have not been respectively removed and restored by the said Alexander George Moore. (*Fifth*) That the said Alexander George Moore is, upon a sound construction of the said lease . . . bound to remove the engine-seats and to restore the said areas marked A, B, C, and D on the said plan, so as to render the same arable and as suitable and fit for the purpose of agriculture or any other purpose in every respect as before being originally interfered with. (*Sixth*) That the pit shafts at the Garrockhill Pit and the old pit respectively have not been properly fenced. (*Seventh*) That the said Alexander George Moore is, upon a sound construction of the said lease . . . bound to fence the said pit shafts in a proper manner by stone and lime walls of at least six feet in height. (*Eighth*) That the area of ground extending to about ·310 (three hundred and ten one-thousandth parts) of an acre, formerly occupied by the hutch road between Garrockhill and Duchray, has not been restored by the said Alexander George Moore in terms of the obligations thereanent contained in the said lease . . . (*Ninth*) That the drains and watercourses in the said last-mentioned area have been injured by the construction and use of the said railway or hutch road. And (*Tenth*) That the said Alexander George Moore is, upon a sound construction of the said lease, and notwithstanding the termination of his occupancy of the minerals under the said area, bound to restore the said last-mentioned area, and to render the same arable and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before the formation of the railway or tramway, and also to restore the field-drains and watercourses intersecting the said area." The arbiter also found Moore liable in expenses.

The defender pleaded—"(3) The pursuer not having timeously called upon the defender to restore the ground in question, and the relative obligations in the lease not being prestable against the defender after his removal from the subjects, the defender is entitled to be assoilzied from the conclusions of the summons thereanent. (7) In any event, the sum sued for in name of damages under the first conclusion of the summons is excessive."

On 17th June 1905 the Lord Ordinary (Dundas), having heard counsel in the Procedure Roll, pronounced the following interlocutor—"Finds that the arbiter has not acted *ultra vires* nor outwith the scope of the reference: Repels the defender's whole pleas-in-law except the seventh: Allows the pursuer a proof of his averments in support of the *First* operative conclusion of the summons, and to the defender a conjunct probation, said proof to proceed on a day to be afterwards fixed: Finds, declares, and decerns in terms of the declaratory conclusion of the summons: Further decerns and ordains the defender, in terms of conclusion *Second* of the summons, to remove the engine-seats and to restore the areas marked A, B, C, and D on the plan lodged in the reference referred to in the summons, so as to render the same arable and suitable for the purposes of agriculture or any purpose in every respect as before being originally interfered with, and that at the sight and to the satisfaction of James M'Creath mentioned in the summons, and within such time as he shall consider reasonable, with power to him to report to the Court at any time if so advised; and further, decerns and ordains the defender, in terms of conclusion *Third* of the summons, to fence the pit-shafts on the said subjects of the lease referred to in the summons in a proper manner by stone and lime walls of at least 6 feet in height, and that at the sight and to the satisfaction of the said James M'Creath, and within such time and with power as aforesaid: And further, decerns and ordains the defender, in terms of conclusion *Fourth* of the summons, to restore the field-drains and watercourses upon the area of ground mentioned in said conclusion, and also to restore the said area itself and to render the same arable and as suitable and fit for the purposes of agriculture as before the formation of the railway or

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tramway, at the sight and to the satisfaction of the said James M'Creath, and within such time and with power as aforesaid: Decerns against the defender for payment to the pursuer in terms of the *Fifth* conclusion of the summons."

Opinion.—"The pursuer seeks to have the defender ordained to implement a decree arbitral pronounced by an arbiter named in a mineral lease dated in 1884, in which the pursuer and defender subsequently acquired the rights of landlord and tenant respectively. The defender gave notice to terminate the lease as at Whitsunday 1896, which was accepted by the then landlords, but in point of fact the tenant, by arrangement, continued to work the minerals, and did not remove his plant until a later period in that year. The then landlords subsequently called upon the defender to perform certain operations which they alleged to be incumbent upon him under the lease, and the pursuer, after he acquired the subjects, insisted in these demands, but the defender denied all liability in the matter. The pursuer accordingly invoked the aid of Mr James M'Creath, the arbiter named in the lease, and proceedings were instituted before him. The defender applied in the Bill Chamber to have Mr M'Creath interdicted from proceeding with the reference, upon the ground that the order prayed for would be *ultra vires* of the arbiter. The Second Division ultimately refused to grant interdict. The case is reported (*Moore* v. *M'Cosh*, June 9, 1903, 5 Fr. 946), but I do not think that either of the parties can now effectually pray it in aid, because the Court, so far as I can gather, decided no more than this, that they were not prepared to say that Mr M'Cosh might not under the clause of submission be able to make good some claim against Mr Moore, though the claim as then stated in the arbitration proceedings might not be successful. I understand that, in point of fact, the pleadings were afterwards largely recast, and the matter came before the arbiter for proof, the defender keeping his position open by renewing to Mr M'Creath the protest that what he was asked to do was *ultra vires*. Notwithstanding the protest, the arbiter thereafter issued a decree arbitral, the material portions of which are printed in Cond. 16, which contains findings of liability on the defender 'upon a sound construction of the said lease,' to perform the operations specified. The object of this action is, as I have explained, to obtain decree of specific performance of these operations. The principal defence is a renewal of the plea of *ultra vires*.

"The first point then seems to be to consider the terms of the clause of reference contained in the lease, in order to ascertain what truly were the limits of Mr M'Creath's jurisdiction. The clause is printed at length in Cond. 7, and is expressed in remarkably comprehensive terms. It was, *inter alia*, 'agreed that in the event of any misunderstandings or disputes arising between the parties as to the true intent and meaning of these presents, or any of the terms or provisions hereof . . . or the rights or obligations of either party, or in any way in relation to the premises, all such shall be' referred to the final decision of the arbiter. It was observed by Lord President Robertson (in the case of *Mackay & Son*, 20 R. 1093, at p. 1105), in regard to a clause of reference, that 'if on its fair reading, the parties have agreed to refer to the arbiter every dispute or difference about the meaning and effect of the contract, whensoever and wheresoever such dispute or difference may arise, then there is no rule or principle of law to defeat such agreement.' It is true that the Lord President dissented in that case, but the Judges who formed the majority did not deny, but on the contrary agreed with, the proposition thus generally expressed by his Lordship, though they thought it was not applicable to the clause there under consideration. Therefore, although it is not usual for parties to leave to the arbiter the absolute construction of the meaning of the contract in all its parts and under all circumstances, such a course would, in my judgment, be quite competent, and would not be either unintelligible or necessarily unwise. The parties might not unreasonably, I think, prefer, upon the construction of a mineral lease, to peril their case upon the decision of an experienced civil and mining engineer rather than upon that of a court of law. I have come to the conclusion that that is what the parties here intended to do, and have done, because I think that is the result of a 'fair reading' of the language used. I was referred to some of the numerous decisions as to the scope of clauses of reference—each of which, of course, turned upon the particular language of the clause—but I am not aware of any case where the words used were so comprehensive, or, as I think, so clearly intended to leave the arbiter a free hand in construing the contract, as that now under consideration. Nor, in my judgment, is the effect of the words which I have quoted lessened or restricted by the express enumeration of certain specific matters which intervenes between the sentences of my quotation. Holding these views, it is not necessary for me to express an opinion whether or not Mr M'Creath has, in regard to any of the points raised in discussion, wrongly construed the intent and meaning of the contract, for it is well-settled law that an arbiter, acting honestly and within the limits of the submission, is final upon matters of law, or of construction, as well as of fact. Among the most recent authorities to this effect are *Holmes Oil Company, Limited*, 18 R. (H. L.) 52, and *Caledonian Railway Company* v. *Turcan*, 25 R. (H. L.) 7. But it is fair to say that I am not satisfied that Mr M'Creath's construction of the lease is, upon any point, otherwise than correct. The principal matter of complaint by the defender's counsel was in regard to the clause (quoted in Cond. 6) by which the lessees are bound 'before the expiry or sooner termination hereof, to fill up, if desired, all pits and excavations already made or to be made,'

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and to remove engine-buildings, &c., and to clear away or trench in all tramways and heaps of rubbish, so as to restore the land and render it arable, and to restore fences, drains, water-courses, &c. Mr Murray strenuously argued that the whole of these obligations were intended to emerge only in the event of the defender being 'desired' by the landlord to perform them 'before the expiry or termination' of the lease, and that as no such 'desire' was expressed by the landlord before that period the obligations had not become, and could not thereafter become, prestable. Mr Murray argued that the true intent of the clause was that if, after a six months' notice to terminate had been given by the tenant, the landlord should, before the six months had elapsed, 'desire' him to perform these operations, he would be bound to do so, the landlord having, *ex hypothesi*, decided to cease letting or working the minerals, and to resume agricultural possession of the surface; but that if the landlord, having secured a new mineral tenant, should refrain accordingly from expressing such desire, the obligations necessarily flew off at the termination of the lease, being obviously unadapted, and indeed destructive, to the continued working of the colliery. I confess, however, that I think that the words 'if desired' are intended to qualify only the first of the series of obligations referred to, viz., the filling up of pits, &c., and that there is nothing to indicate that the other obligations with which this case is concerned might not be enforced after the termination of the lease, and apart from any previous expression of 'desire' by the landlord. The case seems to me to be different from that of *Sinclair*, 25 R. 703, which Mr Murray relied upon, where a landlord was held not entitled, after the conclusion of a lease, to demand performance of operations in the quarry which the tenant was bound to execute from time to time during its currency. But it is unnecessary that I should elaborate the matter further, because, in my opinion, Mr M'Creath was entitled to construe the lease, as he has evidently and admittedly done, in a sense adverse to the defender's argument, and his decision is, in my judgment, final.

"But Mr Murray argued, as an alternative, that the Court ought, in no view, to grant decree of specific performance of the obligations, or at all events of certain of these. This argument was especially pressed in regard to the conclusion for restoration of the ground to an arable condition. The principal averments on the point are contained in answer 13. It appears that there are upon part of the ground huge bings which the defender says it would be impossible to clear away or trench in. He argued that these were not 'heaps of rubbish' within the meaning of the lease, but that, I think, was clearly a matter for the arbiter alone to consider and decide. This alleged impossibility is apparently based upon (*a*) the enormous cost which, it is said, would be involved in the removal of the bings, especially since the defender has removed his tramways and plant, and (*b*) his want of any legal title to enter upon the pursuer's lands. The latter difficulty could, I apprehend, be obviated by the pursuer granting his permission to the defender to enter upon the lands for the purpose of removal. With the former I have much sympathy; but the defender undertook by the lease to remove 'heaps of rubbish,' which the arbiter has decided to include these bings, and I do not know of any decision in our books which would warrant me in refusing to the pursuer a decree for specific performance of the obligation under such circumstances as are here disclosed. The only Scots cases to which I was referred upon this point were *Stewart* v. *Kennedy*, 17 R. (H. L.) 1; *Middleton*, 19 R. 801; and *Moore, &c.* v. *Paterson*, 9 R. 337.

"Various other points of minor importance were urged by Mr Murray. He objected to the conclusion for removal of the engine-seat, upon the grounds, as I understood, that it did not fall within the words of obligation (Cond. 6) to remove 'all engine buildings or other erections, in so far as the same may be their own property.' But it appears to me that it was for the arbiter alone to decide whether or not the engine-seat falls under the category named, and whether or not it was the defender's property and was included in the inventory of machinery, &c., appended to the lease. As to the 'impossibility' of removing it (Answer 13), I refer to what I have said in regard to the bings.

"Lastly, a matter about fencing pit-shafts, referred to in Cond. and Answer 13, seems to me to have been also finally decided by the arbiter.

"It was admitted that inquiry would be necessary in order to assess, failing agreement of parties, the damages claimed in the first conclusion of the summons. For the rest I shall pronounce an interlocutor in terms of the declaratory conclusion of the summons, and substantially, though not identically, in terms of the operative conclusions other than the first."

The defender reclaimed, and argued—The submission, though expressed in general terms, was ancillary to the contract. It applied to the parties' obligations as landlord and tenant, but had no relevance to their position after the expiry of the lease. Therefore the arbiter's findings were *ultra vires*. These findings being *ultra vires* it followed that they could not now be enforced. The landlord's only remedy was an action of damages—*Greenock Parochial Board* v. *Coghill & Son*, March 6, 1878, 5 R. 732; *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 79, 15 S.L.R. 51; *Mackay* v. *Parochial Board of Barry*, June 22, 1883, 10 R. 1046, 20 S.L.R. 697; *Beattie* v. *Macgregor*, July 5, 1883, 10 R. 1094, 20 S.L.R. 729; *Mackay & Son* v. *Leven Police Commissioners*, July 20, 1898, 20 R. 1093, 30 S.L.R. 919; *Sinclair* v. *Caithness Flagstone Company, Limited*, March 4, 1898, 25 R. 703, 35 S.L.R. 541; *Savile Street Foundry Company, Limited* v. *Rothesay Tramways*

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Company, Limited, March 20, 1883, 10 R. 821, 20 S.L.R. 562.

Argued for the pursuer—Reference clauses are of two kinds, (1) executorial or limited, and (2) of a wider nature involving a consideration of the intention of parties as to the scope and extent of the matters which might be referred to arbitration in the event of disputes arising on a particular contract. The reference clause here fell under the second category, and the arbiter had correctly interpreted the scope of the reference—*Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134, 20 S.L.R. 753; *Moore* v. *M'Cosh*, June 9, 1903, 5 F. 946, 40 S.L.R. 691.

At advising—

LORD PRESIDENT — This is an action raised by a Mr M'Cosh, ironmaster, against Alexander George Moore, coalmaster, and it has various conclusions in which the Court is asked to make operative by decree the findings pronounced by Mr M'Creath, civil engineer, in a certain arbitration which had taken place between the parties. The relationship between the parties is that Mr M'Cosh is proprietor of a certain estate upon which the defender is the quondam tenant. The Lord Ordinary has given decree in terms of the conclusions of the summons, with a slight exception as regards one conclusion, so that there is still a small matter to be cleared up by proof. The defender has reclaimed against that judgment, his contention being that the arbiter was not empowered to pronounce the findings he has done, and that upon a true construction of the clauses of the lease in respect of which these findings proceed, the defender ought to be assoilzied from the conclusions of the summons. I am of opinion that the Lord Ordinary has taken a just view of the questions in dispute, and I have really very little to add to his Lordship's very careful note in this case.

It is quite clear that your Lordships cannot approach the question of what is the proper construction of the various stipulations in the lease unless you come to the conclusion that the arbiter had no power to determine what he has done by interpretation of these various stipulations, and I therefore apprehend that the initial point—the point which if decided in one way ends the case—is, what is the true construction of the arbitration clause? The arbitration clause is printed on page 13 of the appendix, and is in these terms. [*His Lordship quoted the clause given above and continued*]—Now, this matter of the construction of an arbitration clause has often been before the Court on previous occasions, and there are two cases which, I think, may be held to have completely settled the principles on which these questions are to be determined. The first case is the case of *Mackay* v. *Parochial Board of Barry*, 10 R. 1046, and the passage that really lays down the general principles in the leading judgment, which was given by Lord Rutherfurd Clark, is on page 1050, and is this — "The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more, and extend it to the decision of any claim which may arise out of the contract. In this sense the reference is not less executorial of the contract than when it is confined to the settlement of questions which may arise during the execution of the works." That expression of opinion of Lord Rutherfurd Clark was very soon after its delivery entirely approved of and concurred in by Lord President Inglis in the case of *Beattie* v. *Macgregor*, reported in the same volume of Rettie, page 1094, and his Lordship there, on page 1096, comments with approval upon the judgment of Lord Rutherfurd Clark, and quotes that portion of his judgment which I have just read, and he himself came to apply the same views in a subsequent case in the same volume — the case of *Levy & Company* v. *Thomsons*, page 1134. His Lordship goes on to say in *Beattie* v. *Macgregor* — "If parties would only keep in view that there are two kinds of reference, one of which includes only disputes arising in the execution of the contract, while the effect of the other is to refer to arbitration every claim and obligation that at any time arises out of the contract—if parties would only keep this in view, there would be an end to cases of this class."

Therefore the only point is, which class of these cases does this clause in the arbitration fall under? It is not immaterial to notice that the Lord President went on to say in *Beattie* v. *Macgregor* that he had no doubt at all that Lord Rutherfurd Clark's opinion of the application of the general principle to the particular in the case of *Mackay* v. *The Parochial Board of Barry* was a sound one. Now, the clause of reference in *Mackay* v. *Barry* was this—"Should any dispute arise as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, claim, or obligation whatever arising out of or in connection with the works, the same shall be submitted and referred." Your Lordships may notice the strong family resemblance, if I may say so, between the words of that clause and the words of the clause with which we are dealing, but taking the clause alone, without any question of authority upon it, it seems to me that the clause is very plain, and it seems to me really practically to go in what I may call chronological order through the whole period during which the lease operates, and it echoes all stipulations in the lease on the one hand or the other which could possibly form matters of dispute. These all apply to the event of misunderstanding and disputes arising, first, as to the true intent and meaning of these presents. That is a question of the construction of the lease, which of course might arise the moment the lease was entered into. Then there is "as to the conduct by the second party of

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their coal workings;" that is something during the currency of the lease. Then, as to the "condition of the engines, machinery, plant, and others, when handed over by the second party to the first party," that is, at the termination of the lease; and then we come to the general words, "the rights or obligations of either party, or in any way in relation to the premises." That seems to me to cover every possible question which can arise in respect of the stipulations of the lease.

Now, the defender argued very strenuously that all that did not apply here, because the expression on which the determination of most of these matters arose was an expression which in time is limited to the duration of the lease. The clause in the lease on which these matters depend is the clause which is printed, and it is an obligation upon the mineral tenants "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be their own property," and to clear away the obstructions and restore the ground to arable condition. The defenders argued that inasmuch as admittedly the lease has now expired, the true meaning of this clause is that the prestations in it were to be performed during the currency of the lease, that the lease being now over they could not be so performed, and that accordingly it must be *ultra vires* of the arbiter to ordain them to do anything after the lease was over. It seemed to me that argument involved a certain amount of confusion of thought. It is, of course, true that an arbiter cannot be the ultimate judge as to the scope of the reference. He is liable to be corrected by this Court if he is wrong. None the less he is bound to determine the scope of the reference in order to see whether or not he will proceed. But if the scope of the reference is absolutely general—and I have already given your Lordships my opinion on that point—then all we have got to do is to see whether the disputed question is a question which falls within that general scope or not. Now, if it had been possible to say that it was a legal impossibility in a lease to bind either party by any stipulations which should only take effect after the lease was over, then I should have understood the argument that although the reference clause was absolutely general as to anything which could happen under the lease, yet that if something happened after the expiry of the lease it could not fall within that reference clause. But of course any such contention that it is a legal impossibility to have a stipulation in a lease which shall only be prestable after the expiry of the lease is impossible. It is a matter of everyday practice that there should be stipulations inserted in leases which shall only be put into effect after the lease is over. Accordingly, if that is so, then the question as to whether this particular clause in this lease is really only prestable before the expiry, or prestable after the expiry, is simply a question of the construction of the particular clause of the lease, and being a question of the construction of the particular clause of the lease it falls within the clause of reference, if the true meaning of the clause of reference is what I have said.

I should only like to say that I am far from saying that this is one of those cases where the Court is reluctantly bound to affirm what it sees is an obviously wrong decision. Upon the question of whether the words "before the expiry" apply to the first branch only or to the whole branches of that sentence I am bound to say that I think the arbiter came to a right conclusion. I do not know that I am quite so certain upon the question of the engine-seats. There may be more in this question of property—because that is upon what it depends—than I know, and at any rate I do not take any further concern with that, because, for the reasons I have stated, it is really immaterial whether the arbiter has decided it rightly or wrongly.

The effect of my opinion is that we should affirm the judgment of the Lord Ordinary. Upon the form of the judgment, as the parties have told us that the small matter which was left over is not worth having a proof upon, I shall be glad to put the judgment in a form which will suit the parties if they would sooner have it in that form rather than in the form of a simple affirmation of the Lord Ordinary's interlocutor. But failing agreement I propose that we should affirm the Lord Ordinary's judgment.

LORD ADAM—I concur.

LORD M'LAREN—I am quite of the same mind. The only question raised before us was the question of the scope of the reference, which, of course, is always a question for the Court, because we could not allow an arbiter to determine finally the limits of his own jurisdiction. He may provisionally do so, but his opinion upon the limits of his own jurisdiction is not final. With regard to the scope of the reference and what questions are included in it, I adhere very firmly to the decision in the case of *Barry Parochial Board*, in which I concurred at the time. I think that the point decided there, or the principle affirmed, was only this, that there is no presumption with respect to reference clauses in leases and contracts that they are executorial, in the restricted sense in which that word has come to be used, but that each lease or contract must be considered by itself, and effect given to the intention of the parties as to the scope and extent of the matters which might be submitted to arbitration. Now, in leases these matters very often include pecuniary questions which may arise either during the lease or at its termination. They include always, I think, questions as to working in terms of the agreement. There must be some one to see whether the tenant is working fairly, and in very many cases questions arise as to restoration and value of the plant at the termination of the lease. It seems to me that the parties here have very clearly expressed their intention that the

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reference to Mr M'Creath was to embrace matters arising at the termination of the lease, as well as those disputes which might take place during its currency. Perhaps it was even more necessary to provide for the settlement of disputes at the termination of the lease than of disputes of the other class, because if landlord and tenant are on good terms, and are desiring to work the contract fairly, there may be no questions during the currency of the lease, but there must always be questions to settle at its termination. We are asked, however, to interfere on the ground that the arbiter in deciding this question has had to construe the lease, and it is said that his construction is so clearly wrong that the foundation of his award is taken away by his having proceeded upon a false basis. I can conceive a case where an award may be cut down or set aside on such a ground, but I think that it would be almost necessary to say that the decision was so manifestly and demonstrably unsound that no honest arbiter, properly conducting his case, could have come to that conclusion. Now, it is not suggested that the objection to this award is of the character which I have stated. So far from that being the case as regards the more important question, the opinion of the Lord Ordinary (with which I understand your Lordships are in agreement) is that with nothing but the lease before him he would come to the same conclusion as the arbiter. With regard to the engine seat, which certainly raises a troublesome legal question, I am not prepared, any more than the Lord-Ordinary, to say that the award is wrong, because I think it is quite possible that there may have been evidence before the arbiter that the tenant had taken over this engine seat, and that it had thereby become his property in the sense of the contract. If he took the view that, according to the true meaning of the contract the tenant was to be treated as the proprietor of fixtures which he had paid for, then I cannot say that I should pronounce that decision to be wrong. On the whole matter I agree with your Lordship that, subject to the slight alteration that may be necessary upon the first finding, we should adhere to the Lord-Ordinary's interlocutor.

LORD KINNEAR—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—The Dean of Faculty (Campbell, K.C.)—Cooper, K.C.—Hunter. Agents—Webster, Will & Co., S.S.C.

Counsel for the Defender and Reclaimer—The Solicitor-General (Clyde, K.C.)—C. D. Murray. Agents—Drummond & Reid, W.S.

Thursday, November 23.

SECOND DIVISION.

[Lord Low, Ordinary.

ROBERTSON AND OTHERS *v.* DUKE OF ATHOLL AND OTHERS.

Process—Proof or Jury Trial—Right-of-way.

In an action raised by members of the public against proprietors, for declarator that a right-of-way existed (1) from A to B *via* certain places, (2) also from A to B for the first part *via* the same places but for the latter part *via* certain other places, a portion of this latter part being claimed by alternative routes forming a bifurcation, the defenders argued for a proof in lieu of jury trial on the ground of (1) the complexity of rights-of-way sought to be established, (2) the danger of the jury being misled by the evidence, since part of the right-of-way claimed was an admitted right-of-way, another part was a tolerated route, and traffic from either end to and from a certain well near the right-of-way claimed was likely to be mistaken for through traffic.

Held that there was nothing to take the case out of the settled rule of practice that right-of-way cases should be tried by a jury.

This was an action of declarator of right-of-way, brought by Robert Robertson, boot and shoemaker, Dunkeld, but to which, by interlocutor of 20th June 1905, the Reverend John White Hamilton, United Free Church Minister, Dunkeld, and John Murray, joiner, Dunkeld, were sisted as pursuers (see *ante*, May 5, 1905, 42 S.L.R. 601), against the Duke of Atholl and others. The pursuers sought to have it found and declared that there existed a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, (1) between Dunkeld and Kirkmichael *via* Santa Crux Well and certain named places, the route claimed being further identified by reference to certain points marked on a map produced with the summons, (2) between Dunkeld and Kirkmichael, also *via* Santa Crux Well as in (1), but thence *via* certain other named places also under reference to points marked in the said map. A portion of (2) was claimed by alternative routes. There was also an alternative conclusion for declarator that a public right-of-way existed between Dunkeld and Santa Crux Well which was not contended for in the Inner House, the pursuers there assenting to the defenders being assoilzied from it.

Defences were lodged for the Duke of Atholl, Charles Edward Stuart Chambers of Cardney, Frank Balfour of Kindrogan, and the trustees of the late Charles Trotter of Woodhill.

On 20th June 1905 the Lord Ordinary (Low) appointed the pursuers to lodge the issue or issues which they proposed for the trial of the cause.

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The proposed issues, which embodied the conclusions of the summons, were as follows:—"(1) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road or right-of-way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge, at the point marked A on the map herewith produced, in a northerly direction past the houses of Hatton and Birkenburn to the Glack Sawmill; thence in a north-easterly direction across Cardney Hill to Grews or Santa Crux Well at the point marked B on the said plan; thence in a north-easterly, northerly, and north-easterly direction past Easter Riemore across Riemore Hill, on the west side of Loch Benachally, to the estate of Woodhill; thence through the Woodhill estate in a northerly direction past Dalnabrick, Pitcarmick, Dalvey, Stronamuck, Cragansualtach, and the Kirkmichael Free Church to Kirkmichael, where it joins the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said plan? (2) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road from Cally Lodge aforesaid to Grews or Santa Crux Well aforesaid until it reaches Riemore, being the road or way described in the first issue hereof; thence in a north-westerly and northerly direction up the bed of the Buckney Burn past Lochan Oisinneach Mhor to Lochan Oisinneach Bheag through the gate in the fence at the top of Loch Oisinneach Bheag at the point marked D on said plan, and downwards towards Loch Esk; thence by alternative routes, the first in a north-easterly, easterly, and northerly direction towards Cragansualtach, at the point marked E on said plan, and past the Free Church aforesaid; and the second by a ford over the Loch Esk Burn by Balnald plantation in a north-easterly direction to Balnakilly, and thereafter in an easterly direction, both to Kirkmichael, joining the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said plan? Or alternatively (3) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot between Dunkeld and Grews or Santa Crux Well aforesaid, leading the said public road or right-of-way from the said public highway between Dunkeld and Blairgowrie, at or near Cally Lodge aforesaid, and proceeding to Grews or Santa Crux Well, at the point marked B on the said plan, by the road or way between these points described in the first issue hereof?"

On 4th July the Lord Ordinary (Low) pronounced the following interlocutor:—"Disallows the issues proposed by the pursuers: Before answer, allows to the parties a proof of their respective averments, and to the pursuers a conjunct probation, to proceed on a day to be afterwards fixed.

Opinion—"I think that it must now be regarded as settled practice that an action of declarator of right-of-way will be sent to a jury unless it possesses some peculiarity which renders such a mode of trial inadvisable.

"In this case the pursuers claim three rights-of-way. The first two lead from Dunkeld to Kirkmichael. They both lead, in the first place, upon the same line, to a place called Santa Crux, where there is a mineral well, but they then divide and proceed by different routes to Kirkmichael. If those had been the only ways claimed I should have had no doubt that the pursuers were entitled to have the case sent to a jury. But the pursuers claim alternatively a way leading to Santa Crux Well and no further. It is evident that whether that is a relevant claim or not depends upon whether Santa Crux Well is a public place. Now, the pursuers' averments in regard to Santa Crux Well are these—'The said well has been in existence for centuries, and has been and still is regularly visited by large numbers of people on account of the supposed medicinal quality and curative power of its waters. At the well there was a chapel which was used by pilgrims for devotional purposes. Tents were erected for the accommodation of the pilgrims, and refreshments were sold as openly as at a fair. The said Well was and is a public place.'

"I confess that I have great doubt as to the relevancy of these averments; it is not disputed that the Well is situated on the private property of the Duke of Atholl, and no such public right as that claimed by the pursuers has ever been recognised in Scotland as capable of being acquired by the prescriptive use of a well, whether medicinal or not. Such a right cannot be a servitude, and if it exists at all, must I apprehend, be based upon dedication to the public use from time immemorial. The doctrine of implied dedication to public uses has never been received with favour in the law of Scotland, but I do not think that the possibility of implying such dedication from immemorial use is altogether excluded. I therefore do not think that I would be justified in throwing out the claim without ascertaining the precise facts, and indeed the Solicitor-General, for the defenders, conceded that there must be inquiry. I am of opinion, however, that the question is one which is entirely unsuitable for a jury. It involves a question of law of a kind which has given rise to great controversy, and the result will probably depend upon the legal inference to be drawn from the facts. It therefore seems to me to be a typical case for an allowance of proof before answer, and, of course, if one part of the case is to be tried by way of proof, the other must be so also. I shall therefore allow a proof before answer upon the whole cause."

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The pursuers then lodged the following minute—"Hunter for the pursuers stated, and hereby states, that he departs from the third issue contained in the proposed issues for the pursuers, and craved, and hereby craves, the Lord Ordinary to approve of the first and second issues."

On 7th July the Lord Ordinary pronounced this interlocutor—"The Lord Ordinary having heard counsel upon the minute for the pursuers, refuses the same in respect that it is not competent for the Lord Ordinary to deal therewith, he having disallowed the issues proposed by the pursuers by the immediately preceding interlocutor."

The pursuers reclaimed against the interlocutor of 4th July 1905.

In the course of the argument in the Inner House, the defenders (respondents) argued that the rights-of-way claimed were not sufficiently identified, and that, though certain points were referred to on the map produced, they were far apart, and no line was drawn between them. The pursuers (reclaimers) while maintaining that it was not necessary there should be a line on the plan (*Mackintosh* v. *Moir*, February 28, 1872, 10 Macph. 517, 9 S.L.R. 300), agreed to lodge plans for the convenience of the Court with lines shewing roughly the rights-of-way claimed, and to enable these plans to be prepared the further hearing was postponed for a week. At the continued hearing of the case the pursuers (reclaimers) further agreed that said lines should also be marked on the plan produced with the summons, and that reference should be made in the proposed issues to this plan. They also consented to the defenders being assoilzied from the alternative conclusion of the summons which was embodied in the third issue proposed in the Outer House.

The reclaimers (pursuers) now argued—The case should he sent to a jury. The Lord Ordinary would have done so if it had not been for the right-of-way claimed to Santa Crux Well in the alternative conclusion of the summons. That conclusion having been given up, the judgment was really in their favour. The fact that there were two bifurcations did not make this a complex right-of-way case, and it was the settled practice to send ordinary cases of declarators of rights-of way to a jury. Even supposing there were difficulties of question of fact, these were perfectly suitable for trial by jury—*Nairn* v. *Speedie and Others*, March 3, 1899, 1 F. 635, 36 S.L.R. 501; *Hope* v. *Gemmell*, March 1, 1898, 25 R. 678, 35 S.L.R. 528; *Fraser Tytler's Trustees* v. *Milton*, March 15, 1890, 17 R. 670, 27 S.L.R. 533; *Blair* v. *Macfie*, February 2, 1884, 11 R. 515, 21 S.L.R. 349. Though there was an alternative claim of servitude in the case of *Paterson* v. *Airdrie and Coatbridge Water Company*, February 14, 1893, 20 R. 370, 30 S.L.R. 637, it was sent to be tried by jury. The case of *Mackintosh and Others* v. *Moir*, February 28, 1871, 9 Macph. 574, 8 S.L.R. 382, referred to by defenders, was sent to a jury. They relied on modern cases; those referred to by the defenders were all old.

The respondents (defenders) argued—Even though the alternative conclusion had been abandoned, the case ought not to be sent to a jury. The Court had a free discretion in the matter. This was not one of the enumerated causes, and there was no warrant for erecting the series of decisions quoted by the pursuers into a rule of practice binding on the Court—certainly not on that Division. Further, so far as the Second Division was concerned this matter stood as left by *Macfie* v. *Stewart*, January 24, 1872, 10 Macph. 408, 9 S.L.R. 240, and the views there expressed were also held by the First Division up to and including the case of *Fraser Tytler's Trustees*. The case ought not to be sent to be tried by jury because of (1) the complexity of the rights-of-way sought to be established, which appeared from the proposed issues—Two rights-of-way were claimed, partly the same and partly different, and one of these had an alternative loop—because of (2) the danger of the jury being misled by the evidence owing to the following facts, that part of the right-of-way claimed was an admitted right-of-way, that another part was a tolerated route, that people went to Santa Crux Well from either end, that there was a tolerated access to Santa Crux Well. The jury would find it difficult to sift what was evidence of through traffic and what was evidence of right. On the dangers of evidence calculated to mislead they referred to Lord Deas' opinion in *Mackintosh* v. *Moir*, February 28, 1871, 9 Macph. 574, at p. 577. The Court should apply the same standard as in *Fraser Tytler's Trustees*.

At advising—

LORD JUSTICE-CLERK—I think there can be no doubt that—although cases of this kind have not recently come before this Division—it has come to be well established as matter of practice in cases that have come before the First Division, that, where the question of right-of-way which is raised is a pure question of fact without any complication of any kind, a case ought in ordinary course to be sent to a jury. I cannot help saying for myself I think that is about the worst way of trying a right-of-way case that can be imagined. But it has been practically settled that if it is a question of fact it is to go to a jury. Now, when this case first presented itself in the Outer House, Lord Low saw ground for sending it, not to a jury, but to proof before himself, and if the case had been in the exact position it was in when it was debated in the Procedure Roll before him we should certainly have held that his judgment was right. There was then a question of a difficult kind indeed, involving questions of law which might depend on evidence led at the trial, namely, whether any person going up from Dunkeld towards Kirkmichael might be held, on reaching Santa Crux Well, to have reached a public place. That of course might have raised a very difficult question as to the law applicable to the facts, but that point has now been given up, and the question is whether there have from time immemorial, or for forty years,

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been public roads from Dunkeld on the lines marked on the plan, coming out at what is undoubtedly a public place at Kirkmichael. It seems to me that that is a question as to which, according to the decisions, there is no ground for not allowing it to be tried by jury. I am therefore of opinion that we should recal the interlocutor. Of course the issues must be with reference to a plan.

LORD KYLLACHY—I concur with what your Lordship has said. I quite agree that cases of this kind would be much better tried by a judge than by a jury; but I am afraid that except in special cases the practice is settled the other way. In the present case I do not think that there is anything in the circumstances which would justify me in differing from the view of the Lord Ordinary that, the alternative conclusion of the summons being withdrawn, there must be a trial by jury.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor —"Recal the . . . interlocutor reclaimed against: Assoilzie the defenders from the alternative conclusions of the action and decern: Appoint the pursuers to lodge issues within eight days, and find no expenses due to or by either party since 4th July last.

The issues as finally adjusted and approved were as follows—"(1) Whether for forty years and upward, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road or right-of-way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge at the point marked A on the map No. 7 of process in a northerly direction past the houses of Hatton and Birkenburn to the Glack Sawmill; thence in a north-easterly direction across Cardney Hill to Grews or Santa Crux Well at the point marked B on the said map; thence in a north-easterly, northerly, and north-easterly direction past Easter Riemore, across Riemore Hill, on the west side of Loch Benachally, to the estate of Woodhill; thence through the Woodhill estate in a northerly direction past Dalnabrick, Pitcarmick, Dalvey, Stronamuck, Cragansualtach, and the Kirkmichael Free Church to Kirkmichael, where it joins the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the line coloured red on said map? (2) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road from Cally Lodge aforesaid to Grews or Santa Crux Well aforesaid until it reaches Riemore, being the road or way described in the first issue; thence in a north-westerly and northerly direction up the bed of the Buckney Burn past Lochan Oisinneach Mhor to Lochan Oisinneach Bheag through the gate in the fence at the top of Lochan Oisinneach Bheag at the point marked D on said plan, and downwards towards Loch Esk; thence by alternative routes, the first in a north-easterly, easterly, and northerly direction towards Cragansualtach, at the point marked E on said map, and past the Free Church aforesaid; and the second by a ford over the Loch Esk Burn by Balnald plantation in a north-easterly direction to Balnakilly, and thereafter in an easterly direction, both to Kirkmichael, joining the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the lines coloured red on the said map?"

Counsel for Pursuers (Reclaimers)—Ure, K.C.—Hunter, K.C.—J. A. Macdonald. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defenders (Respondents)—Solicitor-General (Clyde, K.C.)—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, December 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow

KIRK'S TRUSTEES *v.* WALKER AND OTHERS.

Succession—Trust—Vesting—Repugnancy—Discretionary Power of Trustees to Withhold Payment—Conditional Institution of Issue of Beneficiary—"Dying," meaning Dying before Receiving Payment, and not Dying before Term when Legacy might have been Paid.

A testator who died in 1884 conveyed to trustees his whole estate, *inter alia*, "(*Second*) For payment at the first term of Whitsunday or Martinmas after my death . . . to my nephews" A and B, "equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner in which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said" A or B "dying, leaving lawful issue, my trustees shall be entitled to apply such deceaser's share of the legacy for behoof of such issue in

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any way they may think proper, and failing such issue they shall be entitled to hold the share of such deceaser for behoof of the survivor of my said nephews in like manner and subject to the same conditions as are applicable to the original legacy" With regard to the residue of his estate, he directed his trustees "to divide the same among the legatees before named in proportion to the legacies hereinbefore bequeathed to them respectively. . . ."

A died in 1902 intestate, leaving a widow and issue, and without having claimed or received full payment of his half-share of the said legacy and its accompanying proportionate share of residue. Of the unpaid balance his widow claimed one-third as *jus relictæ*.

Held (1) that the unpaid balance of the half-share of the legacy had not vested in A, and so was not subject to his widow's claim of *jus relictæ*, and (2) that the share of residue followed, as regarded all its conditions and incidents, the share of legacy to which it was attached.

This was an action of multiplepoinding brought in the Sheriff Court of Lanarkshire at Glasgow by John Watt, agent of the Bank of Scotland in Trongate, Glasgow, and George Phillips, wholesale grocer, Trongate, Glasgow, the surviving testamentary trustees of the late William Kirk, tea merchant, Candleriggs, Glasgow, who died in the beginning of August 1884. Kirk by his trust-disposition and settlement, dated 15th April, and recorded in the Books of Council and Session 16th August 1884, conveyed his whole means and estate to the said John Watt, the said George Phillips, and John Connell, Sandyford Place, Glasgow (who predeceased the testator), and the acceptors and acceptor, survivors and survivor, as trustees in trust for certain purposes, *inter alia*—"(*Second*) For payment at the first term of Whitsunday or Martinmas after my death of the following legacies, all free of legacy duty, namely, to each of my trustees who shall accept office a legacy of £100 sterling; to my nephews Thomas Kirk and Ebenezer Kirk, sons of my late brother Thomas Kirk, equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner to which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said Thomas Kirk or Ebenezer Kirk dying leaving lawful issue my trustees shall be entitled to apply such deceaser's share of the legacy for behoof of such issue in any way they may think proper, and failing such issue they shall be entitled to hold the share of such deceaser for behoof of the survivor of my said nephews in like manner and subject to the same conditions as are applicable to the original legacy. . . . . —"*Lastly*, with regard to the residue of my means and estate, I direct my trustees to divide the same among the legatees before named in proportion to the legacies hereinbefore bequeathed to them respectively—that is to say, in the event of my estate being more than sufficient to provide for payment of all of the said legacies, then the said legacies shall all be proportionally increased; and on the other hand, in the event of the amount of the legacies being found to exceed the amount of my estate, then the same shall suffer proportionate diminution."

The testator's nephew, the said Thomas Kirk, died on 11th May 1902, intestate, leaving a widow—Mrs Margaret Warnock or Kirk, who subsequently married Alexander Walker, baker, East Crawford Street, Dennistoun, Glasgow—and also surviving issue — Agnes Kirk, Mrs Mary Kirk or Anderson, Thomas Kirk, and John Kirk. His share of said legacy of £1000, and the accompanying proportion of residue, amounted together to £951, 18s. 2d., and from this the trustees made regular payments to him during his life to account of the capital and revenue thereof. On his death the balance in the hands of the trustees amounted to the sum of £305, 6s. 1d. Two-thirds of this sum—*i.e.*, £203, 10s. 9d. — the trustees divided amongst the said issue, and they stated they were ready and willing to divide also the remaining one-third—*i.e.*, £101, 15s. 4d. This sum—which formed the fund *in medio*—was, however, also claimed by the widow, Mrs Margaret Warnock or Kirk or Walker.

The widow — the said Mrs Walker—claimed the whole fund *in medio*, on the ground that, as the widow of Thomas Kirk, she was entitled, "in terms of the law of Scotland in intestate succession, to succeed to one-third of the clear moveable estate left by her said husband, being the *jus relictæ* due to her from her deceased husband's moveable estate which she succeeded to on the said Thomas Kirk's death."

The said issue claimed that they were entitled equally among them to payment of the whole fund *in medio*, or that the fund should be held by the trustees for their behoof, in terms of the trust-disposition and settlement.

The Sheriff-Substitute (M. G. DAVIDSON), on 21st February 1905, repelled the claim for the said Mrs Walker, and sustained the claim for the said issue.

"*Note.*—The competing claims here are those of the widow and children of the late Mr Thomas Kirk, who was one of the beneficiaries of his uncle's will. In that settlement the testamentary trustees were empowered to retain in their own hands the legacy bequeathed to the said Thomas Kirk for an indefinite period; and there is a provision that in the case of his death the legacy may be paid to his issue. I have no doubt whatever that the money never vested in Thomas Kirk, and that he could

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not have tested upon it. In these circumstances I disallow the claim of his widow, and prefer the other claimants to the fund *in medio*."

The claimant Mrs Margaret Walker appealed to the Sheriff (GUTHRIE), who adhered to his Substitute's interlocutor of 21st February 1905, with additional expenses to the successful claimants.

"*Note.*—This is a case which raises a question of nicety, and I am sorry not to have had the benefit of Sheriff Davidson's reasons for holding that the legacy did not vest in Thomas Kirk. I have considered many, though probably not all, of the cases bearing on the subject. It was contended that it fell within the class of cases among which *Chambers* v. *Chambers' Trustees*, 5 R. (H.L.) 151, is the leading case, and that so a conditional vesting should be held to have taken place. If that were so, it would still have to be determined how far Mrs Walker, taking *jure relictæ—i.e.*, as a creditor—is affected by the condition attached to her husband's rights. I think, however, that the condition under consideration was a suspensive condition, and that no vesting in Thomas Kirk could take place before payment to him. That part of the legacy, therefore, which was not paid at his death never vested. *Paterson's Trustees* v. *Paterson*, 1870, 8 Macph. 449, although a comparatively old case in the law of vesting, seems to be in point and not to be shaken by any later decision. The trustees have paid and are willing to pay to Thomas Kirk's issue, so that no question arises except as to the widow's claim."

The defender and claimant Mrs Margaret Walker appealed to the Court of Session, and argued—The Sheriff's judgment was wrong and should be recalled. (1) The half-share of the legacy of £1000 had vested in Thomas Kirk absolutely *a morte testatoris*. There was nothing in the clause (2nd clause), "but declaring" to "applied for the benefit of the legatees," to take away this gift, for the power to withhold payment had no such effect—*Macfarlane's Trustees* v. *Macfarlane*, December 10, 1903, 6 F. 201, 41 S.L.R. 164 (which, after the trustees had exercised their option, and "apportioned and set aside," came to be in a similar position to this case, where there was a direction to pay); *Wilkie's Trustees* v. *Wright's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106, especially Lord M'Laren's opinion. The clause (3rd clause) beginning "and in the event" was a conditional institution (or at most a substitution); "dying" in that clause meant dying before the contemplated period of distribution, the first period of Whitsunday or Martinmas after the testator's death, *i.e.*, practically meant "predeceasing me;" "dying" had reference to the period of testator's death, and not to one legatee surviving another—*Wood* v. *Neill's Trustees*, November 6, 1896, 24 R. 105, 34 S.L.R. 107; *Hunter's Trustees* v. *Dunn*, January 27, 1904, 6 F. 318, 41 S.L.R. 251; *Greenlees' Trustees* (*supra*). The power of the trustees to give to the issue flew off as soon as Thomas survived the testator, after which the clause, "in the event," had no application. Even if it was a substitution it could be evacuated, and the contention of the other claimants that "dying" meant "dying before full payment" involved adding after "deceaser's share," the words "or portion of a share." It also involved reading "shall be entitled" as imperative, otherwise the fee would not be disposed of at all. (2) Assuming that "dying" did not mean "predeceasing me," but meant "dying before full payment," full payment of the legacy had been made, and what remained was not legacy but residue, for of legacy and residue which together amounted to £951, 18s. 2d. (£500 of this being legacy), what remained unpaid at Thomas' death was £305, 6s. 1d., and as legacies were paid before residue this balance must be considered residue. But there was no imposition at any rate on the residue of restrictive powers, and accordingly this unpaid balance was subject to *jus relictæ*.

Argued for the claimants, the surviving issue of Thomas Kirk—(1) There was no gift to the legatees except through the trustees, who had an absolute discretion either to pay or withhold, and the case was ruled by *Paterson's Trustees* v. *Paterson*, January 29, 1870, 8 Macph. 449, 7 S.L.R. 247 (*sub nomine Jamieson* v. *Paterson*). [The LORD JUSTICE-CLERK here pointed out that the distinction was that the present case started with a direction to pay.] If anything vested, it was not an absolute fee, but a conditional fee subject to the exercise of the trustees' discretion to withhold payment. The trustees, so far as they had not paid, had exercised their discretion not to pay, and therefore the sums remaining in the trustees' hands at the date of Thomas' death had not vested in him, and were not accordingly subject to *jus relictæ*—*White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660; *Russell* v. *Bell's Trustees*, March 5, 1897, 24 R. 666, 34 S.L.R. 497. (2) No distinction could be drawn between the interest in the legacy and the interest in the residue. The latter followed the former.

LORD KYLLACHY—In the first place, I think it is fairly clear that the shares of residue follow, as regards all their conditions and incidents, the legacies to which they are attached. That being so, the question which we have to determine is whether this legacy to these two brothers Thomas and Ebenezer Kirk had vested in the deceased brother to the extent of one-half at the date of his death, so as to become subject to his widow's right of *jus relictæ*.

Now, I do not doubt that if the gift had been qualified only by the power to withhold payment during the legatee's life, the legatee would have possessed from the first, and would have retained at his death, a vested right of fee in such part of the capital as remained unpaid to him. In other words, the widow's case would have

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been quite clear if the bequest had stopped at the end of what has been called the second clause—the clause which concludes with the words "for the benefit of the legatees."

But then it does not so stop. It proceeds to make an ulterior destination which further qualifies the right of fee, and does so by, in a certain event, carrying it to other people—the legatee's issue—and failing such issue to the survivor of the two brothers. The question thus comes really to be whether this ulterior destination applies only to the event of the legatee dying before the testator or before the first term of Whitsunday or Martinmas after the testator's death, or whether it also applies to the event of the legatee dying before payment, that is to say, full and complete payment of the legacy.

I am of opinion that the latter is the correct view. Reading the deed fairly, and giving full effect to all recognised principles of construction, I think the testator intended the destination over to apply in the event of the legatee's death while any portion of the legacy remained undisposed of in the hands of the trustees; and that being so, there was not, and could not be—as regards the sum now in dispute—any vested right in the legatee. I am therefore of opinion that the interlocutors of the Sheriffs should be affirmed.

LORD STORMONTH DARLING—I quite concur, and shall only add this—the appellant argued that the word "share," in what has been called the third clause of the destination, means the whole share as it existed at the date of the testator's death. I do not think that that is the true meaning of the clause. The trustees are to apply "such deceaser's share . . . in any way they may think proper." They could not apply what they had paid away, and I think the meaning is that they were to apply any balance that remained after what they had paid away to or for behoof of Thomas. I agree with your Lordship's construction of the deed, and that the judgment of the Sheriffs should be affirmed.

LORD LOW—I am of the same opinion. I think that upon the death of Thomas Kirk his children became entitled to that portion of the legacy which was still in the hands of the trustees, free of any claim on the part of the widow. The solution of the question in the case lies where Mr Robertson put it. If what has been called the third clause was restricted in its application to the case of the legatee predeceasing the testator, or dying before the first term of Whitsunday or Martinmas after the testator's death, then it is plain that the fee vested in Thomas Kirk, he having survived both of these events. If, on the other hand, this clause is not restricted to that event, but applies to the event of Thomas Kirk's death at any time before the legacy had been fully paid to him, it is equally clear that any part of the legacy which had not been paid, was not *in bonis* of him at his death, and could not be made subject to a claim of *jus relictæ*. I am clearly of opinion that the clause in question was intended to cover the latter case. The testator had given power to his trustees either to pay the whole of the capital, or to pay part of it to Thomas Kirk, or to limit his enjoyment to the income. Having given that power, it was most natural that the testator should go on to provide what was to happen if any part of the capital was left in the hands of the trustees at the death of the legatee. In my judgment he did so by the third clause, and provided that in the event of Thomas Kirk's death the whole or any part of the capital which had not been paid to him should belong to his children, not as taking through or in succession to him, but in their own right.

I am therefore of opinion that the Sheriff's judgment should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion and have nothing to add.

The Court dismissed the appeal and affirmed the judgment appealed against.

Counsel for the Claimant Mrs Walker (Appellant)—M'Lennan, K.C.—J. A. T. Robertson. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimants, the issue of Thomas Kirk (Respondents)—Macdiarmid. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday, December 8.

SECOND DIVISION.

[Lord Low, Ordinary.

SCOTT'S TRUSTEES *v.* MACMILLAN.

Trust—Succession—Donation mortis causa—Subsequent General Trust-Disposition Revoking all Previously Executed Testamentary Writings.

A trust-disposition and settlement by which the testatrix conveyed to trustees her "whole means, estate, and effects, heritable and moveable, real and personal," contained the following clause:—"And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The testatrix had at an earlier date made a *mortis causa* donation by means of a deposit-receipt.

Held that *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, 17 S.L.R. 597, was a case in point, and, following it, that the general trust-disposition and settlement with its clause of revocation was not sufficient by itself to revoke the prior *mortis causa* donation

Donation mortis causa—Deposit-Receipt—Delivery.

Circumstances in which *held—approving* judgment of Lord Ordinary (Low)—that a *mortis causa* donation had been made by a deposit-receipt found in the donor's repositories after her death.

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This was an action at the instance of William Tait, S.S.C., 33 York Place, Edinburgh, and David Macgill, 9 Carmichael Street, Govan, trustees and executors of Mrs Robina Tait or Scott, against Mrs Jane Robertson Gourlay or Macmillan, Archibald Macmillan, residing at 92 New Keppochhill Road, Glasgow, her husband, as her curator and administrator-in-law, and the Commercial Bank of Scotland, Limited. The pursuers sought declarator that they were entitled to payment of £100 contained in a deposit-receipt for that amount granted by the said bank in the joint names of Mrs Scott and Miss Jane Robertson Gourlay (subsequently Mrs Macmillan), and on it being so found and declared, that the defender Mrs Macmillan should be decerned and ordained to endorse the deposit-receipt, and if she failed to do so, that the said bank should be ordained and authorised to pay the said sum of £100. The action was defended by Mrs Macmillan.

Mrs Scott died on 19th February 1904, and left a general trust-disposition and settlement dated 10th November 1903, by which she conveyed to her said trustees her "whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, presently belonging and addebted, or which shall belong and be addebted, to me at the time of my death," in trust for certain purposes, and, *inter alia*—"(Second) For payment of the following legacies, *videlicet* . . . To Mrs Jeanie Gourlay or Macmillan, wife of Archibald Macmillan, 92 Keppochill Road, Springburn, Glasgow, the sum of £50 and my harmonium, and that as a tangible recognition of her long service to me."

The trust-disposition and settlement contained the following clauses:—"And I confer upon my trustees all requisite powers, including power to sell my heritable estate either by public roup or private bargain;" "And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The residue of her estate was bequeathed to her nephew (and trustee) the said William Tait.

In the testator's repositories at her death was found a deposit-receipt, dated 10th July 1903, in the following terms:—"Received from Mrs Robina Scott and Miss Jane Robertson Gourlay, Crosspark, Hamilton, one hundred pounds sterling, repayable to either or survivor, which is placed to their credit on deposit-receipt with the Commercial Bank of Scotland, Limited."

The pursuers pleaded—"(1) The sum contained in the said deposit-receipt being part of the estate of the late Mrs Scott, the pursuers are entitled to decree in terms of the declaratory conclusion of the summons."

They maintained that the sum contained in the deposit-receipt had never been given to the defender Mrs Macmillan, but (2) that if there had been donation the donation had been subsequently revoked by the general trust-disposition and settlement.

On 25th October 1904 the Lord Ordinary (Low) allowed to the parties a proof of their respective averments, and on 17th May 1905 assoilzied the compearing defender from the conclusions of the summons. His opinion, in which the facts of the case as ascertained by the proof are fully set forth, was as follows:—"In this case the defender claims that she is entitled to a sum of £100, contained in a deposit-receipt which belonged to the deceased Mrs Scott, on the ground that the latter made a donation of that sum to her *mortis causa*.

"The defender was, with the exception of a short period about 1894, in Mrs Scott's service from 1887 until April 1902, when she was married. Mrs Scott suffered from an affection of the eyes which caused her great pain, and rendered her almost blind. She therefore required a considerable amount of attendance and of assistance in her affairs, and these she received from the defender, who was her only servant. There is no doubt that Mrs Scott was grateful to the defender for the way in which she served her, and intended to benefit the defender at her death. Mrs Scott made various writings of a testamentary nature. She first executed a formal settlement in 1887. That was just about the time when the defender entered her service, and naturally the settlement contained no bequest in favour of the former. In April 1897, however, Mrs Scott added a codicil to the settlement, in which she bequeathed to the defender £100 'if she should still be with me at the time of my death.' In May of the same year Mrs Scott got a friend to write a document purporting to bequeath £100 to the defender absolutely, and in the month of September a document bequeathing some furniture to the defender if she 'remain with me unmarried till my decease.' Finally, in November 1903, Mrs Scott executed a trust-disposition and settlement whereby she recalled all previous testamentary writings, and which contained a legacy of £50 to the defender. Mrs Scott died on 19th February 1904.

"The deposit-receipt for the £100 which the defender claims is dated 10th July 1903, and is in name of Mrs Scott and the defender, 'repayable to either or survivor.' That £100 was part of a sum of £150 which on 19th February 1901 had been placed in the bank on deposit-receipt in the same terms. The deposit in 1901 was made by the defender, who, at Mrs Scott's request, asked the witness Mr Keith, the Provost of Hamilton, to accompany her, which he did. In 1903 the £150 was uplifted, and £100 redeposited in the terms which I have stated—by Mr Keith upon the instructions of Mrs Scott. Immediately after the £150 were deposited in 1901 Mr Keith called upon Mrs Scott for the purpose of ascertaining whether the terms in which the receipt had been taken was in accordance with her intention. Mrs Scott told him that it was so, and (Mr Keith said) 'she stated that she considered that she was under an obligation to Jane Gourlay, and this was the method she adopted to liquidate the obligation, under the reservation that if during her lifetime she required money she

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was still to be allowed to draw it out for her own use.'

"In 1903 Mr Keith says that Mrs Scott sent for him, and 'told me that she was needing money, and she would be obliged if I would go to the bank with the deposit-receipt and get £50 for her and redeposit the balance. I asked if it was to be redeposited in the joint names as this deposit-receipt was, and she said yes, she wished it to be on precisely the same lines as the other. I understood from what she said that she still wished Jane Gouriay to get the money at her death in the event of her not requiring it before that. That is what she said.'

"In cross-examination Mr Keith said:—'I would not say that in 1901 or 1903 she' (Mrs Scott) 'anticipated a long life. I think she was rather looking forward to death as not an improbable contingency in the near future.'

"It seems to me that the evidence of Mr Keith—an entirely independent witness—establishes that Mrs Scott's intention in depositing the £100 in the terms which I have stated, was to make a donation of that sum to the defender, subject to two qualifications—the one that the defender should survive her, and the other that she should have right during her life to draw upon the fund if she required to do so. The first qualification is that which is characteristic of all donations *mortis causa*, and in regard to the second qualification I do not think it prevented the gift taking effect in so far as Mrs Scott did not during her lifetime exercise the reserved power to draw upon the fund.

"The deposit-receipt was not delivered to the defender, but was retained by Mrs Scott, and was found in her repositories at her death. I think, however, that it must be regarded as settled that that did not prevent the donation being effectual, if the intention to make it is otherwise established—*Crombie's Trustees*, 7 R. 823; *Macfarlane's Trustees*, 25 R. 1201.

"The fact, however, that the deposit-receipt remained under Mrs Scott's control put it in her power to revoke the donation, or to render it ineffectual by disposing of the money otherwise. As I have said Mrs Scott a few months before her death executed a trust-disposition and settlement, whereby she conveyed her whole means and estate to trustees for the purposes therein mentioned. Now, I think that if there was clear evidence that Mrs Scott intended the deposited fund to be carried by the general conveyance in her trust-disposition and settlement, the result would be to revoke the donation. I think that the principle applicable is very much the same as in the case where a special destination of a particular subject is followed by a general conveyance. In such a case the special destination will remain effectual unless there is clear evidence of intention to evacuate it.

"It was argued that in this case there was sufficient to show that Mrs Scott intended the deposited fund to be carried by her trust-disposition and settlement. What is chiefly founded on is the fact that unless the £100 were carried by the settlement, the pecuniary legacies bequeathed by Mrs Scott were largely in excess of the funds possessed by her. Mrs Scott left legacies amounting to £750, and at the time when her settlement was made, her funds, including the £100 in question, amounted to £730, namely, £500 Glasgow Corporation Stock, £50 on deposit with the Royal Bank, £80 on deposit with the British Linen Company's Bank, and the deposit in question with the Commercial Bank. In any view, therefore, the legacies left by Mrs Scott exceeded the capital sum at her disposal, although if she intended the £100 to be available for legacies the excess was trifling.

"Mrs Scott was, however, possessed of heritable estate of some value, and the scheme of her settlement was that she conveyed her whole means and estate, heritable and moveable, to her trustees, with power to sell the heritage, and directed them to pay the legacies to which I have referred, and to make over the whole residue to the pursuer Mr Tait. There is, therefore, no doubt that the trust estate is sufficient to pay all the legacies in full. The pursuers' case is that Mrs Scott intended Mr Tait (who was her heir-at-law) to take the heritage clear of all burdens. Such an intention, however, cannot be gathered from the settlement itself, in which Mr Tait is only given right to the residue, whatever that may be, and the pursuers rely upon the evidence given by Mr and Mrs Tait as to what Mrs Scott said in reference to her intentions when giving Mr Tait instructions for her settlement.

"Both Mr and Mrs Tait say that Mrs Scott expressed her intention to be to leave the heritable property to Mr Tait free of burdens, and that she mentioned a sum of £100 deposited in bank as available for payment of legacies. Mr Tait's evidence is as follows—'She told me that she had £500 deposited with the Glasgow Corporation. She also mentioned that she had a sum of £100 on deposit in the Commercial Bank. (Q) How did she come to mention that?—(A) At that meeting, seeing that she said that she wanted to leave me the stone and lime clear, I thought it right in my own interest to draw her attention to the fact that if she conveyed the property to me in her lifetime there would be a saving in duty. She did not like that suggestion, and when she referred to the £500 and the £100 she said there would be sufficient there to pay the legacies and give me the property free. She made no reference to any other investment, but she certainly dealt with the £100 in the Commercial Bank as her own property.'

"Mrs Tait's evidence is as follows—'(Q) Do you remember whether, on the occasion when your husband received instructions, reference was made to a particular deposit of £100?—(A) The only reference I remember is that, in talking over what she had, she said there was £500 with the Glasgow Corporation and £100 on deposit-receipt. She did not say where it was, so far as I remember. (Q) Did she refer to that £100

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as money which would be available for any particular purpose?—(A) She meant it to be available to meet the legacies, and it was to be thrown into the estate. (Q) Did she say so?—(A) She said to my husband, 'There is this £500 and the £100, and I want to give you the property free.'

"Although I need hardly say that I do not doubt the honesty of Mr and Mrs Tait as witnesses, I do not think that that evidence aids the pursuers' case. It is to be observed that when enumerating the funds available for legacies, Mrs Scott made no mention of the sums—amounting to £130—which were deposited in the Royal and British Linen Banks, and which were undoubtedly available for legacies. She may have forgotten about these sums, but it seems to me to be just as probable that what she intended to refer to was the money deposited in her own name, and that she had got confused as to the banks in which the different deposits were made. In any view she spoke as if she only had £600 available for legacies, which was very near the mark if she did not intend to include the £100 in question. It is also to be remembered that Mrs Scott was very ill at the time—indeed, she was on her death-bed, although she lived for several months afterwards—and she may very well have been not quite clear in regard to details.

"It was also urged that it was very improbable that Mrs Scott should have intended to give the defender both a legacy and a donation, and that the presumption was that the legacy under the settlement was intended to come in place of the donation. I think that the answer to that argument is that at one time, at all events, Mrs Scott certainly intended to make a donation *mortis causa* to the defender, and also to leave her a legacy. Thus, when the £150 were deposited in 1901, the codicil to the settlement of 1887 was still unrevoked, and if Mrs Scott had died before the defender left her service, the latter would have been entitled both to the £150 and to the legacy bequeathed to her in the codicil.

"There is one consideration to which I am inclined to give considerable weight. The £100 were deposited in the circumstances which I have stated on 10th July 1903, and Mrs Scott gave the instructions for the preparation of her trust-disposition and settlement in October of that year, and the settlement was executed on the 10th of November. It is improbable that Mrs Scott should have forgotten the terms in which and the purpose for which the deposit was made. As I have already said, there seems to me to be no doubt that Mrs Scott directed the receipt to be taken to herself and the defender and the survivor for the purpose of giving the defender right to the sum if she was the survivor, and I think that there is as little doubt that Mrs Scott believed that if she did not uplift the money, the terms in which it was deposited would be sufficient to effect that purpose. Now, Mrs Scott seems to have been a shrewd and capable woman, and if she had changed her mind between July and October and no longer intended that the defender should have right to the £100 in the event of her death, I think that it would have occurred to her that it was necessary to alter the arrangement which she had adopted, and that she would either have uplifted the money and re-deposited it in her own name, or would have stated in her settlement that the legacy of £50 was to come in place of the £100.

"For these reasons I am of opinion that the defender is entitled to absolvitor."

The pursuers reclaimed, and argued—Admitting that there had been donation of the £100 in the deposit-receipt, there was sufficient evidence to show that the donation had been recalled. Testatrix' moveable estate amounted to £730 at the time the settlement was made, though £30 more came in prior to her death, which she could hardly have had in view when she made her settlement—the legacies amounted to £750, so that unless the £100 in the deposit-receipt was regarded as part of her estate, there was not enough, or, as it turned out, barely enough, to pay the legacies. The same evidence that was sufficient to prove a donation was sufficient to revoke it. The deposit-receipt was not by itself sufficient to establish donation, but had required the evidence of Mr Kirk to show the intention of the testatrix at the time it was made. If the defender was entitled to show the testatrix' intention at one time, the pursuer could show it at a subsequent time. The testatrix' change of intention was shown by the following circumstances—That the trust-disposition and settlement of 10th November 1903 was a general conveyance of her whole means and estate, and at its date the money in question was her property; that the said settlement revoked prior testamentary writings; that it contained a legacy, generous by itself, to Mrs Macmillan "as a tangible recognition of her services;" that it was likely the gift would be revoked, for in prior deeds the provisions to Mrs Macmillan had been made conditional on her being in the testatrix' service, which she was not; that there was evidence that Mr Macmillan was not much liked by testatrix.

The defender (respondent) argued—The personal estate was sufficient to pay legacies, but in any case there was no sharp division in the scheme of settlement between heritable and moveable, for it contained a power to sell heritage. There was no evidence of an intention to revoke, for the execution of a general conveyance did not recall a prior donation *mortis causa*, nor did the clause of revocation apply to a donation *mortis causa*, but only to testamentary writings. The case was ruled by *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823 (Lord Deas, 831; Lord Shand, 834), 17 S.L.R. 597.

LORD JUSTICE-CLERK—I do not see any reason for interfering with the judgment in this case. There is no doubt that a donation was made, and the only question is whether it was subsequently revoked. I think it was not revoked, and, concurring entirely as I do with the view which the

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Lord Ordinary has taken, I do not think it necessary to say more.

Lord Kyllachy — The only question raised by this reclaiming note is the question whether the donation made to the defender by Mrs Scott was afterwards revoked. It was not seriously contended that the clause of revocation in the general settlement of the deceased necessarily operated revocation, or that, apart from the revocation clause, the general conveyance in the settlement necessarily carried this deposit-receipt. Any such suggestion is excluded by the judgment in the case of *Crosbie's Trustees*, which was decided in very similar circumstances. Therefore the only question is whether it has been shown that there has been a competent revocation in some other manner. I am satisfied of the contrary, and find it enough to say —waiving all questions of competency or relevancy—that the proof here fails to establish that there was even any change of intention on the part of Mrs Scott. I entirely concur in the judgment of the Lord Ordinary.

Lord Stormonth Darling—I concur. I have little to add, because I entirely agree with the opinion of the Lord Ordinary.

The important dates in the case are as follows—the deposit-receipt, which the defender claims to retain, is dated 10th July 1903; the final trust-disposition and settlement is dated 10th November 1903; and Mrs Scott died on 19th February 1904.

The will contains a general clause of revocation, which it is not now seriously contended is sufficient by itself to revoke the gift. Is there, then, other evidence of an intention to revoke a gift made so lately as 10th July 1903?

The act is proved to have been done with the full knowledge of its effects; the evidence of Provost Keith shows that he satisfied himself that it was Mrs Scott's intention to make a donation. Now, I cannot find evidence that there was ever any intention to undo what had been solemnly and deliberately done in July.

Lord Low—I considered this case very carefully in the Outer House, and the argument which I have heard to-day has confirmed me in the view which I then formed.

The Court adhered.

Counsel for Pursuers (Reclaimers)—A. J. Young—Graham Stewart. Agents—Tait & Johnston, S.S.C.

Counsel for Defender (Respondent) — Crabb Watt, K.C.—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Dundas, Ordinary.

J. & F. FORREST *v.* GOVERNORS OF GEORGE WATSON'S HOSPITAL.

Superior and Vassal—Feu Charter—Condition of Feu Charter—Building Restriction — Interest to Enforce Condition of Feu Charter.

The singular successors of the original feuars of a piece of ground, about an acre in extent, brought an action against the superiors for declarator that they were entitled to remove a villa situated on the feu, and to erect tenements of dwelling-houses on the ground as they might think proper. The feu charter provided, *inter alia*, that the feuar "shall be bound to build and maintain on the area or piece of ground hereinbefore disponed, a dwelling-house of the value of not less than £800, according to a plan to be approved of by" the superiors, "and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained a declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" with resolutive clauses. There was no general prohibition in the feu charter against dwelling-houses additional to that stipulated for being built on the feu, and certain tenements had already been erected. The ground on which the pursuers sought the declarator was, that the said tenements already built fulfilled the conditions required in the stipulated dwelling-house and that the superiors had no longer any interest to object to the erection of additional tenements involving the demolition of Napier Villa.

Held that even if it were necessary for the superiors to shew an interest to insist on the maintenance of said dwelling-house (which the Court did not hold that it was) the stipulation itself implied interest, and that nothing had occurred to take away that interest.

This was an action by the feuars of a piece of ground extending to about an acre situated at the corner of Morningside Road and Merchiston Place, Edinburgh, against the superiors, the Governors of George Watson's Hospital, concluding for declarator (1) that the pursuers were entitled to remove a dwelling-house called Napier Villa situated on said piece of ground, and (2) that they were entitled to erect tenements of dwelling-houses on the said ground in such way or manner as they might think proper. The defenders by feu charter dated 1st August 1854 had disponed the said piece

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of ground to William Kerr. He disponed it in 1870 to Mr and Mrs Steedman (the original pursuers), who by disposition dated 13th May 1901 disponed it to James Forrest and Francis Forrest as trustees for the firm of J. & F. Forrest (the pursuers).

The said feu charter of 1854 provided, *inter alia*, as follows:—"And it is further provided and declared that the said William Kerr shall be bound to build and maintain, on the area or piece of ground hereinbefore disponed, a dwelling-house of the value of not less than £800, according to a plan to be approved of by said Governors, and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof [*i.e.*, Merchiston Place] than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained an express declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" and resolutive clauses followed.

The following history of the action is taken from the opinion of Lord Kincairney which accompanied his interlocutor of 22nd November 1904—"Shortly after the date of the charter the feuars erected on the feu the dwelling-house known as Napier Villa. The original pursuers of the action, Mr and Mrs Steedman, became by singular succession owners of the villa and the feu, which they afterwards disponed to James Forrest and Francis Forrest, who, in 1904, were sisted as pursuers of this action.

"This action was signeted on 6th August 1889, and on 30th November 1889 an interlocutor was pronounced declaring that the pursuers (the feuars) were entitled to erect tenements of dwelling-houses in such way and manner as they might think proper on the area in question 'other than the portion thereof occupied by "Napier Villa" and the ground between the said villa and Merchiston Place,' and superseding further consideration of the cause. This interlocutor became final, and it was thus determined that there was nothing in the charter which restrained them in building on the feu, so long as they confined themselves to dwelling-houses, except what bore on the house and the ground in front of it. Nothing was then decided about the pursuers' (the feuars') claim of right to remove Napier Villa or as to the occupation of the ground between it and Merchiston Place. These points were reserved.

"In 1902 the pursuers presented a petition to the Dean of Guild for authority to erect two tenements on the feu, and on 6th March 1902 the Dean granted warrant to erect one of the tenements, but refused leave to build the other, the erection of which he apparently held, as appears from his note, to be prohibited by the interlocutor of 30th November 1889.

"The pursuers appealed, and a record was made up in the appeal, but before an interlocutor was pronounced, a minute was lodged for the superiors, in which they stated that they no longer objected to the prayer of the petition, and consented to the appeal being sustained and the interlocutor of the Dean of Guild being recalled, so far as it refused the prayer of the feuars' petition."

On 22nd November 1904 the Lord Ordinary (KINCAIRNEY) allowed the parties a proof. His opinion accompanying this interlocutor, after stating the nature of the action and narrating its history as above quoted, proceeded—"That seems to leave undecided between the parties only two questions raised in this action—(1) Whether the pursuers had right to remove the villa; and (2) Whether they had right to build on the site of it and on the space between that site and Merchiston Place; and I understand that the recent debate was directed to these points. Practically there was and is only one point now in dispute, viz.—Whether the feuars are entitled to take down the villa, or whether the superiors are entitled to insist on the maintenance of it.

"On that point the superiors insisted that the provisions of the charter were clear, that the feuars were expressly bound to maintain the villa, and that the superiors were entitled to enforce it, and that the question of patrimonial interest is immaterial. They cited, *inter alia*, *The Magistrates of Edinburgh* v. *Macfarlane*, 1857, 20 D. 156; *Earl of Zetland* v. *Hislop*, 1882, 9 R. (H.L.) 47; *Waddell* v. *Campbell*, 21st January 1898, 25 R. 456. The feuars did not admit that any obligation was imposed on them by the charter to maintain Napier Villa; the obligation was to build and maintain a dwelling-house worth £800, but not Napier Villa; and so long as such a house was on the feu their obligation was fulfilled. Therefore they were entitled to remove the villa if they secured the feu-duty by building a house of equal value. I am inclined, however, to think that when Napier Villa was built and accepted and approved, the clauses in the charter in reference to the house applied to Napier Villa. As to the superiors' argument that they were not bound to prove material patrimonial interest, the law seems to be that while a superior would not be permitted to enforce conditions on a feuar in which he had no interest, yet his interest to enforce them was to be presumed from the mere fact that he imposed and the feuar accepted them—*Zetland* v. *Hislop*, *supra*; *Menzies* v. *Commissioners of Caledonian Canal*, 2 F. 953. There could have been no doubt that if the feuars had proposed to take down the villa immediately after it had been built the superiors could have prevented them; their interest to prevent it could not have been questioned. But here the condition of matters has been materially changed. It is averred that many buildings have been erected on the feu sufficient to secure the feu-duty many times over, and that the superiors have now absolutely no interest to insist on the maintenance of Napier Villa considered merely as a security for the feu-duty. The superiors, indeed, have not admitted the pursuers' averments as to the value of the buildings placed on the ground since the date of the charter. Per-

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haps they may give a sufficient admission on the point. But they say, besides, that such buildings do not afford them the same security as Napier Villa does, because while they have a contractual right to insist on Napier Villa being maintained, they have no right of the kind in regard to the new buildings. I think, however, that probably they have a right under the contract to insist on the feu-duty being secured to the extent stated in the contract, and I doubt whether there is any reality in the professed apprehension that the security from buildings on the feu may prove insufficient. I do not see, however, that I can decide that point without proof or admissions.

"I understand, however, that the superiors are against the removal of Napier Villa on grounds connected with the amenity of the feu and of the adjoining feus. I do not see how I can determine these questions without some enquiry, which need not, however, be long. But I cannot at present see how I can either treat the pursuers' averments as irrelevant or at once grant decree in their favour."

On 17th March 1905 the Lord Ordinary (DUNDAS) pronounced this interlocutor:—"Finds that the pursuers are not entitled to take down and remove the villa or dwelling-house known as Napier Villa, Merchiston, Edinburgh, nor to erect upon the ground described in the summons tenements of dwelling-houses in any way or manner incompatible with the continued existence and maintenance of the said villa *in situ*: Therefore assoilzies the defenders from the first branch of the conclusion of the summons: Further, subject to the above finding and to the decree of declarator contained in the interlocutor, dated 30th November 1899, assoilzies the defenders from the second branch of the conclusion of the summons and decerns."

Opinion.—"This action has been in Court since 1899, and its history and procedure have been somewhat peculiar. For a clear narrative of these down to the date when proof was ordered, I refer to the note which accompanied Lord Kincairney's interlocutor of 22nd November 1904. Proof has now been led before me, throwing light upon the various points as to which Lord Kincairney indicated that evidence should be forthcoming. But the pursuers' counsel now takes a very high ground, and contends that the whole, or almost the whole, of the proof is irrelevant. He argues that, upon a sound construction of the feu-charter, and it being admitted or proved that the tenements built upon the feu are of greater value than is necessary to secure the feu-duty, the superiors have no right or title to be heard to object to the erection of the additional tenements which would involve the demolition of Napier Villa, and that any other or further question of interest on the part of the superiors is immaterial and irrelevant. This contention, which I do not find sharply raised by the pursuers' record, is, in my opinion, untenable. The obligation upon the original feuar William Kerr, which it was admitted would, up to the limits of its meaning and effect, run with the lands, so as to affect singular successors, was to 'build and maintain' upon the ground conveyed 'a dwelling-house of the value of not less than £800, according to a plan to be approved of by the said Governors, and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors.' The charter contains an express declaration that 'all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null,' and resolutive clauses follow. The pursuers propose to build tenements of dwelling-houses which will necessarily involve the demolition of Napier Villa, which is the dwelling-house built according to a plan approved of by the superiors, and ever since maintained in terms of the above clause, and of the value, and situated at the distance from the street, there specified. Not only, if the pursuers are right, is the villa approved by the superiors no longer to be maintained, but the dwelling-house or houses to be substituted are, without the sanction and against the protest of the superiors, to occupy a position which would infringe the stipulation about the distance of 26 feet from the street. Whatever may have been the intention of the granters of the charter, this is, according to the pursuers' argument, the result. I cannot accept this contention. The question arises purely between the proprietors of the ground and the superiors, and has no element of mutual rights competent to a body of feuars *inter se*. Now, it was, no doubt, decided by Lord Kincairney's interlocutor of 30th November 1899, which is now final, that the pursuers are entitled to erect tenements of dwelling-houses as they please upon the ground of the feu, other than the portion thereof occupied by Napier Villa and the ground between said villa and Merchiston Place. But that was just because the feu-charter contains no words sufficient to expressly prohibit building to the extent and of the character allowed by the interlocutor. But a distinction was drawn in regard to the excepted part of the feu. I see no reason why the superiors, if they have a reasonable interest to do so, should not still insist upon the maintenance of the dwelling-house originally approved by them in its stipulated position with regard to the street. The case of *Clark* v. *The City of Glasgow Life Assurance and Reversionary Company*, 12 D. 1047, 1 Macq. 668, although it presents some features of specialty, seems to me to go far to defeat the pursuers' contention. Nor, in my opinion, are the cases of *Moir's Trustees*, 7 R. 1141, *Buchanan*, 10 R. 936, and *Miller*, 15 R. 991, cited by the pursuers, helpful to their argument, but rather the reverse. In these cases, as I understand them, it was held that what was objected to was rather a new use of the premises than a structural deviation from the original design, but no doubt was cast upon the necessity of the building being conform to design and plan,

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nor was anything said to suggest that it might lawfully be pulled down and something else substituted, so long as the latter was not of less value than the former.

"The question remains whether the defenders have sufficient interest to maintain their objection. I am of opinion that they have. I was referred to the cases cited by Lord Kincairney in his note of 22nd November 1904, and also to a recent judgment of Lord Stormonth Darling—*Wingate's Trustees* v. *Oswald*, 20th December 1902, 10 S.L.T. 517. The onus in this matter is upon the pursuers, because interest is presumed from the fact of stipulation, and I think they have entirely failed to discharge it. If evidence of patrimonial interest were necessary, which, upon the authorities, I apprehend it is not, I should be prepared to hold that it exists in the proof. It would, I think, serve no useful purpose to examine the evidence in detail. It is sufficient to point out that there are, on the one hand, witnesses such as Mr Harrison and Mr Heron, who explain the earnest desire on the part of the superiors to act in all cases up to the spirit, as well as the letter, of their contracts with feuars, and who indicate that the maintenance of a good name in this regard is to be desired not only from its chivalrous but also from its pecuniary aspect. On the other hand, practical men of weight, such as Mr Marwick and Mr Robertson, make it, I think, clear that the gradual introduction of tenements into this district, which has been hitherto deliberately reserved for villas, would tend, not only to disorganise the feuing schemes of the defenders, but also to diminish amenity, and in many ways to affect the financial interests of the superiors.

"I am therefore of opinion that the pursuers are not entitled to take down and remove Napier Villa, nor to proceed to erect tenements which admittedly could not be completed so as to secure sufficient open space, compatibly with its continued maintenance *in situ*."

The pursuers reclaimed, and argued—The obligation imposed on the feuars by the charter was to build and maintain a dwelling-house worth £800, at least 26 feet from Merchiston Place, not to build and maintain Napier Villa. So long as a dwelling-house on the feu complied with those conditions their obligation was fulfilled, for the obligation did not refer to a specific building. This distinguished the case from that of *Clark* v. *City of Glasgow Life Assurance and Reversionary Company*, June 20, 1850, 12 D. 1047, and 1854, 1 Macq. 668, where the obligation was to maintain specific buildings already in existence. There was no prohibition, whatever may have been intended, against building other dwelling-houses to any extent on the feu, and the tenements already built on the feu fulfilled the above conditions. Had they been built before Napier Villa the superiors would have had to accept them as the stipulated dwelling-house; accordingly the singular successors of the original feuar were entitled to pull down Napier Villa, the said tenements being substituted —*Oswald* v. *Wilson*, 1898 (O.H.), 6 S.L.T. 69; *Moir's Trustees* v. *M'Ewan*, July 15, 1880, 7 R. 1141, 17 S.L.R. 765; *Buchanan and Another* v. *Marr*, June 7, 1883, 10 R. 936, 20 S.L.R. 635; *Johnston* v. *MacRitchie*, March 15, 1893, 20 R. 539, 30 S.L.R. 518; *Miller* v. *Carmichael*, July 18, 1888, 15 R. 991, 25 S.L.R. 712. No burdens or restrictions could be imposed upon the vassal which were not clearly expressed in the feu charter—*Cowan* v. *Magistrates of Edinburgh*, March 19, 1887, 14 R. 682, 24 S.L.R. 474; *Walker's Trustees* v. *Haldane*, February 28, 1902, 4 F. 594, 39 S.L.R. 409; *Russell* v. *Cowpar and Another*, February 24, 1882, 9 R. 660, 19 S.L.R. 443. The superiors had now no interest, patrimonial or otherwise, to object to the pulling down of Napier Villa and the erection of more tenements. Their feu-duty was amply secured by the tenements, and as regards amenity, there were already tenements on a part of the feu, and the whole character of the neighbourhood had changed since the date of the feu charter.

The defenders (respondents), who admitted there was no effectual general prohibition against other dwelling-houses being built on the feu, argued—(1) The superiors did not require any interest to insist on the maintainance of Napier Villa because its maintenance was an essential condition of the feu, not a building restriction—Bell's Lectures, vol. i, p. 614; Menzies (ed. 1900), p. 576; *Macrae* v. *Mackenzie's Trustees*, November 20, 1891, 19 R. 138, Lord Kinnear at 145, 29 S.L.R. 127; *Waddell* v. *Campbell*, January 21, 1898, 25 R. 456, 35 S.L.R. 351; *Calder* v. *North Berwick Police Commissioners*, January 31, 1899, 1 F. 491, 36 S.L.R. 380. Even assuming that the tenements already built were sufficient to fulfil the original stipulations, as soon as Napier Villa was built and approved of, it became the specific dwelling-house which the feuars were bound to maintain, and it was no answer that other buildings (the tenements) had been put up of greater value—*Clark* (*supra*), especially Lord President Boyle at p. 1054 of 12 D. (2) The superior must be presumed to have had an interest from the mere fact that he imposed the condition, and the onus lay on the vassal to prove loss of interest—*Zetland* v. *Hislop*, June 12, 1882, 9 R. (H.L.) 47, 7 A.C. 427, 19 S.L.R. 680; *Menzies* v. *Caledonian Canal Commissioners*, June 7, 1900, 2 F. 953, 37 S.L.R. 742; *Wingate's Trustees* v. *Oswald*, 1902 (O.H.), 10 S.L.T. 517. This onus the pursuers had failed to discharge. These cases also showed that the superiors' interest need not be patrimonial, and was not confined to the particular feu in question. (3) If interest, even if patrimonial interest, were required, it was disclosed in the proof, which showed that the progressive encroachment of tenements destroyed, and would destroy, the confidence of the feuars and prospective feuars in other parts, and cause a diminution in the capital value of the villas, causing the selling values of feu-duties to fall from 28 years' purchase to 25; that these tenement blocks competed and would compete with the superiors' tene-

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ment ground, and that the present feu-duty was easily recovered, but from tenements it was not, whether allocated or not.

At advising—

LORD JUSTICE-CLERK—The stipulation in the title in this case, which forms the basis of the defence against the pursuers' declarator, is very distinct and clear. It is, that the pursuers' author was taken bound to "build and maintain" upon the ground conveyed—"a dwelling-house of the value of not less than £800, according to a plan to be approved of by the said Governors, . . . and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors." The object of the pursuer's declarator is to have it found and declared that the pursuers are entitled to take down and remove the house which was built in accordance with this condition of the title, and that they are entitled to erect tenements of dwelling-houses on the ground "as they may think proper." It appears to be very clear, that if such a declarator had been brought immediately after the feuars had built the house, the erection of which was a condition of their holding the feu, no decree in their favour could have been given. If therefore they have a right now to such a declarator, it must be from some new agreement between them and the superiors, or because of some change of circumstances which acts as a bar to the defenders enforcing the stipulation to which the pursuers agreed as a condition of their obtaining their right. Now, it cannot be contended with any force that the superiors have agreed either to the house being removed or to tenements being erected on its site and on the 26 feet in front of it on the north side. As regards change of circumstances, it is contended that because the pursuers have been allowed to erect tenements along the north side of the feu, therefore it must follow that they can do so over the whole feu. To that construction I am unable to give any assent. There is nothing in the fact that there are tenements on another part of the ground to militate against the right of the defenders to insist on the maintenance of the obligation I have quoted, with which the erection of these tenements has not in any way interfered. The house approved of by the defenders stands where it did, and the 26 feet between it and the road on the north stands still unoccupied by buildings, and that something has been done on another part of the feu to which the obligation does not apply, seems to me to form no ground for saying that the pursuers have acquired any new right inconsistent with the obligation, or that the defenders have lost their right to insist upon the observance of an express and definite obligation, if they consider it to be in their interest to do so, whether as regards the particular feu itself or as regards the general interest of their estate of which it formed a part.

This is not a question of putting an existing building to some new and different use to that to which it was originally put when a feu was first given off and a building erected. It is a proposal to remove altogether what was erected in fulfilment of the obligation to build a house approved of by the superiors and to occupy with buildings ground on which it was not permissible to put the building stipulated for. Even if it were necessary for the superior to show an interest to insist on observance of the obligation (which I do not hold that it was), *prima facie* the superior's interest cannot be doubted. The stipulation itself implies interest, and I am quite unable to see how that interest has been taken away. It certainly is not taken away by anything that has been done upon the south side of the feu, and as regards what has been done at the eastern corner, consent was obtained for a consideration. But such a consent can never be founded on to extinguish rights in regard to another part of the feu where no consent has been given, and where the superiors have all along insisted on the express stipulation in the title being carried out.

This case in no way resembles the numerous cases in which rights of a body of feuars *inter se* have suffered extinction by things being permitted to be done which subverted the original conditions and rendered them incapable of enforcement in their entirety. It is a question solely between one superior and one vassal, and I have no hesitation in holding that the Lord Ordinary has rightly decided that the pursuer's contentions are untenable and that the defenders are entitled to absolvitor.

LORD KYLLACHY—I concur, and have nothing to add. I am quite satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Ure, K.C.—M'Lennan, K.C.—Sandeman. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Defenders (Respondents) Shaw, K.C.—W. J. Robertson. Agent—Alex. Heron, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CONNAL & CO. LIMITED *v.* REID AND OTHERS.

CLYDE NAVIGATION TRUSTEES *v.* REID AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

A & Co., timber merchants, shortly before bankruptcy granted to B & Co., timber measurers, one of their creditors, delivery orders applicable to certain lots of timber which were lying

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at D & Co.'s yards. A & Co. having become bankrupt, the timber was claimed by E, their trustee, and also by B & Co.; and an agreement was entered into between them that the timber should meanwhile be sold in the ordinary course of business, and the proceeds deposited in bank in their joint names. Portions of the timber were sold and the proceeds deposited.

E having discovered that the timber was lying in D & Co.'s yards, and not as he had supposed in B & Co.'s actual custody, raised an action of multiplepoinding in name of D & Co. and the Bank, as nominal raisers, the fund *in medio* being the unsold timber and the sums deposited. B & Co. objected to the competency of the action on the ground that there was no double distress.

Held (*following Commercial Bank of Scotland v. Muir*, Dec. 1, 1897, 25 R. 219, 35 S.L.R. 174) that as there were two competing claimants to funds in the hands of a third party the action was competent.

Expenses — Multiplepoinding — Multiplepoinding where Dispute might have been Decided by Direct Action—Expenses of Raising the Action.

Question whether, in the event of the real raiser of a multiplepoinding being unsuccessful in his claim, the general rule of allowing him the expenses of bringing the action out of the fund *in medio* would be followed if the dispute could have been equally well determined in a direct action at his instance against the other claimant.

The first of these actions was an action of multiplepoinding, in which Connal & Company, Limited, storekeepers, Glasgow, and the National Bank of Scotland Limited were pursuers and nominal raisers, and (1) Robert Reid, C.A., Glasgow, trustee on the sequestrated estates of M'Dowall & Neilson, timber merchants, Glasgow, and (2) Hagart & Company, timber measurers, Glasgow, were defenders, Robert Reid being also real raiser; and in which the fund *in medio* consisted of certain lots of timber lying in Connal & Company's yards, and certain sums contained in certain deposit-receipts issued by the National Bank of Scotland in favour of Hagart & Company and Robert Reid.

The second action was also an action of multiplepoinding, in which the parties were the same as in the first, except for the fact that the Clyde Navigation Trustees took the place of Connal & Company, and that the fund *in medio* consisted of certain other lots of timber lying in the yards of the Clyde Navigation Trustees, and certain other deposit receipts granted by the National Bank of Scotland in favour of the same parties. The circumstances, the pleadings, and the interlocutors in both cases were otherwise identical.

The facts are set forth in the opinion of the Lord Ordinary in the case of *Connal & Co., infra*. The agreement referred to by the Lord Ordinary in his opinion, and by the defenders in plea 4, was contained in the second and third of the letters which follow:—

1. Letter, Connal & Co., Ltd., to Robert Reid, dated 7th October 1903.

"*M'Dowall & Neilson's Sequestration.*

"We are in receipt of yours of date intimating your appointment as judicial factor on the sequestrated estates of Messrs M'Dowell & Neilson. In reply to your note, we have to inform you that all timber stored on their a/c in our yards is under the control of Messrs Hagart & Co., measurers, Yorkhill Wharf, who are, subject to our lien for rent, the real custodians of the timber, and who take all responsibility for it, so that intimation should be made to them."

2. Letter from Hagart & Co's. Agents to Reid's Agents, dated 22nd January 1904.

"*M'Dowall & Neilson's Sequestration.*

"*Reid* v. *Hagart & Company.*

"Adverting to the writer's interviews with Mr Donaldson and Mr Reid, we have now to state that our clients are prepared to allow the timber to be sold on the following conditions;—1. The salesman to be Mr Cant, and he is to be instructed to sell by private bargain at the best prices in the market—not hurriedly, but in the usual course of his business. 2. In all questions of law or procedure at law the money proceeds of the sale are to be held as in the custody and possession of Hagart & Co., just as the timber is, and it is to be subject to their liens and claims of every description in the same manner as the timber. 3. Generally, Messrs Hagart & Co's. position is not to be prejudiced in any way by their parting with the timber and allowing it to be sold, and the trustee is not to be at liberty to base any plea on the sale in derogation of our clients' right. On the other hand, the trustee's pleas in the action now pending before the Court are not to be prejudiced either, but will be reserved by him entire. 4. Subject to above reservation of the pleas and rights of both parties, the proceeds of sale are to be consigned in the National Bank of Scotland, St. Vincent Street, Glasgow, in name of Hagart & Co. and of Mr Reid, to await the final issue of the legal proceedings."

3. Letter, Reid's Agents to Hagart & Co's. Agents, dated 29th January 1904.

"*M'Dowall & Neilson's Sequestration.*

"*Reid* v. *Hagart & Co.*

"We have now had an opportunity of submitting to the trustee and commissioners your letter to us of 22nd curt., but they, like ourselves, do not quite understand conditions 2, 3, and 4, as expressed by you. They are willing that the timber should be sold by Mr Cant by private bargain at the best prices he can obtain in the usual course of his business, such sale to be under reservation of the rights and pleas of both parties, and the proceeds of sale to be consigned in bank in joint names of your clients and the trustee to await the issue of the legal proceedings, such proceeds to be held as a surrogatum for the timber."

The defenders, Hagart & Co., pleaded, *inter alia*—"(2) There being no double distress, the

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action is incompetent and should be dismissed. (4) The real raiser is not entitled to bring the present action (*a*) in respect it is a breach of the agreement above set forth, and (*b*) the defenders have, on the faith of said agreement, parted with the possession of the said goods and allowed the same to be sold. (5) Under the terms of said agreement the alleged fund *in medio* is, in a question with the real raiser, in the custody and possession of the defenders. (6) There being no competing claims to the property in the fund *in medio* the action is incompetent."

On 20th June 1905 the Lord Ordinary (Low) pronounced the following interlocutor in both actions:—"Repels the defences for the appearing defenders, and decerns: Appoints the cause to be enrolled for further procedure, and grants leave to reclaim: Finds the said defenders liable in expenses from the date of the calling of the summons herein to the date hereof."

Opinion. — "The circumstances under which this action of multiplepoinding was brought are these.

"Certain lots of timber belonging to the bankrupt firm of M'Dowall & Neilson were stored in the timber yards of the pursuers and nominal raisers, Connal & Company. The defenders Hagart & Company are timber measurers, who acted for M'Dowall & Neilson in measuring the timber and storing it in Connal & Company's yards. M'Dowall & Neilson were due to Hagart & Company certain fees and charges for the services which they had rendered, and it appears that the latter had also made advances to the former. Shortly before their bankruptcy M'Dowall & Neilson granted delivery orders for the timber in favour of Hagart & Company. These orders appear to have been granted upon the assumption that the timber was truly in the custody of Hagart & Company, and not of Connal & Company. Upon the same assumption Mr Reid, M'Dowall & Neilson's trustee, brought an action against Hagart & Company for delivery of the timber. During the course of that action the parties came to an agreement (which I shall presently refer to more particularly) that the timber should be sold by a gentleman named, as opportunity offered, but that Hagart & Company's position should be in no way prejudiced by the sale of the timber. Ultimately Mr Reid abandoned the action, the reason alleged being that he discovered that the timber was not in the custody and possession of Hagart & Company but of Connal & Company.

"Part of the timber was sold under the agreement to which I have referred, and the proceeds were deposited in the National Bank in the names of Hagart & Company and Mr Reid. These sums and the portion of the timber which has not been sold form the fund *in medio*.

"In these circumstances Hagart & Company maintain that there is no double distress, and that an action of multiplepoinding is therefore incompetent. They pointed out that while Mr Reid claims the timber or its proceeds as being the property of the bankrupt firm, they claim only a right of retention in respect of the fees and charges and advances.

"Now as regards the money deposited in bank I do not think that there is much substance in the distinction taken by Hagart & Company between the character of the two claims. Hagart & Company say that, although the timber was stored in Connal & Company's yard, it was under their control, and that they were therefore in a position to retain it, and were entitled to retain it against the debt due to them by M'Dowall & Neilson; that the money is in the same position as the timber; and that they have the same right to retain the money as they had to retain the timber which it represents. That may be quite true, but if a person is entitled to retain money belonging to another which is in his possession against a debt due by that other to him, that simply means that he is entitled to apply the money in payment of the debt so far as it will go. Therefore Hagart & Company's claim is, in substance, a claim for the deposited money just as much as Mr Reid's claim is.

"That being the position of matters, I think that the case of *Commercial Bank of Scotland* v. *Muir* (25 R. 219) is an authority for holding that so far as the deposited money is concerned the action is competent. That was also a case where two parties had deposited money in bank in their joint names, and where one of them maintained that he had right to the whole of the fund, and the other that he had right to half of it. It was held by the First Division that the action was competent. Lord Adam said—'There are two competing claimants to funds in the hands of a third party, and that, I think, is enough to make the action competent.' In like manner Lord Kinnear said—'The substance of the matter is that there is a dispute as to the right of these two persons to the whole or part of this sum, and therefore there is, in my opinion, a sufficient competition to support the action of multiplepoinding.'

"In so far as the fund *in medio* consists of the unsold portion of timber, I have more difficulty, but I think that it is substantially in the same position as the consigned money. It is admitted that the timber is stored in Connal & Company's yard, but Hagart & Company say that it was stored in their name and was under their control, and that they are entitled and are in a position to retain it as against Reid, first in respect of an agreement between them and the bankrupts that they should hold the timber in security of advances made to the latter, and, second, in respect of a lien which they allege over the timber in respect of their fees and charges. I think that that is a case of competing claims to the timber in Connal & Company's yard, and that it therefore falls within the rule laid down in *Commercial Bank* v. *Muir*. It is true that the question might have been determined in an action of declarator by Reid against Hagart & Company, but the same argument was rejected in the *Commercial Bank* case.

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"Hagart & Company, however, further maintain that the action is entirely excluded by the agreement to which I have already referred, which was entered into during the course of the previous action at the instance of Reid *v.* Hagart & Company. The latter maintain that that was an agreement to the effect that the timber should in all questions between them and Reid be regarded and dealt with as being in their actual custody and possession, and that the proceeds of timber sold should be in the same position. They accordingly argue that the present action, in which Reid's claim is based on the assumption that the timber was never in the custody and possession of Hagart & Company, is barred by the agreement. Now the agreement was embodied in several letters, a portion of one of which only is quoted by the defenders in their answers. I have already said that the occasion of the agreement was that Reid had brought an action against Hagart & Company for delivery of the timber upon the footing that it was in the custody and possession of the latter, and the object of the agreement was to allow of the timber being realised to the best advantage without thereby prejudicing the position and right of Hagart & Company. I am of opinion that the letters, when read in the light of the circumstances in which they were written, constitute an agreement that the price of timber which might be sold should come in place of the timber, and that Hagart & Company should have the same rights in all respects to the price as they would have had to the timber if it had not been sold. But I cannot read the letters as being a contractual admission by Reid that the timber was in fact, or was in all questions between him and Hagart & Company, to be treated as being in the custody and possession of the latter.

"I am therefore of opinion that the present action is not barred by the agreement."

The defenders Hagart & Company reclaimed and argued—A multiplepoinding was not a competent form of process, there being here no fund in the hands of a third party as to which two other parties were in dispute. The timber was to all purposes in their own custody. That was distinctly recognised in the agreement (Sect. 2), and, apart from the agreement, Connal & Company's letter of 7th October 1903 showed that Connal & Company held the timber solely for them, and were under no obligation to anyone else. There was therefore no stakeholder, and the essential object of a multiplepoinding was the exoneration of a stakeholder. The money—*vide* the agreement—was in exactly the same position as the timber. Reid should therefore have raised a direct action against them. *Commercial Bank of Scotland* v. *Muir*, December 1, 1897, 25 R. 219, 35 S.L.R. 174, founded on by the respondent, was not to be extended, and *Connal* v. *Ferguson*, February 19, 1857, 19 D. 482, dealt only with trust funds, and there was no argument as to competency. The present case was analogous rather to *Russel* v. *Johnston*, June 1, 1859, 21 D. 886; *Clark* v. *Campbell*, December 12, 1873, 1 R. 281, 11 S.L.R. 138; *Royal Bank of Scotland* v. *Ellis*, 10 S.L.T. 167. The practical objection to a multiplepoinding was that they would, even if successful, be subjected to the real and nominal raiser's expenses—*Hepburn's Trustee* v. *Rex*, July 17, 1894, 21 R 1024.

Argued for the respondent Reid—The action was competent, there being no competing claims to timber and money in hands of third parties—*Connell* v. *Ferguson*; *Commercial Bank of Scotland* v. *Muir* (*cit. sup.*). The timber was *de facto* in the hands of a third party, Connal & Company, and the agreement, justly construed, meant only that the proceeds of such portions as might be sold were to be in the same position as the timber had been. It was not an agreement that the timber was in Hagart & Company's possession. If, however, it turned out on the litigation upon its merits that he was wrong, he was willing to pay the nominal raiser's expenses, and to forego his claim to his expenses as real raiser out of the fund.

LORD JUSTICE-CLERK—There is no doubt that the question of the competency of a multiplepoinding has had a history. It is, of course, a question of practice, and of practice only. There is no possible interest in it except as a question of practice, and it is really for the Court to decide what the practice is. It is plain that, if it has been the practice of the Court to hold that where such a state of matters exists as we have here a multiplepoinding is competent, then I think it would be improper to go back upon that to something which has been abandoned. The question could not have been more clearly decided than in the case of *Muir*, upon which the Lord Ordinary relies. If it was the case that before that particular litigation took place it was held that where there were two competing claimants to a fund in the hands of a third party that was not sufficient to make an action of multiplepoinding competent, it was distinctly decided there by the First Division that it was so. The words are very distinct that where there are two competing claimants to funds in the hands of a third party, that is enough to make the action competent. Therefore I have no hesitation or doubt in holding that this action is competent. There is a great deal to be said for the point taken by Mr Hunter and Mr Chree with reference to the payment of the real and nominal raiser's expenses out of the fund *in medio*. That might have made difficulties in this case at a later stage if we reserved the question of expenses. But that difficulty is now out of the way, because Mr Cooper has very properly said that if it turns out on the litigation upon its merits that his clients were wrong, he has no objection to his clients being refused the expenses incurred by him as real raiser out of the fund *in medio*, and found liable in any expenses found due to the nominal raisers. That

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being so, I think we should adhere to the Lord Ordinary's interlocutor, reserving the question of expenses, and I should suggest that power be given to the Lord Ordinary to dispose of the expenses of this reclaiming note, and of the expense of raising the action of multiplepoinding, so that there will be no need for the case to come back here unless something is done of which any of the parties may have reason to complain.

LORD KYLLACHY—I am entirely of the same opinion. I agree with the Lord Ordinary's construction of the correspondence, and think with him that it forms no bar to this action. I agree with him also that the case of *Muir* decides practically the question of the competency of a multiplepoinding in the circumstances which exist here.

LORD STORMONTH DARLING—I concur.

LORD LOW—I am of the same opinion. If it had not been for the case of *Muir* I should have had great difficulty in holding that this multiplepoinding was competent. I remain, however, of the opinion which I expressed in the Outer House that there is no substantial difference between the circumstances of this case and that of *Muir*, and I think that it is desirable that when a rule of practice has once been laid down it should be followed.

The Court pronounced this interlocutor—

"Refuse the reclaiming note, adhere to the said interlocutor reclaimed against and remit the case back to Lord Salvesen to proceed therein: Reserve the question of the expenses of the Reclaiming note, appoint them to be expenses in the cause, and authorise the Lord Ordinary to deal with them at the conclusion of the cause."

Counsel for Defenders and Reclaimers, Hagart & Company—Hunter, K.C.—Chree. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defender, Reid, Real Raiser and Respondent — Cooper, K.C. — MacRobert. Agents — Drummond & Reid, W.S.

Agents for Pursuers and Nominal Raisers —Webster, Will, & Company, S.S.C.

Saturday, December 16.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

PARK *v.* MAVER.

Master and Servant — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 2, sub-sec. 1—Claim for Compensation —"Claim" means a Demand for Definite and Specified Sum.

By section 2, sub-section 1, of the Workmen's Compensation Act 1897 it is provided that proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and "unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident."

A workman was injured on 16th August 1904. On 20th September 1904 his law-agent wrote to the employers as follows—"I am instructed" on behalf of the workman "to give formal notice of the claim arising in respect of injuries received by him whilst in your employment on 16th August 1904. . . . I understand you are already acquainted with the circumstances, but it is necessary to give you notice in order to found proceedings should these be necessary for obtaining compensation."

On 14th August 1905 the workman brought an arbitration in the Sheriff Court.

Held (*following Bennett* v. *Wordie & Co.*, May 16, 1899, 1 F. 855, 36 S.L.R. 643) that the letter was not a "claim for compensation" in the sense of the Act, inasmuch as it did not contain a demand for a definite and specified sum, and that consequently the arbitration proceedings of 4th August 1905 were not maintainable.

Powell v. *Main Colliery Co., Limited*, [1900] A.C. 366, *commented on.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 2 (1), enacts—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

The following case in an appeal under the Workmen's Compensation Act 1897 was stated by one of the Sheriff-Substitutes of Aberdeen, Kincardine, and Banff (ROBERTSON) — "This is an arbitration in which the respondent claims compensation from the appellant to the amount of 17s. weekly as from 30th August 1904, but under deduction of £38, 11s. 11d. paid to account, with expenses.

"The grounds of the claim are that the respondent was employed by the appellant on 16th August 1904 at the erection of a house. The building was then over 30 feet in height, and scaffolding was being used for its construction. The respondent, while engaged at said building on said date, sus-

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tained injuries, and was unable to earn any wages until 5th July last, when he resumed work with the appellant till 26th July last, but has been unable to work since said last-mentioned date.

"On 20th September 1904 the respondent's law-agent wrote the following letter, which was admittedly received by the appellant—

"181 Union Street, Aberdeen,
Mr James Park, *20th Septr.*, 1904.
Joiner,
13 Balmoral Terrace, Aberdeen.

Dear Sir,—I am instructed on behalf of Mr George Maver, joiner, 193 Holborn Street, Aberdeen, to give formal notice of the claim arising in respect of injuries received by him whilst in your employment on 16th August 1904 at new house in course of construction at Roslin Terrace, Aberdeen, caused by a mortar-tub falling on him off a crane, with the result that his head was severely cut and his back and one of his arms injured, besides being stunned and suffering a serious nervous shock. I understand you are already acquainted with the circumstances, but it is necessary to give you notice in order to found proceedings should these be necessary for obtaining compensation.—Yours faithfully,

T. R. GILLIES."

"The respondent raised the present proceedings in the Sheriff Court at Aberdeen on 4th August 1905.

"The appellant's pleas-in-law were, *inter alia*:—1. 'The application is irrelevant.'

"2. 'The application is excluded, and is incompetent, in respect that the claim now maintained with respect to said accident was not made within six months from the occurrence of the accident as required by section 2 of the Workmen's Compensation Act 1897.'

"The Sheriff-Substitute (SANDEMAN), acting at Aberdeen on 21st August 1905, heard parties, and held that the letter above copied was a claim for compensation in the sense of the Workmen's Compensation Act 1897, section 2, and therefore repelled the pleas-in-law above quoted, and *quoad ultra* allowed proof, which was led before me on 19th October 1905. On the evidence adduced at said proof I held that the respondent was entitled to compensation at the rate of 12s. 3d. per week, and I accordingly awarded him this amount.

"The question in law for the opinion of the Court is—"Whether the letter of 20th September 1904 above copied was a claim for compensation in the sense of section 2 of the Workmen's Compensation Act 1897?"

Argued for the appellant—The letter was not a "claim" within the meaning of the Act, inasmuch as it did not contain a demand for a definite sum of money. It was only a "notice"—*Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855, 36 S.L.R. 643; *Powell* v. *Main Colliery Company, Limited*, [1900] A.C. 366.

Argued for respondent—The letter was a good "claim," and not merely a "notice." The only object of section 2 was to impose a time limit within which proceedings must be taken, and accordingly it merely enacted that a "claim for compensation" must be made within a certain time; it did not enact that the amount claimed must be stated—presumably, however, it would be the maximum provided by the Act—that being a matter of no moment so far as concerned the immediate purpose of the section. Any introduction of additional technical requirements was utterly opposed to the spirit of the statute—see the Lord Chancellor's opinion in *Powell*. That case was an authority for the proposition that anything which could fairly be called a claim was sufficient. The letter here was in a better position than the letter in *Bennett*, but, in any case, *Bennett* was inconsistent with *Powell*, and in the more recent case of *Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653, although the question of the necessity of the claim being for a definite amount was left an open one, there were distinct indications of opinion in favour of the view now contended for by the respondent. A technical illiberal interpretation of the Workmen's Compensation Act was always to be avoided.

LORD JUSTICE-CLERK—If this question had come before us for the first time I should have said that the case for the respondent was not maintainable. But it is unnecessary to go into the reasons for so holding, because the question has already been dealt with by this Court. In the case of *Bennett* v. *Wordie* (1 F. 855) it was expressly decided that the statement of claim must not be a mere intimation of a claim, and that the amount of the claim must be stated. The only remaining question is, whether that decision has been set aside by higher authority. If the House of Lords had decided otherwise I should of course follow what they had laid down. But when the case of *Powell* v. *Main Colliery Company* (L.R. [1900] A.C. 366) is examined it will be seen that it contains a distinct statement to the effect that the decision of this Court in the case of *Bennett* was not wrong. Two questions arose there—*first*, whether the claim must be made in judicial proceedings, and *second*, whether there must be a claim for a definite amount. As to the first of these the House of Lords by a large majority held that judicial proceedings were not necessary, but it was also laid down that the claim must be for a definite sum. That being so, the decision to that effect in *Bennett* is not impugned. In *Powell's* case there was a definite statement of a claim for 15s., and the other party was certiorated what he was asked to pay. This is a claim which bears to be for some compensation which is not stated, and it is therefore not a good claim. I am unable to hold a claim in general terms without specifying any sum to be a sufficient claim for compensation. On the whole matter I am of opinion that the appellant's contention is right, and that the question should be answered in the negative.

LORD KYLLACHY—I am of the same opinion. I think, with your Lordship, that the question is settled by authority. In

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the case of *Bennett* v. *Wordie*, 1 F. 855, two points were decided in this Court—*first*, that a "claim" in the sense of the statute meant a demand for a definite and specified sum as compensation for the injuries received; *second*, that the demand must be made judicially. In the subsequent case of *Powell* v. *Main Colliery Company* [1900], A.C. 366, the House of Lords approved of the decision in *Bennett* on the first point, but, by a majority, disapproved of it upon the second point. In these circumstances it appears to me to be quite impossible to hold that the letter in this case—the letter of 20th September 1904—was a "claim" in the sense of the statute.

LORD LOW—I am of the same opinion. There is no substantial difference between the notice given in the case of *Bennett* v. *Wordie & Company*, 1 F. 855, and the notice given here. In neither case is there a specific claim for compensation but only a notice that a claim will be made. That was held in the case of *Bennett* not to constitute a "claim for compensation" within the meaning of section 2 of the Act, and that interpretation of the statute was subsequently expressly approved of by the House of Lords in the case of *Powell* v. *Main Colliery Company*, [1900] A.C. 366. I am therefore of opinion that the question of law stated in the case falls to be answered in the negative.

LORD STORMONTH DARLING was absent.

The Court answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellant — Orr, K.C. — Spens. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent — Hunter, K.C.—Macmillan. Agent—Andrew Newlands, S.S.C.

Saturday, December 16.

FIRST DIVISION.

(Before the Lord President, Lord M'Laren, Lord Kinnear, Lord Kyllachy, Lord Stormonth Darling, and Lord Low.)

MARQUIS OF TWEEDDALE'S TRUSTEES *v.* MARQUIS OF TWEEDDALE AND OTHERS.

Succession — Vesting — Liferent or Fee — Direction to Pay subject to Subsequent Declaration to Hold for Legatee in Liferent and her Children in Fee—Death of Legatee without Issue.

A testator by his trust-disposition and settlement directed his trustees "to make payment" at a certain term after his death of a certain sum to each of his daughters, "but . . . subject always to the provisions, declarations, powers, directions, and others hereinafter written." In a subsequent purpose of the settlement he provided and declared that, "notwithstanding anything to the contrary herein before written," the trustees were to "set aside and hold and retain and invest in their own names," as trustees, the several provisions granted to each of his daughters for behoof of the daughters "in liferent for their respective liferent uses allenarly . . . and for behoof of their respective children equally among them in fee." The *jus mariti* and right of administration of the daughters' husbands were excluded, and the daughters' liferents were declared to be alimentary and not liable to the diligence of creditors. There was no destination-over of the daughters' shares in the event of their dying without issue.

Held (1) that the daughters took a fee of the sums directed to be paid to them respectively, which was reducible to a liferent only in the event of their having issue, and (2) that on the death of a daughter without issue her share fell to be disposed of as part of her moveable estate.

The late Marquis of Tweeddale died on 10th October 1876, leaving a trust-disposition and settlement dated 9th April 1870, which, with various codicils, was registered in the Books of Council and Session on 18th October 1876.

The trust-disposition provided as follows—(Fifth purpose)—"I direct and appoint my trustees to make payment at the first term of Whitsunday or Martinmas that shall happen six months after my decease, to each of my daughters Elizabeth Duchess of Wellington, Lady Louisa Jane Wardlaw Ramsay, Lady Hannah Charlotte Watson Taylor, Lady Emily Peel, and Lady Jane Taylor, of the sum of £8500; to my daughter Lady Julia Hay of the sum of £13,500; to each of my sons Lord William Montagu Hay and Lord John Hay of the sum of £505; and to each of my sons Lord Charles Edward Hay and Lord Frederick Hay of the sum of £13,995; the lawful issue of any of my said children who may predecease me leaving issue coming in place of their parents, and taking equally among them the said sums which would have been payable to their deceased parents if in life, but subject always, in the case of my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions, declarations, powers, directions, and others hereinafter written applicable to them respectively." (Seventh purpose)—"I direct and appoint my trustees (subject always as regards any provisions falling to my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions declarations, powers, directions, and others hereinafter written applicable to them respectively) to pay, convey, and make over, as soon as conveniently may be, after implement and fulfilment of the preceding purposes of this trust, the whole residue and remainder of my said means and estate, heritable and moveable, real and personal, to my son the said Viscount

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Walden, in the event of his surviving me, and in the event of his predeceasing me then to the heir-male of his body succeeding to the foresaid entailed estates; and in the event of the said Viscount Walden leaving no such heir-male of his body, or if such heir-male of his body shall predecease me, then to the whole of my other children (other than and except the heir of entail succeeding to said entailed estates) alive at the time of my death, and the lawful issue of such of my children (other than the said heir of entail) as shall have predeceased me leaving lawful issue, equally among them, share and share alike, such issue coming in place of their parents and taking equally among them the shares which would have fallen to their deceased parents if in life; providing always, and declaring in regard to the several provisions herein conceived in favour of my said sons Lord Charles Edward Hay and Lord Frederick Hay, as it is hereby expressly provided and declared, that notwithstanding anything to the contrary hereinbefore written my trustees shall set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said sons Lord Charles Edward Hay and Lord Frederick Hay, and shall during all the years of their respective lifetimes after my decease apply the interest or other annual produce thereof as an alimentary fund for their use and behoof respectively: With full and ample power to my trustees either to pay the said interest or other annual produce, or so much thereof as my trustees shall think proper, to my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, or to apply the same, or so much thereof as my trustees shall think proper, for their use and behoof and for their proper support and maintenance, the remainder being accumulated for their use and behoof respectively and added to the capital of their said provisions, and also if my trustees shall deem it expedient and proper to give or make over to either of my said sons Lord Charles Edward Hay or Lord Frederick Hay the whole or any part of their said respective provisions, including any accumulations of interest or annual produce added thereto: With full power also, if my trustees shall think it necessary or expedient, to invest the capital of the said provisions, or either of my said sons Lord Charles Edward Hay or Lord Frederick Hay, including any accumulations of interest or annual produce added thereto, in the purchase of an alimentary annuity for either of them, or otherwise to encroach upon the capital of such provisions and accumulations for their proper support and maintenance: Declaring always that neither of my said sons Lord Charles Edward Hay and Lord Frederick Hay shall be entitled to control my trustees in any way whatsoever in the exercise of the powers hereby given to them in relation to the foresaid provisions, it being my desire that the matter shall be left entirely to the discretion of my trustees, and that they shall not be responsible to any one for the exercise or non-exercise of the said powers or any of them; and declaring further that the said several provisions hereby granted to my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and the interest and produce thereof, are and shall be strictly alimentary, and shall not be assignable or capable of anticipation by them or attachable by the diligence of their creditors; and upon the respective periods of decease of my said sons Lord Charles Edward Hay and Lord Frederick Hay, without leaving lawful issue, I direct and appoint my trustees to pay and make over the capital of the said several provisions hereby granted to each of my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and any accumulations of interest and annual produce added thereto, or such part thereof as shall not have been disposed of by my trustees under the foresaid powers, to my son the said Viscount Walden, in the event of his surviving my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, and in the event of his predeceasing them respectively, then to the heir-male of his body succeeding to the foresaid entailed estates, and in the event of the said Viscount Walden leaving no such heir-male of his body, or if such heir-male of his body shall have predeceased my said sons Lord Charles Edward Hay and Lord Frederick Hay respectively, then to their whole surviving brothers and sisters (including the survivor of the said Lord Charles Edward Hay and Lord Frederick Hay, but excepting the heir of entail succeeding to said entailed estates) and the lawful issue of such of their brothers and sisters (including and excepting as aforesaid) as shall have predeceased them leaving lawful issue, equally among them share and share alike, such issue coming in place of their parents and taking equally among them the shares which would have fallen to their deceased parents if in life: Declaring that the shares or share so succeeded to by the survivors of the said Lord Charles Edward Hay and Lord Frederick Hay and of my said daughters shall be taken subject to the same provisions, declarations, powers, directions, and others as are herein before and after written in regard to their foresaid provisions so far as applicable to them respectively: And providing and declaring further in regard to the several provisions herein conceived in favour of my said whole daughters, as it is hereby specially provided and declared, that notwithstanding anything to the contrary hereinbefore written, my trustees shall set aside and hold and retain and invest in their own names, as trustees foresaid, the several provisions hereby granted to each of my said daughters for behoof of my said daughters in liferent for their respective liferent uses allenarly during all the days of their respective lifetimes after my decease, and exclusive of the *jus mariti* and right of administration of their husbands or of any husbands they or any of them may marry, and for behoof of their respective children equally among them in fee, and that the liferents of the said several

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provisions shall be purely alimentary and shall not be assignable or capable of anticipation by my said daughters respectively, nor liable to the diligence of their creditors, and not affectable by the debts or deeds of their husbands, or of any husbands they or any of them may marry, or attachable by the diligence of such husbands' creditors, the *jus mariti* and right of administration of all such husbands being hereby expressly excluded and debarred . . . and the said legacies, shares, and provisions hereby granted and bequeathed to my children respectively, and the other sums and provisions above mentioned, are and shall be accepted by them and each of them, and are hereby declared, to be in full satisfaction to them and each of them of all legitim, executry, and everything else which they or any of them can ask or claim by or through my decease. . . . and with reference to the beforewritten distribution of my means and estate, it has always been my anxious desire to make as ample provision for my children (other than my said heir of entail who will succeed to my said entailed estates and is therefore well provided for) as my circumstances will permit, and also to do justice to all my younger children by placing each of them on a footing as nearly equal as circumstances render prudent, and where I have attached conditions or restrictions to the provisions left to any of them, I desire it to be understood that as my children are all equally dear to me I have conceived and executed this deed solely from an anxious regard for the welfare of each and all of them. . . ."

Viscount Walden survived the testator, and died on 28th December 1878 without issue. The present Marquis of Tweeddale was his residuary legatee.

One of the daughters of the testator was the late Dowager-Duchess of Wellington. She died on 13th August 1904, and at the date of her death she was a widow and had no issue. Until the date of her death she enjoyed the liferent of £8415, being the £5500 provided to her by the trust-disposition and settlement, after deduction of the legacy-duty of £85 paid thereon.

In these circumstances, questions having arisen as to the nature of the Dowager-Duchess of Wellington's interest in the said sum of £8415 provided to her by said trust-disposition and settlement, the present special case was presented.

The parties to the special case were (1) General Sir Richard Chambre Hayes Taylor and others, the trustees acting under the testator's trust-disposition, first parties; (2) the present Marquis of Tweeddale, the residuary legatee of Viscount Walden, second party; (3) the Duke of Wellington and another, the testamentory executors of the late Dowager-Duchess of Wellington.

The second party maintained that the said Dowager-Duchess of Wellington had a mere liferent of said sum, and that on her death it fell to be disposed of as residue and to be paid to the second party as in right of the said Viscount Walden, the residuary legatee.

The third parties maintained that the bequest of the said sum to the Dowager-Duchess of Wellington was a gift of the fee, and that the subsequent clause providing for the restriction of her enjoyment of the same to a liferent was intended to apply only in the event of her leaving children to the effect of giving the fee to such children. They accordingly contended that the said sum vested in her and fell to be disposed of as part of her moveable estate and to be paid to them as her trustees.

The questions for the opinion and judgment of the Court were—"(1) Was the right of the said Dowager-Duchess of Wellington in said sum of £8415 limited to a liferent thereof, and did said sum on her death fall into residue of the testator her father, and become payable to the second party, or those in his right? or, (2) Did the said sum of £8415 on the death of the said Dowager-Duchess of Wellington fall to be disposed of as part of her moveable estate, and to be paid to her assignees *inter vivos* or *mortis causa*, or, failing her disposal thereof, to her heirs *in mobilibus?*"

Argued for the second party—There was no absolute disposition to the daughters of the fee of the sums which the testator had directed his trustees to pay them. In this respect the case was different from *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, 18 S.L.R. 199; *Dalglish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559, 26 S.L.R. 424; *Logan's Trustees* v. *Ellis*, February 7, 1890, 17 R. 425, 27 S.L.R. 322. It had been held that a direction to "hold and invest" did not infer a gift of fee—*Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553, 32 S.L.R. 370. The construction here contended for had been adopted in a case where the testamentary provisions were very similar — *Young's Trustees* v. *Young*, March 5, 1901, 3 F. 616, 38 S.L.R. 434. The directions in the seventh purpose were exegetical of what the testator meant by the direction to pay in the fifth purpose. So read there was no repugnancy between the direction to pay in the fifth purpose and the directions in the seventh purpose. *Fulton* v. *Fulton's Trustees*, February 6, 1880, 7 R. 566, 17 S.L.R. 377, was a direct authority in favour of this contention. *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038, 14 S.L.R. 694, was also referred to.

Argued for the third parties—The direction to the trustees to pay at a term after the testator's death a specified sum to each of his daughters amounted to the gift of a fee. There were several cases in which, where a daughter died without issue, she was held to have taken a fee in a share of the estate, her enjoyment of which during her life was limited to a liferent—*Lindsay's Trustees* v. *Lindsay*; *Dalglish's Trustees* v. *Bannerman's Executor*; *Logan's Trustees* v. *Ellis* (*cit. sup.*); *Dunlop's Trustees* v. *Sprot's Executor*, March 9, 1899, 1 F. 722, 36 S.L.R. 531. The sole object of the testator in restricting the daughter's enjoyment of her share during her life to a

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liferent was to protect and secure the succession of her children if she had children. Accordingly it was just the ordinary case of a fee burdened with a gift-over to children if there should be any—*Mackay's Trustees* v. *Mackay's Trustees*, June 8, 1897, 24 R. 904, 34 S.L.R. 683; *Stewart's Trustees* v. *Stewart*, January 22, 1896, 23 R. 416, 33 S.L.R. 297. This construction was the only one under which the original gift and the subsequent liferent clauses could both receive effect. The absence of a destination-over strongly supported this construction, and the other clauses of the deed pointed in the same direction.

At advising—

LORD PRESIDENT—This case was sent for consideration by Seven Judges for two reasons—first, because we thought the question a narrow and difficult one on the construction of the deed, and secondly, because it seemed advisable to consider whether there was any repugnancy between the cases of which *Fulton's Trustees* may be taken as a type on the one hand, and *Lindsay's Trustees* as a type on the other.

On the construction of the deed I am of opinion with your Lordships. I have had the advantage of perusing the opinions now delivered by Lord Stormonth Darling and Lord Low, and I content myself with saying that I concur in the view they have taken as to the inference to be drawn from the clauses of the deed.

But on the wider question I wish to say a few words.

In one sense it is true that no decision in this branch of the law can ever be authority for another, for as different instruments are being construed, and the sole question is what is the true meaning of each, the decision of the proper construction of the will of A can never as authority rule the construction of the will of B.

But none the less the dicta of Judges in giving the reasons for holding a certain construction of the will of A to be the true one may and often do act as guide-posts to direct the inquirer for what *indicia* he should look in construing the will of B, and in this sense it is convenient if not strictly accurate to speak of the principle of so-and-so as laid down in a case or a series of cases.

I do not propose to examine separately the cases which were brought before our notice in the very satisfactory argument we had from the bar, but using the word principle in the sense I have explained, I do deduce from them certain principles.

As a person's testamentary writings must always be viewed as a whole, it, in one sense, makes no difference whether two or more directions as to one fund or interest are contained in one part or in several parts of one deed, or in different deeds. The whole of the sentences, wherever found, must be read together. But in another sense it does make a difference. There is an antecedent improbability that a rational being—and testators are in the eyes of the law presumed to be rational—intends to contradict at the end of a sentence or clause what he has said at the beginning of it. But there is no antecedent improbability that a testator intends to contradict in his codicil what he has said in his will. Codicils are often written for no other purpose. If the codicil in terms revokes or alters the will or a portion of it, no question remains. If it does not do so in terms, there is still no antecedent improbability that it may not do so; only, as the revocation or alteration alleged is now not express but implied, we must be sure that the implication is a necessary inference from the words used.

Passing away from the position of the directions, the next point I gather is this.

When in the beginning of an instrument you find words which purport to bestow a certain gift or interest, and then subsequently find further provisions or declarations which obviously deal with the gift or interest of the same donee, then the further expression of the donor's will must have been inserted by him for one of two purposes, either (1) to enlarge or abridge the gift from what, had the original words remained unadded to, it would have been or might have seemed on a certain construction of the words to be; or (2) leaving the gift the same, to adhibit further conditions or directions as to the way in which the gift is to be enjoyed. Let me interpolate, that it does not seem to me that these propositions are affected by the point whether there is or is not what I may call a warning expression in the first clause that there is more on the same subject to come.

The final proposition I take to be this—that where the subsequent declaration does not in terms purport to affect the first purpose—*i.e.*, to enlarge or abridge the gift itself—then on the well-known view of allowing continued effect to *all* the testator has said, that construction will *in dubio* be preferred which assigns it to the second rather than to the first category.

I do not think that any of the cases cited will be found not to square with these propositions. I should only wish to add that a difficulty which pressed me a good deal as to the case of *Fulton* v. *Fulton's Trustees* has been removed by a perusal of the session papers. From the deeds, which are there printed *in extenso*, it appears clearly that the original gift in the will, which in expression clearly purported a fee, was in terms revoked by a codicil, and that what was substituted therefor was a gift, which with equal clearness purported a liferent and nothing more. The case is not therefore, as it at first sight appeared to be, in any way inconsistent with the case of *Stewart's Trustees*.

LORD M'LAREN—I have had the opportunity of studying the opinion of Lord Low, in which I wish to concur, and I am also entirely at one with your Lordship in the chair and with Lord Stormonth Darling in your observations. I should only add one word about the question of principles of construction. So far as principles of construction are rules of logic, I am afraid we cannot get on without them, but in so far as they are arbitrary rules, I think there is a

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general concurrence of judicial opinion at the present time that it is undesirable to lay down rules which might have a tendency to obscure the real question, which is the meaning of the testator in a particular case. Now nothing that we decide to-day, as it seems to me, can have that effect, because we only decide two things—first, that according to Lord Tweeddale's intention, as made manifest in his will, he desired to give a right of fee to his younger children, and at the same time to surround them with such protection as the law enabled him to give, by directing his trustees to pay them the income for life and to keep the fee for the children. The other proposition which is involved in the judgment is this, that where such is a testator's intention there is no rule of law or rule of construction that should prevent us from giving effect to that intention, and in my opinion the intention in this case is sufficiently clear to enable us with some degree of confidence to pronounce a judgment.

LORD KINNEAR—I have had considerable difficulty in this case, not because of any conflict of decision, but because of the complexity of the will itself, and because it appeared to me to be a case in which there was a serious danger of our being led to force upon a complicated will a construction not exactly in conformity with the testator's intention, out of deference to a supposed principle or canon of construction established by previous decisions. But my difficulty has been removed both by the examination of the will which has been made by Lord Stormonth Darling and by Lord Low, and also by the observations that your Lordship in the chair has made on the proper use of those previous decisions, with all of which I desire to express my concurrence, and I therefore agree that we should answer the questions in the manner proposed by Lord Stormonth Darling.

LORD KYLLACHY—I also have had some difficulty as to the just construction of this particular deed, but in the end I have come to concur with the rest of your Lordships, that on the just construction of the deed the first question falls to be answered in the negative and the second in the affirmative.

LORD STORMONTH DARLING—Nothing in the decided cases can relieve us of the necessity of construing this will by itself; and we must do so by reading the will as a whole, and, if possible, in such a way as to harmonise all its provisions. So construing it, I reach the conclusion that the sum of £8415, on the death of the Duchess-Dowager of Wellington fell to be disposed of as part of her moveable estate, and to be paid to her executors.

I admit that this result can only be reached if you find in the will words which on their just construction are capable of conferring a fee. But I find such words in the directions to the testator's trustees to make payment at a particular term after his death of a specified sum to each of his daughters, including the Duchess. I do not think that the words which almost immediately follow—"but subject always in the case of my sons the said Lord Charles Edward Hay and Lord Frederick Hay, and my said whole daughters, to the provisions, declarations, powers, directions, and others hereinafter written applicable to them respectively"—impart any other or greater qualification of the original gift than would be constituted by the clause which is printed in the appendix, and by which the trustees are directed to "set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said daughters for behoof of my said daughters in liferent for their respective liferent uses allenarly during all the days of their respective lifetimes after my decease, and exclusive of the *jus mariti* and right of administration of their husbands or of any husbands they or any of them may marry, and for behoof of their respective children equally among them in fee." And then follows a declaration that the liferents are to be alimentary and not assignable. In short, I do not see much force in what I may call the *in gremio* argument.

This clause (the seventh) undoubtedly imparts an important qualification of the original gift, and that in a double sense. It leaves the money in the hands of the trustees during the whole life of each daughter, in order to secure that she shall only have the income as an alimentary provision, and it gives the fee to her children, if any. But beyond effecting these two purposes it does not go, at all events expressly. The second party, as representing the residuary legatee, maintains that it goes much further and reduces the daughters' right to a liferent whether they had children or not. If that contention be adopted it is impossible to reconcile the two clauses—they are mutually repugnant. If, on the other hand, you adopt the construction for which the Duchess' executors contend, you find a reason for the testator having left the two clauses standing in the same deed. In the events which have happened both clauses receive effect—the liferent clause by the protection afforded to the lady herself during her life, and the original gift by conferring upon her the *jus disponendi*.

There are other clauses in the will which in my opinion support that view. In particular, the provisions to Lord Frederick and Lord Charles Hay, although first directed to be paid to them at a particular term after the testator's death, just as in the case of the daughters, are afterwards so dealt with as to make it perfectly clear that if these younger sons should die without leaving lawful issue the capital of their provisions is to go to the testator's eldest son in the event of his surviving these younger sons, and to certain other persons in the event of his predeceasing them. In their case, therefore, it would have been impossible to contend that they had a fee subject to divestiture. But there

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is no such special provision with regard to the daughters, and the contrast seems to me significant.

With regard to the cases, there is a series, beginning with *Lindsay's Trustees* in 1880, and coming down to *Dunlop's Trustees* in 1899, in which both Divisions of this Court have given effect to the principle that a clause reducing a beneficiary's interest to a liferent may be reconciled with a clause capable of being read as conferring upon her a fee, by treating the liferent as conditional on her having issue. The principle seems not only a sound one but is firmly established, and it ought, I think, to be applied wherever the will permits of such reconcilement, as this will in my opinion does.

LORD LOW—The questions in this case are whether the fee of the provision which the late Marquis of Tweeddale made in his trust-disposition and settlement for his daughter the Duchess of Wellington vested in her in the event, which happened, of her dying without issue, or whether her right was restricted to a liferent only.

The answer to these questions depends upon the construction of the trust-disposition and settlement, and in particular of the fifth and seventh purposes thereof.

By the fifth purpose the truster directed his trustees "to make payment at the first term of Whitsunday or Martinmas that shall happen six months after my decease" to each of his daughters "of the sum of £8500, but subject always . . . to the provisions, declarations, powers, directions, and others hereinafter written." These provisions and declarations are to be found in the seventh purpose, and are in the following terms:—"Providing and declaring further that, notwithstanding anything to the contrary hereinbefore written, my trustees shall set aside and hold and retain and invest in their own names as trustees foresaid the several provisions hereby granted to each of my said daughters, for behoof of my said daughters in liferent for their respective liferent uses allenarly . . . and for behoof of their respective children equally among them in fee." The *jus mariti* and right of administration of husbands were excluded, and the liferents were declared to be purely alimentary, and not liable to the diligence of creditors. There was no destination over in the event of failure of children.

It was argued that that clause must be read as defining what the truster meant by the direction to pay in the fifth purpose, and as prescribing the way in which that direction was to be carried out. I am unable to take that view because the direction to pay to each daughter the capital sum of £8500 in the fifth purpose is distinct and unequivocal, and the direction in the seventh purpose not to pay any part of the capital sum to the daughters is equally distinct and unequivocal. No doubt the former direction is to pay subject to the provisions and declarations after written, but that does not alter the fact that the direction is to pay the capital sum. There is, therefore, an apparent contradiction between the two directions, and if upon a fair construction of the settlement they cannot be reconciled that which comes last must prevail. A construction of a settlement, however, which gives no effect to an unambiguous direction is not to be adopted if it be possible, upon a fair construction of the settlement as a whole, and without unduly straining the language used, to ascribe to the direction an intelligible meaning and purpose.

In my opinion the direction to pay in the fifth purpose and the direction to hold in the seventh purpose can be reconciled without doing any violence to the language used, by reading the direction to pay according to the natural meaning of the words as conferring a fee on the daughters, and by reading the directions in the seventh purpose as merely limiting or burdening that fee to the extent of the trust thereby created, the object of which was to secure the capital sum to the daughters' children, if they had children, and to make more secure to the daughters themselves the enjoyment of the income so long as they lived. If that is a sound construction then upon the death of a daughter without children the original gift of the fee to her took effect and the capital passed to her heirs and assignees.

There are several considerations which seem to me to favour that construction. In the first place there is no destination-over of the fee, and I think that it is plain that the truster did not contemplate that the provisions to daughters should in any event either fall into residue or become intestate succession. If, however, a fee was given to the daughters subject only to the limitations of the trust constituted by the seventh purpose, no destination-over was required, because in the event of the death of a daughter without children the trust came to an end and the initial gift of the fee took effect.

Further, unless the omission of any destination-over failing children is to be accounted for by there being no necessity to insert such a destination, the clause with which I am dealing is in marked contrast to other clauses in the settlement, where most careful provision is made for every contingency. Thus the trustees are directed to pay the residue to Viscount Walden, the truster's eldest surviving son, and failing him by predecease to the heir-male of his body succeeding to the entailed estates, and failing such heir-male to the whole other children of the truster alive at his death, and the issue of such children as might have predeceased him. In like manner the trustees are directed to pay the sums provided to two of the truster's sons, Lord Charles and Lord Frederick Hay, in the event of their deaths without leaving lawful issue, to the Viscount Walden, whom failing to the heir-male of his body, whom failing to the truster's other children as directed in regard to the residue.

Now, all these directions are contained in the seventh purpose, that relating to the provisions to Lord Charles and Lord

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Frederick Hay immediately preceding the direction in regard to the provisions to daughters. It is therefore most unlikely that the failure to give express directions for the disposal of the daughters' provisions failing children was due to an oversight, and that, I think, aids the view that such a direction was not given because it was unnecessary, a fee having already been conferred upon the daughters, and the truster's intention being that the gift of the fee should take effect except in so far as it was limited and burdened.

In the next place, the words with which the directions in the seventh purpose are introduced—"notwithstanding anything to the contrary hereinbefore written"—appear to me to be not without importance. These words were founded upon as an expression of the truster's intention that the daughters' rights should be limited to a liferent allenarly. Perhaps they are capable of that meaning, but I think that the sounder view is that they point in an opposite direction. If the intention had been to give the daughters nothing but a liferent, and the framer of the deed had found when he came to give effect to that intention that he had already inserted a clause which *prima facie* gave them a fee, I think that he would have deleted or altered that clause. I cannot imagine him allowing the clause to stand with an explanation that it did not express what the truster meant. Accordingly I read the words as recognising and approving the direction to pay in the fifth purpose, and as being in effect a declaration that, notwithstanding any apparent contradiction between that direction and those about to be written, the former should still be regarded as expressing the truster's intention.

There is another circumstance which I do not think was referred to in argument, but which appears to me to be worthy of observation. The residue clause begins with the declaration that the directions which it contains shall be "subject always as regards any provisions falling to . . . my whole daughters to the provisions, declarations, powers, directions, and others hereinafter written." In like manner, it is declared in regard to the ultimate destination-over of the provisions to Lord Charles and Lord Frederick Hay—the destination, namely, to the surviving brothers and sisters of these gentlemen, and the issue of predeceasing brothers and sisters — that "the shares or share so succeeded to by the survivors . . . of my said daughters shall be taken subject to the provisions, declarations," and so forth, "as are hereinbefore and after written in regard to their foresaid provisions."

If therefore a share of the residue or of the provisions to Lord Charles and Lord Frederick Hay had fallen to a daughter, the trustees would have been bound to hold such share for the daughter in liferent allenarly and for her children in fee, just as if it had been part of the original provision to her.

Now, suppose (what might possibly have happened) that the whole of the residue, and the whole of the sums provided to Lord Charles and Lord Frederick Hay had fallen to daughters, and that all the daughters had died without children. In that event, if the right of daughters was limited to a liferent allenarly, the result would have been that practically the whole personal estate of the truster would have been undisposed of, and would have fallen into intestacy. A construction of the settlement under which such a result would be possible is not to be favoured; and it can be avoided by holding that when the truster directed payment to be made to a beneficiary he intended to give a fee, subject only to such burdens and limitations as he might subsequently impose.

The construction which in my opinion should be adopted seems to me to receive support from the series of cases which were cited, beginning with *Lindsay's Trustees*, 8 R. 281. The principle recognised in all these cases seems to me to be that where there is a direct bequest, or a direction to trustees to pay or convey to a daughter in terms which according to the natural meaning of the language used import a gift, that gift will not be recalled by a subsequent direction to the trustees to hold the fund for, or settle it upon, the daughter in liferent for her liferent use allenarly and her children in fee, except in so far as may be requisite to give effect to these purposes, and accordingly if there are no children the fee will vest absolutely in the daughter and be *in bonis* of her at her death.

Perhaps in one of the cases (namely, *Stewart's Trustees*, 23 R. 416) the principle was carried too far, or rather was applied to circumstances to which it was not truly applicable. The present case, however, appears to me to be one to which the principle is plainly applicable, because it renders it possible to give an intelligible meaning and purpose to every clause in the settlement, and avoids the necessity of regarding one clause (unambiguous in itself) as altogether inoperative.

I am therefore of opinion that the first question in the special case should be answered in the negative, and the second in the affirmative.

LORD ADAM was present at the hearing, but had resigned before judgment was given.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First and Second Parties —Dean of Faculty (Campbell, K.C.)—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Third Parties—C. K. Mackenzie, K.C. — Howden. Agents — J. & F. Anderson, W.S.

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Saturday, December 16.

FIRST DIVISION.

[Jury Trial.

CANAVAN *v.* JOHN GREEN & COMPANY.

Reparation—Negligence—Master and Servant—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3—*"Orders or Directions" to which Workman Bound to Conform—Order must be a Particular Order.*

A, an ordinary workman, was engaged to work at a stone-planing machine, where he was to be under the orders of B who was in charge of the machine, but no set orders were given him as to what his precise duties were to be, his knowledge of them being presumed. In the course of the operations it was necessary from time to time to clear the machine of chips, and this work was done by A. While he was so clearing the machine B, without warning him, set it in motion, and A's foot was crushed. It was not necessary that A should have stood where he did, and he had received no order from B how he was to do the work. B, however, had not interfered to prevent his standing where he did. A raised an action of damages under the Employers' Liability Act 1880 and obtained a verdict.

On a bill of exceptions and motion for a new trial by the defenders, *held* (*diss.* Lord Stormonth Darling) that in section 1 (3) of the Employers' Liability Act 1880 "orders or directions" to which the injured workman was bound to conform, and did conform, and in conforming to which he was injured, meant a particular order, "particular in this sense, that within its scope it supersedes the workman's own private judgment and discrimination and substitutes for it the behest of the person to whose directions he is bound to conform," and inasmuch as there was no such order given to A a new trial *granted.*

Expenses—Jury Trial—Bill of Exceptions—New Trial—Expenses of Discussion on Bill of Exceptions.

The rule that when a new trial is granted the question of expenses should be reserved, applies not only to the expenses of the former trial and of a motion for a new trial, but also to the expenses of the discussion on a bill of exceptions.

The Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 1, enacts—"Where personal injury is caused to a workman . . . (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

John Patrick Canavan, labourer, 14 South Shamrock Street, Glasgow, raised in the Sheriff Court at Glasgow an action of damages at common law, or alternatively under the Employers' Liability Act 1880, against John Green & Company, masons and brickbuilders, 600 Eglinton Street, Glasgow.

He pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault and negligence of defenders, or those for whom they are responsible, is entitled to reparation therefor."

The defenders pleaded—"(3) If said accident was due to the fault of anyone it was that of pursuer's fellow-workmen, for whom the defenders are not liable, and decree of absolvitor should be granted, with expenses."

The Sheriff-Substitute having allowed a proof, the pursuer appealed for jury trial, an issue was approved, and the case was tried before Lord Stormonth Darling and a jury on the 24th and 25th March 1905, when a verdict was returned for the pursuer under the Employers' Liability Act, the damages being assessed at £170.

At the trial counsel for the defenders excepted to the direction of the presiding Judge. The bill of exceptions stated—". . . It appeared that on 17th May 1904 the pursuer, while in the employment of the defenders at their stone-dressing works in Glasgow, was severely injured by a stone-dressing machine in the said works. The machine in question, which is known as 'Anderson's Patent,' consists of a plane or table about 12 feet long and 3 feet broad, which, by being geared on to an engine, is made to travel backwards and forwards on two rows of fixed pulley rollers placed on the ground about 2 feet apart, each of the rollers being about 9 inches in diameter. Stones requiring to be planed are fixed in position on the table and are dressed by means of chisels attached to an adjustable cross bar below, which the table passes at a slow rate of speed. The defenders had placed a man named Alexander Garrie in charge of this machine, and it was the pursuer's duty to assist Garrie by placing and taking away the stones which required to be dressed and by removing from the table the shivers and debris which were planed off the stones. On the occasion of the accident a stone had been placed in position on the table ready for dressing, and the pursuer and Garrie were standing beside it. Garrie passed round one end of the machine to the other side where he put it in motion. About the same time the pursuer moved to the other end of the machine, and immediately thereafter his leg was crushed between the moving table

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and one of the fixed pulley rollers. The machine was started by Garrie without giving any express warning, although at the moment he did not see the pursuer. In assisting Garrie at the said machine the pursuer was subject to Garrie's orders, but he had received no express order from Garrie on the occasion of the accident, nor did it appear that he had ever received from Garrie any special instruction as to the manner in which he should remove the shivers from the table, or as to where he was to stand in doing his work.

"In addressing the jury counsel for the pursuer maintained that Garrie was guilty of negligence in starting the machine without knowing where the pursuer was and without giving him warning, and that in respect the pursuer was conforming to Garrie's orders at the time of the accident, and the accident resulted from his having so conformed, the defenders were responsible for Garrie's negligence under section 1 (3) of the Employers' Liability Act 1880. Counsel for the defenders having thereafter addressed the jury, Lord Stormonth Darling charged the jury, and in the course of his charge he directed the jury as follows:—

"'Now I have to tell you that if you think that the injury here was caused by the negligence of Garrie, he was a person to whose orders the pursuer was at the time of the injury bound to conform and did conform, and the injury resulted from his having so conformed. Of course, gentlemen, you quite understand that, when I say that, I suppose that you have first cleared out of the way the question of fault on the pursuer's own part, because what I am saying now would not apply to a case where you thought there was negligence or contributory negligence on the pursuer's part; but if that is out of the way, then I do tell you that if you think the injury arose by reason of the negligence of Garrie, his negligence renders the defenders liable in the circumstances. Well, I will tell you why in a word. It is a direction for which I am responsible, and you will kindly take it from me, but I say so for this reason: It is suggested that under this sub-section there must be some special order which is the immediate cause of the injury. I do not so read the statute. I think all that the statute requires is that the negligent person—Garrie, to wit—was in a position of superiority to the injured workman in the sense that the injured workman was bound to obey his orders, and that if the injured workman was in the course of doing his work then he was in the sense of the statute conforming to these orders, although the orders were not special. It would be an absurd thing to say that in the very ordinary case of a workman's labourer working the whole day to that workman's hand, bound to obey him, liable to be reprimanded or even dismissed if he disobeyed him, it would in my estimation be absurd to say that he is not conforming to the orders of that man, although the orders are not repeated from time to time. The intention of the statute, it seems to me, is that when one workman is placed at the disposal and under the lawful orders of another and is doing his duty conformably to these orders, if injury to him results through the negligence of that superior workman then the master and not the superior workman—which would be a very empty form of remedy—the master himself is liable. I think it respectful to tell you the reason of my laying down this law, but you will take it from me that this is the law of the case.'

"Whereupon the counsel for the defenders excepted to the said direction, and asked Lord Stormonth Darling to give the following directions to the jury:—1. That the defenders are not responsible to the pursuer under section 1 (3) of the Employers' Liability Act for the consequences of any negligence on the part of Alexander Garrie unless the pursuer's presence at the place where he was injured was due to a specific order given to him by Garrie to work in or about that place. 2. That the defenders are not responsible to the pursuer under section 1 (3) of the Employers' Liability Act for the consequences of any negligence on the part of Alexander Garrie unless the order to which the pursuer was conforming at the time of the accident was in itself a negligent act on the part of Garrie. Which directions Lord Stormonth Darling refused to give."

The defenders moved for a new trial and a rule was granted; and the case subsequently came up for discussion on the rule and on the bill of exceptions.

Argued for pursuer—The Lord Ordinary's direction to the jury was right. The pursuer was bound to obey the orders of the defenders' workman Garrie. At the time of the accident he was obeying an implied order of Garrie. It was not necessary that the order should be specific or particular, and it would be extravagant to expect that the order should be repeated before every turning of the stone. The use of the term "directions" in the statute supported this contention, and seemed to indicate something less than a specific order. Otherwise no man of ordinary intelligence doing routine work such as the pursuer was doing would ever take benefit under the Act. When a man was working under implied orders the statute was satisfied when a routine was established and the workman was shown to be conforming to that routine—Bevan on Negligence (2nd ed.), p. 853; *Millward* v. *Midland Railway Company*, 14 Q.B.D. 68; *Wild* v. *Waygood*, [1892] 1 Q.B. 783; *Snowden* v. *Baynes*, 24 Q.B.D. 568, *affirmed*, 25 Q.B.D. 193; *M'Coll* v. *Black & Eadie*, February 6, 1891, 18 R. 507, 28 S.L.R. 354; *Flynn* v. *M'Gaw*, February 21, 1891, 18 R. 554, 28 S.L.R. 392; *Mitchell* v. *Coats Iron and Steel Company*, November 6, 1885, 23 S.L.R. 108.

Argued for defenders — The evidence showed that the pursuer was not working under any order, implied or general, at the time of the accident. In any event, it was not sufficient merely to prove an implied order. The Act required a specific or particular order, and no such order had been given—*Dolan* v. *Anderson & Lyell*, March

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7, 1885, 12 R. 804, 22 S.L.R. 529; *Grant* v. *William Baird & Company*, February 20, 1903, 5 F. 459, 40 S.L.R. 365; *Sweeney* v. *M'Gilvray*, November 23, 1886, 14 R. 105, 24 S.L.R. 91.

At advising—

LORD PRESIDENT—We have to dispose of a bill of exceptions and a motion for a new trial on which a rule has been granted. It will, I think, be convenient that I should first state to your Lordships my view of the evidence which was laid before the jury. The pursuer was an ordinary workman, and was engaged by the foreman of the defenders named Irvine. He was told by the foreman that he was to work at a stone-planing machine in a certain shop, and that he was to be under the orders of Garrie, who was in charge of the machine. No set orders were given him by the foreman as to what his precise duties were—seemingly he was assumed to know generally what they were, just as an ordinary miner is assumed to know the ordinary work of working a mine.

The stone-planing machine consisted of a moveable table, which was moved by means of chains actuated by steam, and the stone to be planed was placed on the table, and as the table was moved the stone went along with it, and was pushed up against a chisel or planing tool held firmly in position, just as a log is pushed up against a circular saw. To facilitate the motion of the table with the heavy block of stone upon it the table travelled over rollers. These rollers never shifted their position, but were free to move on their axes. As the table moved forward it mounted and passed successively over one roller after the other. At the end of each forward journey the table naturally became encumbered with the chips or planings which had come off the stone, and accordingly, before another journey was taken it was necessary to clear the table of these chips. This work was done by the pursuer. In order to do it on the occasion of the accident he stood at the end of the table. Inadvertently he placed his foot in front of the table between its end and the nearest unoccupied roller, on what would be its forward track. While he was in that position Garrie suddenly, and without giving the pursuer any warning, started the engine, the table moved forward, and catching the pursuer's foot between its own end and the said roller, crushed it severely. In respect of the injury so inflicted the pursuer raises the present action. There are only, in my opinion, two other facts which need be mentioned in order to decide the legal question which arises. These are (1) that the table, being only 3 feet 6 inches broad, it was not in any way necessary in order to remove the chips that the pursuer should put his foot where he did, or stand in front of the table at all. It might have been effectively and safely cleared from the side. The second is, that while on the one hand no specific instructions were given by Garrie to the pursuer as to where he was to stand when he was clearing the chips, on the other hand there is no evidence that in going where he did he was acting in an unusual manner, or that Garrie in any way checked him from going there.

In these circumstances the proximate cause of the accident was not doubtful. It was the negligence of Garrie in starting the machine without warning the pursuer while the pursuer had his foot in a place where the machine could crush it. But inasmuch as Garrie was the fellow-servant of the pursuer, it is equally clear that at common law the plea, which for convenience sake I call the plea of collaborateur, would, apart from the question of contributory negligence of the pursuer, afford a good defence to the action.

The point therefore turns upon the provisions of the Employers' Liability Act. Now the section of that Act which has relation to such cases as the present is the first section, sub-sections 2 and 3. They run thus —[*His Lordship quoted section* 1 (2), (3) *supra.*]

Though I shall be compelled to revert to No. 2 for other purposes, it is clear it has no direct bearing here, because no one alleges that Garrie was a person who had superintendence entrusted to him within the meaning of the Act. The jury found a verdict for the pursuer, and admittedly did so because they thought the case fell within the third sub-section.

In order to create liability under the third sub-section, it seems to me that three separate sets of things must be proved, and unless each and all of them is proved the said section cannot apply. These three sets of things are as follows:—(1) Injury must be caused to the workman by the negligence of a person in the service of the employer; (2) that person must be the person to whose order or direction the injured workman was bound to conform and did conform; (3) the injury must have resulted from his having so conformed.

As regards (1) there is no question. Garrie was in the service of the employer, and the injury happened to the pursuer through his negligence. As regards (2) it is also incontestible that the pursuer was bound to conform to the directions of Garrie. As to whether he did conform, that, I think, depends in what sense the words "did conform" are taken. If all that is meant by "did conform" is that the workman gave general obedience to his directions—*i.e.*, was not an unruly servant—then there is no evidence to suggest that the pursuer was otherwise than an obedient servant. But if "did conform" means did conform at the time of the accident to any particular direction, then there is no evidence to show that any such particular direction was ever given.

As regards (3), the same fact—viz., that no particular direction is found ever to have been given—necessarily negatives the idea that the injury resulted from his having so conformed. I shall explain in the sequel in what sense I use the expression "particular direction."

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It follows that in the view I take of the evidence and of the statute there was no evidence to support the verdict of the jury, and that a new trial would fall to be granted on that account. But it is clear that the jury proceeded on a view of the statute different from what I have expressed, and that they were directed to that view by the charge of the learned Judge who tried the case; and further, as I understand from my brother Lord Stormonth Darling that he approves of the verdict, it is more necessary that I should examine the exceptions which are taken to the charge then given. The portion of the charge to which exception is taken is as follows—[*His Lordship read the direction excepted to, supra*].

By the first part of what I have read I am of opinion that the learned Judge took away from the jury three questions of fact necessary to allow of the application of these sub-sections of the statute, and that these questions of fact ought to have been left to the jury.

But further, on the facts I am of opinion that, as regards the two latter of the three questions the Judge came to an erroneous conclusion, but did not do so because his Lordship's view of the facts differs from those that I have already set forth, but because his view of the meaning of the expressions of the statute is different from mine. I say that his Lordship's view of the facts is the same as mine, because I do not find any material difference between the narrative of the facts as narrated in the bill of exceptions, which was approved of by his Lordship, and the narrative as I gave it a short while ago to your Lordships. As regards the law, his Lordship's meaning is clearly expressed by what follows.

The particular suggestion which seems to have been made by the defenders' counsel, and which his Lordship is rebutting, is that there must be some special order which is the immediate cause of the injury. In arguing this it would rather seem that counsel had used the expression "special order" in the sense of an order given immediately before the accident, or at least given when the operation during which the accident occurred had already begun; because the Lord Ordinary says he thinks that it would be an absurdity to hold that an order should be—if the statute is to apply—repeated from time to time. So far I agree. But when his Lordship goes on to say:—"The intention of the statute it seems to me is that when one workman is placed at the disposal and under the lawful orders of another, and is doing his duty conformably to these orders, if injury to him results through the negligence of that superior workman, then the master and not the superior workman—which would be a very empty form of remedy—the master himself is liable." I think that he leaves out altogether the concluding words—"and the injury resulted from his having so conformed." I think it is important to note the difference between the phraseology of the second and third sub-sections. When a man is a superintendent then no more is necessary except that his negligence should be while in the exercise of his superintendence. In other words, for every fault of a foreman *qua* foreman which causes an accident the master is liable. But when the superior workman is not a foreman but only *propositus ad hoc*, then there must be not only his negligence causing the accident while so *propositus* but the injury must result from the workman having conformed to his order. If the learned Judge's view as stated were right there would be no difference between the second and third sub-sections, and the last words of the third sub-section would be unnecessary.

Now, what is the real meaning of the words "the injury resulting from the workman having so conformed"? The expression "results from" seems to me to connote cause and effect, and therefore to point clearly to something more in an order than a mere order to do his duty. When I say cause I do not necessarily mean proximate cause. I agree to the distinction which has been taken in some of the cases, that the *causa* need not be the *causa causans* but may be a *causa sine qua non*. But still the conforming to the order must be a *causa*, and an order of that sort must be, I think, to a certain extent specific or particular. It need not be in writing, it need not even be in words—a sign might do. It need not be expressed; it might be implied from a course of proceedings. But it must, I think, be specific or particular in this sense, that within its scope it supersedes the exercise of the workman's own private judgment and discrimination, and substitutes for it the behest of the person to whose directions he is bound to conform; and then the accident must be due to the workman conforming to that behest in at least the sense that if he had not so conformed it would not have happened to him.

I believe there is no reported case under this section of the statute in which these requisites have not been fulfilled in the facts proved. The larger proposition put by the learned Judge, viz., that it is enough if the accident happen through the negligence of the superior workman while the inferior is working under directions according to the ordinary methods of the employment, is, for the reasons I have given, in my opinion an unwarranted extension of the statutory provisions, and is, I think, unsupported by authority.

On the view generally of the meaning of the section I would cite the opinion of Lord Young in *M'Coll* v. *Black & Eadie*, where he says — "According to the contention of the pursuer, as that contention strikes me, wherever there is a foreman, then there is liability on the part of the master. That view is extravagant. Such is not the case provided for by the statute, which contemplates a particular order given by a foreman, and injury resulting from a workman's having conformed to such particular order."

It is true that Lord Young was in the minority, but one of the majority of two allowed an issue because he held there was

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a relevant case at common law, and although Lord Rutherfurd Clark indicated that he thought the pursuer might recover under the statute he did not indicate that the view of the law laid down by Lord Young was wrong.

Lord Young repeated this view in *Flynn* v. *M'Gaw* — "No doubt the language in the Act of Parliament is very loose and general language, but I cannot read that language as meaning that whenever the master has appointed one of the workmen as foreman over the others, and the foreman gives a perfectly general order to his men to go on with their work, that the master shall be responsible for any accident which may happen in the course of the work." These cases were decided on relevancy. I turn to those in which the facts had been ascertained.

In the first place, that there must be an order expressed or implied and not merely a non-interference of the superior workman is directly settled by *Sweeney* v. *M'Gilvray* (14 R. 105).

Then as to the point of the order being specific or particular as opposed to general there is the case of *Snowden* v. *Baynes*, 24 Q.B.D. 568, *affd.* 25 Q.B.D. 193. In that case Sellick, a carpenter, had the right to order the pursuer, a labourer, what work he was to perform. He ordered him to work in a certain shed. But he had no power to order, and consequently did not order, the pursuer exactly how to perform his work when he got there. The pursuer went to the shed, where he was joined by Sellick, and while working he was injured through a negligent act of Sellick. Mr Justice Wills, delivering the judgment of himself and Baron Pollock, which held that there was no liability, says—"We think the order which is contemplated by this sub-section must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part—if not, it is not his order at all. Sellick had authority to say, 'You shall do this bit of work or that bit of work,' but not 'You shall do it at this place or that place.'" This seems to me clearly to indicate that the kind of order needed was an order to do the work at this or that place. The point that Sellick had no authority to give such an order is neither here nor there, except as a link in the evidence that no such order was given.

The section was very carefully considered by a very strong Court consisting of Lord Herschell, Lord Lindley, and L. J. Kay in the case of *Waygood* v. *Wild*. The actual point under consideration was whether the expression "resulting from having so conformed" necessitated a *causa causans*, or might be satisfied by a *causa sine qua non*, and the decision was in accordance with what I have ventured to express as my own opinion on that point. But incidentally there are various expressions relating to the order which all seem to point to the construction I am contending for—*i.e.*, a particular as against a general order.

The facts were these. Wild, the plaintiff, was for the time being subjected to the orders of Duplea in a job connected with the erection of a lift. Wild was ordered by Duplea to put a plank across the well of a lift, and it was inferred was ordered to stand on the plank. I get what follows from the judgment of Lord Hershell:—"It must be taken that there was evidence that Duplea, whilst the plaintiff was on that plank, negligently started the lift, the effect of which was that the plaintiff was in the position of having to choose between two alternatives—either to fall down the well of the lift, or to endeavour to catch hold of the rope, which he did, and which carried him up to the pulley and injured him considerably. Therefore this is certain—that he was injured owing to his stepping on the plank, and the lift while he was so standing upon it being started." I beg attention to the next sentence. "That the position which he was ordered to occupy was one of danger if the lift was started while he was upon it, is certain." On these facts liability was held to follow. I think it is clear from the words I have read that the order there was, and was considered by Lord Herschell as, a particular order. And if that is not enough I would refer to a further passage of his judgment when he says—"Now in this case it appears to me that it is quite clear that the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence."

Contrast these facts with the present. The only order that can be implied (Garrie in fact giving no order at all) was an order to clear the table of shivers. That might have been done in many positions without any possibility of danger. It might even have been done in this position without danger if the pursuer had not inadvertently put his foot forward between the table and the roller. How can it be said here, as it was said in *Waygood* v. *Wild*, that the injury resulted from the pursuer conforming to an order?

This view is I think strongly supported by a consideration of the criticism which in the same case Lord Herschell makes of *Howard* v. *Bennett*, 58 L.J. (Q.B.) 129. The facts of that case are exceedingly analogous to those of the present, with just the difference which I think to be vital. I quote again from Lord Herschell's opinion—"In that case there were two men working a machine, and it was the duty of one to start it and the other to do certain operations in connection with it. If there was an order given which the man was bound to conform to at all it was an order to put certain calico on to the machine, and that order being complied with and conformed to, the other person started the machine, and so the plaintiff

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was injured. It is necessary to state that in order to explain the judgment of the Chief-Justice. He says—'The injury resulted not from the directions given'—'order,' it should be—'but from the machine being set off too soon and at too great a speed.' Now, I must respectfully express my dissent from the view of the Lord Chief-Justice there indicated. Of course it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform; but supposing the plaintiff was bound to conform, and that the person to whose orders he was bound to conform in working a machine tells him to put his hand in a certain part of the machine, and then negligently starts it while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there."

The phraseology several times repeated of "a certain part of the machine" in the mouth of one so accurate in expression as Lord Herschell is inexplicable unless he meant to accentuate the necessary distinction between a general and a particular order.

I understand that my learned brother Lord Darling relies on the case of *Millward* v. *The Midland Railway Company*. The only question that could be raised in that case was whether there was evidence on which the verdict of the jury could be supported. In that case the plaintiff had been crushed by the falling of frames which he was helping to unload. I see no reason to doubt the verdict given, because it was quite fair to infer that the boy in helping to unload the frames stood at the particular place where he did by Hicks' order, and that the particular place was a place necessarily dangerous if the operation of untying was negligently performed, just as the plank was a place necessarily dangerous in *Wild* v. *Waygood*. Further, the negligence might have been held to be in the order itself—*i.e.*, to untie, without at the same time retying. Without the evidence, which the report does not give, it is speculation to guess which ground the jury may have gone on. But either was sufficient, and neither transgresses the canons I have laid down, or involves the wider proposition contended for by my learned brother. I do not find in the judgment of Mr Justice Mathew any trace of the wider proposition. If it is there, then it is overruled by *Lumsden* v. *Haynes*, which is a judgment of the Court of Appeal.

I do not think it is necessary to scrutinise the directions which the defenders' counsel asked the learned Judge to give. The second was obviously wrong, and indeed was given up by counsel at your Lordships' Bar. The first, in my view, was substantially right; although I think the word specific is not as good as particular; and, further, I think that the point to be left to the jury, after adequate explanation, should be in the words of the statute whether the injury did result from his having so conformed. But I think it unnecessary to say more, because if the views I have expressed are right there must be a new trial, both in respect that the jury were misled by the directions given them, and that there was in fact no evidence to support the verdict given.

LORD M'LAREN—I do not think that the verdict can be supported except on grounds consistent with the opinion of the presiding Judge as expressed in his direction to the jury, and if we think that the direction goes beyond the statute it follows that there should be a new trial.

I understand Lord Stormonth Darling's view of the statute leads to the result that where a workman is bound to conform to the orders of a superior workman the responsibility of the master is practically the same as if the man was acting under a superintendent. This is practically the effect of the theory of "implied order" as enlarging the effect of the statute.

Now, there are several answers to this interpretation of the statute. The first is that the words of the statute seem to have been carefully chosen and exclude this interpretation. The word "orders" is used, and that is a word of various meanings. It is sometimes used as implying co-ordination—that one man may be under the orders of another—but it is also used with the signification of a direction, and the words of the statute, "orders or directions," show that that is the true meaning. This is, I think, the proper answer; there must be an order given having the force of a direction in order to exclude the defence of common employment. Further, it is a condition that the injury must have resulted from obeying that direction, and of course if no direction is given this condition cannot exist.

Then, further, if you are to imply a direction (and I do not say there are no circumstances in which an order would have to be implied), the only direction I could imply in this case is that the inferior workman was to clear the machine, having due regard to his personal safety. I cannot imagine an order being implied to clear the machine without that proviso as to his safety being also implied. If there was negligence in the case I think it was partly the act of the pursuer himself. If the injury which he sustained had been to his hand my opinion might have been different, but the injury in this case was to his foot, and was due to the pursuer carelessly putting his foot in the way of the rollers instead of standing clear of the machine. It was also a negligent act to start the machine without warning; but then that was the negligence of a fellow-servant.

With all respect to my learned brother, I think the notion of an implied order obliterates the distinction between the superior

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workman and the superintendent. In my view, to say that there was an implied order is just another way of saying that no order was given, and that the accident was not the result of conformity to an order.

LORD KINNEAR—I also agree with all that your Lordship has said, and I have little to add. I think it is common ground that the action and the verdict can only be supported in virtue of the provisions of sub-section 3 of the first section of the statute. Now that sub-section has been judicially considered both here and more frequently in the courts in England, and I cannot say that there appears to me to be any doubt as to the true construction of it—at any rate with reference up to a certain point. It is well settled that to give an injured workman the benefit of this provision of the Act it is necessary that three things should be proved, viz., (1) that the injury was caused by the negligence of a servant in the service of the same employer; (2) that this negligent servant was one to whose orders the workman was bound to conform and did conform; (3) that the accident resulted from his having so conformed. The difficulty that has arisen in several other cases as well as in this one is as to the precise significance of the second and third of these propositions. The question comes to be what is meant by conforming to an order, and what is meant by proving that the injury resulted from so conforming. It is on these points that the present bill of exceptions has been brought.

Now, with regard to it, I must say that I think the presiding Judge was quite right in refusing to give the directions asked for. The second of these is no longer insisted in; and it appears to me to be directly contrary to the second condition of the statute, and also to embody a view that was expressly rejected in *Wild* v. *Waygood*, [1892] 1 Q.B. 781. The first seems equally objectionable on other grounds. It appears to me that it could not have enlightened the jury, and might indeed have misled them, unless the Judge had gone on to do what the direction does not ask him to do, and had defined by reference to the precise facts of the case what he meant by a "specific order" which the pursuer was bound to obey.

I must, however, state that, with the greatest respect to the presiding Judge, I have to assent to the view that has been expressed of the positive directions which were given by him to the jury. The leading proposition in law which he laid down comes to this, that if the jury were satisfied that the injury arose by reason of the negligence of Garrie, his negligence rendered the defenders liable in the circumstances. And then his Lordship went on to say what was meant by conforming to orders, and his statement was that if Garrie "was in a position of superiority to the injured workmen in the sense that the injured workman was bound to obey his orders, and that if the injured workman was in the course of doing his work, then he was in the sense of the statute conforming to these orders although the orders were not special." Now, I cannot agree with that expression of the law for the reasons your Lordship has given. I think it stops short of what the express words of the statute require. What I think they require I cannot put in better words than those used by Lord Herschell in *Wild* v. *Waygood* [1892]. 1 Q.B. 781, in a passage that has not been already quoted. After pointing out that it is not necessary that conformity to the order should be the *causa causans* of the injury, he goes on to say—"The negligence must be the *causa causans* of the injury, no doubt. That is what gives the right of action, and if the section had stopped there that is all that would have to be proved—viz., negligence, which was the *causa causans* of the injury to the person who suffered. But then the section does not stop there, and undoubtedly something more must be proved. It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform, but it must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed to the order." Now, it is this last proposition that ought to have been put to the jury here to enable them to arrive at a sound and intelligent verdict. They should have been asked to say not only whether the accident resulted from the negligence of Garrie, but also whether it resulted from the pursuer having conformed to an order of Garrie. The kind of order which Lord Herschell supposed is made quite clear in the passage from his judgment which your Lordship quoted towards the end of your opinion. On looking at the case cited by Lord Herschell—the case of *Howard* v. *Bennett*, 58 L.J. (Q.B.) 129, 60 L.J. 152—it seems clear that if the pursuer had been ordered by Garrie to stand in a certain position towards the machine which placed him in a position of danger if the machine started, and if Garrie, who was in charge of the machine, had then started it and caused the accident, all the conditions of the sub-section would have been complied with. If he were standing in a position of danger, then Garrie's negligence in starting the machine would be the *causa causans* of the accident, but the conforming to the order which placed him in that position of danger would also be a cause, though not so immediate, of the accident; and so the conditions of the statute would be satisfied by the accident being the result of Garrie's negligence and of the workman conforming to his order.

I also agree as to the necessity of having a particular order, in this respect that the injured man must at the time of the injury have been acting in obedience to an order. It is not enough to show that he was acting in the ordinary course of his work, unless it be shown that he was doing so in consequence of an order from the fellow-workman whose negligence caused the injury. I do not think it is necessary that the order

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should be given in explicit words, or at the precise time of the accident. I think it might be given without the use of express words at all; but it must be an order the conforming to which places the man in a position of danger, and the circumstances must be such that the negligence of the man giving it so operated as to cause the injury. Further, the order must be such that the pursuer would be entitled to say that it was not as a result of his own judgment and discretion that he got into the position of danger, but as the result of obedience to an order which he was bound to obey, whatever he himself might think was prudent.

I do not think it necessary to go further or deeper into the requirements of the statute. It is enough to say that I think the jury were not directed to a consideration of the main point in the case, inasmuch as they were not directed to consider whether the injury did or did not result from conformity to an order that was given by Garrie. There is enough of evidence, I think, to justify the jury in finding that the accident was caused hy the negligence of Garrie, and that the pursuer was bound to conform to Garrie's orders, but I do not think there is evidence that Garrie gave any order which placed the pursuer in a position of danger, and it follows that there can be no evidence that the injury resulted from the pursuer having conformed to such order.

Lord Stormonth Darling—As your Lordships are deciding that there is to be a new trial, it is undesirable to comment more than is absolutely necessary upon evidence which must be gone over again before another jury. But it is right that I should accept my share of responsibility in connection with the former verdict, for although your Lordships have not held that I ought to have given either of the directions which I was asked by the defenders' counsel to give, I cannot help feeling that the view which I then took, and still take, of the meaning of sec. 1 (3) of the Employers' Liability Act must have had something to do with the result. I need not say that, in so far as my view differs from that of your Lordships, I must necessarily hold it with great distrust. But I think I should be pusillanimous if I did not state it.

My view, then, shortly is this—The Act is a remedial Act, intended to mitigate in favour of workmen the severity of the doctrine of *collaborateur*. It should therefore, where any doubt exists, be read favourably to the application of the remedy which the Legislature intended. By the third sub-section the employer is made responsible to a workman for the negligence of a fellow-workman when three things combine—(1) that the injured workman is bound at the time of the injury to conform to the orders or directions of his fellow-workman; (2) that he does so conform; and (3) that the injury resulted from his having so conformed. The first thing to be proved is that the workman in authority was guilty of negligence; until that is done the other three conditions of liability do not arise. The negligence may be connected with the order which results in the injury, or it may not; it may be altogether unconnected with it, except in so far as an arbitrary connection is brought about by the statute requiring, on the one hand, that the injury should be caused "by reason" of the negligence, and, on the other hand, that the injury should "result" from conformity to the order. But essentially and in themselves the negligence and the order are quite distinct. You have first, then, to prove, under the Act, negligence on the part of the man whom I may call the "gaffer," and next you have to prove, apart from the Act, that the injured workman was not guilty of contributory negligence, for unless contributory negligence is negatived you need not even consider the question of conforming to orders. At the trial I made that clear to the jury, and I have no doubt they concluded, as they were entitled to conclude, that they were dealing with a negligent gaffer on the one hand—negligent in respect that he started this machine without warning—and a non-negligent labourer on the other—non-negligent in respect that he had no reason to expect that the machine would be started without warning. I do not understand your Lordships to hold that the jury in so holding were going against the weight of evidence, but if you do I respectfully dissent. Then came the crux of the case—Was the injured man acting under orders? It was not alleged that there was any specific order, or any order in words, or any order even by sign or gesture, to do the work of clearing off the shivers at any prescribed place or in any prescribed way. But I confess I thought, and I still think, that if the man was doing his appointed work in a way that had been followed before without objection on the part of the gaffer, and in which there was no neglect of his own safety so long as the machine remained at rest, then he was in a reasonable sense conforming to the gaffer's orders. I think that the requirement of conforming to orders was not intended to exclude the claim of an injured workman, innocent of any contributory negligence, merely because the negligent gaffer abstained from giving an express order as to where his subordinate was to stand, or how he was to do his work, at the moment of injury. I think that the requirement was intended to meet the case of a disobedient or heedless workman not doing his work, or doing it in a careless way.

In the case of *Millward*, 14 Q.B.D. 68, it was held that the order need not be in express words but might be implied from the circumstances; and the implied order there was merely to assist in the operation of unloading three iron frames from a van, one of which fell on the plaintiff and injured him, the untying of one of the strings which held the frames being done by the plaintiff himself without any express order from the vanman. L. J. Matthew (then J.) said, at the foot of p. 70—"The plaintiff

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was doing what, according to the evidence, it was the ordinary course of business for him to do in unloading similar goods. Is it necessary in order that the sub-section may apply that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?" To that question, when applied to the present case, I answer "no"; and it is because I fear that your Lordships' judgment in holding that the order must be as your Lordship has put it "particular" will be taken as meaning that the order must be express and precise, and the scope of the sub-section may thus be restricted within narrower bounds than the Legislature intended, that I venture to think that this verdict should stand.

I would only add that cases falling under this sub-section of the Employers' Liability Act must now be considered as involving too much metaphysical refinement to make them suitable for jury trial.

Counsel for the defenders, while admitting that following the general rule the expenses of the previous trial and the discussion on the motion for a new trial should be reserved, moved for the expenses of the discussion on the bill of exceptions. He referred to *Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262; and *Henderson* v. *Russell*, October 22, 1895, 23 R. 25, 33 S.L.R. 14.

The LORD PRESIDENT stated that the Court would consider the point, and subsequently, the case having been put out in the single bills, intimated that after consultation with the Judges of the Second Division, the opinion of the Court was that there appeared no reason to depart from the practice of the Court as established by the Second Division in *Macdonald* v. *Wyllie & Son*, that there was no distinction to be drawn between cases where a new trial was allowed on the ground that the verdict was contrary to evidence and cases where a new trial was allowed on a bill of exceptions, and that the expenses of the discussion on the bill of exceptions would accordingly also be reserved.

The Court allowed the exceptions, made the rule absolute, set aside the verdict, and granted a new trial, reserving all questions of expenses.

Counsel for the Pursuer—J. C. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Thursday, November 23.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

TURNER *v.* SELKIRK'S TRUSTEE.

Process—Reclaiming Note—Assignation of Decree—Assignee Sisted as Pursuer along with Original Pursuer—Interlocutor Pronounced on Withdrawal of Reclaiming Note.

The pursuer in an action for payment having obtained decree in the Outer House, the defender lodged a reclaiming note. Subsequently the pursuer assigned his right under the decree, and his assignee was sisted as pursuer along with the original pursuer.

The defender, desiring to withdraw his reclaiming note, moved the Court to refuse the reclaiming note. The original pursuer thereupon moved the Court to recal the interlocutor of the Lord Ordinary, and of new grant decree in similar terms in favour of his assignee.

The Court *refused* the reclaiming note.

In an action at the instance of James William Turner, writer, Greenock, against Thomas Landells Selkirk, chartered accountant, Glasgow, sole accepting trustee acting under the trust-disposition and settlement of the deceased James Landells Selkirk, concluding for payment of a sum of money, the Lord Ordinary (ARDWALL), on 2nd March 1905, decerned against the defender in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

On the same date the defender lodged a reclaiming note against this interlocutor.

Subsequently the pursuer assigned his right under the decree to one Farmer, and on 25th October 1905 Farmer was sisted as pursuer in the action along with the original pursuer.

On 23rd November, in the Single Bills, counsel for the defender stated that the defender desired to withdraw his reclaiming note, and moved the Court to refuse the reclaiming note and adhere to the interlocutor of the Lord Ordinary.

Counsel for the pursuer Turner moved the Court to recal the interlocutor of the Lord Ordinary, and of new grant decree in terms of the conclusions of the summons in favour of the pursuer Farmer.

The Court pronounced this interlocutor—

"The Lords, on the motion of counsel for the defender and reclaimer, refuse the reclaiming note for him, and decern: Find the pursuers entitled to additional expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for the Pursuer Turner—D. Anderson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Pursuer Farmer—J. A Christie. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Findlay. Agents—Gill & Pringle, S.S.C.

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Thursday, December 21.

FIRST DIVISION.

BLACKBURN *v.* SHARP & ANOTHER.

Process—Reclaiming Note—Competency—Expiry of Reclaiming Days on a Day on which Clerk's Office not Open—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 54.

Section 54 of the Court of Session Act 1868 enacts that where the leave of the Lord Ordinary has been obtained, "a reclaiming note, presented before the whole cause has been decided in the Outer House, may be lodged within ten days from the date of the interlocutor granting leave with one of the clerks of the Division of the Court in which the cause depends, without transmission of the process or any part thereof."

Where the time for lodging a reclaiming note under section 54 of the Court of Session Act 1868 expired on a day when the clerk's office was not open, *held* that the reclaiming note was competently lodged on the first day thereafter on which the clerk's office was open.

In an action pending in the Outer House the Lord Ordinary (DUNDAS) pronounced an interlocutory judgment on 6th December 1905, and on the same day granted leave to the defenders in the action to present a reclaiming note against this interlocutor.

The ten days within which, under the provisions of section 54 of the Court of Session Act 1868, a reclaiming note might be lodged expired on Saturday 16th December. The clerk's office in the Register House is not open on Saturdays.

The reclaiming note was boxed on Saturday, 16th December, but was not lodged till the following Monday.

On December 21 the reclaimers enrolled the case in the Single Bills for the purpose of moving that it be sent to the Summar Roll.

Counsel for the respondent moved the Court to refuse the reclaiming note as incompetent in respect that it had not been timeously lodged. He argued that the provisions of section 54 of the Court of Session Act 1868 requiring the reclaiming note to be lodged within ten days were imperative—*Ross* v. *Herde*, March 9, 1882, 9 R. 710, 19 S.L.R. 481; *Watt's Trustees* v. *More*, January 16, 1890, 17 R. 318, 27 S.L.R. 259.

The reclaimers argued that the cases founded on by the respondent had no application, as in both these cases there had been a failure to box within the required number of days from the date of the interlocutor reclaimed against. In this case the reclaiming note was timeously boxed on Saturday, 16th December, and it was not lodged on that day simply because the clerk's office was closed on Saturdays. That being so, the provisions of section 54 of the Act were sufficiently complied with by the reclaiming note being lodged on the first day thereafter on which the clerk's office was open—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5, 26 S.L.R. 11.

The Court repelled the respondent's objection to the competency of the reclaiming note.

Counsel for the Pursuer and Respondent—Blackburn. Agents—Mackenzie & Black, W.S.

Counsel for the Defenders and Reclaimers—W. T. Watson. Agents—Reid & Crow, Solicitors.

Tuesday, November 28.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

SAWREY-COOKSON *v.* SAWREY-COOKSON'S TRUSTEES.

Reduction—Minority—Misrepresentation—Essential Error—Trust Conveyance by Lady in Contemplation of Marriage—Averments—Relevancy.

In an action of reduction of a trust-conveyance raised by a lady with consent of her husband against the trustees, the pursuer averred that when she executed the deed she was a minor and knew nothing of business; that she was told by her father, whom she trusted, that she had better sign it, and that the deed was merely a testamentary arrangement of her fortune; that she now discovered that it was alleged to be an irrevocable deed under which she had tied up her whole fortune, even as against herself. *Held* that her averments were relevant.

International Law—Conflict—Trust-Deed Executed by Scotchwoman in intuitu of English Marriage—Deed in Scottish Form and Majority of Trustees Scottish—Revocability of Trust Conveyance—Power to Revoke.

Prior to her marriage a Scotchwoman executed a trust conveyance by which she conveyed her estate to trustees. The deed was executed *in intuitu* of an English marriage, but it was in Scottish form, and two of the three trustees nominated in it were Scotch. *Held* (1) that the question of the revocability of the deed fell to be determined by Scotch, and not by English law; but (2) that averments that "by the law of England the effect of marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed or settlement in contemplation of the marriage," were relevantly made by the defenders and must be the subject of inquiry.

Trust — Revocation — Married Woman—Deed Executed in Contemplation of Marriage—Subsequent Marriage—Power to Revoke.

In contemplation of marriage a lady executed a trust conveyance conveying

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her estate to trustees. Subsequent to her marriage she claimed right to revoke it. *Held* that on the authority of *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267, had she remained a Scotchwoman she would have been entitled to revoke it. *Watt* v. *Watson* (*cit. sup.*) commented on.

International Law—Conflict—Deed Executed by Lady Domiciled in England Ratifying Trust-Deed Executed by her in Contemplation of Marriage, and when Domiciled in Scotland—Revocability—Averment of English Law—Relevancy.

A lady, subsequent to her marriage to a domiciled Englishman, executed a ratification of a Scottish trust-conveyance granted by her in contemplation of marriage, and when she was domiciled in Scotland. She subsequently claimed right to revoke the ratification. *Held* (1) that the question of the revocability of the ratification was to be determined by English law, and (2) that averments to the effect that by the law of England the ratification was irrevocable were relevantly made in defence, and must be the subject of inquiry.

Reduction — Ratification by Married Woman with Consent of her Husband of Conveyance Executed by her when Unmarried—Misrepresentation—Error—Concealment—Relevancy.

A lady having applied to the trustees acting under a trust conveyance granted by her prior to marriage to pay her part of the trust funds, the trustees refused to do so unless she granted a ratification of the trust conveyance. After negotiations in which she had independent legal advice, and in which the parties dealt with each other at arm's length, she executed the ratification. In a subsequent action, in which she claimed to reduce the ratification, she averred that she had signed it under essential error; that the trustees had failed to inform her that the trust-conveyance was revocable; and that she had been induced to execute the ratification by misrepresentations on the part of the trustees, and in consequence of statements made on their behalf that it was truly of the nature of a receipt. *Held* (*rev.* the judgment of Lord Ardwall, Ordinary) that the pursuer's averments were irrelevant.

This was an action at the instance of Mrs Catherine Anna Stirling Sawrey-Cookson, wife of James Freville Rawlinson Sawrey-Cookson, and residing with him at the Old Palace, Chippenham, Wiltshire, and the said Mr Sawrey-Cookson as her curator and administrator-in-law and for his own interest, against Thomas Archibald Warnock of Portaferry, County Down, Ireland, and Mark Bannatyne, solicitor, 145 West George Street, Glasgow, the surviving trustees acting under a trust conveyance and settlement granted prior to her marriage by Mrs Sawrey-Cookson (then Miss Stirling), with the special advice and consent of her father, the deceased Richard Stirling, dated 5th June, and recorded in the Books of Council and Session 12th July 1890.

The summons concluded for reduction of (1) the said trust conveyance and settlement, and (2) a receipt and ratification thereof dated 17th March, and recorded in the Books of Council and Session 19th April 1894, granted by Mrs Sawrey-Cookson, with consent of her husband, in favour of the trustees; or otherwise for declarator that the trust conveyance and settlement was revocable by Mrs Cookson with her husband's consent.

Mrs Cookson, prior to her marriage, resided with her father in Melville Street, Edinburgh, and had a Scottish domicile. Mr Cookson was at the date of the marriage, and still was, a domiciled Englishman. There was no issue of the marriage in existence, and the capital funds administered by the trustees amounted to upwards of £15,000.

Mrs Cookson, who was then nineteen years of age, by the trust conveyance and settlement in question, in contemplation of her approaching marriage, assigned to the trustees therein mentioned her whole means and estate (excepting as therein specified), reserving power to herself at any time to ask and receive from the trustees, with their consent and approval, on her own receipt, a payment or payments out of the capital of her estate of a sum or sums not exceeding in all £2000, as her own absolute property. The purposes of the trust were briefly these—Payment to the pursuer Mrs Sawrey-Cookson of an alimentary liferent of the free yearly income; payment of a similar liferent to her husband in the event of his survivance; payment of the capital on the death of the survivor of the spouses to the children of the marriage, and failing children, payment of the capital on the death of Mr Cookson, should he survive his wife, to the heirs and representatives of Mrs Cookson, or in the event of her survivance to herself. Mr Sawrey-Cookson was not a party to the said trust conveyance, and it was averred by the pursuers that he was not aware of its existence until some time after the marriage.

With regard to the execution of the trust conveyance and settlement by Mrs Sawrey-Cookson, the pursuers averred:—"(Cond. 6) . . . Some little time before the execution of the deed the pursuer Mrs Sawrey-Cookson was told by her father that it was usual and proper for her prior to her marriage to make what he termed her 'will,' and shortly thereafter he further informed her that a deed for that purpose had been prepared by his agents, and would be presented for her signature. No explanation whatever was given to the pursuer Mrs Sawrey-Cookson of the nature and effect of the deed so prepared beyond this, that, as above-stated, she had then been led by her father to believe that it was of the nature of a testamentary settlement. On 5th June 1890 the pursuer was taken by her father to the office of Messrs Hamilton, Kinnear, & Beatson, W.S., Edinburgh,

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where she and her father executed the deed in presence of two of the staff in the office. The pursuer signed said deed in obedience to her father's wishes and at his request. Prior to signing the same the pursuer had not seen the deed or any draft thereof, or been given any opportunity of examining or considering its terms, or of advising with others as to the propriety of her signing the same. The deed was not read over to her at the time of its execution, and neither then nor at any time prior thereto was the nature and effect of said deed explained to her. The pursuer Mrs Sawrey-Cookson, who was, as before stated, then in minority, was not represented by any independent legal adviser, and at the time she executed the said deed was in complete ignorance of its true nature and effect. Said deed was signed by her in the erroneous belief, induced by the representation of her father, as above stated, that the deed was merely of a testamentary character. The pursuer was not aware that said deed was of the nature of a matrimonial trust intended to take immediate effect, and to be irrevocable, and its proposed purpose and effect was not explained to, but was on the contrary concealed from, her by her father and those advising in the matter. Had the true character of the deed been explained to the pursuer she would not have signed the same." The defenders in answer averred that Mrs Cookson was at the time of executing the deed fully aware of its purpose.

With regard to the execution of the receipt and ratification, the pursuers averred:—"(Cond. 8) In or about May 1892 the pursuer Mrs Sawrey-Cookson, in terms of the reserved power in her favour contained in the deed, requested and obtained from the trustees payment of a sum of £500, and thereafter she on various occasions made application to the trustees for further payments up to at least the limit of £2000 prescribed by the deed. These applications were uniformly refused. In or about the beginning of 1894, owing to expenditure on a new residence and other causes, the pursuer Mrs Sawrey-Cookson's financial needs became pressing, and some creditors were threatening action. She again appealed to the trustees, who declined to consider the same unless she and her husband were prepared to ratify the trust deed. To this course the pursuer Mrs Sawrey-Cookson declined to assent, and certain correspondence on the subject then ensued between her then solicitors . . . and Messrs Petch & Smurthwaite, solicitors, London, acting for Messrs Bannatyne on behalf of the trustees. The trustees however adhered to the position that ratification of the deed must precede any capital payment by them to Mrs Sawrey-Cookson. It was represented to the pursuer Mrs Sawrey-Cookson that any action at her instance to enforce her demand against the trustees would be most prejudicial to her father's health, and also that on her signing the document in question all her then debts would be settled by the trustees. The pursuer Mrs Sawrey-Cookson throughout protested to her father and to the defenders and their advisers that she was being coerced into ratifying the trust deed, and that undue advantage was being taken of her and her husband's then financial straits. She was informed that bankruptcy proceedings would issue against her at the instance of creditors, and that no alternative was open to her other than compliance with the trustees' conditions. The pursuer Mrs Sawrey-Cookson was further at the time in a weak state of health and suffering from a severe mental strain owing to the embarrassed state of her affairs. Ultimately, under the pressure brought to bear on her by the trustees and those representing them, and in view of her urgent financial difficulties, the pursuer Mrs Sawrey-Cookson and her husband were forced to comply with the trustees' demand that she should confirm the trust deed, and the receipt and ratification hereinafter mentioned was accordingly signed. . . . . (Cond. 10) Said receipt and ratification was granted by both pursuers, as the trustees were well aware, in consequence of the financial pressure to which they were at the time subjected. When said document was first presented to the pursuer Mrs Sawrey-Cookson for signature on 16th March 1894 she declined to sign it on the ground that the trustees were, in the circumstances, putting undue pressure upon her. . . . The pursuer Mrs Sawrey-Cookson was apprehensive that by signing said receipt and ratification her right to reduce the trust conveyance on the grounds before mentioned might be in some degree prejudiced, and it was mainly for this reason that she declined to sign the document when first presented for her signature. She subsequently however had an interview with Mr Smurthwaite, who was acting for the trustees, and who is her brother-in-law. Mr Smurthwaite stated to the pursuers that the document was truly only of the nature of a receipt, and was only required by the trustees as 'evidencing her good faith,' and that her father was prepared to assist solely on the condition that she signed the same. Said statements were in point of fact untrue. In consequence of said statements, and of the pressure brought to bear on her, the pursuer Mrs Sawrey-Cookson was however induced to sign the document. . . . When signing said document she stated that she did not do so of her own free will but 'under duress.' The said document contained no recital of the clauses of the trust-deed, and in signing it the pursuer's husband understood that he was merely as his wife's guardian signifying his approval of the monetary transaction then in hand. . . . The trustees and those advising them were, it is believed and averred, at the time fully cognisant that it was within the power of the pursuer Mrs Sawrey-Cookson to recall the trust-deed, but, contrary to their duty, they concealed this both from the pursuers and their advisers. Neither the pursuer Mrs Sawrey-Cookson nor her husband were at this time aware, nor had they been advised, that it was within Mrs

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Sawrey-Cookson's power, and that she was legally entitled, to revoke the trust-deed, and they both signed said document in complete ignorance of their legal rights, and in particular of the pursuer Mrs Sawrey-Cookson's right to revoke said trust-deed. Had the pursuer Mrs Sawrey-Cookson and her husband been aware that said trust-deed was revocable they would have declined to sign the deed of ratification. . . . Said receipt and ratification was executed by the pursuers *sine causa* in ignorance of their legal rights, and under essential error as to its import and effect.

. . . . . .

. . *With reference to the defenders' averments added by way of amendment, it is denied that the law of England is to the effect stated, or at least has any such effect in cases where the deed sought to be ratified either contains a clause of revocation or is otherwise revocable at the will of the granter, or is truly testamentary in character.*" (The words in italics were added by way of amendment in the Inner House.)

In answer the defenders stated that the pursuers in granting the ratification were fully aware of all their rights and had an independent legal adviser. They "explained that the trust-deed was executed by the pursuer Mrs Cookson in contemplation of her marriage with a domiciled Englishman, and that the revocability of said deed falls to be decided by the law of the matrimonial domicile—*videlicet*, the law of England, according to which a unilateral settlement made by a wife prior to and in contemplation of marriage is after the marriage irrevocable by either or both of the spouses. *In any event, on her marriage and consequent acquisition of an English domicile, Mrs Cookson by the law of that country became incapable of affecting or revoking the said trust deed, either with or without the consent of her husband. By the law of England the effect of marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed of settlement in contemplation of the marriage.* The trust deed by Mrs Cookson thus became irrevocable on her marriage. Further, the meaning and effect of the receipt and ratification fall to be decided by the law of England, which was the *lex domicilii et loci actus*, and according to which a voluntary or contractual postnuptial settlement by one or both, respectively, of the spouses, or a postnuptial settlement in pursuance of ineffectual antenuptial marriage articles, are all irrevocable at the instance of either or both of the spouses. The said ratification was thus irrevocable." (The words in italics were added in the Inner House.)

The pursuers pleaded — "(1) The writs under reduction having been executed under essential error as to their import and effect, as condescended on, the pursuers are entitled to decree of reduction as craved. (2) The writs under reduction having been executed under essential error as to their import and effect, induced by misrepresentation and concealment as condescended on, the pursuers are entitled to decree of reduction as craved. (4) The pursuers are entitled to decree of declarator as craved, in respect—(*a*) said trust conveyance and settlement was and is revocable by the pursuer, at least with her husband's consent; and (*b*) the nature and effect of said trust conveyance and the pursuer's right to revoke the same were in no wise affected *by Mrs Cookson's marriage or by her consequent acquisition of an English domicile, or* by the granting of the said receipt and ratification." (The words in italics were added in the Inner House.)

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (3) The defenders are entitled to absolvitor, in respect that (*a*) the trust conveyance and settlement having been executed by the pursuer Mrs Cookson in contemplation of her marriage with a domiciled Englishman, the revocability thereof falls to be decided by the law of England, according to which it is irrevocable at the instance of the pursuers; (*b*) *separatim, in respect that the capacity of the pursuer Mrs Cookson to revoke said trust-deed and conveyance falls to be decided by the law of England, and that according to that law she is incapable of revoking said deed either with or without the consent of the pursuer Mr Cookson;* (*c*) in any event, the receipt and ratification having been executed in England by spouses domiciled in England, falls to be construed and given effect to according to the law of England, and accordingly the receipt and ratification is irrevocable, and renders said trust conveyance and settlement irrevocable at the instance of the pursuers." (The words in italics were added in the Inner House.)

On 14th June 1905 the Lord Ordinary (ARDWALL) pronounced this interlocutor—"Finds (1) that the trust conveyance and settlement libelled, taken by itself, is revocable by the pursuer Mrs Sawrey-Cookson; but (2) that standing the receipt and ratification also libelled, the pursuers are barred from reducing or revoking the said trust conveyance; (3) that the pursuers allege that they are entitled to have the said receipt and ratification reduced, as having been executed under essential error as to its import and effect, induced by misrepresentation and concealment: Therefore, before further answer, allows to the parties a proof of their averments relating to (*First*) the granting and execution of the receipt and ratification under reduction; and (*Second*) the law of England applicable to both and each of the deeds under reduction." . . .

Opinion.—"In this action Mrs Catherine Anna Stirling or Sawrey-Cookson, with consent of her husband, and he for his own interest, seek to reduce a trust conveyance executed by Mrs Cookson before her marriage, and a receipt and ratification granted by Mrs Sawrey-Cookson and her husband on 17th March 1894; alternatively, declarator is asked that the said trust conveyance is revocable by Mrs Sawrey-Cookson; that she is entitled to revoke it; and that upon

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such revocation the defenders, who are the trustees under the trust conveyance and settlement, are bound to denude of the whole trust-estate in favour of Mrs Sawrey-Cookson.

"The first question argued to me was whether the trust-conveyance executed by Mrs Sawrey-Cookson was revocable by her prior to the execution of the receipt and ratification under reduction. It was conceded by counsel for the defenders that if that question is to be judged by the law of Scotland, the present case is ruled by the decision in *Watt* v. *Watson*, 16th January 1897, 24 R. 330, but he maintained that as the trust conveyance and settlement was truly a matrimonial deed, in respect that it bore to be executed in view of an intended marriage, and contained provisions in favour of the granter's future husband and possible children, the question of its revocability fell to be decided by the law of the matrimonial domicile; that the matrimonial domicile admittedly was English, and that by English law such a deed was not revocable by either or both of the spouses. I am of opinion that the question of the revocability of the deed must be judged of by the law of Scotland, that being the law by which it was intended at its execution by the parties that the deed should be governed. Several considerations support this view. (1) The deed itself is in Scottish form, was executed in Scotland by a domiciled Scotchwoman, with the consent of her father as her curator, who was also domiciled in Scotland; (2) it appears to have been intended that the trust should be managed in Scotland by the family law-agent, who was nominated one of the trustees, and power to employ whom as law-agent is specially given in the trust-deed; (3) by the second and third purposes of the trust, alimentary liferents are given, and such provisions are ineffectual according to the law of England—see Lord Shand's opinion in *Corbet* v. *Waddell*, 7 R. 208; (4) in the event of there being no children of the marriage, and of the truster dying intestate, the fee of the trust estate is destined 'to my own legal representatives whomsoever according to the law of Scotland'; (5) further, there is a declaration that the provisions conceived in favour of the husband and children of the marriage are to be in full of all claims arising to them, whether under the Married Women's Property (Scotland) Act 1881, or under any other statute or at common law, and further in the same clause, all of which is conceived in terms applicable to a Scotch trust, the *jus mariti* and right of administration and curatorial power of husbands is excluded from provisions descending to females.

"It was ably argued for the defenders that while the interpretation and effect of the deed itself might fall to be judged of according to the law of Scotland, yet the rights of the parties interested in the deed to revoke it fell to be regulated by the law of the matrimonial domicile. I cannot assent to this reasoning. I consider that the revocability of a deed must be judged of by the law which regulates the legality and operation and effect of the deed in other respects, and so judging the matter I am of opinion that the deed of conveyance was revocable. (See *Corbet* v. *Waddell*, quoted *supra*, and *in re Fitzgerald*, L.R. 1904, 1 Ch. D. 573, and *Duncan* v. *Canon*, 18 Bevan, 128.)

"The next point for decision is as to the effect of the receipt and ratification under reduction. It was maintained for the pursuers that this deed must follow the same rule as the trust conveyance, it being an ancillary deed to it, and indeed primarily, a receipt for moneys payable under it, and the case of *Duncan* v. *Canon*, above cited, and *Tweedie* v. *Maunder*, L.R., 1901, 1 Ch. D. 547, were referred to. I cannot assent to this argument. The deed in question is not only a receipt but a ratification. The following is the clause of ratification:—'Further, I, with consent and concurrence of my said husband, and he for all right competent to him in the premises, do hereby not only ratify, adopt, and confirm the said trust conveyance and settlement, and the whole heads, clauses, and provisions therein contained, but also ratify and approve the whole actings of the said trustees thereunder.' The deed contains a clause of registration, and is duly signed by both pursuers and authenticated in the English form. I accordingly consider this deed a valid ratification and adoption by both the spouses of the trust conveyance, and it certainly would be a novel doctrine to hold that all deeds of ratification were subject to revocation or reduction in the same way as the deeds which they purport to ratify. It would follow, of course, from such a doctrine that ratification of one deed by another would be impossible.

"It was practically admitted by the counsel for the pursuers that this deed, if allowed to stand unreduced, would be a complete answer to an action of reduction at the instance of the pursuers of the original trust conveyance, and, as already stated, I think that standing unreduced it is equally valid as a bar to revocation by the pursuers or either or both of them.

"The pursuers maintained further that the receipt and ratification, apart from its ancillary relation to the other deed, is itself revocable by the law of Scotland, just as it would have been if it had been a repetition *in extenso* of the original trust conveyance which it bears to adopt and ratify.

"I am of opinion, on the contrary, that it is irrevocable. It must be noticed that the trust conveyance is adopted not only by the wife but by the husband, and I think that this amounts in law to the execution of a postnuptial contract, for reading the two deeds together I think that is the legal result which must be arrived at. Now, even supposing the deeds to be judged of by the law of Scotland, I think that upon the authority of such cases as *Allan* v. *Kerr*, 8 Macph. 34; *Low's Trustees*, 5 R. 185; and *Peddie*, 18 R. 491, such deed being a reasonable marriage contract is not revocable at the

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instance of either or both of the spouses. But I consider further that the receipt and ratification being a matrimonial deed executed in England *stante matrimonio* must be given effect to as an English deed, and according to the averments of the defenders, which will require to be proved, not being admitted, such a deed is irrevocable.

"The pursuers, however, maintain that they have set forth a relevant case for reduction of the said ratification on the ground of essential error as to its import and effect, induced by misrepresentation and concealment on the part of the defenders. I must say that I have difficulty in holding that a relevant case has been stated, but having regard, particularly, to the averments regarding Mr Smurthwaite's intervention, I am not prepared to dispose of the case without a proof. In the view I have taken of the case, there seems no reason for a proof in support of the reductive conclusions so far as affecting the trust conveyance. As there requires to be a proof regarding the law of England bearing on the question of revocation of the receipt and ratification, I think it as well that there should be also a proof regarding the law of England as regards the revocability of the trust conveyance; such proof should not add much, if anything, to the expense, and it would obviate the necessity for further proof in the event of my first finding being hereafter held to be erroneous."

The pursuers reclaimed, and argued—Both the trust conveyance and the ratification were revocable. The ratification was purely ancillary to the principal deed, and fell to be construed by the same law. The ratification was not a deed between the spouses, but a receipt by the lady to certain trustees. The main cause for which it was granted was to secure the trustees. It was prepared in Scotland, was in Scotch form, and bore to be executed in virtue of a reserved power in a Scotch deed. It ought therefore to be construed according to the law of Scotland—*Duncan* v. *Canon*, 1853, 18 Beav. 128, *aff.* 1855, 7 De G. M. & G. 78; *De Nicols* v. *Curlier*, [1900] A.C. 21. The effect of the ratification was to confirm the deed as it was—*i.e.*, subject to revocation—and no amount of ratification could render such a deed irrevocable, or defeat the inherent power of the spouses to revoke it. The ratification was not a postnuptial contract, but even if it were it would be revocable as a donation to the husband, who gave nothing in exchange for it. There was no issue of the marriage in existence, and therefore no *jus quæsitum*. In the case of *Low's Trustees*, referred to by the Lord Ordinary, the deed was a unilateral one by the husband, equivalent to a reasonable provision, and therefore irrevocable. The pursuer was entitled to an issue of essential error. As to Mrs Cookson's alleged incapacity by the law of England to revoke the trust conveyance, the following authorities were referred to—*Duncan* v. *Canon* (*cit. sup.*); *Peillon* v. *Brooking*, 1858, 25 Beav. 218; *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Trocedie* v. *Maunder*, [1901] 1 Ch. 547; *Bald* v. *Bald*, 1897, 76 L.T. 462.

Argued for respondents — The trust conveyance fell to be governed by English law. That was the intention of parties. The deed was made in contemplation of marriage, and in view of the fact that after marriage the parties would be domiciled in England. By the law of England the deed was irrevocable. After her marriage Mrs Cookson was domiciled in England, so that the *lex loci contractus* and the *lex loci domicilii* were the same. The law of England therefore determined her capacity to revoke the trust conveyance—*Cooper* v. *Cooper*, February 24, 1888, 15 R. (H.L.) 21, 25 S.L.R. 400. By the law of England the trust conveyance was irrevocable, and therefore Mrs Cookson after her marriage was not entitled to revoke it—Westlake, Private International Law, 45; Dicey, Conflict of Laws, 543, rule 146; *Guepratte* v. *Young*, 1851, 4 De G. & S. 217. The present case was more in the category of *Lashley* v. *Hog*, [1804] 4 Paton, 581, than of *De Nicols* v. *Curlier* (*cit. sup.*). Reference was also made to *Fitzgerald*, [1904] 1 Ch. 573; and *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200, 17 S.L.R. 106. The ratification adopted and rendered contractual a deed which was previously not contractual. The trust conveyance and the ratification read together were equivalent to a postnuptial settlement in the law of Scotland, and as there was nothing unreasonable about it it was irrevocable—Fraser, H. & W. ii, 1503; *Allan* v. *Kerr*, October 21, 1869, 8 Macph. 34, 7 S.L.R. 9; *Peddie* v. *Peddie's Trustees*, February 6, 1891, 18 R. 491, 28 S.L.R. 336. All that was necessary in order to render the trust conveyance contractual was the husband's consent. That was given in the ratification, and therefore standing the ratification the trust conveyance was irrevocable—*Barras* v. *Scottish Widows' Fund Society*, June 27, 1900, 2 F. 1094, 37 S.L.R. 831. There were no averments that the pursuers were induced to grant the ratification by misrepresentation. Mere averments of essential error were not enough—*Gray* v. *Binny*, December 5, 1879, 7 R. 332, 17 S.L.R. 210; *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469. Mrs Cookson had a separate legal adviser. That was an element to be considered — *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, at p. 142, 30 S.L.R. 530. Moreover, the parties were then dealing at arm's length, so that concealment was out of the question. In any event, the defenders were entitled to a proof of their averments as to the law of England.

At advising—

LORD PRESIDENT—Miss Stirling, a Scottish lady who had a certain amount of fortune, became engaged to an Englishman of the name of Sawrey-Cookson. Acting under the advice of her father, she, before she was married, executed a trust conveyance and settlement which dealt with her property. I do not need for the purposes

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of this case to go minutely into the provisions of the trust conveyance and settlement further than to say, in popular language, that it tied her fortune up and prevented her husband having access thereto. She afterwards married Mr Sawrey-Cookson, who, as I have already pointed out, was an Englishman. Under the provisions of the trust conveyance and settlement there was a power in the trustees, upon the demand of Miss Stirling, to give her a certain sum of money, limited, I think, to £2000, out of the property. The trustees were not in any way bound to do so unless they wished. The spouses seem at an early period to have got into pecuniary difficulties, and accordingly Mrs Cookson made a requisition to the trustees to advance her out of this money a sum amounting to not more than £2000. The trustees—I am going rapidly over the facts of the case at this moment—were unwilling to do so, except upon condition that she and her husband should execute a ratification of the trust conveyance and settlement which she had made before she was married. Upon these terms a certain amount of money was paid to Mrs Cookson, and she and her husband gave a receipt for the money she received, and executed a ratification of the trust conveyance and settlement. The spouses seem again to have been in need of money, and the present action is a demand by Mrs Cookson, with the consent of her husband, upon the trustees to denude of the whole trust estate, upon the ground that it is revocable at the instance of Mrs Cookson and has been so revoked. The action is defended by the trustees upon the ground that they have no power to denude in the way asked.

The action is supported not only by certain views of the law applicable to the case, but also by averments to the following effect:—The pursuer says that as regards the original trust conveyance and settlement she was really misled by her father and his advisers, that she was at that time a girl of seventeen or eighteen, and did not understand business; that she was led to believe that all that she was doing in executing this trust conveyance and settlement was to make certain testamentary arrangements as to her property; and that it was never explained to her, and she did not know, that she was in any way entering into an irrevocable settlement of her property. There is the further averment that, as regards the receipt and ratification which I have already referred to, she also was induced to execute it by material misrepresentation, and that she, in giving her consent to that deed, was under essential error. The Lord Ordinary has made certain findings upon this matter, and he has allowed parties a proof of their averments relating to (first) the granting and execution of the receipt and ratification under reduction, and (second) the law of England applicable to both and each of the deeds; and this reclaiming note is brought against that judgment.

I think it most convenient for the lucid treatment of this case not to proceed directly to the Lord Ordinary's grounds, but to take the case, if I may say so, chronologically, in the order of the incidents which happened. Now, the first point in the case is the execution of the trust conveyance and settlement by this lady, when she was an unmarried Scottish girl under age. I do not doubt that the averments here of the facts are relevant to support the reduction of the deed, because I think if the lady says—"I was a girl of seventeen or eighteen and naturally knew nothing of business, and I was told erroneously by my father, whom I trusted, and his advisers, that I had better sign a certain deed, and I was assured that the deed was merely a testamentary arrangement of my fortune, whereas I now discover that it is alleged to be an irrevocable deed under which I have tied up my whole fortune even as against myself"—I do not doubt that is a relevant ground for reduction; and I do not imagine that in that matter the Lord Ordinary differs from the conclusion that I have arrived at, although in the view he comes to take of the second question that becomes immaterial.

Of course that matter can only be inquired into by proof; but passing from that, and assuming for the moment that the proof fails upon that subject and that consequently the deed is not reduced, the first question that arises is—What class of deed is this? It was contended by the defenders in this case that because this lady was going to marry an Englishman, and the deed was executed *in intuitu* of an English marriage, it must be construed as an English deed. I am satisfied that that view is erroneous. I think it is quite plain that this deed is a Scottish deed, and must be so construed. The structure of the deed is Scottish,—there is, for instance, a clause of registration, which is undoubtedly Scottish, the trustees are Scottish, and it seems to me that the whole idea of the deed leads to the view that it should be Scottish, because if there was any idea at all in that girl setting her hand to a deed, not of the class of a marriage contract, but of a settlement of her whole estate in view of marriage, the object must have been that her advisers wanted to keep her estate under the domination of a trust which should be under the law to which they were accustomed, and not allow her estate to be dealt with by a law which to them was unfamiliar. Therefore I have no hesitation in coming to the conclusion that the first deed was a Scottish deed. Now, being a Scottish deed there can, I think, be no doubt that if this lady had remained a Scottish woman the deed would have been itself a revocable deed, because that is the effect of the decision of a Seven Judges case —*Watt* v. *Watson*, reported in 24 R. p. 330. There was a division of opinion in *Watt* v. *Watson*, and it obviously is a case in which there is a good deal to be said on both sides; but I do not think your Lordships can have any doubt that the point was deliberately raised and determined in *Watt* v. *Watson*, and if *Watt* v. *Watson* is wrong the only tribunal that can put it

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right is the House of Lords. Therefore I am clearly of opinion that, had that lady remained a Scotswoman, there is no doubt that it would have been in its essence a revocable deed. On that point the Lord Ordinary is of the same opinion.

Now, the next event that happened was the marriage, and according to well-known principles of law, as to which there is no dispute, the lady on marrying a domiciled Englishman became a domiciled Englishwoman. The Lord Ordinary has dealt with this matter thus:—After having stated that the deed was a Scottish deed, he says—"I consider that the revocability of the deed must be judged of by the law which regulates the legality and operation and effect of the deed in other respects, and so judging the matter I am of opinion that the deed of conveyance was revocable." As regards the proposition his Lordship there lays down I have no fault to find with it. I have already said the deed was Scottish, and as such, under *Watt* v. *Watson*, it had the quality of revocability, and in the state of the record at that time I do not wonder that his Lordship did not go further; but in the discussion that took place before your Lordships it became apparent that the defenders here really wanted to put forward a plea for which at that time they had no materials on the record. But they amended their record in the course of the discussion, and they amended it in this wise, that they put in a perfectly distinct averment that by the law of England a married lady has no capacity to revoke a deed of this sort. I humbly think that that is a good plea. Of course I am not giving naturally any opinion as to whether the substratum of fact upon which it is founded is a good substratum or not, but what the defenders have now averred is this—"In any event on her marriage and consequent acquisition of an English domicile Mrs Cookson by the law of that country became incapable of affecting or revoking the said trust deed either with or without the consent of her husband. By the law of England the effect of a marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed or settlement in contemplation of the marriage." I think, upon the principles that were laid down by the House of Lords in the well-known case of *Cooper*, that is a good plea, but at the same time it is a plea which I think we must be very careful not to allow to stray beyond its own province. The question is not whether, according to English law, a married lady cannot revoke a settlement which she has made before marriage; by the English law it may very well be that that is so. But you have to press the matter further, you have to find out whether, if that is the English law, it depends upon non-revocability in the deed or want of capacity in the revoker. I think I can best make clear what I am saying by taking an illustration from the Scottish law. I take two cases. I take *Watt* v. *Watson* and I contrast *Watt* v. *Watson* with *Menzies* v. *Murray*. Now, it is to be observed that the capacity of the lady in *Watt* v. *Watson* and *Menzies* v. *Murray* was exactly the same. They were both married ladies, and they were both married ladies proposing to revoke antenuptial deeds *stante matrimonio;* but in *Watt* v. *Watson* it was held that the revocation was good, and in *Menzies* v. *Murray* it was held that the revocation was bad. That shows clearly that the point in these cases was that the deed in the case of *Watt* v. *Watson* had the quality of revocability, and that in *Menzies* v. *Murray* it had the quality of irrevocability. Therefore it seems to me that the question which is to be put to the English lawyers in this case is not whether, if you found a deed of this class in England, could a married woman revoke it—because I think that would be begging the question—but it is this—supposing in England a single woman had executed a settlement of her fortune and had put in it an express clause of revocation, so that the deed upon the face of it bore that it was a revocable deed, then, according to English law, would the effect of her marriage be such that she was incapable of executing the power of revocation which the deed had given her, and which had she remained single she could have exercised. Still to that limited effect I think it is a good plea. For the way the Lord Ordinary has dealt with it I do not blame his Lordship, because I do not think the pleadings were in a position in which he could have taken up the plea in the sense in which I have taken it up.

Now I pass to the next phase. The next thing is that these parties got some money from the trustees, they signed a receipt, and they executed a ratification. By this time they were, of course, a domiciled Englishman and Englishwoman, and therefore I think it is abundantly clear that this deed, whatever it is, must be judged of by the law of England. Now, there is quite a good averment here that by the law of England such a ratification is first of all a good ratification—in other words, that its effect is to ratify and make good something that was revocable before, and it is also said that by the law of England the ratification would be itself irrevocable. I think that is a good plea, and the Lord Ordinary on this matter is of the same opinion. But it is further said that upon the facts this deed of receipt and ratification is itself reducible, and the Lord Ordinary upon that matter has allowed a proof. That is the part of the case in which I disagree with the Lord Ordinary. I do not think that the averments which are here made are relevant to allow a proof for the reduction of the second deed. They are very different averments, and necessarily so, from the averments which I have already held relevant upon the first deed. In the first deed you have the case of a girl seventeen or eighteen years of age knowing nothing about business, naturally depending upon her father and his advisers, and practically signing anything that is put before her, and it may very well be that she

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signed it under truly essential error as to the nature of the deed which she was signing, such essential error being induced by the persons who got her to sign it. But what is the state of the facts when we come to the second deed. By this time the lady was of full age and married to an impecunious husband, who obviously had very direct views as to the ways of raising money. They pressed the trustees again and again to give them money out of the trust funds. I am only here going upon her own statements, and not upon any statements of the defenders. The trustees at once took the position that they would not give them any money—for everybody admits that they were not bound to do so—unless the spouses would execute a ratification of the original trust conveyance. For instance, in Cond. 8 the pursuers say this—"In or about May 1892 the pursuer Mrs Sawrey-Cookson, in terms of the reserved power in her favour contained in the deed, requested and obtained from the trustees payment of a sum of £500, and thereafter she, on various occasions, made application to the trustees for further payments up to at least the limit of £2000 prescribed by the deed. These applications were uniformly refused. In or about the beginning of 1894, owing to expenditure on a new residence, and from other causes, the pursuer Mrs Sawrey-Cookson's financial needs became pressing, and some creditors were threatening action. She again appealed to the trustees, who declined to consider the same unless she and her husband were prepared to ratify the trust deed. To this course the pursuer Mrs Sawrey-Cookson declined to assent, and certain correspondence then ensued between her then solicitors and the solicitors acting for the trustees. The trustees, however, adhered to the position that ratification of the deed must precede any capital payment by them to Mrs Sawrey-Cookson." After a long story about the negotiations, which I pass over, the pursuers go on to say—"Ultimately, under the pressure brought to bear on her by the trustees and those representing them, and in view of her urgent financial difficulties, the pursuer Mrs Sawrey-Cookson and her husband were forced to comply with the trustees' demand that she should confirm the trust-deed, and the receipt and ratification hereinafter mentioned was accordingly signed."

In view of that description of what was going on by the pursuer herself it seems to me idle to say, as she now says, that she was in ignorance of what her legal rights, as regards either reduction or revocation of the first deed, were. At that time she was at arm's length with the trustees, she was represented by advisers of her own, and if she did not know the law she ought to have known it. Besides that, just let us press the matter and see how really out of the question her present averments are. She says—"I was under essential error induced by the representations of my opponents, because I did not know that I could revoke the first deed, and I ought not to have been asked to sign the ratification unless I had been properly told that I could revoke the first deed." The view here of the opposing parties to this moment is that she is not entitled to revoke the first deed. That is a view upon which they may be wrong, but upon which they have at least a good deal to say for themselves upon their view of the English law. In other words, her essential error amounts to this, that she was under essential error because the opposing parties did not tell her that the law was exactly the opposite of what they then thought and now think it to be. I think, when pressed, this averment is an absurd averment, and that consequently it is out of the question for your Lordships to allow any proof upon these averments relevant to set aside the second deed.

Upon the whole matter it seems to me to come to this. There are relevant averments to set aside the first deed upon the facts. There is a relevant averment to the limited extent that I have explained upon English law as to the capacity of the lady to revoke the first deed, which by Scottish law I hold to be revocable. And there are also good averments upon English law as to the effect of the second deed upon the first deed, in the view that the first deed was either revocable or reducible—it does not matter which.

The real question that now comes is—what is the most convenient way of dealing with the case. I think after what I have said, and if your Lordships agree with me, obviously the most convenient way of dealing with the case is not at present to go into the facts of the case upon the first deed, but to find out what is the English law upon the two averments which are made upon the English law, because on a certain view of the English law the answer to these questions may not necessitate any inquiry into the facts at all. Accordingly, I am of opinion that we should recal the Lord Ordinary's interlocutor, which, as I have said, I think is wrong, in allowing the proof he has done in one instance, and, *hoc statu* and before further answer, allow the English law to be ascertained upon these two points. When we have got the English law ascertained the case will be disposed of, or it will be in a condition in which we must either have yea or nay upon the averments and facts as to the first deed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor and, *hoc statu* and before further answer, direct the English law averred by the defenders to be ascertained under the provisions of the Act 22 and 23 Vict. cap. 63, and appoint the parties to prepare a case under said Act for the approval of this Court."

Counsel for the Pursuers and Reclaimers—C. N. Johnston, K.C.—C. D. Murray. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defenders and Respondents—Guthrie, K.C.—Hon. W. Watson. Agents—Hamilton, Kinnear, & Beatson, W.S.

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Friday, December 1.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

GILLIES *v.* CAIRNS.

Reparation—Negligence—Master and Servant—Ship—Seaman Injured through Defective Ladder—Duty to Inspect—Custom of Trade—Fellow Servant.

A ship's steward having been injured through the giving way of one of the rungs of a ladder leading down into the lazarette of the ship, sued the shipowner, his employer, for damages. The evidence showed that while the ladder was originally sufficient, it was unsafe at the time of the accident. It was also proved that it was the custom in the trade in question to leave the repair of minor defects in the ways of a ship to the master and crew. There was no proof that it was usual to have an inspection of a lazarette ladder at the commencement of each voyage.

Held (1) that the lazarette ladder was one of the minor matters which were left to the care of the persons in charge of the ship by the proved custom of the trade, on which the Court, in such cases sitting as a jury, must go, and (2) that consequently no fault on the part of the shipowner was established, inasmuch as the defect in the lazarette ladder was either latent or, if apparent, had not been repaired owing to the negligence of a fellow servant.

This was an appeal from the Sheriff Court at Edinburgh in an action of damages for personal injury at the instance of Norman Gillies, shipsteward, 51 North Forth Street, Leith, against David Cairns, steamship owner, Leith.

The pursuer at the time of the accident was a ship steward on board the s.s. "Cavendish," in the employment of the defender, the owner of the ship. The vessel, which was bound for the Mediterranean with coal, left Leith on 8th July 1903 and arrived at Jarrow-on-Tyne on 14th July following. In the afternoon of that day the pursuer had occasion to go into the lazarette, where the stores were kept, and the access to which was by means of a ladder. While he was descending the ladder he fell, as he averred, owing to one of the rungs giving way, a distance of ten feet into the lazarette, and sustained a severe spinal injury. He averred—"(Cond. 4) The foresaid accident was due to the fault or negligence of the defender, or those for whom he is responsible. It was the duty of the defender to see that the ways and works in said ship were, prior to the commencement of each voyage, inspected and put in a safe condition for those requiring to use them. Prior to the commencement of the voyage condescended on, he failed in said duty as regards the ladder leading to the lazarette. The accident was caused by one of the rungs of the said ladder giving way owing to the defective condition of the ladder, and in particular of said rung and the fastenings thereof. Said rung was not securely attached to the uprights, the fastenings thereof being old and rusted. The ladder in question was old and shaky, not properly bolted together, and generally unfit for the purpose for which it was used. It had not been originally made for the lazarette, but was part of an old accommodation ladder which had been cut up. At the time of the accident two of the rungs on the ladder were awanting. They had been so from the commencement of the voyage. In respect of said ladder, the vessel was unseaworthy when the voyage commenced. The condition of the said ladder was known to the defender, or should have been so if he had discharged his said duty. He did not employ a ship's carpenter on said ship to attend to the ways and works."

The pursuer pleaded—"(1) The pursuer having sustained loss, injury, and damage through the fault of the defender, or those for whom he is responsible, is entitled to reparation as concluded for."

Proof was led. The result of the evidence appears from the notes of the Sheriff and Sheriff-Substitute (*infra*).

On 6th January 1905 the Sheriff-Substitute (HENDERSON) pronounced this interlocutor:—"Finds in fact (1) that on 14th July 1903 the pursuer, while in the performance of his duties as a steward on board the defender's steamer 'Cavendish,' fell from a ladder leading from the deck of said ship to its lazarette, owing to a rung of said ladder giving way under him, and sustained very severe injuries; (2) that the pursuer has failed to prove that the defender is responsible for the accident through which he was thus injured: Therefore assoilzies the defender from the conclusions of the petition; finds the defender entitled to expenses. . . ."

Note.—. . . "I assume that I am stating the law applicable to this case correctly when I lay down the following propositions—(1) That a shipowner is not bound to be an expert as regards the fittings, ways, and works of his vessel, and that, if he has put any ship of his under the management and control of a duly qualified and careful master, all of whose requirements he promptly conforms to and supplies, he no longer incurs liability should an accident occur notwithstanding his precautions; (2) that such a qualified and careful master is not bound personally to test all the fittings, ways, and works of his vessel, or to search for and bring to light latent defects in any of them, but that as regards such things, his duty is restricted to remedying all apparent defects, and also such minor deficiencies as he has not himself noticed, but which are reported to him by his officers or any of the crew under him or them. If this be the state of the law in such cases, it then becomes necessary to inquire where or how the defender here has offended against these conditions so as to make him liable for the injuries with which the pursuer met. The ladder in question had been in use for more than one voyage.

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It has been I think proved that, so far from being of flimsy or unsatisfactory construction, it was, if anything, too heavy and big for the purpose to which it had been turned after it ceased to be an accommodation ladder. Originally, undoubtedly, it was a well made and perfectly safe ladder. . . .

"After careful consideration of the evidence as to the state of this ladder when the voyage on which the pursuer was injured commenced, I have come to the conclusion that there was nothing in its external appearance or condition to put any persons, who were either inspecting the ship for faults or making use of the ladder in the ordinary way, on their guard as to its being in the slightest degree in a dangerous state.

"The defender's evidence as to his instructions to the master (Lister) as to keeping everything in good order is fully corroborated by the master. There is also the further fact that the vessel had been gone over before the pursuer's accident by foremen for the ship repairers at Jarrow for all possible defects, and this ladder was not reported against.

"On the whole, I have come to the conclusion that the step that gave way with the pursuer must have been damaged the evening before by the crew when lowering provisions and cases into the lazarette. This supposition on my part is however quite unnecessary for the decision of the case, as my true ground of judgment is that the pursuer has failed to prove that his accident happened through any cause for which the defender can be held responsible."

On appeal the Sheriff (MACONOCHIE), by interlocutor of 16th February 1905, adhered.

Note.—"In order that the pursuer should be successful in this action, it is necessary, in my opinion, that he should prove that the ladder was in a defective condition at the commencement of the voyage; that the defender did not fulfil the duty laid upon him of having the fittings of the vessel properly inspected before she sailed, and that the breaking of a step of the ladder, which caused the accident, arose from a cause which a careful inspection would have revealed—*Rothwell* v. *Hutchison*, January 21, 1886, 13 R. 463, 23 S.L.R. 307; *Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. After very careful consideration of the evidence, I have come to the conclusion that the pursuer has failed to discharge the onus of proof which is upon him.

"The evidence as to the state of the ladder when the ship left Leith is not at all satisfactory, but I cannot hold that it is proved that it was then in a dangerous condition. . . .

"Assuming, however, that the ladder was not in a safe state when the vessel left Leith, the question is, did the owner discharge the duty on him of having a proper inspection made before that time. Now it seems to me that in law it cannot be said that, assuming that the ladder was dangerous, that amounted to unseaworthiness in the sense of sec. 458 of the Merchant Shipping Act 1894, nor can it, I think, be said that at common law, inasmuch as the owner did not personally inspect this ladder, he did not discharge the onus upon him. In matters of this kind the owner may be quite incapable of making a proper inspection and of detecting a fault. In my opinion he discharges the onus on him if he directs a competent person to make the inspection for him and furnishes him with the means of making good imperfections—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568; *Mackenzie* v. *Treganna S.S. Co.*, November 30, 1893, 31 S.L.R. 141; *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A.C. 222. Here I think it is proved that he did appoint the master to inspect, and that the master, who is the person usually charged with the inspection of such minor matters did inspect. But further, even if the master overlooked a fault which he ought to have discovered, I am of opinion that the owner is not liable in damages on the ground that the master was a fellow workman of the pursuer's (see *Wilson's*, *Mackenzie's*, and *Hedley's* cases, *sup. cit.*).

"Lastly, even on the assumption that the ladder was defective, and that no thorough inspection was made, was the fault so patent that a properly executed inspection would have revealed it? This question is a difficult one, but on a consideration of the evidence, and looking to the facts as to the long use of the ladder without accident, and without complaint of its state being made to the officers, I have come to be of opinion that it must be answered in the negative. . . .

"I may add that I attach no importance to the inspection and repairs which the defender says were made at Jarrow just before the accident occurred. No person who was employed in making those repairs was called as a witness, and there is no evidence to show that the ladder in question was then even inspected. On these grounds I hold that the pursuer has failed to discharge the onus of proof which is upon him, and that being so, it is not necessary for me to form any opinion as to how the accident occurred."

The pursuer appealed, and argued—The defender had failed to provide proper materials and was therefore liable—*M'Killop* v. *North British Railway Co.*, May 29, 1896, 23 R. 768, 33 S.L.R. 586. The same obligation lay on the owners of vessels in regard to providing safe materials as on other employers. There was a duty to inspect here—*Webb* v. *Rennie*, [1865] 4 F. & F. 608. The dangerous condition of the ladder may not have been apparent to a casual observer, but it could have been discovered by a careful inspection. The defender was in fault in not having done so—*Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262. The rule that a servant continuing to work in the face of a known danger was not entitled to recover did not apply to a seaman on board ship—*Rothwell* v. *Hutchison*, January 21, 1886, 13 R. 463, 23 S.L.R. 307, nor where there was negligence on the employer's part —*Smith* v. *Baker & Sons*, [1891] A.C. 325, at

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p. 362. The case of *Mackenzie* v. *Treganna S.S. Co., Ltd.*, November 30, 1893, 31 S.L.R. 141, cited by the Sheriff, was distinguishable, for the equipment of the vessel here was defective. There was no ship's carpenter on board, and that made it all the more necessary to have a careful inspection before the vessel sailed—*Murphy* v. *Phillips*, 1876, 35 L.T. N.S. 477. The vessel was unseaworthy in the sense of sec. 458 of the Merchant Shipping Act 1894.

Argued for respondent—The liability of an employer for supervening defects was different from that for original defects—*Macdonald* v. *Wyllie & Son* (*cit. supra*). The ladder was part of the gear of the ship, and was quite sufficient at the commencement of the voyage, and that was sufficient—*Gordon* v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23. The defender was not liable for latent defects, nor for defects caused by rough usage during the voyage in question. It was for the master and crew to look after the ways of the ship. The master had in fact inspected the ways of the ship and satisfied himself that they were sufficient. If there was any negligence it was that of a fellow servant, for which the defender was not liable—*Wilson* v. *Merry* v. *Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568. The vessel was perfectly seaworthy—*Hedley* v. *Pinkney & Sons' Steamship Company*, [1894] A.C. 222. The custom of trade must be read into contracts of employment, and the custom here was to leave the repair of minor defects to the crew. The repair of this ladder was in the same category as the splicing of a rope and properly left to the master and crew—*Gordon* v. *Pyper* (*cit. supra*).

Lord President—This is an action of damages by a ship's steward for injuries which occurred to him owing to a step giving way in a ladder which led down to what is called the lazarette.

The learned Sheriffs have assoilzied the defender because in their view the case turned on the well-known doctrine laid down in *Wilson* v. *Merry & Cuninghame*. The case here has been argued on different grounds, and I think it is necessary to say to what I think the facts come. I have no doubt that the ladder, of which a step gave way, was on the occasion of the accident in what may be called a somewhat rickety condition. The original steps of the ladder as it existed at first were substantial, the steps being made of teak, being secured in a groove, and kept in position with screw nails. It seems that these original steps had been in several instances recently replaced, and that the replacing work had been done in a somewhat makeshift manner. At the same time I do not think the pursuer has been able to show—and the onus of course is on him—that this ladder when originally put up was insufficient, so far as safety was concerned, for the purpose for which it was put up. It may not have been a convenient ladder for it had been originally used as an accommodation ladder, but I think in its construction it has been proved to have been amply strong for its purpose. I do not need to say more than this, that I do not think the pursuer has proved that the ladder as originally built was unfit for the purpose for which it was put there. At the same time I think he has proved that at the time of the accident the ladder was in an unsafe condition.

The question then comes, in that state of the facts, to be—what is the law applicable to the matter? There are a great many cases, and I do not propose to go through them, but I think it is very well settled that an employer's duty consists in the furnishing, first of all, of proper apparatus. That does not mean that he warrants it or guarantees it, but it does mean that he must provide proper apparatus, and that he cannot delegate that duty to anyone else. But for the reasons I have already stated I do not think that in this case the employer has been shown to have failed in that initial duty. But no doubt his duty does not end there. He has also a duty to see that the apparatus, proper at first, does not fall into an improper condition. The law is nowhere better put than in the case of *Webb* v. *Rennie*, 4 Foster & Finlayson, p. 608, where the late Chief-Justice Cockburn, after speaking of the duty on the employer to provide a proper apparatus, goes on (p. 612)—"And although in general the employer was not liable unless he knew of the danger"—that is to say, where the apparatus had got into an improper condition—"yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not." Now, the case in question there, for purposes of analogy, is very like the case here. It was an accident that was brought about by the fall of a telegraph pole which had become rotten by standing in the ground for a considerable time. Nothing was said against the telegraph pole when it was originally put up—there was no averment that it was not a good enough pole—but it had been allowed to go wrong, and had become a bad pole. I think that is exactly the same as the ladder here.

Therefore it comes to this—Did the employer know, or ought he to have known, that this ladder was in a bad condition. Did he know himself? Of course there is no question that he did not. Now, when it comes to a question of whether he ought to have known, there comes in a question that affects a good deal his duty in respect of such matters. In this class of cases it seems to me that your Lordships, who are, I think, sitting as a jury, must not go on what your own views would be, but must go according to the proved custom of the trade or business that you are concerned with. It was said by a learned Judge in one of the cases—I think an American one—that it would never do for juries to sit down and settle under what conditions and regulations trades are to be conducted, and that, although they must be the judge in every case of whether reasonable precautions have been taken, they must determine that not of their own consciousness of what they think right or wrong, but according

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to what are proved to be the ordinary conditions in the trade. Now, applying that rule here, I do not think there has been any proof amounting to this, that an inspection of a lazarette ladder was a thing which in ordinary circumstances would take place at the commencement of each voyage. In other words, I think it was necessary that these minor matters should be left to the person in charge of the ship, generally the master, and that consequently when the ladder came, by some reason or other, to be worn out—it may have been by things being bumped on it or some other reason—this was just one of those things which the master, or the man delegated by the master, ought to have discovered. It might have been put right by any temporary precaution. The putting of the steps safe is an operation anybody with tools and a screw could have done at once. They may not have made, as one of the witnesses put it, a tradesmanlike job of it, but safety might have been secured.

I accordingly come to the conclusion that the pursuer here is really in a dilemma. Either the fault was latent altogether, in which case nobody was to blame, or it was just one of those things rightly left by the employer to some other person, and, if this was negligence, it was negligence of fellow servants, in respect of whose negligence the pursuer cannot recover, not, as Lord Cairns pointed out, owing to any technical rule, but simply because pursuer has failed to show that the employer has been guilty of any negligence towards him. Upon these grounds I am of opinion that the result the Sheriff has come to is right, and that the appeal should be dismissed.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I agree with your Lordship and have nothing to add.

LORD KINNEAR was not present at the hearing.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 6th January 1904 and 16th February 1905 respectively: Refuse the appeal, affirm the said interlocutors, of new assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to the expenses of the appeal, and remit," &c.

Counsel for Pursuer and Reclaimer—M'Lennan, K.C.—J. W. Forbes. Agent—J. Ferguson Reekie, Solicitor.

Counsel for Defender and Respondent—Younger, K.C.—Jameson. Agents—Boyd, Jameson & Young, W.S.

Thursday, December 7.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

CAMPBELL *v.* COCHRANE.

Reparation—Slander—Judicial Slander—Privilege—Communication to Pursuer's Agent by Defender—Malice—Relevancy.

An employer, replying to a claim on the ground of wrongous dismissal, made by a dismissed servant through an agent, wrote, *inter alia*—". . . I may inform you that the reason of" the servant's "dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." And later in another letter—"I do not anticipate any difficulty in proving that" the servant "did dishonestly take my butter." *Held* (recalling the judgment of Lord Ardwall) (1) that the communications were of the nature of pleadings and entitled to the highest privilege; (2) that facts and circumstances from which to infer malice were not relevantly averred; and consequently (3) that no issue could be allowed.

Opinion (*per* Lord M'Laren) that the facts and circumstances necessary for an inference of malice in the case must have been antecedent to and independent of the dismissal.

On 11th August 1905 John Campbell, Welton Farm, Blairgowrie, brought an action against Major Archibald Hamilton Cochrane of Dalnabreck, Ballintuim, Blairgowrie, to recover £500 as damages for slander contained in two letters written by the defender to the pursuer's agents. Campbell had been engaged by Major Cochrane's gamekeeper (Ross) to manage a small farm for his master. In the course of his work he considered he was interfered with by Ross and saw his master with regard to the matter, and shortly afterwards, at a second interview, he was dismissed on a month's notice. Having taken legal proceedings for wrongous dismissal he was successful in his action, and it was in the negotiations prior to that action that the letters complained of were written.

The pursuer averred—"With that object"—[*i.e.*, to get his relations with Ross put on a proper footing]—"the pursuer called upon the defender on the evening of Monday, 31st August 1903, and desired that a meeting be arranged by the defender at which Ross should be present, as he deemed it unfair to make any statement about Ross until he should be present to hear and answer same. The defender took offence at the attitude of the pursuer in insisting that Ross be present at the interview, and, becoming angry, replied that if Ross was interfering with his work, it was no business of the pursuer's whatever, and that he would not tolerate complaints from servants, and he could not have anyone about his place that would

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find fault with Ross, and to remember that he was master there and no one else. Still in a temper, he discussed with the pursuer the terms of his engagement as arranged with Ross, and admitted that he was bound by these terms, and agreed to have a meeting of parties in his presence on the following Wednesday, at which the subject could be fully discussed. Up to this date the defender personally had acted towards the pursuer in a kindly manner, and indicated that he appreciated the services of the pursuer and his wife. As the result of the said meeting, however, the defender conceived a strong dislike to the pursuer. On the . . . 2nd September the pursuer, Ross, and defender met in front of Dalnabreck House, and the terms of the pursuer's engagement were discussed. Ross, in reply to a question from the defender, stated that he had no recollection of what he had said at his meeting with the pursuer in April prior to the engagement, and stated that he did not remember what he had said about butter on that occasion. He further declined to contradict the pursuer's narrative of the terms of his engagement. The defender then told the pursuer that he could not find fault with Ross, as Ross had been with him for over five years, and that the pursuer would have to leave, and that he would get a month's warning. The pursuer replied that he was a yearly engaged servant, to which the defender rejoined that he was not, and that he considered all servants were monthly servants. The defender added that he knew the law well, for he had been a justice of the peace and had sat on the justice bench in England and that the law was the same in Scotland as in England. The pursuer replied that 'that might be the case in England, but it was not in Scotland,' and he declined to accept the statement as correct. The defender thereupon became very angry at the pursuer for daring to contradict his statement of the law in Scotland, and the personal dislike to the pursuer which he had conceived at the previous interview became very much increased and very pointed. . . . The defender closed the interview by giving pursuer one month's notice to leave, repeating that he would have no one about the place that would find fault with Ross. . . . It was well known not only to the defender but also to Ross and the other outdoor servants as well as the indoor servants of the mansion-house who came to the dairy for supplies, that the pursuer was taking an allowance of 1 lb. of butter or less per week, and he did so quite openly as part of the stipulated remuneration for his own and his wife's services at Dalnabreck. At the interview on 2nd September foresaid the defender accepted the pursuer's claim to butter as a right in terms of his engagement, and from that date onwards until he quitted the defender's service the pursuer continued to take the allowance of butter to which he had a right. So far from the defender offering any objection to that course he knew it was being taken as before and acquiesced in that. The defender did not on that or any other occasion suggest to the pursuer personally that the latter was stealing his property nor use any language that would bear that inference. On the contrary he was so well satisfied with the absolute truth of the pursuer's narrative of the terms of his engagement that the defender upbraided the gamekeeper Ross for having given such good terms. . . . . The pursuer consulted Mr Nelson, solicitor, Blairgowrie, with reference to the notice given to him to leave whereby his yearly engagement was brought to an end at the Martinmas term in place of the following Whitsunday. Mr Nelson, by letter to the defender, dated 2nd February 1904, intimated the details of the pursuer's claim for reparation and inquired whether he had any proposal to make for settlement. The pursuer being reluctant to take court proceedings desired that the defender should have a full opportunity of settling amicably. By letter, dated 4th February 1904, the defender replied to Mr Nelson as follows, viz.—'In answer to your letter of February 2nd, I write to inform you that John Campbell was not engaged by me by the year, but on the same condition as all my other servants—one month's notice on either side; also I may inform you that the reason of Campbell's dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house.' The said letter is produced herewith and referred to. The statement in said letter that the pursuer was found by the defender 'appropriating' his butter 'for his own use' was false, malicious, and calumnious, and was intended to mean and does mean that the pursuer had dishonestly appropriated and stolen butter belonging to the defender. The defender well knew that the only question under discussion was the duration of the pursuer's contract of service, and the said malicious statement contained in said letter was gratuitous and unwarranted, and was false in the knowledge of the defender, and was uttered without any cause. It was wrongfully made for the purpose of gratifying his animus against the pursuer, and in so uttering the said slander the defender was giving way to the malice and ill-will he had conceived against the pursuer, before condescended on. (Cond. 10) The pursuer's agent Mr Nelson, in reply by letter dated 5th February, remarked that according to his information the defender was in error when he said that the pursuer was engaged by the month, and as a final effort to avoid court proceedings he suggested that the pursuer was quite prepared to meet the defender in an amicable settlement if possible. The defender immediately replied by letter, addressed to the said Mr Nelson, dated 6th February 1904, that it would serve no good purpose to argue in this matter, and added these words, *inter alia*, viz.—'I do not anticipate any difficulty in proving that Campbell did dishonestly take my butter.' That statement charging the pursuer with dishonesty is a repetition of the gross slander narrated in the preceding article.

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It was false, malicious, and calumnious, and was intended to mean, and did mean, that the pursuer was a dishonest man and a thief, and had theftuously and feloniously taken the defender's butter. The defender well knew that the only question under discussion was the duration of the pursuer's contract of service, and the said malicious statement contained in said letter was gratuitous and unwarranted, and was false in the knowledge of the defender, and was uttered without any cause. In so repeating the said slander the defender was giving way to the malice and ill-will he had conceived against the pursuer, before condescended on, and the slander was uttered for the purpose of gratifying his personal animus against the pursuer." . . .

On 10th November 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Repels the first plea-in-law for the defender: Allows amended issues to be lodged as proposed at the bar, and, that having been done, approves of the said amended issues, and appoints the same to be the issues for the trial of the same."

Opinion.—. . . . "I have at present to decide whether the pursuer has set forth a relevant case. The first contention put forward by the defender in support of his plea against the relevancy is that there is here a case of absolute privilege, and he relied on the case of *Watson* v. *Jones and M'Ewan*, [1905] A. C. 480, in support of this contention. I think *Watson* v. *Jones and M'Ewan* was concerned with a very different question from the present, namely, what privilege a witness had in the preliminary stages of an action before he entered the witness-box. A witness has an absolute privilege as was established in that case, and as was understood, though not decided to be the law before that case came up, and the other case of *Rome* v. *Watson*, 25 R. 733, cited for the defender, was a case establishing the absolute privilege of a counsel or solicitor speaking on behalf of a client.

"The statements in the letters complained of here are not statements either of a counsel or of a witness; they are letters written by one of the parties to a dispute to the agent of the opposite party, who is about to raise an action against him. Now, undoubtedly letters written in these circumstances are entitled to a privilege, and a privilege of a very high order. They were written in answer to letters which very naturally elicited the statements which are made, but they are not, in my opinion, entitled to the absolute privilege which has been applied to the case of witnesses, advocates, or solicitors. They enjoy a privilege more resembling the privilege which attaches to statements on record in ordinary cases of judicial slander. I therefore hold that the plea against the relevancy, so far as founded on absolute privilege, must be repelled.

"These letters being privileged, as a consequence malice must be relevantly averred on record, together with facts and circumstances from which malice may be inferred. Now that is the question of difficulty here, whether the averments of malice set forth on record by the pursuer are sufficient. I must say that, taking a general view of the case, I think it rather improbable that this old gentleman of 85 was actuated by malice towards this servant whom he knew very little about, and who was just treated in the ordinary way a master would treat a servant with whom he had a dispute; but while that may be *my* impression upon the general view of the case, I am bound to examine the specific statements made on record, and, examining these, I am forced to the conclusion that a relevant case of malice has been here averred, because the general statement of the pursuer comes to this, that a question arose about the terms of the pursuer's engagement, whether it was an engagement terminable on a month's notice, or whether it was an engagement for a year. The pursuer practically says that in the course of this dispute the defender improperly dismissed him upon a month's notice, on the ground, first of all, that that was according to the terms of his engagement; but he says the defender further, in order to justify this dismissal, brought into the question of dismissal the other question about the appropriation of butter by the pursuer. Now the suggestion is, all through the pursuer's record, that this was a sort of afterthought, and in support of that it is said in article 8 of the condescendence that it was very well known both to all the other servants and also to the defender that the pursuer was taking this butter, that he was taking it quite openly as part of his remuneration, and that he was also taking it even after his dismissal as long as he remained at the defender's farm, and that, notwithstanding all that, the defender put forward this appropriation of butter both in the letters which are complained of and in the record as a serious offence against honesty which justified the dismissal of the pursuer. Now, these are circumstances from which I think malice might be inferred.

"But the matter does not altogether stop here, because the pursuer not only avers these circumstances, but further avers very specifically that at a meeting on 2nd September 1903 the defender got into a war of words with him, first about the law of Scotland as compared with the law of England, and in the next place with regard to the attitude of the pursuer towards Ross, the gamekeeper, who was apparently a sort of factotum in the absence of the defender at his English residence, which lasted most of the year, he being only in Scotland for some three months in the autumn. Now, the pursuer says that the defender lost his temper with him at that time, and the result was a personal dislike to the pursuer on the defender's part which lasted down to the present date. Now, that may be perfectly unfounded or imaginary, but it is averred on record, and of course if the pursuer makes a statement that the defender was actuated by personal

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dislike in what he said or wrote, that is a case of malice. Accordingly, whatever may turn out to be the truth of this case, which I regret has been brought before me at all, I think I must hold that on the record as it stands sufficient facts and circumstances are averred from which malice may be inferred. I accordingly will allow the issues, amended as I have suggested."

The issues allowed were—"(1) Whether on or about 4th February 1904 the defender wrote and sent, or caused to be written and sent, to J. Sidey Nelson, solicitor, Blairgowrie, a letter in the terms second set forth in Schedule I annexed hereto; whether said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that he had stolen butter belonging to the defender, to the loss, injury, and damage of the pursuer? (2) Whether on or about 6th February 1904, the defender wrote and sent, or caused to be written and sent, to J. Sidey Nelson, solicitor, Blairgowrie, a letter in the terms second set forth in Schedule II annexed hereto; whether said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that he had stolen butter belonging to the defender, to the loss, injury and damage of the pursuer?"

The defender reclaimed, and argued—No facts and circumstances were averred on record sufficient to infer malice. Moreover, the communications complained of were absolutely privileged—*M'Ewan* v. *Watson*, [1905] A.C. 480, July 28, 1905, 42 S.L.R. 837. If such a rule of law were set up as was here propounded, all approach to a settlement in similar cases would be barred.

Argued for pursuer—The Lord Ordinary had indicated two grounds for holding that facts and circumstances were set forth sufficient to infer malice. His judgment should be affirmed. On challenge the defender had given a false reason, not in his mind at the time of dismissal, for that act, and the knowledge he had that it was false inferred malice. There was on record a relevant averment of ill-will to the pursuer, and that in consequence the slander was uttered. In any case, the privilege was not absolute, and the case of *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781, gave the rule as to what extent facts and circumstances must be averred.

Senior counsel were not called upon.

LORD PRESIDENT — This is an action which the Lord Ordinary characterises in the first line of his note as being, to some extent at all events, a frivolous and vexatious action. It may be that there are some circumstances in which, according to the law of Scotland, we are bound to entertain frivolous and vexatious actions, but I do not think they exist here. The circumstances out of which the case arose are that the pursuer was engaged as a farm manager by the defender, the actual engagement not being made by the defender personally but by his gamekeeper. The pursuer and the gamekeeper do not seem to have got on very well together, and accordingly the pursuer craved an interview with the defender, at which he made the statement that the gamekeeper interfered with him in his work. The defender, who seems to have been attached to the gamekeeper, an old servant—I am taking all this, of course, on the pursuer's averment—took the gamekeeper's part, and after discussion dismissed the pursuer. He did so upon the ground that he had a right to dismiss him upon a month's warning. The pursuer, on the other hand, took up the position that he was not engaged by the month, but by the year, and that consequently his dismissal was wrongful, and he intimated to the defender that he held the defender liable for the damages incurred. At the same interview there had been a certain amount of discussion of the terms of the pursuer's engagement, and incidentally in this discussion, there had been more or less raised the question of whether the pursuer was or was not entitled to take some butter, which he made for his master, for his own use. Following upon this the pursuer, having been dismissed, raised an action for wrongous dismissal in Perth Sheriff Court, but before he did so he instructed his agent to write a letter to the defender making a claim, and this his agent did upon the 2nd February 1904. In answer to that letter, which concluded with the pecuniary amount of the claim, the defender wrote the first of the letters complained of in this action, and it is in these terms:—"Sir,—In answer to your letter of February 2nd, I write to inform you that John Campbell was not engaged by me by the year, but on the same conditions as all my other servants — one month's notice on either side. Also, I may inform you that the reason of Campbell's dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house. I do not consider, nor will I admit, that he has any claim whatsoever on me." The pursuer's agent answered that letter in a letter in which he controverted the law as to a yearly engagement, and pointed out that the butter question would be a matter of proof; that he did not think that before the Sheriff that would be sufficient reason to entitle the master to dismiss the servant without paying compensation; and then the letter winds up by saying—"Failing a settlement by Monday, I have no other alternative but to serve a summons." To that the defender answered by a letter, which is the second letter complained of in this case, and which is in these terms:—"Sir,—It would serve no good purpose to argue in this matter. I do not anticipate any difficulty in proving that Campbell did dishonestly take my butter. If you consider it to be to the advantage of your client and yourself to bring this matter into Court you will do so." After that the action went on, and the result of that action was that the learned Sheriffs—for it went from the Sheriff-Substitute to the Sheriff-Depute—held that in

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the circumstances of the case the engagement was a yearly one and not a monthly one, and that, although the "butter story"—I am quoting textually from the learned Sheriff's note—"is not a satisfactory one," there was no wilful dishonesty on the part of the servant, and that although the master had ground for dissatisfaction he had no right to dismiss him, and accordingly awarded damages of £25 to the pursuer.

The pursuer now brings this action in which he claims damages for slander or libel in the two letters which I have read to your Lordships. Now, I think upon the analogy of the case of *Watson* v. *M'Ewan* in Appeal Cases [1905], page 480, it is quite clear that a statement made by the defender as to what he would say if he were brought into Court by an action intended against him by the pursuer, is just in the same position as if the statement had been made in the Court in a pleading; and therefore I take it that the criterion to be applied to this case is the same as is applied in judicial slander. The law as to what is necessary in judicial slander is very well fixed, and I may read a few words of an opinion of Lord President Inglis in the case of *Beaton* v. *Ivory*, reported in 14 Rettie at page 1062, where he says this—"I think a case of judicial slander a very special case indeed, because there is a very strong presumption in such a case that if a man makes an averment which, whether it be irrelevant or not is at least pertinent to the case, he must be presumed to have made it from an honest motive, with a view to urging everything that he knows of in support of his case. That is a perfectly justifiable and proper motive, and it will protect the party making it against the consequences of any injury that he may have done by that statement to a third party. Now, this becomes all the more strong if the averment is not only pertinent to the case but is a perfectly relevant averment, for then it becomes the duty of the party to himself and to his advisers and to the Court to make the averment,"—and his Lordship proceeded to hold that facts and circumstances must be averred from which malice could be inferred. The averments here are perfectly relevant to the case, and accordingly not only is the presumption of privilege of the highest order, but I think the averments must be scrutinised very strictly to see if there are any averments from which malice could possibly be inferred. I find no such averments in this case. And I say most strongly that the meaning of the expression, that there must be facts and circumstances averred from which malice can be inferred, goes to the nature of the facts and circumstances, and not to a kind of word-painting that a more or less ingenious counsel can put into the contents of the condescendence.

Now, here there was no statement of the kind complained of made at all until the pistol was placed at this gentleman's head by the threat of an action, and it seems to me that he was absolutely entitled to say what was his belief—that this man had been guilty of dishonesty. He has been found wrong, but nevertheless he was perfectly entitled to put that forward as a defence to the action; and I find no averment of facts and circumstances whatsoever which lead up to any malice as the inducing cause of making the statement. There is a certain amount of averment that this old gentleman, the defender, had got into a temper at this discussion which took place between him and the pursuer, and particularly he is said to have been very angry because, he being a justice of the peace in England, a Scottish farm servant had told him that his English law was not Scottish law, and would not accept his master as an authority upon the law of master and servant. That is scarcely a fact and circumstance which makes one come to the conclusion—the only conclusion that one must come to—that a person in putting in his defence a perfectly relevant statement is doing so, not with a view to make his case relevant, but with the view of doing a person an injury to his character.

I am clearly of opinion therefore that here there are no sufficient facts and circumstances averred, and that the issue should be refused and the action dismissed.

LORD M'LAREN—I am of the same opinion. From the observations of the Lord President in the case of *Beaton* (14 R. 1057), I should infer that that eminent lawyer was of opinion that, on the question of what constitutes a relevant averment of malice, a distinction might be taken between cases that fall within the category of judicial slander, and those where the slander is of a less highly privileged description, as for instance an action between a master and a servant. Since then, the nature of privilege in the latter instance has been considered in a case that was cited to us—the case of a dismissed barman who brought an action on the ground that his master refused him a character—I mean the case of *Macdonald* (3 F. 1082). Although I see no reason to doubt the soundness of the opinions expressed in *Macdonald's* case, it is not necessary that we should consider that case very carefully at present, because I agree with your Lordship that this case, although not literally a case of judicial slander, falls within the principle and the degree of protection which the law gives to judicial slander, just as the statement of a witness in precognition, although not a statement made in a judicial proceeding, and not a statement which would render him liable to prosecution for perjury, is nevertheless, for reasons of policy, within the degree of protection which the law gives to the statement of a witness in open court.

The question then is, whether a relevant case of malice is here averred. Now, I can hardly think that it would ever be fair to a defender that the law should be satisfied with a mere general averment of malice. No doubt there may be degrees. A party may be held to more strict averments in one class of cases than in another, but I think one obvious reason for requiring

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some specification is that the defender, when he goes to trial, ought to know the case that he is to meet and should be put in a position, if necessary, to lead evidence to disprove the case that is to be made against him. But merely to say that a statement is malicious gives no clue whatever to the line of action which the pursuer intends to take at the trial. Especially would the defender seem to be entitled to that notice in a case of judicial slander or one that would fall within the principle and degree of protection afforded to judicial slander. In considering whether the statements made in the record lead up to the theory that the defender had conceived an ill-will towards the pursuer and had made a case of dishonesty out of what was really and in substance only a misunderstanding, I have been looking at these statements to see whether there is anything which the defender can be called upon to meet that admitted of proof one way or the other, but it seems to me that the averments resolve merely into an imputation of motives—that you are to infer from his hostile tone towards the pursuer that he was actuated by ill-will. But in order to make a relevant case of malice there must be facts alleged which are independent of the cause of dismissal, independent of the immediate cause of circulating the slander, from which the jury might legitimately infer some antecedent ill-will or indirect motive as the origin or cause of the slander. It will not do to say that there were interviews which led up to the dismissal—that culminated in the dismissal—because that is all really part of one transaction. I do not see that ill-will arising out of the self-same cause of difference is in any different position from ill-will or malice inferred from the dismissal itself, which clearly would not be sufficient. I think there must be some tangible antecedent circumstance from which the jury may or may not, if the facts are proved, infer that the statement was not a fair statement but one made from malevolent feelings towards the pursuer, but I find no such averments here, and I am therefore of opinion that the action should be dismissed.

LORD KINNEAR concurred.

The Court disallowed the issues.

Counsel for the Pursuer and Respondent—Watt, K.C.—Malcolm. Agent—William C. Morris, Solicitor.

Counsel for the Reclaimer and Defender—Morison — J. Macdonald. Agents — Gordon, Falconer, & Fairweather, W.S.

Saturday, December 9.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

HILL *v.* CAMPBELL AND ANOTHER.

Reparation—Alleged Illegal Arrest—Alleged False Charge—Public Officer—Police Constable—Malice and Want of Probable Cause—Arrest and Charge by Constable on which Conviction has followed—Issue—Relevancy.

In an action of damages against two police constables for an alleged illegal arrest and an alleged false charge made by them while admittedly acting within the scope of their duty, the pursuer averred no facts and circumstances from which malice might be inferred, and admitted that he was convicted on the charge of which he complained.

Held that the pursuer was not entitled to an issue either *quoad* the arrest or *quoad* the charge, inasmuch as (1) while want of probable cause was essential to an issue, the conviction showed that there was probable cause, and (2) the pursuer had failed to set forth on record facts and circumstances from which malice might be legitimately inferred.

Reparation—Arrest—Public Officer—Police Constable — Unnecessary Violence in Making Arrest—Issue.

In an action of damages against police constables, the pursuer, who had been arrested and charged by them while acting within the scope of their duty, and had subsequently been convicted on the charge, proposed the following issue:—"Whether . . . the pursuer was wrongly and forcibly taken into custody . . . by the defenders while acting as police constables."

In support of the issue he *inter alia* averred that "he was violently seized by the defenders and subjected to gross and unnecessary violence. He was held by the wrists by the defenders, one on each side, and his arms twisted, and considerable and unnecessary violence was applied to him, causing several bruises on one of his arms, as well as swelling with considerable pain, in consequence of which he had to submit himself to medical inspection and treatment the following morning."

Held (1) that the issue was inappropriate and must be disallowed in as much as the insertion of malice and want of probable cause was unnecessary unless the question was as to the use of improper violence, and (2) that the averments were insufficient to found a case upon improper violence.

Wood v. *N.B. Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407, *distinguished*.

Opinion (*per* Lord Kinnear) that the issue (1) failed to put the question of

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unnecessary violence to the jury, and (2) erroneously assumed that for a police constable to use any force at all in making an arrest was an actionable wrong.

This was an action of damages, raised in the Sheriff Court at Hamilton, at the instance of Thomas Benjamin Hill, restaurateur, Windmillhill Street, Motherwell, against Donald Campbell and William Smith, police constables, Motherwell, in which the pursuer prayed the Court to grant decree ordaining the defenders, jointly and severally and severally, to pay to the pursuer the sum of £300 sterling, or alternatively the sum of £150 each.

The pursuer averred—"(Cond. 2) On or about the night of Saturday the 15th or early morning of Sunday the 16th days of July 1905, and while quietly and peacefully engaged in his business, he was without any reason or warning being given suddenly accosted and illegally and wrongously arrested by the defenders acting in concert as police constables aforesaid. Defenders without permitting him to put on his coat and vest, which were off at the time, and either ignoring or refusing pursuer's request to be allowed to put his garments on, conveyed him in custody from the back door of his said place of business through Windmillhill Street and Brandon Street and Clyde Street of the said burgh, in the presence of a number of residenters of Motherwell, and brought to the local police office in the street last named, and therein the defenders, acting as aforesaid, falsely and maliciously and without probable cause charged the pursuer to the officer in charge, Inspector Moir, with having in the rear of the restaurant in Windmillhill Street aforesaid occupied by him behaved in a riotous manner and committed a breach of the peace by shouting and swearing in a loud voice, and making use of abusive language towards the defenders and challenging them to fight with him, all of which was untrue. As stated, the arrest of the pursuer was not only illegal, irregular, wrongful, and oppressive, and in gross violation of their duty as police constables, but the charge preferred against him by the defenders was false and made maliciously and without probable cause. Admitted that pursuer was convicted and fined 10s., the alternative being five days' imprisonment, but explained and averred that said conviction proceeded on erroneous use of the evidence and law. (Cond. 3) While being conveyed to the police office as aforesaid pursuer was assaulted by the defenders. Offering no resistance to his arrest he protested against his being so wrongously arrested, but in spite of his remonstrances he was violently seized by the defenders and subjected to gross and unnecessary violence. He was held by the wrists by the defenders, one on each side, and his arms twisted, and considerable and unnecessary violence was applied to him, causing several bruises on one of his arms as well as swelling with considerable pain, in consequence of which he had to submit himself to medical examination and treatment the following morning. Said arrest of pursuer by defenders and their subsequent abusive behaviour were entirely outwith the scope of their employment as police constables."

The pursuer pleaded—"(1) The defenders having wrongously and illegally arrested the pursuer, and conveyed him in custody through the public streets of Motherwell to the police office there, and having assaulted him while taking him there, all as before condescended on, are liable in damages therefor. (2) The defenders having falsely, maliciously, and without probable cause charged the defender with having committed the offence hereinbefore set forth, slandered the pursuer, and being therefore liable in damages, decree should be granted therefor."

The defenders pleaded—"(1) Privilege. (2) The pursuer having by his own conduct as condescended on necessitated his apprehension by the defenders, is barred from insisting in the present action. (3) The defenders having acted throughout in the course of their duty and without malice, and having done nothing which they were not entitled to do as police constables to preserve the peace, should be assoilzied, with expenses."

The Sheriff-Substitute (THOMSON) having allowed a proof, the pursuer appealed for jury trial, and proposed the following issues:—"(1) Whether on or about the night of Saturday the 15th, or early morning of Sunday the 16th, both days of July 1905, the pursuer was wrongly and forcibly taken into custody and removed from his restaurant in Windmillhill Street, Motherwell, to Motherwell Police Office, in custody by the defenders Donald Campbell and William Smith, while acting as police constables, to the loss, injury, and damage of the pursuer? (2) Whether on or about the night of Saturday the 15th, or early morning of Sunday the 16th, both days of July 1905, in the Police Office, Motherwell, the defenders Donald Campbell and William Smith, or one or other of them, falsely, maliciously, and without probable cause, charged the pursuer to Inspector Moir, the officer in charge, with having in the rear of the restaurant in Windmillhill Street, Motherwell, occupied by the pursuer, behaved in a riotous manner and committed a breach of the peace by shouting and swearing in a loud voice, and making use of abusive language towards the said defenders, and challenging them to fight, or made one or other of these charges, or charges of a like import, of and concerning the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £300." During the discussion the pursuer also proposed the following issue:—"(3) Whether on or about the night of Saturday the 15th or early morning of Sunday the 16th, both days of July 1905, the pursuer was wrongously, maliciously, and without probable cause apprehended by the defenders, &c. (as in the first proposed issue."

The respondents (defenders) moved that the action should be dismissed as irrelevant, and argued—There was no issuable matter

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on record. The issues proposed could not be granted. Want of probable cause must be in them for the defenders otherwise were only doing their duty, but the conviction which was admitted showed that there was probable cause both for the arrest and the charge. There was indeed no averment on record of want of probable cause in regard to the arrest. Malice must also go into the issues, and a mere averment of malice was not enough against a public official. Specific facts and circumstances must be set forth from which malice could be legitimately inferred—*Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057, 24 S.L.R. 744. No appeal had been taken against the conviction, and standing the conviction the present action was irrelevant —Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62), sec. 3; *Maclellan* v. *Miller*, December 7, 1832, 11 S. 187; *Gilchrist* v. *Anderson*, November 17, 1838, 1 D. 37; *Young* v. *Mitchells*, June 12, 1874, 1 R. 1011, 11 S.L.R. 582; *Kennedy* v. *Wise*, June 21, 1890, 17 R. 1036, 27 S.L.R. 813.

Argued for appellant (pursuer)—It was unnecessary that want of probable cause should go into the first issue, as there was there put in issue the use of unnecessary violence in the arrest. The pursuer's averments on that point were amply specific, and the first issue was modelled on the issue approved in similar circumstances by the Court in *Wood* v. *North British Railway Co.*, February 14, 1899, 1 F. 562, 36 S.L.R. 407. [Lord Kinnear—In that case the constables were acting not as constables but as servants of the railway company.] [Lord President—In *Wood's* case want of probable cause was not necessary, so if this issue is modelled on *Wood* the issue is wrong.] If it were necessary, a third issue would be proposed similar to the first, but inserting malice and want of probable cause *quoad* the apprehension, viz., "Proposed Additional Issue"—(3) "Whether the pursuer was wrongously, maliciously, and without probable cause apprehended by the defenders, &c." [Lord President—If you go to trial on that issue and the conviction is proved would the judge not direct the jury that there was probable cause? In what way can probable cause be better proved than by a conviction?] In any event, the pursuer was entitled to an issue of unnecessary violence without inserting malice or want of probable cause—*Wilson* v. *Bennett*, January 16, 1904, 6 F. 269, 41 S.L.R. 216.

Lord President—This is an appeal from the Sheriff Court in an action of damages at the instance of a restaurateur against two police constables in Motherwell, and the question now before the Court is whether the issues proposed by the pursuer ought to be granted. The averment of the pursuer is that on a certain night in his own premises he was suddenly accosted and illegally and wrongously arrested by the defenders, acting in concert as police constables of the burgh of Motherwell. He goes on to say that they conveyed him in custody from the back door of his place of business to the local police office, and falsely and maliciously and without probable cause charged him to the inspector there with having committed a breach of the peace. He then goes on to say that he was convicted in the Burgh Court and fined 10s. He further alleges that while being conveyed to the police office he was assaulted by the defenders, and he explains that by saying that he was subjected to gross and unnecessary violence, held by the wrists and his arms twisted, and that "considerable and unnecessary violence was applied to him causing several bruises on one of his arms as well as swelling with considerable pain, in consequence of which he had to submit himself to medical examination and treatment."

The two issues the pursuer proposed originally were, first, whether he was wrongly and forcibly taken into custody, and, second, whether the defenders falsely and maliciously and without probable cause charged him with breach of the peace. His counsel now proposed a third issue, namely, whether he was wrongously, maliciously and without probable cause apprehended. As regards these two last issues I am clearly of opinion that they cannot be granted, and for the very simple reason that the pursuer has averred himself out of Court upon the matter of probable cause, and therefore cannot be granted an issue the success of which must depend on proof of want of probable cause. The case was simply one of an arrest and a charge made by ordinary police constables acting admittedly in the scope of their duty, and in a place where they had a right to make arrests and charges. Doubtless if they did that without probable cause, and in order to gratify their own spite, they would be liable to an action of damages, but unless malice and want of probable cause were proved against them the action could not succeed. But it appears to me that if a conviction followed on the complaint that was made, as is here admitted, it is idle to say that the constables had no probable cause in preferring the complaint. The conviction might have been wrong in this sense, that it is possible, if there had been a review of the facts, the Court of review might have taken a different view from the presiding Magistrate, but none the less it could never be said that there was no probable cause for making the complaint if the result was that the proper tribunal before whom the complaint was heard found a conviction. Therefore upon the pursuer's own showing he has disentitled himself to either of these two issues.

I think there is another reason, too, if it is necessary to slay the slain, why these issues should not be allowed, and it is that, on the principle laid down in the case of *Beaton* (14 R. 1057) there must be facts and circumstances set forth from which malice may legitimately be inferred. I find no such facts and circumstances set forth in the record here, and I therefore think that that is an additional ground for refusing these two issues.

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There still remains the first issue. Into that issue it is not proposed to put "maliciously and without probable cause." It is admittedly founded on an issue that was approved by the Second Division in *Wood* v. *North British Railway Company* (1 F. 562). I humbly think that the pursuer was mistaken in thinking that he could frame an issue in this case on the model of the case of *Wood*, and that for the very good reason that *Wood's* case proceeded entirely upon the theory and upon the fact that the constables there were not ordinary city constables but were servants of the North British Railway Company. Indeed, it was obviously necessary that that should be the pursuer's theory in *Wood*, because he did not seek damages against the constables but against the Railway Company, who were only responsible if a wrong had been committed by their servants acting within the scope of their employment. In that case the pursuer averred that he was illegally and wrongously arrested by the company's servants. Now, it may be that, in point of fact, they were justified by the powers conferred by the Railway Regulation Act in making the arrest, but the averments were that there were no such circumstances as to justify them in exercising these powers, and that their act was that of ordinary railway servants and unjustifiable. In that case it was averred that the arrest was not only wrongful but that there was undue violence used, and accordingly the Second Division held, and I assume rightly, that it was not necessary to have a separate issue for these two things but that the whole matter might be tried in one issue which used the words "wrongly and forcibly." But that issue cannot be adapted to a case where, as here, it is necessary to have malice and want of probable cause to make a relevant issue. Therefore the first issue being based on an issue which was applicable to a different state of circumstances, is not an issue which can be granted in this case.

I do not for one moment say that there might not be a case where an issue would be granted in respect of the use of improper violence by police constables, and that without any question of malice or want of probable cause. The expression "want of probable cause" has no application to such circumstances, the question being whether the violence used can be justified as necessary. I have no doubt whatever that a police constable is not to be allowed, in excess of his duty, to take advantage of his position and brutally assault a person who is rightly in his custody. But that class of case would never be allowed to proceed unless there were very distinct averments to that effect. The averment here, although to a certain extent an averment of unnecessary violence, is really not sufficient to found a case of that class. The pursuer says he was held by the wrists and his arms were twisted, but these appear to me to be the ordinary circumstances of nearly every arrest, and I confess that the idea seems to me to be ridiculous that every pickpocket who is hauled along the street, by averring that the policeman twisted his arms a little further round than he need have done, should have as a matter of right an action of damages and a jury trial, in which twelve jurymen would be called upon to determine the precise angle of distortion at which the arms ought to be in taking a struggling man along a street. If, on the other hand, really serious violence is specifically averred, then that would be a case for allowing an issue. But, as I have said, I think there are no such averments here, and on the grounds that I have stated I am for refusing all the issues.

LORD KINNEAR—I am of the same opinion. I do not think that the first issue here can be allowed, for it assumes that for a police constable to use force in taking a man whom he has arrested to the police office is an actionable wrong. Now that in itself is not a wrong which would entitle the arrested man to recover damages; though it may be that if unnecessary violence has been used by the police constable an action might lie. I do not think that the pursuer alleges or intends to allege any such violence as would entitle him to an issue on that ground. But my objection to this issue is that it does not put the question of unnecessary violence to the jury at all, for the jury would be quite justified in returning an affirmative finding on this issue if they thought force had been employed, even though that force was not in their opinion more than was indispensable.

As to the second and third issues, they both appear to me to give rise to the same objection. These two issues follow on the averment that the defenders arrested the pursuer, took him to the police office, and there stated to the inspector the grounds on which their charge against him was preferred. Now, it is admitted that the pursuer can have no claim for damages for these actings except on a relevant averment of malice and want of probable cause. I agree with your Lordship that want of probable cause must be excluded here, for it is admitted that there was probable cause inasmuch as the charge when inquired into resulted in a conviction.

I agree further that there are no sufficient averments of malice to be sent to a jury, for it is settled that in alleging the malicious exercise of a public duty, such as that of a police constable effecting an arrest, it is necessary, not only to aver malice in general terms, but to set forth specific facts and circumstances from which malice can be legitimately inferred. The presumption is that those who are acting in discharge of a public duty are acting honestly; and the onus is on the pursuer to set forth facts and circumstances which, if proved, will displace the presumption of honesty, by showing that in point of fact they were acting maliciously. There are no such facts and circumstances averred here, and I therefore agree with your Lordship that these issues must be disallowed.

LORD PEARSON concurred.

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LORD M'LAREN was not present.

The Court disallowed the issues, dismissed the action, and decerned.

Counsel for Pursuer and Appellant—M. P. Fraser. Agent—D. Hill Murray, S.S.C.

Counsel for Defenders and Respondents—Guthrie, K.C.—W. Thomson. Agents—Ross, Smith, & Dykes, S.S.C.

Saturday, December 23.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

KEITH *v.* LAUDER.

Reparation—Slander—Slander with respect to Trade—Privilege—Malice—Probable Cause—Ship—"Register of Defaulting Crews"—Member of Association which Kept Register Reporting Seaman as Defaulter.

A was chief engineer of a steam trawler belonging to a fishing company of which B was manager. The fishing company was a member of an association of owners of fishing vessels. The members of the Owners' Association had resolved that a "Register of Defaulting Crews" should be kept, and that if a member of the crew of a steam trawler belonging to a member of the association, after engaging to go to sea in such trawler, should absent himself or refuse to go to sea, or should come on board in a state of intoxication, the member of the association should report to its secretary the name of the member of the crew, and the offence committed by him, for insertion in the register. A register accordingly was so kept. A, without due notice, left the said steam trawler when she was ready to go to sea, and so delayed her departure. B reported to the secretary of the Owners' Association that A had been drunk and had refused to go to sea, and accordingly A's name and the said alleged offences were entered in the register. The Court after proof were of opinion that in making the report B was not actuated by malice, and that he had reasonable grounds for believing that the statements of and concerning A contained in the report were true.

Held (1) that B was privileged in making the report, and in respect that he did not make the report maliciously was not liable in damages to A for slander, and (2) that the circumstances did not disclose any other ground upon which A was entitled to claim damages from B.

The pursuer in this action, which was raised in the Sheriff Court at Aberdeen, was George Keith, an engineer, who had for some time been employed on board fish-trawling vessels. Thomas Lauder, the defender, was the manager of the Aberdeen Icelandic Steam Fishing Company, Limited. For about a fortnight prior to 30th September 1904 the pursuer had been employed as chief engineer on board the steam trawler "Princess Melton," which belonged to the said Steam Fishing Company, but on that date he left the "Princess Melton" and refused to go to sea, in consequence of which she was delayed in harbour for more than a day.

The Icelandic Steam Fishing Company, Limited, was a member of the Aberdeen Steam Fishing Vessels Owners' Association, Limited, which company was formed in 1902 for the purpose, *inter alia*, of "collecting and circulating statistics and other information relating to the fishing or shipping industries or any trade or business connected therewith." The Association, in November 1903, had resolved that its members should report men who being engaged to go to sea should absent themselves or refuse to go to sea or come on board in a state of intoxication, and that a list of the men so reported should be kept for the information of all its members; the list so kept was called the "Register of Defaulting Crews." On these reports the secretary of the Association, if he did not think the matter too trivial, sent out circular letters to its members, about 15 or 20 in number, informing them of those reported to it, but no penalty attached to an owner choosing to employ a seaman so reported, and sometimes he did so.

The pursuer admitted that on 30th September 1904 he left the "Princess Melton" when she was about to sail for the fishing ground, but maintained that he was justified in so doing because certain defects in the machinery of which he had previously complained had not been put right. But it appeared from the evidence that these repairs were not serious and could have easily been repaired temporarily. It further appeared that although the pursuer knew at 11 o'clock in the forenoon that the repairs were not to be made until another trip, he had remained about the ship until the afternoon, when he went on shore for a pint of beer, and that it was only on his return on board after being sent for that he refused to go to sea. (For a fuller account of the evidence on this matter *vide* Lord Low's opinion, *infra*.) The pursuer further himself admitted he was under the influence of drink at the time but denied that he was drunk.

On Monday, 3rd October, the defender met the secretary of the Owners' Association, Paul, and a Mr Doeg, a member of the Association, and told them about the pursuer's conduct of 30th September. Doeg expressed the opinion that the matter should be reported. The defender then asked his superintendent engineer Walker to report the matter to the superintendent porter at the fish market, Smith, who, subject to the secretary's instructions, kept the register of defaulters. Walker however forgot to do so.

On 6th October the pursuer raised an action in the Small Debt Court for arrears of wages against the Aberdeen Icelandic

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Steam Fishing Company, Limited, in which action he was successful. On 10th October the defender learnt that the report had not been made by Walker, and on that day went along with him to Smith, and made a verbal report, in consequence of which the following entry was put in the Register of Defaulting Crews.

Date.	Name of Owner.	Boat.	Name of Accused.	Charge and Nature of
1904 Oct. 10	Thomas Lauder	"Princess Melton"	G. Keith, I. Engineer	Drunk and refusing to proceed to sea.

The same day the Secretary of the Owners' Association sent the following circular letter to the members.

"*Private.*

"ABERDEEN STEAM FISHING VESSELS
"OWNERS' ASSOCIATION LIMITED.
"Fish Market Buildings,
"Aberdeen, 10*th October* 1904.

"Dear Sir,—Please note that the undermentioned have been reported to this Association, and you are requested to refrain from shipping them meantime. — Yours truly,
GEO. F. PAUL.

Name.	Occupation.	Last Vessel.
George Keith.	1st Engineer.	'Princess Melton.'

. . . . . ."

The pursuer averred that in consequence of the report which caused said entry to be made and said letter to be sent, he had lost a situation which he had obtained as engineer on board the steam trawler "Craiggowan," a vessel belonging to the Aberdeen Steam Trawling and Fishing Company, Limited. He also averred that as a consequence of the report he had been prevented from obtaining other employment.

The defender denied that it was in consequence of the report, or even of the said entry and said letter, that pursuer had lost his situation, and explained that it was because the trip for which he had been engaged was finished, and because the superintendent of that company had discovered pursuer had been previously dismissed from one of said company's ships, and so did not choose to re-engage him. He also denied the averments that in consequence of the report the pursuer had been prevented from obtaining other employment.

The pursuer pleaded—"(1) The defender having wrongfully and maliciously procured the pursuer's discharge from employment and prevented him from obtaining employment, is liable to the pursuer in reparation as craved."

On 5th April 1905 the Sheriff-Substitute (HENDERSON BEGG), after a proof, made, *inter alia*, the following findings in fact—"(5) That on the said 30th September 1904, about four o'clock in the afternoon, the pursuer refused to go to sea with the said steam trawler, on the ground that certain repairs, which he had mentioned to Mr W. Walker, the superintendent engineer of the said company, about 8 a.m. of the said day, and which he deemed necessary, had not been made to the engines. . . . (11) That the defender reported to Mr G. F. Paul, the secretary of the foresaid Owners' Association, that the pursuer had been drunk and had refused to go to sea on the said 30th September 1904, and thereby procured the said secretary, without making inquiries on both sides, to send the circular letter on 10th October 1904 to each member of the said Owners' Association, stating that the pursuer had been reported to the Association, and requesting each member to refrain from shipping the pursuer meantime; (12) That on 17th October 1904 the pursuer, who had obtained employment on board the steam trawler 'Craiggowan,' belonging to the Aberdeen Steam Trawling Company, Limited, a member of the said Owners' Association, was dismissed without notice by Mr Joseph Lamb, the superintendent engineer of the said company. . . . (15) That it is not sufficiently proved that the said dismissal was caused by the actings of the defender mentioned in the eleventh finding hereof; but (16) That the failure of the pursuer to find employment since 17th October 1904 has been caused mainly, if not wholly, by the said actings of the defender; and (17) That the defender has thus caused pecuniary loss and damage to the pursuer."

The Sheriff-Substitute held that the whole system of the Register of Defaulting Crews was illegal, on the ground that "it establishes a secret tribunal, consisting practically of only one person—the secretary of the Association—with power to punish a man unheard for an alleged offence by taking the means whereby he lives." But that even if the system were not illegal, that the defender must prove that he was justified in acting as he did, which he had failed to do, and that the charge of drunkenness was unfounded, that the actings of the defender were wrongful, not justified, and not privileged, and that he was liable in damages to the pursuer, which he assessed at £50.

The defender appealed to the Court of Session.

During the debate upon the appeal the pursuer was allowed to amend his record by adding the following condescendence—"(Cond. 7) On or about 10th October 1904 the defender falsely, maliciously, and calumniously caused the name of the pursuer to be reported to the said Association, and to be inserted in a register kept on behalf of the members of the said Association by John Smith, fish porters' superintendent, Fishmarket, Aberdeen, as a person accused of being drunk and refusing to proceed with his said vessel. The defender in so reporting the pursuer and in getting his name inserted in the said register as a person so accused, knew that his said accusation was false and groundless. The insertion of the pursuer's name in the said register was intended by the defender to represent, and did represent, that the pursuer was an unreliable and untrustworthy engineer, unfit to be employed as such owing to his drunken habits, and to his habitually detaining vessels on which he had been engaged, by deliberately refusing to proceed with them to sea without good cause or on

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false pretexts. The defender knew that the pursuer by being so reported and entered in the said register would be treated as he represented him by members of the said Association, and by employers of men in the position of the pursuer. The defender acted with that object in view, and for the sole purpose of having the pursuer prevented from getting employment as an engineer." The defender's answer to this was "Denied."

The pursuer was also allowed to add the following plea-in-law—"The defender having falsely, maliciously, and calumniously slandered the pursuer, as condescended on, and the pursuer by such means having been prevented from getting employment, the pursuer is entitled to damages as concluded for."

The defender (appellant) argued—(1) The system of the Register of Defaulting Crews was not illegal, and the Sheriff had erred—*Mogul Steamship Company, Limited* v. *M'Gregor, Son, & Company*, [1892] A.C. 25, Lord Watson at p. 41; *Scottish Co-operative Wholesale Society, Limited* v. *Glasgow Fleshers' Trade Defence Association and Others*, January 14, 1898, 35 S.L.R. 645; and *Quinn* v. *Leathem*, [1901] A.C. 495, which expressly approved of the last-named case. (The respondent here admitted the legality of the register.) The defender here argued that in *Allen* v. *Flood*, [1898] A.C. 1, Lord Watson had summed up the law on this subject when he said at p. 96—"There are in my opinion two grounds only upon which a person procuring the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly, and for his own ends, induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and in that case . . . the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party." The first ground had been relevantly set out on record, and the Sheriff had proceeded on it; it was now, however, given up. The second ground figured by Lord Watson, of which the most recent example was *South Wales Miners' Federation* v. *Glamorgan Coal Company, Limited*, [1905] A.C. 239, was not relevantly set out on record. If pursuer's case now were that the defender by illegal means induced trawl owners to deny employment to the pursuer, or that damages were due for a slander which had had the result of stopping his employment, the pursuer would require to amend his record, for there was no averment of the falsehood of the statements made. [*The pursuer was allowed to amend his record as set forth above.*] (2) The said Owners' Association and its objects being legal, the *bona fide* statements of members for the use of other members were privileged because of the conjunction of interest between the giver and receivers of information—*Waller* v. *Loch*, 1881, L.R., 7 Q.B.D. 619. Even if the information was given unasked, there was privilege if there was a right to give it—*Farquhar* v. *Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549. It was true that doubts were cast on this in the case of *Reid* v. *Moore*, May 18, 1893, 20 R. 712, by Lord Trayner, at p. 717, 30 S.L.R. 628, but in the present case the statements complained of were not ultroneous, because such information was an object of the Owners' Association, and accordingly from the fact of membership of the Association there arose a duty or obligation to make the communication a duty self-imposed no doubt by the members of the Association, but still a duty. Where there was a duty to make a statement there was privilege—*Pattison* v. *Jones* (1828), 8 B. & C. 578; even if the duty was only a moral or social duty—*Toogood* v. *Spyring*, (1834) 1 C. M. & R. 181; *Davies* v *Snead*, (1870) L.R. 5 Q.B. 608. The furnishing of such information being an object of the Association there existed really a continuing request from each of its members to the others for such information, and consequently such information was privileged—*Bayne & Thomson* v. *Stubbs, Limited*, January 29, 1901, 3 F. 408, 38 S.L.R. 308. The statement accordingly was privileged, and the onus was on the pursuer to show actual malice, or that statements were made without probable cause—in fact were so destitute of foundation as to exclude *bona fides*. But none of the witnesses—not even the pursuer himself—said that he was sober. (3) Even if there was no privilege, and the onus was on the defender to show the truth of his statement, the evidence was sufficient to show that the man was drunk. (4) Even if there was an actionable wrong the damage shown must be direct. Here the pursuer only at most applied to two people for work (one of them denied it), but at any rate neither had work to give him; this distinguished the case from *Giblan* v. *Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600.

The pursuer (respondent) argued—(1) Even admitting, as the pursuer was now willing to do, that in itself the system of the Register of Defaulting Crews was legal, the pursuer was now out of employment and had failed to get employment owing to the illegal actings of the defender, namely, his misrepresentation or slander; and this constituted an actionable wrong—*Mogul Steamship Company*; *Allen* v. *Flood*; *Parlane* v. *Templeton and Others*, November 14, 1896, 34 S.L.R. 234. (2) The pursuer was not to blame that no allegation of misrepresentation and slander was in the record, for the terms of the report embodied in the entry had only been recovered by diligence after the record was closed; the whole facts were before the Court, and though the pleadings were bad the record should be allowed to be amended—*Muirhead & Turnbull* v. *Dickson*, June 1, 1905, 7 F. 686, at 692, 42 S.L.R. at 581. [*The amendments as above set forth were allowed to be made.*] (3) The evidence

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showed that reports were only to be made in the case of habitual offenders, which the pursuer was not. There was therefore no duty on the defender to report him, and the report was not privileged. In any case privilege was a question of degree —*Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1062, 38 S.L.R. 781, which approved of *Sheriff* v. *Denholm*, December 18, 1897, 5 S.L.T. No. 309. *Farquhar, supra*, was to be explained because of the right of keepers of registers to know their client's disabilities. (4) In any event malice was shown in the evidence, for the pursuer's whole actings were consistent with the view that the reason he refused to go to sea was because the necessary repairs had not been made, and the evidence showed that the charge of drunkenness was unfounded. An unfounded charge of drunkenness showed malice—*Anderson* v. *Wishart*, 13th July, 1818, 1 Mur. 429, at 441. The report was made after the summons in the small debt action was served. The very fact that *veritas* was still put forward was in itself an *indicium* of malice —*Praed* v. *Graham*, 1889, 24 Q.B.D. 53. The defence of "probable cause" was inapplicable to the present case—*Milne* v. *Smiths*, November 23, 1892, 20 R. 95, Lord M'Laren at p. 100, 30 S.L.R. 105. (5) Even if the report were true, *veritas* was no defence to an accusation used for the purpose of preventing a person obtaining employment—*Giblan*, *supra*, [1903] 2 K.B. 600, at 624.

At advising—

LORD KYLLACHY—In this case I do not consider that we are at all required to enter upon the controversies which have arisen out of certain recent decisions—I mean the decisions of the House of Lords in the cases of *Allen* v. *Flood* and *Quinn* v. *Leathem*, and other cases of that description. The pursuer has certainly tried by the form of his action to draw us into that somewhat difficult region, and, so far as the Sheriff is concerned, he seems to have partly succeeded. But it became, I think, evident at an early stage of the argument that we have here really to deal with a much more commonplace, and indeed fairly familiar kind of question—a question, namely, of alleged slander—slander of a person with respect to his trade or employment—slander of which the only peculiarity is that it is said to have caused to the pursuer loss and damage of a somewhat special and very serious kind.

The Sheriff no doubt founds mainly on what he appears to consider the illegal character of a certain association to which the defender belongs, and through whose machinery he is said to have perpetrated the alleged slander. But the pursuer's counsel frankly conceded that he did not impugn either the legality of the original objects of that Association, or even the legality of the additional object lately added, viz., the protection of members, by mutual conference and interchange of information, against the employment on their ships of undesirable persons. Carried out by legal means, such an object was, properly I think, conceded to be quite lawful; at all events, I see no reason to doubt that it is so.

Accordingly, what is really contended is only this, that in the present case the protective machinery thus lawfully instituted was set in motion by the defender to the pursuer's detriment in an illegal way, viz., by communicating to the society, and through the society to the defender's fellow-members, false allegations as to the pursuer's habits and conduct, allegations not only false but known to the defender to be so.

The case is therefore, as I have said, really and in substance a case of slander—slander resulting in a particular kind of injury. That is the simplest and, I think, most favourable view of the pursuer's case, and in that view I am quite prepared to consider it.

But so taking it, I am unable upon the evidence to hold that the pursuer has proved his case. I do not say what might have been the result if the position had been free from all element of privilege. On that assumption and the statements made being plainly defamatory, the onus would have rested on the defender to prove the truth of his statements as under an ordinary counter issue of *veritas*. And I am by no means sure, if that had been the position of matters, that I should have differed from the Sheriff, who saw the witnesses, and to whose judgment, even apart from that circumstance, I should have been disposed to give great weight. But upon repeated consideration I find it impossible to doubt that the defender was here in a privileged position. He was a member of this association of shipowners—an association lawful and having lawful objects; and if in pursuance of those objects in which he had himself, as a member and shipowner, a material and quite legitimate interest, he made the statements in question honestly and in good faith, I am unable to hold otherwise than that he was in a privileged position. *Prima facie* he must be held to have been acting, if not strictly in performance of a duty, at all events in the exercise of a right. And that being so, he only acted illegally if he was actuated by malice—the onus of proving malice being upon the pursuer, and involving at least this requirement, that the statements complained of should be shown to be either destitute of foundation or so grossly exaggerated as to exclude honesty and good faith.

Now, that being the issue, I am afraid the pursuer has failed to establish it. My impression, I must own, was at the outset the other way, and I approached the evidence of the defender with some distrust. But I have found it impossible to resist the conclusion that the pursuer, contrary to his contract, refused to proceed to sea, if not on a mere pretext, at all events on insufficient grounds, and further, that he was, on the afternoon in question, if not "drunk," at least more or less intoxicated —visibly not sober—and indeed visibly the worse of drink. I think, in short, his conduct and his condition furnished reasonable

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grounds for the defender reporting him as drunk and refusing to proceed to sea; and that being so, I fail to find in the other parts of the case any evidence of malice. The defender's delay in making the report until the pursuer raised his small debt action was certainly suspicious and somewhat suggestive. But I have come to think that the defender's explanation is on the whole satisfactory.

LORD STORMONTH DARLING — I have thought from the first that the right way to deal with this case was to treat it as an action for slander, although the pursuer, both in raising and conducting it, endeavoured to refer it to a much more difficult and contentious chapter of law. So treating it, I own that at one time I had some doubts whether the occasion when the defender made the report to the Secretary of the Trawl-Owners' Association, on which the action is founded, was a privileged occasion, and also whether, if it was, the defender did not exceed, and thereby lose, his privilege by authorising the secretary (if he did authorise him) to send out the circular to the members of the Association, requesting them to refrain from shipping the pursuer and the other reported persons in the "meantime." I still think that the secretary in so doing went dangerously near the line where the privilege of a master giving information as to the conduct of a servant ceases to protect him.

But having had the advantage of conferring with both of your Lordships, and having carefully reconsidered the proof, I have come to think that the occasion was a privileged one, notwithstanding the volunteered character of the communication, because of the legitimate interest which the defender and the other members of the Association had in knowing what the experience of each of them had been with respect to the conduct of their respective crews; and, as regards the other matter, that, in leaving the secretary free to express the circular as he did, the members of the Association (including the pursuer) intended to do, and did no more than to lay the facts before their fellow-members and leave each of them to judge for himself. For there was no penalty or compulsitor of any kind on any member who chose to disregard these reports.

I therefore concur with your Lordships (1) that there was nothing illegal in the system by which this Register of Defaulting Crews was established and carried out; (2) that the defender was privileged in making the report for which he is sought to be made liable; and (3) that the pursuer has failed to prove that in making it the defender was actuated either by actual malevolence or by that kind of recklessness or exaggeration which the law regards as equivalent to malice.

LORD LOW—I cannot agree with the views expressed by the learned Sheriff-Substitute in regard to the illegality of the course adopted by the Aberdeen Steam Fishing Vessels Owners' Association in regard to defaulting seamen. It appears that not only owners of steam trawlers, but also members of the crews who shared in the profits, suffered considerable loss by men who were engaged to sail in vessels absenting themselves, or returning to the ship in a state of intoxication. The Association therefore resolved that, when an incident of that kind happened, the owner of the vessel should report the defaulter to the Association, and that a list of the men so reported should be kept. I can see nothing illegal in that. All the members of the Association drew their crews from the same body of men, and every member had an interest to know what men had proved to be untrustworthy by reason of desertion or drunkenness.

I rather gather, however, that what the Sheriff-Substitute founds upon is not so much the resolution as the way in which it was carried out. He complains that everything was left to the secretary of the Association, who, although he made some inquiry as to the circumstances which led to a man being reported a defaulter, never communicated with the alleged defaulter himself. That, says the Sheriff-Substitute, was to establish "a secret tribunal consisting practically of only one person, with power to punish a man unheard for an alleged offence 'by taking the means whereby he lives.'"

I cannot accept that view. There was no secret tribunal established, or, indeed, any tribunal at all. What the Association resolved was that the members should report men who were in default, and that a list of the men so reported should be kept for the information of all the members of the Association. I cannot find that the secretary was bound to do more than record the facts, namely, that a certain man had been reported by a certain owner for a certain offence. If that and nothing more had been done, there would have been nothing illegal in it, and it can make no difference that the secretary was at the trouble to make some inquiry, and took upon himself not to enter in the list the name of a man who had been reported if he was satisfied that the offence had been trivial.

I am therefore of opinion that the ground upon which the Sheriff-Substitute puts his judgment cannot be sustained—the ground, namely, that "the whole system referred to is illegal," and "that the defenders by putting it into operation against the pursuer committed a wrongful act."

It seems to me that if the pursuer has a claim against the defender at all, it must be upon the ground of slander. There is, of course, no doubt, as to the slanderous nature of the statements made by the defender when he reported the pursuer, and I think that there are two questions—1st, whether the occasion was privileged, and 2nd, whether the report was made maliciously.

I am of the opinion, for the reasons given by Lord Kyllachy, that the occasion was clearly privileged, and that the only question in regard to which there is any difficulty is whether the defender was actuated by malice.

Now, in a case of this sort, there can, I

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imagine, be no better evidence of malice than that the statement complained of was untrue, and was made without reasonable grounds for believing that it was true. It is therefore necessary to consider how the matter stands upon the evidence.

The statement made by the defender concerning the pursuer was that upon a certain occasion he was drunk and refused to go to sea. In regard to the first of these charges, no one says that the pursuer was sober, and he himself admits that he was under the influence of drink. It was said that the pursuer could not have been drunk, because he worked the engines while the ship was being taken across the harbour to another berth. I agree that that shows that he was not rendered totally incapable by drink, but it is a matter of common experience that a man may be able to perform efficiently enough a more or less mechanical duty to which he is accustomed, although he is so much under the influence of drink that it would not be an abuse of language to say that he was drunk. There are two witnesses who may, I think, be regarded as giving a reliable account of the pursuer's condition. The one is an altogether independent witness, Napier, a working engineer, who went on board the ship to fit in a new plug in the water-gauge. He says—"The man appeared to me to have a good drink in him. I would not say the man was incapable." The other witness is Barron, the mate of the ship, who, when asked what condition the pursuer was in, said—"I would say under the influence of drink, but not too drunk—capable of getting about without any assistance." In the face of such evidence it seems to me to be impossible to say that the defender had not reasonable grounds for reporting that the pursuer was drunk.

In regard to the charge of deserting the ship, it is admitted that the pursuer left the ship when she was on the point of sailing for the fishing ground, and that, in consequence, she was unable to get away until the second day afterwards. The pursuer, however, maintains that he was justified in leaving the ship, because certain defects in the machinery of which he had previously complained had not been remedied. It is the case that the pursuer had complained of the condition of some parts of the machinery, and it is also the case that the engine and boiler and other appliances were in need of being overhauled, having been several months in use without the ship being laid up for repairs. The ship was, in fact, laid up for repairs a few days after the pursuer left her, having made only one fishing trip in the interval, but the evidence of Mr Barter, the Board of Trade Surveyor, shows that, although the machinery required to be overhauled, the ship was in no way unseaworthy, and that there was no reason why she should not make another trip before being laid up.

What the pursuer complained of was that the feed-pump and the bilge-pump were out of order. Mr Barter says that he found nothing wrong with the feed-pump, and that although the bilge-pump was somewhat defective, the defects were not serious, and could have been temporarily repaired by very simple means. He further says that, notwithstanding the defects, the bilge-pump discharged water quite satisfactorily. It therefore seems to me that the condition of the pumps did not justify the pursuer in leaving the ship at the last moment, when it was impossible to supply his place.

Further, the conclusion which I draw from the evidence is that the condition of the pumps was not truly the reason why the pursuer refused to go to sea. The pursuer, as I have said, did complain of the condition of the pumps, and asked that they should be put right. That was in the morning, when the ship came in with her cargo of fish. It appears to have been arranged that if the catch was sold for £100, the ship would at once be laid up for repairs, but that if that sum was not realised she would make another trip before being laid up. The catch did not realise £100, and, accordingly, another trip was resolved upon. The pursuer says that he knew that the repairs were not to be made, at 11 o'clock in the forenoon. If he had resolved not to sail again unless the repairs were made, he should then have intimated his intention to leave the ship, and another engineer might probably have been engaged to take his place before the vessel was ready to proceed to sea. The pursuer, however, did nothing of the sort, but appears to have remained on or about the ship during the day. In the afternoon, when the plug was being fitted into the water-gauge, the pursuer told the skipper that he was going for a pint, and left the ship. When the work upon the water-gauge had been completed, the pursuer was still absent, and the mate was sent to find him. The mate found the pursuer in a hotel, and told him that the vessel was waiting for him, and the pursuer said that he would come directly. The mate then went back to the ship, and the pursuer followed him soon afterwards. The pursuer, of course, knew that the reason why he was sent for was that the ship was ready to go to sea, and up to this stage he does not appear to have said or done anything to suggest that he did not intend to sail with her. When he went on board, however, and the superintendent engineer told him to get the ship away to sea, he said he would not go to sea, and after assisting in taking the ship to another berth, he left her, along with the second engineer and fireman, who apparently left because the pursuer did so. These being the circumstances, I cannot take it from the pursuer that his reason for leaving the ship was that the pump had not been repaired. He knew early in the day that the repairs were not to be made until after another trip, and the only inference I can draw from his conduct is that notwithstanding that knowledge he intended to sail with the ship, and went on board for the purpose of doing so, but that at the last moment, for what reason I do not know, he suddenly made up his mind to leave. It therefore cannot, in my opinion, be said that the defender had not reasonable grounds for reporting

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that the pursuer had refused to go to sea.

It was argued, however, that the course adopted by the defender showed that he did not report the pursuer to the Owners' Association because he thought that it was a case which it was his duty to report, but that he did so only because the pursuer brought an action in the Small Debt Court for wages. That argument is founded upon the facts that while the pursuer left the ship upon Friday the 30th of September, and brought his action in the Small Debt Court on the 6th October, the defender did not report the pursuer as a defaulter until the 10th of October. If the defender's delay in reporting the pursuer's conduct had not been satisfactorily explained, the inference might very well have been drawn, that if the pursuer had not brought the small debt action the defender would not have reported him. But it seems to me that the delay has been satisfactorily explained. On the morning of Monday the 3rd of October the defender met Mr Paul, the secretary, and Mr Doeg, a member of the Association, and told them about the pursuer's conduct upon the previous Friday, and Mr Doeg expressed the opinion that the case was one which ought to be reported. The defender then asked Mr Walker, his superintendent engineer, to report the matter to Mr Smith, the superintendent porter at the fish market, who, subject to the secretary's instructions, kept the register of defaulters. Mr Walker, however, forgot to do so, but the defender did not learn that the report had not been made until the 10th of October, when he himself went to Smith, along with Walker, and had the pursuer's name entered in the register. These facts seem to me to leave no room for the inference that, in reporting the pursuer's conduct the defender was actuated by malice against him for having brought an action for his wages.

On these grounds I am of opinion that the Sheriff-Substitute's interlocutor should be recalled, and the defender assoilzied.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact (1) that for about a fortnight prior to 30th September 1904 the pursuer was in the employment of the Icelandic Steam Fishing Company, Limited, of which company the defender is manager, as chief engineer on board their steam trawler 'Princess Melton': (2) that on the said 30th September 1904 the pursuer, without due notice, left the said trawler when she was ready to go to sea, in consequence of which she was detained in harbour for more than a day; (3) that the said Icelandic Steam Fishing Company, Limited, is a member of the Aberdeen Steam Fishing Vessels Owners' Association, Limited; (4) that in or about the month of November 1903 the members of the last-mentioned Association resolved that a 'Register of Defaulting Crews' should be kept, and that if a member of the crew of a steam trawler belonging to a member of the said Association, who was engaged to go to sea in such trawler, should absent himself, or refuse to go to sea, or should come on board in a state of intoxication, the said member of the Association should report to the secretary the name of the said member of the crew, and the offence committed by him, for insertion in the said register; (5) that the defender reported to Mr G. F. Paul, the secretary of the said Association, that on said 30th September 1904 the pursuer had been drunk and had refused to go to sea, and that accordingly the pursuer's name and the said alleged offences were entered in the said register; and (6) that in making the said report the defender was not actuated by malice, and that he had reasonable grounds for believing that the statements of and concerning the pursuer contained in said report were true: In these circumstances finds in law (1) that the defender was privileged in making said report, and in respect that he did not make the report maliciously is not liable in damages to the pursuer for slander; and (2) that the circumstances do not disclose any other ground upon which the pursuer is entitled to claim damages from the defender: Therefore assoilzies the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for the Defendant (Appellant)—Ure, K.C.—A. R. Brown. Agents—Alex. Morison & Co., W.S.

Thursday, December 14.

FIRST DIVISION.

(Before the Lord President, Lord M'Laren, and Lord Mackenzie.)

[Sheriff Court at Glasgow.

BRYSON *v.* J. DUNN & STEPHEN, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Sched., secs.* (1) *and* (2)—*Amount of Compensation—Partial Incapacity—Discretion of Arbitrator—All the Circumstances to be Considered which Arbitrator Thinks Relevant—Interlocutor.*

In considering an application under the Workmen's Compensation Act 1897 to vary the weekly payment during partial incapacity, the arbitrator is to have regard to all circumstances which he thinks relevant, as well as to the difference in the wage-earning capacity

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before and after the accident, and any payment not wages received from the employer in respect of the injury during the incapacity, both of which he is bound by the statute to consider; but it is not necessary that he should show in a stated case that he has had in view any particular consideration save those required by the statute.

Geary v. *William Dixon, Ltd.*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; and *Parker* v. *William Dixon, Ltd.*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663, *commented on* and *approved.*

The Workmen's Compensation Act 1897, First Schedule, sec. (1), enacts that the amount of compensation shall be "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings" before the injury, "such weekly payment not to exceed £1."

Sec. (2) enacts—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

This was an amended stated case on appeal from the Sheriff Court of Lanarkshire at Glasgow in an arbitration under the Workmen's Compensation Act 1897, brought by William Bryson, miner, 16 Graham Street, Tollcross, Glasgow (the respondent), against J. Dunn & Stephen, Ltd., coalmasters, 21 Bothwell Street, Glasgow (the appellants).

The case as amended stated — "This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow at the instance of the respondent, in which the Sheriff was asked to grant a decree against the appellants ordaining them to pay to the respondent the sum of 18s. 4d. sterling weekly, beginning the first payment as on 23rd July 1901, with expenses. The case was heard and proof led before Mr Sheriff-Substitute Strachan on 28th October 1901, when the following facts were admitted or proved:—

"(1) That the respondent had been a miner in the employment of the appellants at their Foxley Colliery, near Tollcross.

"(2) That on 26th March 1900, while in said employment at Foxley Colliery aforesaid, of which the appellants were undertakers within the meaning of the Workmen's Compensation Act 1897, and while in the ordinary course of his employment, the respondent received injury by accident, in consequence of which his left leg was amputated above the knee.

"(3) That the average weekly earnings of the respondent had been 36s. 8d.

"(4) That the appellants had admitted the respondent's claim for compensation under said Act, and paid him compensation at the rate of 18s. 4d. per week, being one-half of his average weekly earnings as aforesaid to 16th July 1901, but that further compensation was refused on the ground that the respondent was then fit for light employment.

"(5) That the respondent was not at the date when said compensation was stopped, nor at the date of the Sheriff-Substitute's judgment, in a fit condition to work or to earn any wages.

"The Sheriff-Substitute, Mr Strachan, therefore awarded respondent the sum of 18s. 4d. per week from 23rd July 1901 until the further orders of Court, with expenses.

"On 14th October 1904 the appellants lodged in process a minute craving the Court to review and end or diminish the weekly payments decerned for, in respect that the circumstances of the respondent were then changed, and that he was fit for employment.

"Said application for review was heard before me, and proof led on 20th January 1905, when I found (1) that the respondent having then been offered and accepted employment by the appellants as a night watchman at a wage of 17s. per week, his compensation might be reviewed; (2) that his wage of 17s. per week, coupled with the compensation at present payable (18s. 4d. per week) would not amount to the wage previously earned by him, viz., 36s. 8d. per week; and (3) that no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, and in which state of matters I found that these facts furnished no sufficient ground for reducing the weekly payment of which the respondent was in receipt, and awarded him the same sum as heretofore, viz. 18s. 4d. per week till the future orders of Court. I also found him entitled to expenses."

The question of law for the opinion of the Court was—"Whether, where a workman is in receipt of 18s. 4d. of compensation (his former average earnings having been 36s. 8d. per week), and can earn, and is in fact earning, 17s. per week, his employer, in the absence of any other facts or circumstances affecting the issue, is not entitled to have the said maximum rate of compensation reduced."

(The case as originally stated was remitted by the First Division to the Sheriff-Substitute in order that he might "state specifically what the question of law was on which the opinion of the Court was desired." In it the third finding of the Sheriff was—"(3) That no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, in which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of Court"; and the question of law was—"Whether in the circumstances above set forth the arbiter was right in refusing to order a reduction in the sum previously found due as compensation.")

Argued for appellants—An arbiter was bound to consider each case on its merits, but keeping in view the terms of section (2)

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of the First Schedule. There was no such rule (as the Sheriff-Substitute seemed to think there was) that where the compensation and the secondary wages did not amount to more than the original wage, the compensation was not to be interfered with. The arbiter had evidently regarded the words "regard shall be had" . . . as equivalent to a direction, and as setting forth the only element to be considered, whereas it was merely one of the elements. Regard was to be had not only to "the difference" but also to any relevant circumstance, including any payment not being wages received by the workman during his incapacity. This the Sheriff had apparently not done. For example, he apparently had not considered that the wage now being earned together with the proposed compensation was much more than enough to support the man. That was a relevant consideration. The case should at least be remitted back to find out if it had been taken into account. The following authorities were referred to—*Geary* v. *William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Parker* v. *William Dixon, Limited*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663; *Corbet* v. *Glasgow Iron and Steel Co., Limited*, May 14, 1903, 5 F. 782, 40 S.L.R. 601; *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113; *Webster* v. *Sharp & Co., Limited*, [1904] 1 K.B. 218. Money paid by way of compensation was to be distinguished from wages—*Gibb* v. *Dunlop & Co., Limited*, July 9, 1902, 4 F. 971, 39 S.L.R. 750.

Argued for respondent—It was in the arbiter's discretion to award the full amount of compensation allowed by the limits specified in the Act. The arbiter had applied his mind to the whole circumstances of the case. The appellants were in error in thinking that he had only regarded one element. That was apparent from the fact that he had not awarded the full amount of the difference between his former and his present wages—*Illingworth* v. *Walmsley*, [1900] 2 Q.B. 142. An interlocutor similar to that pronounced in *Parker* v. *William Dixon, Limited* (*cit. supra*), ought to be pronounced here.

LORD PRESIDENT—This is a stated case under the Workmen's Compensation Act 1897. The facts of the case are these:—The respondent, who was in the employment of the appellants as a miner, was working at an average weekly earning of 36s. 8d. sterling to the time he met with the accident. For the time he was totally incapacitated by his accident he received from the appellants 18s. 4d. per week, being fifty per cent. of his wages. After a certain time, however, he accepted employment from the appellants as a night-watchman at a wage of 17s. a-week, and on that the appellants made an application to the Court and asked for a review of the payment. The case came up before your Lordships at the end of last Summer Session upon a stated case, and the condition of the stated case at that time was that, after setting forth the fact of the workman accepting employment, the Sheriff went on to say as follows—"(2) That his wage of 17s. per week, coupled with the compensation at present payable (18s. 4d. per week), would not amount to the wage previously earned by him, viz., 36s. 8d. per week; and (3) that no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, in which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of the Court." The question of law which was then set out was—"Whether in the circumstances above set forth the arbiter was right in refusing to order a reduction in the sum previously found due as compensation?"

Your Lordships having heard that case remitted it to the Sheriff, and for this reason, that the various phrases used by the Sheriff were obviously capable of double interpretations. He had found the respondent entitled to the same sum as before, but that might mean that he was entitled as by right of law, in which case, as it concerned the interpretation of the Act, your Lordships would be in a position to review that finding, and it was not obscurely intimated by Lord Adam in giving judgment in that case, that if that was a question of law the Sheriff had arrived at a wrong conclusion. But the other view was that the Sheriff had merely found that in the circumstances of the case the man was entitled to this amount of compensation. That would be a finding in pure fact, and so not subject to your Lordships' review. The case was accordingly remitted to the Sheriff for further particulars.

The case has now come back, and I am bound to admit that the question of law is most unhappily stated; because the question of law now put instead of the old one is this—"Whether, where a workman is in receipt of 18s. 4d. of compensation (his former average earnings having been 36s. 8d. per week), and can earn, and is in fact earning, 17s. per week, his employer, in the absence of any other facts or circumstances affecting the issue, is not entitled to have the said maximum rate of compensation reduced?" The criticism which one is forced to make on that is, that if the question was answered by the Court in the affirmative or in the negative, it would almost baffle the wit of man to discover what was the result. But at the same time, although I do think the question of law is in fault, as I have pointed out, the learned Sheriff did amend the case to a certain extent, and did so with respect to the sentence from his findings which I read before. The sentence formerly read—"In which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of the Court." It now runs thus—"In which state of matters I found that these facts furnished no sufficient ground for reducing the weekly payment of which the respondent was in receipt, and awarded him the same sum as heretofore."

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Now, it seems to me that that is sufficient to enable us to dispose of this case without being reduced to the necessity, which one would regret, of sending the case back to be amended again. The difference in the two sentences which I have read consists in this, that in the first version of the case the respondent was said to be entitled, which of course might mean legally or of right entitled, whereas the learned Sheriff now puts it that the respondent's right is based on his finding as to the sufficiency of the facts. In other words, it is dependent on the whole circumstances of the case. The law upon the matter seems to me to be already completely settled by the decisions and dicta in the two cases which were cited, viz., the case of *Geary* (4 F. 1143) and the case of *Parker* (4 F. 1147), both in 4 Fraser. While I cannot add anything to what was said by Lord Robertson in the case of *Geary*, I may recapitulate the propositions deducible from the decisions and dicta in these cases. They seem to me to be four in number. An arbiter, either in the original application to settle the weekly payment to be made as compensation during incapacity, or in an application to vary the compensation—(1) must have regard to the difference in the wage-earning capacity between the position before the accident and the position at the time of the application, as evidenced by the wages *de facto* earned before the accident and the wages being earned at the date of the application; (2) must keep in view any payment other than wages which the employer gave to the workman during the period of incapacity; (3) may take into view any other circumstances which he may consider relevant to the question of the proper compensation to allow; and (4) may, having considered the matter under the foregoing conditions, award what sum he pleases, provided only that such sum does not exceed 50 per cent. of the average wages at the time of the accident (such wages being calculated as regards an average in the way prescribed by the statute), and does not exceed £1 per week, the claimant not being entitled as of right to any particular sum whatever.

Applying these propositions to the present case, I find that the arbiter has complied with proposition (1), because he has set out the facts in that relation as having been considered by him. The same may be said of proposition (2), because no one has suggested that any payment has been made by the employer other than the 18s. 4d. a-week. As regards proposition (3), I think that this statement in the case, "that there were no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable," is equivalent to a finding that there were no other circumstances which he held relevant. Finally, the operative conclusion the Sheriff came to, viz., continuing the payment of 18s. 4d., does not transgress either of the elements set forth in proposition (4). Therefore I think that the finding of the learned Sheriff as arbiter must clearly be supported. Mr Guthrie, for the appellants, argued that the arbiter had set forth that the compensation of 18s. 4d. and the wage of 17s. did not amount to the former wage of 36s. 8d.; but that he had not set forth that they did amount to 35s. 4d., and he asked a remit to the Sheriff in order to make it quite certain that the Sheriff had considered that view of the matter, the sum of 35s. 4d. being more than ample to support the man. I am not going into the question as to whether payments which would support a man—or what is sometimes called a living wage—could ever possibly be a relevant consideration for an arbiter or not. I can only say that I see no trace of it one way or another in the statute. At the same time I do see this under the statute, that there is no limit to the considerations which arbiters may have before them, and it is not for us here to set up a sort of model code for arbiters as to what they ought to think about. The crave, however, of Mr Guthrie for a remit for that purpose is clearly inadmissible, because it would really come to this, that this question having once been mooted, the case is not perfect unless the arbiter sets forth all the various considerations which some people might think relevant in order to assure the Court that he has had them before his mind and has rejected them. All that they can possibly ask the arbiter is that he should show that he has not forgotten those things which he was told by the statute he must consider, and which I have embodied in propositions (1) and (2), and that he has had before him the whole facts which were relevant to these considerations. The rest of the matter must be left entirely to him, the statute being silent upon what other considerations are relevant and what are not. Therefore I think that, deserting the question put, we should give a finding that the award of the arbiter ought not to be disturbed.

Lord M'Laren—On a first reading this question would rather suggest that the topic of inquiry was, what is the right of a workman earning 17s. a-week, leaving out of consideration what would be the case of a workman earning 18s. 4d. Of course that is not really the question put, and from the argument I gather that what we are asked to consider is whether there is any legal ground or rule which would interfere with the discretion of the arbiter in awarding any sum which he might think proper within the statutory limits. I am unable to find that there is any such rule, and it is a complete fallacy to say that, because 18s. 4d. a-week was adequate compensation when the man was receiving no wages, therefore he must be taken to be overcompensated when he is getting 17s. a-week of wages, because the answer is that very likely the arbitrator would have given him more than 18s. 4d. if he had had the power to do so, and that he gave him that particular sum, not on the theory that the man would thereby be fully compensated, but because that was all the compensation which the statute allowed the arbitrator to give. If that were so, it would be quite consistent

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for the same arbitrator to hold that, notwithstanding that the man was in receipt of wages, still he was not fully compensated, because the two payments together did not amount to the wages he had been earning before the accident occurred. I do not think that an arbitrator is compelled to make an abatement of the weekly payment merely because the workman happens to be earning a certain wage. I think that that suggestion is contrary both to the spirit and the words of the statute. The completeness of recovery, the resultant incapacity, and many other things, might enter into the consideration of the arbiter. There is only one rule fixed with regard to such a circumstance, and that is, that in an application for reconsideration of a weekly allowance it would not be consistent with the provisions of the statute for an arbitrator to award a sum which would, when added to the wages being earned, give the workman a larger weekly income than he was earning before the accident. I think that this is well settled, and on obvious and sufficient grounds. But when the compensation and the wages added together do not amount to as much as the workman was earning before the accident, I see no legal rule to lead us to interfere with the award that the arbiter has made. I therefore agree that the interlocutor should be such as your Lordship has suggested.

LORD MACKENZIE concurred.

LORD KINNEAR and LORD PEARSON were absent.

The Court pronounced this interlocutor—

"Find in answer to the question of law stated in the amended case that the award of the arbitrator is in conformity with the terms of the Workmen's Compensation Act 1897: Therefore dismiss the appeal, affirm the award of the arbitrator, and decern."

Counsel for the Appellant—Guthrie, K.C.—A. Moncreiff. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Johnston, K.C.—M. P. Fraser. Agents—W. & W. Finlay, W.S.

Tuesday, January 9, 1906.

SECOND DIVISION.

[Lord Dundas, Ordinary.

MUIR *v.* MUIRS.

Arbitration—Clause of Reference—Contract—Construction—Contract of Copartnery for Watchmaking Business—Disputes "in any way relating hereto" Referred to Arbitration—Dispute whether Proposed Additions Amount to a Different Business Held to Fall under Clause of Reference.

A contract of copartnery for the carrying on of a watchmaker's and jeweller's business provided, *inter alia*, "Any disputes that may arise between the partners, or between the heirs of a deceasing partner, in any way relating hereto, shall be referred to the amicable decision of an arbiter to be mutually chosen, whose decision shall be final."

A question having arisen as to whether certain proposed additions to the business fell within the scope of a watchmaker's and jeweller's business, for which alone the copartnery existed, *held* that the question was one relating to the construction of the contract, and fell accordingly under the clause of reference.

Thomas Muir, Airdrie, brought a note of suspension and interdict against his sons, Henry Muir and James Muir, watchmakers and jewellers, Glasgow, in which he sought to interdict them "from entering into an agreement with Simon L. Goodman, optician and sight tester, 182 Argyle Street and 1 Union Street, Glasgow, or with any other person, whereby the firm of Muir & Sons, carrying on a joint business as retail watchmakers and jewellers, 182 Argyle Street and 1 Union Street, Glasgow, agrees to carry on the business of opticians and sight testers in the firm's premises, 182 Argyle Street and 1 Union Street, Glasgow, or in any premises they may occupy, and also from in any way carrying on, as part of the business of the said firm of Muir & Sons, the business of opticians and sight testers."

The facts of the case sufficiently appear from the following narrative, which is taken from the opinion of the Lord Ordinary:—"The question which I have to decide is whether or not a dispute which has arisen between the complainer and the respondents falls within a clause of reference which is contained in their contract of copartnery. By that contract, which is dated 2nd July 1900, the complainer, as first party, and the respondents (and John Muir, since dead), his sons, as second parties, agreed to be copartners in carrying on a joint business as watchmakers and jewellers at 182 Argyle Street and 1 Union Street, Glasgow, for seven years from 26th January 1900, under the firm name of 'Muir & Sons.' By article *Seventh* it was provided that the sons should devote their whole time and attention to the business and management thereof, and should 'do their utmost to extend and promote the business'; but while the father should 'have the entire and uncontrolled oversight of the business and all its concerns,' he should not be bound to give any particular or stated time or attention thereto, his duties 'being merely those of supervision for the interest in and welfare of himself and his copartners.' Article *Eighth* provided that 'None of the partners shall, during the currency of the copartnery, directly or indirectly be engaged in any other business, profession, trade, or occupation, without the previous consent of the others in writing.' By article *Ninth* it was, *inter alia*, provided that the partners should conduct

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the business with such assistants as might be necessary, and should keep a regular set of books, in which should be entered all transactions of the copartnery. Article *Fifteenth* is in these terms:—'Any disputes that may arise between the partners, or between the heirs of a deceasing partner, in any way relating hereto, the same shall be referred to the amicable decision of an arbiter to be mutually chosen, whose decision shall be final.' Since the date of the said contract the parties have carried on the business of retail watchmakers and jewellers, which has included the sale of barometers, opera glasses, spectacles, and other similar goods such as watchmakers and jewellers usually keep in stock. But the complainer avers that 'In the month of August last (1905) the respondents determined to add as an addition to the firm's joint business of watchmakers and jewellers aforesaid the business of opticians and sight testers, and brought in and employed a person named Goodman as an optician and sight tester, and had handbills printed and distributed that they were now carrying on the additional business of opticians and sight testers. Such a business is not part of a retail watchmaking and jewellery business—at all events of the retail watchmakers' and jewellers' business carried on by Muir & Sons—but is an entirely different and independent business, and had never been carried on by Muir & Sons.' The complainer further alleges that he objected and objects 'both to the new business and the person to be employed to carry it on,' but that the respondents are, in conjunction with Goodman, carrying on, in the firm's premises, an optician and sight-testing business without his written consent, and in spite of his opposition. He has accordingly brought this note of suspension and interdict to have the respondents prohibited from entering into an agreement with Goodman as above indicated, and 'from in any way carrying on, as part of the business of the said firm of Muir & Sons, the business of opticians and sight testers.' The draft agreement between 'Thomas Muir & Sons, watchmakers and jewellers,' as first parties, and 'Simon L Goodman, optician,' as second party, is produced, and it narrates, *inter alia*, that 'the second party has approached them' (*i.e.*, *the first* parties) 'with a proposal that they should add to their said business an additional branch as sight testers and opticians, and the first parties having considered said proposal favourably, they have decided to do so, and employ the second party as their assistant.' The draft agreement goes on to provide, *inter alia*, that the first parties shall fit up and furnish 'a sight-testing room as an optical part and branch of their said businesses as watchmakers and jewellers'; that the second party shall 'manage, conduct, and carry on, on behalf of the first parties, said optical parts or branch of their said businesses, and that part only'; that he shall 'keep a distinct set of books' relating to 'said optical branch'; that the first parties shall supply the necessary stock, &c., and that 'a balance-sheet of the sale and expenditure connected with said branch' of the business shall be periodically made up, and the profits realised from it applied and divided as specified in the agreement, during the currency and after the expiry of which it is provided that the trade, custom, and goodwill connected with or gained by the 'said branch' shall 'vest, belong, and remain' the exclusive property of the first parties, as well as the stock, fittings, materials, and utensils."

The respondents pleaded, *inter alia*—"(3) The present proceedings are excluded by the clause of reference quoted. (5) The respondents' actings being concerned with an ordinary matter connected with the partnership business, and having been decided upon by the firm or by the respondents as a majority of the partners, . . . the prayer of the note should be refused with expenses."

On 25th November 1905 the Lord Ordinary (DUNDAS), after hearing parties upon the closed record, pronounced the following interlocutor:—"Finds that the record discloses that a dispute has arisen between the partners relating to the contract of copartnery within the meaning of article fifteenth of said contract: Therefore, and with reference to said article, sists procedure in this action *in hoc statu*."

Opinion.—[*After the narrative of facts set forth above*]—"The respondents represent the proposed agreement as embodying not a business different to and independent of that of watchmakers and jewellers, but merely an extension and development of the optical branch of that business which they allege has all along existed; and they say that in this view of the matter they are entitled, as a majority of the partners, to act without the consent and against the wish of the complainer, who stands in a minority. But, *ante omnia*, the respondents maintain that the dispute, which has admittedly arisen amongst the partners, falls within the scope of the arbitration clause in the contract of copartnery, the terms of which I have quoted above.

"I am of opinion that the respondents contention upon this last point is well founded. I think that the words 'relating hereto,' which occur in the arbitration clause, are equivalent to 'relating to these presents,' *i.e.*, to the contract of copartnery of which the clause forms part, and that therefore a dispute involving, as in my judgment the present dispute necessarily involves, a question as to the proper construction to be put upon that contract, must be decided by the arbiter, and not by this Court. The complainer's counsel ingeniously argued that that 'relating thereto' really means relating to the conduct of the business of watchmakers and jewellers which is the subject of the contract of copartnery, and that in order to ascertain whether or not the present dispute truly falls within the scope of the arbitration clause, it would be necessary to have a proof, the evidence in which would disclose whether (as the complainer avers), the pro-

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posed change amounts to the constitution of a new and additional business, or (as the respondents contend) involves merely the extension and development of an existing branch of the business of retail watchmakers and jewellers. If the latter view were established by the proof, the complainer's counsel admitted that the matter would fall within the arbitration clause, but if the former view were proved to be correct, then he maintained that it would be for the Court to grant interdict as craved. This is, in my judgment, an unsound and a too finical reading of article *Fifteenth* of the contract. I think that whichever of the alternative views of the matter may turn out to be the true one, a question of construction of the contract, and particularly of article *Seventh* thereof, above quoted, is involved, and that the matter of construction is referred to the arbiter by article *Fifteenth*. Indeed, the complainer's own averment at the end of statement 3 is that 'this addition to the retail watchmaking and jewellery business of an optician and sight-testing business constitutes a change in the nature of the said partnership business for which the said contract of copartnership does not provide.' This, in my judgment, amounts to a frank confession that the question turns upon a construction of the contract. Similarly, the respondents' counter averments appear to me to raise sharply questions as to the meaning of the contract, and especially of article *Eighth* thereof. In my opinion, then, the record discloses the existence of a dispute between the partners relating to the contract of copartnery, which must be decided by the arbiter, and upon the merits of which therefore I refrain from expressing any opinion.

"While, however, I agree so far with the respondents' contention, I am not prepared to sustain their third plea-in-law to its full extent. That plea is that 'the present proceedings are excluded by the clause of reference quoted.' I think that the proper course is not to refuse the note *de plano*, but to sist proceedings *in hoc statu*, in respect that the dispute between the parties falls, in my judgment, within the terms of article *Fifteenth* of the contract of copartnery."

The complainer reclaimed, and argued—(1) The present proceedings were not excluded by the clause of arbitration, which only ousted the jurisdiction of the Court in "disputes relating hereto," *i.e.*, to the deed of copartnery. There was here no dispute as to the contract of copartnery, which dealt only with the watchmaking business, but a dispute upon a question of fact outwith the contract altogether, viz., whether the new business was or was not a watchmaking business. That was a question of fact to be decided by the Court after proof—*Roddan* v. *M'Cowan*, June 26, 1890, 17 R. 1056, 27 S.L.R. 984; *Ransohoff & Wissler* v. *Burrell*, December 10, 1897, 25 R. 284, 35 S.L.R. 229. (2) In any event the complainer was, under article 7, invested with a complete power of veto.

Argued for the respondents—(1) The parties were not at issue upon any question of fact. There was no dispute as to what the new proposals were, but merely as to whether they fell or did not fall within the scope of the contract, and that such was a dispute "relating to" the contract, and therefore one for the arbiter. (2) The question as to the complainer's right of veto was purely one of the construction of the contract, and therefore for the arbiter.

LORD KYLLACHY — The first question which we have to decide is whether the complainer is entitled to have a proof as to the exact nature of this proposed new business, such proof being said to be necessary as a preliminary towards determining the question whether the dispute between the parties falls under the clause of reference in the contract.

If the parties had been at all at issue upon the facts, such proof would be proper and necessary. But it is, I think, quite plain that with respect to the nature and extent of the proposed new departure there is no dispute. The sole question is whether upon the admitted facts the kind of business proposed to be added to the concern falls within the business of watchmakers and jewellers in the sense of the contract of copartnery. And that being so, it seems to me that it is a question as to the construction of the contract and nothing else.

The other point, viz., as to whether the complainer is under the 7th article entitled to exercise a veto upon what is proposed, is also clearly a question upon the construction of the contract. It is a point not perhaps free from difficulty, but it is one entirely for the arbiter.

LORD JUSTICE-CLERK—I agree with the judgment of the Lord Ordinary, and with the reasons which he has stated.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Reclaimer — Graham Stewart — Morton. Agent — W. A. Farquharson, S.S.C.

Counsel for the Respondents — Cullen, K.C. — Macmillan. Agents — Cowan & Stewart, W.S.

Thursday, January 11.

SECOND DIVISION.

[Lord Dundas, Ordinary.

WALKER'S TRUSTEES *v.* AMEY AND OTHERS.

Trust—Inter vivos Disposition—Right to Revoke.

A lady in a trust-disposition (on the narrative that owing to delicate health, and in order to make provision for herself in the event of continued illness or incapacity) declared that she instantly made over to A and B, as

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trustees, £700 sterling. The purposes were (first) payment of annual income to the truster during life; (second) power to the trustees in their discretion at any time to apply the whole or part of the capital for the truster's behoof; (third) on her death the realisation of investments and payment of proceeds, subject to two legacies to C and D, in equal shares to the truster's mother, brother, and two sisters, with destinations-over in the event of the brother or either sister predeceasing the truster. The deed contained powers of investment and sale, and a declaration that it was irrevocable. The sum of £700 was handed over to the trustees, and the deed registered.

The lady, of the same date, executed a testament in which she appointed A and B her sole executors, and bequeathed the whole personal estate belonging to her at her death to her mother, brother, and two sisters in equal shares, with a destination-over similar to that in the trust-disposition. The testatrix reserved her liferent, with power to revoke or alter, and she revoked all previous settlements made by her. By two codicils she left two legacies to C.

The lady died, survived by her husband, who claimed *jus relicti* out of the £700, maintaining that the trust-disposition was merely administrative and testamentary, and therefore revocable.

Held that it was irrevocable.

Mrs Margaret Amey or Walker, on the 18th day of December 1903, executed a trust-disposition in the following terms:—"I, Mrs Margaret Amey or Walker, presently residing in Hawick, carrying on business there as a tobacconist, and wife of David Walker, millwright, sometime residing in Leith, considering that, owing to the delicate state of my health at present, and in order to make provision for myself in the event of continued illness or incapacity, I have resolved to make the following disposition of the principal sum after mentioned, for my own benefit in the first place, and for those persons hereinafter named after my death in the second place: Therefore I declare that I have instantly given and made over, as I do hereby give and make over, to John Oliver, solicitor, residing at Lynnwood, Hawick, and John Smith, residing at No. 2 Wellogate Place, Hawick, and to the survivor of them, and to such other person or persons as they or the survivor of them shall assume to act in the trust hereby created, and to the survivors and survivor of the persons hereby named or assumed as aforesaid, as trustees, for the purposes after mentioned (the said trustees named and assumed as aforesaid being throughout these presents denominated 'my trustees'), and to the assignees of my trustees, the principal sum of seven hundred pounds sterling, being money earned by me in the business in which I am engaged: But declaring always that these presents are granted by me in trust only for the purposes following, *videlicet*—(*First*) That my trustees shall, with all convenient speed, invest the said sum in accordance with the powers hereinafter conferred upon them, and shall pay the annual interest and income arising therefrom to myself during all the days of my life, at such times and terms as to them shall seem convenient and proper; (*Second*) That my trustees shall have power at any time during my lifetime, if they, in their own absolute discretion, shall deem it advisable for my benefit, being in no way bound, to apply any part of the said principal sum, or the whole thereof if necessary, for my maintenance and behoof; and (*Third*) That my trustees shall, as soon after my death as possible, realise and convert into money the stocks, shares, or securities upon which the said principal sum, or such part thereof, if any, as shall then be extant, and shall from the proceeds thereof pay to Mary Amey Laing or Looz, residing at 21 Dean Street, Edinburgh, my niece, the sum of twenty-five pounds sterling, and to Violet Looz, step-daughter of my said niece, the sum of twenty-five pounds sterling, and shall divide and pay the remainder of said proceeds, if any, after deducting expenses of realisation and division and all other necessary outgoings, amongst and to the following persons in equal shares, *videlicet*, to Margaret Reid or Amey, my mother, if she shall survive me, one share; to John Amey, residing in Edinburgh, my brother, one share; to Mary Amey or Laing, wife of William Laing, residing in Glasgow, my sister, one share; and to Isabella Amey or Murdoch, my sister, in Australia, one share; declaring always, that in the event of my said brother or either of my said sisters predeceasing me, the share of the predeceaser shall be paid to his or her lawful issue then in life in equal shares, and failing such issue, then and in that case the same shall accresce and belong to the survivors or survivor of my said brother and sisters, or their respective issue, equally, *per stirpes;* and I hereby authorise and empower my trustees to sell the trust-estate or any part thereof at any time they shall think fit; and also to appoint factors and law agents, from their own number or otherwise, and to allow them suitable remuneration; and I empower my trustees to invest the trust-funds in . . . And I further hereby declare that these presents shall not be revocable by me upon any ground whatever . . ." The trust-disposition was handed over to the trustees and registered by them on the 23rd of December 1903, and the trustees were immediately put into possession of the funds, which were administered by them until the truster's death.

Upon the same date—viz., 18th December 1903—she executed the following testament:—"I, Mrs Margaret Amey or Walker, . . . being desirous of settling my affairs in the event of my death, do hereby nominate and appoint John Oliver, solicitor, residing at Lynnwood, Hawick, and John Smith, residing at No. 2 Wellogate Place, Hawick, or the survivor of them, to be my

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sole executors or executor: And I hereby leave and bequeath the whole personal estate of every description which shall belong to me at the time of my death, after deducting therefrom my sick bed and funeral expenses, and all my just and lawful debts and the expenses of realising my said estate, to the following persons, in equal shares, *videlicet*, Margaret Reid or Amey, my mother, John Amey, residing in Edinburgh, my brother, Mary Amey or Laing, wife of William Laing, residing in Glasgow, my sister, and Isabella Amey or Murdoch, my sister in Australia; declaring always, that in the event of my said brother or either of my said sisters predeceasing me, the share of the predeceaser shall be paid to his or her lawful issue then in life in equal shares, and failing such issue, then and in that case the same shall accresce and belong to the survivors or survivor of my said brother and sisters, or their respective issue, equally, *per stirpes;* and I reserve my own liferent of the premises, with power to alter, innovate, or revoke these presents at any time as I shall think proper; and I dispense with delivery hereof; and I revoke all previous settlements made by me . . ."

By a codicil, dated 16th January 1904, a legacy of £25 was left to the said Mrs Mary Amey Laing or Looz, and by another codicil, dated 1st March 1904, another legacy of £50 to the same lady. The testament and codicils were registered on 18th March 1904.

Mrs Walker died on 12th March 1904, survived by her mother Mrs Margaret Amey, her brother John Amey, and her two sisters Mary Laing and Isabella Murdoch. She was also survived by her husband David Walker, who claimed, *jure relicti*, half of the fund held by the trustees under the trust-disposition, maintaining that the trust-disposition was revocable and testamentary, and therefore ineffectual to defeat his right.

The beneficiaries under the trust-disposition claimed among them the whole fund, maintaining that the trust-disposition was valid, operative, and irrevocable, and that accordingly the truster at the date of her death was not vested in the moneys conveyed by the trust-disposition, and that therefore they were not subject to the husband's *jus relicti*.

In these circumstances the trustees acting under the trust-disposition brought an action of multiplepoinding, in which the fund *in medio* was the fund in their hands. They concurred in the contention of the beneficiaries.

The Lord Ordinary (DUNDAS), on 17th June 1905, pronounced an interlocutor finding that the trust-disposition was a valid and operative document.

Opinion.—"In this multiplepoinding the fund *in medio* consists of certain moneys conveyed to trustees (who are nominal raisers) by the late Mrs Walker by a trust-disposition, dated 18th December 1903, so far as remaining in their hands. The principal question which I have to decide is whether or not this deed was of a revocable character. The husband of the truster maintains the affirmative of this proposition, and claims one-half of the fund *jure relicti*. The negative is maintained by the trustees, who claim to hold and administer the whole fund in terms of the trust-disposition, and by those persons who would take benefit if the deed is an irrevocable one.

"I may summarise the contents of the trust-disposition. The truster at, and for some years prior to, its execution was living apart from her husband, and carrying on business on her own account as a tobacconist in Hawick . . . . . .

[*His Lordship then narrated the narrative and the provisions of the trust-disposition, the execution of the testament and its provisions, the death of Mrs Walker survived by her mother, brother, sisters, and husband, and the claim by the husband, v. sup.*] . . . . . .

"The reported cases upon this branch of the law are very numerous. Every case must of course depend upon the precise terms of the deed under consideration, but one may derive valuable aid from the decisions and dicta in the books as to the general rules of law applicable to such cases, and as to the features in such deeds which have been held to make for or against revocability. Perhaps the most instructive aids to the just consideration of the trust-disposition here in question are the recent cases of *Shedden*, 23 R. 228, where a deed was held not to be revocable, and *Byres' Trustees*, 23 R. 332, where the contrary result was arrived at. The question must always be one of intention, whether, on the one hand, the granter intended the trust to be one merely for the administration of his affairs, he retaining the radical and beneficial interest in the estate conveyed, and being entitled to revoke the deed at pleasure, or whether, on the other hand, he must be held to have truly divested himself of the estate so as to enable the trustees to hold it against him.

"In my opinion Mrs Walker's trust-disposition falls under the second of these alternative categories. It appears to me that it contains most, if not all, of the characteristics which are held to indicate that a deed is not of a testamentary nature but is irrevocable. In particular, I may note (1) that this deed contains a *de præsenti* conveyance to trustees, not of the truster's whole estate but of a specified sum of money; (2) that it is expressly declared that it shall not be revocable upon any ground whatever; (3) that in point of fact the money was immediately handed over by the granter to the trustees, and the deed delivered to them and recorded. As indicating the strong significance of delivery following upon a declaration of irrevocability in the deed itself, I may refer especially to the opinion of Lord Kinnear in *Byres'* case (*sup. cit.*); (4) that the express power to the trustees to apply the capital, in whole or in part, for the granter's behoof, in their own absolute discretion, seems adverse to the view that she could at any time have called upon them to denude of the whole gift; (5) that the fact that abso-

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lute vesting in certain of the persons to whom the trustees are directed to pay the residue of the trust fund after the truster's death, did not emerge until that date, is not hostile to the view that the deed could not be revoked—*Lyon's Trustees*, 3 Fr. 653; and (6) that the argument for revocability does not, perhaps, arise under quite such favourable circumstances, when put forward by a third party after the granter has died without having made any attempt at revocation, as when it is urged by the granter himself during his lifetime. For these reasons, I am of opinion that the contention put forward by Mr Walker is unsound and cannot be given effect to." . . . [*His Lordship then dealt with another branch of the case.*] . . .

Walker reclaimed, and argued — The trust-disposition was merely an administrative and testamentary deed, the truster retaining the radical interest in the estate and being entitled to revoke at pleasure. That such was the truster's intention was apparent not only from the preamble but from the general tenor of the deed, especially when read along with the testament. The declaration of irrevocability was in itself of little moment—*Smitton* v. *Tod*, December 12, 1839, 2 D. 225; *Murison* v. *Dick*, February 10, 1854, 16 D. 529; *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, 9 S.L.R. 106; *Menzies* v. *Murray*, March 5, 1875, 2 R. 507, 12 S.L.R. 373; *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, 15 S.L.R. 690; *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746, 20 S.L.R. 486; *Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236; *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267; *Lyon* v. *Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568. *Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228, 33 S.L.R. 154, was distinguishable. Such a deed should not be allowed to defeat a husband's rights. It would not have defeated legitim—Fraser, H. & W., ii. 1001; *Nicolson's Assignee* v. *Macalister's Trustees*, March 2, 1841, 3 D. 675, 16 F.C. (octavo) 728.

Argued for the respondents—The deed was irrevocable for the reasons set forth by the Lord Ordinary in the last paragraph of his opinion. *Shedden* (quoted above); *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715; *Smith* v. *Davidson*, December 21, 1900, 8 S.L.T. 354, were authoritative decisions. In *Byres' Trustees* (quoted above), the most important adverse authority, the language of the deed was obviously testamentary.

LORD JUSTICE-CLERK—In this case I see no reason for interfering with the judgment of the Lord Ordinary.

LORD KYLLACHY—I am entirely satisfied with the judgment of the Lord Ordinary.

LORD STORMONTH DARLING—I agree.

LORD LOW—I am of the same opinion. I think the main question in the case is whether the directions to the trustees to divide the fund among the persons named on the death of the truster were only testamentary, or conferred a present right on these persons subject to certain contingencies. The latter is, in my opinion, the correct view. In the first place the truster expressly declares the deed to be irrevocable, and although such a declaration is by no means conclusive, it is always an element which may be considered, and as a testamentary writing is in its nature revocable, the declaration of irrevocability shows that the truster did not regard the trust deed in question as being of that character. In the next place the deed deals with a specific sum, and further, on the same day the truster executed a *mortis causa* settlement dealing with the remainder of her property. Again, the trust deed in question was delivered to the trustees, and the fund handed over to them, and I think that from that moment they held the fund for the benefit of the persons named in the deed, and that the truster could not have defeated the interest of these persons by revoking the deed.

The Court adhered.

Counsel for the Reclaimer (Walker)—Hunter, K.C. — Hart. Agents — Fyfe, Ireland, & Dangerfield, W.S.

Counsel for the Respondents (Walker's Trustees and Others)—Macmillan. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondent (John Amey)—Trotter. Agents — Forman & Bennet Clarke, W.S.

Friday, January 12.

SECOND DIVISION.

[Exchequer Cause.

WALKER *v.* REITH (INLAND REVENUE.)

Revenue — Partnership — Income Tax — Abatement—Employee—Partner or Employee—Profits Credited to an Employee in the Books of a Company but not his Indefeasibly—Finance Act 1898 (61 *and* 62 *Vict. cap.* 10), *sec.* 8.

A testator by his trust-disposition and settlement conveyed his whole estate to trustees. He left also, regarding his business, a deed of arrangement which formed part of his settlement as if embodied therein. Article (1) thereof named fifteen employees and allocated to each a certain number of shares, as prospective interests in the business, with a declaration that these "shall not become vested interests until the whole of my capital and interest has been paid out as after mentioned, and it shall not be competent . . . for any employee to sell, convey, or dispose of his interest in the profits or in the business itself." Article (2) provided that after certain deductions the profits of the business were to be divided among the sur-

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viving employees in proportion to the number of their shares, ten per cent. of such profits being paid to them in cash and the remainder being credited to their respective accounts in said business, and forming a fund available for paying out the testator's capital, until his whole capital and interest was paid out. Article (3) provided that payment should not be made to the representatives of any employee dying or becoming bankrupt, of the amount standing to his credit in the books, before all the testator's capital and interest in the business had been paid out. Article (4) provided that the employees should carry on the business as carried on by the testator. The trustees were not to be required to take any active part in the business, nor to be liable for omissions or negligence, but were to have the sole right of granting authority to sign the firm name, of appointing managers and superintendents, of settling questions as to salaries and wages, and of removing employees from the business. Article (5) empowered the trustees to require payment of such of the testator's capital as they thought from time to time not necessary for the business, and directed them after the whole of the testator's capital and interest had been paid out, and after the amounts due to representatives of deceased and bankrupt employees had been paid, to convey to the surviving employees the whole business at the price of £20,000. Article (6) entitled the trustees to inspect the books from time to time, and empowered them, if losses were made, to wind up the business, paying out first the testator's capital, and dividing any remaining proceeds amongst the employees.

A, an employee, whose total income for the year ending 5th April 1905 amounted (1) if his income was taken as his salary plus his share of the ten per cent. of profits paid in cash, to £561, but (2) if his income was taken as his salary plus his share of the full amount of the profits, whether paid or credited, to £2000, claimed abatement of income-tax equal to the income-tax upon £120, on the ground that his total income for the year of assessment though exceeding £160 did not exceed £600 (61 and 62 Vict. cap. 10, sec. 8).

Held (1) that the business was the property of the trustees until the conditions were fulfilled for their conveying it to the employees, and that till then the employees were only employees with a right to share in ten per cent. of the profits, and not partners; (2) that the share of the ninety per cent. of profits credited to A in the books of the company was not part of his income for the year of assessment; and (3) that A was consequently entitled to the abatement claimed.

Mersey Docks v. *Lucas*, 1883, L.R. 8 App. Ca. 891; *Hudson* v. *Gribble*, *Bell* v. *Gribble*, [1903] 1 K.B. 517; and *Smythe* v. *Stretton*, 1904, 20 Times L.R. 443, *distinguished*.

This was an appeal by case stated under The Taxes Management Act 1880, for the opinion of the Court of Exchequer. The appellant was James Walker, of Messrs R. & J. Dick, Glasgow; the respondent was James Reith, Surveyor of Taxes, Glasgow.

The Finance Act 1898 (61 and 62 Vict. cap. 10), sec. 8, provides:—"Any individual who having been assessed or charged to income-tax or having paid income-tax either by deduction or otherwise claims and proves in manner prescribed by the Income-Tax Acts that his total income from all sources, although exceeding £160, does not exceed £700, shall be entitled to relief from income-tax equal . . . (c) if his total income exceeds £500 and does not exceed £600, to the amount of the income-tax upon £120 . . . and such relief shall be given either by reduction of the assessment or by repayment of the excess which has been paid, or by both of those means, as the case may require."

At meetings of the Commissioners for the General Purposes of the Income-Tax Acts held at Glasgow on the 16th day of December 1904 and the 23rd day of March 1905—James Walker, of Messrs R. & J. Dick, 3 M'Phail Street, Glasgow, appealed against an assessment of £316 (duty £15, 16s.) made under Schedule D of the Income-Tax Acts for the year ending 5th April 1905, in respect that he had not been allowed an abatement of £120. The assessment was made under 5 and 6 Vict. c. 35, sec. 100; 16 and 17 Vict. c. 34, sec. 2; and 4 Edw. VII, c. 7, sec. 7. The abatement was claimed under 61 and 62 Vict. c. 10 sec. 8 (*cit. sup.*) on the ground that the appellant's total income from all sources did not exceed £600.

The following facts are taken from the case stated:—James Dick, manufacturer, Glasgow, died on the 7th March 1902 leaving a general trust-disposition and settlement appointing testamentary trustees and regulating the succession to his whole means and estate after his death, and also a deed of arrangement regarding the business of boot and shoe and belt manufacturer carried on by him. The deed of arrangement (*vide* its last article *infra*) was incorporated in the trust-disposition and settlement. The said deed of arrangement, which was dated 4th and recorded in the Books of Council and Session 11th March 1902, formed part of the case, and was as follows:—

"I, James Dick, manufacturer in Glasgow, considering it is desirable I should make arrangements to take effect after my decease regarding my business of boot and shoe and belt manufacturer, presently carried on by me at Greenhead, Glasgow, and elsewhere, under the designation of R. & J. Dick, and considering that the best method which has suggested itself to me of continuing the business is by giving the heads of the various departments and others in my employment a prospective interest in the profits and power to acquire

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the business after my decease, I have determined and do now make the following arrangements, *videlicet*:—

"(First)—The parties hereinafter named, presently in my employment (and hereafter termed the employees), shall from and after my death have each, on the terms and conditions herein set forth, a prospective interest in the profits of the business and in the business itself if acquired by them in proportion to the number of shares hereinafter set forth against their names respectively, *videlicet*:—

John Edward Audsley, Greenhead Factory,	Ten shares.
Andrew Barclay, Greenhead Factory,	Ten shares.
Adam Hay, Greenhead Factory,	Ten shares.
Andrew McAllister, London	Ten shares.
Peter Dennistoun, Greenhead Factory,	Ten shares.
Peter Brock, Greenhead Factory,	Ten shares.
Thomas Traill,	Ten shares.
David Kennedy, Belfast,	Ten shares.
Robert Burns,	Four shares.
Walter Reid,	Four shares.
James Walker, Birmingham,	Four shares.
John Linn, London belt shop,	Two shares.
Robert Lockhart, Argyle Street shop,	Two shares.
Allan Mair, shop, 12 Gallowgate,	Two shares.
David Galbraith, shop, 18 Gallowgate,	Two shares.
Total number of shares,	One hundred.

But it is understood that I shall be entitled to add to or take from the number of employees, and to allot to any new employees such number of shares as I may consider proper, or vary the said allotment in such manner as I may consider proper; and it is hereby specially provided and declared that the provisions under these presents in favour of the employees shall not become vested interests until the whole of my capital and interest has been paid out as after mentioned, and it shall not be competent on any ground or pretext whatever for any employee to sell, convey, or dispose of his interest in the profits or in the business itself under these presents to any person, and any act done in contravention of this stipulation shall be, and is hereby declared to be, *ipso facto* void and null. In the event of any of said persons ceasing to be an employee or leaving the business, the share of the profits of the business allotted to him and his interest therein shall, unless I otherwise direct, from and after the date of his so ceasing or leaving, accresce to and be divided amongst the other remaining employees in proportion to their said shares.

"(Second)—At the date of my death the books of the said business shall be brought to a balance, and my capital in the business ascertained, and interest at the rate of three per centum per annum shall be paid thereafter to my trustees in cash on the thirty-first day of December in each year after my decease, on the total amount at my credit in the books of the business, or so much thereof as may remain unpaid, and at the annual balances, which shall take place as at the thirty-first day of December in each year after my death, the whole profits of the business, after deducting (first) the said interest on my capital account, (second) the sum of eight hundred and fifty pounds sterling yearly as the rent of the factory, and (third) such provision for bad debts, depreciation on plant, stock, etcetera, as may be considered necessary by my trustees, shall be divided amongst the surviving employees in proportion to the number of shares allotted to them, or to which they may acquire right under these presents, and ten per centum of such profits shall be paid over to them in cash, and the remaining profits shall not be drawn by the employees, but credited to their respective accounts, to be opened in the names of the several employees in the books of R. & J. Dick, until the whole of my capital and interest in the said business is paid out, and the said remaining profits, allotted to the employees as aforesaid, shall be accumulated, without adding interest, and form a fund available for the paying out of my capital in the said business. In the event of a loss arising upon the working of the business in any one year, such loss shall be carried forward until the same shall be wiped out from the profits of succeeding years. It is hereby further provided and declared that the whole of the stocks of balata lying in the factory at Greenhead, or stored outside or abroad, shall be retained by my trustees, and shall remain under their sole control and custody. And further, they shall have power from time to time, as may be required by the business, to sell to the employees such portions of said stocks as they may deem proper, and that at the invoice prices at which said stocks were purchased.

"(Third)—In the event of the death or bankruptcy of any employee prior to or after my death, I hereby provide and declare that his said interest in the profits of the business and in the business itself shall cease as from the commencement of the year in which he may die or become bankrupt, provided he die or become bankrupt after my decease, and his representatives shall only be entitled to be paid the amount standing to his credit in the account in his name in the said books at the balance previous to his death, but such payment shall not be made before all my capital and interest in the business is paid out as hereinbefore provided, and the remaining employees, unless I shall otherwise direct, shall be entitled amongst them to the interest and prospective share of profits which would have fallen to the deceasing or bankrupt employee *pro rata*, according to the respective number of shares they each hold.

"(Fourth)—Upon my death the employees who may then survive and be capable of acting shall carry on the said business as it is carried on by me at the time of my death, and my trustees are hereby empowered to appoint capable managers for conducting the business, and

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I recommend my trustees to appoint the said John Edward Audsley to have charge of the counting house and financial part of the business, and to appoint David Kennedy, Belfast, as superintendent of the industrial departments of the business, and my trustees shall have power to depute and grant authority to the said John Edward Audsley, or to any other person or persons, to sign the firm name of R. & J. Dick, it being declared that my trustees shall have the sole power of granting such authority. And I provide and declare that my trustees shall not be required to take any active part in the carrying on of the said business, and in respect of the business being so carried on my trustees shall not be liable for omissions or for negligence, but each for his own actual personal fraud. In the event of any question arising amongst the said employees regarding the appointment and remuneration of managers and foremen connected with the business or scale of wages to the work people, all such questions shall be submitted to and determined by my trustees. And in the event of any of the said employees so misconducting himself as to render it, in the opinion of my trustees, desirable that he should be removed from the business, my trustees shall have the power to do so, and his interest therein and in the prospective profits shall cease and be dealt with in the same way as in the case of a deceasing or bankrupt employee.

"(Fifth)—Farther, my trustees shall be entitled to take payment in so far as the same has not been previously paid (at such times and in such amounts as looking to the requirements of the business they may deem proper) of the amount of profits standing at the credit of the said employees or any of them, and sums so taken shall be debited to my capital account and treated as payments *pro tanto* of the sums standing at my credit in the books of the firm. And further, my trustees shall have right to require payment out of the business from time to time of such proportion of my capital as may not in their judgment be required for the sufficient carrying on of the business, and when the whole of my said capital and interest shall have been fully paid to my trustees, they shall then pay out of the accumulated profits the amount appearing in the books as due to the representatives of deceased or bankrupt employees, and to such employees as may have retired from the business, if there be any such, *pro rata*, or arrange for such payment being made by the surviving employees in such manner as to them shall seem fit; and my trustees shall thereupon convey to the employees who may be surviving at that date the whole business, including the stock-in-trade and other assets, and all the shop businesses, both at home and abroad, and goodwill thereof, and also the factory at Greenhead with the whole machinery, plant, and tools therein, the price of which is hereby fixed at twenty thousand pounds sterling, which shall be paid in addition to the sum standing to my credit as aforesaid (subject always to the payment by the employees of the debts and obligations of every kind due and exigible from the business), according to their respective interests therein as shown by the number of shares allotted to them, or to which they may have right under these presents, and as appearing from the books of the business.

"(Sixth)—Further, the employees or the survivors of them (but excluding bankrupt, retired, or dismissed employees or their representatives), after my death shall, notwithstanding what is before written, at any time be entitled to purchase from my trustees, and they are hereby empowered and instructed to sell to the employees, the said business, including the foresaid stocks of gutta percha or balata for the capital sum standing to my credit in the books of R. & J. Dick at the time of such purchase, and also the factory and machinery at Greenhead at the price hereinbefore stated, subject always to the payment by the employees of the debts and obligations owing by the business, and I hereby authorise and empower my trustees if they see fit to lend part of the said capital on the security of the said business and assets thereof, or any part thereof. It is understood that my trustees, although they are not to take any active part in the management of the business, shall be entitled from time to time, by themselves or by any other person or persons whom they may appoint for that purpose, to inspect the books of the business in order to ascertain the position of the same, and the yearly balance sheet of the business shall be exhibited to and approved and sanctioned by them after being duly audited, and in the event of the balance sheet in any one year showing a loss, my trustees shall then be entitled to investigate into the causes which have led to the failure of profits, and along with the employees in the management to take such measures as may be deemed most expedient to prevent the recurrence of loss for the future, but in the event of its being found after a fair trial that losses continue to be made, and that the business cannot be carried on at a profit, or that the profits are so inadequate, as in the judgment of my trustees to render it necessary that the business should be wound up, they are hereby empowered so to do and to realise the assets, and after paying thereout the debts and obligations owing by the business, they shall apply the available proceeds, in the first place, in payment of the sum standing to the credit of my capital account (with interest as aforesaid) in the books of the business, and the remaining proceeds shall thereafter be divided amongst and paid to the employees, including the deceased, bankrupt, retired, or dismissed employees or their representatives, if there be any such, in proportion to the amounts standing to their credit in their respective accounts in the books of the business *pro rata*.

"(Lastly)—It is hereby understood and declared that the arrangement herein set forth regarding the disposal of my busi-

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ness shall form part of the settlement of my affairs, as if the said arrangement had been embodied in my trust-disposition and settlement. And I reserve power to alter, innovate, or revoke these presents, in whole or in part. And I reserve my own liferent; and I dispense with delivery hereof; and I consent to registration hereof for preservation."

The remaining facts as stated in the case were as follows:—"At the date of Mr Dick's death, on 7th March 1902, his capital in the business amounted to £351,550. At the same date the firm of R. & J. Dick had an overdraft of £143,177 from their bank. It was arranged between the trustees and the employees that the overdraft should be liquidated by the employees before they began to pay out Mr Dick's capital. By the 31st December 1903 the overdraft had been liquidated to the extent of £93,209, and the indebtedness of the business as at 7th March 1902 (date of Mr Dick's death), and at 31st December 1903, was as follows:—

As at 7th March 1902—		
To the bank, . .	£143,177	
,, ,, trustees, .	351,550	
		£494,727
As at 31st December 1903—		
To the bank, . .	£49,968	
,, ,, trustees, .	351,550	
		401,518
Reduction of indebtedness during the period from 7th March 1902 to 31st December 1903, ...		£93,209

During the same period the accumulated 90 per cent. of the profits of the business credited to the accounts of the employees in the books of R. & J. Dick, under the provisions of the second article of the deed of arrangement, was £72,076, 17s. 1d. The assessable profits of the business for the year ending 5th April 1905, taken on the average of three years to 31st December 1903, amount to £43,441, for which an assessment has been made on R. & J. Dick. The appellant's income from all sources for the year ending 5th April 1905, for the purpose of determining whether he is entitled to abatement, amounts (1) to £561 if his income from the business is taken at his share of the 10 per cent. of profits payable to the employees in cash, or (2) to £2000 if his income from the business is taken at his share of the full amount of profits, whether paid to the employees in cash or credited to their respective accounts in accordance with the provisions of the deed of arrangement."

After consideration of the facts and arguments submitted to them, the Commissioners confirmed the assessment as made. The appellant appealed by way of case stated under the Taxes Management Act 1880 to the Court of Session as the Court of Exchequer in Scotland.

The appellant argued—The share of profits in the business of R. & J. Dick placed annually to his credit in its books was not income. *Tennant* v. *Smith* (*Inland Revenue*), March 14, 1892, 19 R. (H.L.) 1, 29 S.L.R. 492, *cf.* opinions of Lord Chancellor and Lord Macnaghten. £561 was admittedly all the income of which appellant had the actual enjoyment—why should he be assessed on £2000? If Revenue's argument were sound, a man with only £50 a year to live on might be rated on £1600, which would reduce the argument to a *reductio ad absurdum*. The appellant had not a vested but only a contingent right to his share of the 90 per cent. of profits. For the business might lose all its money, or the trustees owing to losses might decide to wind it up before the testator's estate had been paid out. The withholding of the 90 per cent. of profits was not a matter of contract but of bequest, in this differing from cases of salary deferred, in part, by contract. This distinguished it from *Hudson* v. *Gribble*, *Bell* v. *Gribble*, [1903] 1 K.B. 517, and *Smythe* v. *Stretton*, 1904, 20 Times L.R. 443, 90 L.T. Rep. 756. In these cases though the whole salary was not actually received, it was because the recipients had voluntarily contracted to have a certain amount set aside, and the legal conception was that they received the whole salary. The present case had no similarity to the case of *Mersey Docks* v. *Lucas*, June 28, 1883, Law Rep. 8 App. Cas. 891, where the income was actually earned and received. The deed of arrangement did not change the employees into partners; they remained employees, but in addition became beneficiaries as to a small percentage of profits, and prospective beneficiaries in the business itself. The owners of the business were the trustees, who had the decision in the event of loss as to whether the business was to be wound up or not, and who could dismiss the employees for misconduct of which they were judges. The final act of the scheme was directed to be the conveyance by the trustees to the employees, which assumed that up till that time the trustees were the owners.

The respondent argued — *Tennant* v. *Smith* (*Inland Revenue*) merely decided that a bank agent in computing his income was not bound to include the annual value of a bank house occupied by him in performance of his duty. The other cases cited by appellant were in respondent's favour. In *Smythe* v. *Stretton* the deferred salary might be forfeited or lost, and yet the whole salary was held assessable. The principle to be deduced from *Smythe* v. *Stretton*, *Hudson & Bell* v. *Gribble*, and *Mersey Docks* v. *Lucas*, was that if under the Income-Tax Acts it was found that there does come profit to a company or individual, that profit once earned was liable to tax, whatever the individual might choose to do with it, whether he set it aside voluntarily or compulsorily or not. The appellant's share of the ninety per cent. in question was his profits. The deed of arrangement was really a deed by which the testator directed his trustees to sell his business to the beneficiaries at once, but with deferred payment. The trustees did not carry on the business, and were not liable in a question with the general public. The relation between the trustees and the beneficiaries was that of unpaid sellers and

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buyers respectively. The beneficiaries were really partners and proprietors of the business, but were only entitled to a conveyance from the trustees on payment of the price. It was for the appellant to show that the money standing at his credit in the books of the company was not his. He did not discharge the onus by showing that till a certain date (the payment of the price) he could not touch the money, nor did this fact affect the payment of income-tax.

At advising—

LORD STORMONTH DARLING—This appeal arises on a claim by the appellant for abatement of income-tax, which the Commissioners have refused to allow. The claim was made under 61 and 62 Vict. c. 10, sec. 8, on the ground that the appellant's total income from all sources for the year of assessment though exceeding £500 did not exceed £600, and he was therefore entitled to relief equal to the income-tax upon £120. His precise income he stated at £561, made up of £316 of salary (the immediate subject of assessment) and £245 which had already borne tax. It was conceded by the Crown that this sum of £561 was all the income of which he had the actual enjoyment, but they contended that his income from all sources amounted to £2000 a-year if account were taken not only of ten per cent. of the profits of the business of R. & J. Dick paid to him in cash, but of the balance of those profits credited to his account in the books of R. & J. Dick in accordance with a certain deed of arrangement granted by the late Mr James Dick on 4th March 1902. The question for decision is whether this balance of profits was part of the appellant's income for the year of assessment, and that depends on the just construction of the deed of arrangement.

The late Mr Dick, who was the granter of it, was the sole proprietor of a large and lucrative business in Glasgow as a boot, shoe, and belt manufacturer, and he seems to have conceived the idea that the best means of achieving the double purpose of getting payment of his large capital out of the business after his death, and at the same time benefiting the heads of the various departments of his business, was to give them a prospective interest in the profits, and power ultimately to acquire the business itself.

Accordingly, by the first article of the deed he named fifteen employees (of whom the appellant is one), and he allocated to each of them a number of shares, varying in number from ten to two, and making in all one hundred shares, with a declaration that he might afterwards add to or take from the number of employees, or vary the allotment in such manner as he might think proper, and with the further declaration that the provisions of the deed in their favour should not become vested interests until the whole of his capital and interest had been paid out, and that it should not be competent for them on any ground whatever to sell or dispose of their interest in the profits or in the business itself.

As the deed is printed at length and forms part of the case, it is unnecessary to enlarge on its provisions; but I may note that there are directions for ascertaining the granter's capital at the date of his death, and paying interest thereon to his testamentary trustees at the rate of 3 per cent., and that after making these and other deductions the whole profits of the business were to be divided among the surviving employees in proportion to the number of their shares, 10 per cent. of such profits being paid over to them in cash, and the remaining profits being credited to their respective accounts in the books of R. & J. Dick, until the whole of Mr Dick's capital and interest was paid out. As if to emphasise that the interest of the employees in these profits was to be contingent on Mr Dick's own capital being paid out, there was a declaration that the "said remaining profits allotted to the employees as aforesaid shall be accumulated, without adding interest, and form a fund available for the paying out of my capital from the said business." With regard to the management of the business, the deed provided that the employees should carry it on as it was carried on by Mr Dick at the time of his death, but the trustees were placed in a position of absolute control, being invested with the sole right of granting authority to sign the firm name, of appointing managers and superintendents, of settling questions as to salaries and wages, of determining what was to be left in the business as working capital, of deciding whether it could no longer be carried on at a profit and ought to be wound up, and even of removing any of the "said employees" from the business, with the result of depriving him of all future interest in it. The ultimate conveyance of the whole business by the trustees to the employees surviving at that date, subject to its debts and obligations, was not to be made until the whole of Mr Dick's capital and interest had been fully paid to the trustees, but they were entrusted with a discretionary power to lend part of the capital on the security of the business and assets. Lastly, there was a declaration that the arrangement set forth in the deed regarding the disposal of Mr Dick's business should form part of the settlement of his affairs, as if it had been embodied in his trust-disposition and settlement.

Before inquiring into the effect of this deed on the legal position of the appellant and the other employees, there are only a few facts to be noticed. At the date of Mr Dick's death, on 7th March 1902, his capital in the business amounted to £351,550. At the same time the firm of R. & J. Dick had an overdraft of £143,177 from the bank. It was arranged between the trustees and the employees that the overdraft should be liquidated by the employees before they began to pay out Mr Dick's capital; and by 31st December 1903 so prosperous had the business been that the overdraft had been reduced by £93,209. Accordingly, at 31st December 1903 the debt to the bank stood at £49,968; the debt to Mr Dick's trustees stood at its original figure of £351,550; and

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the accumulated 90 per cent. of the profits of the business credited to the employees in the books of R. & J. Dick under the provisions of the second article of the deed amounted to £72,076, 17s. 1d. The assessable profits of the business for the year ending 5th April 1905 were £43,441, for which an assessment has been made on R. & J. Dick and paid.

Now, what is the effect of the deed of arrangement on the legal position of these employees until the time arrives for Mr Dick's trustees making a conveyance of the business in their favour? Are they still only employees, with a right to salary and immediate payment of a small percentage on profits, together with a prospective and contingent interest in the business itself? Or are they a purchasing partnership, with immediate entry to the business, but with a postponement of the obligation to pay the price, and only such limitations on their right of property as are necessary to give the seller security for the price? I have no hesitation in adopting the first of these alterations and rejecting the second.

The entire deed seems to me redolent of the granter's desire to keep the business under the control of his trustees until the whole of his capital and interest has been paid out. Till then the employees are to have no vested interest, and are to have nothing to sell or convey. Till then they are not to touch a shilling of the profits except the small percentage, which is much more appropriate to active management by a servant than to the position of a principal. Till then they are to be under the control of the trustees with regard to all the more important questions of policy, including the question whether the business is to be continued or wound up, and they are themselves to be liable to dismissal by the trustees for misconduct, of which the trustees are to be the judges. In the face of provisions such as these, it seems to me impossible to hold that the employees were proprietors, with only some rights of control by an unpaid creditor. Mr Dick seems to me to have intended no more than that the employees whom he desired ultimately and contingently to benefit by the acquisition of the business should have the same kind of management of its practical details as they had formerly possessed in his own lifetime. In short, the business was to be in law and in fact the property of the trustees until the conditions were fulfilled for their conveying it to the employees.

If so, it is impossible to predicate of the appellant that his share of the 90 per cent. of profits was a part of his income for the year of assessment. It was no doubt carried to his credit as a book entry, but it was primarily to form a fund available for the paying out of Mr Dick's capital, and it might never be the property of the appellant at all. Consequently there is no similarity between this case and cases like *Mersey Dock* v. *Lucas*, 8 App. Ca. 891, where, an income having been actually earned and received, the question was (as explained by Lord Blackburn at p. 910 of the report) whether the Queen was to have her tax upon it. Here the King has had his tax upon it in the hands of R. & J. Dick, and when the Crown demands that the appellant's presumptive share of these profits shall be reckoned as part of his individual income, the Crown must show that the share is not presumptively or contingently but actually and indefeasibly his.

Neither does it seem to me that this case is governed or even affected by cases where persons in the acknowledged position of servants—like the deputy town clerk of Manchester in *Hudson* v. *Gribble*, (1903) 1 K.B. 517, or the assistant master at Dulwich College in *Smythe* v. *Stretton*, (1904) 20 Times L.R. 443—were held not entitled to deduct from assessment for income-tax the proportion of their respective salaries which their employers had withheld in order that it might form a provision for themselves or their representatives in the event of retirement or death. The claim to deduction in *Gribble's* case was based entirely on the Manchester "thrift" scheme, having been authorised by a local statute, which was said to let in a reference to sums payable by virtue of any Act of Parliament in the first rule of section 146 of the Income-Tax Act of 1842. That contention is of course inapplicable here. But even taking the decision apart from that essential distinction, I have no reason whatever to quarrel with it. Of course the mere fact that under a man's contract of service a portion of his salary is held up or deferred for the benefit of himself or those dependent upon him does not the less make it a part of his income. The only point of the Crown's reference to either that or the Dulwich case (which was a decision by a single Judge) is that there were provisions in each scheme by which the contributing member might forfeit his contributions, or part of them, for misconduct involving loss to his employers. That is a mere provision for set-off in case of counter-claims arising between master and servant, or, if it extends to forfeiture in case of early termination of the service, it is balanced by the contributor's chance of gaining benefit by the same stipulation when applied to his fellow-contributors. But the deferred portion of the salary is still salary contributed by the servant himself, and there is nothing contingent about it merely because he contracts as to its ultimate application. There is surely all the difference in the world between a case of that kind and one where the contingency is so vital that the fund said to form part of a man's income may, from causes over which he has no control, never be his at all.

I am therefore for reversing the determination of the Commissioners and allowing the abatement claimed.

Lord Kyllachy, Lord Low, and the Lord Justice-Clerk concurred.

The Court sustained the appeal and allowed the abatement.

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Counsel for the Appellant—Cullen, K.C. —R. S. Brown. Agent—Henry Robertson, S.S.C.

Counsel for the Respondent—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—P. J. Hamilton-Grierson, Solicitor of Inland Revenue.

Thursday, December 14, 1905.

FIRST DIVISION.

[Sheriff Court at Inverness.

WARRAND *v.* WATSON AND OTHERS.

Process — Possessory Action — Interdict — Competency—Property Held pro indiviso —Right of Pro indiviso Proprietor to Protect Property from Encroachment by Outsider—Salmon Fishing.

A *pro indiviso* proprietor is entitled by interdict to protect the property held *pro indiviso*, as for example salmon-fishing, from encroachment by an outsider.

Process—Interdict — Procedure — Trespass —Wrongous Fishing—Fishing Denied, but Right to Fish Asserted—Right to Interdict de plano.

In defence to an action of interdict, brought by the proprietor of a salmon-fishing against certain persons whom he alleged to have on certain specified occasions unwarrantably fished therein, the defenders denied that they had fished, but asserted that they had a right to fish. *Held* that interdict *de plano* could not be granted, but that there must be inquiry whether the defenders had fished.

Macleod v. *Davidson*, November 17, 1886, 14 R. 92, 24 S.L.R. 69, *distinguished.*

Property — Pro indiviso Property — Trespass—Burgh—Salmon-Fishing—Outsider Pleading in Defence of Trespass a Plea to Title Conceivably Open to pro indiviso Proprietors inter se—Indweller of Burgh Asserting Burgh's Right to Property not Claimed by Burgh.

A was *pro indiviso* owner along with the burgh of X of salmon-fishings, A having the right of fishing on seven days and the magistrates and council of X (as representing the community of the burgh) on every eighth day. The burgh's right to fish had not been dedicated to the public, but was only exercised by the public fishing. A having brought an action of interdict against certain of the indwellers of the burgh for fishing on days other than the eighth day, the respondents pleaded that the rights of the burgh as in a question with A were more extensive than the burgh was content to claim, and that as indwellers in the burgh they were, in exercise of those more extensive rights, entitled to fish not only on the eighth but on other days as well.

Held that the indwellers of the burgh were not entitled to plead in defence to a summary action of interdict rights which the burgh might, as in a question of title, conceivably plead against the other *pro indiviso* proprietor.

This was an action of interdict brought in the Sheriff Court at Inverness by Captain Alexander Redmond Bewley Warrand of Bught, residing at Ryefield House, Conon-bridge, against Donald Watson, fishing-tackle maker, Inglis Street, Inverness, and others, indwellers in the burgh of Inverness.

The pursuer craved the Court "to interdict the defenders and each of them from unlawfully entering or trespassing upon the pursuer's fishings in the water of Ness, known as the "Four Cobles Fishings" and the "Duke of Gordon's Fishings," being the fishings in the said river Ness, between the stone known as the Clachnahagaig and the sea, or upon any part thereof, or in any way interfering with the pursuer's possession, use, and enjoyment thereof, and from taking, fishing for, or attempting to take, or aiding or assisting in taking, fishing for, attempting to take salmon, grilse, sea-trout, or other fish of the salmon kind by means of rod and line, or by any other method, from the said fishings, but always under the exception in favour of the Magistrates and Town Council of Inverness, as representing the community of said burgh, (1) of the right of fishing for salmon or any other kind of fish in the said Four Cobles Fishings every eighth week-day, and (2) of the right of fishing for salmon or any other kind of fish in the fishing known as the Friar's Fishing."

The pursuer, *inter alia*, claimed to be, and produced a title as, *pro indiviso* proprietor to the extent of three and a-half cobles of the Four Cobles Fishing in the river Ness, and the town of Inverness was the other *pro indiviso* proprietor. He averred—"(Cond. 7) The only practical way of exercising fishing rights by rod and line in a case similar to the present is to limit the number of rods in proportion to the rights of the respective proprietors, or to allocate certain days to each proprietor in proportion to the extent of his right. By an arrangement entered into between the predecessors of the pursuer and the town of Inverness it was agreed that the Magistrates and Town Council of Inverness, as representing the community of said burgh, should exercise their right of fishing in respect of the one-half coble now vested in them by fishing over the whole of the Four Coble waters once in every eighth week-day, the pursuer's authors on the other hand being permitted to exercise their rights of fishing during all the other days of the season without interference by the Magistrates and Town Council or members of the community of said burgh. This arrangement has been in force for forty years, and the dates on which the town's rights can be exercised are published in the *Inverness Courier* in February of each year. Each fishing-tackle maker in town published a list of said dates, and in particular the said Donald Watson, or the firm of D. Watson & Company, has done so for the last ten or twelve years. The pursuer is absolute pro-

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prietor on seven days out of every eight week-days, and the town is sole proprietor on the eighth day. The present action has been informally intimated to the town by their vassal, but that body is satisfied with the right to fish on every eighth week-day, and on that account have not as yet appeared in the action. The defenders are not in right of the town of Inverness. They merely fish by toleration one day out of every eight week-days without any authority whatever from the town, and they are without any right or title to represent the town in this action. The counter statement is denied, and it is averred that the arrangement in question was in force during the past year and when the present action was instituted."

In answer the defenders stated—"(Ans. 2) Admitted that the town of Inverness did feu out certain fishings in the water of Ness described as part of the Four Cobles Salmon Fishings, which are still in part held feu of the town. *Quoad ultra* denied, and explained that the town retained and still retains the right to the whole fishings . . . except in so far as limited by certain of the said grants of feu to vassals to hold of them of certain *pro indiviso* shares in said fishings; that part of said fishings remain in superiority and property wholly and solely vested in the town of Inverness for behoof of the community thereof without qualification or restriction; that the town of Inverness was in use to let the same to tenants, and did let the same to tenants down to season 1859, when the town ceased to let the said fishings and resumed the natural possession thereof, and has since occupied and possessed the same by and through the inhabitants and indwellers of the said town of Inverness, who have exercised the town's rights therein of fishing for salmon or other fish; and that the defenders are one and all indwellers within the said burgh who with the consent and approval of the said Magistrates have exercised the town's right of fishing in the water of Ness other than the town's right in the portion of the said fishing known as the Friar's Shott, to which the town has the exclusive right and which the town still lets to tenants. Explained further that the rights granted by the town of Inverness to their said vassals in the said grants were mere *pro indiviso* rights with the town and the other vassals, and no exclusive right to fish in any part of the said four cobles water was ever granted by the town or acquired by any of the town's vassals. . . . (Ans. 7) Any arrangement as to the mode of exercising the said right of fishing has been solely from season to season for the convenience of the *pro indiviso* proprietors of the said fishings and their said tenants, that no such arrangement is now in existence, and that the defenders, as in right of the town of Inverness, are entitled to fish at any and every time on any and every part of the said fishings, so long as they do not thereby unduly interfere with the rights of the pursuer, which they have not done."

The pursuer further averred—"(Cond. 9) The defenders have no right or title to fish for salmon or other fish of the salmon kind in the portion of the said river between the stone of Clachnahagaig and the sea on any other day than the day selected under the arrangement above referred to, by which the said Magistrates and Town Council have chosen to exercise the rights they are entitled to in respect of the half-coble presently vested in them. The arrangement referred to is not disputed by the burgh of Inverness or the Town Council thereof, which alone has the right to make or unmake it. The defenders are called upon to sist the said burgh as a party to the action."

The defenders' answer was—"(Ans. 9) Denied. The defenders are entitled to exercise the town's rights of fishing in the said river. The pursuer is not entitled to question the actions of the defenders so long as they are within the rights of the town of Inverness in the said fishings."

The pursuer specified various dates on which he alleged that the various defenders had fished in contravention of his rights. In addition to the instances mentioned, he averred that all the defenders had fished said waters on many occasions both before and subsequent to the dates mentioned, and were in the habit of doing so, and asserted a right thereto.

The different defenders denied that they had so fished.

The pursuer pleaded, *inter alia*—"(3) The pursuer being proprietor of three and one-half cobles of the water known as the Four Cobles Fishing in the river Ness, is entitled, under the arrangement with the proprietors of the remaining half-coble, to the sole and exclusive right to fish for salmon and fish of the salmon kind on seven week-days out of every eight."

The defenders (Watson and Others) pleaded, *inter alia*—"(1) All parties not called, and pursuer has no title to sue. (3) The defenders having exercised only the rights of the public of the town of Inverness in the fishings of the said river Ness, and having exercised such rights only to such limited extent and in such manner as not to interfere with any right of the pursuer in or to said fishings, the prayer of the petition ought not to be granted. (4) The pursuer having no exclusive right of fishing in the said fishings, is not entitled to interdict as craved. (5) Any right the pursuer has in the said fishings being only in the nature of a *pro indiviso* share therein, and not having been invaded or interfered with by the defenders, pursuer is not entitled to decree as craved."

The defenders (Fraser and Shaw) pleaded, *inter alia*—"(5) The defenders not having trespassed as alleged the action should be dismissed."

On 24th October 1904 the Sheriff-Substitute (GRANT) appointed the pursuer to intimate the dependence of the action to the Provost, Magistrates, and Town Council of Inverness in order that they might, if so advised, crave to be sisted as parties to the action.

Thereafter on 23rd December 1904 he granted interdict against the defenders

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(other than the defender Fraser, who had been cited by mistake).

The defenders appealed to the Sheriff (FERGUSON), who also granted interdict *de plano* against the defenders (other than the said defender Fraser) in terms of the prayer of the petition, "reserving to the pursuer and to the Magistrates and town of Inverness, as representing the community of the said burgh, the right to give such permission to fish in the town cobles fishings grant as they respectively think fit, in so far as the granting of such permission is not regulated by agreement between the pursuer and the said Magistrates, or by the order of a competent Court."

Note.—"This case raises several questions of some delicacy. The defenders state under one head the separate pleas of no title to sue and all parties not called. These are both founded on the common interest of the pursuer and the Town Council of Inverness in the fishings which are the subject of litigation. It is unnecessary in this process to determine the alleged uncertainty as to the precise extent of the rights which belong to each of the *pro indiviso* owners. The pursuer's rights have not been questioned by the other owners, and his titles produced are amply sufficient, apart from any specialty in the law of common property, to entitle him to sue. The plea is truly founded on the fact that he is a part owner and the alleged necessity for the concurrence of the other joint owner. Now, while both joint owners must concur in the general administration of the joint property and the removal of tenants, &c., this is not necessary where the property is merely being defended against encroachment, and the owner is entitled to vindicate it against intruders—(*Johnson* v. *Crawfurd*, 17 D. 1023; *Lade* v. *Largo Baking Company*, 2 Macph. 17; *Aberdeen Joint Passenger Station Committee and G.N.S.R.* v. *N.B.R.* (1890), 17 R. 975, at pp. 981 and 984). If the pursuer is right in this case, he is undoubtedly merely repelling illegal encroachment on his rights. Whatever might be the case if a declarator were being sued, there is no obligation upon him to call any other than the intruders in a petition for interdict. His conclusions are drawn so as to leave undisturbed the arrangements with and right of the other proprietor as understood by him, and it is difficult to see what ground there could be for making the Magistrates of Inverness, whom he avers to be friendly to his action, respondents in a petition for interdict. The proper course to enable them to safeguard their own interest, or any public interests of which they may be guardians, has been taken by the formal intimation of the action to them. I have no hesitation in repelling the preliminary pleas for the defenders.

"A question of more difficulty is, however, raised when we come to consider whether the pursuer is entitled to interdict *de plano*, or whether there are averments that must be made the subject of proof. If the defenders had clearly and specifically averred the express authority of the Town Council of Inverness to fish the water on any lawful day as claimed by them, granted to them either by individual licences or by resolution of the Town Council, specifically condescended on, a very different case would have been presented from what can be discovered on record. What they do aver is that at a certain period the town, which had hitherto let the unalienated half coble or thereby of the four cobles fishing, ceased to let it, and that the natural possession was resumed and exercised by the indwellers of Inverness, with the consent and approval of the Town Council. Now, this means no more than that the Council ceased to let and did nothing, whereas in dealing with a body such as a corporation, express authority, either by written permission or in recorded resolution, was to be expected, and if founded on could have been at once verified. It is impossible to overlook the facts that the precise position of the fishings in question has been more than once the subject of judicial consideration, and that in the Four Cobles Fishings we are not dealing with fishing rights of doubtful character or description as to their being private property, or the subject of the exercise of general public rights, but with a heritable estate of salmon fishing, granted by charter and feued out as property from time to time. The proper vindicators of the rights of Inverness in the fishings are the Town Council of Inverness, and as they have deliberately refrained after judicial intimation from making any appearance, it must be assumed that the petitioner's prayer does not conflict with any rights which it is their duty to protect, or affect any licence, express or tacit, which they may have given to others to fish.

"This being so, it does not appear to me that the defenders have any title to challenge the averments of the petitioner as to the arrangement between him and the Town Council for the adjustment of their respective rights and the satisfactory exercise of them in terms fair and reasonable to both. Fishing on the eighth day is not challenged by the petitioner. The existence of an eighth day, on which the town may let the water lie open, is significant as to the true meaning of the defenders' averment, and they have made no sufficiently specific and relevant averment as to authority from the town to fish on the seven days, on which alone the pursuer seeks interdict.

"The neutral and negative attitude of the Town Council is natural in the circumstances, and affords a good illustration of the propriety of the rule that one part owner is entitled to vindicate the common property against encroachment. The Town Council are a body dependent on popular election, and the defenders may or may not be municipal electors. The petitioner is in right of the fishings to the extent of at least three-fourths, and his interest far exceeds that of the Town Council. On the other hand the Town Council are bound in good faith to do nothing to injure the value of the rights derived from them by the petitioner and his authors. The effect of

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the defenders' contention is that an unlimited number of persons being or pretending to be indwellers in Inverness, could at all times whip the water in respect of one-fourth or one-eighth of the fishing rights, with the result of destroying the letting value or the fishing amenity of the petitioner's three-fourths or seven-eighths. A more graphic example of the lean kine eating up the fat could hardly be afforded, and the substantial interest and reasonable apprehension which justify the remedy of interdict obviously exists.

"The defenders Watson and others give a general denial of the petitioner's averments as to specific acts of fishing. Had there been conclusions for damages, a proof as to these would therefore have been necessary. But apart from this, they have appeared to defend, stated that they 'one and all' have exercised the town's right of fishing, and maintained on record that they, as in right of the town of Inverness, are entitled to fish at any and every time on any and every part of the said fishings. There is therefore that threatened injury to the petitioner, and statement of a defence negative of his rights, which is itself sufficient to entitle him to protection by interdict. (*Moncrieff* v. *Arnot*, 1828, 6 S. 530; *Dunn* v. *Hamilton*, 1837, 15 S. 853 (6th exception at p. 871); *Macleod* v. *Davidson*, 1886, 14 R. 92).

"The defenders Simon Fraser, clerk, Holme, and Edward Shaw, state defences in somewhat different terms from the other defenders, but they aver a right on the part of the inhabitants of Inverness undistinguishable from that claimed by Watson and others. They also therefore truly challenge the pursuer's rights, and if they do not impinge these the interdict will not affect them. While I am not clear that I would in the first instance have granted interdict against these defenders I am not prepared to differ from the conclusion to which the Sheriff-Substitute has come in regard to them.

"While my judgment is an affirmation on the merits of the cause, the interlocutor appealed against has been recalled, and the one now pronounced substituted, on the ground that in possible eventualities it might possibly prove that the interlocutor of 23rd December 1904 had given the pursuer more than he asked. He asks for no interdict affecting the eighth day, as to which he avers an existing arrangement which excludes him, and the exceptions in his own prayer must be given effect to in terms."

The defenders appealed, and argued—The interdict granted was too wide, as it would prevent the defenders fishing for trout. The defenders did not admit that they trespassed, and therefore granting interdict *de plano* was incompetent. The mere assertion of a right was not equivalent to actual trespass. The pursuer had only a *pro indiviso* right of fishing, and therefore had no title to sue. Some of the defenders had not even asserted the right, and therefore the interdict against them was clearly incompetent. There had been no encroachment on the pursuer's rights, and any threatened injury must be very obvious before interdict would be granted *de plano*. The defenders were exercising the town's right of fishing. *Esto* that they had no permission, permission was unnecessary. Each member of the community had an interest and a title to assert the town's right. Moreover, in cases of long user (as here) no title was necessary. *Esto* that a *pro indiviso* owner could interdict a trespasser, there had been no trespass here, and the pursuer must prove trespass before getting interdict. The defenders did not admit the pursuer's right to fish on days other than the eighth. That being so, the pursuer must bring a declarator of his rights against the town, and the town was not called. In any event a proof of the alleged fishing was necessary. Reference was made to *Magistrates of Inverness* v. *Duff*, January 27, 1775, M. 14,257, and *Warrand's Trustees* v. *Mackintosh*, February 17, 1890, 17 R. (H.L.) 13, 27 S.L.R. 393.

Argued for respondent—The pursuer did not claim right to interfere with the town's fishing rights. The defenders were claiming much more than the town's rights. Moreover, the rights they claimed were inconsistent with those claimed by the town, and were such as the town could not grant. The defenders had no permission from the town, and they had not set forth facts and circumstances which would lead one to infer that they were exercising the town's rights of fishing. In these circumstances interdict had been properly granted against them *de plano*—*Macleod* v. *Davidson*, November 17, 1886, 14 R. 92, 24 S.L.R. 69.

LORD PRESIDENT—This is an action of interdict brought by Captain Warrand against certain inhabitants of Inverness, and he seeks to have them interdicted from fishing in "the pursuer's fishings in the water of Ness, known as the Four Cobles Fishings and the Duke of Gordon's Fishings." The pursuer sets forth his title to the fishings in question, which consists of a title to three and a-half cobles of the ancient fishings of the burgh of Inverness from Clachnahagaig to the sea. This fishing has been more than once already the subject of litigation, and in particular the extent of it was judicially determined in the case of the *Magistrates of Inverness* v. *Duff* in M. 14,257, and it came under the cognisance of the House of Lords in the case of *Warrand's Trustees* v. *Mackintosh* in 17 R. (H.L.) 13.

Now, the case of *Duff* settled conclusively that the Four Cobles Fishings were (with the exception of certain specified shots, as to which I need not particularise) exhaustive of the whole fishings of the burgh of Inverness between the stone of Clachnahagaig and the sea, and it is therefore certain that any right that the burgh of Inverness now have is not a right in virtue of their ancient charter, but is a right in virtue of a re-grant of a portion of the fishings which they originally feued out. That right we are told by the pursuer in this case he believes amounts to a half of a coble in the person of the burgh of Inverness. The pursuer

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further sets out that, he being *in titulo* of three and a-half cobles, and the burgh of Inverness being *in titulo* of half a coble, an arrangement had been entered into a long time ago, under which it was agreed that the fishings should be exercised thus—the pursuer in right of his title should have exclusive right to the whole of these fishings for seven days and the burgh of Inverness for one day. He then goes on to allege that the defenders having, some of them in good faith and some not, conceived that the rights of the indwellers of Inverness were of greater or of somewhat undefined extent, proceeded to assert those rights by fishing in the waters on days other than the eighth day which was allocated to the burgh in terms of the arrangement I have mentioned.

Now, the defenders have put in defences, and the first matter in the defences to which I think it necessary to direct your Lordships' attention is that they do not admit the actual fact of fishing on days other than the eighth day. It is true that they do not, I think, make any very frank statement of when and where they did fish, or any frank statement that they did not fish at all, but at any rate it is the fact that they have not put in anything that can be construed as an admission of the pursuer's statement that they fished on days other than the eighth day. Their defences also deal with a vast variety of matter. In the first place they indulge in a good many not very precise statements, which, if fairly read, mean, I think, nothing at all if they do not mean a contraversion of what was laid down in the case of *Duff* (M. 14,257). They further go on to deny that there was any arrangement as between the burgh of Inverness and the pursuer as to the regulation of the fishings, and they also proceed to say that for many years the burgh of Inverness has not let such fishings as belonged to it (with the exception of one specified shot, with which we have nothing to do), but has exercised its right through permitting the indwellers of Inverness to fish.

Upon this state of the pleadings the learned Sheriffs have granted interdict *de plano*. I think it is abundantly clear that the point which was really litigated in argument before the learned Sheriffs was a point of which we have not heard much, if anything, in this discussion, namely, the attempt on the part of the defenders as a matter of law to urge that they as indwellers of Inverness were entitled to the rights that the burgh of Inverness possessed, and that therefore they could not be proceeded against in a summary manner as by interdict, but were entitled to raise as in a competition of title all questions which the burgh of Inverness could conceivably raise against the pursuer. As I have said, we have not heard anything of that argument here. I think that argument was very justly put aside in the Sheriff Court as quite unmaintainable, and the reasons are very well given in the learned Sheriff's note. But I think that particular topic of discussion perhaps rather obscured the matter which I shall have immediately to advert to—whether the interdict should be granted *de plano* or not.

Now the defenders have appealed against the judgment of the learned Sheriff, and their argument is that your Lordships should either dismiss the action altogether—a contention for which I am bound to say but feeble support was put forward, and which indeed I cannot imagine could be very well supported—or alternatively allow them to go into proof of those various matters which I have mentioned as tabled in their defences.

There is only one other matter which I think it necessary to mention on the state of the facts so as to be in a position to dispose of the case, and that is this, that the learned Sheriff quite rightly at an early stage of the case and in view of the pleading that the pursuer had tabled this arrangement which had been made between himself and the burgh of Inverness, appointed intimation of the action to be made to the burgh of Inverness so that the burgh of Inverness, if they saw fit, might sist themselves as defenders to the action. That was done, and the burgh of Inverness had made no appearance.

Now as regards the competency of the action, it is quite clear that any *pro indiviso* proprietor is entitled to have a possessory action against an outsider who is troubling him in the possession of the *pro indiviso* property; and therefore that the action of the pursuer is a competent action seems to be absolutely clear. Let us then see if the defence of the defenders makes any difference. They first of all table certain views of the title which are inconsistent with what has been already decided; but I do not need to go into that, because the question really is whether the defenders are persons who are *in titulo* to table any views of the title at all. Of course the other *pro indiviso* proprietor might table views as to title, but he does not choose to do so, and the defender here is therefore in no better position than this, that he merely says—"I am a person who lives in Inverness, and who, as I propose to show, with the permission or at least without the hindrance of the town of Inverness, proposes to exercise the right which the town of Inverness has"; but then, if the agreement is standing, those rights do not go to fishing on anything except the eighth day.

Therefore the conclusion I come to is this—I do not think that the pursuer here can be entitled to an interdict *de plano*, while there is standing the denial that the defenders have actually fished. The pursuer maintains that he ought to get his interdict *de plano*, because he says that the defenders in their defences put in the statement that on a proper construction of the titles they are entitled to fish everywhere; and he tried to assimilate that matter to the case of *Macleod* v. *Davidson* (14 R. 92), where an interdict was pronounced, although the defenders did not actually admit that they had been upon the ground,

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but at the same time put in pleas that they were entitled to go there. I do not think the two cases are exactly parallel. In that case the state of affairs put forward by the defenders did not arise on the original summons and pleadings, but arose in respect of a minute that was put in. Now here, when I come to look at the pleadings, it does not seem to me that the two portions of the pleadings are inconsistent. It is not an inconsistency for the defenders to say when charged with trespass—"We do not admit that we ever went, but at the same time we say to you that as a matter of fact we have got a right to go."

But seeing that interdict is a matter which may be followed by criminal proceedings, I do not think that interdict ought to be granted without seeing that the defenders have been actually fishing in the waters, or have, as individuals, been asserting their intention of going on the waters because they had a right. And therefore I am of opinion that, before granting interdict as has been done by the Sheriff, a proof must be allowed upon this matter. I do not think the proof can go any further than that. When the defenders say that they want to go into what is the true partition between the town and the pursuer, they seem to me to try to raise a matter which they have no title to raise. The town having been given a perfectly good intimation that that is the arrangement which the pursuer tabled, and not having thought fit to come forward and deny it, the defenders here at the utmost can only have a subordinate right to the town; because, although the question of so called dedication was mooted in the argument, the defenders' counsel when pressed really could not put his argument so far as to say that there could possibly be anything in the matter of dedication so as to give him a right which was good even as against the town—a right which in a proper case of dedication the inhabitant has, as for instance in the case of the Kirkcaldy Links. That being so, the defender's right can only be a granted right by the town, and if the town stand by and allow the pursuer to put forth his version of the agreement, and the town say nothing either for or against it, I do not think it would ever do in such circumstances to allow an indweller of Inverness to come forward and litigate that question with the pursuer. My opinion therefore upon the whole case is this—we must recal the interlocutor of the Sheriff and allow the pursuer a proof of the averments that the defenders fished in the waters on a day other than the eighth day permitted to the town, and to the defenders a conjunct probation,—and I think it better to explain to the defenders, in case there should be any misunderstanding, that conjunct probation means a probation conjunct to the one fact which the pursuer is allowed to prove. I say that in order that they should not go to the expense of preparing a case upon the other matter, because they will not be allowed to go into any proof or enter into any other matter whatever, except to show that they did not actually fish upon those particular days. We shall keep the case here, and keep that matter right by taking the proof before one of ourselves.

LORD M'LAREN—I agree with your Lordship, and I think the proof ought to be limited as your Lordship suggests.

LORD KINNEAR—I also agree. It is common ground that the complainer and the burgh of Inverness are *pro indiviso* proprietors of the fishings described in the condescendence. If there be any question as to the extent or limitations of the rights of those *pro indiviso* proprietors, it is a question that must be settled either by agreement, or, if by litigation, then by litigation between them and them alone. The pursuer's rights as *pro indiviso* proprietor cannot be effectually defined either by agreement or by judgment obtained in a disputed case between him and residents in the town of Inverness, who have no title to bind the burgh as a corporation. It appears to me to be quite sufficient to say that the respondents are not proper contradictors of the complainer in any question as to the extent or limit of his rights; and therefore their answer, founded upon a challenge of his right, is no good answer to an action for obtaining a possessory judgment. Although the question of legal right as between the two *pro indiviso* proprietors cannot be effectually determined in this action, I have no doubt that the pursuer, as one of them, is entitled to protect the fishing which they hold in common from encroachment. If the burgh chose to take up the question which is raised in the defences, they would be quite entitled to do so, and they had an opportunity of doing so. They have not come forward, and therefore the position of the present action is this, that the answer of the defenders, that the pursuer has overstated the true extent of his right in the salmon fishings, is one upon which the pursuer is not bound to meet them. He is bound to meet any person only who has a title to raise that question with him, and so to raise it that a final and conclusive judgment can be obtained as between the two disputing litigants in the action. I quite agree with your Lordship therefore that we must look upon this case, so far as it remains in Court, as an action for an interdict only, based upon averments of encroachment; and I agree that, the encroachment not being admitted by the respondents, the pursuer must prove it before he can obtain an interdict. I think the proof must be limited as your Lordship proposes.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute and of the Sheriff, dated respectively 23rd December 1904 and 20th February 1905: Allow the pursuer a proof of his averments that the defenders have fished in the waters of Ness described in the

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condescendence on a day other than the eighth day appropriated to the town of Inverness, and to the defenders a conjunct probation, said proof to proceed before Lord on a day to be afterwards fixed by his Lordship: Find the expenses of the appeal to be expenses in the cause," &c.

Counsel for Pursuer and Respondent—Johnston, K.C.—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defenders and Appellants—Hunter, K.C.—Constable. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, December 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

H. *v.* P.

Reparation—Slander—Statement by Defender that Pursuer had Committed Adultery with Defender—Veritas—Averments of Misconduct by Pursuer with Men other than Defender—Relevancy—Deletion.

In an action of damages for slander founded on an alleged statement by the defender, contained in a letter written by him to the pursuer, and subsequently repeated by him before witnesses, that she (the pursuer) had committed adultery with him, the defender pleaded that the statement was true, and lodged a statement of facts in which he averred, *inter alia*, that the pursuer had on a specified occasion committed adultery with A, and had on other specified occasions been guilty of indecent familiarities with B and C.

Held (*affirming* judgment of Lord Pearson, Ordinary) that these averments were irrelevant and fell to be deleted from the record. *A* v. *B*, Feb. 23, 1895, 22 R. 402, 32 S.L.R. 297, *followed*.

On 15th August 1905 Mrs —— or H., wife of H., raised an action against P., in which she sought to recover £1000 as damages for alleged slander.

The pursuer averred—"(Cond. 2) On 12th August 1905 she received the following letter from the defender:—

'. . . 11*th August* 1905.

. . . . . .

'Dear Madam,—I have now to notify you that I have at last made up my mind to make a confession as to my having committed an act of adultery with you, while you was, and is now, the lawful wife of G. F. H... As to time and place, I will fully explain when my opportunity comes to be heard in Court. You can make use of this letter in any way you think fit, and either answer it personally to me or through your agent.—Yours truly, D. C. H. P...'

"(Cond. 3) The said letter contains a statement that the pursuer had carnal connection with defender at a time when the pursuer was the wife of the said G... F... H.., and thus committed adultery with him. Said statement is false, malicious, and slanderous. The pursuer has never at any time committed adultery with the defender. The defender has since the 11th of August last repeatedly stated to a number of people that the pursuer has committed adultery with him, and in particular he called on the pursuer's husband on or about 17th August last and repeated that statement to him. (Cond. 4) Further, the defender on 27th September last went to the house occupied by pursuer, and there in the presence and hearing of his step-daughter," Miss E, Mr F, "and the defender's brother-in-law," Mr G, "said to the pursuer that he had fornicated with her, and that she and Miss" E "were a pair of whores, or used words of the like import and effect of and concerning pursuer, meaning thereby to represent that the pursuer was a prostitute. Said statements are false, calumnious, and malicious."

In answer the defender admitted writing the letter, and averred that the statement therein was true. In a statement of facts he averred that there had been great intimacy between the pursuer and himself, that they had been together on a great many occasions, on all of which the pursuer had indulged in improper familiarities towards him, even before strangers and friends, and that "the result of this intimacy was that the pursuer committed adultery with the defender on two occasions, viz., in the parlour of the defender's dwelling-house at ——, on a Saturday evening towards the end of September 1904, and again in the private office at defender's public-house between 1st and 17th October 1904."

The statement also contained the following articles:—"(Stat. 7) Both before and during the time when the pursuer was intimate with the defender she made a regular practice of walking and driving with other men, both alone and in company with the defender and others. She also allowed and encouraged these other men to take improper familiarities with her, and her conversation and conduct in the course of said walks and drives was of a lewd and indecent description. Among those was A, with whom in August 1900 she committed adultery in her own house in . . . . She confessed this act of misconduct to her husband, who forgave her. (Stat. 8) Among others with whom the pursuer thus made a practice of walking and driving alone or in company with the defender and others were B and C. Between 1899 and 1904 she very often drove out with B to agricultural shows or places in the neighbourhood. Both on these occasions and in her own house she allowed and encouraged B to take indecent familiarities with her. In particular, on one occasion in the month of July or August 1900 or 1901, when the pursuer and B were driving in the neighbourhood of . . . ., their conduct was such that the pursuer's brother-in-law, Mr ——, who met them while cycling, stopped and publicly remonstrated with

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pursuer. She also walked and drove a great deal with C both about . . . . and and . . . ., and allowed him to take similar familiarities with her. In particular, in the end of August or beginning of September 1900, when her husband was in London, she drove with C to . . . . and . . . ., and such familiarities were indulged in on both these occasions. The names and addresses of A, B, and C have been communicated to the pursuer's agents."

The pursuer pleaded—"(3) The averments in articles 7 and 8 of defender's statement of facts (added at adjustment) are irrelevant, and should not be admitted to probation."

The defender pleaded — "The pursuer having committed adultery with the defender, and the statement in the letter complained of being accordingly true, the defender should be assoilzied, with expenses."

On 24th February 1905 the Lord Ordinary (PEARSON) appointed the 7th and 8th articles of the defender's statement of facts to be deleted from the record.

Opinion—"In this action the pursuer, Mrs H..., sues Mr P..., retired publican, ..., for damages for slander founded on a letter which he wrote to the pursuer notifying her that he had made up his mind to confess to an act of adultery with her. The defender, who takes an issue of *veritas*, makes specific averments in his statement of facts that the pursuer had also misconducted herself with another man, and that on two occasions she was guilty of unchaste conduct with other men, whose names and addresses have been communicated to the pursuer's agents. These statements are denied by the pursuer, who maintains that they should be deleted from the record. The defender claims to have these averments added to the inquiry which is to be held, on three grounds. The first is that he is entitled to prove the facts regarding these three instances as adminicles of proof of the misconduct charged in the letter complained of. The proposal is to establish a probability that she committed adultery with him by proving instances of unchastity with other men. In some cases, particularly in criminal practice, it is allowable to lead general evidence of repute of unchastity. But that is not proposed here. The averments in question are averments of specific instances, such as have been allowed to be proved in certain circumstances in matrimonial cases. But, so far as I have heard, such an inquiry has not been allowed in any case at all resembling the present, and I am not in favour of extending the practice. The second ground is that the defender is entitled, as the pursuer's character of chastity is in issue, to have the facts ascertained in mitigation of damages, in respect that if she had an unchaste character the damages would be diminished. It must be kept in mind that it is really the defender who put the pursuer's character in issue; and, as pursuer of the issue of *veritas*, I hold that he must confine himself to the two instances in that issue of which he has undertaken to prove the truth. Beyond that I do not see the justice or the expediency of allowing, in mitigation of damages, proof of other instances of unchastity. The contention assumes that the pursuer will get a verdict —in other words, that she is innocent of the misconduct charged, else there will be no damages to mitigate; and that being so it comes to this, that because the defender says falsely that the pursuer was guilty of two instances of misconduct with himself, he is to be allowed to reduce the damages by proving what he calls other instances with other men. I do not think that is permissible; and upon this ground the defender also fails. The third ground is that proof of the allegations would furnish a test of the pursuer s credibility. That raises quite different considerations. While I do not think these statements ought to remain on the record for either of the two purposes mentioned, it is a question of some nicety whether they should remain on the record for the purpose of testing credibility, or, being deleted from the record, should be deleted under the implied reservation that notice having been given of them the defender will be at liberty to cross-examine the pursuer upon these specific statements. I have some difficulty in seeing how, upon the conditions laid down in the case of *A* v. *B* (22 R. 402), such cross-examination could be useful as a test of the credibility of the pursuer. If she answered yea—that is, if she confessed to the charge in the cross-examination—then, of course, there would be no further question about it; but if she denied it the defender could not follow it up; he must be satisfied with her answer. Such an examination, however, would certainly operate as a steadying influence upon the witness who was being examined, because she would know that she would be liable to a prosecution for perjury if she were proved to have sworn falsely. I propose to follow the case of *A* v. *B*, and to delete the statements from the record, reserving to the defender the right to put questions in cross-examination."

The defender reclaimed, and argued—The statements in question were relevant to his counter issue of *veritas*, and he was therefore entitled to prove them. They were relevant both as affecting the probability of the fact alleged in the letter and also in mitigation of damages. Evidence of such facts as the defender averred was allowed in matrimonial cases and should be admitted here. The only available evidence was that of the parties, who contradicted each other, and where there was a paucity of evidence the strict rule could be relaxed—*Whyte* v. *Whyte*, March 15, 1884, 11 R. 710, 21 S.L.R. 470. In the case of *A* v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297, the *species facti* were different. The rule in criminal cases was that acts of unchastity might be proved if part of the *res gestæ*—*Dickie* v. *H. M. Advocate*, July 15, 1897, 2 Adam 331, 24 R. (J.C.) 83, 35 S.L.R. 5. The evidence should be allowed in mitigation of damages—*Brash* v. *Steele*,

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February 27, 1845, 7 D. 539. [The LORD PRESIDENT referred to the case of *Livingstone* v. *Dinwoodie*, June 28, 1860, 22 D. 1333.] [LORD KINNEAR—You may cross-examine on these facts but you would be bound by the answer.] *Verry* v. *Watkins*, 1836, 7 C. & P. 308. *Tolman* v. *Johnstone*, (1860) 2 F. & F. 66, was also referred to.

Counsel for the pursuer and respondent were not called on.

LORD PRESIDENT—I am of opinion that the Lord Ordinary has come to the right conclusion in this case, and I should be sorry if the law of Scotland obliged us to come to any other. I refrain from expressing the views which are very near to one's lips as to the propriety of putting on record, in a case of this kind such averments as are here put relating to third parties, and I content myself with saying that I entirely concur and agree with what was said with the greatest felicity by Lord President Robertson in the case of *A* v. *B* (22 R. 402). The present case seems to me to be *a fortiori* of that case, for if it be true in a case of rape that averments having to do with third parties are irrelevant, it is much more true in the present case.

I should like also to say, as to the case of *Whyte* v. *Whyte* (11 R. 710), with which I am very familiar, that the principle laid down there is limited to matrimonial cases, and for this reason, that it being the duty of the Court to protect the matrimonial bond against grievous injury, the very strict rule has been in such cases somewhat relaxed.

I therefore propose that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree, and think the cases cited are directly in point. The Lord Ordinary was perfectly right in striking out the averments objected to, because the proof proposed is as to matters entirely collateral to the issue, and involves unnecessarily the character and reputation of third parties. The circumstance that the strictest rule of relevancy has been relaxed in matrimonial cases is no ground for relaxing it in other cases.

The Court adhered.

Counsel for the Pursuer and Respondent—George Watt, K.C.—Ingram. Agents—Graham Pole & Lawrence, S.S.C.

Counsel for the Defender and Reclaimer—The Lord Advocate (Shaw, K.C.)—Constable. Agent—J. Ferguson Reekie, Solicitor.

Saturday, December 16.

FIRST DIVISION.

(Before Seven Judges.)

[Sheriff-Substitute at Airdrie.

DOBSON *v.* THE UNITED COLLIERIES LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*"—*Acting in Breach of a duly Published Statutory Rule—De facto Ignorance of Statutory Rule duly Published—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58)—*Permitting Naked Light to be in such a Position as to Ignite an Explosive.*

Rule 1 of the additional special rules framed for a mine in pursuance of the Coal Mines Regulation Act 1887 provided—"While charging shotholes or handling any explosives not contained in a securely closed case or canister a workman shall not smoke or permit a naked light to remain in his cap or in such a position that it could ignite the explosive."

A miner having drilled a shothole went to his powder-box for a cartridge, and having got the cartridge, which was not in a closed case or canister, was returning to his working-place with the cartridge in his hand and his lamp in his cap. In getting back he had to crawl through a narrow road only 2 feet in height, and while he was doing so the naked light in his cap came in contact with the powder in the cartridge, an explosion ensued, and he was injured. The conditions of exhibition at the mine of the special rules satisfied the requirements of sub-sec. 1 of sec. 57 of the Coal Mines Regulation Act 1887. The workman, however, did not *de facto* know the rule, having neither read it nor seen it, and in acting as he did he was following his own practice and that of other miners in the mine.

Held that the accident having been caused through the workman's breach of a duly published statutory rule, his injury was attributable to his serious and wilful misconduct in the sense of sec. 1, sub-sec. 2 (c), of the Act.

M'Nicol v. *Speirs, Gibb, & Co.*, Feb. 24, 1899, 1 F. 604, 36 S.L.R. 428, *commented on.*

Opinion (*per* Lord President and Lord Kyllachy) that acting in breach of a duly published statutory rule, where there was no dominant reason for so doing, was serious and wilful misconduct, for which ignorance of the rule could in no circumstances be an excuse. *Opinion* (*per* Lord M'Laren) that circumstances were conceivable where the workman might be excusably ignorant. *Opinion* of Lords Kinnear and Stormonth-Darling *reserved.*

Opinion of Lord President and Lord

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Kinnear that, apart from the breach of the statutory rule, the act of the workman was serious and wilful misconduct in the sense of the statute, and that this was a mixed question of fact and law on which the Court might review the decision of the arbitrator.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, enacts, sub-sec. 2 (c)—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

Clydeside Colliery additional special rule No. 1, framed in pursuance of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), is quoted in the rubric.

This was a stated case on appeal from the Sheriff Court of Lanarkshire at Airdrie in an arbitration under the Workmen's Compensation Act 1897, brought by William Dobson, miner, Crosshill Cottage Rows, Baillieston, against the United Collieries Limited, mine-owners, Clydesdale Collieries, Broomhouse, who appealed.

The following were the facts as given in the stated case—"(1) That on 14th November 1904 the applicant was employed as a miner at the respondents' Clydeside Colliery.

"(2) That about 1 p.m. on the said date the applicant having drilled a shothole went to his powder-box for a cartridge.

"(3) That before opening his powder-box he placed his lamp on the ground at a distance of 6 feet from the box, but after getting a cartridge from the canister in said box and closing the box, he replaced his lamp on his cap and proceeded to return to his working-place with his lamp on his cap and the cartridge in his hand, the cartridge not being contained in any case or canister.

"(4) That in order to get back to his working-place he had to crawl through a road about 2 feet in height, and as he was doing so the cartridge exploded and injured his hand.

"(5) That the cause of the explosion was the ignition of the powder by a spark from the applicant's lamp.

"(6) That in carrying the powder as he did the applicant contravened additional special rule No. 1, established for the pit under the Coal Mines Regulation Act, which special rule enacts . . . [the additional special rule was here given, *v. sup.*] . . .

"(7) That the special rules originally established for the colliery are kept at the pithead in a wooden box with folding doors supported on a stand, but the additional special rules are not kept in that box but in a glass case which is hung in the shed at the pithead.

"(8) That the applicant, although aware that there was a rule forbidding a miner to have a lamp on his cap when taking powder out of a canister or charging a shothole, did not know of the said additional special rule, or that there was any rule against a miner having his lamp on his cap while carrying in his hand a cartridge not enclosed in a case.

"(9) That in carrying a cartridge as he did with his lamp on his cap the applicant acted in accordance with his usual practice, which he had followed for a number of years, and that the same practice was followed by some other miners in the pit.

"(10) That although the said additional special rule has been established at the pit for about two years, it does not appear to be universally known among the miners.

"(11) That as a result of the injury he sustained the applicant was off work for eight weeks, but resumed work at the end of that period.

"(12) That his average weekly wage in the respondents' service during the twelve months preceding the accident was £1, 4s. 2d."

On these facts the Sheriff-Substitute (MACKENZIE) found in law—"(1) That the injury sustained by the applicant was received by accident arising out of and in the course of his employment, and (2) that the accident was not attributable to serious and wilful misconduct on his part in the sense of sec. 1, sub-sec. 2 (c), of the Workmen's Compensation Act 1897. I therefore awarded the applicant the sum of £7, 5s., for which I decerned against the respondents, and found him entitled to expenses."

The question of law for the opinion of the Court was—"Was the accident to the applicant attributable to his own serious and wilful misconduct within the meaning of sec. 1, sub-sec. 2 (c), of the Workmen's Compensation Act 1897?"

On 19th May 1905 the First Division remitted to the Sheriff-Substitute to report—"(1) Whether the additional special rule No. 1, quoted in paragraph 6 of the case, was the only special rule dealing with the handling of explosives, or whether there were other rules dealing with that subject, either in the special rules originally established or in the additional special rules both alluded to in paragraph 7, and, if so, what were the terms of said rules; (2) whether the conditions of exhibition of (*a*) the original special rules, and (*b*) the additional special rules particularly described in paragraph 7, were sufficient to meet the requirements of sec. 57, sub-sec. (1), of the Coal Mines Regulation Act 1887; (3) whether, apart from the question of rules, the act of the applicant . . . was, looking to the nature of the cartridges as proved, an act of serious and wilful misconduct on his part."

On 9th June 1905 the Sheriff-Substitute (MACKENZIE) reported—"(1) Additional special rule No. 1, quoted in paragraph 6 of the stated case, was the only special rule dealing with the handling of explosives established for the pit. In this connection, and in explanation of my findings in paragraph 8 of the case, I should add that the conclusion I came to on the evidence was that the applicant's knowledge that there was a rule against a miner having a lamp on his cap when taking powder out of a canister or charging a shothole, had been obtained from other miners or from officials in the pit, and that he had no knowledge of the special rule itself, or, except to the

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extent stated, of the regulations embodied in it. (2) The original special rules and the additional special rules were both exhibited in conspicuous places near the pithead, where they might conveniently be read by the persons employed in the mine, and in my opinion the conditions of exhibition were in each case sufficient to satisfy the requirements of sub-sec. 1 of sec. 57 of the Coal Mines Regulation Act 1887. (3) The cartridge carried by the applicant was a two ounce cartridge of compressed gunpowder. It was proved that such cartridges are covered with a paper wrapper. There was no further evidence as to its nature. In my opinion the act of the applicant, as described in the case, exposed him to considerable danger, but I was satisfied that he did not appreciate the danger or think that he was incurring any serious risk. In these circumstances, and apart from the question arising on the special rule, his act did not in my opinion amount to serious and wilful misconduct."

Thereafter, on 13th July, the First Division remitted the case to Seven Judges, and it was heard on 24th November 1905.

Argued for appellants—A mine-owner was bound to have the special rules for the mine posted up in such a way as to be easily read by those employed in the mine (Coal Mines Regulation Act 1887, 50 and 51 Vict. c. 58, secs. 51, 52, 54, 57, and 58). That had been done at this mine, and the Sheriff's findings and the statements in his report showed that the respondent was aware of the existence of the regulations as to naked lights, though he may not have actually read them. That being so, his failure to observe them was "serious and wilful misconduct" in the sense of the Act —*Dailly* v. *John Watson, Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782; *O'Hara* v. *Cadzow Coal Company, Limited*, February 6, 1903, 5 F. 439, 40 S.L.R. 355; *Condron* v. *Gavin Paul & Sons, Limited*, November 5, 1903, 6 F. 29, 41 S.L.R. 33; *United Collieries, Limited*, v. *M'Ghie*, June 7, 1904, 6 F. 808, 41 S.L.R. 705. In *M'Nicol* v. *Speirs, Gibb, & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428, the rule did not appear to have been properly published, but that was not so here, for the appellants had taken the best available means of making it known. [LORD PRESIDENT—There are dicta in *M'Nicol's* case which seem to indicate that even if the rules were properly published a workman who failed to observe them might only be guilty of negligence, as distinguished from serious and wilful misconduct.] If the rules were published the workman was bound to know them, and it was enough if he contravened them. The breaking of a statutory rule could not be anything else than wilful. *De facto* ignorance was no excuse for failure to obey a statutory rule. The breach of a statutory rule was different from the failure to obey the ordinary regulations of the employment. The workman must have known there was danger in doing what he did. That made his misconduct "wilful," and as the rule violated was a statutory one that made it "serious."

Argued for respondent—The purpose of the Workmen's Compensation Act was to give compensation for the ordinary risks of the employment. Mere negligence therefore was not a bar to relief. Whether the negligence was excusable or not was a question of circumstances in each case. It was therefore a question of fact. The arbiter had found (1) that the respondent did not in point of fact know the rule, and (2) that he did not appreciate the risk. [LORD M'LAREN—"Serious" depends on the quality of the act, not on what the workman may think of it.] The respondent did not know the rule, and therefore could not be guilty of wilful misconduct. The mere fact that the rule was broken did not make his offence serious and wilful misconduct—*M'Nicol* v. *Speirs, Gibb, & Company* (*cit. sup.*). Whether misconduct was wilful or not was a personal matter, for it required a conscious act, as distinguished from the mere following of the customary practice—*Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *Lewis* v. *Great Western Railway Company*, 1877, L.R. 3 Q.B.D. 195, per L. J. Bramwell, at p. 206; *in re Young & Harston's Contract*, L.R., 31 Ch.D. 168, at p. 175, Bowen L.J.; *Smith* v. *Baker & Sons*, [1891] A.C. 325. In all the earlier cases (except that of *M'Nicol, cit. supra*) actual knowledge was either proved or implied, and in all the cases (except that of *Dailly, cit. supra*) the risk was obvious.

At advising—

LORD PRESIDENT—This is a stated case in an arbitration under the Workmen's Compensation Act. The facts which are given in the case, which has been drawn by the learned Sheriff, are these. The applicant was a miner and employed as such in the respondents' Clydeside Colliery. On a certain occasion he, having drilled a shothole, went to his powder box for a cartridge. Having got the cartridge, he returned to his working-place with the cartridge in his hand and his lamp on his cap. In getting back to his working-place he had to crawl through a narrow road only two feet in height. While he was doing so, the naked light on his cap came in some way in contact with the powder in the cartridge, an explosion ensued, and he was injured in the hand. Now, in doing what he did there is no question that he was contravening additional special rule No. 1, established under the Coal Mines Regulation Act, which rule enacts that "while charging shotholes or handling any explosive not contained in a securely closed case or canister, a workman shall not smoke or permit a naked light to remain on his cap." The learned Sheriff, acting as arbitrator upon these facts, and in respect of the further fact established, viz., that the applicant did not *de facto* know the rule, having neither heard of it nor read it, found that the accident was not attributable to serious and wilful misconduct in the sense of sec. 1, sub-sec. 2 (*c*), of the Workmen's Compensation Act. That is the point upon which the special case is

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stated. When the case first came before us we were of opinion that there were still some facts which had not been stated in the case which were necessary for its proper determination, and accordingly your Lordships remitted the case to the Sheriff and asked him to answer certain specific questions, amongst others, these—whether the conditions of the exhibition of the special rule were sufficient to meet the requirements of sec. 57, sub-sec. 1, of the Coal Mines Regulation Act, and also whether, apart from the question of rules, the act of the applicant as described was, looking to the nature of the cartridges as proved, an act of serious and wilful misconduct on his part. We had before us the report of the learned Sheriff-Substitute in answer to that remit, in which he tells us that in his opinion the conditions of exhibition of the special rules were such as to satisfy the requirements of the Coal Mines Regulation Act. He then sets forth the nature of the cartridge, a two-ounce cartridge of compressed gunpowder covered with a paper wrapper. He states that in his opinion the act of the applicant, as described in the case, exposed him to considerable danger, but that he was satisfied that he did not appreciate the danger or think that he was incurring any serious risk, and in these circumstances, and apart from the question arising on the special rule, the learned Sheriff-Substitute adds that "his act did not in my opinion amount to serious and wilful misconduct." Now, the section of the Act on which the question turns is in these words—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation shall be disallowed." I am of opinion that when, as here, it is proved that an accident happened through the disregard of one of the proper statutory colliery rules, that is in itself an act of serious and wilful misconduct. After all, what are these rules? They are a set of rules which are made for the safety of the mine and all the workers therein. I need not go through the sections in the Coal Mines Regulation Act, because it is quite sufficient to say, as your Lordships are well aware, that there are anxious provisions for the way in which the rules are to be exhibited, and that it is made, among other things, a general offence if the rules are then disregarded. Now, that seems to me to end the matter. Of course it is perfectly evident that a man might transgress a rule and yet that that might not amount to serious and wilful misconduct, because the accident might not be attributable to his transgression of the rule. It would not do, if an accident happened, to simply prove that the man had transgressed some rule or other, and to say "therefore you forfeit your right to compensation because you are a breaker of rules." The transgression of the rule must be associated with the cause of the accident. As to the application of that to the present facts, I do not enlarge upon it, because there is obviously no doubt that the reason this accident happened was that the man did what the rule told him not to do, namely, keep an open light in his cap near a cartridge which was not properly protected. There have been four cases in this Court all dealing with the transgression of these rules, and upon the same question in the section of the Compensation Act, viz., whether the breach was serious and wilful misconduct. There is the case of *Dailly* v. *John Watson, Limited* (2 F. 1044), which had reference to the same rule as here (it was the carrying of a naked light), and that would be an absolute decision in point were it not for the fact that this man did not *de facto* know the rule. He had never read it or seen it. Now, in *Dailly's* case the report bears that, there being no proof one way or the other, the man was presumed to know the rule. No doubt there is an expression of the Lord Justice-Clerk in *Dailly's* case that he still held his judgment open when a case would occur where the man did not *de facto* know the rule. The next case was that of *O'Hara* v. *The Cadzow Coal Company, Limited* (5 F. 439). That was a case having to do with the omission to sprag. In that case also the man knew the rule. In the case of the *United Collieries, Limited* v. *M'Ghie* (6 F. 808), which was the case of a bottomer going through the gate near the bottom of the pit, there again, so far as the report bears, the applicant knew the rule. But at the same time all those cases are so far decisions in point that they certainly give countenance to the idea that the breaking of one of these colliery rules is serious, and doing something in contravention of them which causes an accident is serious and wilful misconduct. There is only one other case, which, of course, was naturally relied upon by counsel at the bar as going the other way, and that is the case of *M'Nicol* v. *Speirs, Gibb, & Company* (1 F. 604). I am bound to say that, so far as I myself am concerned, I could not have concurred in the judgment of that case, and I am free to say so because we are here sitting as a Court of Seven Judges. If that case can be explained upon the ground that the rules in that case were not proved to have been properly posted, then I should have concurred in the judgment, because I think it goes without saying that a rule not properly posted is really no rule at all; it is merely a piece of paper in the employer's pocket, so to speak, and no question of breach can arise until the rule is posted. But where I humbly disagree with the dicta in that case I may explain thus. There was certainly a discussion in that case whether, assuming the rule to be properly posted, you yet may not have a further question—whether there was in each particular case serious and wilful misconduct in the man's not knowing the rule. Now in my opinion that does not admit of any exception. The man is bound to know the rule, and of course the question under the Act of Parliament is not whether there has been serious and wilful misconduct, but whether the injury is attributable to serious and wilful misconduct. In other words,

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the question of serious and wilful misconduct is always a question of something the man does. Whether he knew the rule—whether it was serious or wilful misconduct not to know the rule, does not seem to me to enter the discussion, because if he had known the rule there would then have been the further question, what he would have done in consequence—a thing that of course in the case of a man not knowing the rule you never can tell. But it seems to me that, viewing these rules as I do under the Act of Parliament, there is no possible exception to the duty of knowing the rule. When a person knows the rule I could conceive that there might be a possible exception which would excuse him from breaking it. That is another matter. For instance, to put one case, supposing there had been an explosion in the mine, and in order to save the lives of many other people a man temporarily broke the rule, that would seem to me to be a proper excuse, and would then turn what is generally termed serious and wilful misconduct into something which is not misconduct; but that would be an excuse in fact, and would have nothing to do with the question of not knowing the rule. I do not hesitate to say that whenever a man breaks a colliery rule which has been properly posted, and an accident happens in consequence, that is serious and wilful misconduct, unless he can show that there was some dominant reason for his breaking the rule on that particular occasion. Of course there was nothing of that sort here, and therefore I am of opinion that there was serious and wilful misconduct. I ought to say, further, that although this case was sent to Seven Judges in order to consider this very important question on the rule, really on the facts of this case I should be prepared to hold that there was serious and wilful misconduct. No doubt the learned Sheriff says that it is not so in his opinion, but I do not think that his opinion on that matter is an opinion on a question of fact. I think it is on a mixed question of fact and law, and that allows us to review it, and if I am allowed to review it, then I find that he tells me that what the workman here did was a dangerous thing, but that he considers that particular workman did not appreciate the risk. Now, I entirely demur to the idea that you are to measure these things by a subjective standard which varies with every workman employed. The only result is that the more foolhardy a person is the less can he be guilty of serious and wilful misconduct. I think you must judge all these things as all other things are judged—by the general standard of mankind, and therefore I would be prepared to hold, if necessary, that on the facts alone there was serious and wilful misconduct here, but the case is more important on the other matter, and my opinion therefore is that we should answer the question in the way I have suggested.

Lord M'Laren—I concur in the opinion of your Lordship in the chair, except that I do not wish to be understood as expressing a doubt as to the soundness of the decision in *M'Nicol's* case. It is not of very much consequence whether that decision was right or wrong once the question has been determined, as I think it is now determined, that the infraction of a mining rule amounts to serious and wilful misconduct where it is the cause of the accident, but I think there may be an exception to that principle where the workman is either excusably ignorant of the rule or where he breaks the rule through some paramount necessity. Now, in *M'Nicol's* case, the rule in question was to the effect that after a shot had been lighted, if it did not explode, the workman was to wait half an hour before going to look at the charge, and there was evidence that the letter of the rule had been generally disregarded, and that the practice was to wait for what was considered a reasonable and sufficient time. We thought that the workman might excusably hold the rule to be no longer in observance because in point of fact it was not observed in the pit, and that seems to me to be one of the exceptions that may be admitted to what is otherwise a principle of universal application. I think it will always be very difficult to establish an exception, because the very purpose of those rules is to guard against accident and injury to life and property, and whoever undertakes to disregard them undertakes a very heavy responsibility.

Lord Kinnear—I agree with your Lordship, but with one qualification, because I desire to reserve my opinion on a point which I think is not necessary to the judgment, namely, whether it is or is not possible that there may be a reasonable answer to a case alleging wilful and serious misconduct when rules at a mine have been published and the miner has transgressed them—alleging what your Lordship has called some dominant cause, or even alleging ignorance of their existence. The question is not whether ignorance of a bye-law is excusable, but whether an act done in such ignorance is wilful misconduct. I should rather decide that question when the case arises, and I do not think it has yet arisen. I do not think it arose in the case of *M'Nicol* v. *Speirs, Gibb & Company*, because the judgment in that case proceeded upon the hypothesis that the rules had not been properly published. The opinion of the Court was that the facts before them did not show proper publication of the rule, and at the same time that they did show that the ordinary course of working in the mine, with the knowledge and sanction of the owners and managers of the mine, involved a departure from the rules, and that was thought relevant both because it tended to prove ignorance consequent upon the failure to publish, and because, as between master and servant the former can hardly maintain that a method of working amounts to wilful misconduct when he has himself authorised and encouraged it. I do not see therefore that that decision is in point, since we hold that the accident to the pursuer happened through a disregard of a duly published rule

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which he must or ought to have known. I of course assent to the observation which fell from your Lordship that ignorance of the rule will not and cannot in itself be the wilful and serious misconduct which causes the accident. I agree also upon the second point which arises, apart from the rules and from the publication of the rules. I have very much the same difficulty as I think your Lordship has in interfering with a judgment of the arbitrator which appears to involve only a question of fact, and the question of serious and wilful misconduct is primarily a question of fact. But then it is a question of mixed fact and law, and I think the report of the learned Sheriff in this case enables us to distinguish between the fact and the law involved in this decision, so as to raise the true point for our own judgment, because he sets out certain facts as proved which undoubtedly involve extremely reckless conduct on the part of the miner. The Sheriff finds that he carried a naked light in his cap, having at the same time in his hand a cartridge of powder very insufficiently protected, and did so while he was going through the low passages of a mine. That that was a piece of serious and wilful misconduct, as exposing both himself and all the other workmen in the mine to a very serious danger, seems to me to be beyond doubt, and I quite agree that to say that the man himself did not exactly appreciate the amount of danger to himself in no way tends to show that this misconduct was not serious, and does tend to show that it was wilful.

LORD KYLLACHY—I agree with your Lordship in the chair. It appears to me that to disobey a special rule such as that here in question is serious and wilful misconduct in the sense of the statute; and it does not seem to me to be any excuse or to make any difference that, the rule being duly published, the particular miner does not choose to read it or make himself acquainted with its terms. I should perhaps add that I do not myself see how it could be any excuse or make any difference although the rule should have been commonly disobeyed, or even disobeyed with the knowledge of the employers.

LORD STORMONTH-DARLING—It seems to me that the question, whether the injury to a workman is attributable to his own "serious and wilful misconduct" within the meaning of section 1 (2) (*c*) of the Workmen's Compensation Act 1897, so as to disentitle him to compensation in respect of that injury, is in general a question of mixed law and fact. I can quite imagine cases in which it may be a question of fact alone, and in which the finding of the Sheriff as arbitrator on the facts would therefore be final. But in this case I think the Sheriff is right in stating the question as one of law.

Accepting it as such, and taking the stated case along with the Sheriff's report of 9th June 1905 in answer to the remit of the First Division, we are told that the injury was attributable to the act of the workman in carrying an unenclosed cartridge in his hand and crawling through a road about two feet in height while his lamp was on his cap, with the result that a spark from the lamp ignited the cartridge; that this act constituted a contravention of a special rule established for the pit under the Coal Mines Regulation Act 1887; and that the rule was exhibited in such a manner as to satisfy the requirements of that Act. It is true that the Sheriff has also found that the workman was ignorant of the rule, and that in acting contrary to it he followed his own usual practice and the practice of some other miners in the pit. But this, as it seems to me, cannot excuse him if he was bound to know the rule, and that he was so bound follows necessarily from the fact of its due publication.

His act, therefore, was clearly "misconduct." But the question remains, was it "serious and wilful misconduct?" I should not like to say that there may not conceivably be some contravention of a rule having statutory force, when arising from ignorance of the rule, which could not be so described. A contravention must generally be "serious" if injury results from it, which it must do before the question can arise; but it must also be shown to be "serious and wilful." Where, however, you have a duly published rule contravened, and the only excuse for the person contravening it is that he did not take the trouble to make himself acquainted with its terms, the serious and wilful character of the misconduct, in my opinion, consists in his not informing himself of what he ought to know, and has the means of knowing, for the safety both of himself and others.

I therefore concur with your Lordships that the question of law ought to be answered in the affirmative, and that the award of the Sheriff-Substitute should be recalled.

LORD LOW—I agree with all your Lordships that the accident to the workman in this case is attributable to serious and wilful misconduct, and I adopt the grounds stated by your Lordship in the chair for arriving at that conclusion.

LORD ADAM, who was present at the hearing, had resigned before the case was advised.

The Court answered the question of law in the affirmative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for Claimant and Respondent—M'Clure, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents and Appellants—The Dean of Faculty (Campbell, K.C.)—R. S. Horne. Agents—W. & J. Burness, W.S.

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Thursday, December 21.

FIRST DIVISION.

PURVES *v.* CARSWELL.

Administration of Justice—Trial before Lord Ordinary without a Jury—Lord Ordinary before whom Case Depending Removed to Inner House—Competency of Lord Ordinary thereafter Completing the Trial—Lunacy (Scotland) Act 1866 (29 *and* 30 *Vict. c.* 51), *sec.* 24—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 46.

In an action of damages against a medical man for the alleged wrongful granting by him of a certificate under the Lunacy Acts, the Lord Ordinary—before whom the case was being tried without a jury, in accordance with the provisions of sec. 24 of the Lunacy Act 1866, and secs. 46 and 47 of the Court of Session Act 1850—was removed to the Inner House before hearing counsel on the proof or pronouncing his findings in fact.

Held that there was no incompetency in the Lord Ordinary, though removed to the Inner House, completing the trial of the action.

Allan v. *M'Murray*, June 20, 1855, 17 D. 969, *commented on.*

The Lunacy (Scotland) Act 1866 (29 and 30 Vict. c. 51), sec. 24, enacts—"In any action at law which may be raised against any medical person in respect of any certificate granted by him under the provisions of this Act or of any of the recited Acts, the issue or issues after being adjusted shall be tried, and the amount of damages (if any) assessed, by the Lord Ordinary before whom such action depends without a jury, and the proceedings at and consequent on the trial of such issue or issues shall be regulated by the provisions of the" Court of Session Act 1850 "with respect to the proceedings at and consequent on the trial by the Lord Ordinary without a jury of such issues as may under the provisions of that Act be so tried."

The Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 46, enacts—". . . Whenever any issue shall be tried by a Lord Ordinary without a jury, such Lord Ordinary shall take notes of the evidence, and shall hear counsel thereon, and otherwise the proceedings shall be conducted continuously and as nearly as may be in an ordinary jury trial; and within eight days after the proceedings at the trial are concluded such Lord Ordinary shall pronounce an interlocutor, in which he shall state specifically what he finds in point of fact; and it shall be competent to either party, by written note within eight days from its date, to bring such interlocutor of the Lord Ordinary under review of the Lord Ordinary upon his own notes of evidence, who shall forthwith hear parties thereon; and it shall be competent to the Lord Ordinary upon such review, and within eight days after hearing parties, either to correct his interlocutor as regards such findings in fact, or to order a new trial as he may think fit, provided always that if either of such periods of eight days extends into vacation or recess, such period shall not be held to elapse till the fourth day after the next meeting of the Lords Ordinary or the Court thereof."

This was an action at the instance of William Purves, 170 Dumbarton Road, Glasgow, against Dr John Carswell, 5 Royal Crescent, Glasgow, for £10,000 in name of damages in respect of the alleged wrongful granting by the defender of a certificate under the Lunacy Acts. There was also another similar action at the instance of the same pursuer against Dr Marion Gilchrist, Glasgow, for £10,000 damages in respect of the alleged wrongful granting of a certificate under the Lunacy Acts. These two actions by consent of parties were set down for trial on the same days, and by minutes lodged in each process it was agreed that the evidence and productions in the one cause should be held as and taken to be the evidence and productions of the other.

The action against Dr Carswell was called and depended before Lord Pearson (Ordinary) until his removal to the Inner House in December 1905. In accordance with the provisions of the Lunacy (Scotland) Act 1866, sec. 24 (quoted *supra*), an issue was adjusted for the trial of the cause, and, following thereon, proof was led before Lord Pearson by the parties on certain days of November 1905. On the conclusion of the proof the Lord Ordinary continued the case for hearing counsel till 13th and 14th December, upon which days he appointed counsel to be heard. In the interval between the conclusion of the proof and the diet appointed for the hearing of counsel Lord Pearson was removed to the Inner House. Nothwithstanding this, by consent of parties and by arrangement with Lord Pearson, the hearing took place at the appointed diet, viz., 13th and 14th December, on the footing that he would pronounce the interlocutor with the findings in fact required by sec. 46 of the Court of Session Act 1850 (quoted *supra*), and proceed to dispose of the cause as if he had continued to be the Lord Ordinary before whom the cause depended. After the hearing Lord Pearson made avizandum.

The defender Carswell presented a note to the Lord President which appeared in the Single Bills on December 21, 1905. To this note the defender annexed a copy of a minute presented on behalf of the defender to Lord Mackenzie. This minute, after narrating the facts above set forth, stated that after hearing counsel on 13th and 14th December, a question had been raised by Lord Pearson with regard to his power to pronounce an interlocutor containing the findings in fact, or to proceed further with the cause, having regard to the decision in *Allan* v. *M'Murray*, June 20, 1855, 17 D. 969.

The minute further set forth that the eight days within which the Lord Ordinary must, in terms of sec. 46 of the Court of Session Act 1850, pronounce an interlocutor with his findings in fact expired on 22nd

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December. The minute craved Lord Mackenzie to verbally report the case to the First Division.

The crave of the note presented by the defender to the Lord President was "to remit the case to Lord Pearson to pronounce an interlocutor containing the findings in fact and proceed in the cause as if he were still the Lord Ordinary before whom the cause depended within the meaning and for the purposes of sec. 46 of the statute of 1850; or otherwise to give such direction or such remedy as to the Court may seem proper."

LORD PRESIDENT—The point to be decided has arisen in these circumstances. By sec. 24 of the Lunacy Act of 1866 actions of damages for wrongful incarceration in a lunatic asylum are directed to be tried under the provisions of sec. 46 and 47 of the Court of Session Act of 1850, that is to say, by a Lord Ordinary without a jury. Lord Pearson tried this case in that way, but before hearing counsel or pronouncing findings in fact, which, under the provisions of the statute, he was bound to do, Lord Pearson took his seat in this Division owing to the resignation of Lord Adam.

The course of procedure which these sections 46 and 47 of the Act of 1850 prescribe is that the Lord Ordinary, having heard the case, shall pronounce a series of findings in fact, which he must do within eight days after the trial is concluded. Another period of eight days is given to the parties during which they may lodge what is practically a reclaiming note to the Lord Ordinary against his own findings. His ultimate findings become final, but the law which he applies to them is reviewable in the Inner House.

The point which has arisen is what is to be done in the circumstances. I should not myself have been doubtful were it not for the case of *Allan* v. *M'Murray*, 17 D. 969. That case was almost parallel to this but not quite, although the method of trial was the same. Lord Curriehill had pronounced the first set of findings, but within the eight days he was removed to the Inner House. What happened then was that Lord Ardmillan, who took up the case as an Outer House Judge, reversed Lord Curriehill's findings. It was held that Lord Ardmillan's procedure was altogether inept, but it was also held that there was no way of curing the matter except by retrying the whole case from the beginning.

I do not doubt that the decision in that case was correct, that is to say, that Lord Ardmillan had no power to reverse Lord Curriehill's findings, and in that sense the judgment does not need to be attacked. But the views on which that judgment was pronounced, viz., that there was no way of curing the matter but by a re-trial from the beginning, if it is right, constitutes in my opinion something little short of a scandal in our methods of procedure. But I have come to the conclusion that we are driven to no such unfortunate result. When I look at the 46th section of the Act it is abundantly clear that the whole proceedings in a trial of this kind are to take place before the same Judge. What would happen in the event of the death of a Judge it is unnecessary to inquire, but where there is no death it seems to me quite certain that the statute intends that one Lord Ordinary is to finish the whole matter. Now, I have gone through all the Procedure Acts from 1808, and what they come to is this—Originally the Court all sat as one Court, and the so-called Outer House was not really in any sense a separate Court, but was simply a place where one of the fifteen Judges sat for the preparation of cases, just as another sat in the Bill Chamber. All that was changed in 1808. The Court was made to sit in two Divisions, and the Judges were appropriated to the two Divisions, the First Division consisting of the Lord President and Seven Judges, and the Second Division of the Lord Justice-Clerk and Six Judges; and these appropriated Judges—Ordinary Judges as they were called—sat in rotation in the Outer House to prepare cases, as had been originally done by one of the old fifteen. The next alteration that came was that instead of each of the Ordinary Judges doing that work in rotation, the four Junior Judges of the First Division and the three Junior Judges of the Second were taken for the work, the others being allowed to remain in the Divisions without going to the Outer House. Inasmuch as that reform could not be carried out without the consent of the Judges concerned, there was provision made for a transition stage. And then, in the Extract Act of 1810 (50 Geo. III c. 112), section 32, it was provided "as soon as five Junior Ordinary Judges shall officiate as permanent Lords Ordinary in the manner herein directed, three Judges in either Division shall be a quorum in the Inner House, and the other Judges of the Court of Session shall be relieved from attendance in the Outer House and from performing the duties of Lords Ordinary therein," and that alteration stands to this day. Your Lordships will see that this leaves the position of the Inner House Judges just the same as it was in the days of the old fifteen excepting that they are not compellable to do ordinary Outer House work. But so far as competency goes, I have no doubt that all the Judges of the Court of Session can do Outer House work; I have no doubt that the Presidents of the Divisions are competent to do it.

The result is that there is no incompetency in a Lord Ordinary going on and finishing his Outer House work though in the meantime he has become an Inner House Judge. There might be a difficulty if Lord Pearson, standing upon the section of the Act, refused to go to the Outer House, for I do not see how we could compel him to do so. But I have no doubt that Lord Pearson will do what the Act of 1850 prescribes and pronounce his findings.

LORD M'LAREN—Two points have to be considered in coming to a decision in this matter—(1) All decrees though issued by a single judge are decrees of the Court of

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Session, and the judge who pronounces them only exercises a delegated jurisdiction; (2) it is a necessary condition of the trial of a question of fact that a trial, whether by a judge and jury or by a judge alone, is an indivisible function which must be begun and finished by the same member of the Court.

If this had been a trial by a judge with a jury no one would dispute the accuracy of what I have just said. The case is not quite so clear in the case of the trial of a cause by a Lord Ordinary without a jury. But having regard to the policy of the statute there can be little doubt on the question. The statute points out the judge who is to commence the trial, but it does not make it a condition of his going on with the trial that he is to remain a Lord Ordinary in the Outer House. The only difficulty arises on the case of *Allan* v. *M'Murray*, 17 D. 969. There it was held that it was incompetent for Lord Ardmillan to review an interlocutor previously pronounced by Lord Curriehill, who after taking the evidence had been transferred to the Inner House. There the irregular intervention of the second Judge may have created a difficulty, but in the present case, where all the proceedings have been regular, it seems to me that the Lord Ordinary who began the trial should carry it out to its conclusion.

LORD KINNEAR — I am of the same opinion. With the greatest respect I am unable to agree with the reasoning of the learned Judges in *Allan* v. *M'Murray*, 17 D. 969. It is perfectly clear that the statute contemplates that the whole proceedings shall be carried out by one judge. [*His Lordship quoted sec.* 46.] That all this is to be done by one Lord Ordinary is obvious. This cannot be put more clearly than it was by Lord Colonsay in *Allan* v. *M'Murray*, where he says at 971—"The language of the 46th section is applicable throughout to successive steps to be taken by the same judge who tried the case. It is in truth a continuation of the trial. The evidence has been taken, but the verdict has not been finally adjusted. The Lord Ordinary who sits at the trial performs the function of both judge and jury. The object of the statute is to combine these functions. They are not discharged until the verdict has been adjusted. But there is nothing in the statute to imply that the adjustment of the verdict is to be left to a judge who has not heard the evidence." In this case Lord Pearson has heard the evidence, and the verdict is not yet given. Lord Pearson alone can give that verdict. He must pronounce his findings. The only difficulty that has arisen is that it is said that Lord Pearson is no longer the Lord Ordinary before whom the case is pending. But the Lord Ordinary who was trying the case was certainly the judge before whom the action depends, and it did not cease to depend before him when he was removed to the Inner House. It was still a depending cause because it had not been disposed of, and if it was depending before any judge it must have been before the judge who was still engaged in considering it. I think, if I may say so, with great respect, that it was rightly decided in *Allan* v. *M'Murray* that Lord Curriehill's successor could not competently take up the cause at the point at which Lord Curriehill left it. But that is only another form of saying that the new Lord Ordinary was not the Lord Ordinary in the cause, and if it does not pass to another Lord Ordinary it remains with the Judge who has taken the evidence but has not yet decided the case. I agree with the observation of Lord M'Laren that the case is the same with the case of a jury trial presided over by the senior Lord Ordinary who in the course of it is removed from the Outer to the Inner House by the death or resignation of one of the Inner House Judges and the appointment of a new Judge in his room. It is not suggested that in such a case the Lord Ordinary is incompetent to complete the trial.

LORD PEARSON concurred.

The Lords remitted the case to Lord Pearson to proceed therein.

Counsel for Pursuer—Crabb Watt, K.C. —Spens. Agent—Aug. M. Graham Yooll Solicitor.

Counsel for Defender—Wilson, K.C.—D. Anderson. Agents—Fraser & Davidson, W.S.

Saturday, January 13.

SECOND DIVISION.

[Lord Johnston, Ordinary.

M'CARDLE *v.* M'CARDLE'S JUDICIAL FACTOR.

Process—Reclaiming Note—Competency—Judicial Factory under sec. 164 *of The Bankruptcy (Scotland) Act* 1856, *sec.* 164—*Interlocutor Ordering Inquiry and not Disposing of Merits—Reclaiming Note Incompetent—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 164 *and* 171—*Act of Sederunt, 25th November* 1857, *sec.* 29—*Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56), *secs.* 4 *and* 6.

The Lord Ordinary, in dealing with certain objections to a report by the Accountant of Court on the accounts of a judicial factor appointed under section 164 of The Bankruptcy (Scotland) Act 1856, pronounced an interlocutor with a view to inquiry and investigation merely, and which did not finally dispose of any matter on the merits.

Held, on a consideration of The Bankruptcy (Scotland) Act 1856, secs. 164 and 171, Act of Sederunt 25th November 1857. sec. 29, Distribution of Business Act 1857, secs. 4 and 6, that a reclaiming note was incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides, sec. 164—

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"It shall be competent to one or more creditors of parties deceased to the amount of one hundred pounds, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court for the appointment of a judicial factor, and . . . the Court may appoint such factor . . ." Sec. 171—"Where any judgment of the Lord Ordinary is to be brought under review of the Inner House, the same shall be done by a reclaiming note in common form presented within fourteen days from the date of the judgment . . ."

The Act of Sederunt of 25th November 1857, for regulating the procedure of judicial factors under the Bankruptcy Act 1856, provides, sec. 29—"All proceedings, which in this Act are appointed to take place by or before the Court, shall, although the same be addressed to the Lords of Council and Session, be brought before, dealt with, and disposed of by the Junior Lord Ordinary officiating in the Outer House or by the Lord Ordinary officiating on the Bills in time of vacation, subject to the review of the Inner House, in conformity with the 4th section of the statute 20th and 21st Vict. cap. 56 (The Distribution of Business Act 1857).

The Distribution of Business Act 1857 (20 and 21 Vict. c. 56) provides, sec. 4—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz. . . ." (*Here follows a list of petitions and applications.*) Sec. 6—"It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report as aforesaid with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord Ordinary on the merits . . . may be reclaimed against. . . ."

J. M. M'Leod, C.A., Glasgow, was in 1899 appointed judicial factor on the estate of the deceased James M'Cardle, late of Carnlough, in the county of Antrim, farmer, and of 124 Trongate, in the city of Glasgow, on a petition at the instance of his widow, Mrs Ellen Mullin or M'Cardle, brought under section 164 of the Bankruptcy (Scotland) Act 1856.

The factor entered into management of the estate, and ultimately, with a view to winding up the factory and obtaining his discharge, lodged his accounts, which were in ordinary course remitted to the Accountant of Court, who lodged a report upon them.

Mrs M'Cardle lodged objections to the Accountant's report, maintaining, *inter alia*, that as her husband was a domiciled Irishman at his death, his executry was an Irish executry, for which she was responsible, and that the rights *hinc inde* must be determined on that footing. She also averred that the factor had allowed no value for the goodwill of a lodging-house business in Trongate, Glasgow, which had belonged to the deceased.

The Lord Ordinary (JOHNSTON) on 23rd December 1905 pronounced an interlocutor allowing the parties proof on the question of the deceased's domicile and the goodwill of the Trongate business.

Mrs M'Cardle reclaimed against the interlocutor.

The judicial factor, on the reclaiming note appearing in the Single Bills, objected to its competency, arguing—The factor having been appointed under sec. 164 of the Bankruptcy Act 1856, the proceedings were regulated by sec. 29 of the Act of Sederunt of 25th November 1857. The effect of that section was to add petitions and applications brought under the Bankruptcy Act 1856 to the list of those petitions and applications contained in the fourth section of the Distribution of Business Act 1857, in which review of any interlocutor pronounced with a view to investigation and inquiry merely, and which did not finally dispose of the merits, was expressly excluded by sec. 6 of that Act.

Argued for the reclaimer—It was sec. 171 of the Bankruptcy Act 1856 that dealt with review, and it contained no limitation as to the nature of the interlocutor that could be reclaimed against. Further, sec. 29 of the Act of Sederunt of 25th November 1857 referred only to sec. 4 of the Distribution of Business Act 1857, and made no mention whatever of sec. 6, which was the only section that limited the right of review.

LORD JUSTICE-CLERK—It seems to me perfectly clear that if sec. 6 of the Distribution of Business Act 1856 applies to this case, Mr Horne's argument is conclusive. On a consideration of the statutes and of the Act of Sederunt, I am satisfied that it does apply, and that this reclaiming note is therefore incompetent, since it is against an interlocutor pronounced with a view to investigation and inquiry merely, and does not finally dispose of any matter upon the merits.

LORDS KYLLACHY, STORMONTH DARLING, and LOW concurred.

The Court refused the reclaiming note as incompetent.

Counsel for Reclaimer—Findlay. Agents—Gill & Pringle, W.S.

Counsel for Respondent (M'Cardle's Judicial Factor)—Wilson, K.C.—Horne. Agents—Bell, Bannerman, & Finlay, W.S.

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Saturday, January 13.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILLER & SON *v.* OLIVER & BOYD.

(See *ante* November 10, 1903, 41 S.L.R. 26, and 6 F. 77.)

Arbitration—Scope of Reference—Extension by Pleadings—Bar.

In an arbitration under a reference clause referring any question as to the true intent and meaning of a minute of agreement, parties lodged claims which extended beyond the limits of the clause of reference. The arbiter closed the record and proposed to allow a general proof in order to determine whether the claims fell within the reference. One of the parties protested that he should not be compelled to lead proof save to expiscate facts showing the true intent and meaning of the agreement.

Held that the scope of the reference had not been enlarged by the proceedings of parties—*per* Lord President on the ground that the agreement of parties was the basis of a reference, and there was no such agreement here to an extended reference; *per* Lord M'Laren on the ground that no arbitration can be enlarged without the consent of the arbiter as well as that of the parties, and that had not been given here before one of the parties had resiled; *per* Lord Pearson on the ground that in the special circumstances there was still time for the parties to withdraw from an extended reference.

Opinions (*per* Lord President and Lord M'Laren) that it is commonly on the ground of bar that a party to a reference is not allowed to challenge an award which, while within the pleadings in the reference, is outwith the scope of the reference clause.

Arbitration — Scope of Reference — True Intent and Meaning of Agreement — Averment that Words in Agreement have not Ordinary but Special Meaning —Averment that Condition of Agreement though Apparently not Really Fulfilled —Alleged Fraudulent Conduct of Party so as to Fulfil Condition — "Business Turnover."

A minute of agreement which referred to an arbiter any questions as to its true intent and meaning, provided that the purchaser of a business should pay a certain sum for the goodwill on the basis that the seller should introduce to him not less than a certain sum of "business turnover." The purchaser refused to pay the price on the ground that the condition had not been fulfilled, and maintained (1) that "business turnover" meant a turnover of business on which there was the usual business profit, and (2) that the seller, who under the agreement was thereafter employed as a manager, had accepted business below current rates and bound to result in a loss, in order to swell and bring up to the required figure the turnover. He pleaded in defence to an action that the question fell within the reference clause.

Held that the reference clause was not applicable because (1) the words "business turnover" must be taken in their ordinary meaning and left nothing to the arbiter to decide, and (2) the averment of the fraudulent conduct of the seller when acting as manager did not raise a question of "the true intent and meaning" of the agreement.

Arbitration — Arbiter — Disqualification — Arbiter Functus Officio—Previous Final Award by Arbiter Reduced but not on Ground of his Misconduct.

Opinion per Lord Pearson (Ordinary) that an arbiter who had acted as arbiter under a clause of reference in an agreement and had issued his final award, which, together with all proceedings since the closing of the record, had been reduced, but not on the ground of his misconduct, was not *functus officio* and disqualified from acting further.

By minute of agreement dated 15th and 20th April 1897 Messrs Oliver & Boyd, publishers, Edinburgh (of the first part) agreed to purchase the printer's business of Messrs J. Miller & Son, Rose Street North Lane, Edinburgh (of the second part). The minute, which stipulated that Andrew Carruthers Miller, the sole partner of J. Miller & Son, should be employed on certain terms by the first parties, *inter alia* contained the following clauses:—"*Second*, the price of the goodwill of the said business of J. Miller & Son has been mutually arranged between the parties to be £800 sterling, on the basis that the said second parties shall introduce not less than £1600 sterling per annum of business turnover to the first parties prior to 30th June 1898, and in the event of their failing to introduce business turnover to the amount of £1600 sterling, the parties agree that the price of the goodwill for which the second parties shall be credited in the books of the first parties shall be proportionately less: And the first parties bind themselves to pay to the second parties, as at 15th May 1897, said sum of £800 sterling, or such lesser sum as may be ascertained as aforesaid; but declaring that in no event shall payment of the said sum of £800 sterling in name of goodwill be demandable by the second parties, or their heirs or representatives, from the first parties until 15th May 1902, unless this agreement shall be terminated previous to that date by the first parties: And further declaring that at 15th May 1902 it shall be in the option of the second parties to demand payment of one half only of the sum to be ascertained in name of goodwill, the remaining one half of goodwill to remain in said business, and to be paid at 15th May 1907, and said first parties to pay interest on said remaining half of goodwill at five per centum from 15th May 1902 until

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15th May 1907. . . . *Third*, . . . [this clause contained the terms of employment of Andrew Carruthers Miller]. . . . *Fourth*, The price to be paid by the first parties to the second parties for the stock, plant, and machinery and fittings at present belonging to and used by the second parties in the conduct of their business as printers in Rose Street North Lane, Edinburgh, and to be taken over by the parties of the first part, shall be fixed by mutual valuation; and said stock, plant, machinery, and fittings shall be property of the first parties from and after the 15th day of May 1897. *Fifth*, Meantime it is agreed that the first parties shall pay to the second parties the said price of their stocks, plant, machinery, and fittings as follows, *videlicet*—(1) the sum of £500 sterling at 15th May 1897, and (2) a farther sum of £500 sterling at 30th June 1898, said sums to bear interest at the rate of five per centum from 15th May 1897 till paid; and (3) the balance of any price exceeding £1000 sterling shall be paid at 15th May 1899, said balance to bear interest at five per centum from 15th May 1897 till paid. *Sixth*, Should any question arise between the parties regarding the true intent and meaning of these presents, the same is hereby referred to Charles Ritchie, Esq., S.S.C., whom failing, to James Morton, Esq., Secretary, Union Bank of Scotland, Limited, Edinburgh, whose decision, whether *interim* or final, shall be binding upon both parties."

In accordance with clause fourth a valuation of the stock, plant, &c., was obtained bringing out the value at £1340, 9s. 3d., and this valuation was signed as accepted on 22nd July 1897 by J. Miller & Son. Acceptance by letter of the same date was also given by Oliver & Boyd.

On 10th August 1904 Miller & Son raised an action against Oliver & Boyd, in which they sought to recover, *inter alia*, £400, being the first instalment of the price of the goodwill, and £390, 9s. 3d., being the balance of the price, as brought out by the valuation, of the stock and plant.

In a statement of facts the defenders made the following averment—"(Stat. 9) After the agreement between the pursuers and defenders was entered into, the pursuer Andrew Carruthers Miller accepted work at prices greatly below the current rate, and which he knew or ought to have known must result in a considerable loss. [He did so in order to procure an apparent turnover of £1600, and so enable him to claim £800 for goodwill. In point of fact, however, the said turnover was not a business turnover in the sense of the contract, it being an implied condition of the pursuers being entitled to a payment as for goodwill that the business which he introduced was capable of yielding a profit at the ordinary trade rate.] *He did so in order to attempt to procure an apparent turnover of £1600, and so enable him to claim £800 for goodwill. The said pretended turnover which, as appearing from the pursuer's statements thereof, amounts to the sum of £1470, consists only of a business turnover in the sense of the said agreement to the extent of £627. The balance thereof did not consist of legitimate business, but was introduced by the pursuer without the knowledge or consent of the defenders, and to the extent of at least £710 was so introduced in order to create a fictitious appearance of turnover introduced by him. The said turnover was not a business turnover in the sense of the minute of agreement. On a sound construction of articles 2 and 3 of the said minute of agreement the defenders contend that the business turnover referred to meant either a turnover capable of yielding a profit at the ordinary trade rate to the defenders, or at all events such a turnover as a prudent manager of the defenders with a practical knowledge of the trade would introduce into their business.* The defenders suffered damage through the failure of the pursuers to implement their part of the agreement, amounting to at least £1000. This sum the defenders are entitled to set against any sum to which the pursuers may be found entitled . . ." (The portion in brackets was deleted and the portion in italics added by amendment in the Inner House.)

There had already been arbitration proceedings before the arbiter Ritchie, and the arbiter's final award and the proceedings after the 30th October 1899, *i.e.*, practically everything from the making up of the record in the reference, had been reduced partly on the ground that it did not appear that he had exhausted the questions, and partly on the ground that the award was in part *ultra vires*. The claims in the reference went beyond the clause of reference, but on the arbiter allowing a general proof in order to determine whether the claims fell within the reference, the pursuer had protested against evidence being led save to expiscate facts to prove the true intent and meaning of the agreement (41 S.L.R. 26, and 6 F. 77).

The defenders now, *inter alia*, pleaded—"(2) The action ought to be dismissed in respect that the questions raised fall to be determined by Mr Ritchie acting as arbiter in terms of the agreement. (3) At all events the action ought to be sisted until the questions submitted by the parties to arbitration have been determined by Mr Ritchie as arbiter."

The pursuers, *inter alia*, pleaded—"7. The present action is not excluded by the clause of reference in the minute of agreement or by the former arbitration proceedings in respect that—(1) No question regarding the true intent and meaning of the agreement is now raised. (2) Any consent to submit questions not strictly falling within the clause of reference was limited to the arbitration before Mr Ritchie, *et separatim*, was limited to the last date to which Mr Ritchie's jurisdiction was prorogated by consent of parties, namely, 4th July 1900. (3) The said arbitration before Mr Ritchie lapsed on 4th July 1900. (4) *Separatim*, it lapsed by the issue of his final decree-arbitral, on which event he became *functus officio*. (5) The whole arbitration proceedings have been reduced and set aside by the decree of reduction referred

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to. (6) Mr Ritchie has become disqualified from acting as arbiter under said minute of agreement. (7) *Esto* that the reference to Mr Ritchie is left untouched as regards the proceedings prior to 30th October 1899, the pursuers had not at that date agreed to extend the scope of the reference."

On 8th August 1905 the Lord Ordinary (PEARSON) pronounced an interlocutor sisting process that the parties might proceed with the reference to Ritchie the arbiter.

Opinion.—[*After narrating the origin of the action and the provisions of the said clauses of the minute of agreement, supra*] — . . . "The present action relates (1) to the payment to the pursuer of the price of the goodwill, with interest; (2) to a small sum of £4, 18s. 8d. of salary due to the pursuer down to 12th December 1898, on which date he was dismissed by the defenders; and (3) to a sum of £340, 9s. 3d., being the balance of the price of the plant and machinery said to have been due and unpaid to the pursuer at the date of his dismissal.

"The defence mainly relied on is, that the action is excluded by a subsisting reference to Mr Charles Ritchie, S.S.C., as arbiter, and that in any view the action should be sisted until the questions have been determined in that reference.

"It is the case that questions having arisen between the parties, they requested Mr Ritchie to act as arbiter under the agreement, and after an ineffectual attempt to adjust a separate minute of reference embracing all the points in dispute, the parties proceeded with the reference under a simple acceptance by Mr Ritchie as 'arbiter nominated in the submission contained in the within-written minute of agreement.' The arbiter's acceptance is dated 5th April 1899, and on the same date he appointed parties to lodge claims within fourteen days, and answers in eight days thereafter. The adjustment of the record on the claims and answers was continued from time to time, and on 29th May 1899 the record was closed. Shortly afterwards certain amendments by the defenders were allowed to be added, with answers for the pursuer, and the record was of new closed on 22nd June 1899.

"Although the scope of the reference clause as set forth in the agreement was limited to questions 'regarding the true intent and meaning of these presents,' the record made up before the arbiter and closed by him on 22nd June 1899 went considerably beyond the scope of the reference clause. The parties were thus committed, so far as regards the proceedings before Mr Ritchie, to a considerably wider reference than the clause itself would have covered, although as soon as a proof was allowed (which was not until six months later) the pursuer lodged a minute of protest against any evidence being given to establish facts other than those bearing on the true intent and meaning of the agreement, and reserved his objections against the competency of the arbiter adjudicating on any other matters.

"In the result, after a proof which lasted for several days, Mr Ritchie on 1st June 1900, pronounced a 'decree-arbitral,' in which he found the present defenders liable to the pursuer in a lump sum of £618, 7s. 11d., and decerned and ordained the defenders to make payment thereof to the pursuer, with interest at five per cent. from the date of the decree. He further found the pursuer liable to the defenders in two-thirds of their expenses, and on the parties implementing the decree-arbitral he declared them respectively freed and discharged of all claims *hinc inde* in consequence of the minute of agreement or of the claims lodged in the submission, and ordained them each to execute and deliver a valid discharge accordingly.

"The present pursuer being dissatisfied with this award challenged it in an action of reduction, in which he obtained decree of reduction on 10th November 1903. He maintains that the way is thus clear for the present action upon the agreement. The defenders, on the other hand, maintain that the matters in dispute in the present action were within the scope of the reference to Mr Ritchie, that the reduction had not the effect attributed to it by the pursuer, and that there is nothing in the legal position of the parties to prevent the arbiter from proceeding with the reference by taking it up at the point from which the reduction is operative, but prior to which it has no operation.

"Now, the documents reduced and set aside by the decree of reduction, which was in terms of the conclusions of the summons, were the orders of the arbiter from 24th November 1899 to 26th January 1900 both inclusive, and also (1) the proposed findings issued on 24th March 1900; (2) the proposed decree-arbitral issued on 4th May 1900; and (3) the decree-arbitral dated 1st June 1900. The first order reduced (24th November 1899) allowed to both parties a proof of certain specified averments and to each a conjunct probation, and the remaining orders were consequential upon that, in the way of recovery of documents and the like. All this leaves untouched the reference itself, and the procedure therein down to and inclusive of the closed record, which contains the claims now made in this action so far as these are in dispute. I note in passing (as bearing upon an argument which I shall have to deal with presently) that on 4th April 1900 the arbiter, 'of consent and by request of the parties,' prorogated the submission to the 4th day of July 1900.

"The grounds of reduction are set forth, I think quite accurately, in the rubric of the case as reported (*Miller & Son*, 1903, 6 F. 78). They were (1) that the pursuer's claims were not *ejusdem generis*, and it was impossible to discover *ex facie* of the decree how far the arbiter had considered all of them; (2) that the decree-arbitral did not show how the arbiter had dealt with the defenders' counter-claim; and (3) that the order for mutual discharges, which was admittedly *ultra vires*, was not separable from the rest of the decree. In other words, it was not clear that the arbiter had exhausted the reference, while in another direction he had gone *ultra fines*. I should

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add that there was no allegation of misconduct on the part of the arbiter, except that it was alleged he had received and considered statements bearing on the submission which were made to him by the defenders outwith the knowledge of the pursuer. But these averments were not proved, and did not enter into the grounds on which decree of reduction was pronounced.

"In these circumstances the pursuer, in replying to the defenders' appeal to the reference as still subsisting, maintains in his seventh plea-in-law that it is at an end and cannot now be invoked for the decision of the questions raised in this action; and this on several grounds.

"In the first place, it is said there was a time limit which has long since expired. This does not refer to the expiry of year and day before the final award; for though this was alluded to in argument it was not pressed. It could not apply so far as the reference depended on the clause in the agreement; and even beyond this, the authorities are to the effect that the proper case for the application of the rule as to year and day is where the usual blank is left in the clause as to prorogation. The time limit here is said to have been fixed by the arbiter's order of 4th April 1900, already mentioned, by which he 'of consent and by request of parties' prorogated the submission to 4th July 1900. I cannot attribute such an effect to this order. It seems to have been pronounced *ob majorem cautelam* and in consequence of some one having raised a doubt on the point. But it proceeded on the erroneous assumption that the reference would fall unless prorogated; and I am unable to hold this as imposing a term upon its duration to which it would not otherwise have been subject.

"Then it is said that the arbiter, by reason of having issued his award as and for a final award, was *functus officio*, and that this ended the matter so far as he is concerned. This is undoubtedly the case while the award stands, as is illustrated by many decisions. But where the award has been reduced *in toto* together with the documents immediately leading up to it, namely, the proposed findings and the proposed award, that rule can have no application. The rule excludes all dealing on the part of the arbiter with a final award once issued. But whatever other objections may be urged here, that particular rule cannot apply, for it is not the arbiter but the Court which has dealt with the award by setting it aside as if it had never been.

"Further, it is urged that the arbiter himself is disqualified by what has happened from again taking up the reference. As I have already said, nothing of the nature of misconduct can be imputed to him. But the disqualification is said to attach—first, by reason of the issuing of the final award, which shows that his mind is already made up on the disputed points; and secondly, by his having given evidence in the reduction on the defenders' citation and as their witness. As to the first point, I think it is necessary to distinguish, and in particular to have regard to the precise grounds of reduction. Misconduct on the part of the arbiter would of course preclude his dealing with the matter again, on general grounds. He then becomes absolutely disqualified from judging in that dispute. But here the grounds of reduction were that in certain matters he had gone beyond his powers, and that in certain other respects he had not exhausted the reference or might not have exhausted it. I know of no authority for holding that in such circumstances an arbiter is disqualified from again taking up and adjudging on the reference; nor am I aware of any rule or principle of law which should compel such a decision. But it is said that the arbiter having been cited and examined as a witness for the defenders in the reduction must be held as disqualified from judging fairly between the parties. That would no doubt have been so if he had been examined on the merits of the dispute, as in the case of *Dickson* v. *Grant*, 1870, 8 Macph. 566. But his evidence was confined within the usual and well-known limits imposed in a case where the arbiter is examined; and this seems to me to distinguish this case also from that of *Reid* v. *Walker* (1826, 5 S. 130), where the arbiter, having issued his award, had given a quite erroneous explanation of the meaning of it to one of the parties privately, and the Court declined in the circumstances to send the case back to the same arbiter.

"On the whole matter, taking the facts as they stand, I do not find any sufficient cause for withdrawing the case from the cognizance of the tribunal selected by the parties. It was strenuously urged for the pursuer that there is no question now raised which falls even within the scope of the reference clause of the agreement, inasmuch as there can be no doubt or question as to the intent and meaning of the agreement as regards the expression 'business turnover.' To me it appears that there is a *bona fide* difference between the parties as to the meaning of that expression in this agreement, however easy it may be of solution; and I regard that as clearly a matter for the arbiter to decide, along with such other questions in dispute as may have been put in issue by the parties in the closed record which was made up in the reference. But since the arbiter has no power to pronounce a decree for payment, I think the proper course is to sist this action."

The pursuers reclaimed and argued—They were not bound to submit the questions in dispute to arbitration. There was no question on the true intent and meaning of the agreement. As to the £340, 9s. 3d., that was a liquid debt about which there could be no dispute. There was the valuation accepted by the parties which fixed the sum of £1340, 9s. 3d. as the price of the plant, &c., and of this £1000 had been paid. As to the claim for £800, the only question could be whether the conditions under which it was payable were fulfilled. The

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defenders said that raised a question about the meaning of the words "business turnover," but no construction was required for these words, and the nature of the turnover was a question of fact. There must be a real question of construction if the arbitration clause was to be brought into force—*Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919. The defenders' contention that the turnover was a fraudulent one raised a question of fact, not of construction. Further, the arbitration could not be taken up at the point it had reached prior to the proceedings which had been reduced. On the pronouncing of a decree-arbitral the arbiter was *functus officio*, and on reduction of the decree his jurisdiction could not be revived—Bell on Arbitration, 295, s. 584; Russell on Arbitration, 8th edition, 100; *Bannatyne* v. *Gibson & Clark*, December 2, 1862, 1 Macph. 90; *North British Railway Co.* v. *Barr*, November 27, 1855, 18 D. 102; *Wilson* v. *Porter*, June 19, 1880, 17 S.L.R. 675; *in re arbitration Stringer & Riley Brothers*, [1901] 1 K.B. 105. The contract was to take an award from the arbiter once for all. If he failed to issue a valid decree he could no longer look on the case with an unbiassed mind. The slightest bias was enough to disqualify a person from acting as arbiter unless the parties went into the arbitration with the facts which caused the bias full in view—*Peckholtz & Co.* v. *Russell and Others* (O.H.), July 13, 1899, 7 S.L.T. 135; *M'Lauchlan* v. *Brown & Morrison* (O.H.), December 1, 1900, 8 S.L.T. 279; *Dickson* v. *Grant and Others*, February 17, 1870, 8 Macph. 566, 7 S.L.R. 317; *M'Dougall* v. *Laird & Sons*, November 16, 1894, 22 R. 71, 32 S.L.R. 52; *Buchan* v. *Melville*, February 28, 1902, 4 F. 620, 39 S.L.R. 398. In one case it was considered but not decided whether a dispute in which arbitration proceedings had been set aside should be sent back to the same arbiter—*Reid* v. *Walker*, December 15, 1826, 5 S. 140, n.e. 130. The reasons for sisting a case that a reference might be proceeded with were stated in Lord Watson's opinion in *Hamlyn & Co.* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, but were not applicable here where there should be no reference. The proceedings in the arbitration did not extend the scope of the reference, and besides, any proceedings which could have this effect had been swept away by the decree of reduction.

The defenders argued—The scope of the reference had been widened by the claims made by the pursuers in the arbitration. The presentation of a claim going beyond the scope of the reference involved a new agreement to refer. No objection being taken and the record closed (not as a technical act but as a formal adjustment of the pleadings) the agreement was complete. The arbiter was not *functus officio*—Bell on Arbitration, 297. There were no averments tending to show that the arbiter was disqualified through bias as in the cases cited. There was something to refer under the reference clause in the agreement. The words "business turnover" meant turnover capable of yielding a profit—*Mordue* v. *Palmer*, 1870, L.R. 6 Ch. 22; *in re Stringer* and *Bannatyne* v. *Gibson & Clark*, *cit. sup.* The turnover introduced by the pursuer was a fictitious turnover fraudulently introduced.

After argument had been partially heard the Court pointed out that the defenders' averments did not sufficiently specify and distinguish their two replies to the claim for £800, viz. (a) that the pursuer took advantage of his position as manager to create a fraudulent turnover; and (b) that "business turnover" meant a turnover which was capable of producing an ordinary business profit, and that this was a question of construction with which the arbiter ought to deal. The defenders therefore by permission of the Court amended their averments in this respect (*v. sup.*).

At advising—

LORD PRESIDENT—This is an action at the instance of Miller & Son against Messrs Oliver & Boyd. I do not think it necessary to preface my observations with a full statement of the facts, because not only are they given in the note of the Lord Ordinary to the interlocutor under review, but they are also fully detailed in a former case between the same parties, reported in 6 Fraser, of which case this is a sequel. That action reduced an award which had been made by Mr Ritchie between these two parties. The documents under reduction which were called for in the conclusions of that action were all the proceedings in an arbitration which had taken place before Mr Ritchie subsequent to an interlocutor of the arbiter of 30th October 1899, but the prior steps of procedure in the arbitration, which consisted of the preliminary stages, equivalent to what is known in Court of Session practice as making up the record, were left unreduced. The present action is raised upon obligations which arise out of a contract between the parties, the contract being in connection with the transference of a printing business of the present pursuers to the defenders. The first question in the case has reference to a sum of £800, which is part of the price conditioned under the contract for the goodwill of the business which was so transferred; and the second to a sum of £340 odds, which is the balance unpaid of stock-in-trade and fittings which were handed over, the price of the stock-in-trade and fittings being fixed by a valuation, to which is appended a document containing an acceptance by both sides concerned of the figures contained in that valuation. The contract of sale out of which all these matters arose contained an arbitration clause referring to Mr Ritchie all matters relating to the true intent and meaning of the contract, and that clause accounts for the fact that the parties betook themselves to Mr Ritchie for arbitration purposes.

Now, the first answer that is made by the defender to the demand for these two sums which I have mentioned is that the action is barred by the right of the defender

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to have these questions determined by arbitration and not by the Court, and that was the view that was taken by the Lord Ordinary in the interlocutor under review. The pursuer states several contentions in reply to this. He says, first of all, that the matters in dispute are not in any proper sense of the word questions relating to the true intent and meaning of the contract. To that the defender replies, that even if the questions do not fall under the original contract of submission as contained in the arbitration clause of the contract of sale, still the parties have enlarged the scope of the reference by their proceedings before Mr Ritchie. The pursuer replies to that again, that the proceedings before Mr Ritchie have no such effect. The pursuer, secondly, contends that he cannot go to Mr Ritchie now, because Mr Ritchie having taken up these matters in an arbitration subsequently reduced is no longer in that condition of absolute open-mindedness in which every arbitrator must be. Of course he does not impute in the slightest degree any prejudice of any sort to Mr Ritchie, who is above any such suspicion, but he simply says it is an implied condition of every arbitration submission that parties should get an arbitrator who has had nothing to do with the matter before, and that in every case where the arbitrator has had something to do with the matter before his jurisdiction may be declined unless it can be shown that the parties at the time of submission knew that and took him with their eyes open.

Now, if the parties are under the original contract of submission, the criterion is whether these questions which are now in dispute are questions having to do with the true intent and meaning of the contract. Taking first, the claim for the sum of £340 odds, the pursuer in evidence of his claim produces a document—I would not exactly say that it is a liquid document—which settles the matter if nothing more can be said, because it is a valuation of the machinery in question with attested acceptance of the figures in that valuation by both parties, bringing out a total sum of £1340, 9s. 3d. Admittedly there has been a payment to account of £1000, and accordingly of course the balance *prima facie* remains due, and therefore it would seem to me to be impossible to say that there is any question which could be submitted to an arbitrator under the true intent and meaning of the purposes of the contract.

To the claim for the £800 the defence that is made upon the merits is this—There was a clause in the contract which made the payment of the £800 conditional upon there being a turnover of £1600 in the business transferred, and the defenders say that that turnover was never attained. When the case was first heard before your Lordships—and of course when it was first heard before your Lordships it was in the condition in which it was when the Lord Ordinary pronounced his judgment—your Lordships came to be of opinion that the defender had not been sufficiently precise in his statements about this question of the turnover, in respect that he really attempted in one statement to make two allegations, which when analysed are really two very different allegations—the one being in one sense what might be called a point of law, and the other being rather different. Accordingly, your Lordships invited the defender if he wished these points to be raised, to amend his record, and that has now been done. That amendment, I think, has brought out perfectly clearly and satisfactorily the two different points which are sought to be raised. The one is that turnover means turnover capable of yielding a profit. That does not seem to me to be a question at all. I do not think it is possible for a person to take any phrase in a contract which is conceived in ordinary English, and then by attaching quite a fantastic meaning to the English to say that he has thereby raised a question of law. Turnover means turnover, and the result of that turnover may be a profit to the business or not, and, accordingly, I am of opinion that there is no question in that point of the defence that could go to the arbiter, for there is nothing for him to determine.

The other question is different. It is set forth that the pursuer, as manager of the business after it was transferred, had the right of taking in contracts for work which bound the firm, and that he took in work not on ordinary tradesmanlike terms, but simply with the view of fictitiously increasing the turnover. I think it is perfectly clear that while that is a perfectly relevant defence, it is a defence which has nothing to do with the true intent and meaning of the contract. It is a defence, on the facts, that what is called turnover is not really turnover at all, but is part of a scheme not far short, I think, of a fraudulent scheme. Accordingly, here again I do not think that there is anything to send to an arbiter. Now, that disposes of the matter, provided we are under the arbitration clause as constituted by the clause in the original contract.

How now shall the matter stand when we come to the question of whether the submission has been enlarged by the conduct of parties? I do not hesitate to say that I have had, not difficulty in this part of the case, but rather doubt if I am right, because, although it is not in any sense *res judicata*, it is quite obvious that the learned Judges of the other Division took the view that it had been so enlarged in the case that I have quoted, and the same view seems to have been taken by Lord Kyllachy in another Outer House case, the details of which I need not go into; but at the same time I am not certain that the matter was really argued with the same precision before the other Division as it has been now, and for this very good reason that after all it did not very much matter there.

Now, the only foundation of submission must always be the consent of the parties, the submitters. That consent is appropriately shown by a formally tested contract of submission, or, as here, by a

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clause of submission contained in a contract relating to other things, and it may be shown in other ways, for wherever you have got something that will really show a consent between the two parties to a submission, that is enough. There is no technical rule of law which says that it must be done with any certain formality, but none the less you must show consent of the parties. Now, when parties, having entered into a contract of submission, which is, so to speak, limited in its scope, proceed to an arbitration under that contract of submission, I think I am at least right in saying this, that *primâ facie* you certainly expect the pleadings in that arbitration to have the function of carrying out the contract of submission upon which they are indubitably based, and not of forming a new contract of submission. These pleadings are not as a rule written by the party himself, but are written by his legal adviser, and it would be a very startling proposition to suppose that by the mere act of his legal adviser, whose mandate is to carry out the original proceedings and not to institute new ones, the party could be bound to submit questions far beyond the scope of the submission to which he had already put his hand. I do not mean that in the course of pleadings that might not be done. I think you might bind the client from the whole scope of the circumstances. I am far, therefore, from giving countenance to this, that if parties choose to put in claims and go on after their submission with an arbitration which is somewhat wider than the strict terms of the original contract of submission, and then find the award little to their taste, that they might be entitled to turn round and then take the matter critically upon the contract of submission. But the doctrine which would prevent them would be, I think, not so much the doctrine that you had proved against them a new contract in the earlier period of the pleadings, but the doctrine of bar, which has, I think, been probably more fully developed in the sister country under the name of estoppel. But here, owing to the question of reduction, we are not in that condition. We have to judge of this point as if this matter had arisen at the time of the interlocutor of 30th October 1899. Now, what did these parties do in this arbitration? No doubt they put in claims which, being framed as merely for pecuniary sums, covered these sums about which there is at present the dispute. But they do no more than that, and the arbiter seems *in initio* to have taken a perfectly proper view of the subject, because he said he proposed to allow a proof as to the determination of the agreement, and as to the turnover of the printing business, its extent and nature, in order that he might determine whether the claims made in respect thereof fell within the true intent and meaning of the agreement. Upon that the present defenders in the case asked for a hearing, and they then started the point that the reference had been enlarged, and there for the moment they were successful before the arbiter, but the other parties at once protested that they ought not to be made to lead proof upon any subjects which did not go to an expiscation of what was the true intent and meaning of the agreement. In the face of that protest, taken at once when the matter came to a head, it seems to me almost impossible to contend that you have here such a consent of the parties as to make what is a new contract of submission; and therefore I come to the conclusion that this submission has not been enlarged. I think it is better for the law that it should be thus, because I do consider it a most dangerous doctrine that when parties enter into a submission, the terms of which they carefully consider and then sign, you may suddenly find that at any moment of the pleadings something quite outside these terms is imported into the reference, and I think abuse can be checked perfectly satisfactorily by applying the doctrine of bar or estoppel. The pursuer argued that, even assuming that the submission had been enlarged, the present pursuer could not be called upon to go before Mr Ritchie again. That is a point which at first I confess I did not think was strong, but I wish to say most emphatically that the learned Dean of Faculty's argument convinced me that the point was one of extreme difficulty. In the view that I have taken of the case it is immaterial to decide that. I only wish to say, therefore, that I entirely reserve my opinion upon the point, and although the Lord Ordinary has decided it, I am not to be held as concurring with him in that matter.

LORD M'LAREN—The substantial question which we have to consider is whether the present action is excluded by an agreement to refer to arbitration the questions raised on this record. The case is peculiar in this respect, that the parties have already gone to arbitration upon questions arising in the execution of the contract in question, *i.e.*, the contract for the purchase of the printing business. In consequence of the arbitrator having gone beyond the scope of the reference on material points, his award has been set aside by a decree of the other Division of the Court, but in such terms as to leave the pleadings and certain interlocutory orders of the arbitrator apparently unaffected by the decree of reduction. Accordingly the defenders say that there is still a pending submission—which is undoubtedly true in a sense—and that nothing which has been done in regard to either the hearing of the case or the decision of the arbiter precludes them from setting up the reference again, and thereby excluding the action.

I hold, in common with your Lordship in the chair, that the question whether the arbiter is *functus officio* is a very delicate and important question, because it is a question that must occasionally arise in other cases of much greater importance, and as I concur in the judgment proposed upon the other grounds, I should desire to reserve my opinion upon this question. I am especially desirous of doing so, because

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in a standard work on the law and practice of arbitration in England—Russell on Arbitration—it is laid down as a perfectly accepted and undoubted proposition that when the award of an arbitrator is set aside his functions are at an end and the arbitration cannot be set up. I should be unwilling, unless compelled by principle or authority, to establish a different rule in Scotland from what has been established and found to work conveniently in the sister country, but it may be that the principles of our law might in a case raising the question lead to a conflict of practice, and I do not desire to give any definite opinion upon it.

The question whether the parties have agreed to enlarge the scope of the reference arises in this way. There are two claims made in this action. One of these is for a balance due on the price of machinery, and it raises no difficulty, for there is really no question as to the price of the machinery.

The other claim arises upon the terms of the contract of sale, and relates to a sum which was to be paid for the goodwill of the business based on the turnover. Now, I agree with your Lordship that when a case is before the Court, and the question arises whether it should be sent to an arbitrator to determine the true meaning of the contract, we must be satisfied that there is a question upon the meaning of the contract which would justify the case being turned out of Court. It may be that if parties had voluntarily gone before the arbitrator and one of them had said, "A turnover means a turnover that has resulted in a profit at the end of the year," the arbitrator might well have found that the most convenient way of disposing of the defence was simply to repel it as manifestly unsound, but it does not follow that we are to send the case to an arbitrator that he should go through what may be an empty form. But then it is also said that the manager for his own purposes had made sales, or made contracts for printing, below trade prices, with the dishonest purpose of swelling the turnover, and thereby getting in the shape of goodwill a larger sum than he stood to lose upon the sales. That may be a relevant objection to the claim, but it has nothing to do with the meaning and effect of the contract of sale, and therefore, unless the reference has been enlarged, obviously that is not a question for the arbitrator at all. Now, I am perfectly satisfied that the scope of the reference may be enlarged by the action of the parties when they come before the arbitrator. Whether particular acts have that effect or not is always a circumstantial question which depends on the facts of the case. There are some cases where the statements in the pleadings before the arbiter may be so clear and unequivocal that they put it beyond question that the arbitration must be enlarged. There are others where we may not be able to see evidence of an original intention to enlarge, and yet where, if the arbiter goes on to decide questions outside the scope of the reference, it may be held that the defending party is stopped or barred from saying that he has not enlarged it, because his actions have been inconsistent with such an attitude. But the present case does not seem to me to fall within either of these categories.

I think that the solution of this case lies in this proposition, that no arbitration can be enlarged without the consent of the arbitrator as well as the parties to the reference. No arbitrator by accepting a reference undertakes to do anything more than to decide the questions which are submitted to him in the written contract of reference. Of course, if the arbitrator makes no objection, and goes on to consider other questions, he would be held to have given his consent, but until the merits of the case are approached by the arbitrator, either by the leading of evidence or by agreements between the parties, I cannot hold that there is a final agreement to enlarge.

Now, how stand the facts in this case? It is no doubt true that—intentionally or *per incuriam*—these questions were included in the claims originally submitted to Mr Ritchie, but before proof was taken the pursuer entered a protest against the arbitrator proceeding to deal with this question. Well, I think his protest was in time, because it was taken before the parties had been heard in the enlarged reference, and it is consonant with general contractual principles that until a contract is assented to by all the parties anyone may withdraw. I think there is no question in this case that there was *locus pœnitentiæ* at the time when the protest was made, and therefore that there never was on the part of the pursuers a final and binding agreement to enlarge the reference. It follows, then, that as the questions raised in this action are not questions upon the true effect and meaning of the contract, the action is not excluded, and proof ought to be allowed.

Lord Kinnear—I agree entirely with all that has been said by your Lordship in the chair and do not think it necessary to repeat any part of what has been said. I only desire to add, what I think is quite in accordance with the views stated by your Lordship, that while it may be perfectly possible to enlarge the scope of a reference by lodging competing claims before an arbiter and inviting his award upon these claims, that necessarily amounts to a new contract of arbitration between the parties. Therefore if it is maintained that the contract of submission to be inferred from these claims excludes an action, we must be satisfied that the question raised in the action is exactly the same as the question raised in those claims. The hypothesis is that it is the new claims that constitute or at all events express the contract, and therefore when we are to exclude an action at law it can only be upon the ground that the question included in that action is already to be found stated in the claims. Now, the most material averment upon the record now before us with reference to one

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of the leading questions between the parties is the averment contained in the amendment added by the defenders, to the effect that the pursuer put before them a statement of a turnover amounting to £1470, which in great part did not consist of legitimate business but was introduced by the pursuer without the knowledge or consent of the defenders, and to the extent of £710 was so introduced in order to create a fictitious appearance of turnover, and that the said turnover was not a business turnover at all. Now, I agree that that is equivalent to a fraudulent statement by the pursuer of a fictitious turnover. I do not find that averment in the pleadings before the arbiter at all. I think it is a new question, and I cannot infer from anything that took place before the arbiter that the parties have agreed to be bound by his judgment upon the question of the honesty or fictitious character of the balances put before the defenders by the pursuer Mr Miller. On that ground alone I should hold that the question now before your Lordships is not embraced in any contract of submission which has been brought before us. But while I so hold I desire to say—as indeed I have already said—that I entirely assent to the reasons which have been given by your Lordship in the chair and by Lord M'Laren, and that I also agree in reserving my opinion upon the point which your Lordship has not thought it desirable to decide in this case.

LORD PEARSON—In sisting this action as Lord Ordinary, in order that the parties might proceed in the reference to Mr Ritchie, I acted upon two assumptions.

The first was that the question in dispute as to the business turnover might be regarded as a question as to the intent and meaning of the agreement; that to that extent it fell within the scope of the original reference clause, and that there was a real dispute between the parties on that head, however easy it might be of solution. The defenders have since been allowed to amend their record so as to bring out more clearly the question actually in dispute, and it now appears clearly that the parties are really at one as to the meaning of the expression "business turnover," and that the variance is upon the facts as to the character of the business introduced by Mr Miller. That being so, it is no longer a question to be tried in the original reference, but in an extension of that reference, if it has been extended, or in this action, if it has not. Now, the second assumption on which I proceeded was, that the reference had been extended by the parties so as to include all the claims appearing in the record as closed by the arbiter, and these certainly included the two pecuniary claims made in this action. Now I think it would be impossible to lay down any general rule as to what circumstances will be sufficient to import a concluded agreement to refer, or at what stage of the arbitration proceedings an agreement is to be inferred from the pleadings. I should be unwilling to hold that it was in every case open to either party to resile unless and until the award was issued. Further, I should think that the joining issue on a closed record was a circumstance of some importance on that question, though perhaps not absolutely conclusive. But the present case is peculiar in this respect, that the arbiter had no sooner closed the record for the second time than he threw the whole thing loose by proposing to limit the proof in such a way as to restrict it to matters falling within the original reference clause; and he appointed parties to be heard on that proposal, an order which was immediately followed by a strong protest from the present pursuer. It was precisely at that stage that the decree of reduction subsequently pronounced took effect. All the procedure that followed was cleared away by that decree, and while I think the point is one of some difficulty, I am prepared to hold that it would not have been too late at that stage, and consequently is not too late now, for the pursuers to withdraw from the position they had previously taken up, and to decline to have the reference enlarged.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to allow a proof.

Counsel for Pursuers and Reclaimers—The Dean of Faculty (Campbell, K.C.).—M'Lennan, K.C.—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for Defenders and Respondents—Johnston, K.C.—Hunter, K.C.—Morison. Agents—Somerville & Watson, S.S.C.

Tuesday, January 9.

FIRST DIVISION.

[Lord Pearson, Ordinary.

H. M. ADVOCATE *v.* WARRENDER'S TRUSTEES.

Revenue—Estate-Duty—Property Passing on Death—Deductions Allowable as Debts—Debts Incurred for "Full Consideration in Money or Money's Worth wholly for the Deceased's own Use and Benefit"—Marriage-Contract Provision—Provision by Father in Son's Marriage Contract—Discharge of Possible Claim for Legitim—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 7.

A father in his son's marriage contract bound himself, in contemplation of the son's marriage and in consideration of a conveyance by the son's intended spouse in an indenture or marriage settlement executed by her, to grant a bond over his estate in security of an obligation undertaken by him in the said contract to settle a sum of £30,000 in trust for behoof of the son, and on his (the son's) death for behoof of his widow in liferent and their issue in fee. In the marriage

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contract the son discharged any claim of legitim that he might have against his father's estate.

Held that the bond being granted in consideration of, not only the discharge of legitim, but also the marriage, was not a debt incurred "for full consideration in money or money's worth wholly for the deceased's own use and benefit," within the meaning of sec. 7 (1) of the Finance Act 1894, and therefore that it did not fall to be deducted in ascertaining the value of his estate for the purpose of estate duty.

The Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 7, enacts—"Value of Property.—(1) In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and encumbrances, but an allowance shall not be made (*a*) for debts incurred by the deceased or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest . . . and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

Sir George Warrender, Bart., of Lochend, died on 13th June 1901 leaving a trust-disposition and settlement dated 24th January 1899, and, with relative codicils, recorded 26th June 1901, whereby he conveyed to certain trustees for the purposes therein stated his whole estate heritable and moveable. For the purpose of adjusting the estate duties leviable in respect of the heritable property which passed or was deemed to pass on the testator's death, the trustees lodged accounts from which it appeared that such estate amounted to £319,008, 2s. 7d., but they claimed to make therefrom a deduction for bonds amounting to £92,500, including therein a bond for £30,000 which had been granted by the testator over his estate of Bruntsfield in favour of his son's marriage contract trustees. The inclusion of this bond for £30,000 was objected to.

In these circumstances the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, raised an action on 1st March 1905 against William Hugh Murray, W.S., Edinburgh, and others, the trustees acting under the trust-disposition and settlement, in which he sought to have them ordained to deliver a corrective account and to pay the sum of £2200 as the amount of estate duty on such heritable estate still due and resting-owing.

He pleaded—"On a sound construction of the Finance Act 1894, and in particular of section 7, the value of the testator's heritable estate passing on his death is not subject to any deduction in respect of the bond and disposition in security for £30,000 granted under his son's marriage-contract."

The facts connected with the bond for £30,000 are given in the opinion (*infra*) of the Lord Ordinary (PEARSON), who on 5th December 1905 pronounced this interlocutor—"Appoints the defenders to deliver to the pursuer the corrective account called for in the summons: Finds that in said corrective account deduction for the sum of £30,000 contained in the bond and disposition in security mentioned in the record is not permissible: Finds the pursuer entitled to expenses."

Opinion.—. . . . [*After narrating the nature of the action, supra*]—. . . . "The Inland Revenue Commissioners object to the proposed deduction of this sum of £30,000. They have ascertained the principal value of the property in terms of section 7, subsection 5 of the Finance Act, by estimating the price which, in their opinion, the property would have fetched if sold in the open market at the time of the death, on the footing of the property being unencumbered. Then, in terms of section 7, subsection 1, they are called on to make allowance for debts and encumbrances, subject to this direction that 'an allowance shall not be made for debts incurred by the deceased, or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit.' Allowance has been made in respect of all the encumbrances except the bond for £30,000. As to that encumbrance it is maintained that the defenders have failed to show that it was created 'for full consideration in money or money's worth wholly for the deceased's own use and benefit.'

"The bond bears to be granted in implement of an obligation contained in the antenuptial contract of marriage (dated February 1894) between George Warrender (Sir George's second son) and Lady Ethel Maud Ashley; and it is in favour of the trustees of that contract. Sir George Warrender thereby binds himself, and his heirs, executors, and representatives, to pay to the trustees the sum of £30,000 at Martinmas 1894, with interest and penalty, and conveys the Lands of Bruntsfield in security in common form. Accordingly, the question must be decided in view of the marriage contract provisions and the circumstances of the parties to that contract.

"The parties (as the contract bears) were George Warrender, with the special advice and consent of Sir George Warrender his father, and Sir George Warrender for himself, on the one part; and Lady Ethel Maud Ashley, with the special advice and consent of her mother Lady Shaftesbury, on the other part. Sir George bound himself to grant the bond now in question; and it was further stipulated that if the trustees should call upon him to pay up the amount in the bond, or in the event of his doing so, he should be bound to provide other security which, with the £30,000, should be sufficient to yield a minimum annual income of £1200. The trust fund was to be held for payment of the income to the husband during his life. On his death the trustees were to set aside £20,000, and pay the income of it to Lady Ethel if she survived

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him, restrictable on her re-marriage. The fee was to be divided among the children or their issue up to certain specified amounts, subject to a power of appointment vested in the husband, and subject also to the exclusion of any child succeeding to the entailed estate of Lochend at the period of division. Any surplus of the trust-fund was to be made over to the person who should have succeeded to the baronetcy when the funds became available. Power was conferred on the husband, in the event of his marrying again, to make certain provisions for the wife and children of the second marriage.

"These provisions in favour of the wife and children were declared to be in full satisfaction of all legal rights arising to them through the decease of the husband.

"Further, the husband accepted of the obligations thereby contracted by his father Sir George Warrender as in full satisfaction of all legal claims for legitim or otherwise that he might have against Sir George's estate, other than his rights under his father's marriage settlement. And he also bound himself, if he should become heir-apparent to the entailed estate of Lochend during his father's lifetime, to enter into a re-entail of that estate in certain terms should his father request him to do so. The effect of these clauses, as shewing onerous consideration between Sir George and his son, is said to be enhanced by the circumstances set forth by the defenders in answer 9. It appears that under Sir George's own marriage settlement there was already an exclusion of the rights to legitim of all his children other than the child who should succeed to the entailed estate of Lochend. The heir-apparent to Lochend was his eldest son John Warrender; and in 1892 Sir George, being anxious to have a perfectly free hand in the disposition of his moveable estate, had obtained from his son John, for valuable consideration, a discharge of his right to legitim. In 1894 John Warrender's state of health was such as to make it not improbable that George would succeed his father as heir of entail in Lochend, in which case he would be entitled to legitim. Hence the desire of Sir George Warrender to obtain from his son George a discharge of his legitim in any event. The defenders do not say what the amount of Sir George's free moveable estate was at the date of the marriage contract in 1894, but they aver that George's share of legitim at his father's death would have amounted to over £250,000.

"I hold that the defenders fail to bring the case under either of the requirements of section 7, subsection 1. In the first place, I cannot affirm the proposition that the encumbrance was created wholly for the deceased's own use and benefit. The renunciation of legitim, which is said to have been the consideration for it, did not operate for Sir George's use and benefit in any real sense. It did not enlarge his estate nor his own powers over it *inter vivos*. It only enlarged his testamentary power over so much of the estate as he chose not to spend. It is true that, if the trustees had called on him to pay up the money (as they were entitled to do), he might possibly have arranged to obtain the money from a third party on the security of the estate; and it may be that such an encumbrance might have been represented as being for his own use and benefit, seeing that it was to raise money to pay a debt. But the original incurring of the debt, the original creation of this encumbrance, can hardly be so represented, apart from the question whether Sir George created the encumbrance for full consideration in money or money's worth. As I am prepared to answer this question in the negative it is needless to pursue the discussion of the other question further.

"I note, to begin with, that Sir George Warrender's obligation to grant the £30,000 bond, as undertaken in his son's marriage contract, bears to proceed (1) in contemplation of the marriage, and (2) in consideration of the conveyance and obligation by Lady Ethel Ashley in a marriage settlement in English form which she executed of even date with the Scotch contract. In view of this clause so expressed it is impossible to say to what extent the alliance of his son with Lady Ethel Ashley may not have entered into his mind, and even into his calculations, in resolving to grant a bond for the amount he did. It is well settled that the consideration of marriage is not money's worth within the meaning of such a statutory enactment; and therefore it is impossible to find out how much of the obligation in the bond is to be held as induced by a consideration in money's worth, if any such existed.

"The defenders suggest that such full consideration for the bond is to be found in the stipulations of the contract as between the husband and his father. They concede that the consideration of marriage cannot be represented as money or money's worth. But they say that the contract, apart from the rights and stipulations of the spouses *inter se*, contains also a series of stipulations as between Sir George Warrender and his son which furnished Sir George with full and ample consideration in money or money's worth for his granting the bond for £30,000. They found, in particular, on the clause whereby the son discharged his right to legitim in the circumstances I have briefly described. Even so, it appears to me impossible to affirm that this can be taken as fulfilling the requirements of the statute. The value of the share of legitim as at the date of the marriage contract is not stated, but assuming that as at that date the share would have been well over £30,000, the contingencies which stood between George Warrender and the enjoyment of it were such as to render all calculation of its value futile. It depended not only on his surviving both his father and his elder brother, but also on his father's not spending his fortune in his lifetime, and not investing it in heritable property. On these grounds I am of opinion that the defenders fail to bring the case within the requirements of section 7, subsection 1, so as to entitle them to the

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deduction which they claim.

"I have thought it right to consider the particular arguments urged in this case; but I must add that I think in principle it is ruled by the case of *Alexander's Trustees*, 1905, 7 F. 367.

"The defenders maintained that in any view partial deduction of the debt should be allowed, even if it could not be wholly deducted as having been created for full consideration. I confess I am not satisfied that the statute allows any such partial deduction, and there are no materials in the defenders' pleadings for the ascertainment of it, even if it were allowable."

The defenders reclaimed and argued—The sum in the bond fell to be deducted in respect that it was granted for full consideration in money's worth and for the granter's use and benefit. The claim of legitim which was discharged in the marriage-contract was a valuable right, and the discharge operated to the father's benefit—*Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121; Lord Fullerton at pp. 1139-40. In *Lord Advocate* v. *Sidgwick*, June 6, 1877, 4 R. 815, 14 S.L.R. 522, it was recognised that the discharge of legal rights might in some cases amount to a "consideration in money or money's worth." The case of the *Inland Revenue* v. *Alexander's Trustees*, January 10, 1905, 7 F. 367, 42 S.L.R. 307, on which the Lord Ordinary founded, was distinguishable in that there the son did not discharge his legal rights.

Counsel for the respondent were not called on.

LORD PRESIDENT—In this case I am satisfied that the Lord Ordinary has come to the right conclusion. The whole point turns upon the meaning of sub-section (1) of the 7th section of the Finance Act, which provides that "allowance shall not be made (*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest." Now, the sum which is here sought to be deducted is a sum of £30,000, for which Sir George had granted a bond and disposition in security. This bond was granted in implement of an obligation undertaken by Sir George in his second son's marriage contract as a provision for that son, the sum being settled under the marriage contract in consideration of the marriage which he was about to make with his proposed spouse Lady Maud Ashley. It is quite true that as one of the incidents of the marriage contract there is also a discharge by the said son of any claim for legitim which he might have. His claim for legitim was in a peculiar position, because in Sir George's own marriage contract all rights in respect of children's legitim had been discharged with the exception of such child as should succeed to the family estates. At the time of the marriage contract with the younger George, the eldest son, the heir-apparent to the family estates, was a certain John, and it was possible that if John should die Sir George would require, if he wished his estate to avoid the payment of legitim, to take a discharge from the younger George. But all that seems to me to come in quite incidentally. It is perfectly impossible to say that the £30,000 was a consideration wholly for Sir George's own use and benefit. Whether the language "own use and benefit" applies to a discharge of a possible claim of one of the children for legitim is doubtful, but without deciding that, it is enough to say that the £30,000 was not wholly given for the discharge of legitim, and the further consideration of the marriage is obviously not a consideration in money's worth for Sir George's own use and benefit.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer and Respondent — Solicitor-General (Ure, K.C.) — A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for Defenders and Reclaimers—Macfarlane, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, January 16.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

MASSIE *v.* THE CALEDONIAN RAILWAY COMPANY.

Process — Jury Trial — Appeal for Jury Trial—Remit to Outer House—Motion for Trial—Trial not Necessarily within Three Weeks of Party's Motion — Court of Session Act (13 *and* 14 *Vict. c.* 36), *sec.* 40 *—Notice for Sittings.*

Observed, per Lord President, that the provision of section 40 of the Court of Session Act 1850 that "where an issue or issues is or are approved . . . it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues, such time being . . . except upon special cause shown, not later than three weeks from the date of such motion," does not apply to cases appealed from the Sheriff Court for jury trial; and where such a case has been remitted to the Outer House the judge to whom the case is remitted may try it at any time before the next sittings, but if he is unable to do so notice may be given for such sittings.

This was an action in the Sheriff Court of Lanarkshire at Glasgow at the instance of Mrs Margaret Slessor or Massie against the Caledonian Railway Company for damages for the death of her son due to the alleged fault of the defenders. The pursuer ap-

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pealed to the First Division of the Court of Session for jury trial.

In approving of the issue proposed by the pursuer and remitting the case to the Outer House, the LORD PRESIDENT observed—"It has been suggested in view of the provisions of section 40 of the Court of Session Act 1850 that when a case is appealed from the Sheriff Court for jury trial and is remitted to the Outer House, the judge to whom it is remitted must fix a day for the trial of the issue within three weeks. In my opinion that statutory provision has no application to appeals from the Sheriff Court for jury trial. It appears that in some cases of this sort when we have made a remit and the judge has been unable to give a diet within three weeks, notice has been given for the sittings. This is wholly unnecessary, for the judge to whom the case is remitted may try the case at any time before the next sittings. Of course these cases cannot be hung up indefinitely, and if the judge cannot give a day before the end of the session notice of trial for the sittings may be given."

Counsel for Pursuer—Spens. Agents—Oliphant & Murray, W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Johnston, Ordinary.

M'CARDLE, PETITIONER.

(See *ante*, January 13, 1906, 43 S.L.R. 268.)

Administration of Justice—Distribution of Business—Power to Transfer—Transfer to Another Lord Ordinary of Cause Appropriated to Junior Lord Ordinary—Jurisdiction of Judge to whom Cause was Transferred on the Appointment of a New Junior Lord Ordinary—Court of Session Act 1857 (*Distribution of Business Act*) (20 *and* 21 *Vict. cap.* 56), *secs.* 1 *and* 4—*Bankruptcy* (*Scotland*) *Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 164—*Act of Sederunt, 25th November* 1857, *sec.* 29—*Clerks of Session Regulation Act* 1889 (52 *and* 53 *Vict. cap.* 54), *sec.* 3.

In a petition appropriated by statute to the Junior Lord Ordinary, a Junior Lord Ordinary intimated that having acted as counsel in the cause he desired not to exercise jurisdiction; and the Lord President transferred the cause to another Lord Ordinary.

Held (after consultation with the Judges of the Second Division) (1) that the Lord President had power so to transfer the cause under sec. 1 of the Court of Session Act 1857 (Distribution of Business Act) and (2) that on the appointment of a new Junior Lord Ordinary the cause did not revert to him unless re-transferred.

The Court of Session Act 1857 (Distribution of Business Act) (20 and 21 Vict. cap. 56) in sec. 1 enacts—"It shall be lawful for the Lord President of the Court of Session from time to time, as it shall appear to him to be necessary or expedient with a view to promote the due despatch of the business of the Court, to transfer causes from one Division of the Court to the other, and from any one Lord Ordinary to any other Lord Ordinary, to such extent as he shall judge to be necessary or expedient, for the purpose of promoting despatch and preventing delay. . . ."

Section 4 provides—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court viz., (1)... (2)... (3)... (4)... (5) . . ."

The Act of Sederunt of 25th November 1857 regulates the procedure of judicial factors under the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). In its 29th sec. it provides—"All proceedings which in this Act are appointed to take place by or before the Court shall, although the same be addressed to the Lords of Council and Session, be brought before, dealt with and disposed of by the Junior Lord Ordinary officiating in the Outer House, or by the Lord Ordinary officiating on the Bills in time of vacation, subject to the review of the Inner House, in conformity with the 4th sec. of the statute 20 and 21 Vict. cap. 56.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 164, *inter alia*, provides—"It shall be competent to one or more creditors of parties deceased to the amount of £100, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof . . . to apply by summary petition to either Division of the Court for the appointment of a judicial factor and . . . the Court may appoint such factor. . . ."

The Clerks of Session Regulation Act 1889 (52 and 53 Vict. cap. 54), sec. 3, provides—". . . All summary petitions and applications which are at present under the provisions of sec. 4 of" the Court of Session Act 1857 "appropriated to the Junior Lord Ordinary, shall . . . be presented and disposed of in the Bill Chamber, . . . and such applications may be made and petitions presented and disposed of and orders pronounced thereon at all times by the Junior Lord Ordinary in Session and by the Lord Ordinary on the Bills in vacation, provided that nothing herein contained shall affect the form of such applications and petitions, or of the interlocutors to be pronounced therein, or the preparation of extracts of decrees pronounced therein,

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or shall increase or alter the powers presently possessed during vacation by the Lord Ordinary on the Bills, who shall have the same powers, including that of reporting to the Inner House, as are at present exercised by the Junior Lord Ordinary."

In 1899 Mrs Ellen Mullin or M'Cardle presented a petition under sec. 164 of the Bankruptcy (Scotland) Act 1856, in which she sought the appointment of a judicial factor on the estate of her deceased husband, the late James M'Cardle of Carnlough, in the county of Antrim, and 129 Trongate, Glasgow, and under it J. M. M'Leod, C.A., Glasgow, was duly appointed judicial factor. By the Act of Sederunt of 25th November 1857 (*supra*) the petition was appropriated to the Junior Lord Ordinary, who at the time of its being presented was Lord Pearson. During the proceedings following on the petition Lord Pearson was succeeded in the position of Junior Lord Ordinary by several successive Judges, before each of whom the cause from time to time came. When Lord Salvesen was appointed Junior Lord Ordinary he intimated to the Lord President his disinclination to act as Judge in the cause because he had formerly acted as counsel for one of the parties, and the Lord President therefore on 7th November 1905 transferred the cause to Lord Johnston. On Lord Mackenzie succeeding Lord Salvesen as Junior Lord Ordinary a minute was lodged by the petitioner declining the jurisdiction of Lord Johnston.

Lord Johnston reported the cause to the First Division.

Argued for the petitioner—This case fell to be dealt with by the Junior Lord Ordinary under sec. 29 of the Act of Sederunt of 1857, following on the Bankruptcy Act of 1856. The case had been treated as a Bill Chamber case. That appeared not only from the way it had been treated but from the notice of the transfer, for that notice was of a transfer of Bill Chamber causes. It was not a Bill Chamber cause but a Court of Session cause appropriated by the Act of Sederunt to the Junior Lord Ordinary. The only reason for dealing with it in the manner applicable to a Bill Chamber cause was because of the provisions of sec. 29 of the Act of Sederunt 25th November 1857, sec. 4 of the Distribution of Business Act 1857, and sec. 3 of the Clerks of Session Regulation Act 1889. The transfer was not one under the Distribution of Business Act. It had nothing to do with the distribution of business, but was for a reason personal to the Judge from whom it was transferred. It was simply giving effect to Lord Salvesen's declinature—*Moubray's Trustees* v. *Moubray*, January 16, 1883, 10 R. 460. Whether the transfer was properly effected or not at the beginning the personal reason for declinature had ceased to exist through the appointment of a new Junior Lord Ordinary, and the case therefore must go before him.

Counsel for the judicial factor was not called on.

LORD PRESIDENT—I have looked into this matter and have also consulted with the Judges of the other Division. There are two points raised here, and the first is whether there was power under the Distribution of Business Act to transfer this case from Lord Salvesen to Lord Johnston. I must say I do not think there can be any doubt as to the existence of that power. The powers given by sec. 1 of the Distribution of Business Act are very wide, and the only question for the Lord President in deciding whether to transfer or not, is whether it is "necessary or expedient" to do so. It is true that there was no formal declinature here, but I do not think that that was necessary; I think it is quite sufficient that the Lord President should be informed that, for a reason personal to himself, the Junior Lord Ordinary does not wish to act, and I can quite understand that there may be other reasons for that wish besides the one given in this case, viz., that the Judge had formerly acted as counsel in the case. Therefore I do not doubt that what was done here when the case was remitted to Lord Johnston was properly done. I think that probably Mr Dickson had some justification for his verbal criticism of the form of the notice of transfer, namely, that this cause was not properly called a Bill Chamber cause, but I do not think there is any materiality in that objection, for this is clearly an instance where *falsa demonstratio non nocet*.

The second point is whether this case should not now go back to the Junior Lord Ordinary, a new appointment having been made to that office, and the present holder of it not being subject to the personal disqualification which attached to Lord Salvesen. It is urged that it should go back on the ground that causes which are appropriated to the Junior Lord Ordinary should be disposed of by him unless there be some existing reason for them being otherwise dealt with. This is not one of the causes enumerated in sec. 4 of the Distribution of Business Act as falling to be dealt with by the Junior Lord Ordinary, for it has its genesis under the Bankruptcy Act, but then the Act of Sederunt of 25th November 1857 provides that such petitions shall be disposed of by the Junior Lord Ordinary "in conformity with the 4th section" of the Distribution of Business Act. I do not doubt, therefore, that this is a case appropriated to the Junior Lord Ordinary, and that it falls under the general phraseology of sec. 4. But it seems to me that when a statute provides that a petition shall come before the Junior Lord Ordinary it means that it shall do so subject to the general incidents and powers which exist as to the jurisdiction of the Junior Lord Ordinary, and one of these incidents and powers is that the Lord President may transfer the cause to some other Judge if he should think fit, and that it remains before that Judge until it is taken away again. In this instance I see no reason why it should be taken away, but every reason why it should remain. It is before a Judge who is competent to try it,

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and who has already considered the cause and disposed of some of the points arising in it, and I think it should remain before him until all the points are disposed of.

I would add that I do not think that litigants have any right to interfere with the distribution of business. The duty of the Lord President in these matters is not primarily to the litigant but to the general public, and his duty is to promote the due despatch of the business of the Court. I therefore think that this is not a matter on which the litigant should be heard at all, for he has no right in these circumstances to choose the Judge before whom he desires his case to be heard. This case is at present before Lord Johnston, and what I have to say to him in answer to the question raised by his report is that it will remain with him, as I have no intention of retransferring it.

LORD M'LAREN—I concur with your Lordship.

LORD PEARSON—I agree with all your Lordship has said.

The Court, without issuing an interlocutor, intimated that the petition remained before Lord Johnston.

Counsel for the Petitioner — Dickson, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Counsel for the Judicial Factor—Wilson, K.C.—Horne. Agents—Bell, Bannerman, & Finlay, W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

AGNEW *v.* THE BRITISH LEGAL LIFE ASSURANCE COMPANY LIMITED.

Reparation—Slander—Master and Servant—Company—Letter and Statement by Official of Company—Threat if Accounts Not Settled to Report to Authorities—"Greatest Liar and Fraud"—Innuendo—Liability of Company for Letter and Statement by its Official Acting within Scope of Employment

An insurance superintendent wrote to one of the agents under him that as the latter had not appeared on the day for settling his accounts and was reported to have left the town, he would give him till the Monday morning following to settle; "failing this, I shall be obliged to report the matter to the authorities." The superintendent on the same day called, and in the presence of the agent and his wife stated that the agent was "the greatest liar and fraud that had ever come into" the town, and that if he did not settle as required he would give him "into the hands of the authorities." The agent brought an action of damages against the company, in which he averred that the letter and statements falsely and calumniously represented that he was guilty of dishonest misappropriation, and that his conduct was such as to make it necessary to report the matter to the criminal authorities. He also averred that the letter was written and the statements made by the superintendent in the course of his employment as representing the company and as acting in its interests and for its benefit, and were false, calumnious and malicious.

Held (1) (*aff.* judgment of Lord Ardwall, Ordinary) that the letter was not slanderous and would not bear the innuendo sought to be put upon it, and (2) (contrary to the opinion of Lord Ardwall, Ordinary) that the statements by the superintendent were not slanderous.

Opinion (per Lord Ardwall, Ordinary) that it was only in special circumstances that a master was liable for the slander of his servant, and as there were no such circumstances here the company could not be held responsible. *Opinions* of the Division on this point *reserved.*

Citizens Life Assurance Company Limited v. *Brown*, [1904] A.C. 423, *commented on.*

On 2nd June 1905 Charles Agnew, insurance agent, 36 Hagg's Road, Pollokshaws, brought an action against the British Legal Life Assurance Company Limited, Glasgow, in which he sought to recover £300 as damages for slander. The pursuer had on 1st April 1905 been engaged by the defenders' district superintendent at Greenock, Thomas Ferguson, as a local agent and collector, and thereafter had accounted every Thursday afternoon for the premiums collected. On Thursday, 11th May, he failed to appear and to account, having left Greenock and returned home on that day owing as he alleged to ill-health.

The pursuer averred—"(Cond. 4) On the forenoon of Saturday, 13th May 1905, the pursuer received by post from the said Thomas Ferguson the following letter, written on official notepaper bearing the name and address of the defenders' company printed at the top:—'12*th May* 1905.

'Mr Charles Agnew, 36 Hagg's Road,
Pollokshaws.

'Dear Sir,—As you have failed to turn up here at your proper time, and, upon making inquiry at your lodgings, I find that you are reported to have left Greenock, and that you have been drinking, as you have failed to forward me your collections, I will give you till Monday morning, the 15th inst., to hand me every penny you have collected; failing this, I shall be obliged to report the matter to the authorities.—I am, yours, &c.,

'T. FERGUSON, *Supt.*'

On the afternoon of the same day, 13th May 1905, the said Thomas Ferguson called at the pursuer's house, 36 Hagg's Road, Pollokshaws, and was shown into the room where the pursuer was still confined to bed.

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In the presence and hearing of the pursuer and his wife the said Thomas Ferguson then stated in said house that the pursuer was the 'greatest liar and fraud that ever came into Greenock,' and that if the pursuer did not settle with him (Ferguson) for the sums collected and in his hands by the beginning of the week he would give the pursuer 'into the hands of the authorities,' or used words to the like effect. (Cond. 7) The said letter of 12th May 1905, written and sent by the said Thomas Ferguson to the pursuer, and the said statements made by him as above set forth when visiting the pursuer . . . were written and uttered by him in the course of his employment with defenders, and as representing them, and as acting in their interests and for their benefit, and they were false, calumnious and malicious. By said letter and said statements the said Thomas Ferguson falsely and calumniously represented and intended to represent that the pursuer was guilty of dishonest misappropriation of the monies in his possession belonging to the defenders, and that his conduct was such as to make it necessary to place the matter in the hands of the criminal authorities. Said statements were entirely false and unwarranted, and were made recklessly and maliciously and without any inquiry whatever being made as to the cause of pursuer's delay in paying over said monies. Had Ferguson or any other person on behalf of defenders made any inquiry into the circumstances, he would have ascertained that there was absolutely no ground for making such a charge. Defenders, however, or Ferguson as representing them, took no such precaution and made no inquiry, and in ignorance of the facts they recklessly accused him of embezzling or dishonestly misappropriating said monies."

The pursuer proposed the following issues:—"1. Whether Thomas Ferguson, the defenders' district superintendent at 45 Hamilton Street, Greenock, while acting within the course of his employment as a district superintendent of defenders' company, wrote and sent to the pursuer the letter dated 12th May 1905 . . . and whether the statements contained in said letter falsely and calumniously represented that the pursuer was guilty of dishonest misappropriation of monies in his possession belonging to the defenders, and that his conduct was such as entitled the said Thomas Ferguson to place the matter in the hands of the criminal authorities, to the loss, injury and damage of the pursuer? 2. Whether on or about 13th May 1905, at or near the pursuer's house 36 Hagg's Road, Pollokshaws, the said Thomas Ferguson, while acting within the course of his said employment, falsely and calumniously stated to the pursuer, in the presence and hearing of the pursuer's wife, that the pursuer was 'the greatest liar and fraud that ever came into Greenock, and that if the pursuer did not settle with him' (Thomas Ferguson) 'for the sums collected and in his hands by the beginning of the week he would give the pursuer into the hands of the authorities,' or used words of like import and effect, representing thereby that the pursuer was guilty of dishonest misappropriation of monies in his possession belonging to the defenders, and that his conduct was such as might make it necessary to place the matter in the hands of the criminal authorities, to the loss, injury, and damage of the pursuer."

The pursuer also made averments as to the superintendent Ferguson having called on one M'Dougall, from whom the pursuer had obtained a certificate of character, and having warned M'Dougall not to give any more certificates. This portion of the case, however, on which there was a third issue, was given up in the Division, such actings having been held, in the Outer House, to be plainly outwith the scope of the superintendent's employment.

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The alleged defamatory statements made by the said Thomas Ferguson not having been made in the course of his employment as a servant of defenders, they are not liable therefor."

On 21st October 1905, the Lord Ordinary (ARDWALL) pronounced this interlocutor—"Disallows the said issues; sustains the first plea-in-law for the defenders; dismisses the action; and decerns: Finds the defenders entitled to expenses: allows an account thereof to be lodged, and remits the same to the auditor to tax and report; and decerns."

Opinion.—"In this case I propose to inquire with regard to each of the alleged slanders complained of—*first*, whether the statements alleged to have been made by Thomas Ferguson, the defenders' superintendent, are slanderous; and *second*, whether, if any of them are so, the defenders are in law responsible for such slanders.

"With regard to the first slander alleged to be contained in the letter written by Ferguson on 12th May 1905, I am of opinion that that letter is not slanderous in its nature, and will not bear the innuendo sought to be put on it by the pursuer. It does not contain a statement, nor, in my opinion, can it be justly innuendoed as containing a statement, that the pursuer had in point of fact dishonestly appropriated moneys in his possession belonging to the defenders. It seems to me to consist of two parts—*first*, a complaint of irregularities on the part of the pursuer, which complaint is not founded on as libellous; and *second*, a threat that if the pursuer would not account for all the money he had collected on behalf of the defenders on the following Monday, Ferguson would be obliged to report the matter to the authorities. This means that should the pursuer at a future date fail to hand over moneys in his hands admittedly belonging to the defenders, that would constitute an offence which Ferguson would be entitled to report to the criminal authorities. This threat, I think, Ferguson was perfectly entitled to make in the circumstances, and I also am

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of opinion that it would be extravagant to hold that a letter in these terms, written by an employer to an employee who was certainly behindhand in his payments, is in point of law a slanderous document. The reference to the criminal authorities, be it observed, was made not in view of past or present conduct on the part of the pursuer but in view of a future contingency which might never occur, and which in point of fact did not occur in the present case. I accordingly disallow the first issue.

"The second slander complained of was that alleged to have been uttered by Thomas Ferguson in the pursuer's house on 13th May 1905. The words alleged to have been used seem to me to be different in one important respect from those used in the letter, because the threat to give the pursuer into the hands of the authorities is alleged to have been prefaced by the statement that the pursuer was 'the greatest liar and fraud that ever came into Greenock,' and, taking the utterance as a whole I am of opinion that if this action had been directed against Thomas Ferguson, the pursuer might be entitled to an issue with the innuendo proposed by him. But the question now occurs, are the defenders liable in respect of what Thomas Ferguson is alleged to have said on the occasion in question? I am of opinion they are not. It is no doubt the case that circumstances may occur in which a principal may be liable for slander uttered by an agent or servant in the course of his employment. Such circumstances were held by the jury to have occurred in the case of *The Citizens Life Assurance Company, Limited*, v. *Brown*, Ap. Cas. 1904, p. 423, and the Privy Council declined to disturb their verdict. On the other hand, there are circumstances in which the principal will not be so liable. Such circumstances occurred in the case of *Cameron* v. *Yeats*, 1 F. 456, and in the Outer House case of *Eprile* v. *Caledonian Railway Company*, 6 S.L.T. 65. I am of opinion that in this case the pursuer has failed to set forth averments relevant to infer liability on the defenders' part for what was said on the occasion in question by their superintendent Thomas Ferguson. To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by anyone in their employment in the course of such employment, would be to introduce an appalling extension of the law of defamation. I take it to be the sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent. In my opinion no such circumstances are set forth in the present action. As an illustration of how the liability of a slanderer is held by the law to be strictly personal, I may refer to the cases of *Barr* v. *Neilson*, 6 Macph. 651, and *Milne* v. *Smith*, 20 R. 95, in each of which cases the Court refused to hold a husband liable for slanders uttered by his wife. I therefore disallow the second issue.

"With regard to the third issue, I am of opinion that it appears from the pursuer's own averments that Thomas Ferguson in calling at James M'Dougall's shop and informing John M'Dougall that he wanted to warn his father against giving any further certificate of character to the pursuer, was not acting in the course of his employment at all, inasmuch as it was in no sense the business of the defenders to go and warn a man from whom they had received a certificate of character of a servant who had not turned out well, not to give further certificates of character to that person, which might possibly enable him to get employment from other members of the public. This I think abundantly plain. I accordingly disallow the third issue also.

"I may say that, had I been disposed to allow either the first or the second issue, I should have held that it was incumbent upon the pursuer to put malice into the issue, and it was held in the case of *The Citizens Life Assurance Company, Limited*, v. *Brown* that a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant, and for which libel they are in law responsible, and I am disposed to think that, whether he might be able to prove them or not, the pursuer has set forth facts from which malice on the part of Ferguson might be inferred. The principle of these are the language used on the occasion of his visit to Agnew's house and the steps he took against the pursuer in connection with the M'Dougalls. I may further add that, if I had allowed issues in the case, I would have made several changes in the framework and wording of the issues."

The pursuer reclaimed and argued—The letter and statements which were complained of clearly charged the pursuer with misappropriation, and if there was any doubt on the point it was for a jury to decide it. The Lord Ordinary would have allowed the second issue, but had held that the defenders were not responsible. In that he had erred. The case was ruled by *Citizens Life Assurance Company* v. *Brown*, [1904] A.C. 423, which case followed on—*Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Eq. 259, and was but an extention of the principles laid down in *Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510. A master might be liable for his servant's slander within the scope of the employment, and the question of the scope of employment went to the jury—*Ellis* v. *National Free Labour Association*, May 12, 1905, 42 S.L.R. 495. It had been held that the master might be responsible even for an assault by his servant—*Dyer* v. *Munday*, [1895] 1 Q.B. 742—and it was not necessary the servant should have been acting for the master's benefit—*British Mutual Banking Company* v. *Charnwood Forest Railway Company*, L.R. 18 Q.B. D. 714—though that was so here. *Cameron* v. *Yeats*, January 27, 1899, 1 F. 456, 36 S.L.R. 350, quoted for defenders, turned on the proof of an aver-

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ment, and *Eprile* v. *Caledonian Railway Company*, June 21, 1898, 6 S.L.T. 65, on special regulations. Malice if required might be inserted in the issues, and there were sufficient facts and circumstances averred from which it might be inferred. The third issue was not insisted upon. (Odgers on Libel and Slander, 4th ed. p. 546, was also referred to.)

Argued for the defenders and respondents—The third issue having been given up, the questions now involved were whether the letter and statement to the defender himself were slanderous, and if so, whether the defenders were responsible. The letter containing no present charge could not bear the innuendo suggested, and was not slanderous in itself, and the statement to the pursuer and his wife was made *in rixa*, was merely abusive, and consequently was not slanderous and actionable—*Macintosh* v. *Squair*, July 3, 1868, Scot. Jur. 561. The term "liar" was not slanderous *per se*—*Watson* v. *Duncan*, February 4, 1890, 17 R. 404, 27 S.L.R. 319. But even if the letter and statement were slanderous the defenders were not responsible. An employer was not responsible for a verbal slander by his employee acting in excess of his duty—*Eprile* v. *Caledonian Railway Company*, *cit. sup.* He was only liable if he were benefited by the employee's act done within the scope of the employment—*Western Bank* v. *Addie*, May 20, 1867, 5 Macph. (H.L.) 80, 4 S.L.R. 113; *Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626, 14 S.L.R. 403; *Houldsworth* v. *The City of Glasgow Bank*, March 12, 1880, 7 R. (H.L.) 53, 17 S.L.R. 510; *Hockey* v. *Clydesdale Bank*, November 25, 1898, 1 F. 119, 36 S.L.R. 119. That was not so here, and in this the case was distinguished from *Citizens Life Assurance Company* v. *Brown* and *Dyer* v. *Munday*, *cit. sup.* Were an issue to be allowed, malice would require to be inserted, but the malice of an agent could not be imputed to his principal, the malice must be on the part of both—*Mackellar* v. *Duke of Sutherland*, June 18, 1862, 24 D. 1124; *Citizens Life Assurance Company* v. *Brown*, *cit. sup.* Further, there were not sufficient facts and circumstances averred on record to infer malice, and these were necessary—*Sheriff* v. *Denholm*, March 4, 1898, 5 S.L.T. 346; *Macdonald* v. *M'Coll*, July 19, 1901, 3 F. 1082, 38 S.L.R. 781. *Laidlaw* v. *Gunn*, January, 31, 1890, 17 R. 394, 27 S.L.R. 317; and *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549, were also referred to.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has disallowed all the issues. As regards what his Lordship has said in respect of the first issue and the third issue, I am entirely in accordance with him, and I do not think it necessary to add anything.

The second issue raises a question of considerable difficulty. His Lordship has held that the language was slanderous, but he has also held that the case is not one which allows an issue against the employers of the person who uttered it. I may remind your Lordships that the facts on which the action is based are these. The pursuer was a sub-agent of an insurance company, and the action is raised by him against the company. The sub-agent was under the inspection of an inspector—a regular agent of the company—who travelled round, and among other duties had to see that the sub-agents regularly paid up the money which they collected from various persons who had entered into insurance contracts. The pursuer in this case seems to have been irregular in his payments, and the matter complained of arose on an occasion on which the head insurance agent called on him and asked him to pay up the money.

The questions raised by the Lord Ordinary and dealt with by him in that portion of his note which refers to this issue are, I confess, of great difficulty. On the one hand, it is impossible not to see that to open the door to liability for, as the Lord Ordinary says, any slanderous language rashly used by anyone in the employment of another or of a corporation is to open the door very wide indeed. On the other hand, there is the case—of very high authority—of *The Citizens' Life Assurance Company* v. *Brown*, [1904] A. C. 423, decided by the Privy Council, where undoubtedly countenance is given to the doctrine that a corporation may be liable for the slander of an agent, if that slander is uttered by an agent while acting within the scope of his authority. I do not think that the present case is exactly similar to *The Citizens' Life Assurance Company* v. *Brown*, because in that case the agent was writing a circular-letter on behalf of the company. It was an act which was *prima facie* a company act, and I do not think that that is the same thing as a casual expression uttered, as was obviously the case here, with a certain amount of heat and wrath, uttered also *viva voce* in the course of a call which the insurance agent was making on his sub-agent.

But I have come to be of opinion that this case may be quite safely disposed of on other grounds. The alleged slander was this—the agent went to the pursuer's lodgings and was shown into the room where the pursuer was confined in bed, and "in the presence and hearing of the pursuer and his wife, the said Thomas Ferguson then stated in said house that the pursuer was the greatest liar and fraud that ever came into Greenock, and that if the pursuer did not settle with him (Ferguson) for the sums collected and in his hands by the beginning of the week he would give the pursuer into the hands of the authorities." Now, I must say that in cases of this sort one should always look strictly at the words used to see if they are really slanderous; and I have come without any difficulty to be of opinion that these words were not slanderous. It has already been decided on more than one occasion that to call a man a liar is not a slander. But the agent is said to have called the pursuer "the greatest liar and fraud that ever came into Greenock." Now, it is perfectly true that to accuse a man of committing a fraud is a

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slander; but if slang is used it must be taken according to its ordinary meaning. Here it is nothing else than slang, and calling a man a fraud does not mean that he has committed a fraud. All that is meant is that he is not nearly so good as he pretends to be; and it may be that in a great many walks of life, or in what can scarcely be called walks of life, a man may be called a fraud, *e.g.*, with reference to his pretensions even to play a game well, or to be an authority on a certain branch of knowledge. And I have no doubt whatever, knowing the English language as it is used—and a judge is entitled to make use of such knowledge—that the ordinary slang expression of calling a person a fraud does not mean that the person has committed a fraud in the legal sense of the term. Therefore, to call a man a liar and a fraud is not slanderous. It is abusive language, which may or may not be deserved, but it is not slanderous.

The rest of this matter may be disposed of in the same way as the Lord Ordinary has disposed of the other issues. It does not come to anything more than this—that if the pursuer, who was in arrears at the time, did not pay up by the end of the week the matter would be put into the hands of the authorities. That does not mean that he has cheated. It means that if he does not pay by the time he ought to have paid, then investigation will be made to see why he has not paid. In a case like this, where the parties are in such business relations, there must be a certain freedom for the superior towards his subordinate who is in arrears.

I therefore recommend your Lordships to come to the same conclusion as the Lord Ordinary. And although, as regards the second issue, I prefer to put my decision on the ground I have mentioned rather than on the very difficult and delicate ground on which the Lord Ordinary decided it, and on which I reserve my opinion, the interlocutor need not be varied.

LORD M'LAREN—If we should have to consider in another case the question as to the liability of a company for their written statements containing imputations on other persons, I think it would be necessary to consider very carefully the limits of the principle which was laid down in the Privy Council case to which we have been referred. Therefore I shall say no more upon that subject except that I doubt whether the principle can be extended to verbal slander. The whole subject would have to be considered, and therefore I do not express any opinion on it.

I agree with your Lordship in the chair that the words in the present case, which were uttered verbally and not written, and were addressed to the pursuer himself, are not actionable. While the law of England would have excluded this action on two grounds, first, that it was a statement to the party himself, and secondly, that it was verbal, the law of Scotland recognises verbal slander; but I think that we have been in the habit of scrutinising the averments of verbal slander much more rigidly than we do those of libel. The reason is, that everything is to be presumed in favour of a person who is speaking, and if his words are ambiguous we should not necessarily put the worst construction upon them. In the present case I do not think the words are actionable, because they are such that, used as they were, they would have done harm to no one. Considering the circumstances in which they were used I do not think these words will bear a defamatory meaning, and I am therefore for disallowing the issue.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing, concurred.

LORD PEARSON was absent.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against, finding the defenders entitled to additional expenses.

Counsel for the Pursuer and Reclaimer—Orr, K.C.—J. D. Miller. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defenders and Respondents — Cooper, K.C. — C. D. Murray. Agents—Campbell & Smith, S.S.C.

Wednesday, January 24.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

STARK'S TRUSTEES *v.* DUNCAN.

Jurisdiction — Appeal — Process — Interdict Granted in Sheriff Court—Breach of Interdict—Appeal from Sheriff-Substitute to Sheriff—Minute of Parties Waiving Certain Objections—Sheriff not thereby Constituted Arbiter — Appeal — Competency.

In a complaint for breach of interdict, in a Sheriff Court, the evidence was not formally recorded, and the Sheriff-Substitute gave judgment, the defender not being present in person. On appeal to the Sheriff a minute of parties was presented accepting the Sheriff-Substitute's notes as the notes of the evidence and waiving objection to the judgment having been given in defender's absence. An appeal having been taken to the Court of Session it was contended that the appeal was incompetent, parties having by their minute made the Sheriff arbiter and so excluded the jurisdiction of the Court.

Held that the case being *quasi* criminal, it was not possible to make the Sheriff arbiter and that appeal was competent.

Dykes v. *Merry & Cuninghame*, March 4, 1869, 7 Macph. 603, 6 S.L.R. 405, *distinguished.*

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Jurisdiction—Process—Sheriff Court—Interdict—Complaint of Breach of Interdict—Appeal—Decree of Fine or Imprisonment in Default Pronounced in Absence of Defender—Refusal to Review Proceedings when Interdict Granted—Competency.

A Sheriff-Substitute having interdicted a defender from interfering with heritable subjects or their rents, subsequently found on petition that a breach of interdict had been committed, and in the absence of the defender fined him and adjudged him, in default of payment, to be imprisoned, refusing to review the proceedings when the interdict was originally granted. The Sheriff having adhered to his Substitute's judgment, an appeal to the Court of Session was taken. *Held* (1) that the proceedings in the Sheriff Court were competent; (2) that inquiry was not allowable into the proceedings when interdict was granted; (3) that the defender's absence when judgment was pronounced did not invalidate the judgment.

On 24th May 1905, in the Sheriff Court of Lanarkshire at Glasgow, in an action at the instance of James Rennie, teacher, Maryhill, Glasgow, and others, the testamentary trustees of the late James Stark sometime residing at Barrwood, Gourock, interim interdict was granted against Ebenezer Steel Duncan, engineer, 15 Phœnix Park Terrace, Glasgow, restraining him from interfering further with certain property or uplifting the rents thereof.

On 7th June 1905 Stark's trustees presented a petition in the Sheriff Court praying the Court "To grant warrant to cite the defender to appear personally before the Court at such diet as it shall appoint to answer hereto; to find that he has committed a breach of the interdict granted by the Court on 24th May 1905 in an action at the pursuers' instance to have the defender, and all others acting on his behalf, interdicted from interfering with the property . . . and uplifting the rents thereof, and has thereby been guilty of a contempt of Court; to fine and amerce the defender in the sum of £50, or such other sum as the Court shall think fit in the circumstances, or otherwise, or failing his payment of such fine, to adjudge him to be imprisoned for such period as the Court shall appoint, and to find him liable in expenses."

The pursuers made averments of what constituted the alleged breach of interdict, and pleaded—"The defender having wilfully disregarded and broken the interdict granted by the Court, ought to be punished for the contempt of Court thereby committed."

The defender pleaded, *inter alia*—"(1) This action for breach of interdict is incompetent in respect it rests upon an interim interdict in an action which in itself is inept. (2) In respect that the citation of the defender in the action in which the interim interdict was procured is by one of the pursuers thereof, and is consequently invalid, this action, which is founded thereon, falls to be dismissed. . . . (5) The defender having in no way disregarded and broken the interdict granted by the Court is entitled to absolvitor."

On 2nd August 1905 the Sheriff-Substitute (DAVIDSON), after proof had been led on 21st July, pronounced judgment, finding that a breach of interdict had been committed, and fining the defender £5, and adjudging him in default of payment within ten days to be imprisoned for ten days. The defender was not present in person.

On 8th August 1905 the defender appealed to the Sheriff (GUTHRIE), and on 16th August the following minute of parties was presented:—"R..... for pursuers and W..... for defender concur—defender being present in Court—in holding the notes of evidence taken by Mr Sheriff Davidson, as in all respects formally recorded, and waive all objections thereto. They also concur in waiving all objections to the competency of the sentence, in respect of the same having been pronounced in absence of the respondent. . . ."

The Sheriff on 22nd August 1905 adhered to the Sheriff-Substitute's findings, and of new fined the defender £5 with fourteen days in which to pay, and adjudged him in default of payment to be imprisoned for ten days.

"*Note.*—Some objection was taken to the competency of the appeal on the general ground that a complaint for breach of interdict is a criminal proceeding. That is not so in the wide sense intended, although it is a proceeding of a *quasi* criminal nature (compare *Christie Millar* v. *Bain*, 1879, 6 R. 1215). In practice there have constantly been appeals to the Sheriff, just as there have been appeals from judgments in breach of interdict proceedings from the Outer to the Inner House of the Court of Session. See also in illustration of principle *Magistrates of Portobello* v. *Magistrates of Edinburgh*, 1882, 10 R. 130. As the case was presented to me, however, it would have been impossible to deal with the merits, because the sentence sought to be reviewed was pronounced in absence of the defender, and because the notes of evidence were not taken in any form recognised in the Ordinary Court. I have thought, with some hesitation, that both of these objections are obviated by the consent of parties embodied in the joint-minute. The parties are not unaware of the effect of that minute, the case of *Dykes* v. *Merry & Cuninghame*, 1869, 7 Macph. 603, having been referred to by the pursuers' procurator in the course of the debate.

"Accordingly, I have considered the arguments of parties upon the merits of the petition for breach of interdict, which are quite distinct from the merits of the petition for interdict, which has now ceased to exist as such. . . . I concur in Sheriff Davidson's remarks in his note, and I think that on the whole he has taken the right view of the position. It is matter for regret, however, that the pursuers should have been obliged to resort to this kind of proceeding under the very peculiar lease which is the subject of the

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leading action. Of course nothing can be said now of the merits of that action, upon which to a great extent the appellant's argument in this appeal was founded. I agree with the Sheriff-Substitute in regarding such argument as irrelevant, and holding it indispensable to the proper administration of justice that a subsisting interdict shall be obeyed even when it is one which, if all the circumstances had been known, the Court might not have granted.

"In the circumstances I think the defender is sufficiently punished by the fine and expenses in the judgment under review, and I allow no expenses in the appeal. I adhere to the judgment of the Sheriff-Substitute."

The defender appealed, and argued — 1. The appeal was competent. The fact that the full notes of evidence had not been printed did not make the appeal incompetent if the ground of appeal was fundamental irregularity in procedure. Even interlocutory judgments could be appealed to that Court when irregularities in procedure had taken place—*Miller* v. *Crawfurd*, January 15, 1881, 8 R. 385, 18 S.L.R. 247. And the Court could entertain appeals against judgments if irregularity had occurred, even though the merits could not be entered upon—*Bone* v. *School Board of Sorn*, March 16, 1886, 13 R. 768, 23 S.L.R. 537. The case of *Dykes* v. *Merry & Cuninghame*, March 4, 1869, 7 Macph. 603, 6 S.L.R. 705, was distinguished from the present, as there the penalty was a pecuniary one with no alternative of imprisonment, and the proceedings before the Sheriff-Substitute were regular. In the present case the proceedings were irregular, and no consent of parties could validate them — Mackay's Manual, p. 64. 2. The Sheriff's judgment should be quashed. Complaint for breach of interdict should be to the Court of Session. Further, the fact that the interdict was from the beginning irregular was a good ground of appeal. The cases of *Gray* v. *Petrie*, March 10, 1849, 11 D. 1021, and *Anderson* v. *Conacher*, December 20, 1850, 13 D. 405, showed that decerniture for a fine with imprisonment in default was incompetent in the defender's absence. The case of *Walker* v. *Junor*, July 3, 1903, 5 F. 1035, 40 S.L.R. 745, was distinguished by the fact that there there was no question of imprisonment.

Argued for the pursuers and respondents —1. The appeal was incompetent. By the minute as to the evidence the case had been taken *extra cursum curiæ*, and the Sheriff was constituted an arbiter from whom no appeal was possible—*Dykes* v. *Merry & Cuninghame*, *cit. sup.* 2. The judgment should stand. The pursuers had followed the usual practice in applying to the Sheriff Court in a case of breach of its interdict, and the jurisdiction of that Court was privative—*Monro* v. *Robertson's Trustees*, June 24, 1834, 12 S. 788; Dove Wilson's Sheriff Court Practice, 4th ed., p. 442; M'Glashan's Sheriff Court Practice, 2nd ed., . 52. The present appeal was not therefore on a question competent for the Court of Session. The real question in this case was not whether the interdict should have been granted in the Sheriff Court, but whether the order of that Court should be obeyed. As to the absence of the defender when fine and imprisonment were decerned, the case of *Walker* v. *Junor*, *ut supra*, showed that the Court in such proceedings could fine competently in the absence of the defender. The appeal should be dismissed. The cases of *Brown* v. *Thomson*, July 20, 1882, 9 R. 1183, 19 S.L.R. 838, and *Anderson* v. *Hunter*, January 30, 1891, 18 R. 467, 28 S.L.R. 324, and *Henderson* v. *Maclellan*, May 23, 1874, 1 R. 920, 11 S.L.R. 531, were also quoted.

At advising—

LORD PRESIDENT—This is an appeal from the Sheriff Court of Lanarkshire at Glasgow in a petition to ordain the defender to appear and to find that he had committed a breach of interdict, and to sentence him to fine or imprisonment. If it had been in the Supreme Court it would have been called a petition and complaint.

The pursuer did not appear personally in answer to the citation. The matter was gone into in his absence, and the Sheriff-Substitute found that a breach of interdict had been committed, fined the defender £5, and failing payment within ten days sentenced him to imprisonment for ten days, and found him liable to the pursuers in expenses. Against that an appeal was taken to the Sheriff. No notes of the evidence taken before the Sheriff-Substitute had been formally recorded at the time, and parties put in a minute holding the notes of evidence taken by the Sheriff-Substitute as in all respects formally recorded and waiving all objections thereto, and also waiving all objections to the competency of the sentence in respect of the same having been pronounced in absence of the respondent. The Sheriff came to the same conclusion as the Sheriff-Substitute on the merits. He held that he could not go into the question raised in the action of interdict out of which this petition took its rise, and he then repeated the finding of the Sheriff-Substitute and again fined the defender to the same extent as before.

The Sheriff mentioned that he could not have taken up the appeal if it had not been for the minute which had been lodged, and he warned the parties as to the effect of that minute as laid down in the case of *Dykes* v. *Merry & Cuninghame*, 7 Macph. 603.

The first question raised now is as to the bearing of that case, the respondents arguing that this proceeding having been taken *extra cursum curiæ* by the minute, and the Sheriff having been thereby constituted an arbiter between the parties for the final disposal of the case, no appeal was according to that decision competent. I do not think the case of *Dykes* can possibly have any effect in a *quasi* criminal proceeding like this. Parties may be able by paction to take a case *extra cursum curiæ* and

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constitute a judge an arbiter of civil rights between them. But they cannot by minute appoint any person an arbiter to pronounce a sentence of fine or imprisonment. I think the case on which this objection is based has nothing to do with the matter.

We have therefore to consider the case on the merits. The questions raised are three. First—Are the proceedings here taken competent in the Sheriff Court? There can be but one answer to that, and the reports supply numerous cases in which it has been exercised.

The second question is—Was the decision of the Sheriff-Substitute right that he could not look at the proceedings in the action of interdict or consider who was in the right there? I am of opinion that the Sheriff-Substitute was clearly right. Persons are not entitled to disobey an order made by the Court and then to claim to show that the Court ought not to have made the order.

The third question is whether this is a bad decree because it imposed a fine on the respondent without him being present. The test of that matter is this—could the present appellant have suspended the decree by which he was fined. I hold that he could not. The ground of the argument is that persons in criminal cases cannot be sentenced in their absence without special provision therefor in the statute which creates the offence. But this is not a criminal proceeding, but a method by which the Court protects its own authority from contempt. It is usual to summon the person charged with contempt to the bar; but I think that Lord President Inglis put that matter, not on any duty to the respondent, but on the view that this being a matter of public interest, it was proper to insist on the person being present. The rule is not universal, because there was cited at any rate one case in which the person charged was not at the bar, the complainer saying that he did not desire him to be brought there. If it is a right of the respondent it could not have been waived by the complainer.

There is another reason why a criminal court does not sentence a person unless he is present. It vindicates its authority by fugitation. But a civil court cannot fugitate, and therefore it seems to me to be out of the question that the court should not be able to vindicate its authority simply because the respondent resorts to the expedient of staying away. I cannot say I think it makes the decree in any way vitiated that the respondent was not present.

I am therefore for refusing the appeal.

LORD M'LAREN—I concur with your Lordship's judgment.

LORD PRESIDENT—Lord Kinnear, who was present at the hearing, also concurs in the judgment.

The Court dismissed the appeal.

Counsel for Defender and Appellant—Craigie, K.C.—A. M. Stuart. Agent—Alexander Ramsay, S.S.C.

Counsel for Pursuers and Respondents—Hunter, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

REGISTRATION APPEAL COURT.

Monday, December 18.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

EMMERSON *v.* OLIVER.

Election Law—Household Franchise—Occupation for Twelve Calendar Months—Entry on First Day of the Twelve Months—Disqualification of Occupier—Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 3—*Representation of the People Act* 1884 (48 *Vict. c.* 3), *secs.* 2 *and* 7 (4).

The tenant of a house situated in a county entered on his tenancy on 1st August 1904, and claimed at a Registration Court held in October 1905 to be enrolled as a voter in respect thereof. *Held* that the claimant was not qualified by possession for "not less than twelve calendar months next preceding the last day of July," as required by statute, his possession having been one day short of that period.

Waddell v. *Macphail*, December 2, 1865, 4 Macph. 130, 1 S.L.R. 50, *followed*.

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. cap. 48), sec. 3, enacts—"Every man shall . . . be entitled to be registered as a voter, and, when registered, to vote at elections for a member or members to serve in Parliament for a burgh, who, when the Sheriff proceeds to consider his right to be inserted or retained in the register of voters, is qualified as follows—that is to say . . . (2) Is and has been for a period of not less than twelve calendar months next preceding the last day of July an inhabitant-occupier as owner or tenant of any dwelling-house within the burgh. . . ."

The Representation of the People Act 1884 (48 Vict. cap. 3), sec. 2, establishes a uniform household franchise at elections in all counties and burghs throughout the United Kingdom, and provides that every man in possession of a household qualification in a county in England or Scotland shall be entitled to be registered as a voter, and when registered, to vote. Section 7 (4) enacts—"The expression 'a household qualification' means, as respects Scotland, the qualification enacted by the third section of the Representation of the People (Scotland) Act 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland. . . ."

This was an appeal by way of special case stated by the Sheriff of Roxburgh, Berwick, and Selkirk (CHISHOLM) from a decision at a Registration Court held by him at Hawick on 4th October 1905.

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The facts stated by the Sheriff in the case were—"At a Registration Court for the county of Roxburgh held by me at Hawick on 4th October 1905, George Emmerson, Whitrope, Riccarton Junction, claimed to be enrolled as tenant of a house at Whitrope aforesaid, which claim was objected to by Thomas Henry Armstrong, Solicitor, Hawick, as mandatory for John Oliver, Solicitor, Hawick, a voter on the roll. The facts are that Emmerson entered on his tenancy of the house on 1st August 1904, and has been in continuous occupation thereof until now. There is no written lease. It is also to be noted that the 31st July in the year 1904 was a Sunday. I held that there had not been occupation for twelve months previous to 31st July 1905 as required by the statute (see *Waddell* v. *Macphail*, 1 S.L.R. 50), and further, that the provisions of section 35 of the Burgh Voters Registration Act 1856 (19 and 20 Vict. c. 58) do not apply to the case."

The question of law for the decision of the Court of Appeal was—"Was there a tenancy giving the household qualification?"

Argued for the appellant—The occupancy here was sufficient. The terms of the statute fell to be liberally construed so as to afford a qualification if the occupation was begun at any time during the first day of August. It would be too strict a reading of the statute to exclude the appellant here. The case of *Waddell* v. *Macphail*, December 2, 1865, 4 Macph. 130, 1 S.L.R. 50, relied on by the Sheriff, was a very old case.

Counsel for the respondent was not called upon to reply.

LORD KINNEAR—This is a very short point. If there was any ambiguity in the terms of the statute I could understand the argument that it should be liberally interpreted.

It would, however, be impossible to fix a point of time more explicitly than the statute has done, and we have no power to extend the time fixed.

The statute requires twelve months' occupancy prior to 31st July, and the question here is whether the appellant is disqualified by the fact that his occupancy was for a day less than the required period. I think there is no doubt that he is disqualified. The point has been already settled by authority in the case of *Waddell* v. *Macphail* (4 Macph. 130), referred to in the case stated by the Sheriff, and, apart from authority, I do not see how we can find that a day less than twelve months is not less than twelve months. I am therefore of opinion that the question must be answered in the negative, and the Sheriff's judgment affirmed.

LORD STORMONTH DARLING and LORD JOHNSTON concurred.

The Court answered the question in the negative and dismissed the appeal.

Counsel for the Appellant—A. M. Anderson. Agent—Alexander Ramsay, S.S.C.

Counsel for the Respondent—G. Moncrieff. Agent—William Boyd, W.S.

Monday, December 18.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

M'KEE *v.* ORR.

Election Law — Process — Procedure — Adjournment — Lodger Franchise — Failure of Claimant to Appear after Citation — Motion for Adjournment in order to again Cite the Claimant Refused.

A person claiming to be enrolled as a voter under the lodger franchise, whose claim was objected to, was cited under warrant of the Sheriff-Substitute to appear at a diet of the Court. He failed to appear, and a motion for an adjournment in order that he might be again cited was refused by the Sheriff-Substitute. *Held* that the granting of an adjournment depending upon the reasonableness of the motion was a matter for the discretion of the Sheriff; and that, as the stated case contained no material for the Court to decide whether the motion was reasonable or not, the Sheriff's judgment must be upheld.

Election Law—Evidence—Lodger Franchise—Claim and Declaration—Presumption in Favour of Claimant's Qualification—Rebutting the Presumption on Facts Ascertained from Valuation Roll—Registration Amendment (Scotland) Act 1885 (48 *and* 49 *Vict. cap.* 16), *sec.* 14.

The Registration Amendment (Scotland) Act 1885 (48 and 49 Vict. cap. 16), sec. 14, enacts—"In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification."

Where a claimant under the lodger franchise, duly cited, failed to appear, the Sheriff found that the *prima facie* evidence of the qualification, contained in his declaration was rebutted by facts disclosed by the assessor from the valuation roll, and there being no other evidence in support of the claim, rejected it. *Held* that there being no question raised as to the competency of the evidence on which the Sheriff proceeded, and his decision being on a matter of fact, the Court could not competently interfere.

This was an appeal from a Registration Court, held at Port-Glasgow on 4th October 1905, by James M'Kee against George Orr.

The facts stated by the Sheriff-Substitute (NEISH) were—"At a Registration Court for the burgh of Port-Glasgow held by me at Port-Glasgow, on Wednesday, 4th October 1905, James M'Kee, rivetter, 5 Laird Street, Port-Glasgow, claimed to be enrolled as a voter in the burgh in respect of a lodger qualification. . . .

"George Orr, slater, Huntly Place, Port-Glasgow, a voter on the roll of the burgh, objected to the name of the said James M'Kee being added to the roll, and cited

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the claimant to appear at the diet fixed for the Registration Court. The citation . . . proceeded upon a warrant from the Sheriff, and was duly served upon the claimant.

"The claimant did not appear in answer to the citation.

"The claimant's agent moved for an adjournment to a subsequent diet in order that the claimant might be again cited to appear, and I refused the motion. The objector moved me to reject the claim.

"The Assessor stated that the annual value of the house 5 Laird Street, as appearing in the valuation roll, was £8.

"No proof was led on either side.

"I found in fact that the *prima facie* evidence in favour of the claimant's qualification, which is given by sec. 14 of the Act 48 and 49 Vict. c. 16, to the declaration of the claimant subscribed to the claim, was rebutted by the facts that the house consisted of only two apartments; that the house was entered in the valuation roll as of the yearly value of £8; and that the claimant had failed to appear in answer to the citation.

"Accordingly, there being no evidence in support of the claim before me, I rejected the claim."

The questions of law for the opinion of the Court were—"(1) Was I entitled to find that the statutory presumption in favour of the claim had been rebutted? and (2) Was I bound to grant the adjournment asked by the claimant's agent?"

It was further stated that the decisions in twenty-six other similar claims would be ruled by this case.

Argued for the appellant—The Sheriff was always bound to grant an adjournment when asked to do so. The appellant's agent showed by the fact of asking for an adjournment that there was more substance in the claim than appeared on the face of it, and that the appellant's evidence was material to the cause—*Connolly* v. *Kyle*, November 26, 1903, 6. F. 236, 41 S.L.R. 102; *Dalgleish* v. *Dodds*, December 12, 1894, 22 R. 198, 32 S.L.R. 156. It did not necessarily follow from the fact that the house was entered in the valuation roll at less than £10 that the annual value of the appellant's lodgings in the house was less than £10. The considerations governing the annual value of the house and the lodgings respectively were entirely different. In any case, the entry in the valuation roll was not conclusive evidence of the value of the lodgings—*Kellie* v. *Little*, January 19, 1897, 24 R. 379, 34 S.L.R. 329.

Argued for the respondent—The matter of adjournment was one entirely in the discretion of the Sheriff. There was no statement in the case to lead to the conclusion that the Sheriff had acted unreasonably.

LORD KINNEAR—I think that this appeal must be refused and the deliverance of the Sheriff-Substitute supported. I suppose that it is extremely reasonable that the Sheriff on cause shown should grant an adjournment, but the stated case sets out no ground which, considering the matter for ourselves, we could hold to be decisive of the reasonableness of the motion. It does not explain why the first citation was not obeyed, nor what was the nature of the evidence that it was proposed to lead, nor why that evidence could not be produced on the day fixed for the inquiry. We have no means of saying whether this was or was not a case for adjournment, and therefore we could not refuse to support the deliverance on the ground that an adjournment ought to have been granted, without laying it down as matter of law that such a motion must be granted in every case where it is made, whether the Sheriff considers that it is reasonable or not. I am not prepared to lay down any such rule of law. It must always be a question for the consideration of the Sheriff whether reasonable cause has been shown for an adjournment. If any such cause was stated we do not know what it was, and therefore we cannot say that the Sheriff was wrong in disregarding it.

If the question as to the adjournment is disposed of, the only other matter is whether the Sheriff-Substitute was justified in holding that the *prima facie* evidence of the claim had been rebutted. The only question of law having any bearing on that point is whether it was competent for the Sheriff-Substitute to take the valuation roll into account at all. If it was, his decision that when comparing the statement in the claim with the valuation roll the value alleged by the claimant is not made out, is a decision on matter of fact with which we are not entitled to interfere. If the Sheriff comes to his decision on incompetent evidence, there is no doubt we may review his judgment, but in this case the inference is one of fact and involves no question of law.

The result I have arrived at is to recommend your Lordships to answer the first question in the affirmative and the second question in the negative.

LORD STORMONTH-DARLING—I entirely concur.

LORD JOHNSTON—I think this is a matter more of the conduct of business in the Registration Court than of the competency as matter of right of the Sheriff granting or refusing an adjournment. I think the case merely illustrates what I know from experience is the case in many Registration Courts. For, as noted in the case, there were upwards of twenty claims in the same position as the present, all involving the leading of evidence which would have occupied considerable time. In a place like Port-Glasgow it is customary that the claimants are represented merely by their agents until and unless it appears that there is a question which involves the taking of evidence. There generally are a large number of claims to be dealt with which do not require the claimant's presence, but are disposed of merely on information afforded by the assessors in presence of the agents. But I think it is a matter of general understanding that, although there are formally no first and second diets, where there is a

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substantial objection requiring the laying of evidence before the Court, the Sheriff will adjourn the case to a subsequent date when such evidence can be taken, as it is quite competent for him to do. Otherwise the progress of the Sheriff in disposing of the routine work of the Registration Court would be impeded. But that is a matter entirely for the Sheriff's own control in dealing with the business of his Court, and it is not for us to dictate to him how he should proceed. I think, however, that there should be a definite understanding as to the conduct of business in each Registration Court, to which parties and agents can then conform. But there is nothing in this case, so far as I can see, to warrant us in saying that the Sheriff has acted incompetently. I therefore agree with the judgment which your Lordships propose.

The Court answered the first question in the affirmative and the second question in the negative, and refused the appeal.

Counsel for the Appellant — Macaulay Smith. Agent—J. Struthers Soutar, Solicitor.

Counsel for the Respondent—Blackburn —Cochran Patrick. Agents — Russell & Dunlop, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, January 24.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord M'Laren, Lord Kyllachy, Lord Stormonth Darling, Lord Low, and Lord Pearson.)

HART *v.* HUNTER.

Justiciary Cases—Complaint—Relevancy—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 320—*Receiving Money for Steerage Passage without Giving Contract-Ticket—Money not Stated to have been Received for a Specified Passage at a Given Time in a Specified Ship.*

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), section 320, enacts —"(1) If any person, except the Board of Trade and persons acting for them and under their direct authority, receives money from any person for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Isles to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract-ticket signed by or on behalf of the owner, charterer, or master of the ship, and printed in plain and legible characters. (2) The contract-ticket shall be in a form approved by the Board of Trade and published in the *London Gazette*, and any directions contained in that form of contract-ticket, not being inconsistent with this Act, shall be obeyed as if set forth in this section. (3) If any person fails to comply with any requirement of this section he shall, for each offence be liable to a fine not exceeding fifty pounds."

A complaint set forth that the respondent had been guilty of offences against the above-quoted section by receiving money for steerage passages from Glasgow, or some other British port, to ports in America without giving in return therefor the required contract-tickets. It did not state that the money was received for a specified passage at a given time on a specified ship, and an objection to the relevancy was taken on that ground.

Held that the complaint was relevant.

Morris v. *Howden* [1897], 1 Q.B. 378, *commented on* and *considered.*

This was an appeal by way of stated case from the Sheriff Court of Lanarkshire at Glasgow, in which James Neil Hart, Procurator-Fiscal, the complainer in a complaint brought in the said Sheriff Court, was appellant, and Graeme Hunter, 9 Kelvinside Gardens, East, Glasgow, the respondent in the complaint, was respondent.

The complaint, which was brought under the provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881 and the Criminal Procedure (Scotland) Act 1887, was in the following terms:—"That Graeme Hunter, 9 Kelvinside Gardens, East, Glasgow, has been guilty of offences within the meaning of the Merchant Shipping Act 1894, particularly section 320 thereof, in so far as he did, on the dates mentioned in the inventory subjoined, in the office then occupied by him at 23 Drury Street, Glasgow, he not being the Board of Trade or a person acting for them and under their direct authority, receive from each of the persons mentioned in said inventory the sums of money mentioned opposite their names respectively for or in respect of their passages as steerage passengers in a ship or ships to the complainer unknown, proceeding within a week or other short period after said dates respectively from Glasgow or some other British port to ports in Canada or in America, without giving to each of said persons a contract-ticket signed by or on behalf of the owner, charterer, or master of said ship or ships, contrary to said section 320 of said Act, whereby the said Graeme Hunter is liable for each of said offences to a fine not exceeding £50.

1905. *Inventory referred to.*

5 June.	Gianis Mostrios, 6 Carrick Street, Glasgow - -	£3	0 0
14 ,,	George Mahearas, 6 Carrick Street, Glasgow - -	3	0 0
14 ,,	Joseph Clemance, 38 Franklin Street, Glasgow - -	6	10 0
14 ,,	Anthony Griks, 13 Muir Park Rows, Bellshill -	6	10 0
19 ,,	Robert Muir, 68 Hawthorn Street, Possilpark, Glasgow	0	10 0

. . . . . ."

The case stated by the Sheriff-Substitute (MACKENZIE) contained the following statement—"At the calling of the case the

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respondent appeared, and the complaint having been read over to him, he stated the following objection to the relevancy thereof, viz.—That it is not stated that the money received by him was paid by any of the parties referred to in the complaint for or in respect of a specified passage commencing at a given time in a specified ship. I sustained said objection, following the case of *Morris* v. *Howden* [1897], 1 Q.B. 378, and dismissed the complaint."

The question of law for the opinion of the Court was—"Was the complaint relevant?"

Argued for the appellant—Section 320 of the Act was enacted for the purpose of protecting emigrants and securing that their money should not be taken until they were secured by contract in certain advantages during the voyage, and against undue detention prior to embarkation. It was never suggested that shipowners were in the habit of defrauding emigrants, but that unauthorised persons sometimes did so. It was just the essence of the offence that no definite ship, passage, or time of sailing were specified. The requirements of a specified passage commencing at a given time in a specified ship were not found in the statute but in the form of contract-ticket in use—Scrutton on Merchant Shipping Act, p. 714. Under the statute the offence was to sell steerage passages and take money for them without giving there and then (not at any future time) a contract-ticket in the form that the Board of Trade should prescribe from time to time. On the construction put by the Sheriff-Substitute on the decision in *Morris* v. *Howden* [1897], 1 Q.B. 378, a passage-broker could evade the statute by merely omitting one of the particulars required by the Board of Trade. *Morris* v. *Howden* did not directly raise this question. The dicta of the Judge in that case, founded on by the Sheriff-Substitute, were *obiter* and unsound. The contract in that case was for a slump sum to place a lad on a farm in Ontario. The obligation to get him there was no doubt incidentally included, but only by a passage not worse than a second-class steamship passage, not necessarily a steerage passage at all.

Argued for the respondent—The offence charged here was statutory and must be judged strictly according to the terms of the Act. Plainly section 320 was only meant to apply to an owner, charterer, master of a ship, or someone acting on behalf of these, viz., someone who was in a position to give a contract-ticket in return for money. It could not apply to a person acting as agent for the intending passenger. It might apply to a passage-broker who acted as agent for the ship. But the respondent here was not a broker and had no licence as such. There could be no contract until the intending passenger and the agent or owner of the ship came together, and therefore no breach of the provisions of the statute. What the respondent undertook to do here might have been done by an ordinary messenger. The decision in *Morris* v. *Howden* was in point, and covered this case, and the reasoning of the judgment there was sound. Counsel referred to Maclachlan on Shipping, p. 350.

At advising—

LORD JUSTICE-GENERAL—The complaint in the present case states that the respondent, Graeme Hunter, Glasgow, has been guilty of offences within the meaning of the Merchant Shipping Act 1894, particularly section 320 thereof, in so far as he did on the dates therein mentioned in the inventory subjoined and at the place stated, he not being the Board of Trade or a person acting for them or under their authority, receive from each of the persons mentioned in the said inventory the sums of money opposite their names respectively for or in respect of their passages as steerage passengers in a ship or ships to the complainer unknown, proceeding within a week or other short period after said dates respectively from Glasgow or some other British port to ports in Canada or America, without giving to each of said persons a contract ticket signed by or on behalf of the owner, charterer, or master of said ship or ships, contrary to said section 320 of the said Act, whereby the said Graeme Hunter is liable for each of said offences to a fine not exceeding £50. The inventory appended sets forth the particulars of certain sums of money taken from individuals therein specified. At the calling of the case the respondent objected to the relevancy of the case in respect that it was not stated that the money received by him was paid by any of the parties referred to in the complaint for or in respect of a specified passage commencing at a given time in a specified ship. The learned Sheriff-Substitute sustained that objection, and the question before your Lordships on this appeal is whether the complaint was relevant. As the appeal is admittedly taken to call in question the soundness of the judgment pronounced in the case of *Morris* v. *Howden* ([1897], 1 Q.B. 378), and as your Lordships will always view with respect the judgment of an English Court on an imperial statute, we thought it well to have the case argued before a full bench. The case of *Morris* v. *Howden* was a complaint not only, as here, under the 320th section of the Merchant Shipping Act but also under the 342nd section, that is to say, for acting as a passage broker without a licence. It was, however, one and the same set of facts which raised the complaint on both sections. I may say at once that I see no reason to doubt that the actual decision in *Morris* v. *Howden* was sound. The facts were these as given in the report. The respondent agreed with J. Craven, in consideration of £22, to place the latter's son as a farm pupil in Western Ontario, Canada. The terms of the contract were contained in a receipt given by the respondent on payment of the £22, and were, so far as material, as follows:—"Received from Mr James Craven, of &c., the sum of £22, the same being a premium, for which we undertake to place his son, Mr E. W. Craven, who is now seventeen years of age, as a farm pupil in Western Ontario, Canada. . . .

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It is distinctly understood that the above-named sum includes second-class steamship passage from Liverpool to Quebec, and second-class rail to Thamesville, together with the charges of this association for placing, and for the after supervision of the said E. W. Craven." Now section 342 makes it illegal to act as a passage broker without a licence. What a passage broker is is defined by section 341. It is one who sells, &c., steerage passages in a ship going out of Europe and not in the Mediterranean. Section 320—I quoted it shortly before from the complaint—deals also with passages as a steerage passenger. If now we look at the contract in *Morris* v. *Howden* we find nothing about a steerage passenger. It was a contract by which, in respect of a slump sum, the contractor bound himself to place the young man in a farm in Canada. No doubt it included the obligation to get him there, but it would have been implemented by the giving of any passage not worse than a second class steamship passage, and that right might have been implemented in any way, not necessarily by the providing of a steerage passage at all. It is impossible, however, to deny that the grounds on which Mr Justice Bruce, who delivered the judgment of the Divisional Court, based his judgment, do go to cover the objection which the Sheriff-Substitute has given effect to. His Lordship says on p. 381:—"Looking at the other sections of the statute bearing upon this matter, and to the forms contained in the schedule to the Act relating to passage brokers and to steerage passengers, I think that the Act referred to means a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage." Again, on page 383, he says:—"I also think that the magistrate was right in refusing to convict under section 320. The defendant did give to Craven a contract ticket duly signed on behalf of the owners of the ship. But further, I am not satisfied that he received money from Craven for or in respect of a passage in any ship within the meaning of section 320. It seems to me to be clear that this section must mean a receipt of money paid for a specified passage commencing at a fixed time in a named ship." In the present case no complaint has been made under sec. 342, and I do not think we can speculate why the complaint was not made under that section. The section is only therefore so far in question in that it is part of the general scheme of the statute upon these matters. Now, what is the scheme of the statute as it is to be gathered from taking the effect of its provisions as a whole? I do not think it can be said to be doubtful. It is to protect a class of people who cannot protect themselves, namely, poor emigrants, to protect them not only against actual embezzlement—although confining the business to a class of licensed brokers who have to give security is a great safeguard in that matter—but also against having to hang on at the port of embarkation waiting for a ship to start and without money to maintain themselves during the period of detention; to protect them while at sea and at the port of disembarkation by providing for their accommodation, food, and proper, not too hurried, discharge. I gather this from the sections of the Act which extend from sec. 289 to sec. 368 inclusive, and sec. 3 of part iii. of the Act entitled "Emigrant Ships." The sections up to 319 inclusive deal with the various requirements on board the ship itself. Sections 327 to 330 deal with the provisions as to maintenance at port of departure and arrival, and these sections provide for the securing of the benefit to an emigrant who is on board the ship, but to make the scheme complete it was necessary to provide that he should be sure to have the right of getting on board the ship. It is here that sec. 320 comes in. It admittedly applies only to contracts for this class of passages, and so applying makes it an offence for anyone to receive money from the intending emigrant unless he at the same time hands him a contract ticket in a form prescribed by the Board of Trade. The error into which, in my judgment, Mr Justice Bruce fell was in considering the section of the Act in the light of the particular form at the moment provided by the Board of Trade. It is true that the actual form provided by the Board of Trade necessitates the specification of a named ship on a named date. It need not have done so; it might be altered to-morrow so as not to do so. If it is as it is, it must be because the Board of Trade thinks it better that no money should be allowed to pass until the contractor for the emigrant is in a position to hand him a ticket where all these things are made certain. That is within their right, and I have no power, even if I wished to, of revising their discretion. It must always be kept in mind that sec. 320 does not strike at a prospective contract. Persons are still free to make such contracts if they please, but money must not pass unless the person contracting is in the position to hand the emigrant the proper contract ticket. It needs no imagination to see what a practical protection to the class we are considering such a provision affords, or to see that if the view of Mr Justice Bruce is right it is easy indeed to get behind what is in my opinion the determinate object of the statute. I need not further allude to sec. 342 and the passage brokerage sections except to say that these provisions seem to me to bear out the *enixa voluntas* of the statute in the same direction. Some illustrations were put in argument by the learned counsel for the respondent as to the impossibility of holding this view without at the same time making it impossible to send a messenger to take such a ticket. It was alleged, *exempli gratia*, that if a person sent a commissionaire to the office of Messrs Cook to buy such a ticket and handed him the money, the commissionaire might be convicted of an offence. They also referred to the illustration given by Mr Justice Bruce of a father taking a ticket for his son. It does not seem to me that these illustrations create any diffi-

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culty. To receive the money "in respect of a passage" obviously points to the receipt of the money by a person who, in respect of the money, engages either as principal or agent of a principal to supply a passage. In the case put of the commissionaire, the commissionaire makes no contract to supply a passage. So far as a contract of passage is concerned, if he is an agent at all—in truth I think he is a mere messenger—he is an agent for the buyer of the passage, not for the seller. In the case of the father he is in no sense approaching his son as an agent or broker. For these reasons I cannot agree with the dicta of Mr Justice Bruce, and I am of opinion that the complaint here was relevant. On the facts the respondent may have a good defence, for it is obvious that the prosecutor must prove, *exempli gratia*, in the first instance, that the £3 which was received from Gianis Mostrios was paid to the respondent in respect of a steerage passage or other passage in an emigrant ship to a port out of Europe and not in the Mediterranean. If he does not do that he fails. If he does prove it, and proves also that no contract ticket in the form prescribed was at the same time supplied, then I think there was an offence under section 320, although the passage covenanted for was a passage generally, without mention of the exact ship or time of voyage. I am therefore for answering the question in the affirmative.

LORD JUSTICE-CLERK—Your Lordship has so clearly expressed my view in this case that I simply express my concurrence with what your Lordship has said.

LORD M'LAREN—I concur both with the decision and the reasons given by your Lordship.

LORD KYLLACHY—I also concur.

LORD STORMONTH DARLING—The Sheriff-Substitute has decided against the relevancy of this complaint solely on the authority of *Morris* v. *Howden*, [1897] 1 Q.B. 378.

Now that was a case stated under the Summary Jurisdiction Acts, raising the question whether, upon the facts stated, the respondent, who was secretary of an association for placing persons as farm pupils in Canada, was guilty either of a contravention of sec. 342 of the Merchant Shipping Act 1894 in respect that he had acted as a passage-broker without holding a licence as such, or of a contravention of sec. 320 in respect that he had received money for a steerage passage in a ship without giving the person who paid the money a contract ticket signed by the owner, charterer, or master of the ship. The first of these questions was the more important of the two and was the question chiefly dealt with in the opinion of Bruce, J., with whom Wright, J., concurred. The material facts were that on 12th May 1896 one Craven paid to the respondent the sum of £22 as a premium for placing Craven's son as a farm pupil in Canada, this payment to include 2nd class steamship passage from Liverpool to Quebec and 2nd class rail to Thamesville, together with the charges of the association for the placing and the after supervision of the lad. On May 18th the respondent obtained from Cook & Son, who were duly licensed passage-brokers, a contract ticket duly signed on behalf of the owners of the s.s. Mongolian and forwarded it to Craven. The respondent paid £8, 18s. 11d. for this ticket out of the £22 paid to him by Craven, and did not get any profit or commission whatsoever in connection with the procuring of the ticket. On these facts the judges held that the respondent had purchased the ticket as agent for Craven, exactly as a friend might have done, and that this could not be said to be selling or letting or being "anywise concerned in the sale or letting of steerage passages" in the sense of sec. 341 or sec. 342 of the statute.

I do not think that any exception can be taken to this ground of judgment taken by itself. At all events we are not called upon to consider any question under sec. 341 or sec. 342. But then the learned Judges went on to hold that the magistrate was right also in refusing to convict under sec. 320, not merely because the respondent had given to Craven within a few days after the payment of the money a duly signed contract ticket (which would probably by itself have been sufficient to justify acquittal), but because the money referred to in the section must be money paid for a specified passage commencing at a fixed time in a named ship.

Now, much as we should always desire to follow a judgment of the Court of King's Bench on the construction of an imperial statute, I think that if these conditions were to be read into sec. 320 they would unduly limit its scope. The section itself says nothing about name of ship or time or place of sailing. The mischief intended to be struck at seems to be the taking of an emigrant's money without there and then giving him the proper credential in statutory form entitling him to the benefits secured to him by the statute, and that whether he is or is not sharp enough to stipulate for particulars of the passage. If no advantage is intended to be taken of him, and if it is impossible to supply a contract ticket without these particulars, it would be easy enough to decline taking payment of his money till the particulars have been ascertained and the ticket has been procured. We do not of course foreclose any answer which the respondent may have upon the facts, but on the question of relevancy I think we must hold that the objection was bad and ought to have been repelled.

LORD LOW—I am of the same opinion.

LORD PEARSON—I agree.

The Court answered the question in the affirmative.

Counsel for the Appellant—Solicitor-General (Ure, K.C.)—Orr Deas. Agent—W. S. Haldane, Crown Agent.

Counsel for the Respondent—A. J. Young—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

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COURT OF SESSION.

Thursday, February 1.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

EDINBURGH AND LEITH HIRING COMPANY, LIMITED, AND OTHERS *v.* SUBURBAN DISTRICT COMMITTEE OF MIDLOTHIAN COUNTY COUNCIL.

Reparation—Obstruction on Public Highway — Lighting — Fencing — Duty of Drivers—Contributory Negligence.

An obstruction on a public highway, caused by the opening up of its east half for a length of 100 yards for the laying of drain pipes, was on the night of an accident marked of in the following manner, viz., at the north end by three red lamps, one in the centre of the road, one at the wall, and one halfway between; at the south end by a red lamp in the centre of the road and a white lamp at the wall; along the centre of the road by a line of white lamps extending from the one central red lamp to the other. At the south end a cord was stretched between the uprights on which the lamps were hung.

The driver of a van approaching from the south on the near or west side of the road saw the lights, and after consulting two men who were sitting beside him, but without sending either ahead to investigate, and without pulling his horses to a walk, drove on at an "ambling" trot between the red and white lights through the cord and into the trench twelve feet beyond. He believed that the white light next the wall indicated that the road was safe on that side.

Held that he had been guilty of contributory negligence sufficient to exclude a claim for damages at the instance of his employers against those responsible for the obstruction.

Observations on the lighting and fencing of obstructions on highways and the duties of drivers.

This was an action in which the Edinburgh and Leith Hiring Company, Limited, and others, sued the Suburban District Committee of the County Council of Midlothian in the Sheriff Court of the Lothians and Peebles at Edinburgh, for the sum of £63, 5s. 6d., representing the damage sustained by a van and two horses belonging to the pursuers in an accident, for the occurrence of which they maintained the defenders were responsible.

The facts of the case are fully stated by the Lord Justice-Clerk and by Lord Low in their opinions.

The defenders pleaded, *inter alia*—"(6) The pursuers' servants having by their negligence caused or materially contributed to the accident in question, the defenders are entitled to absolvitor with expenses."

The Sheriff-Substitute (HENDERSON), after a proof, on 1st June pronounced an interlocutor in which he found that the accident was caused by the fault of the defenders or those for whom they were responsible in not having the trench into which one of the horses was driven, sufficiently lighted and fenced, and granted decree for the sum sued for.

The defenders reclaimed, and argued—(1) The place was sufficiently fenced and lighted. (2) In any event the driver was guilty of contributory negligence in not either sending on a man to investigate or proceeding at a walking pace—*Fleming* v. *Eadie & Son*, January 20, 1898, 25 R. 500, 35 S.L.R. 422.

Argued for the respondents—(1) The place ought to have been fenced, and the lights were misleading. (2) The driver had shown no negligence.

LORD JUSTICE-CLERK—The facts of this case are that at a part of the road on which the pursuers' van was being driven, the off-side of the road in the direction the van was travelling in was broken up as drain pipes were being laid. The space so broken up was marked off at night by lamps, there being three red lamps at the further end, a line of white lamps down the centre of the road, with a final red lamp, and a lamp next the wall, which it appears was usually a red one, but was a white one at the time of the accident, the explanation being that the watchman had taken the red lamp to his box as it required trimming and temporarily placed a white lamp in its place. The pursuers' van driver, who had two other men on the box with him, on approaching the end where the red and white lights were visible, was in doubt as to the side he should take, and spoke of the matter to the other men, and finally resolved to cross over from his own side of the road to the off-side and to try to pass between the red lamp and the white one. He did this at a trot—one of the men describes it as an "ambling" trot—but it is I think evident from the real facts of the case, to which I shall refer later, that it was such a pace as did not admit of instant stoppage. The van being driven on past the lights, one of the horses fell into the drain, pulling the other and the van over, and one of the horses was so injured that it was necessary to kill it. The place at which the van rested after the accident was 12 feet in from the end of the space marked off by the lamps, between which the van passed.

The pursuers attribute two faults to the defenders—(1) that the use of a white light was an invitation to the driver to go to that side of the road; and (2) that the end of the opening was only formed by a piece of tarry rope stretched between the uprights on which the lamps were hung, whereas there should have been some more visible and stronger fence. If the case depended upon a decision of either of these contentions I should have difficulty in holding that the pursuers were entitled to succeed. Some evidence was brought to

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establish that on an open road a white light was an invitation to come towards it, the idea being that red lights and white lights on roads had a relation to the red and white light signals on railways. I cannot give any assent to such an idea. The use of red lights to mark off road obstructions is quite a modern use, and is by no means universal. Very frequently at this day white lights are used on roads in such circumstances, and also white lights and red lights at the same time. I have myself seen instances of both these things within the last few days. And I cannot assent to the idea that white lights on a road are in practice read or ought to be read as an invitation to go quite close to them. If so the lights of a vehicle standing on the road would be an invitation to the drivers of other vehicles to make towards them, while of course the duty of a driver is the exact opposite. He must drive so as to be well clear of them, and certainly not steer so as to try to keep close to them or pass between them.

The other point contended for viz., that there should have been a better fence at night than was provided, has much more to be said in its favour, One certainly has often seen the end of a road space closed against traffic fenced only in the way that was adopted in this case, but it certainly would be better to have something more marked than the rope which was used in this case. Whether the failure to have such a fence could be held to amount to culpable negligence I am not prepared to say. If the case turned upon that question I should have liked to have more full evidence and discussion of the point before forming a decided opinion.

But I am prepared to deal with the case upon the footing that culpable negligence could be imputed to the defenders on that ground. The question would then be whether there was contributory negligence on the part of the pursuers' servant which so contributed to the accident that occurred as to exclude the claim for damages. In my opinion there was such negligence. The driver was approaching an obstruction in the dark. He was in uncertainty as to what he should do. He adopted a course which as it happened was the wrong one. Up to that point it may be fair to say that no culpable blame could attach to him. But not being certain, and driving on in a direction in which if he was in error in any way a serious accident might happen, he was in my opinion bound to have his horses in such control and his vehicle under such conditions as regarded momentum that he could stop instantly the moment there was apparent danger. Now I said before, in detailing the facts, he went on at a trot past the two lights between which he steered. It is spoken of in the evidence as an "ambling trot," but that it must have been at a pace which did not admit of an instant stop is proved by the fact that his vehicle was found many feet forward from the end of the trench; therefore there must have been considerable way on when he entered the dangerous area. Now, after crossing over and before he entered that area he must, if he had been keeping a lookout, have seen that he had got a line of lights running parallel with his direction on his left or near side, and that crossing his path a short distance ahead there was a row of red lights. He was thus entering an oblong space enclosed between a row of white lamps, red lights crossing to the wall in front of him and the wall on his right. I cannot hold that a driver who drives into such a position at speed, so that his vehicle cannot be pulled up till it has passed 10 or 12 feet into the space, in which there is piled up debris on one side, and a deep and therefore shadowed hole on the other, is not driving negligently. If he had been driving with his horses under proper control the white light at the side of the road and the lights of his own van would have shown him that what was in front was unsafe. But he drove on, broke the rope crossing the space, and landed far in past the red and white light at the end, and so far as the evidence goes without ever trying to stop his horses at all.

In these circumstances I feel unable to hold that the plea of contributory negligence is not established. I think it is conclusively established, and I therefore would move your Lordships to alter the judgment given in the Court below and to assoilzie the defenders from the conclusions of the action.

LORD KYLLACHY—I have had difficulty in this case, but I concur in the judgment proposed.

LORD STORMONTH DARLING—I agree on the simple ground that the contributory negligence which is established against the driver is sufficient to disentitle him to damages.

LORD LOW—Between nine and ten o'clock on the evening of 25th December 1904 a coffin-van belonging to the pursuers and drawn by two horses was being driven along the public road from Lasswade to Edinburgh, which is under the control of the defenders. At a part of the road which is called the Kames Road, a drain was being laid, and upon the night in question rather more than one-half of the road was, for a distance of about 100 yards, unfit for traffic by reason of an open trench. The pursuers aver that the part of the road where the open trench was, was insufficiently lighted and fenced, and that in consequence one of the horses fell into the trench and was killed. The Sheriff-Substitute has found that the pursuers' averments in regard to the insufficient lighting and fencing of the trench have been established, and accordingly he has awarded damages to the pursuers.

Now, if the only question had been whether there was negligence in the way in which the trench was lighted and protected I should not have been prepared to differ from the Sheriff-Substitute. I think that the use of lights of different colours—a red light and a white light—at the south end of the trench, was liable to mislead—as

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it did in fact mislead—the driver of the pursuers' van. I also think that the absence of anything in the nature of a fence at the end of the trench was a source of danger. If both the lights had been red, or if the end of the trench had been guarded, as is very often done, by a batten laid across two uprights, the strong probability is that the accident would never have happened.

It seems to me, however, that the learned Sheriff-Substitute has not appreciated the extent to which the accident was due to the reckless conduct of the driver of the van. I think that gross negligence on his part, without which the accident could not have happened, has been proved. When a road is under repair, or an operation such as the laying of a drain is in progress, and the part of the road which is thereby rendered unfit for traffic is marked off by lights, great care is required on a dark night upon the part of the driver of a vehicle, however efficiently the lighting may have been done, because such lights not being sufficient to illuminate or intended to illuminate the roadway, their effect is to intensify the surrounding darkness.

Now in this case there were a number of lights. There were two at the south end of the trench—one practically in the middle of the road and the other close to the wall upon the right-hand side of the road as you go towards Edinburgh. There was also a line of lights running up the middle of the road for the whole length of the trench; and at the north end there were three red lights—one in the middle of the road, one at the wall on the right-hand side, and one between these two. Therefore one-half of the road (roughly speaking) was fenced off with a parallelogram of lights. Further, although the night was dark it was clear, and it is proved that the whole of the lights could be seen from a considerable distance by anyone approaching the place from the south. The driver himself admits that he saw the lights at the north end.

Now what the driver did was to drive at a trot between the red light and the white light which marked the south end of the trench. In other words, he drove into the part of the road which was marked off by lights. He says that he knew that a red light betokened danger, but that he always understood that a clear light indicated the proper road. He does not explain how he came to have that understanding. He does not say that anyone ever told him that a white light indicated safety, or that he had found by experience that that was the case. This much, however, is certain—he knew that there was danger ahead, but he did not know what the danger was nor precisely where it was. In such circumstances his plain duty was to proceed with the utmost caution. He should, in my opinion, have pulled his horses into a walk, and he ought not to have allowed them to advance a single step unless and until he could see what was immediately in front of them. There could have been no difficulty in doing that with the combined aid of the carriage lamps (which are not said to have been in any way defective) and the lights at the end of the trench. Instead of proceeding however, slowly and carefully—feeling his way, so to speak, at every step—he proceeded at a trot, evidently without having the least idea what was in front of him, with the result that he drove into the trench and one of the horses was killed.

Further, as it happened, the driver had it in his power to avoid even the slightest risk, because there were two men on the van with him, and if he had asked one of them to get down and see what was ahead the position of the trench on the one hand and of the open roadway on the other would have been ascertained in a few seconds.

The result, in my opinion, is that there was very clear contributory negligence on the part of the driver, and that accordingly the pursuers are not entitled to recover damages.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Appellants—Hunter, K.C. —Wilton. Agent—David R. M'Cann, S.S.C.

Counsel for the Respondents—The Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agents—Macpherson & Mackay, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WILLIAM BAIRD & COMPANY, LIMITED *v.* SAVAGE.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2) (*b*)—"*Dependants*"—*Wholly Dependent—Husband Living Apart from and Not Supporting Wife—Foreigner.*

In an arbitration under the Workmen's Compensation Act 1897, in which the widow of a workman claimed compensation from his employers on account of the death of her husband while in the course of his employment, it was proved that the deceased, who was a Pole, had resided in this country for nine months, during which period he had remitted to his wife in Poland £1. In addition to that sum the wife's means of livelihood were derived from employment as an outdoor worker, together with contributions from her relatives.

Held (1) that the wife was a "dependant" within the meaning of section 7, sub-section 2 (*b*) of the Workmen's Compensation Act 1897; (2) that she was not wholly dependent upon her husband's earnings within the meaning of the said Act.

Cunningham v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Sneddon* v. *Addie & Sons' Collieries Limited*, July 15, 1904, 6 F. 992, 41 S.L.R. 826; and *Addie & Sons' Collieries Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 86, *commented on.*

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This was an appeal upon a stated case from the Sheriff Court of Lanarkshire at Hamilton in an arbitration under the Workmen's Compensation Act 1897, between William Baird & Company, Limited, coalmasters, 168 West George Street, Glasgow (appellants), and Mrs Magdalena Podolska or Birsztan or Savage, widow of the deceased Maty (Motiejus) Birsztan *alias* Michael Savage, miner, Hamilton (respondent).

Mrs Savage claimed from the appellants the sum of £150 as compensation in respect of the death of her husband.

The facts which the Sheriff-Substitute (THOMSON) found proved or admitted were as follows—"(1) That the respondent, who was born in Poland on 17th January 1886, was married in Poland on 7th October 1902 to the said deceased Maty (Motiejus) Birsztan *alias* Michael Savage, who was also a Pole; (2) that a child was born of the marriage on 22nd August 1903; (3) that the deceased, with the acquiescence of the applicant, came to Scotland in December 1903 to find employment; (4) that shortly after his arrival he found employment as a miner with the respondents at a wage of under 20s. a-week; (5) that in the course of this employment he was killed on 15th August 1904; (6) that during his absence in this country the applicant worked as an out-door worker, earning 9d. per day; (7) that her father and mother kept the child of the marriage, and also assisted to support the applicant; (8) that the deceased sent her £1 before Easter 1904; (9) that he also wrote her without sending her money about a week before his death; (10) that after his death the applicant came to this country in order to present the present application; (11) that the law of Poland is that a husband is liable for the support of his wife and child so far as his means permit, and that this liability can be enforced in the civil courts; (12) that respondents paid the expenses of the deceased's funeral, amounting to £5, 7s."

On these facts the Sheriff-Substitute held in law that the respondent was wholly dependent upon her husband within the meaning of the Act, and awarded her £144, 13s. of compensation under the Act.

The questions of law for the opinion of the Court were—"(1) Upon the facts admitted and proved as above set forth, was the applicant a "dependant" within the meaning of section 7, sub-section 2 (*b*), of said Act? (2) Was the applicant within the meaning of said Act wholly dependent upon her late husband's earnings, of which she received only 20s. during his twelve months' absence?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) in section 1 allows compensation, the scale and conditions of which are given in the First Schedule to the Act. First Schedule sec. 1 provides—"The amount of compensation under this Act shall be (*a*) where death results from the injury; (i) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death . . .; (ii) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death . . .; (iii) if he leaves no dependants . . ." Section 7, 2 (*b*) of the Act enacts—"'Dependants' means, in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death."

Argued for the appellants—The definition of "dependants" excluded dependants outwith England, Scotland, and Ireland; otherwise the Act might be more favourable to foreigners than to British subjects, since the latter had, in order to obtain the benefit of the Act, to fulfil conditions which might not apply to the former. The respondent was therefore not a "dependant" within the meaning of the Act. Further, dependency was a matter of fact—*Main Colliery Co.* v. *Davies*, [1900] A.C. 358; *Turners Limited* v. *Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631. There must be not only a legal obligation to support but also *de facto* support, and such dependency must be established—*Rees* v. *Penrikyber Navigation Colliery Co., Limited*, [1903] 1 K.B. 259; *Pryce* v. *Penrikyber Navigation Colliery Co., Limited*, [1902] 1 K.B. 221. The respondent here was supporting herself by regular labour, which distinguished this case from those in which the wife was only earning money by casual and irregular employment. A contribution of £1 in nine months was so small it was to be disregarded. *Cunningham* v. *M'Gregor & Co.*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Sneddon* v. *Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992, 41 S.L.R. 826; *Addie & Sons' Collieries, Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85., were referred to.

Argued for respondent—The Act did not in terms exclude foreigners, and in these circumstances to exclude them would be an unjustifiable variation of the common law rule that nationality was not a bar to reparation. The respondent was therefore entitled to the benefit of the Act if she fulfilled its requirements. She was a dependant of the deceased workman, and as his wife was wholly dependent on him. There was no permanent separation and no suspension of the relation of husband and wife. The facts proved and admitted showed indigence on the part of the wife and obligation of the husband to support her. As a matter of fact, the husband had contributed, and no inference could be drawn against the continuance of contributions if he had lived. In any event the respondent was partly dependent on her husband—*Turners, Limited* (*cit. supra*); *Main Colliery Company, Limited* (*supra*); *Arrol & Company, Limited* v. *Kelly*, July 6, 1905, 7 F. 906, 42 S.L.R. 695; *Simmons* v. *White Brothers*, [1899] 1 Q.B. 1005.

At advising—

LORD PRESIDENT—This is a stated case in which the question is whether a woman

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called Mrs Birsztan or Savage, who is the widow of a Pole who was killed in a mine in Lanarkshire, is or is not entitled to the full amount allowed by the Workmen's Compensation Act for the death of her husband, and the point entirely turns upon the question whether she was or was not wholly dependent upon her late husband. Now, several cases have been decided upon this branch of the statute, but of course the most authoritative case is the case in the House of Lords of the Main Colliery Company in the appeal cases of 1900 (*Main Colliery Company* v. *Davies*, [1900] A.C. 358), where it was laid down that the question of being wholly or partly dependent was a question of fact. I entirely adhere to that opinion, whether it is technically binding on us or not, and accordingly if the learned Sheriff here had simply come to a conclusion on the facts upon the amount of dependency or the pecuniary result which followed from dependency, I should not have thought myself entitled to interfere with that decision. But inasmuch as the Sheriff here has found that Mrs Savage was wholly dependent, and has then set forth the facts upon which he comes to that finding, I am bound, I think, to consider whether the facts as set forth by the Sheriff will support the finding at all. Now, the facts as set forth by the Sheriff are that these people were Poles, that the husband came over to this country with the view of getting work, and that he so came with the approbation of his wife. Nothing more is said, but one can easily see that they thought they would do better perhaps in a foreign country than at home, and that the wife, so to speak, concurred with the husband in so far risking the family fortunes by this change of abode. Accordingly, the husband came over alone, leaving the wife in Poland. He got work. He made one payment of a small sum to his wife. He wrote to her again, but on the second occasion he did not send her any money, and then before anything else happened he had the accident which caused his death. Altogether he was absent from December 1903 till August 1904. During that time his wife worked as an outdoor labourer at home at a wage of 9d. a day, and supported herself by her own earnings, assisted partly by her father and mother who seem to have kept her child and given a certain amount of assistance to herself, and assisted also by the small sum of money which her husband had sent her. She then came over to this country in order to prosecute this claim.

Now, it seems to me that on those facts it is impossible to say that this woman was wholly dependent upon her deceased husband. As a matter of fact she was not. That is treating the matter, as I think it must be treated, as a question of fact.

But I feel it incumbent to say something more upon this subject because of certain observations made by Lord Young in several of the cases quoted to us, which I think may be misunderstood, and which (at least if they are taken in a certain way) I think are not sound. There have been several cases on this matter, the case of *Cunningham* v. *M'Gregor & Company*, 3 F. 775; *Sneddon* v. *Addie & Sons*, 6 F. 992; *Addie & Sons* v. *Trainer*, 7 F. 115.

I am not saying a word against any of those decisions, because I think each decision must be upon its own facts; and even supposing I, from a jury point of view, should have come to a different conclusion from what other learned Judges did, that does not show that the decision is wrong. But the expression which I rather take exception to is about there being a legal presumption that a wife is dependent on the husband—a legal presumption which in each case has to be displaced. Let me remind you how the matter comes in under the statute. The first section in the statute says that where there has been an accident the employer shall be liable to pay compensation in accordance with the first schedule of the Act. The first schedule of the Act says that if a workman leaves any dependants wholly dependent upon his earnings at the time of his death the compensation shall be a sum equal to so and so. And then in the interpretation clause of the statute "dependants" is defined thus—"In Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death." Now, I want to say most emphatically that, so far as I am concerned, in my opinion what I may call the legal category ends with the first sentence. In order to find out who is entitled, you have got to find out such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman. That is to say, in other words, you have to find out who answers that description according to the provisions of the Scottish law. But when you have arrived at that point, then I humbly think you are done with the Scottish law as law, and that when you come to "as were wholly or in part dependent upon the earnings of the workman at the time of his death", that is a question of fact not affected by the Scottish law or by any other law. An illustration of that can be given very easily. If, as indeed has happened in this case, the workman who is killed is not a Scotsman at all but is a native of some other country, and if the person who is suing is a person who, according to Scottish law, is entitled to sue, that is to say, that his or her title is made out under the first branch of the sentence, then it does not seem to me to matter one bit whether according to the law of their country there is an obligation upon the husband or the father, as the case may be, to support him or her, if as a matter of fact he or she was in point of fact dependent upon the man's earnings. And, accordingly, while I am anxious not to do injustice to the observations of Lord Young—and I may be misunderstanding them—if by a presumption of law that a husband should support a wife he means

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that it is necessary that you should start with that presumption according to the law of Scotland, and that that has necessarily to be rebutted by showing that this particular wife was not dependent on the husband, I humbly do not agree. Taking the sentence in another aspect I quite agree. In a proper sense it is not a presumption at all either of fact or of law, but it is an inference of fact drawn from the experience of ordinary life that if you know nothing about a wife except that she is simply the wife of a husband, more especially in the class with which we are here dealing, the woman is dependent on on her husband, because men's wives in such a class are as a matter of fact usually dependent on their husbands. Accordingly, if I could suppose that nothing in the world was proved except simply that the woman had been living with her husband, who was a miner, as a man of common sense and as a juryman I would assume that that woman had been dependent on that man, but that, I need scarcely say, is an inference of fact and not in any sense a legal presumption either *juris et de jure* or *facti*. I have thought it necessary to explain this in order that there should be no doubt upon the view I hold on the law in accordance with what was clearly laid down by the House of Lords in the *Main Colliery* case.

Accordingly, turning to this case it seems to me that the Sheriff-Substitute has shown on the facts sufficient to make it impossible to support his own finding of total dependency. But when you come to the question of the partial dependency, doubtless a rough axe must be taken. I think the person who wields the rough axe is the Sheriff-Substitute and not ourselves. I do not think we ought to go into that matter. The only hint one may give him is this, that evidently the woman was quite as much dependent in this case upon her own exertions as upon what she got from her husband, but that she was to a certain extent dependent on her husband I have no doubt. I am therefore of opinion that we should answer the questions in the case and remit to the Sheriff-Substitute in accordance with this opinion.

LORD M'LAREN—I take the same view as your Lordship in the chair. I think it is undisputed that the wife of this miner belongs to the class who are described in the statute by the word "dependant." She is a dependant because she is one of the persons who by the law of Scotland would be entitled to sue for damages in the case of death through fault. But then that is not enough to entitle her to compensation, unless she is also in the position to prove that she is either wholly or partly dependent on the person who has lost his life. Now, there are many cases—I should say the great majority of cases—where that is purely a question of fact and where it would be quite impossible to state a case on which we should be called upon to give an opinion. If, for instance, this miner had been able to send £10—he was only one year, I think, in employment in Scotland, or rather less—if he had been able to send £10 to his wife in Poland, and the Sheriff had then held that she was wholly dependent upon him, we should not have listened to an argument to the effect that the woman could not live on £10 in Poland, and that she must therefore be partly dependent on other sources of income. But then this husband, perhaps because he was not at first in regular employment, was only able to send £1 to his wife, and that during a period of nine months. Now, it is clear that even in Poland an individual cannot subsist upon £1 a-year. But then I hold that, as the Sheriff has taken the view that the lady is wholly dependent, it must be upon some misconstruction of the statute, because he could not possibly admit that she lived upon the £1 for the year to the exclusion of all other sources of subsistence. I therefore agree that we should find that the claimant was only partially dependent upon her husband. I also agree with your Lordship that although we do not assess the amount—that is for the Sheriff as arbitrator—it is plain enough that she was at least as much dependent during that year upon other sources as she was upon her husband's contributions.

LORD PEARSON—I am entirely of the same opinion.

LORD KINNEAR was not present at the argument.

The Court answered the first question in the affirmative and the second in the negative, remitted to the Sheriff-Substitute to proceed, and found neither party entitled to expenses.

Counsel for the Appellants—Wilson, K.C. —Horne. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Watt, K.C. —A. Moncrieff. Agents—Simpson & Marwick, W.S.

VALUATION APPEAL COURT.

Wednesday, February 7.

(Before Lord Low and Lord Dundas.)

THE LIVERPOOL, CHINA, AND INDIA TEA COMPANY, LIMITED, AND ANOTHER *v.* THE ASSESSOR FOR EDINBURGH.

(See *ante*, Jan. 14, 1905, 42 S.L.R. 500, 7 F. 415.)

Valuation Cases — Lease — Consideration other than Rent—Obligation on Tenant to Fit up Premises for his Trade — Measure of Consideration other than Rent—Competency of Looking at Negotiations prior to Lease—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Lands Valuation (Scotland) Amendment Act* 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4.

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A lease of a shop stipulated that the tenants "shall, at their own expense, fit up the premises hereby let for the trade or business of a café or tea-rooms to be carried on by them therein." The tenants, with the consent of the landlord, spent a large sum of money on the premises, partly on alterations, and partly on decoration. The assessor claimed that such expenditure should be divided over the years of the lease, and added to the rent stipulated for therein in order to arrive at the rent to be entered in the valuation roll. The landlord maintained that the obligation on the tenant was not a consideration other than rent, at least of any value to him, and produced the correspondence prior to the lease to show that the rent was fixed prior to the alterations, &c., being considered.

Held (1) that the obligation on the tenants was a consideration other than rent; (2) that the correspondence prior to the lease could not be looked at; but (3) that the measure of the consideration other than rent was not what had been spent by the tenant, *e.g.*, in ornamentation and decoration, but "how much was fairly and reasonably expended in such alterations upon the building as were required to fit it for the particular business."

At a Court of the Magistrates of the City of Edinburgh, held at Edinburgh on 21st September 1905, to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1906 under the Valuation of Lands (Scotland) Acts, the Liverpool, China, and India Tea Company, Limited, the tenants, and William J. N. Liddall, advocate, the proprietor, appealed against an entry of "shop 111 Princes Street," at the yearly rent or value of £1036, 12s. They maintained that the yearly rent or value should be £902, 10s. of which £900 was the rent stipulated in the lease, and £2, 10s., one-half of the premium of a policy of fire insurance over the premises which the tenants were taken bound to repay to the landlord.

The Magistrates having refused the appeal a case was taken.

The following facts, as stated in the case, were admitted or held to be proved—"(1) By lease dated 29th May and 2nd June 1903 the appellant, Mr Liddall, let to the appellants, the Liverpool, China, and India Tea Company, Limited, the shop and saloon, No. 111 Princes Street, Edinburgh, with the premises below the same, and also the premises in Rose Street Lane, above the back part of the saloon, for the period of twenty-one years from and after the term of Whitsunday 1903, with breaks in the option of the tenants at Whitsunday 1910 and Whitsunday 1917.

"(2) The yearly rent stipulated to be paid in the said lease is as follows:—For the first seven years of the lease (that is, from Whitsunday 1903 to Whitsunday 1910), £900 per annum; during the next seven years of the lease (that is, from Whitsunday 1910 to Whitsunday 1917), £1000 per annum: and during the remaining seven years of the lease (that is, from Whitsunday 1917 to Whitsunday 1924) £1100 per annum.

"(3) The lease contains a provision to the effect that the tenants 'shall at their own expense' fit up the premises for the purpose of the trade or business of a café or tea rooms, to be carried on by them therein, and that without their having any claim against the landlord for repayment of any part of their outlays, either at the termination of the lease or otherwise. It was further provided by the lease that the plans and specifications of the works to be executed by the tenants in altering and fitting up the premises for the purposes of said trade or business were to be submitted to the landlord for approval before any part of the works was proceeded with. At the termination of the lease the alterations made by the tenants, including all fixtures, except counters, buffets, screens, electric-light fittings, and other tenants' fittings, were to become the property of the landlord. The tenants were further taken bound at their own expense to keep the inside of the premises in repair, and to paint the same every five years. They were also to keep the roofs and gutters of the saloon and of the premises in Rose Street Lane in repair, and to maintain and uphold and renew, if necessary, the glass of the windows of the premises.

"(4) The tenants were taken bound by the lease to repay to the landlord annually one-half of the premium of a policy of insurance against fire, effected by him over the premises, and that for such sum as he might consider the same to be worth. One-half of the said premium amounts to the sum of £2, 10s.

"(5) It was further provided by the lease that in the event of the tenants going into liquidation, or possessing the premises by a manager for creditors, or carrying on in the premises any business other than that before set forth, or assigning the lease, or subletting the premises without the landlord's consent in writing, or leaving any part of a half-year's rent unpaid when the next half-year's rent should have become due, the lease should, in the option of the landlord, become *ipso facto* null and void.

"(6) Both the landlord and the tenants had, before the lease was signed, petitioned the Dean of Guild Court for leave to execute the works before referred to. These works were thereafter executed by the tenants under the provisions of the lease with a view to fitting up the premises as a café or tea rooms, and consisted of the making of a new shop front to Princes Street, the conversion of cellars or stores on the basement floor into smoking-rooms and lavatories, &c. (necessitating the raising of part of the main street floor), the panelling of the walls of the shop and saloon with wood, the installation of electric light, and the insertion of lavatories in the back building, &c. The cost of the said works, exclusive of cost of counters, counter fittings, or other moveables, amounted to the sum of £2816, 3s. The works on which that expenditure was laid out were, in the opinion of the

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Magistrates, proved to be of the nature of structural improvements of the heritable property which are or will be beneficial to both landlord and tenants.

"(7) The Assessor's valuation was made up as follows:—

Amount of rent as stated in the lease	£900	0	0
Cost of the alterations, spread over the full period of the lease, viz., £2816, 3s. over 21 years	134	2	0
One-half of the insurance premium	2	10	0
	£1036	12	0

"(8) A copy of a letter by the tenants to the landlord, dated 30th May 1903, was produced by the appellants. In that letter the tenants undertook, and bound and obliged themselves at the termination of their tenancy to restore to its then level the ground floor of the front buildings, which has been raised eighteen inches, if required by the landlord to do so, or to bear the expense of so replacing the said floor should the tenants prefer to do so."

"(9) A copy of the correspondence which passed between the tenants and the landlord prior to the lease being signed was also produced by the appellants. . ."

The Magistrates were of opinion (1) that the said sum of £2816, 3s. having been expended on works of the nature of structural improvements of the heritable property, the yearly value thereof, which would not be less than £134, 2s., fell to be entered in the valuation roll either as an addition to the rent stipulated to be paid under the lease, under the provisions of section 6 of the Lands Valuation (Scotland) Act 1854, or as a separate entry under the provisions of section 4 of the Lands Valuation (Scotland) Amendment Act 1895; and (2) that the Court having held in the appeal of last year that the tenants were bound under the lease to make the said structural improvements, the said expenditure spread over the number of years in the lease fell to be added to the rent under the provisions of section 6 of the Lands Valuation (Scotland) Act 1854 as had been done by the Assessor. They therefore refused the appeal.

Section 6 of the Valuation of Lands (Scotland) Act 1854 enacts—"In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year . . . and where such lands and heritages are, *bona fide*, let for a yearly rent, conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act. . . ."

By section 4 of the Lands Valuation (Scotland) Amendment Act 1895 (58 and 59 Vict. cap. 41) it is enacted:—"Section 6 of the Valuation Act 1854 shall be read and construed as if the following proviso were inserted:— . . . Provided also that where any lessee of any such lands and heritages, holding under a lease or agreement, the stipulated duration of which is twenty-one years or under from the date of the entry under the same . . . has made or acquired erections or structural improvements on the subjects let, and where the actual yearly value of such erections or structural improvements cannot under the provision of section 6 of this Act be entered in the valuation roll, such erections or structural improvements shall be deemed to be lands and heritages within the meaning of this Act, and such lessee shall be deemed to be proprietor thereof for the purposes of this Act, and the assessor shall ascertain the yearly value of such erections or structural improvements as a separate subject, by taking the amount of rent, if any, in addition to the rent stipulated to be paid under such lease or agreement at which, one year with another, the subjects let, and such erections or structural improvements might together in their actual state be reasonably expected to let from year to year in consequence of such erections or structural improvements having been made, and shall make a separate entry thereof in the valuation roll setting forth all the particulars relating thereto as hereinbefore provided with respect to other lands and heritages."

The lease provided, *inter alia*—"The said William John Norbray Liddall, in consideration of the rent and other prestations after specified, has set and hereby sets, and in tack and assedation lets, to the said The Liverpool, China, and India Tea Company, Limited . . . all and whole the shop and saloon situated at No. 111 Princes Street, Edinburgh. . . . And that for and during the space of twenty-one years from and after the term of Whitsunday (May 28th) 1903. . . . For which causes and on the other part the tenants bind and oblige themselves . . . to pay to the landlord and his heirs and assignees . . . the rents after mentioned, viz., during the first seven years of the lease . . . a yearly rent of £900 . . . during the next seven years of this lease . . . the yearly rent of £1000 . . . and during the remaining seven years of this lease . . . the yearly rent of £1100. . . . And it is hereby specially provided and declared that the tenants shall, at their own expense, fit up the premises hereby let for the purpose of the trade or business of a café or tea-rooms to be carried on by them therein, and without their having any claim against the landlord for repayment of any part of their outlays either at the termination of this lease or otherwise, and the plans and specifications of the works to be executed by the tenants in altering and fitting up the premises for the purposes of the said trade or business shall be submitted to and approved of in writing by the landlord before any part of the said works shall be proceeded with. . . . And at the termination of this lease the alterations so made by the tenants, including all fixtures, except counters, buffets, counter

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fittings, screens, electric-light fittings, and other tenants' fittings, shall become the property of the landlord, and the tenants will not be entitled at any time during the currency of this lease, except with the consent in writing of the landlord first obtained, to make any structural alteration in any part of the premises hereby let, or to cut or injure the timbers or walls thereof, or to use the said premises for any other trade or business than that of a café or tea-rooms as before mentioned."

The evidence which had been adduced went, *inter alia*, to show that a considerable part of the amount expended on the buildings had been for work of the nature of ornamentation, for example, tile and mosaic work had cost £148, 10s. The correspondence passing between the parties prior to the lease was produced by the appellants for the purpose of showing that, as the lease had been agreed upon before any arrangement was come to in regard to structural alteration, such alteration could not be regarded as one of the considerations in respect of which the premises were let. As the Court, however, held that it was incompetent to refer to the correspondence it is unnecessary to give its contents.

Argued for the appellants—In a question of assessment the lease was not conclusive evidence. The Court would seek to discover what was the true intent of parties when the rent was fixed. Hence it was permissible to refer to the correspondence, from which it appeared that the stipulations with regard to structural alterations were made after the rent was fixed and, it followed, were not a consideration given by the tenants in addition to the rent. Further, no binding obligation was imposed upon the tenants, but merely a power conferred, subject to the landlords' approval, to make any alterations upon the premises they should consider necessary for their trade. That was not a consideration other than rent—*Dundee Harbour Trustees* v. *Assessor for Dundee*, March 19, 1886, 13 R. 829, 23 S.L.R. 607. This power to the tenant to make structural alterations to suit himself did not enhance the landlord's rights — *North British Railway Company* v. *Assessor for Glasgow*, March 12, 1890, 17 R. 846, 27 S.L.R. 608. Even assuming, however, that there was a binding obligation upon the tenants, such was really of no value to the landlord, for the structural alterations which had been carried out rendered the premises unsuitable for any business except that carried on by the present tenants. That to the landlord was a disadvantage.

Argued for the respondent—The prior correspondence could not be referred to when a formal lease existed. Here the true consideration was rent plus certain other prestations. The arrangement was obviously to the advantage of the landlord, as he was spared the common law obligation of fitting up the premises for the ingoing tenants. He was also *lucratus* at the expiry of the lease, as he got these alterations as his own property.

LORD LOW—I am of opinion that it is altogether incompetent for us to consider the negotations which took place between the parties prior to the execution of the formal lease. The lease superseded prior communings, and it alone can be looked to to ascertain what was the bargain between the parties. In the lease Mr Liddall let the premises to the Liverpool Tea Company "in consideration of the rent and other prestations after specified." The rent is at first £900 per annum and afterwards rises to £1100. The first of the other prestations is found in that clause in which it is "provided and declared that the tenants shall at their own expense fit up the premises" for the purpose of their business "and without their having any claim against the landlord for repayment of any part of their outlays." That is one of the prestations in consideration of which the lease was granted; and I do not think that the landlord can be allowed to say that it was not an obligation on the tenants in his favour, but that he had taken them bound to do what was entirely to his disadvantage. Therefore I see no reason to doubt the soundness of the view expressed by Lord Stormonth Darling and myself last year.

But that is not sufficient for the solution of the question, because there is no measure of the obligation stated in the lease. If the tenants had spent a very small sum in fitting up the premises the landlord could not have complained so long as the premises were made reasonably suitable for the business; nor, upon the other hand, could he have prevented the tenants from expending as large a sum as they chose. It is therefore open for the Court to look at the expenditure and see how much was fairly and reasonably expended in such alterations upon the building as were required to fit it for the particular business.

We have now a great deal more information furnished to us in regard to the character of the expenditure than was before the Court last year, and I am satisfied that to a large extent the money was expended upon decorations and ornamentation. That, in my judgment, was not the kind of expenditure which the tenants were taken bound by the lease to make. I think that what was contemplated in the lease was such expenditure upon the building as was necessary to adapt it to the purpose in view.

It is impossible to say with precision how much of the expenditure was of the one kind and how much of the other, but I think that we shall do substantial justice if we regard one-half of the expenditure as having been made under the obligation in the lease.

The result is that instead of the sum added to the rent in order to ascertain the yearly value being £134 per annum it will be half that amount.

LORD DUNDAS—I agree entirely with the result stated by your Lordship, and with the reasons which have led you to arrive at it.

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The Court were of opinion that the determination of the Magistrates was wrong and that the valuation should be reduced to £969, 10s.

Counsel for Appellants, Liverpool, China, & India Tea Company, Limited—W. J. Robertson. Counsel for Appellant, Liddall—Macmillan. Agents—Somerville & Watson, S.S.C.

Counsel for the Assessor—Spens. Agents—Wishart & Sanderson, W.S.

Wednesday, February 7.

(Before Lord Low and Lord Dundas.)

EDINBURGH COLLIERIES COMPANY LIMITED *v.* ASSESSOR FOR MUSSELBURGH.

Valuation Cases—Mineral Lease—Mineral Field Situated Partly in County, Partly in Burgh—Proportionate Assessment of Subject as between County and Burgh—Portion of Minerals Worked Situated Wholly within County—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *secs.* 1 *and* 42.

A colliery company leased from the proprietor thereof a certain mineral field, lying partly in a county and partly in a burgh, at a fixed rent (or in the option of the proprietor at a royalty on the output). The minerals in question had so far been exclusively worked from the portion of the field lying in the county.

The assessor for the burgh claimed that he was entitled to assess the portion of the field lying within the burgh, and entered it in the burgh roll at a rent which bore the same proportion to the whole rent as the portion of the mineral field in the burgh bore to the whole mineral field. The tenants appealed against the entry altogether, or alternatively maintained that the rent entered should be *nil. Held* that the minerals having been let, were, although unworked, lands and heritages within the meaning of the Valuation Acts, and that therefore the burgh assessor had no option but to enter them in the burgh roll as he had done.

The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91) enacts, sec. 1—"The commissioners of supply of every county and the magistrates of every burgh in Scotland respectively shall annually cause to be made up a valuation roll showing the yearly rent or value for the time of the whole lands and heritages within such county or burgh respectively. . . ." Sec. 42 ". . . The expression 'lands and heritages' shall extend to and include all . . . mines, minerals. . . ."

At a meeting of the Magistrates of the burgh of Musselburgh, held at Musselburgh on 22nd September 1905, for the purpose of hearing and determining appeals and complaints under the Valuation of Lands (Scotland) Acts, for the year ending Whitsunday 1906, the Edinburgh Collieries Company, Limited, incorporated under the Companies Acts 1862 to 1898, and having their registered office at Wallyford, Musselburgh, appealed against the following entry in the valuation roll of the burgh of Musselburgh for the year ending Whitsunday 1906—

Nature of Subject.	Situation.	Proprietor.	Occupier or Tenant.	Value.
Pinkie Coal	Musselburgh	Sir Alexr. Hope	Edinburgh Collieries Co.	£215

The appellants craved that the said entry should be deleted from the valuation roll or that the valuation should be entered as *nil.*

The Magistrates being of opinion that the principle upon which the Assessor had proceeded in entering the subjects at a value of £215 in the burgh roll was correct, dismissed the appeal. The appellants thereupon craved a case for the opinion of the Lands Valuation Court.

The case stated that the following facts were admitted or proved:—"1. That the appellants are lessees of the minerals in a portion of the estate of Pinkie conform to lease between Sir Alexander Hope of Craighall, Baronet, heir of entail in possession of the said estate, and the Edinburgh Collieries Company, Limited, incorporated under the Companies Acts 1862 to 1890, dated 26th April and 1st May 1900, for a period of thirty-one years from Candlemas 1900, said long lease having been assigned to the appellants conform to assignation dated 28th July 1900. 2. That the mineral field let by the said lease is situated partly in the parish of Inveresk and county of Midlothian, and partly in the burgh of Musselburgh, the approximate area of the surface within the said parish being 354·6 acres and within the said burgh 295·4 acres. If the amount of rent or lordships payable under the lease for the year ending Lammas 1904 were apportioned according to the extent of the subjects within the parish of Inveresk and the burgh of Musselburgh respectively, the sum of £285 would fall to be entered in the valuation roll of the parish of Inveresk, and the sum of £215 in that of the burgh of Musselburgh. 3. That in terms of the said lease the appellants are bound to pay to the said Sir Alexander Hope, Baronet, certain fixed rents, or, in his option, certain royalties or lordships on the price of the coal and dross raised and carried away under the lease. . . . The fixed rent for the three years from Lammas 1903 is £500 per annum. It is further provided in the said lease that in the event of the fixed rent exacted and paid in any year of the lease (excepting the five last) exceeding the sum which could have been charged in the shape of royalties during that year, the appellants shall be entitled in the five years immediately succeeding to raise and sell such a quantity of minerals, free of royalty, as shall make up the excess of the fixed rent paid. 4. That the appellants have entered upon and have been working the minerals let to them

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by the said lease. Since Lammas 1903 the royalties accrued on minerals raised and carried away have exceeded the fixed rents prescribed by the lease, but no sum higher than the sum of £500 has in point of fact been paid to the landlord. For the year ending Lammas 1904 the said royalties amounted to £531, 19s. 1d., being £31, 19s. 1d. in excess of the fixed rent of £500 exigible for that year, and the landlord accordingly, in terms of the lease, declared that for that year he would take the royalties and not the fixed rent. The said sum of £31, 19s. 1d., being the excess of the said royalties over the fixed rent, has been applied in terms of the lease in extinguishing previous shortages, and the sum of £500 was therefore payable to the landlord for the year to Lammas 1904, and is the sum at which the subjects fall to be valued for the year to Whitsunday 1906. 5. That the whole of the appellants' workings in the said mineral field let to them have hitherto been exclusively confined to the portion of the field situated within the parish of Inveresk, and they have worked no portion of the minerals in the burgh of Musselburgh. 6. That the Assessor for the burgh of Musselburgh having ascertained in the course of the year that part of the subjects let under said lease were situated within the burgh of Musselburgh, communicated with the County Assessor, and it was agreed between them that the sum payable by the appellants under said lease should be apportioned between the two areas, according to the extent of the mineral field situated within the county and the burgh respectively, the proportions being £285 for the county and £215 for the burgh. Notices were accordingly issued to that effect by each Assessor prior to the 25th day of August, being the last day for intimating sums to be entered in the valuation roll to the persons interested in terms of section 5 of the Valuation of Lands (Scotland) Act 1854. Thereafter the appellants communicated with the County Assessor, and explained to him that the whole of the minerals which had been worked under said lease were situated in the parish of Inveresk, and that no part thereof had been worked within the burgh of Musselburgh. The County Assessor thereupon altered the sum in the valuation roll for the parish of Inveresk from £285 to £500, and on 28th August he intimated to the Assessor for the burgh of Musselburgh that he had done so, and that the entry of £215 in the burgh roll would require to be deleted. This the Assessor for the burgh of Musselburgh refused to do. The appellants accordingly appealed to the Magistrates, and at the hearing before them evidence was led as to the practice in the county of Midlothian in similar cases."

The appellants maintained that the Assessor for the burgh of Musselburgh had proceeded upon an erroneous principle in entering the subjects in the burgh valuation roll as of a value proportional to the surface area of the mineral field within the burgh. The royalties exacted by and paid to the landlord for the year to Lammas 1904, which were the basis of assessment, were earned exclusively on minerals won from the portion of the mineral field within the parish of Inveresk, and should be entered solely in the county roll, seeing that while the minerals, as an assessable subject within the county, were being exhausted in the earning of the royalties, the minerals within the burgh remained intact, and the landlord was receiving no rent or lordship in respect of them. So long as a mineral field situated in two assessment areas, and let to tenants, was not worked, apportionment of the fixed rent according to surface acreage was the appropriate method, but where the minerals were being worked within one or both areas the only equitable course was to attribute to each area the royalties earned on the minerals extracted therefrom. Where the royalties were less than the fixed rent, and the landlord exacted the latter, the royalties fell to be allocated to the areas in which they were respectively earned, and the difference between the aggregate royalties and the fixed rent then fell to be apportioned between the two areas proportionally to their acreage, being properly attributable to the right of working over the whole field. In consequence of the Assessor for the county of Midlothian having, in accordance with the principle for which the appellants contended, entered the minerals in the county roll at £500, the full amount of the royalties received by the landlord for the year to Lammas 1904, the entry appealed against, if allowed to stand, would result in the appellants being assessed on an annual value admittedly in excess, to the extent of £215, of the total return received by the landlord from the subjects under the lease.

The Assessor maintained that the principle upon which the Assessor for the burgh of Musselburgh had proceeded was correct. The minerals in question, whether situated in the burgh of Musselburgh or in the parish of Inveresk, were let as a whole under one lease, and must therefore be assessed as a *unum quid*. It was contrary to principle to assess, as the appellants maintained, only one part of a subject, the whole of which was let under one lease. Whatever the rent might be, the minerals situated in the burgh of Musselburgh which were let under a lease, were assessable subjects within that area, and the Assessor was entitled to enter them on his roll. That they possessed a value to the lessee was evidenced by the fact that they were included in his lease as part of the subjects for which he was bound to pay rent. They were assessable whether worked or not, and the fact that another part of the coalfield was worked to an extent above the fixed rent could not convert them into non-assessable subjects. Their assessability did not depend upon whether they were *de facto* worked or not. The amount of rent paid, whether in the form of fixed rent or of royalty, while it determined the amount of assessment, could not afford the criterion for determining whether subjects were assessable or not. In the present instance no question of principle arose different from that ap-

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plicable when the fixed rent fell to be taken as the amount of assessment, and in such a case the Assessor maintained that so long as the fixed rent was the sum payable in any year, it must be apportioned according to the area in the parish and burgh respectively as being the sum which was applicable to the whole subjects under the lease. In any event, the whole subjects were being occupied under the lease, the occupation was one and indivisible, and it was impossible to separate or deal with part of the subjects as being rent producing and others as being unproductive. The minerals within the burgh might never be wrought, but they were none the less assessable. The result of the appellants' view would be that the burgh would be deprived of the rental of assessable subjects within its bounds during all the years in which working was carried on in the parish alone, and that the burgh might never obtain a return from minerals within its own borders which were let under a lease for a valuable consideration. The action of the County Assessor in accepting the representation of the appellants, and entering the whole sum of £500 in his roll, could not deprive the burgh of Musselburgh of the right to assess if the subjects in question were legally assessable within the burgh.

Argued for the appellants—It was agreed that £500 was the maximum value on which the appellants could be assessed. If a mineral field situated within two assessment areas was let but not worked, then the method advocated by the Burgh Assessor was correct, but where the minerals were being worked a different rule must be applied. The Burgh Assessor's method was unfair to the county, because when the minerals were exhausted and worked out in the county nothing would remain for assessment within that area, as it was impossible to assess a subject which had ceased to exist. When that occurred the burgh would be in a position to claim assessment on the whole rent. It came to this, that the burgh would get the benefit of a proportion of the assessment while the working was confined to the county, but whenever the mineral in the county was worked out and the company began work in the burgh, the burgh alone would get the benefit of the assessment thereafter. The proper way of dealing with a mineral field in such circumstances as the present was to assess the undertaking in each area according to the output from such area. So long as the minerals were only worked in the county, the county should get the whole benefit, and the burgh in turn should get the whole benefit from the working in its area when that time came. The statutes made no provision for such a case as this, and therefore the guidance of the Court was required. The question was—What was the most equitable rule? None of the authorities quoted by the respondent were applicable. They did not touch the case of a wasting subject—*Regina* v. *Fayle*, April 19, 1856, 27 Law Times 64; Ross Stewart on Mines and Minerals, p. 282.

Argued for the respondent—It was agreed that £500, being the rent under the appellant's lease, was the proper figure at which the undertaking should be assessed. It was also agreed that so long as the mineral field was unworked, the respondent's method of assessment was correct, but the appellants had shown no reason why this method should be altered after working had begun. The argument that after the mineral was worked out in the county there would be no assessable subject left in that area was incorrect, because the pits and shafts were situated there and would naturally be used for working and raising the mineral situated in the burgh. The result of what had happened, viz., that the appellants stood in both rolls for a total amount of £715 was entirely due to their own action in the matter. The appellants' contention was contrary to the provisions of the Valuation Acts, and their claim that it was only the revenue producing portion of the subject which was assessable was untenable—*Beresford's Trustee* v. *Assessor for Argyle*, May 17, 1884, 11 R. 818, 21 S.L.R. 544; *Blantyre Parochial Board* v. *Assessor for Lanarkshire*, March 15, 1883, 10 R. 773, 20 S.L.R. 511; *Dundee Water Works* v. *Dundee Road Trustees*, December 21, 1883, 11 R. 390, 21 S.L.R. 261; *Ayr Harbour* v. *Assessor for Ayr*, May 25, 1894, 21 R. 807, 31 S.L.R. 726.

Lord Low—It is not disputed in this case that the appellants are lessees of the minerals in a portion of the estate of Pinkie, conform to a lease between them and Sir Alexander Hope, the proprietor of that estate, and that a part of the minerals included in the lease are within the burgh of Musselburgh and part within the parish of Inveresk. Further, it is not disputed that the rent payable under the lease is a fair rent.

As to the point raised in this case, I think the Valuation Act leaves no room for discussion. It provides that a valuation roll shall be made up showing the yearly rent or value for the time of the whole lands and heritages within the county or burgh respectively.

Now, it is not disputed that the minerals included in the lease and situated within the burgh are lands and heritages which, in terms of the Act, fall to be entered in the valuation roll, and it therefore seems to me that the Assessor for the burgh had no option but to make the entry in the valuation roll which he has done.

It was argued that if the minerals were now entered in the roll of the burgh as of any value at all, it would ultimately lead to an injustice to the county, because at present the rent or royalty is being paid entirely from the portion of the minerals lying in the county, which alone is being worked, while the portion lying within the burgh remains unworked, and that a time will come when the portion within the county will be worked out and nothing be left for purposes of valuation, while the unworked minerals within the burgh will then fall to be valued solely for the benefit of the burgh.

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I do not think we are called upon to give an opinion on this state of matters, which has not yet arisen. What would happen if all the minerals within the county were worked out before those within the burgh had been reached would probably depend upon circumstances and considerations which we cannot now foresee. As matters stand, the Valuation Act leaves us no option but to sustain the entry in the roll made by the Burgh Assessor.

LORD DUNDAS—I concur. This is a hard case for the appellants, for it appears that owing to a change of attitude on the part of the Assessor of the county they are liable to over-assessment for this year. But I entertain no doubt that the Assessor for Musselburgh was entitled and bound to make the entry in the roll which is appealed against. That is sufficient for the disposal of this case. I am not prepared to consider other and different cases which are not before us, nor to attempt to lay down equitable rules for application to these cases if and when they may arise.

The Court were of opinion that the Magistrates were right, and that the entry in the valuation roll was correct.

Counsel for the Appellants—M'Millan. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D. Anderson. Agent—John Richardson, Solicitor.

Wednesday, February 7.

(Before Lord Low and Lord Dundas.)

THOMAS USHER & SONS, LIMITED *v.* ASSESSOR FOR EDINBURGH.

Valuation Cases—Consideration other than the Rent—"Yearly Rent Conditioned as the Fair Annual Value"—Public-House—"Tied" House—Premises Occupied without Lease—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6.

A firm of brewers, owners of a public-house, had a tenant for many years originally holding in virtue of a lease but subsequently by tacit relocation. Owing to improvements carried out by the local authority, the buildings in which the public-house was, were taken down and new buildings substituted. In the new buildings the brewers erected a new public-house, more advantageous for business, but allowed their old tenant the occupation at the old rent, there being, however, no proved agreement. The tenant was under no obligation to take beer from the proprietors, but as matter of fact he did receive a good deal of beer from them and the tenancy was admitted to be terminable at the end of any year. *Held* that the rent of the premises was not the "yearly rent conditioned as the fair annual value," and that the magistrates were justified in disregarding it in arriving at the valuation.

At a Court of the Magistrates of the City of Edinburgh, held at Edinburgh on 21st September 1905 to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1906, Thomas Usher & Sons, Limited, brewers, Edinburgh, appealed against an entry whereby a public-house let by them to Duncan M'Diarmid was entered in the valuation roll as of a yearly value of £95. The appellants contended that the true yearly value of the subjects was £49, the rent payable by the tenant under a verbal lease.

The Magistrates repelled the contention of the appellants but reduced the entry in the roll to £80. The appellants took a case.

The facts stated were as follows:—"(1) The subjects in question form part of a tenement recently erected by the appellants at the corner of Nicolson Street and West Crosscauseway. The said tenement has frontages both to Nicolson Street and West Crosscauseway.

"(2) The street of West Crosscauseway has recently been widened by the Corporation of Edinburgh under compulsory powers. Prior to the said widening, the appellants were proprietors of an old tenement occupying the corner stance at the junction of the foresaid two streets. That tenement and several other old tenements immediately to the west thereof have been demolished, and the building line of that side of the said street of West Crosscauseway has been set back a distance of 14 feet or thereby. The street has thereby been widened from 26 feet (its previous width) to 40 feet (its present width).

"(3) Prior to said demolitions the shop in West Crosscauseway immediately adjacent to the appellants' property was occupied as a public-house. In consequence of the alterations for the street widening, that public-house has been done away with.

"(4) Mr Duncan M'Diarmid was tenant of the public-house in the foresaid old tenement at the corner of Nicolson Street and West Crosscauseway from 1883 until it was demolished recently. From 1883 to 1895 the proprietors of said public-house were Messrs James and Thomas Usher, brewers. In 1895 the appellants' company was incorporated, and the said property was then conveyed to them. Mr M'Diarmid occupied the said public-house during the whole of the said period on a verbal lease at a rent of £49 per annum.

"(5) The premises now in question consist of a public-house in the new tenement erected by the appellants. The said public-house replaced the old public-house near the same site formerly occupied by Mr M'Diarmid, and belonging to the appellants as above mentioned. Mr M'Diarmid entered into possession of the premises now in question shortly before Whitsunday 1905, and the current year is the first year of his occupancy of these premises. No written lease of these premises has been entered into. The appellants made an averment that a verbal lease of the said

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premises for a year had been entered into between them and Mr M'Diarmid, under which the rent was to be £49 per annum; but that averment was not proved. The period of Mr M'Diarmid's occupancy of the premises is indefinite. The appellants are entitled to eject him at any time.

"(6) The appellants are brewers, and Mr M'Diarmid is one of their customers. Mr M'Diarmid is under no obligation to take his supplies of beer from the appellants, but in point of fact he does obtain a good deal of beer from them.

"(7) The Assessor disregarded the alleged verbal lease, and made up his valuation by comparison with the rents of other premises in the neighbourhood.

"The Magistrates were of opinion (1) that the verbal arrangement between the appellants and Mr M'Diarmid ought to be disregarded in respect that it did not amount to a lease of the premises for a year, or alternatively, that it was not a *bona fide* lease; (2) that although Mr M'Diarmid was not under any written obligation to take his supplies of beer from the appellants, he was liable to be turned out of the premises at any time in the event of his ceasing to take such supplies from them; (3) that the Assessor was right in arriving at his valuation by comparison with the rents of other premises in the neighbourhood, but that the amount which he had taken was too high. They accordingly reduced the valuation to £80."

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6, enacts—"In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, . . . and where such lands and heritages are *bona fide* let for a yearly rent conditional as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act. . . ."

The only witness called by the appellants was Mr Thomas L. Usher, managing director, who gave the following evidence before the Magistrates:—"M'Diarmid has this shop under a verbal lease He held the shop for twelve years under Messrs James and Thomas Usher under a similar lease. In 1895 our company was incorporated, and he was holding the lease for one year. That lease was continued and the rent was continued at the same figure, £49, but there is no obligation on M'Diarmid outside that lease and outside the rent; he can do what he likes. M'Diarmid receives a good deal of beer from our firm. That is as matter of fact; as a matter of law he is not bound to receive it. He receives the beer on ordinary trade terms, and subject to ordinary trade discounts. *By the Chairman*—(Q) Can M'Diarmid be turned out at the end of any year?—(A) I suppose he can. He has been there for twenty-two years. (Q) But not having a lease he can be turned out at the end of a year?—(A) At any time. *Cross*—. . . (Q) What are the conditions of the lease?—(A) He pays me £49. (Q) And you give him the place?—(A) Yes. (Q) Is there nothing about getting beer from you?—(A) No. (Q) In point of fact does not he get all his beer from you?—(A) No. (Q) Is there keen competition for the place?—(A) I do not know. (Q) Did you ever try to get another tenant?—(A) No, I do not want one. (Q) So if you put the premises on the market you have no idea what a tenant would give?—(A) No, probably he would give more. The licence is not endorsed to me. *By the Chairman.*—(Q) Is it not out of the bounds of ordinary commercial transactions if you can get more rent that you do not take it?—(A) No, you must take into consideration that we have got a good tenant. He has been there for twenty-two years. (Q) You think that is an asset to be taken into consideration?—(A) Certainly."

Argued for the appellants—The Assessor was not justified in disregarding the formal rent. The evidence conclusively proved that the new premises were *bona fide* let on a verbal lease at the old rent and that there was no consideration other than rent.

Argued for the respondent—No lease had been proved; in any event the old rent could not be taken as a fair criterion as the premises were not the same. The house was in reality tied, and, on the evidence, the rent of £49 was not a *bona fide* rent "conditioned as the fair annual value" of the premises—*Annan* v. *Assessor for Leith*, February 16, 1899, 1 F. 586, 36 S.L.R. 600; *Bruce* v. *Assessor for Zetland*, March 1, 1882, 10 R. 34, 19 S.L.R. 590.

At advising—

LORD LOW—The circumstances of this case are as follows:—The appellants and their predecessors Messrs James & Thomas Usher were for many years proprietors of a public-house situated at the corner of Nicolson Street and West Crosscauseway, and Duncan M'Diarmid was tenant of the shop for a period of some twenty-two years. It appears that he had at first a lease of the premises for twelve years at a yearly rent of £49, and that when the lease expired he was allowed to continue as tenant from year to year at the same rent. West Crosscauseway Street has recently been widened by the Magistrates under statutory authority, and in carrying out that operation the old public-house was taken down. The appellants, however, have erected a new public-house in the same situation as the old one—that is to say, at the corner of Nicolson Street and West Crosscauseway Street as widened—and they have allowed M'Diarmid to occupy the new public-house as tenant at the same yearly rent as the old house, namely, £49. The terms upon which M'Diarmid was to occupy the new house were not reduced to writing, but it was simply agreed verbally that he should occupy the new house at the same rent as that which he had paid for the old.

The question is, whether in these circumstances the premises can be regarded as being "*bona fide* let for a yearly rent conditioned as the fair annual value thereof

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without grassum or consideration other than the rent?"

Now, we have been given no information in regard to the character of the new house as compared with the old, but I think that we may assume (nothing to the contrary being stated) that it is in no way inferior to the old house, and the fact that a public-house which, prior to the widening of the street, was carried on next door to the appellants' premises, has now disappeared, presumably justifies the inference that the latter premises must have increased in value. Indeed, I do not think that it was seriously disputed that a rent considerably higher than that which is being paid by M'Diarmid might have been obtained. That, however, is not conclusive, because, I apprehend, a rent may be the fair yearly value of the subjects within the meaning of the Valuation Act although it is not the highest rent which might have been obtained. The question therefore is whether in a reasonable sense the appellants can be said to have let the premises to M'Diarmid "for a yearly rent conditioned as the fair annual value thereof."

Now, Mr Usher, the managing director of the appellant company, has stated in his evidence, with perfect frankness, the circumstances under which M'Diarmid was continued as tenant at the old rent.

Mr Usher's evidence is to the effect that he did not consider what rent might be obtained for the premises, but that he continued M'Diarmid as tenant because the latter had been tenant for twenty-two years and had proved himself to be a good tenant. He further said that although M'Diarmid was in no way "tied" to the appellants he had in fact been in the habit of taking "a good deal of beer" from them.

It seems to me that that evidence amounts to an admission that the rent of £49 was not conditioned as the fair annual value of the premises, but that the appellants were, by reason of other and perfectly intelligible considerations, willing to allow M'Diarmid to occupy the premises at that rent whatever the true yearly value might be. In these circumstances I am of opinion that the verbal lease to M'Diarmid cannot be held as fixing, for the purposes of the Valuation Act, the yearly rent or value of the premises.

In questions of this kind what has been decided in one case can seldom be regarded as an authority in another case where the circumstances are different. I may, however, refer to a case, the leading feature in which was very much what we have here. I refer to the case of *Kerr's Trustees*, which is reported in 11 Macph. 983. There the proprietor of a farm which it was proved might have been let for £71 a-year, let it to an old servant whom he favoured, and to whose son he bequeathed the farm by his will, at a rent of £50 a-year. The Court held that the lease was not conditioned as the fair annual value of the farm. That decision confirms me in the view which I take that the Assessor and the Magistrates were justified in disregarding the verbal lease to M'Diarmid.

I am accordingly of opinion that the appeal should be dismissed and the determination of the Magistrates affirmed.

LORD DUNDAS—I am of the same opinion. The proof and the findings in this case have been somewhat loosely gone about, which is unfortunate. But taking them as they stand, I do not think that we are in a position to hold that the heritage in question was "*bona fide* let for a yearly rent" (viz., £49), "conditioned as the fair annual value thereof." There is, of course, no hint or suggestion in this case of *mala fides* on the part of the appellants. The question is whether or not £49 truly represents, in the circumstances, the fair annual value of the subjects. For the reasons which your Lordship has stated I answer this question in the negative. The determination of the Magistrates is, in my opinion, a reasonable and right one, and ought not to be interfered with.

The Court were of opinion that the determination of the Magistrates was right and dismissed the appeal.

Counsel for the Appellants—C. D. Murray. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent — Spens. Agents—Wishart & Sanderson, W.S.

COURT OF SESSION.

Thursday, January 18.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court of the Lothians and Peebles at Linlithgow.

BINNING *v.* EASTON & SONS.

Process—Appeal from Sheriff—Competency—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched.* ii (8)—*A.S. 3rd June* 1898, *sec.* 7 (*a*)—*Application for Warrant to have Memorandum Recorded.*

Held (*per* the Lord President, Lord Justice Clerk, Lord Kyllachy, and Lord Stormonth Darling; *diss.* Lord M'Laren and Lord Kinnear; *abs.* Lord Kincairney, who resigned before advising) that the judgment of the Sheriff in an application for special warrant to have an alleged agreement, under the Workmen's Compensation Act 1897, recorded, is final, and appeal therefrom *dismissed* as incompetent.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule ii, sec. 8, provides—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] by the said com-

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mittee or arbitrator or by any party interested, to the [sheriff clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a [Sheriff Court] judgment. Provided that the [Sheriff] may at any time rectify such register." By sec. 14 (*a*) it is provided that in the application of this schedule to Scotland the words indicated in brackets shall be substituted for those in the text.

The Act of Sederunt of 3rd June 1898, sec. 7 (*a*), provides—"The memorandum as to any matter decided by a committee, or by an arbitrator other than a Sheriff, or by agreement, which is by paragraph 8 of the second schedule appended to the Act required to be sent to the sheriff clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all the parties interested, or where it purports to be a memorandum of a decision or award of a committee or of an arbitrator agreed on by the parties and to be signed in the former case by the secretary or by at least two members of the committee, and in the latter case by the arbitrator, the sheriff clerk shall proceed to record it in the special register to be kept by him for the purpose, without further proof of its genuineness. In all other cases he shall, before he records it, send a copy to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

The Act of Sederunt further provides, sec. 7 (*b*)—"A judgment of a sheriff disposing of an application made to him under the Act, or a certified copy thereof, shall be dealt with by the sheriff clerk as if it were a memorandum as to a matter decided by an arbitrator agreed on by the parties duly signed by the arbitrator. . . ."

An action was raised in the Sheriff Court at Linlithgow by Andrew Binning, 15 Livery Street, Bathgate, against James Easton & Sons, slaters and plasterers, Livery Street, Bathgate, in which the pursuer, who had been injured while in the employment of the defenders, sought the granting of "warrant to record in the special register of Court kept for the purpose the memorandum of agreement between the pursuer and defenders proposed for registration by the pursuer in terms of the Workmen's Compensation Act 1897, and relative Act of Sederunt, and which was lodged by the pursuer with the Sheriff Clerk on or about the 6th day of February 1904."

The pursuer averred—"(Cond. 4) On or about the 14th day of February 1903 the defenders, through their senior partner's wife, at a meeting at pursuer's house in Bathgate, admitted liability to compensate the pursuer under the Workmen's Compensation Act 1897, and agreed and contracted to pay him compensation in terms of and under the said Act at the rate of 12s. 6d. per week from 14th February 1903. Accordingly the defenders themselves regularly paid him every week compensation under said Act at said rate from said date under said agreement down to on or about 11th July 1903, when they failed to continue said payments. Said agreement is accurately set forth in the memorandum sought to be recorded. (Cond. 5) By the defenders' said agreement and actings the defenders admitted (1) that the pursuer was a person to whom the Workmen's Compensation Act applied; (2) that compensation under said Act was due to him; and (3) agreed to pay him compensation at the rate of 12s. 6d. per week under the said Act, and they are not entitled to resile from such agreement. Through the defenders' said actings the pursuer did not take any proceedings under the Workmen's Compensation Act. (Cond. 6) On or about the 6th February 1904 the pursuer requested the Sheriff Clerk at Linlithgow to record said memorandum of agreement pursuant to paragraph 8 of the second schedule to the said Act, and at same time sent a copy of said memorandum of agreement to be forwarded to the defenders in order that the Sheriff Clerk might satisfy himself of its genuineness. The defenders acknowledged receipt of a letter from the Sheriff Clerk at Linlithgow sending them a copy of said memorandum of agreement, and stated that they disputed the genuineness of the memorandum of agreement. In consequence of said objection, which is illegal and unfounded, the Sheriff Clerk at Linlithgow declines to record said memorandum of agreement, and this petition has been rendered necessary."

The pursuer pleaded—"(1) The said memorandum and the agreement set forth therein being genuine, special warrant ought to be granted as prayed for, with expenses."

The defenders pleaded—"(1) The action is irrelevant. (2) The memorandum of agreement mentioned in the prayer of the petition not being genuine, ought not to be recorded in the special register under the Workmen's Compensation Act 1897."

On 28th June 1904 the Sheriff-Substitute (MACLEOD) after a proof found in fact that the pursuer had failed to prove the admission of liability or the agreement to pay compensation, and refused the prayer of the petition.

The pursuer appealed to the Sheriff, (MACONOCHIE) who found in fact and in law in terms of the interlocutor appealed against and dismissed the appeal on 15th July 1904.

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The pursuer appealed to the Court of Session and, counsel having been heard on the competency of the appeal, the Second Division appointed the case to be argued before Seven Judges.

Argued for the respondents—The appeal was incompetent. Application for special warrant under the Act of Sederunt 3rd June 1898, section 7 (*a*), was made to the Sheriff not as a common law Judge but under a purely statutory jurisdiction—*Cochrane* v. *Traill & Sons*, November 27, 1900, 3 F. 27, 38 S.L.R. 18; *Cammick* v. *Glasgow Iron and Steel Company*, Nov. 26, 1901, 4 F. 198, 39 S.L.R. 138. The question whether or not there had been a genuine agreement was one for arbitration—*Dunlop* v. *Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146; *Blake* v. *Midland Railway Company*, [1904], 1 K.B. 503. That a workman adopting the alternative of agreement should be put to the expense of litigation in order to make the agreement enforceable was contrary to the intention of the statute. The case was analogous to that of an appeal to a Sheriff under the Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), section 61, under which no appeal lay against the determination of a Sheriff—*Main* v. *Lanarkshire and Dumbartonshire Railway Company*, December 19, 1893, 21 R. 323, 31 S.L.R. 239.

Argued for the appellant—The interlocutor appealed against was pronounced by the Sheriff in exercise of his common law jurisdiction, and not as an arbiter under the Act; appeal could not be by stated case—*Cochrane* v. *Traill & Sons*, *cit. sup.* The appeal was taken from the Sheriff's findings in fact, and was competent—*Cammick* v. *Glasgow Iron and Steel Company*, *cit. sup.*, Lord Trayner, 4 F. 202.

At advising—

LORD JUSTICE-CLERK—This case turns on the question whether the proceeding for testing the genuineness of an agreement under the Workmen's Compensation Act and relative Act of Sederunt, with a view to its being registered, must be, where a dispute arises as to genuineness, in a Court litigation, with appeal from one Court to another, or whether such a proceeding is of a ministerial nature, to be dealt with by the official appointed by the Act, without review. What seems to be contemplated is that where a memorandum is laid before the sheriff clerk, he shall at once, if satisfied of its genuineness, place it on the register. This is plainly not a procedure in any process of law, but merely a convenient means of providing for a claim based on a memorandum such as the statute contemplated being so formalised as to give to the claiming party under it a right to proceed by summary diligence to put it in force unless stayed by some competent process. To this procedure there is added by Act of Sederunt the useful proviso that if the sheriff clerk finds that genuineness is not admitted the matter shall be referred to the Sheriff to decide. It appears to me that this amounts to nothing more than bringing in the Sheriff to fulfil the duty which in an undisputed case would be done by the sheriff clerk, who if satisfied would register, if dissatisfied would refuse to register. That appears to me to be a ministerial act only. I do not think it alters its character in any way that in order to the question of registering or not registering an inquiry may be necessary. Such an inquiry is not by any means inconsistent with the duty to be discharged being ministerial under the statute, as distinguished from a proceeding in a Sheriff Court process properly so called. I see no ground for holding that the statute intended that a proceeding for registration of a memorandum should become a process of pleading, to be carried, it may be, through several courts of review. If the words of the statute plainly implied this of course the implication would require to receive effect. But in a statute plainly intended to give a rapid, simple, and easy procedure for settlement of workmen's claims for injury, it would require very distinct enactment to make it imperative that such a procedure as the one in question should be held to be in the same category as an ordinary action in the Sheriff Court, liable to run the gauntlet of Court after Court, involving great delay and expense.

If there is nothing in the statute to justify such a conclusion, as I think there is not, then I cannot hold that anything done by Act of Sederunt can make the decision different from what it would have been had the Act stood alone. I do not think that any Act of Sederunt could competently be passed to an effect which would make the procedure open to a series of appeals for which the statute gave no authority.

My view is that the proceedings for the registration of a memorandum, whether dealt with by sheriff clerk or by the Sheriff on his reference, are ministerial, and that appeal is not competent.

LORD M'LAREN—The enactments to be considered are the Workmen's Compensation Act, sec. 8 of the 2nd schedule, and the relative provisions of the Act of Sederunt, 3rd June 1898.

Section 8 provides— . . . [*His Lordship proceeded to quote section* 8 *of the 2nd schedule to the Act, and also section* 7 (*a*) *of the Act of Sederunt of* 3*rd June* 1898, *supra.*] . . .

I assume, in accordance with previous decisions, that a verbal agreement may be the subject of a memorandum under the Act of Parliament. I also assume that the Act of Sederunt has the force of law, being framed in the exercise of powers conferred by Act of Parliament. It follows that as in this case the genuineness of the memorandum was disputed the writing could not be recorded, and would not be "enforceable as a Sheriff Court judgment" without a special warrant under the hand of the Sheriff.

It is quite clear that in granting the warrant for registration the Sheriff does not act as arbitrator, because arbitration and

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agreement are alternative methods, and the provisions as to registration presuppose a completed arbitration or a completed agreement. The Act of Sederunt is silent as to the procedure necessary for obtaining a special warrant from the Sheriff, and I assume that the procedure may be as informal as is consistent with the administration of justice. But clearly the Sheriff could not grant the warrant *periculo petentis*. To do so would be to make the Act of Sederunt a dead letter. The Sheriff must at least hear what the other party has to say against the genuineness of the memorandum, and if the parties are at issue as to the existence of an agreement he must proceed upon evidence given on affirmation or oath, because our laws do not allow an issue of fact to be determined on unsworn testimony.

Having heard the arguments and the evidence adduced, the Sheriff may then issue a warrant of registration, which according to the language of the Act of Parliament is to be "enforceable as a Sheriff Court judgment."

I think in the procedure which I have sketched we have all the characteristics of proper judicial procedure—a Judge appointed by the Crown and not acting as an arbitrator, an application by one of the parties for his intervention, an issue joined, a judgment on the facts and law of the case, and the power of enforcing that judgment by the ordinary diligence of the law.

But if in granting the warrant the Sheriff is acting judicially, I think it must be taken that his decision is subject to review, because neither in the Act of Parliament nor in the Act of Sederunt is the Sheriff's decision made final, and at common law all decrees and warrants of inferior magistrates are subject to the review of the Supreme Courts.

Let me suppose that no provision had been made by Act of Sederunt prohibiting the Sheriff Clerk from puting the memorandum on the register when the parties were at variance on the subject. What would be the remedy of the party who disputed the genuineness of the memorandum?

It does not seem to be open to doubt that he would be entitled to apply to a Court of law for interdict against the registration of the memorandum. The Act of Parliament only empowers the Sheriff Clerk to record the memorandum "on being satisfied as to its genuineness," and how could he be satisfied of that fact if one of the two parties to the alleged agreement denied its existence? In such circumstances the recording of the agreement would be an illegal act, *i.e.*, an act not authorised by the schedule, and would therefore be a proper subject of restraint by interdict. Then the Sheriff's judgment would be appealable. So far as I see, this mode of determining the question in dispute would still be competent, because the Act of Sederunt does not say how the jurisdiction or authority of the Sheriff is to be set in motion, but leaves the parties free to move the Sheriff according to known forms of process. It is certainly a more convenient way of determining such a question that the party putting forward the alleged agreement should initiate the proceedings, but then I am unable to see that this makes any difference as to the right of appeal. I do not think that the party who is *in petitorio*, by presenting an application for warrant to record can deprive the defender of the right of appeal, which he would have if he unsuccessfully applied for interdict against the recording of the memorandum.

It is certainly undesirable that such questions should be made the subject of protracted litigation, but as regards this Court at all events, there is nothing in the notion of an appeal which can be said to be contrary to the spirit of the Act, because in the alternative case of an award of compensation by the Sheriff as arbitrator the right of appeal exists. If there is also the right of appeal to the House of Lords, that is only because in this particular case the Act of Parliament has not empowered the Sheriff or the Court of Session to give a final decision, but has expressly made the genuineness of the memorandum a condition of the right to have it recorded.

It seems to me that as regards the interests of the injured workman or his dependants it is of very little consequence whether an alleged agreement is or is not recorded. If its genuineness is disputed it is always open to the party putting it forward to withdraw the agreement and to claim arbitration—that is, if he has given the preliminary notice, which he would probably do in any case to keep himself safe.

I am therefore disposed to sustain the jurisdiction, for the reasons which I have stated.

Lord Kinnear—The only question which we have to decide is whether this appeal should be heard and disposed of on the merits, or whether it should be dismissed as incompetent. I agree with Lord M'Laren in thinking that it is competent and should be disposed of on the merits. But I cannot say that I concur with his Lordship in assuming that a memorandum drawn up by one of the parties and embodying a previous verbal agreement is proper to be recorded under the 8th section of the second schedule. That is one of the questions that may be raised, and it has not been argued before this Court. The only question, therefore, which I propose to consider is whether the appeal is competent.

The Workmen's Compensation Act 1897, sched. II, sec. 8, has conferred on the workman the right to require in certain cases that a memorandum of an agreement shall be recorded in a special register. I agree with the Lord Justice-Clerk that the duty of recording which is imposed on the sheriff clerk is ministerial and not judicial. But for that very reason it is impossible, in my opinion, to hold that when a memorandum is presented to him, the sheriff clerk has an absolute and exclusive jurisdiction to decide whether it shall be recorded or not. Indeed he has no jurisdiction in any proper sense of the word.

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The statute gives a right to which the Clerk must give effect. The provision is imperative—the sheriff clerk "shall" record the memorandum when presented to him. I think the general rule by which this case may be decided is this—that when an Act of Parliament confers a right it does not intend it to be violated without remedy; and if the Act itself gives no special remedy the party aggrieved must have recourse in order to enforce his right to the ordinary Courts of the country. I conceive, therefore, that if the sheriff clerk refuses to record a memorandum the workman has the right, by an appropriate action, to have him ordained to perform the duty imposed on him. In many cases it might be a very difficult question for the sheriff clerk to decide whether or not a memorandum should be recorded; and the case before us is an example, because although the question of fact which the Sheriffs have decided is probably simple enough, the question whether this is a memorandum which ought to be recorded at all is a very troublesome question of construction, depending as it does on the interpretation of two clauses—section 8 and section 14 (*b*) of the second schedule—which it is by no means easy to reconcile. But that is all the more reason for saying that the final decision in the matter is not to rest with the Sheriff Clerk. Unless it is excluded by express terms or by necessary implication, the workman has a remedy—the ordinary remedy of going to the Sheriff and asking him to ordain the memorandum to be recorded; and of course it follows that the employer in like manner has his remedy when it is proposed to record a memorandum so as to make it enforceable as a judgment although he has not in fact made the agreement which is alleged. I think it impossible to hold that the Legislature intended either that the workman should be denied the right which the statute gives him, or that the employer should be subjected to diligence for payment of a debt he never contracted, at the discretion of a clerk of court who has no judicial authority whatever.

If in such an action an ordinary application in the Sheriff Court would be competent, I do not see why an appeal in that action from the Sheriff to the Court of Session in the usual way should not be equally competent. The only distinction which it is possible to state between such a case and the one with which we are dealing, is that here the petition in the Sheriff Court does not conclude in the ordinary form for an order on the sheriff clerk to record the memorandum, but craves the Sheriff to grant warrant to have the memorandum recorded. The form of the prayer is taken from the terms of the 7th section of the Act of Sederunt, and I think it is a proper form. A question has been raised as to the competency of the Act of Sederunt. I think it competent, because the Act does not exclude an appeal to the Sheriff; but if it were otherwise I do not know by what authority the Court could empower the Sheriff to interfere with the exercise of a discretion which, on that hypothesis, has been committed by Parliament exclusively to the sheriff clerk. If the Sheriff has jurisdiction in the matter at all it makes no difference, in my opinion, whether the writ by which the question is brought before him concludes for a decree or for a warrant. It has been suggested, however, that although a remedy may be given to either party by action in the Sheriff Court, with the ordinary rights of appeal from the Sheriff-Substitute, the present appeal is incompetent, because it is not taken by way of action, but in the course of the performance of a ministerial act which was not intended to give rise to a litigation. The appellant must therefore submit to the Sheriff-Substitute's deliverance in the meantime, and if he wants a judicial and therefore appealable deliverance he must bring a fresh action. I am unable to find in the statute any reason or excuse for this reduplication of processes; and I think it inconsistent with the general scheme of legislation, inasmuch as it multiplies procedure and increases expense. The parties either have a right to go to the Sheriff or they have not. If they have, they must be allowed to exercise it directly and in the simplest form. If they have not, they must submit to the decision of the sheriff clerk.

I am therefore of opinion that the competency of the appeal should be sustained, and that the Court should proceed to consider whether the Sheriff was right in refusing the application on its merits.

LORD KYLLACHY—I am unable to hold that the Act of Sederunt provides, or that the statute contemplates, that when, on an application for registration under the 8th section of sched. II, a question arises as to the genuineness of an agreement, that question shall be simply referred to the arbitrament of the courts of law, the applicant being left to establish his agreement as if the statute had not existed, with this difference only, that, although the litigation may be carried by either party to the House of Lords, the applicant must in all cases begin in the Sheriff Court.

I am not myself able to think that this was what the statute contemplated. It appears to me, on the contrary, (1) that, without excluding the common law right of parties to enforce their agreements in any competent manner, the scheme of the statute was to provide a short and inexpensive road to the statutory register which, once reached, should confer a *prima facie* right to summary diligence; and (2) that, ancillary to that, the scheme of the Act of Sederunt was that, as the statute required that the registrar before registering should be satisfied of the genuineness of the agreement, the question of genuineness, if disputed, should be determined, at least for the purposes of registration, by a reference to the Sheriff, who, after such inquiry as he thought proper, should settle, *vice* the Sheriff Clerk, and with the same degree of finality, whether or not the registration should be allowed.

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I am not, therefore, prepared to hold otherwise than that the Sheriff in this matter is final. In other words, I am not prepared to hold that there is an appeal from the Sheriff-Substitute to the Sheriff, and from the Sheriff to the Court of Session, and from the Court of Session to the House of Lords. It seems to me that such a procedure would be contrary to the scheme of the statute, and, if introduced by the Act of Sederunt, would have been *ultra vires*. Nor do I see that any injustice or hardship is thus caused to either party. The applicant for registration (who will in general, I suppose, be the workman) has, if he fails to reach the register in the manner provided, his remedies at common law as before. He may proceed to constitute and enforce his agreement by a small debt or other action. Or if he pleases he may drop his alleged agreement and proceed to arbitration. If, on the contrary, he (the applicant) succeeds in reaching the register, and his opponent is dissatisfied, and desires to try formally the question of genuineness, he also has his remedy by a suspension or reduction, and perhaps also (though as to this I give no opinion) by an application to the Sheriff to rectify the register. I should expect, if I may say so, that in the great majority of cases—indeed in all but very exceptional cases—the result of the statutory procedure would be practically decisive. But in any case I cannot, as I have said, hold that the Sheriff in this matter discharges merely his ordinary jurisdiction. I think, on the contrary, that if he discharges a jurisdiction at all it is a statutory and special jurisdiction, under which his decision is, for a particular purpose, final.

Perhaps I should add that, if I thought otherwise—if I thought, that is to say, that the Sheriff was exercising his ordinary jurisdiction with all its incidents—I should, I am afraid, require to consider a question, which has not yet arisen, but which may arise hereafter, viz., whether an agreement for the payment of money by way of compounding a statutory obligation to compensate for accident, is an agreement which, under his ordinary jurisdiction, a Sheriff could allow to be proved otherwise than by writing. There is a familiar category of decisions which at least suggest that question.

I should also perhaps add that the finality of the Sheriff with respect to the existence or non-existence of an agreement is not under this statute unexampled. For, in applications under schedule 1, section 12, for review of the weekly payments under an agreement, it is, I suppose, certain that the Sheriff may have to make up his mind, in the first place, whether an agreement exists—in other words, whether there is any weekly payment to review. And in that case, while there would be an appeal to this Court on case stated, such appeal could only be upon matter of law.

LORD STORMONTH DARLING—I concur with the Lord Justice-Clerk and with Lord Kyllachy.

LORD PRESIDENT—This question turns upon section 8 of the second schedule of the Workmen's Compensation Act 1897 and the relative Act of Sederunt. I note, first, that section 8 does not bear to be dealing with the question whether or not on the merits of the case compensation is due. It assumes that the liability to pay compensation and the amount have been already ascertained, and it then provides the method of enforcing payment if required. Therefore it is not surprising if the mode adopted, that of registering the agreement and making it equivalent to a decree of Court, should be committed not to a judge but to an officer of court. So far, I understand Lord Kinnear to go the same way as I do, for he says that the act is ministerial. But I part company with him at the next step. He says that if a ministerial act is not done the aggrieved party is never deprived of his remedy, the remedy of having the party charged with the duty of performing the Act ordained to do his duty. I agree. But in this case the question is not that the sheriff clerk has refused to register the memorandum, but whether, on the merits, this particular memorandum is genuine and one which should be registered.

Reverting then to the position that here there is a ministerial act to be performed by a person who is not a judge, I turn to the terms of the Act of Sederunt. The Act of Sederunt has provided that if the sheriff clerk is in doubt as to the genuineness of the memorandum he may appeal to the Sheriff. But in such a case I think the Sheriff is invoked not as a judge but as the natural counsellor and leader of the sheriff clerk, and when he has made up his mind, it is not the Sheriff who registers the memorandum but the sheriff clerk under his directions. If the Act of Sederunt had taken away this ministerial function from the sheriff clerk and given it to the Sheriff, then I think the Act of Sederunt would be *ultra vires*, because the Act of Sederunt has only the power which the Act of Parliament gives it.

I therefore come to the conclusion that the act of the sheriff clerk is ministerial, that though the Sheriff was called in to help, he was not brought in as a judge, and that no appeal lies from his determination to this Court. The remedy for possible injustice lies in the power of application for revision of the compensation.

I think this view is consistent generaliy with the whole scope of the Act, and I do not hold this view because I think that anything turns upon the question of the form of the application. If it were a question of form merely, I do not think we should stick upon it. But I think it is a question on the merits, for it involves the difference between speedy and possible dilatory procedure. I am therefore of opinion, with the majority of your Lordships, that the appeal should be dismissed as incompetent.

I wish to say further, although in doing so I may be going beyond my province, that it has been to me a very great difficulty to apply my mind to the question as

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it arises on this Act of Parliament. Because there is no doubt that there is here a pure blunder. In Scotland the proper course for a workman who has made an agreement with his employer, and wishes to have it made equivalent to a decree of Court, is provided by sub-section (*b*) of the 14th paragraph of the second schedule. Paragraph 8 of the second schedule is not meant to apply to Scotland at all, and there is no doubt that in the section (sched. II, section 15) which provides that "paragraphs 4 and 7" shall not apply to Scotland, "7" should be "8." The whole difficulty arises from a misprint which in some way found its way into the bill after it had left the House of Commons. But as judges we are powerless to remedy this; we are bound to apply our minds to the statute as it stands, and I have tried to do so in the way I should have done in any other case.

LORD KINCAIRNEY, who was present at the hearing, resigned before advising.

The Court dismissed the appeal.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—J. R. Christie—J. D. Smith. Agent—James G. Bryson, Solicitor.

Counsel for the Defenders and Respondents—Campbell, K.C.—MacRobert. Agents—Macpherson & Mackay, S.S.C.

VALUATION APPEAL COURT.

Thursday, February 8.

(Before Lord Low and Lord Dundas.)

ORMSTON *v.* ASSESSOR FOR GREENOCK.

Valuation Cases — Lease — Consideration other than Rent—Purchase of Goodwill of Business—Break in Lease—Subsequent Purchaser of Property Raising Rent at Break in Lease.

A, the proprietor and occupier of a public-house, in consideration of a rent of £39 and the payment of a sum of money for goodwill, granted to B a lease of the premises for fifteen years from Whitsunday 1897 with a break at Whitsunday 1905. The premises were entered in the valuation roll at £59, of which £39 was the rent in the lease and £20 was one-fifteenth of one-half of the purchase price of the goodwill. A subsequently sold the property to C, who taking advantage of the break in the lease raised the rent payable thereunder to £49, and this was given effect to by minute of agreement, the whole other conditions of the lease being conserved. The Assessor thereupon entered the property in the roll at £69. C appealed and maintained that the entry should be £49, inasmuch as that was the full rent he obtained after purchasing the property in open market, and that he had received nothing for goodwill, and if any of the payment for goodwill effeired to the property it must be considered to have been exhausted at the time of the break in the lease.

Held that as C had bought the subject under burden of the lease to B he was liable to all the consequences of that lease, that the agreement between C and B at the break in the lease was not a termination of the old and a substitution therefor of a new lease, and that therefore the Assessor had acted rightly in entering the subject in the roll at £69.

At a meeting of the Magistrates of the burgh of Greenock, held there on 20th September 1905, for the purpose of hearing and determining appeals and complaints under the Valuation of Lands (Scotland) Acts for the year ending Whitsunday 1906, Richard Dennistoun Ormston, residing at 35 Bowmont Street, Kelso, appealed against the following entry in the valuation roll of the town and burgh of Greenock for the year ending Whitsunday 1906:—

Description of Subject.			Proprietor.	Tenant.	Yearly Rent or Value.	Observations.
Description.	No.	Situation				
Shop and Store.	38	Main Street.	Richard Dennistoun Ormston, Kelso.	John Gemmell Ostler, Spirit Dealer.	£69	Tenant pays £49. Goodwill added.

The tenant did not appear in the proceedings.

The Magistrates being of opinion that the entry in the roll was correct dismissed the appeal, and the appellant craved a Case for opinion of the Lands Valuation Court.

The following facts were stated in the Case as admitted—"(1) The appellant is proprietor of a tenement situated at 38 Main Street, consisting of three square storeys in height, including two shops on the street floor. The eastmost of these shops with a store behind is the subject the amount of the yearly rent of which is in question. The said shop and store are occupied by John Gemmell Ostler as a licensed public-house.

"(2) The former proprietor of the said tenement, Andrew Miller, was also occupier of the licensed premises. He got into financial difficulties, and in March 1896, conveyed the property to William Lawson, wine and spirit merchant, Leith, by a disposition *ex facie* absolute, but really in security of debts due by the said Andrew Miller.

"(3) In February 1897 the said Andrew Miller granted a trust-deed in favour of James Paterson, accountant in Greenock, for behoof of his creditors.

"(4) The said James Paterson, with concurrence of the said William Lawson, sold the goodwill of the said Andrew Miller's licensed business to the said John Gemmell Ostler for £650, in consideration of which the said William Lawson and the said James Paterson, with joint consent, granted him a lease of the shop for fifteen years at a rent of £39 per annum, with a break

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available to either party at Whitsunday 1905.

"(5) That the subjects since the granting of the said lease, and down to Whitsunday 1905, have been entered in the valuation roll at £59, said sum being made up of the rent of £39 under the lease and an annual sum fixed by the Assessor at £20 in respect of the payment of £650 made by the tenant for the goodwill of the said Andrew Miller's business and lease of the premises. This annual sum of £20 was reached by deducting from the said sum of £650 an allowance of £50 for shop fittings and spreading one-half of the remaining £600 over the fifteen years of the lease.

"(6) The said tenement was exposed to sale by public roup by the said William Lawson and purchased by the appellant on 30th March 1899, at the upset price of £1500 under burden of the said lease of the said licensed premises, with entry at Whitsunday 1899.

"(7) The appellant took advantage of the break in said lease at Whitsunday 1905 to enter into an arrangement with the tenant, the said John Gemmell Ostler, which is embodied in the minute of agreement dated 17th and 25th April 1905, whereby the rent of the said subjects was raised to £49 during the remaining years of the lease. This was an increase of £10, which the Assessor added to the former rent, making it £69, against which the proprietor now appeals.

"The appellant maintained that the subjects were *bona fide* let by him to his tenant under the said minute of agreement at the annual rent of £49, which was conditioned as the fair annual rent of the subjects. No part of the payment made by the tenant to the trustee of the said Andrew Miller in respect of the goodwill of the latter's business had been received by the appellant, who had purchased the subjects at public roup for a full price, and the Assessor was accordingly not entitled to take this payment into account as a consideration received by the appellant other than the rent. In any event, that the proportion of the sum paid to the trustee of the said Andrew Miller in name of goodwill which the Assessor held was applicable to the heritable subjects must be considered as exhausted as at Whitsunday 1905, the date of the break in the lease. The subjects therefore fell to be entered in the roll as of the annual value of £49.

"The Assessor maintained that no change had taken place since the rent had been fixed by the Magistrates other than the fact that the proprietor had taken advantage of the break in the lease to increase the rent by £10, which he, the Assessor, had given effect to by entering the subject on the valuation roll at £69 instead of £59 as formerly. All that was effected by the minute was an agreement on the part of the tenant to pay £10 more rent during the remaining years of the lease. It may be, the Assessor contended, that the present proprietor did not directly participate in the £650, but he purchased the property under burden of the said lease, which was granted and the rent fixed at £39 in consideration of the payment of the said £650, and in terms of said lease the present proprietor has increased the rent by £10 per annum. But for the payment of the said £650 the lease would not have been granted, and apart from the terms of the lease the appellant could not have increased the rent by £10 per annum during the remaining years of that lease."

Argued for the appellant—There was no consideration other than rent here from which the appellant derived any benefit. The Assessor should have apportioned the goodwill up to the break, not up to the end of the lease. Having made a mistake in calculation, the Assessor could not throw the burden of it on the appellant. The old lease terminated at the break, and an entirely new lease at a different rent was entered into. Both parties were free at the break, and if a new tenant had come in then the Assessor's contention could not have been seriously maintained.

Argued for the respondent—The Assessor had proceeded here in the proper way. He could not have competently proceeded otherwise. If there was a break in such a lease as this after, say, three years, it would be a very unreasonable burden to put all the goodwill on these three years, instead of spreading it over the whole years of the lease. There was no new lease entered into here at the break. There was merely an agreement which in terms preserved the old lease between the parties, and which spoke of "the seven remaining years of the lease" of the subject as what it proposed to deal with. It preserved all the conditions of the old lease and merely provided for an addition to the rent previously paid—*Wilson*, May 20, 1884, 21 S.L.R. 545.

At advising—

LORD LOW—In 1897 the present tenant of the public-house in question, John Gemmell Ostler, obtained from the then proprietor a lease for 15 years at a rent of £39 a-year, and at the same time he paid to the proprietor a sum of £650 for the goodwill of the business. That payment was a consideration for the lease other than the rent. The way in which the Assessor dealt with that payment in making up the valuation roll was this. He deducted £50 for the shop fittings and then he took one-half of the remainder and spread it over the term of the lease. It seems to me that that was quite a proper method of dealing with the case.

But the matter does not end there. Some time after the lease was entered into the tenement was exposed for sale, and in March 1899 it was purchased by the present appellant for £1500. In the lease there was a break available to either party at Whitsunday 1905, and at that term Mr Ormston might have put an end to it and granted a new lease either to the same or to another tenant. If he had done so no doubt the payment for goodwill which Ostler had made in 1897 could not have been regarded as part of the consideration for the new

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lease. But the lease was not terminated. One term of it was modified. The rent instead of being £39 a year was fixed at £49, but beyond that the lease was confirmed and allowed to stand.

When Mr Ormston acquired the subjects he acquired them under the burden of the current lease, and that lease, as I have said, is still subsisting. Therefore the consideration for which it was granted must still be taken into account, and the fact that the yearly payment fixed by the lease has by agreement been increased in amount seems to me to be immaterial.

I am therefore of opinion that the Assessor was right and that the determination of the Magistrates must be affirmed.

LORD DUNDAS—I am of the same opinion. In my view the minute of agreement of April 1905 was simply a pactional modification by the parties of the existing lease "during the seven remaining years" thereof to the effect of increasing the rent from £39 to £49 per annum. It was not in my opinion a new lease, and there was certainly no new tenant introduced. I see no good reason why the Assessor should not have regard to this increase in the rent as he did have regard to it, and I consider that the Magistrates were quite right in dismissing the appeal to them.

The Court was of opinion that the Magistrates were right and that the entry in the roll should stand.

Counsel for the Appellant—Macdonald. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Respondent—Grainger Stewart. Agents—Cumming & Duff, S.S.C.

Thursday, February 8.

(Before Lord Low and Lord Dundas.)

THE GLASGOW ABSTAINERS' UNION *v.* ASSESSOR FOR ARGYLLSHIRE.

Valuation Cases—Annual Value—Convalescent Home—Valuation per Bed or Percentage on Cost of Erection—Restriction on Use.

A convalescent home was erected on ground held under a feu disposition which contained certain restrictions which precluded its use for any other purpose than that of the erection and maintenance thereon of a convalescent home under the management of a certain specified body of trustees.

Held that in valuing the home for the purposes of the valuation roll regard must not be paid to the restrictions in the feu disposition, but a fair annual value must be taken at which such a subject might be expected to let if unhampered by these restrictions. Principle of valuation at £2 per bed, or 4 per cent. on cost of erection approved.

At a meeting of the Valuation Committee of the County Council of Argyll held at Dunoon on the 11th day of September 1905, for the purpose of hearing and determining appeals and complaints under the Valuation of Lands (Scotland) Acts, the Glasgow Abstainers' Union appealed against the following entry in the valuation roll for the said county for the year ending Whitsunday 1906, viz.:—

Parish of Dunoon and Kilmun.

Description and Situation of Subject.	Proprietor.	Tenant and Occupier.	Yearly Rent or Value.
Convalescent Homes, Kilmun.	Glasgow Abstainers' Union.	Proprietors.	£150.

The Committee on consideration of all the facts fixed £140 as the fair annual value of the subject. The appellants, having expressed themselves dissatisfied with this decision, craved a Case for the opinion of the Lands Valuation Appeal Court.

The Case stated:—"No witnesses were examined on behalf of parties, but the facts of the case and the contentions of parties are contained in the following statements by the appellants and Assessor:—

"*Appellants' Statement and Grounds of Appeal.*—Kilmun Seaside Home, or 'Convalescent Home, Kilmun,' as it is described in the valuation return, was erected some thirty years ago on a free site gifted by the late James Duncan, Esquire, of Benmore, in the County of Argyle, who was the heritable proprietor of the lands. Mr Duncan granted a feu disposition to certain trustees for the Glasgow Abstainers' Union, Glasgow, of whom the appellants are the successors. The site, which consists of one acre of ground, is situated about a mile from Kilmun Pier in the Benmore direction and beyond the head of the Holy Loch, and is in a somewhat isolated locality. The Home . . . is capable of accommodating when fully occupied thirty-four male and thirty-seven female patients. The staff consists and has all along consisted of one matron and six female domestic servants.

"The original cost of erecting the Home was £3,000, and it continued in the condition in which it was originally erected till last year, when, in consequence of dilapidation and the necessity of improving its sanitary arrangements, certain alterations and additions were made, and two additional sitting-rooms and accommodation for seven extra patients were provided. The Home had originally been capable of accommodating sixty-four patients, and the alterations enable other seven to be added, making in all seventy-one. . . . These additions (exclusive of the cost of improving the sanitary arrangements) increased the cost of the buildings by £750, that is to say, if the dormitory wings had been originally erected as they now are, the additional cost would have been £750, making the total cost of the buildings from the start £3,750.

"Prior to the reconstruction the Home had been assessed at £120, and thereafter the Assessor had increased the annual value by £30, making the value of the Home for the current year £150. . . .

"The feu-disposition referred to, a copy

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of which was produced and founded on, contains sundry very stringent conditions. The trustees are taken bound to erect buildings on the site 'to be used as a seaside home for convalescent poor' and to keep in all time coming upon the ground disponed houses and buildings to be used only as a seaside home for the convalescent poor 'to be used and managed by the directors thereof from time to time as a seaside home for the benefit of the poor of Glasgow and elsewhere who may be convalescent from sickness or infirmity,' always in harmony with the principles expressed in the feu disposition, and it is expressly declared that the buildings shall not be used 'by said union or association or society for any other purpose' and 'no intoxicating liquor shall be manufactured on the said ground or on the buildings thereon or used as beverages therein, nor shall the said ground or buildings be used for selling or distributing such liquors as beverages in any way, and in the event of the union being dissolved or ceasing to exist, the trustees are directed to hold the same for, and shall convey the same to, the Lord Provost and Magistrates of the City of Glasgow to be used by them in trust as a seaside home for the convalescent poor, and to be managed and used by them, or by any person or society or organisation to whom they may grant the use thereof, on the same principles and conditions as the said Abstainers' Union use and manage the same and as hereinbefore expressed and not otherwise.'

"The funds for carrying on the home are entirely supplied by voluntary contributions from the charitable public, and no charge of any description is made upon the patients as a condition of admission, and nothing is received from them, and there is no revenue or income derivable from the home.

"The district in which the Home is situated is very sparsely populated. The Home itself is isolated, and there is no other purpose to which the buildings can be used than a convalescent home managed on the principles set forth in the disposition. It is not capable of being used as a church or school or mission hall, as there is no need for such in the district and no population from which to fill or with which to occupy the home. There is ample provision elsewhere for all the wants of the inhabitants in these respects. The patients in the Home for the most part are sent down from Glasgow, and are, as far as possible, of the poorer working class whom a short residence in the Home after illness will fit for resuming their work as breadwinners.

"The appellants contended that the restrictions referred to and the whole circumstances do not justify an annual value of more than £80. The appellants maintain that the Home is valued much in excess of similar institutions, and instanced the case of the Dunoon Seaside Convalescent Home which cost £23,000 and which is valued at £440, also the case of Lenzie Convalescent Home which cost £15,000 and is valued at £180. Reference was also made to the case of *Nordach-on Dee Sanatorium* —a paying concern which cost £52,107— (inclusive of goodwill), and was valued by the Court on appeal at £800 (27th February 1905, 42 S.L.R. 503), and to the case of *Blyth Hall Trustees* (February 24, 1883, 10 R. 659, 20 S.L.R. 433), where a public hall (deriving a revenue) and which cost £4000 was assessed at £80. . . ."

"*Assessor's Statement.* — The Assessor maintained that this is a subject beneficially occupied by the proprietors, and capable of being let to a tenant. It had been assessed for over twenty years at £120. It is a plain building, well adapted for the purpose for which it was built. There is no building in the neighbourhood of the same character, and no means therefore of comparison with other subjects. The appellants admit that there were sixty-four beds in the Home when the valuation was £120, which would make the valuation work out at about £2 per bed. During the past year the accommodation has been increased until the Home is now capable of accommodating seventy-one patients, besides a staff of seven servants, and if this method of fixing the valuation were adopted, the valuation should be £142 plus the servants' accommodation at the same rate per bed, or £156 for the whole. This is the method adopted in the case of *Woodilee Asylum* (*Barony Parochial Board*), April 2, 1877, 4 R. 1149, but the rate per bed in that case is £4; in the case of the *Roselee Asylum, Midlothian*, the annual value of which was fixed at £2, 10s. per bed; and in the *Banffshire District Lunacy Board* case (July 2, 1870, 11 Macph. 982), where the rate per bed was £3. Taking the mean between these three, the rate per bed would be £3, 10s., and the valuation £248. In the case of *Nordrach-on-Dee Sanatorium*, referred to by appellants' agent, the cost of the buildings is not stated. They are valued in the prospectus at £24,219, and the annual value is £800. *The Dunoon Seaside Homes*, referred to by the appellants as costing £23,000, is of no value as a comparison, as the buildings are very costly as compared with the Kilmun Home. The accommodation is not stated.

"If the cost of erection is taken (and this course is sanctioned by the Judges, as reported in the case of *St Cuthbert's Co-operative Association, Limited*, February 19, 1896, 23 R. 681, 33 S.L.R. 487, where their Lordships stated that in the absence of other materials 'Cost is a proper element in estimating value') the cost admitted by the appellants is £3750, and at five per cent, is a moderate rate for a property capable of being let and beneficially occupied by a tenant, which would make the valuation £187, 5s. The Assessor maintained that whether by a rate per bed or by cost of erection his valuation ought to be increased."

Argued for the appellants—The principle of valuation of such institutions at so much per bed was erroneous. The proper principle was cost of erection, but at a rate of 2 per cent. instead of 5 per cent. as proposed by the Assessor. This rate of 2 per cent. had been adopted in the following cases—

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Blyth Hall Trustees v. *Assessor for Fifeshire*, 24th February 1883, 10 R. 659, 20 S.L.R. 433; *Barony Parochial Board (Woodilee Asylum)*, 2nd April 1877, 4 R. 1149; *Banffshire District Lunacy Board*, 2nd July 1870, 11 M. 982. Counsel also referred to Armour on Valuation, p. 259.

Argued for the respondent—The Assessor was willing to take the valuation at £140, which in the circumstances was moderate. The proper principle to adopt here was percentage on cost of erection, and 4 per cent. was the proper rate. The figure brought out by this method corresponded in amount with a valuation on the basis of the number of beds, taking a rate of £2 per bed. The valuation of the building on this principle had been allowed to stand for twenty years without objection.

LORD LOW—It is plain that so long as this convalescent home is held and administered in terms of the feu-disposition it cannot be let to a tenant. That, however, is no reason why the annual value should not be ascertained for valuation purposes. I agree with the opinion expressed by Lord Fraser in the case of the *Blyth Hall Trustees* (10 R. 659) that, in circumstances such as those with which we are now dealing, restrictions imposed by a private individual in regard to property which he has placed in trust, and which prevent the use of the property being a remunerative occupation, must be disregarded in ascertaining the annual value.

Now if the Home in question were put in the market I see no reason why a tenant should not be readily enough obtained. The premises, I imagine, would be suitable for a sanatorium or a hydropathic establishment, or some use of that kind.

What, then, is the rent for which the Home might be expected to be let? There is one circumstance which appears to me to be material, and that is that the Home was entered, apparently without objection, in the valuation roll for twenty years as of the annual value of £120. There was then accommodation in the building for sixty-four patients, and the value fixed was a little less than £2 per bed. That is a common basis for the valuation of subjects the profits from which depend upon the accommodation for patients or guests, and £2 per bed appears to be a moderate estimate. There is another method by which the valuation may be checked, and that is by taking the interest upon the cost of the building. The building in this case cost £3000, so that the valuation of £120 was just 4 per cent. upon the cost, which does not strike one as being more than a moderate return upon the capital expended.

The occasion of the present appeal was that an addition was made to the Home at a cost of £750. The result of the addition was that the accommodation was increased from sixty-four to seventy-one patients, and the committee of the County Council have raised the valuation to £140 per annum. That is entirely in accordance with the principle upon which the subjects were valued before the addition, because the amount fixed is still a little less than £2 per bed, and is as nearly as possible 4 per cent. upon the cost of erection.

I am therefore of opinion that there is no reason to interfere with the determination of the committee.

LORD DUNDAS—I agree with your Lordship, and I do so all the more readily that the Committee have come to this decision with a full local knowledge, and had all the facts before them.

The Court were of opinion that the determination of the Valuation Committee was right,

Counsel for the Appellants — Graham Stewart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Pearson. Agents — Pearson, Robertson, & Findlay, W.S.

COURT OF SESSION.

Saturday, January 27.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

BAIRD (LIQUIDATOR OF DAVID GILLIES & SONS, LIMITED) *v.* GILLIES AND OTHERS.

Arrestments—Debt Due by Company in Liquidation—Proper Method of Arresting—Arrestment in Hands of Liquidator as Individual Ineffectual.

An arrestment "in the hands of you, A, accountant, Glasgow," of "the sum of . . . due and addebted by you to B . . ." the schedule of arrestment in no way indicating that the debt was due by A in any other than a private capacity, *held* ineffectual to attach a sum to which A as liquidator of a limited company had ranked B in respect of a debt due by the company to him.

Per Lord Stormonth Darling—"The proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such."

The firm of David Gillies & Sons, smiths and engineers, Bonnybridge, of which Archibald C. Gillies was a partner, became incorporated as a limited company under the Companies Acts. The company subsequently went into liquidation, and John Baird, accountant, 173 St Vincent Street, Glasgow, was appointed liquidator thereof. Archibald C. Gillies lodged a claim in the liquidation for sums, partly preferable, due to him by the company, and the liquidator having admitted him to a ranking, he became entitled by way of dividend out of the company's estate to the sum of £40, 18s. 10d.

In 1897 the firm of David Gillies & Sons, and the individual members of the firm, had

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granted a bond and disposition in security for £500, to which bond James Henry Burns, solicitor, Falkirk, had in 1900 acquired right to the extent of £420. At his instance letters of horning were passed on the said bond against the said firm and against the partners as partners and as individuals, and on 11th June 1904, by virtue thereof, Burns used an arrestment in the hands of Baird of sums due by him to Archibald C. Gillies and to the other partner of the firm of David Gillies & Sons, as partners and as individuals. The schedule of arrestment was in the following terms:—"I, William Brownlie, messenger-at-arms, by virtue of letters of horning on bond and disposition in security, dated and signeted the sixth day of June nineteen hundred and four years, raised at the instance of James Henry Burns, solicitor, Falkirk, complainer, against David Gillies & Sons, smiths and engineers, Bonnybridge, and . . . and Archibald Cowie Gillies, both smiths at Bonnybridge, the individual partners of said firm, jointly and severally, in His Majesty's name and authority, lawfully fence and arrest in the hands of you, John Baird, accountant, 173 St Vincent Street, Glasgow, the sum of four hundred and seventy pounds sterling, more or less, due and addebted by you to the said . . . and Archibald Cowie Gillies, both as individuals and as partners of the said firm of David Gillies & Sons; together also with all goods and gear, debts, sums of money, or any other effects whatever lying in your hands, custody, and keeping, pertaining or in any manner of way belonging to the said . . . and Archibald Cowie Gillies, both as individuals and as partners of the said firm of David Gillies & Sons, or to any person or persons for their or either of their use or behoof, all to remain under sure fence and arrestment at the instance of the said James Henry Burns aye and until he be completely paid and satisfied of the sum of four hundred and twenty pounds."

On 13th October 1904 Patrick J. Stirling, solicitor, Glasgow, a creditor of A. C. Gillies, having obtained decree for his debt, used arrestments in the hands of Baird as liquidator for £25, having also already on the preceding 30th July arrested on the dependence of his action. And another creditor of Gillies, Alexander Harper, tailor, Falkirk, on 5th August 1904 also used arrestments in the hands of Baird as liquidator for his debt of £4.

In these circumstances Baird, the liquidator of David Gillies & Sons, Limited, as nominal raiser, and Stirling as real raiser, brought an action of multiplepoinding in the Sheriff Court at Glasgow, in which the fund *in medio* was the £40, 18s. 10d. due to Gillies (the common debtor) out of the company's estate. Burns, Gillies, Stirling, and Harper lodged claims, Gillies, Stirling, and Harper pleading that the arrestments by Burns were inept.

On 30th May 1905 the Sheriff-Substitute (BALFOUR) found Burns' arrestments invalid to attach the funds in the hands of Baird as liquidator,

"*Note.*—This is an action of multiplepoinding connected with the liquidation of David Gillies & Sons, and the first question which has to be decided is whether the arrestment used by Mr James Henry Burns in the hands of the liquidator is valid to attach the funds in Mr Baird's hands as liquidator. Mr Burns' arrestment is the first in point of time used in the liquidator's hands. The execution of arrestment bears that the arrestment is laid in the hands of John Baird, accountant, Glasgow, and it attaches sums of money, &c., belonging to William Rennie Gillies and Archibald Cowie Gillies, both as individuals and as partners of the firm of David Gillies & Sons. There is no reference whatever made to the firm being in liquidation or to the arrestment being used in Mr Baird's hands as liquidator, and the effect of the arrestment is to attach funds in Mr Baird's hands as an individual belonging to the two Gillies's. This appears to be quite clear from the authorities, and I refer to Graham Stewart on Diligence, p. 107, where it is stated that where the defender occupies two positions, arrestment of funds belonging to him in one capacity is of no avail in an action against him in another capacity, so in actions against trustees in their trust capacities, arrestment of the private funds of the trustee is incompetent, the arrestee being due nothing as trustee, and, on the same principle, where the arrestee occupies two capacities, the character in which he is alleged to be debtor must be correctly set forth. I refer to the cases which are cited in Mr Stewart's book, particularly the case of *Graham* v. *Macfarlane & Company*, 7 Macph. 640. The case of *Carron Company* v. *Currie & Company*, 33 S.L.R. 578, does not introduce a different principle, because the point decided there was that an arrestment in the hands of shipbrokers who had the entire management of the affairs of a shipping company competently attached the cargo of one of its ships which was under the control of the shipbrokers in harbour."

Burns appealed to the Sheriff (GUTHRIE), who on 6th July 1905 reversed the judgment of the Sheriff-Substitute, found Burns' arrestment to be effectual, and remitted the cause back for further procedure.

It appeared that the judgment of the Sheriff was based on a misapprehension of the facts of the case, and it was subsequently admitted at the bar that the grounds upon which it proceeded could not be upheld.

The Sheriff-Substitute having thereafter, by interlocutor of 18th July 1905, sustained the claim for Burns and repelled those for Gillies, Stirling, and Harper, Gillies and Stirling appealed, and argued—The claim for Burns should be repelled, as his arrestment was bad in two respects; (1) it was used in Baird's hands as an individual and not as liquidator of the company, whereas the fund arrested was due by him in the latter capacity—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 94. Misdescription of the arrestee was fatal to the validity of an arrestment—*Graham* v. *Macfarlane &*

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Company, March 11, 1869, 7 Macph. 640, 6 S.L.R. 424; *Hay* v. *Dufourcet & Company*, June 19, 1880, 7 R. 972, 17 S.L.R. 669. (2) It described the debt as due to Archibald Gillies as partner of the firm of David Gillies & Sons, which firm in point of fact no longer existed.

The respondent (Burns) argued—The respondent's arrestment was valid. (1) The arrestment in Baird's hands as an individual was good, because he, as liquidator, having ranked Gillies on the company's estate, and having declared a certain dividend as payable to him, became liable to Gillies as an individual for the sum thus earmarked—*Ritchie* v. *M'Lachlan and Others*, May 27, 1870, 8 Macph. 815, 7 S.L.R. 500; *Hamilton* v. *Kerr*, November 23, 1830, 9 S. 40. (2) The fund was described as due to Gillies both as an individual and as a partner of the firm. Accordingly, if the first part of the designation was correct it did not matter if the second was bad. It was quite competent in one schedule to arrest in the hands of one arrestee two sums due to two separate persons.

LORD KYLLACHY—I am of opinion that this arrestment is hopelessly bad, and it is hardly necessary to go into particulars. The arrestment is, I think, bad on the ground expressed by the Sheriff-Substitute. And it is also bad on the separate ground urged by Mr Morison, viz., that it is impossible to read the schedule as applying to two separate and unconnected debts due by the company to the two individuals named. What was sought to be attached plainly was some sum supposed to be due to those two persons jointly by a private firm which the arrester supposed was still existing and was being wound up by Mr Baird.

LORD STORMONTH DARLING—I cannot doubt that the proper way to arrest the funds of a company in liquidation is to arrest the debt as due by the company itself and the liquidator as such. This arrestment fails in that essential particular, and is also open to the objection which Lord Kyllachy has indicated. But it is enough to say that it is entirely inept to constitute a preference in favour of the person who has used it, and that we must remit the case to the Sheriff accordingly.

LORD JUSTICE-CLERK and LORD LOW concurred.

The Court sustained the appeal, repelled the claim for Burns, and remitted to the Sheriff to proceed.

Counsel for the Appellants—Morison—A. Mackenzie Stuart, Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Graham Stewart—Macmillan. Agents—Cowan & Stuart, W.S.

Tuesday, January 30.

SECOND DIVISION.

ELSMIE & SON *v.* TOMATIN SPEY DISTRICT DISTILLERY, LIMITED, AND ANOTHER.

Company — Winding-up — Supervision Order or Winding-up Order—Wishes of Creditors and Shareholders—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 149.

On January 4 a creditor to the extent of £152, 7s. 8d. brought a petition to have a company wound up compulsorily. On 13th January an extraordinary general meeting of the company was held, at which a resolution was passed that as the company by reason of its liabilities could not continue its business it be wound up voluntarily, and that A be appointed liquidator, with instructions to place the liquidation under the supervision of the Court.

A note was accordingly presented which set forth the resolution, and stated that a majority of the creditors approved of the voluntary winding up and of the liquidator appointed, and a mandate stating the approval of creditors to the extent of £3176, 7s. 9d., who were a majority in number and value, was lodged in process.

The petitioning creditor contended that the shareholders had no *locus standi* to oppose his petition; that no creditor opposed the petition and the mandate produced was not sufficient; that out of eight creditors for whom the mandate was lodged five were or had been directors of the company, and so had other interests than those of creditors; and that the liquidator appointed was the nominee of one of the directors.

Held that as the majority of the creditors as well as the shareholders desired the voluntary winding-up to be continued under supervision, and as there was no suggestion that the petitioners would be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding-up were granted, or in any other way, a supervision order should be made and the liquidation be continued with A as liquidator.

In *re West Hartlepool Iron Works Company*, 1875, L.R., 10 Ch. 618, *approved* and *followed*.

Expenses—Petition for Winding-up Order—Resolution of Company to Wind-up Voluntarily under Supervision—Refusal of Winding-up Order—Expenses of Petitioner.

Where the Court, giving effect to the wishes of a large majority of a company's creditors, and taking into consideration the whole circumstances of the case, refused the petition of one creditor for a winding-up order, and decided that the voluntary winding-up

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under supervision resolved on by the company subsequent to the petition being presented should be continued, it *allowed* the petitioning creditor his expenses, and directed them to form part of the expenses of the liquidation.

By sec. 79 of the Companies Act 1862 (25 and 26 Vict. cap. 89) it is provided,—"A company under this Act may be wound up by the Court as hereinafter defined under the following circumstances (that is to say) . . . (4) whenever the company is unable to pay its debts; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up." By sec. 80 of said Act it is provided—"A company under this Act shall be deemed unable to pay its debts . . . (4) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

By sec. 91 it is provided—"The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence. . . . In the case of creditors regard is to be had to the value of the debts due to each creditor. . . ."

By sec. 147 it is provided—"When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms, and subject to such conditions as the Court thinks just."

By sec. 149 it is provided—"The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. . . . In the case of creditors regard shall be had to the value of the debt due to each creditor. . . . "

On January 4, 1906, George Elsmie & Son, coal merchants, Aberdeen, presented a petition praying the Court to order that the Tomatin Spey District Distillery, Limited, be wound up and James Alexander Robertson-Durham be appointed official liquidator. The said company was on 8th June 1897 registered and incorporated under the Companies Acts 1862 to 1890 and had its registered office in Inverness. The nominal capital of the company was £12,000, divided into 1200 shares of £10 each. Of these 600 were issued and fully paid up. The working capital of the company was thus £6000.

In the narrative of the petition the petitioners set forth that they were creditors of the said company to the amount of (1) £140, 7s. 7d., with legal interest from 13th November 1905, being the amount of the balance due to them for coal supplied to the company, and for which sum with interest as above they held a decree of the Lord Ordinary (Salvesen) dated 7th December 1905; and (2) to the amount of £12, 0s. 1d., being the total amount of expenses incurred in the action in which they obtained decree as above stated, for which sum they also held decree dated 21st December 1905. They further set forth that application had been made to the company for payment of the sums decerned for, but that they still remained unpaid; that the distillery had not been working for some time past; and that the company was and had been for some time insolvent and unable to pay its debts. The petition was served on the company, and on 9th January notice of this application was given by advertisement in the *Edinburgh Gazette*, *Scotsman*, and *Inverness Courier*.

On 13th January an extraordinary general meeting of the company duly convened was held, when the following extraordinary resolution was duly passed, viz.—"That it has been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it is expedient to wind up the same; and accordingly that the company be wound up voluntarily."

At the same meeting the following additional resolutions were also duly passed, viz.—"(1) That Mr James Forsyth, solicitor, Union Street, Inverness, be and is hereby appointed liquidator for the purposes of winding up the company, with every power which by the Companies Act 1862, and Acts amending and extending the same, is conferred on liquidators. (2) That the liquidator be instructed to take the necessary steps for having the liquidation placed under the supervision of the Court of Session."

On 17th January a note was lodged on behalf of the company and Forsyth as liquidator. In this note the company admitted that the petitioners were its creditors to the extent of £152, 7s. 8d. as above set forth and that it could not by reason of its liabilities continue its business, and it set forth the resolution of January 13 above quoted. The company, however, stated that there were debenture holders to the amount of £6000 (the debenture holders did not make any appearance) and ordinary creditors besides the petitioners to the amount of about £3321. The note further stated—"The shareholders and the great majority of the creditors are opposed to a winding-up by the Court, and desire that the company should be wound up voluntarily under the supervision of the Court. They also desire that in the interest of economical and efficient management the liquidator should be a person resident in the locality. They accordingly oppose the appointment of the nominee of the petitioners, and desire that the present liquidator James Forsyth should act as liquidator in the winding-up."

Mandates were lodged in process from eight creditors of the company, whose debts together amounted to £3176, 7s. 9d., approving of the voluntary liquidation of the company under the supervision of the Court and of the appointment of Forsyth as liquidator.

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Argued for the petitioners (Elsmie & Son)—(1) There was no appearance for any creditor in opposition to the petition. The shareholders of the company and the liquidator had no *locus standi* to resist the petition of a creditor asking for a compulsory winding-up. An order continuing the voluntary winding-up and approving of the liquidator, could not be pronounced without a petitioning creditor; the mere lodging of mandates of creditors was not sufficient. (Lord Stormonth Darling referred to *Drysdale & Gilmour* v. *Liquidator of International Exhibition*, Nov. 13, 1890, 18 R. 98, 28 S.L.R. 91, where an order was pronounced though there was no petitioning creditor). (2) Of the eight creditors who had lodged mandates approving of the continuation of the voluntary winding-up and of the liquidator nominated at the meeting, one was a director, one had been a director but had lately resigned, one was judicial factor for the late managing director, one was secretary of the company, and one was a nominal firm the sole partner of which was a director. These were not true creditors, in the sense that they had other interests than that of creditors. It might perhaps turn out that they had kept the business going longer than they ought, and so be personally liable. (3) In any event the liquidator appointed was the nominee of a director whose suggestion the shareholders had adopted, and the Court should appoint an independent liquidator resident in Edinburgh, because the majority of the creditors were resident in the south of Scotland. Reference was also made to Lindley on Companies, 5th ed. 874, and to sections 137, 138, and 151 of the Companies Act 1862 (in addition to the sections quoted).

Argued for the Tomatin Spey District Distillery, Limited, and Forsyth—The great bulk of the creditors had by their mandate approved of the voluntary winding-up under supervision resolved on by the shareholders, and of the liquidator appointed. The mandates were sufficient evidence of their wishes. There was a difference of opinion here between one creditor and the great majority, and the onus accordingly was on Elsmie & Son to show that they would be prejudiced by a supervision order being pronounced—in re *West Hartlepool Ironworks Company*, July 30, 1875, L.R. 10 Ch. 618; in re *New York Exchange, Limited*, July 27, 1888, 39 Ch. Div. 415; *Pattisons, Limited* v. *Kinnear*, February 4, 1899, 1 F. 551, 36 S.L.R. 402—and the choice of liquidator was equally committed to the majority of the creditors by sec. 149. It was true that the liquidator had been suggested by a director at the company's meeting, but he was suggested because he was an independent person, and after two liquidators originally proposed had been objected to as being interested in the company. The liquidator had been chosen by the shareholders and their choice had been approved of by the creditors in their mandates. No specific objection had been made against the liquidator appointed.

LORD JUSTICE-CLERK—The case stands in this position. One creditor for no very large amount on 4th January presented a petition praying the Court to order that the Tomatin Spey District Distillery, Limited, be wound up, and a liquidator be appointed. A general meeting of the shareholders of the company was held on 13th January, when it was resolved that the company be wound up voluntarily, that Mr James Forsyth be appointed liquidator, and that he be instructed to take the necessary steps to place the liquidation under the supervision of the Court of Session. The shareholders were quite within their right in so acting, and the only way this resolution can be superseded is by the creditors coming forward and showing cause why this should not be done. Here, however, the great mass of the creditors have come forward in support of what has been done by the shareholders, and by their mandates approved of the winding up under supervision, and of the liquidator nominated. No special cause has been shown why the liquidation should not stand. The only objection of the petitioner, who makes no suggestion against the probity of the gentleman nominated, is that he would prefer a liquidator appointed by the Court. Apart from authority my own view would be to let the appointment stand, but the matter has been decided in England, *in re West Hartlepool Ironworks Company*, [1875] L.R. 10 Ch. 618, and it would be very inconvenient to have a different practice here from in England.

Therefore on the whole matter I think we should refuse the prayer of the petition, and allow the liquidation to proceed under the supervision of the Court.

LORD KYLLACHY—I agree. I see no reason for interfering with a scheme of liquidation which has the approval of the shareholders and of the majority of the creditors.

LORD STORMONTH DARLING—I concur, and only wish to add that in this case there is no suggestion that anyone will be prejudiced by the liquidation commencing at a later date than if the petition for compulsory winding up were granted. That being so, we have only to consider whether the petitioner has stated any good ground—he being the only creditor in favour of compulsory winding up by the Court—why the wishes of the majority of the creditors, signified by their mandate, should be disregarded. I am of opinion that he has not.

LORD LOW was absent.

The Court pronounced this judgment—

"Refuse the petition: Direct and ordain that the voluntary winding up of the Tomatin Spey District Distillery, Limited, resolved on by the extraordinary resolution quoted in the said note, be continued, but subject to the supervision of the Court in terms of

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the Companies Act 1862, and Acts amending and extending the same: Confirm the appointment of James Forsyth designed in the said note as liquidator of the said company, in terms of and with the powers conferred by the said Acts: Further order that all subsequent proceedings in the winding-up be taken before Lord Dundas, one of the permanent Lords Ordinary, and remit the winding-up to him accordingly and decern: Find the petitioners entitled to expenses, and direct that the same shall form part of the expenses in the liquidation: Also find the said liquidator entitled to expenses as between agent and client, and direct that the same shall form part of the expenses in the liquidation," &c.

Counsel for Elsmie & Son—Younger, K.C.—Kemp. Agents—Mustard & Jack, S.S.C.

Counsel for Tomatin Spey District Distillery Company and Liquidator—Constable—Macmillan. Agent—A. B. Fletcher, S.S.C.

Thursday, February 1.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BROWN *v.* NORTH BRITISH RAILWAY COMPANY.

Title to Heritage—Bounding Title—Measurement—Bounding Title where Lands Defined by Measurement and no other Description.

A disposition in 1819 conveyed to a canal company "all and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement being part of my lands . . . which are required for the purposes of the said canal and on which the company have commenced their operations." It contained no further description of the area of ground conveyed. There existed, however, extrinsic evidence by which the area conveyed could be identified. The disposition had been recorded, which under the Canal Company's Act operated to the effect of giving infeftment.

Held that to make the disposition a valid warrant for infeftment the area conveyed at the date of infeftment must have been a definite subject capable of identification; that extrinsic evidence was therefore competent to identify it at the present time; and that the area having been identified the title was a bounding title.

Prescription—Positive Prescription—Possession—Acts of Possession not Attributable to Claim of Ownership—Railway and Canal Company.

Circumstances in which *held* that certain acts of possession on the part of a railway and canal company were not attributable to a claim of ownership, and could not establish a title by prescription.

Railway—Superfluous Lands—Land Taken for a Double Line—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120.

At the making of a railway, land for a double line of rails was taken, but only a single line was to be at first laid, the second line to be laid if and when necessary. The land which was not immediately required was not fenced off, but was allowed to be used by the farm tenants of the adjoining lands.

Held (*by* Lord Ardwall, Ordinary) (1) that the land acquired for the future doubling of the line could not become "superfluous lands" within the meaning of sec. 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and (2) that if it could, then in that case it would be necessary for the claimant in order to succeed, to prove that at no future date would the railway company require to double the line of rail.

On 21st September 1904 Robert Ainslie Brown of Manuel, S.S.C., Edinburgh, brought an action against the North British Railway Company and others, *inter alia*, (first), to have it found and declared "that all and whole that area of ground extending to one acre and sixteen parts of an acre Scots or thereby . . . lying on the south-west side of the Union Canal, near the village of Causewayend, in the parish of Muiravonside and county of Stirling, is a part and portion of and comprehended within the bounds and marches of the lands and estate of Manuel, lying in the said parish and county, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel;" and (fifth) to have it found and declared "that all and whole that piece of ground . . . lying on the north-west side of the viaduct forming part of the said defenders' railway between Manuel Station and Causewayend Station in the said parish and county, and which viaduct bounds the said piece of ground on the south-east, is part and portion of and comprehended within the bounds and marches of the pursuer's said lands and estate of Manuel, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel, and which piece of ground is part of the lands which were compulsorily taken by the Slamannan Railway Company or by the Monkland Railways Company for the purposes of their undertaking as set forth in the Slamannan and Borrowstounness Railway Act 1846 (9 and 10 Vict. c. 107), or the Monkland Railways Act 1851 (14 and 15 Vict. c. 62), from the pursuer's . . . author, and not having been required or used by the said defenders the North British Railway Company, or their . . . authors the Slamannan Railway Company, or the Monkland Railways Company, for said purposes, has become 'superfluous lands' within the meaning of the . . . sec. 120 of the Lands Clauses Consoli-

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dation (Scotland) Act 1845, and that in terms thereof the same vested in and became the property of the pursuer's said author as from and after the 26th day of June 1859, and that the same has now vested in and become the property of the pursuer in virtue of his rights and titles to the said lands and estate."

The defenders pleaded—"(5) The pursuer not being owner of the land specified in the first conclusion of the summons, the defenders should, with respect thereto, be assoilzied. (6) The pursuer's claim to the said lands is barred by prescription. (9) The defenders are entitled to be assoilzied from the . . . fifth conclusions of the summons, . . . (*b*) in respect the lands described in the . . . fifth conclusions are not superfluous within the meaning of the said Lands Clauses Act. . . ."

The facts of the case are fully given in the opinion (*infra*) of the Lord Ordinary (ARDWALL), who on 27th May 1905 pronounced this interlocutor—"Finds and declares that all and whole that area of ground extending to 1 acre and 16 parts of an acre Scots or thereby, . . . lying on the south-west side of the Union Canal, near the village of Causewayend, in the parish of Muiravonside and county of Stirling, with the exception of that portion of same which is . . . marked by the words 'Lumber Pit,' . . . is a part and portion of and comprehended within the bounds and marches of the lands and estate of Manuel, lying in the said parish and county, and belongs heritably to the pursuer as proprietor of the said lands and estate of Manuel: . . . Assoilzies the defenders from the fifth conclusion of the summons. . . ."

Opinion.—" . . . The only really important questions, however, are those raised by the first and fifth conclusions. Under the first conclusion the pursuer seeks to have his right of property declared to 1 acre and 16 parts of an acre Scots or thereby marked A B C on the plan. It was, however, conceded in the course of the proof that he was not entitled to that portion of the land A B C, which is coloured yellow and marked with the words 'lumber pit' on the plan.

"Before the construction of the Union Canal, in or about 1819, the whole of the land at or near the piece in question belonged to the estate of Manuel of which the pursuer is now the proprietor. The situation and character of the piece of land in question may be adverted to. The Union Canal crosses the river Avon from east to west upon an aqueduct. From the west end of the aqueduct the canal is carried westward for some distance on an embankment, but as the ground slopes upwards from the bed of the river Avon towards the west, the embankment becomes less and less till the canal reaches the level of the natural surface of the ground, and almost immediately after enters a cutting made through the pursuer's lands and increasing in depth as it goes westward.

"In the course of making the canal it is evident that the engineers constructing it utilised the earth, stones, rock, and other materials taken out of the cutting for the formation of the embankment which is required to support the canal from the time it leaves the aqueduct till it reaches the natural surface level of the ground. The piece of ground now in dispute consists of a bank for about two-thirds of its length beginning at its eastmost point, while for the remaining third of its length the ground practically retains its natural configuration, while to the west of the ground in question there is a clay hill or clay pit from which clay has been taken from time to time in considerable quantities for the purpose of manufacturing puddle clay for the formation and repair of the bed of the canal. The piece of ground in dispute has for many years been covered with trees and scrub. Some of the wood and cover possibly may have been self-sown, but there seem also to have been a considerable number of larch trees which presumably have been planted, but there is no evidence in the case to show when or by whom they have been planted.

"In 1819 the estate of Manuel belonged to Mr John Baird, for whom Messrs MacRitchie, Bayley, & Henderson, W.S. Edinburgh, acted as agents. Mr Baird died on the 21st of November 1831. His affairs seem to have been in some confusion at the time of his death, and on 8th February 1838 an inventory of his personal estate was given up in the Commissary Court at Stirling by Henry George Watson, C.A., Edinburgh, factor *loco absentis* to James Hay junior, who apparently had been decerned executor *qua* creditor of the said John Baird. In that inventory the whole claim at the instance of the deceased John Baird against the Canal Company is set forth, and is the same as the claim on which the settlement I shall hereafter refer to took place; but it seems that in the meantime Isaac Bayley, S.S.C., Edinburgh, who married a daughter of the Rev. Dr Baird, a brother of Mr John Baird, purchased the estate of Manuel in 1832. Mr Isaac Bayley possessed the estate till his death in 1873. It then passed to his son Mr George Bayley, W.S., who held it till his death in 1902, and it was sold to the present pursuer, Mr Brown, in 1903 by Mr George Bayley's heirs

"The title of the defenders, the North British Railway Company, who in virtue of several Acts of Parliament now represent to all effects and purposes the Edinburgh and Glasgow Union Canal Company, consists of a disposition by John Baird, then proprietor of Manuel, to the said Canal Company, dated 12th February 1819. Under the Canal Company's Act, section 60, this disposition when recorded, which was done, is declared to have the same effect as if a 'formal disposition had been executed and followed by charter and seisin.' By the said disposition the land conveyed to the Canal Company is thus described—'All and whole the piece or pieces of ground consisting of four acres and thirty-seven thousandth parts of an acre or thereby Scots measurement, being part of my said lands and estate of Manuelmiln, situated

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within the parish of Muiravonside and county of Stirling, which are required for the purposes of the said canal, and on which the company have commenced their operations.'

"The said disposition contains the further clause, 'and in respect it is impossible to ascertain the precise quantity of land to be occupied by the company until the canal and works connected therewith are completed, it is hereby declared that after the said works are completed a measurement of the ground occupied thereby shall take place, and in case it turn out that the said ground extends to more than is herein specified, the company shall pay to me for the excess at the rate of £75 sterling per acre Scots measurement, and should it turn out that the quantity is less than is herein specified, I oblige myself and my foresaids to repay to the said company such part of the price as shall correspond at the foresaid rate per acre to such difference.'

"These clauses show that while it was at the time supposed that the extent of land therein mentioned was all that would be required for the purposes of the canal, yet there was to be a future measurement and settlement fixing definitely what land was to be permanently acquired by the company, it was doubtless contemplated that there should thereafter be a plan made out and a supplementary deed executed. A plan of the ground, evidently founded on careful measurement, was made by Mr Horne, a surveyor in the employment of the Canal Company, in 1822, which, with its table of contents, shows very distinctly, as it was first drawn out, the ground permanently acquired by the Canal Company, being 4·218 acres; this consisted of the 4·037 acres mentioned in the disposition and a small quantity ·181 acre which is referred to in the correspondence as having consisted of a space of ten feet on each side of the acqueduct. But apparently, shortly after the plan had been drawn, the canal company altered the plan and table of contents so as to transfer from the table of contents of the spoil banks to the table of land retained by the company, the area in dispute consisting of 1·016 acres. The settlement following on the measurement was very long delayed; the first letter on the subject which is produced is dated 9th August 1830, in which the agents for the proprietor of Manuel called the attention of the canal surveyor to the 'still unsettled claim of Mr Baird of Manuel.' A state of claim for Mr Baird as at Martinmas 1831 has been produced, and a discharge by Mr Watson, accountant in Edinburgh, who, after Mr Baird's death, had come to represent Mr Baird's executor-creditor, was granted to the Canal Company on 6th September 1838, and has been recovered from the defenders. This discharge proceeds on the narrative 'that the Canal Company were indebted to John Baird at the time of his death on 21st November 1831 in certain sums of money on account of said company's portions of his estate of Manuel Mill, and for ground taken by them from the said estate, amounting with interest to that date to the sum of £466, 14s. 4d., conform to detailed state thereof as adjusted by Messrs MacRitchie, Bayley & Henderson, writers in Edinburgh.'

"The above sum with additional interest on part thereof brought up the sum due to Mr Watson to £586, 0s. 2d. sterling, and by the said deed he discharges the Canal Company of that sum. This state refers to the numbers and figures on the plan of 1822, No. 93B. According to the state 4·037 acres, which is the quantity mentioned in the disposition, are represented as having been paid for by the £302, 15s. 6d. also mentioned in the disposition, but there is added the ·181 acre, which, at the rate of £75 an acre, made a difference of £13, 11s. 6d. This then is declared in the state to be the ground 'occupied by the canal.' The result of reading the discharge, claim, and plan along with the disposition is to identify exactly by measurements and boundaries the ground acquired by the Canal Company. The difference between the figures in the disposition and in the final settlement was so small that probably neither party thought there was any need for a supplementary deed. But the matter does not stop there, for the second portion of the state deals with what are there termed 'spoil banks,' and it is plain by a reference to the plan that these include the whole of the land now in dispute. . . . The claim in respect of the spoil banks consists of (*First*) a claim for an agreed-on rent for the years 1820 to 1825, both inclusive, and then a claim 'for deterioration of ground by spoil banks, 4·292 acres at £40 per acre.' According to this state of claim, on which the settlement between the parties took place and the discharge already referred to was granted, it is made clear that, beyond the 4·218 acres above referred to no land was purchased or paid for, and in particular that the spoil banks, which by reference to the plan are found to embrace the whole of the ground now in dispute, were treated as still parts of Manuel property, for the deterioration of which by the Canal Company having used them as spoil banks, they paid damages at the rate of £40 per acre.

"It seems from superinduced markings on the plan No. 93B of process and the remarks upon these additions made upon the rough copy of No. 93B, that a dispute had arisen as far back as 1822 as to the land in question. The Canal Company wished to retain the said piece of land, and from evidence in the case it appears that they had marked it out as their own by march stones, without any permission from the proprietor of Manuel. The correspondence brings this out very clearly, but all disputes which had then arisen were settled by the subsequent discharge which, taken along with the claim and plan referred to therein, shows that the whole land conveyed under the disposition was the 4·037 acres there mentioned, and this, with the ·181 acre additional, is all that was paid for by the Canal Company as land taken by purchase. I am therefore of opinion that the defenders have not a title entitling them to prescribe a right to any land beyond the boundaries of the land thereby

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conveyed, which, in my opinion, are quite definitely fixed by the documents and plans above referred to.

"It was strongly argued for the defenders that the disposition must be looked at by itself, and that extrinsic evidence is inadmissible. In this case, however, the evidence of the plan and settlement can hardly be called extrinsic, for *in gremio* of the disposition there is a reference to a future measurement and settlement under which the precise ground required for the purposes of the canal was to be ascertained, and this is probably the reason why no plan was annexed to the disposition showing the situation of the 4·037 acres thereby conveyed. It appears to me therefore that I am entitled to read the disposition by the light of the final measurement and settlement to which the disposition itself refers me, and without which the description in the disposition of the land conveyed is defective and unsatisfactory. I, accordingly, have arrived at the conclusion that the defenders' title is a bounding title under which they cannot acquire by prescription any land in excess of the subjects actually conveyed. The decision in *Auld* v. *Hay*, 5th March 1880, 7 R. 663, and other decisions to a similar effect, accordingly do not apply to the present case.

"The defenders, however, require not only to produce such a title as will admit of their acquiring the land by prescriptive possession, but also to prove possession for twenty years attributable to their title as proprietors, and not to any inferior right. I do not think they have made out such a case. The first fact founded on by them is the existence and position of the march stones. Now, a reference to the correspondence shows that these march stones were put down before the settlement was arrived at which determined what land was to be permanently retained by the Canal Company and what land was to be regarded as damaged land left in the hands of the proprietors as spoil banks. Whatever may be said as to the competency of extrinsic evidence to explain the title, I think when we come to the question of possession, and the existence of march stones is founded on, it is competent to inquire when and under what circumstances these march stones were placed there, and the result of such inquiry is to show that these march stones were put down there without the consent of the proprietor of Manuel, and at a time when it was undetermined what land the Canal Company were to take. And there is no doubt that their presence at the points they were placed at led all along and down to the present time to constant misapprehensions on the part of persons who naturally believed that they correctly marked the boundary of the defenders' ground. It seems to me that such possession otherwise as the Canal Company (and afterwards the Railway Company) had was attributable to the rights of tenancy the company acquired from the proprietors of Manuel.

"A memorandum as to the Canal Company's matters, drawn up by Mr Isaac Bayley, who purchased the property from Mr Baird's representatives, dated 15th July 1841, propounds as one of the questions the following:—'To state what portions of the spoil banks . . . the company are to have right to in absolute property.' These spoil banks together make up the area now in question.

"Following on this, the memorandum proposes that the company are to fence and enclose whatever they are to get in absolute property with a stone fence of a certain description. The answer to this is to be found in a letter dated 6th July 1841 by Mr Ellis, on behalf of the Canal Company, to Mr Bayley, in which he says that the Canal Committee will take a twenty years' lease of the spoil bank at £5 a year, but will not purchase any part of the ground as the cost of enclosing it would be too great.

"It appears that the company duly entered into possession of the land under this arrangement, but so little was the estate of Manuel looked after that no claim was made for rent till 9th April 1852, when £55 was claimed, being eleven years' rent, and that sum was afterwards paid as is shown by the correspondence. The ground which was leased is indifferently called the spoil bank and the clay bank. Strictly speaking, the spoil bank only consisted of the eastmost two-thirds of the area in dispute, while the clay hill was situated wholly on what is marked No. 3 upon the plan of 1822. In the correspondence, however, these terms are applied indifferently to the whole ground. . . .

"The matter came up again in 1873, and after some correspondence a lease, dated 3rd and 4th February 1874, was entered into, granting a lease for six years from Martinmas 1873. The lease confers the privilege of taking clay from that bank or enclosure, 'part of the estate of Manuel, which is situated immediately to the west of the aqueduct on the Union Canal over the river Avon, and is bounded on the eastern side by the said canal, and on the western side by a road from Causewayend Bridge to a ford on the river Avon.' In my opinion this description covers not only the clay hill proper, but the area in question. In point of fact these subjects all formed part of the same enclosure, and although it is true that the provision as to taking clay and restoring to natural level applies strictly only to the clay hill, it seems to me that the lease includes the area in question. It is further proved that all along the Canal Company's servants were accustomed to tip dredgings from the canal on to the place in question with the two objects of getting rid of the dredgings and strengthening the bank of the canal at that place. With their doing this nobody seems to have interfered. It did no one any harm; on the contrary, it tended to strengthen the bank and obviate the danger of leaks and landslips which were to be feared alike by the proprietor of Manuel and the Canal Company.

"There is also some evidence that now and again the employees of the Canal Com-

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pany cut trees on the ground in question for the purpose of forming jetties or arms for jetties along the canal, and it is certainly a remark rather in favour of the defenders that while Mr Bayley wrote objecting to the cutting of these trees he afterwards allowed the matter to drop. Probably he did not think it worth while insisting on being paid for them. The most important act of possession, however, which has been exercised by and on behalf of the defenders was exercised by their tenants the Logans, who built a cottage on the area in dispute. This they did in virtue of a lease which they got from the defenders on 27th July 1894. But it may be said that even if the proprietor of Manuel ever had any notice of what was being done, there was no reason why he should object to a cottage of some value being built on ground belonging to him, but which was of practically no value to him.

"On the whole of this part of the case, I am of opinion that the facts founded on by the defenders as tending to prove possession may fairly be attributed either to the false position of the march stones marked A B C, or to the leases granted to the defenders and their predecessors by the proprietors of Manuel or to the valueless character of the spoil bank itself, or to the combination of one or more of these causes.

". . . [*His Lordship here dealt with another conclusion of the summons*]. . . .

"In the fifth conclusion of the summons the pursuer seeks to have it found and declared that the piece of ground there described vested in and became the property of the pursuer's author as from and after the 26th day of June 1863, and that the same has vested in and become the property of the pursuer in virtue of his titles to the estate.

"When the Slamannan and Bo'ness Railway was constructed the defenders' predecessors considered it a prudent act while laying down only a single line of rails at first, yet so to construct their railway works as that should it at any time become advisable to double their line that could be done without new works being executed beyond the laying down of another line of rails; and to enable this to be done they acquired under their Acts and within their limits of deviation enough land to double their line all along its length. The cuttings and embankments were so constructed as to permit of a double line of rails being laid, but when it came to building the viaduct, while they took enough of ground to enable them to construct a viaduct for a double line of rails, the viaduct actually constructed by them was only constructed for a single line. At the place in question the defenders' predecessors acquired a strip of land 36 feet in breadth. It is undisputed that in constructing all viaducts railway companies acquire at least enough land to provide for a space of 3 feet on each side of the viaduct by which they may have access to all parts of it for repairs and the like without trespassing on ground belonging to others. Accordingly the present viaduct was constructed with its eastern elevation three feet from the eastern boundary of the said strip. The viaduct itself occupies 15 feet more. It is admitted that the Railway Company require 3 feet on the west to repair the present viaduct, and the present claim accordingly is for the strip 15 feet wide which forms the westmost part of the ground acquired by the defenders' authors at that place, and the pursuer maintains that this 15 feet has become superfluous land within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and that it vested in the pursuer's authors on the expiry of ten years from 26th June 1853, being the expiration of the time limited by the special Act for the completion of the railway works.

"I am of opinion that this claim is not well founded. In the first place, it appears to me that land taken for the future doubling of a line of railway is not the kind of land which falls under the section relating to superfluous land at all. It certainly does not seem to fall within any of the categories laid down by Lord Chancellor Cairns in the case of the *Directors of the Great Western Railway Company* v. *May* (L.R., 7 E. & I. App. 283, see particularly foot of page 292), and it seems to me to be not within the policy of the said section, which is to prevent railway companies becoming landowners, which is a character foreign to the enterprise for furthering which alone they obtain compulsory powers to take land (see the case last cited at page 293, and also Lord Hatherley's opinion in the case of *Hooper* v. *Bourne*, L.R., 5 App. Cas. 13). But assuming that the Act does apply to any extent to land taken at the original construction of a railway for the purpose of at any time, if necessary, doubling the line, the next observation is that, as laid down in the case of *Hooper* above referred to, the burden of proving a title to superfluous land lies upon the claimants; and I am of opinion that in the present case the pursuer has not discharged that burden, In order to do so I think he would require to show that at no future time will the defenders require to double their railway, and the evidence in this case shows that far from that being the case the time for doubling it may arrive at any moment. The pursuer laid great stress upon what he alleged to be the abandonment by the Railway Company of the land in question, and at the hearing on the evidence his counsel founded strongly on the fact that the land belonging to the defenders at the viaduct was not fenced in, and had been regularly ploughed and cropped as part of the adjoining fields. It appears to me that the suggestion that the land should have been fenced is a most ridiculous one. To begin with, I think it is certain that the severance damage originally paid by the Railway Company was calculated on the footing that there should be free ingress and egress under the arches of the viaduct. At least that is the footing on which every case I have known of relating to a viaduct has been settled. In particular, I may mention the Glenfinnan viaduct, regarding which there was an interesting discussion on

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evidence as to whether red deer would use the passages under the arches of the viaduct for travelling between one part of the forest and another. But even supposing the Railway Company were entitled to put up such a fence, they had very good reasons for not doing so, because, on the one hand, it would cause needless expense to themselves, and on the other hand it would prevent the pursuer's tenants from using the ground as part of their cropping land, which would obviously be a most unneighbourly act. I therefore cannot hold that the omission to fence the land in question implies abandonment thereof by the Railway Company to the effect of rendering it superfluous land. For these reasons I have no hesitation in assoilzieing the defenders from the fifth conclusion of the summons.

"Of course the judgment now given does not affect any possible questions which the Messrs Logan may raise regarding the ground in question, or the cottage built by them thereon.

"With regard to expenses, while it may be said that the success has been so far divided, yet the pursuer has been successful upon the first conclusion of the summons, with which the greater part of the evidence, oral and written, was concerned. I accordingly find the pursuer entitled to one-half of his expenses from the 23rd of February 1905, as the same may be taxed by the Auditor."

The defenders, the North British Railway, reclaimed, and argued—(1) It had not been shown (and the onus was on the pursuer) that the defenders were in possession of more than the acreage "or thereby" specified in the disposition. The defenders had got ·181 acres more than the 4·037, why not an additional 1·016? After forty years' possession of the defenders, *e.g.*, 1820–1860, it was incompetent for the pursuer to go back and seek to show by extrinsic evidence that the defenders or their authors had taken more than the title of 1819 gave them—*Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465; Rankine on Land Ownership, p. 30; *Buccleugh* v. *Cunynghame*, November 30, 1826, 5 S. 57; *Forbes* v. *Livingstone*, November 29, 1827, 6 S. 167 at 173; *Wallace* v. *University Court of St Andrews*, July 20, 1904, 6 F. 1033, 41 S.L.R. 812. (2) Even if the pursuer had shown that the ground in question was not part of the 4·037 acres, there was nothing in the title to prevent the North British Railway proving that they had acquired the extra acre by prescription. There was no plan appended to or incorporated in the disposition. The plan, discharge, and claim referred to by the Lord Ordinary as contributing to make up a bounding title were extrinsic evidence, and such evidence was not competent to withstand the evidence of possession, nor could a bounding title be so constituted—*Auld* v. *Hay*, and other cases *cit. supra*; also *Fraser* v. *Lovat*, February 18, 1898, 25 R. 603, 35 S.L.R. 471; *Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898, 25 R. 1160, 35 S.L.R. 897, opinions of Lord Justice-Clerk and Lord M'Laren. The pursuer said that here there was no clause of parts and pertinents as in *Cooper;* the absence of a clause of parts and pertinents did not in any way prevent prescription—*Beaumont* v. *Lord Glenlyon*, July 11, 1843, 5 D. 1337; Lord Mackenzie at 1342. The title was not a bounding title; the mere statement of acreage or dimensions could not *per se* constitute a bounding title—*Ure* v. *Anderson and Others*, February 26, 1834, 12 S. 494; Bell's Principles, sec. 738; Rankine on Land Ownership, 96, 97, and *Duff* therein cited; *Cooper's Trustees* v. *Stark's Trustees*, *supra*, and Erskine Inst. ii, 6, 2, and Stair ii, 3, 26, therein referred to; *Douglas* v. *Lyme*, February 2, 1630, M. 2262. This last case was *a fortiori* of the present, and never apparently had been challenged. There was nothing accordingly in the disposition preventing possession (if they proved it) being referable to their title, or being reconcilable with it, which was sufficient—*Education Trust Governors* v. *Macalister*, July 6, 1893, 30 S.L.R. 818. Possession does not merely explain the title, but if there is a habile title and possession has followed, the possession then constitutes the title. They had proved possession, possession of so full a character that it was only compatible with ownership, and must be ascribed to the title of 1819. They must succeed if they showed possession either from 1820–1860, or from 1884–1904. They had succeeded in showing possession for both of these periods. [The pursuer not challenging the Lord Ordinary's judgment on the fifth conclusion of the summons, no argument on it was necessary. The following authorities on that point in the case had been quoted—*Directors, &c. of Great Western Railway Company* v. *May*, [1874] L.R. 7 E. & I. App. 283; *Hooper* v. *Bourne* [1877], 3 Q.B.D. 258 and (1880) 5 App. Cas. 1; *North British Railway* v. *Moon's Trustees*, February 8, 1879, 6 R. 640, 16 S.L.R. 329; *Emsley* v. *North-Eastern Railway Company*, [1896] 1 Ch. 418; *Stewart* v. *Highland Railway Company*, March 8, 1889, 16 R. 580, 26 S.L.R. 438; *Norton* v. *London and North-Western Railway Company* (1879), L.R. 13 Ch. D. 268; *Betts* v. *The Great Eastern Railway Company*, [1878] L.R., 3 Ex. D. 182; *Macfie* v. *Callander and Oban Railway*, February 25, 1898, 25 R. (H.L.) 19, 35 S.L.R. 413; *Hobbs* v. *Midland Railway Company*, L.R. [1882] 20 Ch. D. 418].

The pursuer (respondent), who did not challenge the judgment on the fifth conclusion, argued—In all the cases referred to by defender there was a title capable of carrying what was claimed, or a title which required to be interpreted. In *Cooper* v. *Stark* the possession was under the clause of parts and pertinents; there was none here. Here there was a definite amount of ground conveyed, unaccompanied by any description applying to a larger amount. The plan, claim, and discharge identified the ground conveyed, and the extra ·181 had been shown to be a strip of ground along the aqueduct given for purposes of repair. They were not claiming this; possibly the "or thereby" might be wide enough to cover this, but it was

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not wide enough to cover the ground claimed. The title was a bounding title, or at any rate a limitation *in gremio* of defenders' title, such as figured by Lord Glenlee and Lord Meadowbank in *Ure* v. *Anderson*, *supra*. Prescription might secure a progress of titles, as in *Fraser* v. *Lovat*, *supra*, or interpret a grant, as in *Cooper* v. *Stark*, *supra*, it was not itself the title. *Douglas* v. *Lyme* was very shortly reported. It might well have been that there were no means of identifying which four acres out of the six were those disponed. In any event such possession as the defenders had had was not referable to their title.

At advising—

LORD JUSTICE-CLERK—I have formed in this case a very decided opinion in favour of the view expressed by the Lord Ordinary. It appears to me that it is established that the disposition to the defenders' predecessors was a disposition of a fixed and defined area of 4·037 acres, sufficiently defined at the time to give a basis for infeftment as of a subject distinguishable and certain.

The next question is, can the subject so conveyed be identified? It is maintained that extrinsic evidence could not be received to identify the specific piece of ground. I cannot assent to that. The ground must have been marked out in some way at the time, or the specific and minute measurement could not have been ascertained. If the markings no longer exists, but there are means extrinsically of locating where they must have been, I can see no incompetency in considering and, if they are satisfactory, in giving effect to them. Now, the plan which was made in 1822, and the letters passing at the time, are in my opinion conclusive as to what the boundaries of the 4·037 acres were, and that the 1·015 acres which form the subject of the litigation were not part of what was conveyed.

I fully accept the view that a description by measurement may not be sufficient to exclude a disponee from prescribing to a greater extent than the measurement in the description, such a measurement being not taxative necessarily. But here there is nothing in the title in the way of description which seems capable of being read as covering any larger area than that contained in the measurement given. There is nothing in the title here to which any larger extent of ground than is contained in the measurement can be ascribed. It is by measurement alone that any description is given.

But, further, I find no ground for holding that the defenders have had such possession as would have sufficed to establish their right by prescription to a larger area than that stated in their title, even upon a title habile to enable a prescriptive right to be obtained by possession. On the contrary, I find at one time rent negotiated for and paid, and at another proposals to buy, which fell through because it was thought it would be too expensive to erect a fence which was stipulated for. To pay rent for ground, or to negotiate for its purchase, is scarcely consistent with the running of a possession capable of giving ground for maintaining a right proved by prescriptive possession.

Concurring as I do in the decision on fact and the reasoning in law so clearly stated by the Lord Ordinary, I do not think it necessary to go into the case more fully, and would move your Lordships to adhere to his judgment.

LORD KYLLACHY—In this case I agree with the Lord Ordinary and upon both his grounds. The defenders' case is laid on the positive prescription, and I am of opinion —(1) that they have no habile title—that is to say, no clear and distinct title duly constituted by infeftment—which upon any reasonable construction covers the ground in dispute; (2) that even assuming such habile title they have not had for the requisite period continued and unequivocal possession—possession clearly and unequivocally referable to the title alleged.

The title founded on is the recorded disposition of 1819, which if capable of forming a good warrant for infeftment, admittedly operated, by virtue of the Canal Company's Act, to the same effect as if it had contained a procuratory and precept and had been followed by sasine as required by the existing law. And I quite recognise that in construing such a disposition for the purposes of the positive prescription that construction must be adopted which is the widest of which the language admits. That is the principle—if it be a principle—of the case of *Auld* v. *Hay*, 7 R. 667, of which so much has been said; but which, so far as I know, decided nothing specially new or doubtful.

But so recognising, two questions arise. The first question is whether this disposition can be construed so as to be a disposition of "a particular and certain subject," a subject so defined as to be "distinguished from all others," and thus to escape the operation of the rule laid down by Erskine (ii., 3, 23) that for purposes of infeftment "the conveyance of an uncertain subject is inept and ineffectual." That is the first question. And then the second question is this, whether assuming the subject to be so described as to be sufficiently definite, the definition expressed is not, upon any reasonable construction, such as to exclude the ground now in dispute, and to confine the defenders' title to a certain adjoining area, which it is admitted the defenders have bought and paid for, and as to which there is no dispute.

Now, I am by no means sure that either of those questions can be answered favourably to the defenders, but I am at least certain that they cannot both be so answered.

It seems to be clear upon the terms of the disposition that unless it applies to a specific area of about 4·037 acres, originally at least marked out by visible landmarks so as to be identifiable by those landmarks while they remained, or afterwards by extrinsic evidence as to their position, the whole disposition was as a warrant for infeftment

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entirely inept. In other words, if the attempt of the disposition was not to convey a particular and specific area of 4·037 acres, but to convey by anticipation all the ground or pieces of ground within the estate of Manuel which should be ultimately required for the purposes of the canal (the 4·037 acres being merely mentioned as an assumed quantity which might be afterwards increased or diminished)—if that was the attempt of the disposition, it seems to me to be hardly doubtful that following on such a conveyance there could be no valid infeftment. It would, I apprehend, at least have been necessary to postpone the infeftment until the canal was completed, and then to have a second deed between the parties defining the conveyed area, which deed might under the old form be handed to the notary and set forth in his instrument, or might under the statutory form be recorded along with the disposition.

Accordingly it seems to me that the defenders are shut up to accepting the perhaps less violent proposition that the conveyance was on its just construction confined to a definite area staked out and measured, and consisting, as expressed, of 4·037 acres or thereby. That, I think, is the most favourable view which the defenders can present.

But then, so taking it, what is the result? I apprehend it is only this, that the area disponed being specific, it may even now be identified by extrinsic evidence; and being so, that the defenders' title becomes simply an ordinary and indeed typical bounding title. The defenders maintain no doubt that extrinsic evidence is not competent. But I cannot, I confess, find any ground for that argument. At least I cannot do so except upon a view which would, for the reasons already expressed, be fatal to the validity of the title. For *ex hypothesi* of the argument, the conveyance here is not a conveyance simply of a certain number of acres lying somewhere within the lands of Manuel. It is *ex hypothesi* a conveyance which implies—if it does not express—meiths and bounds—meiths and bounds which must have been at least temporarily visible on the ground, and as to the position of which—if they are no longer visible—there seems no objection to the admission of extrinsic evidence. Neither can I assent to the defenders' further argument that the extrinsic evidence still available is unsatisfactory. As to that, it is enough to say that in my opinion the defenders' plan of 1822, read along with the letters and documents which passed between the parties in 1838 at the settlement of the compensation money payable by the Canal Company to the estate of Manuel, make it perfectly clear what the bounds of the 4·037 acres were; and also quite certain that the same did not include, but excluded, the area of about 1·016 acres which is now in dispute.

Moreover, it appears to me that, assuming extrinsic evidence to be either incompetent or unreliable, the result would not at all improve the defenders' position. We should then, I am afraid, have in substance a case such as I have previously figured—the case namely of a conveyance simply of 4·037 acres somewhere within the estate of Manuel—a conveyance which, as I have already said, could form no warrant for a valid infeftment. It did, no doubt, seem to be argued that even with such a title, if prescriptive possession followed—possession of any number of acres, however large—such possession might not only cure the original indefiniteness, but might, on the principle that measurements are not as a rule taxative, bring the whole area possessed—whatever its extent—within the operation of the Prescription Statute. But apart from other difficulties, I need hardly, I think, point out that the distinction between measurements taxative and non-taxative applies only where there is, combined with the measurements, some sufficient description covering or capable of covering some larger area. It can have no application where, as in the case supposed, *only* measurements are expressed. In such cases (subject always to the latitude covered by the usually adjected words "or thereby") the measurement is, I apprehend, always taxative. And by consequence, while such measurement may not in strictness constitute what is called a Bounding Charter, it necessarily at least constitutes a limitation *in gremio* of the title—a limitation *per se* sufficient to exclude any ascription to the title of a possession substantially in excess of the measurement.

I therefore agree with the Lord Ordinary's first ground of judgment, which is of course sufficient for the decision of the cause. But I think it right to say that, even on the opposite assumption, I also agree with the Lord Ordinary that the defenders have never in fact had any possession of the ground now in dispute—any possession unequivocal in itself and unequivocally referable to the title on which they found. On this point it is perhaps unnecessary to add anything to the Lord Ordinary's reasoned opinion. I may, however, say this, that it seems to me to be really demonstrated by the documents—(1) That from 1819 to 1838 the ground in question was possessed simply as part of certain spoil banks for which the defenders' authors paid rent at so much per acre, plus an allowance for deterioration; (2) that after 1838, and after a proposal on their part to purchase a small strip of the ground in question along the canal (a proposal which only fell through by reason of the defenders' authors being unwilling to incur the expense of a certain fence)—the ground in question was (part of it expressly and the rest, if not expressly, impliedly) let to the Canal Company for a period of years, along with the rest of the spoil banks, at a specified rent; (3) that having possessed under that lease until 1873, the defenders in that year took a new lease of the ground in question, or of the right to use it for certain purposes at an increased rent; and (4) under this lease of 1873 the defenders have possessed and paid rent down to the present time. When to all this it is added that the defenders do not profess that

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either they or their authors ever paid any price for the ground in question, and further, that the whole of the said ground has been since 1852 included in the estate plan of the estate of Manuel—I do not, I confess, see how it is possible for any person reading carefully the print of documents to conclude otherwise than that the idea of the defenders' proprietorship or possession *qud* proprietors of the ground in question is a comparatively recent afterthought for which there is no good foundation either in fact or law.

LORD STORMONTH DARLING—I concur.

LORD LOW—I have had the advantage of reading the opinion prepared by Lord Kyllachy, and I concur so entirely with what he has said that I do not think I can usefully add anything.

The Court refused the reclaiming note and adhered to the interlocutor of 27th May 1905, with expenses to the pursuer since its date.

Counsel for Pursuer (Respondent)—Cooper, K.C.—Welsh. Agent—Party (R. Ainslie Brown, S.S.C.).

Counsel for Defenders (Reclaimers)—Dickson, K.C.—Guthrie, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ADDISON *v.* BROWN.

Process—Citation—Registered Letter—Enrolled Law-Agent—Service by Registered Letter by Party Himself being Enrolled Law-Agent—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3.

A party to an action who is an enrolled law-agent may himself execute service by registered letter.

Process—Citation—Service by Registered Letter—Statement of Inducicæ—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 4, *sub-secs.* (1) *and* (2).

The Citation Amendment (Scotland) Act 1882, section 4, enacts—"The following provisions shall apply to service by registered letter:—(1) The citation or notice subjoined to the copy or other citation or notice required in the circumstances shall specify the date of posting, and in cases where the party is not cited to a fixed diet but to appear or lodge answers or other pleadings within a certain period, shall also state that the *inducicæ* or period for appearance or lodging answers or other pleadings is reckoned from that date; (2) the *inducicæ* or period of notice shall be reckoned from twenty-four hours after the time of posting." . . .

An interlocutor granting decree was served upon the defender by registered letter. The notice continued, after stating the date of posting, "from which the *inducicæ* or period for appearance is reckoned."

A suspension and interdict having been brought on the ground that the notice was wrong inasmuch as the *inducicæ* ran from twenty-four hours after the date of posting, *held* that the notice, following as it did explicitly the words of section 4, sub-section 1, was right, and the suspension and interdict *refused.*

The Citation Amendment (Scotland) Act 1882, section 3, enacts—"In any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of any person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland . . . by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served . . . a registered letter by post, containing the copy of the summons or petition, or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business." . . .

Robert Ainslie Brown of Manuel, Stirlingshire, Solicitor before the Supreme Courts, Edinburgh, having raised a note of suspension and interdict against Abram Addison, tenant of the mill and farm of Manuel Mill, Stirlingshire, to have him interdicted, *inter alia*, from entering upon a certain field, on presentation obtained interim interdict from the Lord Ordinary (JOHNSTON), and served the note and interdict upon Addison by posting to him in a registered letter a copy of the note, to which was annexed the following citation:—"I, Robert Ainslie Brown, law-agent, by virtue of an interlocutor dated the ninth day of June Nineteen hundred and five years, pronounced by Lord Johnston, Ordinary, officiating on the Bills, upon the note of suspension and interdict given in and presented for and in name of *Robert Ainslie Brown, of Manuel, Stirlingshire, Solicitor before the Supreme Courts of Scotland, Edinburgh*, complainer, do hereby, in His Majesty's name and authority, and in name and authority of the said Lord Ordinary, lawfully intimate the said note and interlocutor thereon to you *the therein designed Abram Addison*, respondent, by serving you with the foregoing copy thereof, that you may not pretend ignorance of the same, and desire and require you to conform yourself to said interlocutor, *within eight days*, with certification as effeirs. This I do upon the *ninth* day of *June* Nineteen hundred and five years, being the date of the posting of this intimation, and from

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which the *inducia* or period for appearance is reckoned. R. AINSLIE BROWN, *Law-Agent.*"

Addison did not enter appearance and, decree in absence having been pronounced, he was charged upon the said decree to pay the taxed expenses and dues of extract, and on 18th October 1905 his goods were poinded. He now brought a note of suspension against Brown in which he stated—"The respondent purported to serve said note and interdict by posting said pretended copy, with intimation that the *inducia* or period for appearance should run from the date of posting. The said pretended copy bears to have a citation annexed signed by the respondent himself;" and pleaded—"(1) The note referred to not having been served legally upon the complainer, he is entitled to suspension and interdict, as craved. (2) The decree referred to cannot found a charge, in respect that . . . . the complainer was not duly cited."

On 1st November 1905 the Lord Ordinary on the Bills (SALVESEN) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the note and answers, passes the note and continues the sist and interim interdict."

The respondent reclaimed, and argued—(1) The citation was regular since it was signed by a regularly enrolled law-agent in terms of the Citation Amendment (Scotland) Act 1882, sec. 3. The sole question was, had citation taken place, the personality of him who effected it was immaterial, and it remained good till a reduction was brought. A law-agent was not a public official, such as a sheriff clerk or messenger-at-arms or notary-public acting as such, who was prohibited from performing his official function in a cause to which he was a party, and if the statute had intended to limit a law-agent's rights it would have done so expressly. (2) The statement that the *inducia* ran from the date of posting was made as expressly provided by the terms of the statute. The date of posting was the date of execution from which the *inducia*, although extended by the subsequent sub-section, ran—*Alston* v. *Macdougall*, November 18, 1887, 15 R. 78, 25 S.L.R. 74.

Argued for the complainer and respondent—(1) The purity of public administration must be maintained. A law-agent in executing service was, *pro hac vice*, an officer of the Court, and could not act in his own cause, therefore a citation signed by him was null, and the decree and poinding following thereon were of no effect. That neither a sheriff clerk, nor a messenger-at-arms, nor a notary-public could exercise his function in a cause to which he was a party was settled—*Manson* v. *Smith*, February 8, 1871, 9 Macph. 492, 8 S.L.R. 346; *Dalgliesh* v. *Scott and Others*, June 18, 1822, 1 S. 506; *Russell* v. *Kirk*, November 27, 1827, 6 S. (Pt. I) 133; *Farries* v. *Smith*, June 9, 1813, 17 F.C. 360; and the case of *Ferrie* v. *Ferrie's Trustees*, January 23, 1863, 1 Macph. 291, laid down that rule in a case which was not concerned with diligence. In the Sheriff Courts this principle had been affirmed—*M'Dowall* v. *Smith*, November 23, 1896, 13 S.L.Rev. 13; and *Meldrum* v. *Macgregor*, March 14, 1902, 19 S.L.Rev. 246, Dove Wilson's Sheriff Court Practice, 122. (2) The citation was irregular since the statement of *inducia* bore to run from the date of posting and the Citation Amendment (Scotland) Act 1882 provided otherwise. The note had not been properly served and was null, and in consequence the Lord Ordinary was right.

At advising—

LORD PRESIDENT—There are two questions raised in this case, both of them of a technical nature. The action is one of suspension and interdict in which the complainer seeks to suspend a decree in absence obtained against him by the respondent and to interdict the respondent from acting on said decree. The grounds on which suspension is asked for are that the citation was defective in two particulars. The first objection is that the respondent in citing the complainer did not comply with the provisions of section 4 of the Citation Amendment Act of 1882. Section 4 (1) of that Act is as follows:— . . . [*His Lordship quoted section* 4, *sub-sections* 1 *and* 2, *quoted sup. in rubric*]. . . .

The notice in this case was in the following terms:— . . . [*His Lordship read the notice supra*]. . . .

It is said that this notice is wrong because the Act says that the *inducia* are to run from twenty-four hours after the time of posting. This is really no objection at all. I think the Act is, with regard to these matters, a little blundered. But the server of the notice has done the safe thing in following the words of the Act explicitly. Your Lordships will observe that the Act says that the notice shall state that the *inducia* shall run from the date of posting, and that is exactly what this notice does. The provision of sub-section (2) that the *inducia* shall be reckoned from twenty-four hours after posting is a provision in favour of the receiver of the notice and not a behest on the sender. Its effect is merely to give the receiver twenty-four hours more time than he would otherwise have had. If the respondent had done what the complainer says that he ought to have done the receiver of the notice could have said that it was incompetent because it was not in terms of the Act. I am therefore of opinion that there is no substance in this objection.

The other objection which is taken to the validity of the citation is that the respondent being himself a law-agent sent the citation in a registered letter signed by himself *qua* law-agent. It is said that this renders the whole citation bad on the authority of certain old cases in which various acts done by persons having a double character were held to be bad. In the case of *Manson* v. *Smith*, 9 Macph. 492, a sheriff-clerk-depute signed in that character a summons at his own instance as an individual, and the whole proceedings in the case were held null *ab initio*. There

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are also the cases of *Farries* v. *Smith*, June 9, 1813 (F.C.), and *Russell* v. *Kirk*, 6 S. 133, deciding similar points in the case of notaries public. Now, I do not wish to throw any doubt on the decisions in these cases, but I do not think they have any application to the question here, and further, without saying that they are wrong, I cannot help seeing that the view which the Court took at that time of such questions was largely coloured by considerations long ago swept away, as, for example, that no party could be a witness in his own cause. In this case the question is one of citation. The only object of citation is to give the receiver of the notice warning, and in this case it is not said that he did not get warning. If he had refused to take in the letter nothing would have happened, as section 4 (5) of the Act provides that in such a case further steps must be taken in Court before anything can be done. As a fact the complainer in this case did receive the notice and chose to disregard it, and in thus acting he did so at his own risk. I am therefore of opinion that there is nothing in the second objection, and that the note of suspension should be refused.

LORD M'LAREN—I am of the same opinion. The statute provides that the notice sent to the addressee of the registered letter should inform him that the induciæ are to be reckoned from the date of the notice, but further provides that the induciæ are not really to begin until the following day. Now, the gentleman who served this citation had the virtue of not thinking for himself; he just followed the words of the Act and thus kept himself safe. The object of the ambiguity in the Act is not clear, but its effect is to give the receiver of the notice an extra day of grace.

The second objection taken to the validity of the citation is that it was signed by the respondent, who was himself a law-agent. It is proper to consider the motive of this change in the law of citation. Instead of having to employ a messenger-at-arms it was thought convenient that the pursuer's agent should himself be entitled to give the notice by registered letter. It must be done by a law-agent, because only a lawyer can be entrusted with the execution of the directions of the Act. Now I see no advantage to the defender that the law-agent who serves the notice should be an independent person. The fact that a law-agent is himself a pursuer is no reason for putting him under a disability, because under the new regulation you do not trust to the individual employed to have the citation duly served, but to the post office which gives a receipt for the letter and undertakes to deliver it. If it is not delivered the post office official is bound to return it to the sheriff-clerk, thus giving complete assurance as to the fate of the letter. It follows that the present method of citation is independent altogether of the person who signs the notice; and there is no substance, as I think, in the objection.

LORD KINNEAR concurred.

LORD PEARSON was not present.

The Court recalled the Lord Ordinary's interlocutor and remitted to his Lordship to refuse the note.

Counsel for the Reclaimer and Respondent—Hon. W. Watson. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondent and Complainer—M'Clure, K.C.—Burt. Agents—Cunningham & Lawson, Solicitors.

REGISTRATION APPEAL COURT.

Monday, December 18.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

SOMERVILLE v. KINNAIRD.

Election Law — Occupation Franchise — Claim—Failure to State Houses Successively Occupied—Amendment—Registration of Voters (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 58), *sec.* 46.

The claimant to a vote in respect of occupancy set forth as his qualification the occupancy of a house which it appeared that he had only occupied for a period of three months. Leave to amend the claim by the insertion of a statement setting forth successive occupation of other houses for the qualifying period was refused by the Sheriff. *Held* that, in the absence of a finding in fact to that effect, the omission in the claim was not a casual error within the meaning of section 46 of the Registration of Voters (Scotland) Act 1856, and that consequently the Sheriff had rightly refused to allow the amendment.

Osborne v. *Melville*, December 7, 1899, 2 F. 266, 37 S.L.R. 186, *approved*. *Ross* v. *Carberry*, November 18, 1897, 25 R. 98, 35 S.L.R. 109, *distinguished*.

Opinion (*per* Lord Johnston) that where the omission or error was a casual error within the meaning of the section, the Sheriff was bound to allow amendment.

The Registration of Voters (Scotland) Act 1856 (19 and 20 Vict. cap. 58), sec. 46, enacts —"No misnomer or inaccurate or defective description of any person, place, or thing named or described in any schedule to this Act annexed, or in any list or register of voters, or in any notice required by this Act, shall in any way prevent or abridge the operation of this Act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood; and it shall be lawful to any sheriff in his registration court, or to any court of appeal, if it shall appear to him or to such court that there has been no wilful purpose to mislead or deceive, or that such misnomer or inaccurate or defective descrip-

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tion was not such as to mislead or deceive, to allow any verbal, clerical, or casual error in any such schedule, list, register, or notice to be corrected or supplied."

This was an appeal, by way of stated Case, against a decision of the Sheriff of Roxburgh, Berwick, and Selkirk (CHISHOLM) at a Registration Court for the burgh of Galashiels, held on 6th October 1905, in which Thomas Somerville, librarian, Free Public Library, Galashiels, was appellant, and James Moubray Kinnaird, Solicitor, Galashiels, was respondent. At the said Court Somerville had claimed to have his name inserted in the list of voters for the burgh of Galashiels in respect of occupancy of house, which claim had been objected to by Kinnaird and refused by the Sheriff.

The Sheriff stated the facts of the case as follows — "In the statutory schedule of claim the place of abode was stated to be 'Free Public Library.' Somerville had occupied the house specified for only three months. There was no statement of successive occupation of other houses. I was asked on behalf of Somerville to allow amendment of the claim to the effect of setting forth such occupation of other houses for the qualifying period, and to admit evidence of the occupation. I refused to admit the amendment tendered, and rejected the claim. (See *Hill* v. *Collins*, December 19, 1868, 7 Macph. 283.)"

The question of law for the opinion of the Court was—"Was I bound to allow amendment of the claim to the effect proposed, and to hold that Thomas Somerville had the household qualification?"

Three other persons also appealed against the judgment of the Sheriff whose claims all depended on the same questions of law.

Argued for the appellant—The case of *Hill* v. *Collins*, December 19, 1868, 7 Macph. 283, did not apply. This case was ruled by *Ross* v. *Carberry*, November 18, 1897, 25 R. 98, 35 S.L.R. 109. The statute of 1856, section 46, provided that the Sheriff should exercise his discretion in dealing with amendments of this kind. He had not done so, but had treated the proposed amendment as if it involved the correction of a fundamental objection to the claim.

Argued for the respondent—This was a matter entirely within the discretion of the Sheriff, who had exercised that discretion by disallowing the amendment. The provision of the section was permissive—not imperative. The case of *Hill* v. *Collins*, which was in point, had been followed in *Wilson* v. *Kerr*, November 8, 1878, 6 R. 21. The amendment proposed here was not of a mere clerical or casual error, but would introduce entirely new matter. The claim as it stood gave no sufficient notice to enable objections, if any, to be made—*Osborne* v. *Melville*, December 7, 1899, 2 F. 266, 37 S.L.R. 186; *Johnston* v. *Steedman*, November 22, 1883, 11 R. 175, 21 S.L.R. 130.

LORD KINNEAR—The facts stated in this case are that "in the statutory schedule of claim the place of abode was stated to be 'Free Public Library. Somerville had occupied the house specified for only three months; there was no statement of successive occupation of other houses." Now, if the claim were to be sustained or rejected on that statement alone I think that it was a bad claim, because it does not satisfy the requirements of the statute by setting forth the claimant's place of abode for the full qualifying period, inasmuch as it sets forth what is found to have been his place of abode for three months only, without saying anything at all as to his place of abode during the remainder of the qualifying period. The case goes on to state that the Sheriff was asked on behalf of the claimant to allow amendment of the claim to the effect of setting forth such occupation of other houses for the qualifying period and to admit evidence of the occupation, and that the Sheriff refused to admit the amendment tendered and rejected the claim.

The question of law which is put to us is in the following terms:—"Was I bound to allow amendment of the claim to the effect proposed and to hold that Thomas Somerville had the household qualification?" With regard to the second branch of that question I do not think that we are in a position to dispose of it, because we are not told what the amendment was which it was proposed to make, nor are we told whether, if the amendment had been allowed, the claimant would have had the requisite qualification. We are not told anything except that the claimant occupied the house specified in the schedule of claim for only three months. The real question which we have to decide is whether the amendment ought to have been allowed. I have found that question to be attended with some difficulty, but I have come to the conclusion that the Sheriff was right.

The section on which the question turns is section 46 of the Burgh Voters Registration (Scotland) Act 1856. The section begins by enacting that "no misnomer or inaccurate or defective description of any person, place, or thing named or described in any schedule to this Act annexed, or in any list or register of voters, or in any notice required by this Act, shall in any way prevent or abridge the operation of this Act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood." Therefore so far it seems to me quite clear that what the statute intends to protect the voter against is any objection founded on a misnomer or an erroneous or defective description, and the condition attached is that the words used although erroneous or defective are nevertheless capable of being understood by persons interested in the matter. The statute then goes on to make this ancillary provision—"and it shall be lawful to any Sheriff in his registration court, or to any court of appeal, if it shall appear to him or to such court that there has been no wilful purpose to mislead or deceive, or that such misnomer or inaccurate or defective description was not such as to mislead or deceive, to allow any verbal,

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clerical, or casual error in any such schedule, list, register, or notice to be corrected or supplied." I think it is plain, looking to the facts found by the Sheriff, that we are not in a position to say that the statement as it appears in the schedule of claim was capable of being commonly understood in the sense in which it admittedly must be understood if the claimant is to set forth the necessary qualification. There is nothing stated in the case which suggests how the schedule of claim is to be read as disclosing a misnomer or an inaccurate or defective description. Therefore, apart from authority, I should come to the conclusion that this is not a case in which the Sheriff was bound to allow the amendment.

In *Osborne* v. *Melville*, 2 F. 266, Lord Trayner says this—"As the statute gives a form for claims and requires certain details to be set forth in different columns under various headings, the least thing a claimant can do is to conform to the statute. If in filling up one of these columns there is a clerical error or mistake which will not mislead the Assessor, who has to make up the roll, the Sheriff may amend such error. But where a claimant abstains from filling up one of these columns, leaving it quite blank, I fear the claimant must take the consequences." I am disposed to think that that decision is directly in point, but undoubtedly a difficulty is created by the decision in the earlier case of *Ross* v. *Carberry*, 25 R. 98. That, however, was an exceptional case. It was a case in which the Sheriff allowed a claim to be enrolled as a lodger voter to be amended. The Sheriff proceeded on the ground that he was "satisfied that the failure to mention in the claim the different rooms occupied in succession arose from a casual error," and on this statement of fact the Court was asked the question whether the Sheriff had power to allow the amendment to be made. We held that he had power, and the ground of our judgment was that the Sheriff had found in fact that the omission in the claim was due to a casual error; but that case is distinguishable from the case now before the Court in another respect, because the claim there contained an accurate description of the lodgings and of the person to whom the claimant paid his rent, but it appeared that he had not occupied lodgings in the same house throughout the whole qualifying period, although, as I have said, the lodgings were throughout of the character described in the claim, and the rent was throughout paid to the person named and described in the claim. In these circumstances the claimant was allowed to amend his claim by inserting a description of the house in which he had for a part of the qualifying period occupied lodgings. In that case I am bound to say that we carried the application of this section as far as it can reasonably be carried. I am certainly not disposed to carry it further, and to hold that in the circumstances now before your Lordships the Sheriff was bound to allow the claim to be amended.

Lord Stormonth Darling — All the provisions which determine the precise form of these claims, and all the provisions as to their publication, are directed to the object of enabling the Assessor to make up his list and of giving anyone who has a title the opportunity of objecting to the claims. That being so, it is not unreasonable that the claimant's right to vote should be made to depend on a strict observance of the provisions of the statute with regard to claims. It is true that where a casual error has occurred in any of the particulars of the claim, the Act of 1856 says that such an error may be corrected provided that the person, place, or thing shall be so described in the notice of claim as to be commonly understood. It is pretty plain that this power of amending claims is limited to cases of casual error such as will not mislead anyone. I do not find authority in the statute for supplying a gap in the essential framework of the claim. The case of *Ross* v. *Carbery* was in many respects special. I entirely subscribe to the explanation which your Lordship has given of it. The cases show, I think, that this Court has always limited this section of the statute to the correction of errors which were really casual and not calculated to mislead. That being so, I think that the Sheriff would have been wrong if he had allowed this amendment. He has not found in point of fact, as the Sheriff in *Ross* v. *Carbery* found, that the error was a casual error, and I am unable to discover anything in the facts stated in the case to suggest that he was bound to allow the amendment proposed.

Lord Johnston—I agree with the decision in this case, but not on the grounds stated by the Sheriff. The case of *Hill* v. *Collins*, 7 Macph. 283, to which he refers, entitled him to reject the claim if it was not amended, but I do not think that it has anything to do with allowing an amendment. That depends on section 46 of the Burgh Voters' Registration (Scotland) Act of 1856. Under the concluding branch of that section I think that, if the amendment is competent the Sheriff is bound to allow it, the obligation on him being to be satisfied that there was no wilful purpose to mislead or deceive, and that the misnomer or inaccurate or defective description was not such as to mislead or deceive. Then, going back to the first half of the section to find whether the amendment is competent, you find that the ruling idea is that the description although inaccurate, is such as to be commonly understood. Then turning to form No. 2, Schedule A, you find that what is to be disclosed in the notice of claim includes "place of abode," "nature of qualification," and "street, lane, and other place where the property is situate, and number of the house (if any)." The claim is not fully filled up unless the place of abode is set forth, and if there have been three places of abode in succes-

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sion during the qualifying period you must have the complete list which goes to make the necessary qualification. If only one place of abode is set forth and nothing at all is said about the other two, can it be said that those other two are so described in the notice as to be commonly understood? I think that this is a radical defect which the statute does not allow to be removed. I should follow the case of *Osborne* v. *Melville*, 2 F. 266, and not that on which the Sheriff rests his judgment.

LORD KINNEAR—I should like to add, what I omitted to say, that nothing in this judgment is intended to suggest any imputation of any sort on the claimant to the effect that he intended to deceive or mislead any person, but that negative finding does not dispose of the case. On the assumption that the schedule of claim does not give the necessary information, although there has been no intention to deceive or mislead, we cannot decide whether the error was a casual one or not because we do not know how it occurred.

The Court found in answer to the question stated that the Sheriff rightly refused to admit the amendment proposed on the claim, and dismissed the appeal.

Counsel for the Appellant—T. B. Morison. Agents—Cameron & Orr, S.S.C.

Counsel for the Respondent—Blackburn. Agents—Russell & Dunlop, W.S.

Monday, December 18.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

BROWN *v.* KINNAIRD.

Election Law—Lodger Franchise—Claim—Omission to Insert Designation of Party to whom Rent Payable—Competency of Amendment—Registration of Voters (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 58), *sec.* 46—*Representation of the People (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 4, 19 *and Sched. I.*

The claimant to a lodger vote set forth in his statutory schedule of claim, in the column for statement of the "name, description, and residence of the person to whom rent paid," a name, without specifying any designation or residence. A motion for leave to amend the claim by the insertion of the particulars was refused by the Sheriff.

Opinion per curiam that the error was not a casual error within the meaning of section 46 of the Registration of Voters (Scotland) Act 1856, which the Sheriff by the said section was empowered to allow to be amended.

The Registration of Voters (Scotland) Act 1856 (19 and 20 Vict. cap. 58), section 46, enacts—"No misnomer or inaccurate or defective description of any person, place, or thing named or described in any schedule to this Act annexed, . . . or in any notice required by this Act, shall in any way prevent or abridge the operation of this Act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule . . . or notice as to be commonly understood, and it shall be lawful to any Sheriff in his Registration Court, or to any court of appeal, if it shall appear to him or to such court that there has been no wilful purpose to mislead or deceive, or that such misnomer or inaccurate or defective description was not such as to mislead or deceive, to allow any verbal, clerical, or casual error in any such schedule . . . or notice to be corrected or supplied."

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. cap. 48) sec. 4, enacts—"Every man shall . . . be entitled to be registered as a voter, ... who is qualified as follows (that is to say)—(1) . . . (2) As a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year lodgings of a clear yearly value, if let unfurnished, of ten pounds or upwards. (3) . . . ." Section 19 enacts—"The following regulations shall be observed with respect to the registration of voters—(1) the Registration Acts shall apply to the registration of all persons on whom a right to be registered and to vote is conferred for the first time by this Act, in the same manner and subject to the same regulations, as nearly as circumstances admit, in and subject to which they now apply to the registration of persons entitled at present to be registered and to vote . . . (3) The claim of every person desirous of being registered as a voter for a member or members to serve for any burgh in respect of lodgings shall be in the form No 1 in Schedule I, or to the like effect, and shall have annexed thereto a declaration in the form, and be certified in the manner, in the said schedule mentioned, or as near thereto as circumstances admit. . . . (4) The provisions of the Registration Acts . . . with respect to the proof of the claims of persons omitted from the lists of voters in burghs and to objections thereto, and to the hearing thereof, shall, so far as the same are applicable, apply to claims and objections and to the hearing thereof under this section."

. . . . . .

"SCHEDULE (I).

"*Claim of Lodger.*

"Burgh of

"To the Assessor of the Burgh of

"I hereby claim to be inserted in the list of voters in respect of the occupation of the under-mentioned lodgings, and the particulars of my qualification are stated in the columns below—

"Christian Name and Surname at full length.	Profession, Trade, or Calling.	Description of Lodgings.	Description of House or Houses in which Lodgings situate, with Number if any, and Name of Street.	Name, Description, and Residence of Person or Persons to whom Rent payable.

. . . . . .

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This was an appeal by way of stated Case against a decision of the Sheriff of Roxburgh, Berwick, and Selkirk (CHISHOLM) at a Registration Court for the burgh of Galashiels, held on 6th October 1905, in which John Murray Brown, manufacturer, Ashwood, Galashiels, was appellant, and James Moubray Kinnaird, solicitor, Galashiels, was respondent. Brown had claimed at the said Court to be entered in the list of voters in respect of the occupation of lodgings, which claim Kinnaird had objected to, and the Sheriff had refused.

The Sheriff stated the facts of the case as follows:—"In the statutory schedule of claim, in the column for statement of 'Name, description, and residence of persons or person to whom rent paid,' the sole entry was 'James Brown.' There was no statement of the designation and residence of the person to whom rent was paid. The agent for the applicant moved for leave to amend the claim. This was opposed. The question of the adequacy of the value of the lodgings or the term of occupation was not raised. I rejected the claim on the ground that it did not comply with the requirements of the statute. (See *Meech* v. *Galt*, 1892, 30 S.L.R. 64)."

The question of law for the opinion of the Court was—"Was the applicant entitled to be inserted in the list of voters on his claim, which was defective in the specified particulars?"

Another party also appealed against the judgment of the Sheriff whose claim depended on the same question of law.

Argued for the appellant—The objection here was the barest technicality, and amendment should have been allowed. The fact was that the James Brown mentioned in the claim as the party to whom rent was paid was the father of the appellant, and there was not and could not be a suggestion that there was any intention to mislead or deceive.

Argued for the respondent—This claim was fundamentally wrong. It was no mere clerical or casual error. It was a defective claim in the sense of the statute. The case of *Meech* v. *Galt*, November 14, 1892, 30 S.L.R. 64, applied exactly to the circumstances of this case.

LORD KINNEAR—This case raises a somewhat different point from that which we have just decided. It relates to a claim to be enrolled in respect of the occupation of lodgings. In the schedule of claim the column headed "Name, description, and residence of persons or person to whom rent paid," sets out nothing except the name "James Brown." There is nothing to ascertain where "James Brown" resides or what his description is. That appears to me to be an altogether insufficient description, and if that had been all I should have said that the case of *Somerville* which we have just decided exactly applied. But then the question which is here put to us is, "was the applicant entitled to be inserted in the list of voters on his claim which was defective in the specified particulars?" It is perfectly impossible to answer this question in the affirmative. I think that it contains its own answer.

LORD STORMONTH DARLING—This case raises a question as to a mistake in a lodger claim. It is enough probably to say that we cannot possibly answer the question as put in the affirmative, but I think that the Sheriff in refusing to allow the amendment was perfectly right. I think that he would have been going beyond what he was entitled to do if he had allowed this amendment. It is possible no doubt that a local judge might be aware that everyone would know who was meant by a simple name without designation of any sort. We have no information on that point here, but if the Sheriff had made the amendment upon that footing, a different question would have arisen from that which we have to decide.

LORD JOHNSTON—I concur. The question that was argued to us was just the same question as was argued in the case of *Somerville*. To the question as put in the case there can only be one answer.

The Court answered the question in the negative and dismissed the appeal.

Counsel for the Appellant—T. B. Morison. Agents—Cameron & Orr, S.S.C.

Counsel for the Respondent—Blackburn. Agents—Russell & Dunlop, W.S.

Friday, December 22.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

DUNCAN *v.* JACKSON.

Election Law—Burgh Franchise—"Building"—Representation of the People (Scotland) Act 1832 (2 *and* 3 *Will.* IV, *c.* 65), *sec.* 11.

Held (Lord Kinnear reserving opinion) that a meter house built of stone and lime, 4 feet 6 inches long, 3 feet broad, and 4 feet high, is not a "building" within the meaning of section 11 of the Representation of the People (Scotland) Act 1832.

Question whether, since the Representation of the People Act 1884, the ownership of land within a burgh, combined with residence in or within seven miles of it, will not suffice to give a qualification.

The Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65), sec. 11, enacts—"And be it enacted that every person not subject to any legal incapacity shall be entitled to be registered as hereinafter directed, and to vote at elections for any of the cities, burghs, or towns, or districts of cities, burghs or towns, hereinbefore mentioned, who, when the Sheriff proceeds to consider his claim for registration, shall have been for a period of not less than twelve calendar months next previous to the . . . last day of July

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. . . in the occupancy, either as proprietor, tenant, or liferenter, of any house, warehouse, counting house, shop, or other building, within the limits of such city, burgh or town, which either separately or jointly with any other house, warehouse, counting house, shop, or other building within the same limits, or with any land owned and occupied by him, or occupied under the same landlord, and also situate within the same limits, shall be of the yearly value of ten pounds . . . Provided also, that no such person shall be entitled to be registered or to vote in the present or any future year unless he shall have resided for six calendar months next previous to . . . the last day of July . . . within such city, burgh, or town, or within seven statute miles of some part thereof: Provided also that persons so resident shall be entitled to be registered and to vote if they are the true owners of such premises as are hereinbefore mentioned, within such city, burgh, or town, of the yearly value of ten pounds or upwards, although they should not occupy any premises within its limits, or although the premises actually occupied by them should be of less yearly value than ten pounds . . ."

The Representation of the People Act 1884 (48 Vict. cap. 3), by section 12 and Schedule II, part 2, repeals, except in so far as relates to the rights of persons saved by that Act, and except in so far as the enactment so repealed contains conditions made applicable by that Act to any franchise enacted by that Act, the above-quoted section of the Act of 1832 down to the words which precede the word "provided."

This was an appeal, by way of stated case, against a decision of the Sheriff of Fife and Kinross (KINCAID MACKENZIE) at a Registration Court for the burgh of Crail, in which John Duncan, farmer, Kirkmay, was the appellant, and George Jackson, 76 Nethergate, Crail, was the respondent. At the said Court the respondent, whose name was on the register of voters for the burgh of Crail, objected to the name of John Duncan, farmer, Kirkmay, being retained in the list of Parliamentary voters for the burgh of Crail, which objection was sustained. Duncan was entered on the roll as proprietor of house and lands on road to Anstruther.

The Sheriff found the following facts proved—"The house in question is a structure of stone and brick with sloping cement roof. It is 4 feet 6 inches long, 3 feet broad, and 4 feet high, and was built to house a gas meter. Previous to the year in question Mr Duncan had been entered in the valuation roll for the burgh as the owner of lands of the value of £100; for the year in question the entry in the valuation roll contained the addition of the meter-house, but no increase was made on the valuation in respect thereof. The meter-house in question is situated on a small piece of ground reserved from a feu given off by Mr Duncan; the said piece of ground is contiguous to the rest of the lands, with a road which belongs to Mr Duncan intervening. The meter-house does not quite cover the reserved piece of ground. The meter fills the house. The meter-house has been in its present position for five or six years. Previous to that the meter was outside Mr Duncan's property. He paid for the present meter and for the house. The key of the meter-house is kept by the gas manager in Crail, who regularly inspects the meter in order to check the supply of gas to Mr Duncan's house, which is situated outside the burgh boundary. Mr Duncan has a right to enter the meter-house. He has done so three or four times during the five or six years it has been there."

The Sheriff sustained the objection on the ground that even if the meter house was to be held a building within the meaning of section 11 of the Act 2 and 3 Will. IV, cap. 65, there had not been sufficient occupation to satisfy the provisions of the said section.

The questions of law for the opinion of the Court were—"Whether the meter-house in question is a building within the meaning of section 11 of the Act 2 and 3 William IV, chapter 65? and (2) Whether there was sufficient occupation by the proprietor of the said meter-house to satisfy the provisions of said section?"

Argued for the appellant—All that the Act required was that the building should be substantial. It might be used merely as a store, and need not be even stone and lime built. The building in question here satisfied the above requirement—*Johnston* v. *Guild*, November 3, 1884, 12 R. 42, 22 S.L.R. 34; *Morish* v. *Harris*, L.R., 1865, 1 Com. Pleas 155; Rogers on Elections, 16th ed., vol. 1, p. 180; *Whitmore* v. *Town Clerk of Wenlock*, 1843, 13 L.J., C.P. 55; *Powell* v. *Farmer*, 1855, 34 L.J., C.P. 71. Personal occupancy by actual residence was not necessary in order to give a qualification—*Lunan* v. *Allan*, November 13, 1880, 8 R. 13, 18 S.L.R. 69. This meter-house was erected and occupied by the appellant for his own sole use, which was sufficient. It was also argued that since the first portion of section 11 of the Act of 1832 was repealed by the Act of 1884, no building was necessary to give a qualification but that ownership of land alone was sufficient—Rogers on Elections, p. 72; *Hall* v. *Metcalf*, [1892] 1 Q.B. 208; Mackenzie and Lushington's Registration Manual, p. 136. The Court, however, intimated that they could not hear this line of argument as the question dealt with was not raised in the stated case.

Argued for the respondent—The words of the Act "or other building" must be taken to mean buildings *ejusdem generis* with those specifically mentioned in the section, *i.e.*, (1) buildings which were human dwelling-houses, and (2) buildings which were used for the purpose of some trade or industry. The structure here was not a building in the sense of the Act. It was merely a covering for a gas meter. The real question was whether a gas meter was a building—Cay on the Scottish Reform Act, p. 668. The authorities cited by the appellant showed that a building other than a dwelling-house, in order to afford a

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qualification to the occupier must be used for the purposes of his trade or business. The value of the land was not enhanced by the erection of this structure. The appellant was not the occupier of this structure —*Fairies* v. *M'Guffie*, October 22, 1873, 1 R. 13, 11 S.L.R. 33. He could not occupy except by living in it himself or by housing his servants or beastial in it.

LORD KINNEAR—I have had considerable difficulty in this case, but I have come to the same conclusion in so far as your Lordships agree in thinking that this appeal should be dismissed. I assent also to what I understand is the view of your Lordships that we cannot entertain the question, which was not raised before the Sheriff, and is not put to us in the stated case, but was raised for the first time at the bar in this appeal. We can do nothing except to answer the questions of law which are put to us in the case as having arisen on the facts found to have been proved. The assumption on which the case rests is that it is necessary for the claimant to prove that he has a qualification in the sense of section 11 of the Act of 1832. I reserve my opinion as to the answer to be given to the question—now raised before us for the first time—as to whether this assumption is or is not a sound assumption since the date of the Act of 1884. I am the more reluctant to answer this question when it is raised without notice, because the point maintained is admittedly a new one, and puts in question the interpretation of the statutes which has hitherto prevailed in practice and has been sanctioned by decision.

Setting aside that question therefore, we are, in the first question put to us in the case, asked to determine whether the meter house in question is a building within the meaning of section 11 of the Act of 1832. I have difficulty in answering that question, looking to the facts stated in the case. The Sheriff has not found that it is a building or that it is not a building within the meaning of the Act. We have no finding in fact by the Sheriff on that matter. All that he has found is that if the meter house is a building within the meaning of the Act there has not been sufficient occupation to satisfy the provisions of the Act. Now that puts on this Court a task which, if competent, is not within the ordinary course of our duty—that is to say, we are asked to draw what is *prima facie* an inference of fact, and to say whether this meter house is or is not a building within the meaning of the Act. If I thought it in accordance with my duty to answer that question, I should have considerable difficulty, because it appears to me that the statement of facts from which we are asked to draw the inference is seriously insufficient. The Sheriff does not tell us whether this structure is of the statutory value considered as a separate subject. The case contains certain statements as to entries in the valuation roll from which we are asked to draw an inference as to the value of this property, but I decline to draw an inference as to that question, which is a pure question of fact. I think that it was for the Sheriff to determine as matter of fact the value of this property. But even assuming that we have enough stated to us in the case to satisfy us as to the value of the property, I do not think that the Sheriff has stated the whole facts regarding this property with sufficient exactness to enable us to answer the first question put to us in the affirmative. In ordinary circumstances I should have been disposed to move your Lordships to remit the case to the Sheriff for amendment, but there are obvious reasons which would make that course perfectly futile in the present instance. The conclusion to which I have come is that I do not find sufficient ground in the facts stated in the case to justify me in saying that the Sheriff has gone wrong on the first question. I therefore do not formally assent to the opinion of your Lordships on that question; I am still less prepared to dissent.

With reference to the second question, I agree with your Lordships that if the first question is answered as your Lordships propose the second question does not arise. I confess that I should have had the same difficulty in answering the second question as I have found in answering the first, but if this meter-house is assumed to be a building in the sense of the Act I should be disposed to say that the claimant has had sufficient occupation of it to satisfy the provisions of the Act.

The judgment of the Court will be to answer the first question in the negative and to find it unnecessary to answer the second.

LORD STORMONTH DARLING — I agree with the manner in which my brother Lord Johnston proposes to deal with the questions put to us. The effect is that the appeal must be dismissed.

I desire to reserve my opinion on a question which was not raised before the Sheriff and is not stated in the case, viz., whether a man's ownership of land within a burgh, when combined with residence in it or within seven miles of it, though he should not occupy any premises within its limits, may not afford the qualification that still subsists under the unrepealed portion of sec. 11 of the Act of 1832.

LORD JOHNSTON—I have had very great difficulty in understanding this case as stated, decided, and argued. The facts as I gather them are that Mr Duncan is proprietor of lands within the burgh of Crail which he does not occupy, which are worth £100 a-year, and that he is also owner of a small building which contains a gas-meter, isolated from the land above referred to but within burgh, which meter-house he occupies in this sense, that the meter which is within it measures the gas supplied to his dwelling-house, which is outside the burgh. Though the meter-house be of no appreciable annual value, the meter-house and the lands together are much in excess of the £10 of annual value required by the Reform Act of 1832, sec. 11. They therefore afford a qualification in point of value. Are

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they of a nature to afford a qualification?

Now the Assessor has entered Mr Duncan as proprietor of house and lands within the burgh, the house being *ex hypothesi* this meter-house, and the land the land above referred to.

This entry based on property I can quite understand. But the Sheriff has struck Mr Duncan's name off the roll, in respect that even if the meter-house was to be held a building within the meaning of sec. 11 of the Reform Act 1832 there had not been sufficient occupation of it to satisfy the provisions of the section.

The difficulty I have is in satisfying myself that occupation has anything to do with the claim. Were it not that apparently I have the support of the Assessor, who has dealt with the case as one of the property franchise simply, I should be disposed to think, in face of the Sheriff who decided and the counsel on both sides who argued the case, that I must have misapprehended the facts or that there must be some statutory enactment bearing on the question which has escaped me.

Mr Duncan's claim to vote appears to me to depend entirely upon the penultimate proviso of sec. 11, which provides that persons resident within the specified area, as Mr Duncan is, shall be entitled to vote "if they are the true owners of such premises as are hereinbefore mentioned" within the burgh of £10 yearly value, "although they should not occupy any premises within its limits." Mr Duncan takes nothing from the initial and principal enactment of the section, because though he owns the land he does not occupy it, and therefore it is immaterial whether he is in occupancy of the meter-house, if it be a house or other building in the sense of the statute or not. The only question, as it appears to me, is, what is the meaning of the words "such premises as are hereinbefore mentioned" occurring in said penultimate proviso of the section? Are they confined to "house, warehouse, counting-house, shop or other building," or do they extend to the combination of anyone of them with any other "house, warehouse, counting-house, shop or other building" or with land? I think that they must be held to extend to the combination. If, then, his meter-house is a house or other building in the sense of the statute, Mr Duncan being the true owner of this meter-house and land to the requisite value in combination is under the penultimate proviso of the section entitled to a vote though he occupies nothing within the limits of the burgh. It is for this reason that I have failed to understand why we should be concerned with the sufficiency of Mr Duncan's occupation. Had I to decide the case upon the question of occupancy I should have required further explanation of the grounds of the Sheriff's judgment. But as I have arrived at the conclusion that the meter-house is not a building within the meaning of sec. 11, I am able to limit myself to the first question put in this case.

The statute enumerates house, warehouse, counting-house, and shop. In that collocation I think "house" means dwelling-house, as contradistinguished from warehouse, counting-house, and shop, which covers premises occupied for residential and commercial (and under commercial, I think, agreeing with the Judges of the Court of Common Pleas in the case of *Morish* v. *Harris*, 1865, L.R. 1 C.P. 155, may be fairly included agricultural) purposes. And when the section adds "or other building" that expression must, I think, be interpreted on the principle *ejusdem generis* as intended to cover merely premises, however described, capable of being used for residential and commercial (or agricultural) purposes. I do not think that this meter-house falls under either category.

But I think there is a further objection to the claim, viz., that there is no possible connection between the meter-house and the claimant's property within the burgh, but only between the meter-house and Mr Duncan's house outside the burgh. It cannot in any sense be said that the meter-house, even assuming it to have any value in itself, has any joint value along with the land of which it is no adjunct. I entirely concur in the opinion of the English Judges in the case of *Morish* v. *Harris* that "the requirements which the statute imposes are permanence, utility, and contribution to the beneficial occupation of the land, thereby increasing its real annual value to let." Applying that to the present case, it is clear that we have not the state of circumstances to which the statutory enfranchisement was meant to apply.

The Court answered the first question in the negative, found it unnecessary to answer the second question, and dismissed the appeal.

Counsel for the Appellant—Blackburn—Cochran-Patrick. Agents—Russell & Dunlop, W.S.

Counsel for the Respondent—A. M. Anderson. Agent—Norman M. Macpherson, S.S.C.

Friday, December 22.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

JACK (BETT) *v.* EDIE.

Election Law — Occupation-Franchise — Borough Occupation-Franchise—Tenant of Houses Occupied by his Servants having Service Franchise — "Occupant as Tenant"—Representation of the People (Scotland) Act 1832 (2 *and* 3 *Will. IV, cap.* 65), *sec.* 11—*Representation of the People Act* 1884 (48 *Vict. cap.* 3), *secs.* 3, 5, *and* 7 (7).

A tenant farmer whose tenancy included two houses in a burgh occupied by servants in his employment, who were in the enjoyment of the service franchise in respect thereof, claimed to be entered on the roll in respect of his occupancy of said houses as tenant.

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Held that the employer was not an "occupant as tenant" for the purposes of the franchise, and not therefore entitled to be enrolled, but that the occupiers of the houses in the sense of the franchise statutes were the servants who occupied the houses in virtue of their employment, and who alone were entitled to be enrolled, and that in respect of the service qualification.

The Representation of the People Act 1884 (48 Vict. cap. 3), sec. 3, enacts—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant-occupier of such dwelling-house as a tenant."

Section 5, enacts—"Every man occupying any land or tenement in a county or borough in the United Kingdom of a clear yearly value of not less than £10 shall be entitled to be registered as a voter, and when registered to vote in an election for such county or borough in respect of such occupation, subject to the like conditions respectively as a man is at the passing of this Act entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such borough in respect of the borough occupation franchise." Sec. 7 (7)—"The expression 'borough occupation franchise' means . . . as respects Scotland the franchise enacted by the eleventh section of the Act of the second and third years of the reign of King Will. IV, chapter sixty-five. . . ."

The Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65), sec. 11, enacts—". . . Every person not subject to any legal incapacity shall be entitled to be registered as hereinafter directed, and to vote at elections for any of the cities, burghs, or towns, or districts of cities, burghs, or towns, hereinbefore mentioned, who, when the sheriff proceeds to consider his claim for registration, shall have been for a period of not less than twelve calendar months next previous to the . . . last day of July . . . in the occupancy either as proprietor, tenant, or liferenter of any house, warehouse, countinghouse, shop, or other building within the limits of such city, burgh, or town, which either separately or jointly with any other house, warehouse, counting-house, shop, or other building within the same limits, or with any land owned and occupied by him, or occupied under the same landlord, and also situate within the same limits, shall be of the yearly value of £10. . . ."

This was a special case stated by the Sheriff of Fife and Kinross (KINCAID MACKENZIE) on appeal from the Registration Court for the Burgh of Kilrenny, held on 7th October 1905. The appellant was James Jack (Bett), Cellardyke, and the respondent was Harry Edie, farmer, Cornceres.

The facts of the case were stated by the Sheriff to be as follows:—"Robert M'Gregor, mandatory for James Jack (Bett), whose name is on the register of voters for said burgh of Kilrenny, objected to the name of Harry Edie being retained in the list of Parliamentary voters for the burgh of Kilrenny. Harry Edie was entered on the roll as farmer, tenant of house and land, Cornceres.

"It was admitted that the buildings in question consist of two small houses on Mr Edie's farm, which are occupied by two of his farm servants, who have the service franchise. No deduction is made from their wages in name of rent for the houses. It was conceded that Mr Edie was qualified if his occupancy of these houses was sufficient to satisfy the provisions of section 11 of the Act 2 and 3 Will. IV, chapter 65.

"The Sheriff repelled the objection, and the objector required a case."

The question of law stated by the Sheriff was—"Whether there was sufficient occupation of the houses in question to satisfy the provisions of section 11 of the Act 2 and 3 Will. IV, chapter 65?"

Argued for the appellant—There was no occupation of the houses in question by the claimant. This was simply an attempt by means of a mid-tenancy to get three votes out of this subject. Section 3 of the 1884 Act conferred the service franchise on occupants of houses of this description "as tenants." It could not be maintained that the claimant could assign his right as tenant to an ordinary sub-tenant and still preserve his qualification to vote, and the terms of the section put a servant in the same position as a sub-tenant. A man could not constructively occupy a house by sub-tenants as he might by animals or by his own family—*Urquhart* v. *Adam*, November 25, 1904, 7 F. 157, 42 S.L.R. 178; *Kirkwood* v. *M'Callum*, November 2, 1874, 2 R. 1, 12 S.L.R. 31.

Argued for the respondent—Up to 1884 occupation by servants was regarded as constructive occupation by their employer—*Richardson* v. *Steuart*, November 8, 1878, 6 R. 17, 16 S.L.R. 76; Nicolson on Elections, p. 65. It could not be said that this had been altered by the introduction of the service franchise by the 1884 Act, section 3, because the whole scheme of that Act was not to limit or take away any existing franchise but to extend the benefit of the franchise to a new class, viz., servants.

LORD KINNEAR—In this case the question of law stated by the Sheriff is, whether there was sufficient occupation of the houses in question to satisfy the provisions of sec. 11 of the Act 2 and 3 Will. IV, cap. 65. The case therefore proceeds, like the case of *Duncan* v. *Jackson*, just decided, on the assumption that the 5th and 7th sections of the 1884 Act import the 11th section of the 1832 Act as defining the conditions of the burgh occupation franchise. That section requires that the claimant shall have been for a period of not less than twelve calendar months next previous to the last day of July in the occupancy either as proprietor,

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tenant, or liferenter of any house, warehouse, counting-house, shop, or other building within the limits of the burgh of the yearly value of ten pounds.

Now, that must be read along with the 5th and 7th sections of the Act of 1884. It is indispensable to consider the Act of 1884, both because the Franchise Acts must be read together as a whole, and also because it is the Act of 1884 which creates the uniform qualification in burghs and counties which now determines the occupation franchise. But although the 11th section is repealed in so far as it enacts a franchise, the conditions required by it are retained in so far as applicable to the franchises enacted by the Act of 1884. The facts stated are that the respondent is tenant of two small houses which are occupied by two of his farm servants, who have the service franchise, by which I understand the Sheriff to mean that the servants inhabit by virtue of their service, and that the dwelling-houses are not inhabited by the person under whom they serve, and that they therefore inhabit as tenants in the sense of the statute. They pay no rent for the houses. The question is whether the servants or the farmer whom they serve is the occupant as tenant. I think that is answered by the plain words of the 3rd section of the Act of 1884, which are these —"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant-occupier of such dwelling-house as a tenant." It follows from the plain meaning of these words that the tenants and occupiers of these two houses are the two servants and not their employer. No authority has been cited for the proposition that a person who does not personally inhabit a house, but has let it to a subtenant by whom alone it is occupied, nevertheless remains the tenant for the purposes of the electoral franchise. The case of *Kirkwood* v. *M'Callum* (2 R. 1) is a direct authority to the contrary. The employer in this case does not satisfy the conditions, because, although he is tenant as in a question with his landlord, he is not occupant as tenant for the purposes of the franchise, inasmuch as he has assigned the right to his two servants as his sub-tenants. I propose, therefore, that the question be answered in the negative.

LORD STORMONTH DARLING—I concur.

LORD JOHNSTON—The servant who fulfils the requirements of sec. 3 of the Representation of the People Act 1884 is to be deemed "to be an inhabitant-occupier" of his dwelling-house "as tenant." That, then, is the position of Mr Edie's servants.

To qualify Mr Edie under the 11th section of the Reform Act 1832 he must be "in the occupancy" "as tenant" of the same houses which are for the purposes of the Representation of the People Act 1884 deemed to be inhabited and occupied by his servants as tenants. Mr Edie may be tenant of the houses, but he has placed his servants in the position constructively at least of his sub-tenants. If there is a sublease of premises the tenant cannot plead his sub-tenant's occupancy as constructively his occupancy for the purpose of the 11th section of the Reform Act 1832, and I think this must apply even though the subtenancy is constructive, and by virtue of the 3rd section of the Act of 1884 only.

I therefore answer the question in the case in the negative.

The Court answered the question in the negative.

Counsel for the Appellant—A. M. Anderson. Agent—N. M. Macpherson, S.S.C.

Counsel for the Respondent—Blackburn—Cochran Patrick. Agents—Russell & Dunlop, W.S.

Friday, December 22.

(Before Lord Kinnear, Lord Stormonth Darling, and Lord Johnston.)

WHITELAW *v.* M'GOWAN.

Election Law—County Occupation Franchise—Personal Occupancy—Temporary Absence on Business from Qualifying Premises—Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 6—*Representation of the People Act* 1884 (48 *Vict. c.* 3), *sec.* 5 and 7 (6).

A person claimed to be registered as a voter for a county under the occupation franchise in terms of the Representation of the People Act 1884 (48 Vict. cap. 3), sec. 5.

It appeared that during twelve months prior to the application the claimant was temporarily absent from the qualifying premises for the purposes of his business, but that during that period the premises had been occupied by his wife, and that the furniture therein was his property. *Held* that the claimant's occupancy as tenant of the premises sufficiently satisfied the requirements of the statute notwithstanding his absence from them, and that therefore he was entitled to be registered.

The Representation of the People Act 1884 (48 Vict. cap. 3), section 5, enacts—"Every man occupying any land or tenement in a county or burgh in the United Kingdom of a clear yearly value of not less than ten pounds shall be entitled to be registered as a voter, and when registered to vote at an election for such county or burgh in respect of such occupation, subject to the like conditions respectively as a man is at the passing of this Act entitled to be registered as a voter and to vote at an election for such county in respect of the county occupation franchise, and at an election for such

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burgh in respect of the burgh occupation franchise." Section 7 (6)—"The expression 'county occupation franchise' means . . . as respects Scotland, the franchise enacted by the sixth section of the Representation of the People (Scotland) Act 1868."

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. cap. 48), section 6, enacts—"Every man shall be entitled to be registered as a voter, and when registered to vote at elections for a member to serve in Parliament for a county, who, when the Sheriff proceeds to consider his right to be inserted or retained in the register of voters, is qualified as follows—that is to say (1) . . . (2) Is and has been during the twelve calendar months immediately preceding the last day of July in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of fourteen pounds or upwards, as appearing on the valuation roll for such county . . ."

This was an appeal, by way of stated case, from a Registration Court for the county of Dumfries, held on 6th October 1905, in which James Walter Whitelaw, Solicitor, Dumfries, acting on behalf of Richard Jones, quarry foreman, Locharbriggs, was appellant, and James Hairstens M'Gowan, Ellangowan, Dumfries, was respondent. At the said Court M'Gowan had objected to Jones' name being retained on the list of voters, which objection had been sustained.

The facts of the case as stated by the Sheriff-Substitute (CAMPION) were as follows—"That Richard Jones had for the requisite period been tenant of a dwelling-house at Locharbriggs; that the subjects were entered in the valuation roll as of the yearly value of £13; that the said Richard Jones was in actual personal occupation of the said dwelling-house up to September 1904, when he left this country for Greece in order to fulfil a year's engagement there as quarry-manager; that this engagement being completed he returned to Locharbriggs on 8th October 1905, and again took up residence there; that during his absence from this country the foresaid house has been occupied by his wife, and that the furniture therein is his property. I sustained the objection on the ground that Richard Jones had been absent from the foresaid dwelling-house during the greater part of the qualifying period, and that his absence having been rendered necessary by his business engagement before referred to interrupted the continuity of his occupation of said house, and so disqualified him."

The question of law for the decision of the Court was—"Whether in the circumstances stated Richard Jones is entitled to be enrolled under the occupation franchise in terms of section 5 of the Representation of the People Act 1884 in respect of said dwelling-house."

Argued for the appellant—The requirement of the statute as to "actual personal occupancy" did not involve the necessity of personal residence—*Wetherhed* v. *Moffat*, November 8, 1878, 6 R. 20. Occupation by wife and family was quite sufficient, provided the absence as here was merely temporary—*Manson* v. *Sinclair*, 19th December 1868, 7 Macph. 329, 6 S.L.R. 49. The Sheriff-Substitute had dealt with this case as if it were one of household qualification and involved the inquiry whether the claimant was an "inhabitant-occupier." In the same way as a stable might be occupied by horses or a woodyard by wood for the purposes of the Act, a house might be occupied by a wife and family—*Lunan* v. *Allan*, November 13, 1880, 8 R. 13, 1 S.L.R. 69; *Johnston* v. *Buchanan*, 6th November 1879, 7 R. 7, 17 S.L.R. 163; *Lynn* v. *Henderson*, November 27, 1893, 1 S.L.T. 342.

Argued for the respondent—Personal residence was necessary to give a qualification, otherwise any number of votes might be secured by one person in different constituencies. The absence of the claimant was not voluntary. He was under a legal obligation to remain away for a whole year—*Stewart* v. *M'Fadzean*, December 20, 1890, 18 R. 349, 28 S.L.R. 196; *Rintoul* v. *Falconer*, December 6, 1898, 1 F. 207, 36 S.L.R. 185. Civil possession was not enough, but that was all that Jones had in this case—*Allan* v. *Smith*, November 5, 1879, 7 R. 6, 17 S.L.R. 158.

LORD KINNEAR—The question put to the Court in this special case is whether the appellant "is entitled to be enrolled under the occupation franchise in terms of sec. 5 of the Representation of the People Act 1884 in respect of" a dwelling-house. But that enactment refers to the 6th section of the Act of 1868 for the definition of the county occupation franchise; and the true question we have to consider, therefore, is whether the appellant was, during the twelve months immediately preceding the last day of July, in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of £10 or upwards. The facts on which this question arises are that he was tenant of a house at Locharbriggs of the requisite value during the whole period of twelve months; that he had himself lived in the house up to September 1904; that at that time he left this country for Greece in order to fulfil a business engagement; that this engagement being completed he returned to Locharbriggs on the 8th of October 1905 and again took up his residence there; and that during his absence from this country his wife continued to live in the house and that the furniture was his property. The Sheriff has held that the absence of the appellant interrupted the continuity of his occupancy and so disqualified him, but I am unable to agree with that opinion. He seems to have assumed that personal occupancy necessarily means residence. But the two things appear to me to be different. The statute requires that the voter shall have a right of possession as tenant, and secondly, that he shall have actually exercised that right by occupying the premises. But if these two conditions are satisfied nothing more is necessary. Now the appellant's right as tenant is not disputed; and if the tenant of a house has furnished it so as to

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make it habitable for his family, lives in it with his wife as long as he is in this country, and leaves his wife to live in it while he is absent from this country, it appears to me that he is still occupant as tenant notwithstanding his absence. I am of opinion, therefore, that the question should be answered in the affirmative.

LORD STORMONTH DARLING—I entirely concur with your Lordship. If this had been a claim under the "household qualification," I think the Sheriff's judgment would probably have been right, because he would then have been obliged to inquire whether the claimant was an "inhabitant occupier."

But the claim here is under the "county occupation franchise," and I agree with your Lordship that there has been sufficient "actual personal occupancy" as that phrase is used in the 6th sec. of the Act of 1868, notwithstanding the appellant's absence for some months from this country. I therefore agree that the appellant is entitled to be enrolled, and that the question in the case ought to be answered in the affirmative.

LORD JOHNSTON—I think that the only difficulty in this case has been created by an attempt to confuse the county occupation franchise with the county household franchise, and by citing cases on the construction of the provisions which introduced the latter as authorities for the construction of the provisions which introduced the former.

For the household qualification in counties the Act of 1884, section 7 (4), refers one back to the Act of 1868, section 3, where the qualification is defined as that of "inhabitant-occupier, or owner, or tenant of any dwelling-house."

But the Act of 1884, section 5, defines the qualification for the occupancy franchise as simply "occupying any land or tenement in a county . . . of the clear yearly value of not less than £10." And if by reference that section requires one to consider the Acts of 1868 and 1832, then that of 1868 uses the phrase "actual personal occupancy," and that of 1832 the phrase "in the occupancy as proprietor, tenant, or liferenter."

A man cannot inhabit except personally, but he may occupy personally without inhabiting. In the present case I think that Richard Jones has done so, and that he is therefore entitled to be retained on the register. I therefore answer the question in the case in the affirmative.

The Court answered the question in the affirmative.

Counsel for the Appellant—Blackburn. Agents—Russell & Dunlop, W.S.

Counsel for the Respondent—T. B. Morrison. Agent—T. & T. Galletly, S.S.C.

COURT OF SESSION.

Saturday, February 3.

FIRST DIVISION.

[Lord Low, Ordinary.

BARBOUR *v.* RENFREWSHIRE LOWER DISTRICT COMMITTEE.

Public Health—Infectious Diseases—Milk Supply—Prohibition of Milk Supply by Order of Sheriff—Compensation for Stopping Milk Supply from Dairy—Liability of Local Authority of District where Dairy is Situated—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 60 (2), (3). (7), *and* 164.

An outbreak of infectious disease having occurred in a burgh, the medical officer thereof intimated to the local authority of the adjoining county that he had evidence against the milk supplied from a farm within its district. The county local authority having resolved that no order prohibiting the farmer from supplying milk was necessary, the burgh local authority appealed to the Sheriff, who granted the order. The farmer claimed compensation under section 164 of the Public Health (Scotland) Act 1897. Both local authorities denied liability, maintaining that it was the other which was liable.

Held that the county local authority in whose district the farm was situated was the one liable.

The Public Health (Scotland) Act 1897, section 60, enacts—"(1) If the medical officer of any district has evidence that any person in the district is suffering from an infectious disease attributable to milk supplied within the district from any dairy situate within the district . . . such medical officer shall visit such dairy and . . . (2) If the medical officer of any district has evidence that any person in the district is suffering from any infectious disease attributable to milk from any dairy without the district, or that the milk from any such dairy is likely to cause any such disease to any person residing in the district, such medical officer shall forthwith intimate the same to the local authority of the district in which such dairy is situate, and such other local authority shall be bound forthwith by its medical officer to examine the dairy . . . and by a veterinary surgeon . . . to examine the animals therein, previous notice of the time of such examination having been given to the local authority of the first-mentioned district in order that the medical officer or any veterinary surgeon . . . may, if they so desire, be present at the examinations referred to, and the medical officer of the second-mentioned local authority shall forthwith report the results of his examination, accompanied by the report of the veterinary surgeon, if any, to that local authority or any committee of that local authority appointed . . . to deal with such matters. (3) The

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local authority of the district in which the dairy is situated, or any committee appointed for that purpose, shall meet forthwith and consider the reports together with any other evidence that may be submitted by the parties concerned, and shall either make an order requiring the dairyman not to supply any milk from the dairy until the order has been withdrawn by the local authority, or resolve that no such order is necessary. . . . (7) It shall be open to any local authority or dairyman aggrieved by any such resolution or order or withdrawal of order, to appeal in a summary manner to a sheriff having jurisdiction in the district in which the dairy is situated, and the Sheriff may either make an order requiring the dairyman to cease from supplying milk, or may vary or rescind any order which has been made by the local authority, and he may at any time withdraw any order made under this section. Pending the disposal of any such appeal the order shall remain in force. . . ."

Section 164 enacts—"Full compensation shall be made out of any fund or assessment applicable to the purposes of the Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act except when otherwise specially provided. . . ."

On 23rd February 1905, John Barbour, dairy farmer, High Murdieston, Renfrewshire, raised an action against the District Committee of the Second or Lower District of the County of Renfrew as local authority within that district under the Public Health (Scotland) Act 1897, in which he, *inter alia*, sought declarator, secondly, that the defenders were liable under section 164 of that Act to pay to him such compensation as he was entitled to under that Act for damage sustained by him through the exercise of one of the powers of the said Act.

In or about the month of September 1904 there was an outbreak of enteric fever in the burgh of Greenock. The pursuer supplied milk to certain customers in the district in which the epidemic occurred. The local authority of the burgh of Greenock, being of opinion, on the advice of their Medical Officer of Health, that enteric fever was likely to be spread throughout the burgh by the delivery of milk from High Murdieston Farm, resolved to ask the defenders, as the local authority of the district in which the farm was situated, to exercise the power conferred on them by section 60 of the Public Health (Scotland) Act 1897 of stopping the milk supply from the farm. They accordingly made an application to the defenders to pronounce an order stopping the supply of any milk from the farm of High Murdieston. A special meeting of the defenders' executive sub-committee was called and met on 19th September 1904. After considering the application, correspondence, reports, and information before them, the meeting determined that they were not justified in pronouncing an order requiring the pursuer to cease from supplying any milk from the said farm of High Murdieston. The local authority of the burgh of Greenock appealed against this resolution to the Sheriff-Substitute of the counties of Renfrew and Bute at Greenock, asked him to rescind it, and to give effect to their first application to the defenders. The Sheriff-Substitute having heard parties' procurators pronounced an order on 26th September 1904, ordaining and ordering the pursuer to cease from supplying milk from the farm of High Murdieston.

Immediately after this order was pronounced the pursuer intimated to the defenders that he held them liable in compensation, and on 6th December 1904, when the prohibition had been withdrawn, he again intimated his claim and sent a note of the amount.

The defenders repudiated liability, and stated that his claim should be directed against the local authority of the burgh of Greenock, who, however, also repudiated liability.

The pursuer pleaded—"(2) The pursuer having suffered damage by reason of the exercise of a power conferred on the defenders by the said Act, is entitled to compensation therefor from them, in virtue of the provisions of the said Act, and decree should be pronounced in terms of the second declaratory conclusion of the summons."

The defenders admitted that the pursuer had suffered loss but denied liability.

On 7th July 1905 the Lord Ordinary (Low) pronounced the following interlocutor—". . . Finds, decerns, and declares in terms of the conclusion of the summons: Finds the defenders liable in expenses. . . ."

The defenders reclaimed, and argued—It was admitted that compensation was due, and the sole question was from what source it should come. The Act left that vague, but the burgh local authority had in fact procured the order of the Sheriff stopping the supply of milk from the farm in question, and in so doing was acting in the interests of the inhabitants of the burgh, therefore it should be liable in compensation.

Counsel for the pursuer and respondent was not called upon.

LORD PRESIDENT—In this action a farmer in Renfrewshire sues the District Committee of the Lower District of the County of Renfrew as Local Authority under the Public Health Act of 1897, and seeks to have it declared that he is entitled to compensation from them in respect of damage which he has suffered by reason of the exercise of one of the powers of the Act of of 1897, to wit, an order by which his sale of milk was for a period stopped. The defence of the local authority is that they are not the persons under the circumstances truly liable, the persons truly liable according to them being the burgh of Greenock. That defence arises from the circumstances under which the stoppage order was made. The milk of the pursuer's dairy having become suspected, the matter was started by the Medical Officer of the Burgh of Greenock, who made an intimation in terms of sub-sec. 2 of sec. 60 of the Act. It is con-

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venient, I think, here to remind your Lordships precisely of what the provisions of the Act upon this matter are. They are embodied in sec. 60. The first sub-section provides for the case of the medical officer of a district having evidence that persons are suffering from infectious disease attributable to milk supplied within the district, and it prescribes that he shall go and make an inspection of the dairy accompanied by a veterinary surgeon, and that the report of his examination, coupled with the report of the veterinary surgeon, shall then be submitted to the local authority of that district. The second sub-section makes provision for cases where the infectious disease is attributable to milk supplied by a dairy without the district, and in that case the medical officer of the district within which the mischief for the moment is being done is to intimate the same to the local authority of the district in which the dairy is situate, and there is again provision for a visit, accompanied by a veterinary surgeon, but in this instance what I may call the complaining district is allowed to go to the inspection along with the officials of the district in which the complained of dairy is situate. After these inspections and reports, then in either case the matter goes on before the local authority of the district in which the dairy is situate, and that local authority may make if it wishes a stopping order. In the event of its either making or refusing a stopping order, an appeal is given under sub-sec. 7, the appeal being given either to the dairyman, whose interest is obvious, or to the local authority. Now, the latter of course can only mean that in the case where one local authority has applied to the other local authority the complaining authority has a right of appeal, because it goes without saying that a local authority cannot take an appeal against itself. When the appeal is taken then the Sheriff becomes master of the situation, and he may pronounce whatever order he thought the local authority of the district in which the dairy is situated ought to have pronounced. Now, reverting again to the facts of this present case, these steps having been gone through, the Local Authority of the Lower District of Renfrewshire refused to make an order. Upon that the Local Authority of the Burgh of Greenock took an appeal to the Sheriff, and the Sheriff, taking the view that an order ought to have been made, pronounced the order which the Local Authority of the Lower District of Renfrewshire, according to his view, ought to have made. The order was kept in force a certain time and was afterwards withdrawn. The present action is founded upon section 164 of the same statute, which ordains "that full compensation shall be made, out of any fund or assessment applicable to the purposes of this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." Now, as I have said, the Local Authority of the Lower District of Renfrewshire say that the proper persons to make compensation are the Burgh of Greenock, because they say the Burgh of Greenock were the parties complaining, and it is they that are being protected. I do not think that view is right, and I think the judgment of the Lord Ordinary which is reclaimed against is perfectly sound. I think we must remember that this is a Public Health Act, and that, as its title denotes, its object is to make such provisions as may be necessary to protect the health of the public in general, not particularly to safe-guard one district or another. Further, for the purposes of the Public Health Act the country is divided up into administrative districts, and each local authority in the administrative district is supreme in its own district. Taking the case of milk, which often goes away from one district to another, the statute had to make provision in one way or another for what was to be done if a particular district found it was being supplied with milk which it thought was infected, and had not direct jurisdiction over the supplier of that milk by reason of the fact that the supplier was not within its own district. It might have given powers to one district to, so to speak, descend into the territory of another and seize what it considered to be a wrongdoer, but it did not. On the contrary, it provided that the complaining district, if the subject of complaint was not in its own district but was in somebody else's district, must set that other authority in motion, and then if the determination of that authority was not to its liking it had an appeal to the Sheriff. But none the less, I think it is quite clear that when the Sheriff comes to pronounce his interlocutor and decree he really does it as for the local authority who could themselves have pronounced the decree in the form he says it ought to have been pronounced in the first instance, in which case no appeal to him would have been necessary.

Accordingly, it seems to me that there is no possible ground under the general frame of the statute for getting any compensation except out of the local authority which itself truly emits the order, even although it has been made to emit that order by the superior judgment of the Sheriff telling them to pronounce a certain order which, if they had been well advised, they would have pronounced in the first instance.

Accordingly I am of opinion that the pursuer is entitled to the declarator that he asks for and that the reclaiming note should be refused.

The question of the *quantum* of damages is a perfectly different thing, but it is not for this Court, because under the provisions of the statute, if the amount claimed is more than £50, it is to be ascertained in a certain way by an arbiter appointed under the provisions of this statute, and therefore as to how far this particular man was damnified by the order is a question that is still entirely open.

LORD M'LAREN—If a corporation or public authority is invested by a statute with what are termed compulsory powers, whether

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those powers involve the taking of land, or whether they involve merely the injuriously affecting the property or the trade of another person, I should hold that in the absence of directions to the contrary it is the person whose property or trade is interfered with who is to receive the compensation, and the person who is empowered to interfere with it who is to pay. It might be otherwise provided. A statute might empower Peter to do the damage and Paul to pay for it, but in the absence of express declaration I should not attribute such an illogical, not to say inequitable, intention to the Legislature. It would therefore follow in the ordinary case that it is the local authority in whose name the order is issued, whether by itself or by the Sheriff, who must make payment—in this case the County Council of Renfrewshire. I should only wish to reserve my opinion upon a question that might possibly arise, and that would be, if at the instance of the burgh authority the County District made an order prohibiting the sale, and on appeal to the Sheriff that order was recalled, and then the 16th section provides that pending the appeal to the Sheriff the original order shall remain in force. It is quite conceivable that an argument in such a case might be maintained to enforce liability against the burgh authority for having obtained an order which was ultimately found to be improper, on the same ground as a party applying for interim interdict, afterwards recalled, may be made responsible for the damages caused by the interdict obtained on his representation. I am not expressing any opinion as to the soundness of such a contention, but a case might arise in which, upon grounds different from those of the present case, the criterion of responsibility might also be different.

LORD KINNEAR—I agree with your Lordship in the chair. The pursuer brings this action for compensation for loss which he says he has suffered by reason of the exercise of the powers of the Act. It is conceded on record that he has suffered loss and damage in consequence of a certain order which was pronounced in the exercise of the powers contained in the Act, and the only question is whether the authority liable to make good that compensation is the local authority of Greenock or the local authority of a county district in Renfrewshire. It must be conceded that the case is in exactly the same position as if the order complained of had been pronounced by the local authority of the county. In point of fact the local authority of the county declined to pronounce the order, but an appeal was presented to the Sheriff of Renfrewshire, and he, differing from the local authority, pronounced the order which they ought to have given at first. It is conceded that they are in exactly the same position now as if they had done from the first what the Sheriff found they ought to have done. Therefore the order of which the pursuer complains was an order of the local authority of Renfrewshire in the exercise of the powers conferred upon them by the Act and conferred upon nobody else. It appears to me to follow that if there is compensation for the exercise of that power payable by any local authority, it must be by the local authority which in fact executed the power, because that was the only authority which proceeded directly against the present pursuer, and it is no concern of his whether they are moved to proceed by their own medical officer or by some medical officer of some other local authority. Therefore it appears to me to follow that if compensation is due it must be paid by them. Whether compensation is due or not, or how much is due, is not a question for this Court, because that must be determined, as your Lordship has pointed out, by an arbiter to be appointed by the Local Government Board. In the meantime what we decide is—and all that we can decide is—whether, assuming the claim for compensation to be good, the liability lies against the one or the other of the two local authorities. I agree with your Lordship and the Lord Ordinary.

LORD PEARSON concurred.

The Court adhered.

Counsel for the Respondent and Pursuer—Guthrie, K.C.—Munro. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Reclaimers and Defenders—M'Clure, K.C.—Macmillan. Agent—J. Gordon Mason, S.S.C.

Tuesday, February 6.

FIRST DIVISION.

[Sheriff Court at Perth.

VAUGHAN *v.* NICOLL.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 2 (c)—"*Serious and Wilful Misconduct*"—*Question of Fact or Law—Competency of Appeal.*

A farm servant was driving a lorry into town. Shortly after his setting out the servant was discovered lying injured on the road, the lorry being upset. There was no direct evidence as to the cause of the accident other than the servant's evidence, but the reins were found tied to a drag wheel on the front of the lorry. The Sheriff-Substitute found that the cause of the accident was the servant's tying the reins to the wheel and the horse's head having been pulled round so as to make it run back and upset the lorry, and he was of opinion that the servant's conduct amounted to serious and wilful misconduct in the sense of the Act, and held that he was therefore not entitled to compensation.

In an appeal *held* that the Sheriff-Substitute's decision was not subject to review, in respect that his finding that the applicant had been guilty of serious

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and wilful misconduct was a finding as to fact and was not insupportable in view of the facts proved.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, sub-section 2 (*c*) enacts—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

This was a case stated on appeal from a determination of the Sheriff-Substitute (SYM) at Perth in an arbitration under the Workmen's Compensation Acts 1897 and 1900 between James Vaughan, 40 Pomarium, Perth, claimant and appellant, and David Nicoll, respondent. The respondent was tenant of the farm of Charlestown in the Carse of Gowrie, and the applicant was in his employment and was at the time of the accident engaged in driving up a lorry from the farm to Perth. Shortly after his leaving the farm and while he was still in the farm access road, he was found with the lorry upset.

The case, *inter alia*, stated—"With reference to the cause of the accident, it appeared to be the fact that when the applicant started he was sitting in the proper position upon the front of lorry, with the reins in his hand; that the horse, which was the same he had driven down with the lorry (though the applicant alleged it was a different horse) was a quiet horse, a little short in wind; that the route by which he would have to go to Perth was, first, along the said farm access road, on which there is a rather steep incline upwards from the farm, and afterwards along the main road, through the Carse of Gowrie, from Dundee to Perth, on which there is considerable traffic, both by motors and by horse-drawn vehicles, and alongside which for a considerable distance runs the railway line from Glasgow to Dundee; that no one saw the accident happen, but judging from what was found when the applicant was picked up and the lorry was righted, the cause of the accident was that the applicant had tied the reins to a little wheel which works a brake on the front of the lorry instead of keeping them in his hand, and that although the horse was going uphill on a straight piece of road its head had been pulled round so as to make it run back and upset the lorry; that this opinion is chiefly derived from the fact that when the respondent's sons and their farm servant came to the spot, attracted by the applicant's cries, they found the reins tied to the said small wheel, and had to release the horse by loosing them at the horse's bit; that, taking together such facts as there are, no other natural and intelligible account of the accident occurred to me, for I could not in the circumstances accept the applicant's own, which was that when he was driving up the slope the horse stopped, ran back, and upset the lorry. . . . It was then contended that what the applicant was doing when the accident happened to him was not driving a horse and lorry at all, as was his duty, but that his action, as inferred from the facts, amounted to serious and wilful misconduct. I was of that opinion in fact and in law. I thought the case distinguished from a case cited in which a man was accidentally killed, no one seeing the accident, and in which it appeared most likely that he had taken a dangerous instead of the only safe and proper way of reaching the point at which he was hurt. It was held that he was killed 'in the course of his employment,' and that a rash and dangerous way of going about his employment was not 'serious and wilful misconduct.' I refused compensation, and, as such a question is in certain aspects a question of law, I have stated this case."

The question of law for the opinion of the Court was—"On the facts proved, was I right in holding that the appellant was guilty of serious and wilful misconduct within the meaning of section 1, sub-section 2 (*c*), of the Workmen's Compensation Act 1897?"

Argued for the appellant—The applicant in tying the reins to the wheel was not aware of the risk he incurred, and therefore the element of wilfulness was absent. In all the previous cases in which compensation had been refused on the ground of serious and wilful misconduct the injury was received by the applicant either while he was acting in disobedience of a rule of a mine or factory or of the orders of a person to whose orders he was bound to conform—*M'Nicol* v. *Speirs, Gibb & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428; *Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *M'Nicholas* v. *Dawson & Son* [1899], 1 Q.B. 773.

Argued for the respondent—This was a question of fact on which the Sheriff's decision was final, and appeal was incompetent—*Condron* v. *Paul & Sons*, November 5, 1903, 6 F. 29, 41 S.L.R. 33. [The LORD PRESIDENT referred to *Dobson* v. *United Collieries*, December 16, 1905, 43 S.L.R. 260.] The act of the applicant here was serious and wilful misconduct—*United Collieries* v. *Dobson*, *supra*.

At advising—

LORD PRESIDENT—In this case under the Workmen's Compensation Acts the point raised is whether the Sheriff was right in finding that in the circumstances of the case there had been serious and wilful misconduct within the meaning of section 1, sub-section 2 (*c*). There have been a good many cases decided upon this section, and it has been said more than once that whether there is serious and wilful misconduct is in many circumstances a question of mixed fact and law—that is to say, there is always a question of fact underlying, and there is the further question of whether the true facts have in law a complexion which amounts to serious and wilful misconduct under the statute.

Under the Act it is quite certain that an appeal is given to this Court only upon matters of law, and not upon matters of fact. I confess that I do not feel equal to the extremely difficult task of defining exactly where facts end and where law

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begins. I am somewhat sceptical if any definition could be framed that would meet the various circumstances to which that definition would fall to be applied. And yet in spite of the difficulty of definition, I do not think that in a concrete case there is generally very much difficulty in coming to a conclusion whether the question submitted to the Court depends upon a view of the facts or on a legal view. It is easier to illustrate than it is to define, and it is easiest to illustrate by taking a case at each end of the scale. The case that was recently sent to Seven Judges (*Dobson* v. *United Collieries*, 43 S.L.R. 260), in which the whole matter of the application of the colliery rules was considered, was a case where obviously the considerations which ruled were truly legal considerations. On the other hand it is very easy to fancy cases where the question is a pure question of fact and nothing else. When it is a pure question of fact there can be no appeal upon the consideration of whether the arbitrator has arrived at a perfectly just conclusion, although there may be always an appeal upon this ground, that the facts themselves as proved do not afford any foundation whatsoever on which to rest the arbitrator's decision. In a case like that there has always been review, and I think it is within the last few days that I had occasion to make that remark in the decision which we pronounced in the case between William Baird & Company and Mrs Savage (43 S.L.R. 300, at p. 302).

Now when I come to the present case I am bound to say that I do not think there is any question of a legal complexion in the matter. The only point is whether, from the facts proved, the learned Sheriff-Substitute as arbitrator has or has not drawn the right inference. Upon that matter I do not consider that I am entitled to review his decision. If he had drawn an inference which could not possibly, in any view of the proved facts, have been supported by them, I should have considered myself entitled to review his decision. But I find it impossible to say that the facts could not support the inference he has drawn. I might say that, sitting as an arbitrator, I should not have come to the same conclusion or drawn the same inference; but if I were to say that, I do not think I would have advanced the case, for I would only be saying that if I were arbitrator I would have come to the opposite conclusion. That being so, this seems to me a case in which we cannot interfere with the findings of the Sheriff, and that, accordingly, the question in law ought to be answered in that way.

LORD M'LAREN—I concur.

LORD KINNEAR—I am of the same opinion. It very often takes a good deal of law to determine whether a question is a question of law or of fact, and I do not think any general definition could be safely laid down for distinguishing between the two categories. I think, however, that if a Sheriff finds certain facts as to the conduct of a workman, and then proceeds to find that the conduct so specifically described was wilful misconduct in the sense of the Act, or was not wilful misconduct, the question whether the conduct described by the Sheriff answers the description of wilful misconduct in the statute is a very proper question for the consideration of this Court of Appeal. But that is assuming that the Sheriff has drawn the last inference of fact that could be drawn and has left no facts undescribed, and has then found that the facts so described inferred serious and wilful misconduct in the sense of the statute. I do not think that the case before us presents that kind of question at all. I confess that if I had only to deal with the specific facts as stated by the Sheriff, and from these facts and nothing more, was asked to draw for myself the inference that the man had been guilty of wilful misconduct, I might not be prepared to draw the same inference as the Sheriff did. But then I think it clear that in this case the Sheriff did draw, as an inference of fact, that there was really wilful misconduct; and I agree that that is a decision of a case on fact which we are not entitled to review.

LORD PEARSON—I take the same view as your Lordships.

The Court pronounced this interlocutor:—"In respect the case does not set forth a question of law: Dismiss the appeal, and discern. . . ."

Counsel for the Appellant—Maclennan, K.C.—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Respondent—G. Watt, K.C.—A. M. Stuart. Agent—Alexander Ramsey, S.S.C.

Saturday, February 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WELSH & FORBES *v.* JOHNSTONS.

Agent and Client—Contract—Company—Law-agents' Claims against a New Company Charged against the Original Firm—Contract between Company and Firm—Law-agent not Named or Defined in Contract—"Jus quæsitum tertio"—Title to Sue.

A firm having resolved to turn their business into a limited company, instructed Messrs W. & F., law-agents, to act for them in the matter, and a preliminary agreement, declared only to be binding if adopted by the company, was thereafter entered into between the Firm and W. (of Messrs W. & F.) on behalf of the proposed company. This agreement, *inter alia*, provided that the Firm should pay all the expenses of the flotation up to the allotment of the shares, including a

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commission to the agents of the company. After the company was formed, a minute, on the narrative that the company had agreed to adopt the preliminary agreement, and for that purpose to enter into the present agreement in order that the terms of sale might be binding on it, was entered into between the firm and the company. This minute gave the full terms of the sale and also contained a stipulation that the Firm should pay all the preliminary expenses up to the allotment of shares.

Messrs W. & F., who were not parties to or named in either agreement, having carried through the whole transaction, raised an action against the partners of the now dissolved Firm and the Firm for payment of their commission as agents for the company, which they averred fell in terms of the agreement to be paid by them and not by the company.

Held that as Messrs W. & F. were neither parties to the agreement nor properly defined therein they had no title to sue thereon.

Agent and Client—Company—Flotation—Business Account in connection with Flotation—Charges for Promotion—Applicability of Table of Fees—Charges Properly Made in Form of a Commission, and where Company Formed to Take over Property or Business the Charge against Promoters Includes the Ordinary Commission Chargeable against a Buyer.

Opinion per curiam that the table of fees is not applicable to the business of the promotion of a company, and that such business was rightly charged in the form of (1) the charge of a commission, depending in amount on the labour involved, against the promoters of the company, and (2) where the company was formed to take over a property or business, and the same agent carried through the whole transaction, the charge against the sellers, of the ordinary commission according to scale chargeable against a seller, but without any corresponding charge against the company of the ordinary commission chargeable against a buyer, such buyer's commission being covered by the charge against the promoters.

This was an action at the instance of Messrs Welsh & Forbes, law-agents and conveyancers, Edinburgh, against James Wilson Johnston, 22 Great King Street, Edinburgh, and George Harvey Johnston, 22 Garscube Terrace, there, sole partners of and as trustees for the dissolved Firm of W. & A. K. Johnston, Engravers and Publishers in London, Edinburgh, and Glasgow, and the said Firm of W. & A. K. Johnston, Edina Works, Easter Road, Edinburgh. The summons concluded for payment of the sum of £601, 12s. 6d., the balance which the pursuers alleged to be due on a current account between them and the defenders.

Prior to the raising of the action the defenders J. W. Johnston and G. H. Johnston, then the sole partners of the Firm of W. & A. K. Johnston, having resolved to sell the business to a limited company to be formed for the purpose of its acquisition, instructed the pursuers to act as their agents in regard to the formation and flotation of the company. As a preliminary to the formation of the company a minute of agreement, dated December 1900, giving the terms and conditions of sale, was entered into between the defenders, first parties, and Thomas Scott Welsh (one of the partners of the firm of Welsh & Forbes) for and on behalf of the proposed company, second party, by which it was, *inter alia*, provided—"(*Tenth*) The first parties shall pay all the costs of and incidental to the preparation and execution of this agreement, and of the memorandum and articles of association of the company, and of the registration thereof, and of all stamp duties, fees, and legal expenses incident to the formation of the company and the issue of its capital, including a commission to the agents of the company at such rates as are charged by Messrs Davidson & Syme, Writers to the Signet, Edinburgh, or by other legal firms of like standing in the formation of limited liability companies, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof. . . . (*Twelfth*) In respect these presents are entered into by the second party for and on behalf of the company, the same shall not be binding on him personally, and shall only be binding on the first parties if and so far as the same may be adopted by the company after its incorporation."

The Company having been formed, a minute of agreement dated January 1901 was entered into between the Firm of the first part and the company of the second part, which proceeded on the narrative that the preliminary agreement had been made, that the company had agreed to adopt it, and that for that purpose, in order that the terms and conditions of sale might be binding on it, it had agreed to execute the present agreement. This "adopting" agreement gave the full terms and conditions of sale and, *inter alia*, provided—"(*Tenth*) The first parties shall pay all the costs of and incidental to the formation of the company and the issue of its capital, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof."

Messrs Welsh & Forbes, the present pursuers, were not a party to or named in either of the agreements. In regard, however, to the provision in the preliminary agreement quoted above they averred—"The special stipulation contained in this agreement as to the remuneration of the agents was inserted therein at the request and for behoof of the pursuers, and was agreed to by the defenders in view of the nature of the duties and responsibilities which the pursuers would be called on to perform and undertake in connection with

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the matters referred to. The said stipulation was made for the following reasons, viz.—(*a*) In order that the pursuers might be remunerated on an appropriate footing, having regard to the fact that their services would not be merely ordinary professional services, but would involve work and responsibility of a character which made it proper that special terms of remuneration should be provided for; and (*b*) because the rate in the table of fees is indefinite, and it was desired to adopt the rates which were charged by the first class firms referred to in the agreement as being reasonable and appropriate in the circumstances. . . . It is usual for solicitors and their clients to make special agreements as to the rate or mode of remuneration, or to fix a slump sum for similar services in connection with the formation and flotation of companies. All this was explained to the defenders, and in full knowledge of the circumstances they consented to the stipulation as being proper and reasonable."

The pursuers had duly carried through the formation and flotation of the company, which was registered under the Companies Acts on 24th December 1900.

The pursuers pleaded—"(1) The pursuers having, on the employment of the defenders, made the disbursements and rendered the services set forth in the condescendence, on the terms agreed to by the parties and embodied in the minute of agreement narrated in the condescendence, are entitled to decree in terms of the conclusions of the summons. *Separatim*, the charges and commissions being reasonable and proper, having regard to the special services and responsibilities rendered and undertaken by the pursuers on the employment of the defenders, the same ought to be sustained. (2) The stipulation agreed to by the parties and embodied in the minute of agreement of December 1900, referred to in the condescendence, regarding the method of determining the remuneration payable to the pursuers, is reasonable in the circumstances, and is binding on the defenders."

The defenders pleaded—"The pursuers' business accounts ought to be remitted for taxation as between agent and client, and all excessive or illegal charges and commissions for work done ought to be excluded therefrom."

On 25th February 1903 the Lord Ordinary (KINCAIRNEY), before further answer, remitted the account sued on to the Auditor to tax and to report.

In a note to the interlocutor making the remit his Lordship stated—". . . I understood the pursuers to desire that their account might be remitted to Davidson & Syme that they might fix their commission, or that, if a remit were made to the Auditor, it should be with instructions that he in his audit should adopt rates similar to those allowed by Davidson & Syme or similar agents.

"Several questions appear to arise in reference to the clause in question—(1) Is it binding, seeing that it has not been adopted by the company? (2) Are the pursuers in a position to plead it as *jus quæsitum tertio*, or was the preliminary contract a contract between the parties to it only, in which the pursuers had no right? (3) If these points were determined in favour of the pursuers, is it a contract which can be enforced between agent and client? And (4) what does it mean, and to what part of the account does it relate?

"If these questions have to be solved, it may be that that cannot be done without some inquiry.

"But it seems natural to think that if the ordinary course were followed and this law-agent's account were remitted *simpliciter* to the Auditor, his audit might satisfy both parties, so that no question would arise at all, or, if not, the questions might be raised in a clearer and more definite form by objections to the report. I shall therefore, before answer, remit to the Auditor to audit and tax the account, and I suppose that the vouchers of the pursuers' outlays may be produced before him. . . ."

In his report, dated 16th June 1904, the Auditor stated—". . . The professional charges contained in the account-current remitted to the Auditor may be divided into three groups—*A*, Charges for which detailed business accounts have been produced in ordinary course, and miscellaneous charges; *B*, Charges entered in subsidiary accounts, the balances on which are carried into the principal account-current; and *C*, Fees in respect of which no detailed accounts have been produced. The following are the details of these several groups and the amounts at which they have been sustained by the Auditor:— . . ."

In Group A item 10 was—"*Mar.* 13, 1901. To agents' commission on flotation of company at 1 per cent. on capital, including all charges for meetings, correspondence, &c., and all work preliminary to allocation of shares, £1075 restricted to £686, 12s." It was dealt with thus—

"Amount debited.	Taxed off.	Amount as taxed.
£686 12 0	£180 14 10	£505 17 2"

In Group B item 2 was—"*Dec.* 31, 1900. To agreed-on fee in respect of personal guarantee by Mr Welsh to British Linen Company Bank, £210." It was dealt with thus—

"Amount debited.	Taxed off.	Amount as taxed.
£210 0 0	£172 10 0	£37 10 0"

In Group C the items were—"(1) *Dec.* 14, 1900. To agency negotiating terms of sale, preparation and adjustment of agreement of purchase, &c., at ½ per cent. as per table of fees (£107,500) £537, 10s." "(2) To agents' fee preparing and adjusting prospectus, the proposed arrangements having been repeatedly altered and modified, and its adjustment having been extended over a period of nearly two years, and revising proofs, &c., £105;" and "(3) *Nov.* 6, 1901. To agents' commission as against new company payable by Messrs Johnston in terms of adopting agreement, including commission on shares subscribed for through agents, the stockbrokers selected by directors having withdrawn immediately before prospectus advertised; agents' intromissions with company's capital, settlement of purchase price, payments to Messrs

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Johnston, &c., £537, 10s." Of these three items the Auditor had disallowed entirely 1 and 3 and had dealt with 2 thus—

"Amount debited.	Taxed off.	Amount as taxed.
£105 0 0	£94 10 0	£10 10 0"

The Auditor stated his reasons for dealing with a number of the professional charges in the manner reported, and, *inter alia*, with the above stated charges, viz.—

Group A, item 10—"A commission on flotation of the company being, in the Auditor's opinion, inappropriate in the circumstances, he has allowed in lieu thereof the account of detailed business performed by the pursuers, amounting as taxed to the sum of £505, 17s. 2d."

Group B, item 2—"It appears to the Auditor that this is not a kind of service that any charge is usually made for by a law-agent. It is to be presumed that Mr Welsh undertook this obligation because he was so familiar with the whole position of the parties concerned that in point of fact he was running no risk in doing so, but no doubt the guarantee was an accommodation to Messrs Johnston, and if the Lord Ordinary should be of opinion that in equity some remuneration should be allowed for it, the Auditor thinks that £37, 10s. would be a fair allowance, being ½ per cent. on the amount of the overdraft."

Group C—"(1) The charge of £537, 10s. is not in the circumstances a proper one. There was no other negotiation by the pursuers than is disclosed in their business accounts, the charges in which, as taxed, form the proper remuneration for the work in connection with the sale. (2) There is no warrant in the table of fees or in practice for a random charge such as the pursuers have stated, viz., £105 for preparing and adjusting a prospectus. The work actually done will be very fully remunerated by the fee of £10, 10s. fixed by the Auditor. (3) There is nothing to justify the commission of £537, 10s. charged against the new company. The pursuers will be properly remunerated by the charges relative to the business contained in their business accounts."

In support of the method in which they had made the charges objected to by the Auditor, Welsh & Forbes produced a copy of a letter written by Mr White Millar, S.S.C., dated 14th October 1876, the arbiter in a reference as to the charges for the flotation of the Straiton Estate Company, which was in the following terms:—

"Messrs Tods, Murray, & Jamieson, W.S.

"*Straiton.*

"Dear Sirs,—I have considered the matter referred to me by you and Messrs Keegan & Welsh. I understand I have nothing to do with the latter's charges against the new company, but only with those which I think should be payable by Brash's trustees. I am of opinion that Messrs Keegan & Welsh are entitled to the following charges:—

Commission for making the sale, as per table of fees . . .	£182 10 0
This charge is strictly confined to *making* the sale.	
But Messrs Keegan & Welsh had also not only to find a purchaser, but in effect to create one by getting up a company to purchase, and for this I think they are entitled to one per cent. on the £68,000, or .	£680 0 0
I think they are further entitled to the *ad valorem* fees of drawing the missives of sale, in so far as no deed follows thereon on which an *ad valorem* fee is chargeable. They will have an *ad valorem* fee on £40,000 for preparing the disposition to the heritage. I therefore think they are entitled to an *ad valorem* on the £28,000. This by the old table would have been £49, 17s. 6d., but by the new table is only £10, 10s., and as I understand the transaction took place since the new table of fees came into operation, I propose to allow them the	10 10 0
	£873 0 0

"As I have indicated above, I think Messrs Keegan & Welsh will be entitled to an additional commission from the company in connection with its formation, but I think they are entitled to the above sum from Brash's trustees.—Yours faithfy."

Objections and answers to the Auditor's report having been lodged, the Lord Ordinary (KINCAIRNEY) after hearing counsel for the parties, by interlocutor of 22nd December 1904 assoilzied the defenders.

Opinion.— . . . [*After narrating the nature of the previous steps in the action, supra*] . . . "The pursuers' objections do not cover the whole of the audit. The Auditor has struck off several sums to the deduction of which the pursuers have not objected. The sums so struck of without objection amount according to my calculation to £74, 9s. 11d., which falls to be deducted, in the first place, from the balance of £601, 12s. 6d. sued for, reducing that balance to £527, 2s. 7d.

"The pursuers' objections to the audit are, I think, five in number, and are these—

1. To a deduction of £180, 14s. 10d. from a charge of £686 under date 13th March 1901, for agent's commission on flotation.
2. A deduction of £172, 10s. from a charge under date in the Auditor's report 31st December 1900 of £210, said to be a fee agreed on in respect of a personal guarantee by Mr Welsh to The British Linen Company Bank.
3. A total disallowance of a charge under date 14th December 1900 for £537, 10s. of commission at ½ per cent. on the whole price for 'Agency negotiating terms of sale and adjustment of agreement for purchase.'
4. A deduction of £94, 10s. from a charge of £105 as agent's fee for preparing and adjusting prospectus; and
5. A total disallowance of £537, 10s. charged under date 6th November 1901 as agents' commission as against the new company, payable by Messrs Johnston in terms of adopting agreement, including commission on shares sub-

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scribed for through agents and for other particulars mentioned.

"The Auditor has stated his reasons for that apparently somewhat stringent audit. On considering these reasons, with the pursuers' objections, and the oral argument, I have come to doubt whether it would be safe to sustain the audit in reference to the first three of these items without inquiry into the pursuers' allegations that the defenders had agreed to them, and into the grounds for the charges.

"But it appears to me that the case is different with regard to the fourth and fifth items of the audit. The fourth is a charge of £105 for preparing the prospectus. Now that is a charge which seems to me to fall properly within the Auditor's functions and his ordinary duties as auditor. I do not think it is justified by any allegations of agreement, and I can find no sufficient grounds for overruling the Auditor's decision on this point. With regard to the fifth objection, which refers to a total disallowance of £537, 10s., being in fact ½ per cent. on the capital, I can find no ground for questioning the Auditor's decision, and no relevant averments on the subject. I am of opinion that the Auditor's award on this point must be allowed to stand.

"Assuming that to be so, then the balance of the pursuers' account will be wholly wiped out, and the defenders will be entitled to absolvitor, whatever judgment were come to in regard to the first, second, and third items. Is it necessary or worth while to order a proof upon these items? For the purposes of this case I may assume them all to be decided in favour of the pursuers. But that would not bring out a balance in their favour on the account sued for, nor disentitle the defenders to a judgment of absolvitor. I think that, therefore, I ought to decide the case on that footing.

"The pursuers complain that the Auditor has dealt with them very severely. But I think the nature of the transaction has to be considered. Because, after all, it was only a financial operation. It was not a real sale, and there seem (so far as appears) to have been no conflicting interests. The account runs from July 1899 to March 1902, and amounts, I think, to about £3000 or more, which, even when strictly audited, seems to amount to adequate and liberal remuneration."

The pursuers reclaimed.

In the Inner House the defenders amended by adding, *inter alia*, the following additional plea-in-law—"(5) In making the business charges contained in the account . . . the pursuers are not entitled to found on the tenth article of the minute of agreement, . . . in respect . . . (*b*) The pursuers are not parties to it."

Argued for the pursuers and reclaimers—The provision in the agreement as to the pursuers' remuneration ought to be given effect to. The table of fees did not apply to such work as the formation and flotation of companies. That being so, a law-agent was entitled to make such an agreement as that in question—*Galloway* v. *Ranken*, June 11 1864, 2 Macph. 1199. The agreement was a nominate contract though unusual in its terms, and therefore might be proved *pro ut de jure*—*Scotland* v. *Henry*, July 19, 1865, 3 Macph. 1125; *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Moscrip* v. *O'Hara, Spence, & Company*, October 23, 1880, 8 R. 36, 18 S.L.R. 12; *Jacobs* v. *M'Millan*, November 8, 1899, 2 F. 79, 37 S.L.R. 58. In any event the charges made being outwith the table of fees were not ruled by it—*Galloway* v. *Ranken*, *cit. sup.*—and were proper for the work done. A proof as to the customary remuneration should be allowed, or otherwise a remit to a man of business. The Lord Ordinary was in error in supporting the findings of the Auditor. The Auditor had no special knowledge as to the usual and proper charges in connection with the flotation of companies. Reference was also made to the table of fees, secs. ix., xii., and xx, and to the general notes appended thereto—notes 6 and 8 (*vide* P.H. Book, part G, pp. 11, 14, 21, 22).

Argued for respondents—The Auditor was right in disallowing the items referred to. The charge made for adjusting the prospectus was excessive, as the Auditor had allowed separate charges for meetings in connection therewith. This was not a case of company promoting; it was purely a transfer of the firm's business to a company in order to extend the capital of the business. The work done by the pursuers was usual work for law agents to do, and they were entitled to payment according to the table of fees (*cit. supra*). A client was entitled to have his agent's account taxed—*Cockburn* v. *Clark*, March 3, 1885, 12 R. 707, 22 S.L.R. 475. A law-agent was not entitled to more than the table of fees allowed or to bargain with his client for a higher rate of remuneration—Begg on Law Agents, 131; *Tyrrell* v. *Bank of London*, February 1862, 10 Clark's H.L.C. 26; *O'Brien* v. *Lewis*, January 30, 1863, 32 L.J. (n.s.) Ch. 569, at p. 572; *Jacobs* v. *M'Millan* (*cit. supra*); *Johnstone* v. *Thorburn*, February 19, 1901, 3 F. 497, 38 S.L.R. 343. In any event the defenders could not be charged with the share of expenses falling to be paid by the new company—*in re Empress Engineering Company*, July 21, 1880, L.R., 16 Ch.Div. 125.

At advising—

LORD PRESIDENT—This is an action in which a firm of law-agents and conveyancers sue the members of a dissolved partnership, which was formerly called Messrs W. & A. K. Johnston, for various services rendered by their firm in connection with the promotion of a limited company for the purpose of taking over the business of the dissolved firm of W. & A. K. Johnston.

Certain agreements, which I will presently have to advert to, were entered into between some of the parties; but at present let me direct your Lordships' attention to the account on which this summons has been raised. That account was for various services done, but it contains in particular three items to which attention must be directed.

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It contains an item dated December 14th, 1900, in these terms—"To agency negotiating terms of sale, ½ per cent. as per table of fees—price £107,500—£537,10s." Then it contains another item of date March 13th, 1901—"To agents' commission on flotation of company at 1 per cent. on capital, being rate fixed by Mr W. White Millar, S.S.C., in the reference with Messrs Tods, Murray, & Jamieson, W.S., for the flotation of the Straiton Estate Company, including all charges for meetings, correspondence, &c., and all work preliminary to allocation of shares, £1075—restricted to £682, 12s." And finally it contains another item of date November 6th, 1901—"To agents' commission as against new company in accordance with the before-mentioned award by Mr White Millar, and payable by Messrs Johnston in terms of adopting agreement, including commissions, . . . &c., £537, 10s." Now, a considerable sum had already been paid by the defenders in this action, so that although the account is rendered as an account, yet the summons only concludes for the balance still due.

The case depended in the Outer House before Lord Kincairney, and what Lord Kincairney did was that, in spite of the protest of the pursuers, he remitted the pursuers' account before further procedure to the Auditor of the Court of Session. The Auditor called upon the pursuers for a document which is commonly known by the name of a "note of trouble," and the pursuers, while not admitting that the action should be disposed of in this way, yet very properly furnished this note of trouble for the consideration of the Auditor. The Auditor then took the note of trouble and treated it as an account, and the sum of the matter is contained in a report, which after doing so the Auditor presented to the Lord Ordinary. Now, the gist of that report, for the purpose for which I am at present speaking, may be simply taken, and I think it is quite clearly stated in the appendix. The Auditor says this—"A commission on flotation of the company being in the Auditor's opinion inappropriate in the circumstances, he has allowed in lieu thereof the account of detailed business performed by the pursuers, amounting as taxed to the sum of £505, 17s. 2d." That of course deals with that sum which I have already mentioned, namely, £1075, restricted to £686, 12s. Then when he comes to the charge of £537, 10s. made against the old firm he says this—"The charge of £537, 10s. is not in the circumstances a proper one. There was no other negotiation by the pursuers than is disclosed in their business accounts, the charges in which, as taxed, form the proper remuneration for the work in connection with the sale"; and when he comes to the second charge of £537, 10s. against the new firm he says—"There is nothing to justify the commission of £537, 10s. charged against the new company. The pursuers will be properly remunerated by the charges relative to the business contained in their business accounts."

To put it in a single sentence, the Auditor disallows those whole three sums and he allows instead charges as on an ordinary business account, these charges being estimated at the figure which he thought proper. The pursuer, not unnaturally, protested against this way of dealing with his claim, and stated objections to the Auditor's report, and the matter was debated before the Lord Ordinary. I said a moment ago that this action was really an action for the balance of an account, and therefore it follows that, if it is possible—to use an ordinary expression—to knock off enough from some of the charges to extinguish the balance sued for, it does not matter whether the account was properly stated or not; and the Lord Ordinary really disposes of the case on that footing. He practically took two items,—there was a slip in regard to one of them, but I do not think it necessary to go through the somewhat tedious process of explaining what that slip was because parties are agreed regarding it,—but what he meant to do was to take two items, one of 100 guineas charged for preparation of the prospectus, and the last item of £537, 10s. 3d. charged against the new company; and he disallowed both of these—disallowed the first on the ground that there was no warrant for it and that the sum was far too much, as reported by the Auditor, who said that ten guineas was enough, and the other on the ground that he thought there was no justification for the charge against the new company at all. It is admitted that if you take off 90 guineas and £537, 10s. you take enough off to extinguish the balance. Against his Lordship's judgment the present reclaiming note has been brought.

Now, as far as the actual case is concerned, I think it permits of being disposed of in a very simple manner. As set forth in the account which I have read, the pursuer here founds upon certain agreements, and obviously he must so found because otherwise he, as a law-agent, would only have a right to charge as against the firm of W. & A. K. Johnston the work he had done for the firm of W. & A. K. Johnston, and not any work he had done for the company at all. So that I must first direct your Lordships' attention to these agreements that were made. They were two in number. There was, first, a preliminary minute of agreement between Messrs W. & A. K. Johnston—whom for short I shall always hereafter call the Firm—and Mr T. L. Welsh, who is a partner of the pursuers, but who appears in this minute of agreement not in the capacity of a partner of the pursuers or as representing the pursuers, but on behalf of the limited company which was not yet in existence. That class of agreement is a perfectly familiar one, and it is also familiar law that it does not bind a new born company unless and until the company, after its birth, chooses to adopt and ratify the agreement. Now that agreement did two things. It narrated the terms upon which the sale of the business from the Firm to the company was to be made and provided for the formation of the company, and it also had a clause in it

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that the first parties—that is, the Firm—should "pay all the costs of and incidental to the preparation and execution of this agreement"— . . . and of what I may call floating the company—"including a commission to the agents of the company at such rates as are charged by Messrs Davidson & Syme, Writers to the Signet, or by other legal firms of like standing, in the formation of limited liability companies."

The company thereafter was floated and formed, and after its birth came that which is the second minute in question, which is called an "adopting minute of agreement," between the Firm and the company. The terms of that adopting minute of agreement recite that there had been the preliminary agreement and that the parties wished to carry it out. It then states in a series of clauses the terms upon which the business is to be transferred from the Firm to the company, and the tenth clause provides that "The first parties"—that is, the Firm—"shall pay all the costs of and incidental to the formation of the company and the issue of its capital, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof."

Now, I think two things are perfectly clear about this second agreement. In the first place it did not need to displace anything for there was no displacing in the matter. It was the operative agreement, for really the first agreement bound nobody. That bound the first parties if afterwards adopted; but until adopted it bound nobody. It might have been adopted simply in terms, in which case it would have been binding according to its terms though with different parties; but if parties choose to go into another agreement in which they re-state the various articles one after another, then it is the second which is the ruling agreement and not the first. The second point is this, that obviously the only parties to this agreement are the Firm and the company; and Welsh & Forbes are no parties to it, and *prima facie* have no title to sue on this agreement at all. Now, of course I am very well aware that according to the law of Scotland it is perfectly possible for a person to have rights under an agreement, and to be able to sue for these rights, who is not a party to the agreement. It is the familiar doctrine of what is known in our law as *jus quæsitum tertio*. But while that is so, I know of no authority to support the view that there can ever be an action unless the tertius is a designed person. The usual way is to design the tertius by name, but it may very well be that you design him sufficiently by stating the position he holds, such as—to take a very familiar example—the tertius may be a feuar, and so in a contract between the superior and one feuar, you may bargain for the rights of another coterminous feuar, and bargain in a perfectly certain way, though of course you do not design the coterminous feuar as A B, and his name may not be A B when the agreement comes to be enforced. But still, at the same time, I know no exception to the rule that the tertius must in some way be properly defined. Now, here the only agreement is that the Firm shall pay the expenses incidental to the preparation of the agreement and the formation of the company. If a person came to me and said, "I will bind myself to pay all expenses of the furniture which I understand you are going to put into your new house," that would be a perfectly good agreement as between him and me, and I might enforce it, having bought my furniture; but it would surely be out of the question to suppose that, if I went to some tradesman in the United Kingdom and ordered a piece of furniture, that furniture dealer would have an action against my friend. Now, though I do not say that this agreement could not easily have been framed so as to give a *jus quæsitum*, yet I have no hesitation in saying that that has not been done by this article. And accordingly that seems to dispose quite simply of this last charge of £537, 10s. which is debited against the new company. That might or might not be a good charge against the new company but it is not a good charge against the old Firm, and though the company might recover from the old Firm I fail to see that the solicitors, Welsh & Forbes, have any title whatsoever to recover too. That accordingly disposes of this one item, £537, 10s.

The other item I need say little about. I entirely agree with the Lord Ordinary and the Auditor. I think 100 guineas was quite too large a charge for the preparation of the prospectus and that 10 guineas is enough, seeing that they had already, according to the Auditor, got payment for various meetings which seemed to have been held in regard to the formation of the company. Accordingly, with the correction of the slip that the Lord Ordinary made as between the two items, I am of opinion that the Lord Ordinary's decision is right and that we ought to adhere to it.

But though I do not think it is your Lordships' practice to go beyond what might be called the immediate necessities of a case, I think it would be unfortunate to leave this case disposed of on these grounds; because there has been raised, so far as I know for the first time before this Court, a very important question of practice in the matter of such charges, and because I am not of opinion that the way in which this case has been disposed of would have been a satisfactory or proper one if it had not been for the accident that in this instance it was only a balance that was being sued for, and so to get rid of one item or two items was enough to get rid of the rest of the claim. Supposing that there had not been a balance sued for but that the whole of the account was open, I do not think the way in which the Lord Ordinary treated the case would have been a proper one, because I do not think that the question of the fees for the promotion of a company fall under the particularly rigid view which the Auditor of the Court has taken here. The Auditor of Court has treated the whole matter as simply a business account falling under the

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table of fees. I do not think that anyone could look at the table of fees without seeing that it does not meet this case. After all, the table of fees is just a scale of charges fixed by general consensus of the profession as the proper charges for the ordinary incidents of a professional business, and as such it has with the Court very high authority, that is to say, supposing a difference of opinion arose between a solicitor and his client with regard to payment for ordinary professional business, I cannot imagine that your Lordships would ever depart from the table of fees; nay more, I think your Lordships would look with considerable suspicion on any procedure by which a solicitor tried to get from his client a promise that for any ordinary business that he did he would be remunerated at a higher rate than that scale. But one cannot help seeing that for the business of promoting a company the table of fees makes no provision whatever. It practically, I think, says so on its own face in dealing with the matter of commission, because, while laying down the ordinary rate for an ordinary piece of business, such as an ordinary case of purchase and sale, it says equally plainly that the commission might vary according to circumstances and that it must not be taken as a general rule. Nor do I see how the table of fees could be made to suit a piece of work like the flotation of a company, because that is a piece of work which varies extremely, the flotation of some companies being a gigantic piece of work and the flotation of others being comparatively simple. Accordingly I am not surprised at the Lord Ordinary wanting such help as he could get from the Auditor of Court, yet I do not think the case of a flotation of a company can be simply sent to the Auditor of the Court of Session and treated as if it were an ordinary law-agent's account. But as little do I think that the sort of standard that has been suggested here on the other side is the right one. The pursuers seems to have pinned their faith on a certain award that seems to have been made by Mr White Millar in a reference between Mr Brash's trustees and the Straiton Estate Company, which was floated for the purpose of taking over a shale field which Mr Brash's trustees had. Now Mr White Millar is a gentleman in a very good professional position, but at the same time his views are not binding upon us, and I am bound to say I think his views in that reference, though they may have been just as for the case in hand, are, when used to establish a general rule, quite wrong. The way in which he dealt with the matter was this, the point being as to what Brash's trustees, the sellers of the mineral field, were to pay to the law-agents—He charges first of all "commission for making the sale as per table of fees, £182, 10s.," but then he goes on thus—"But Messrs Keegan and Welsh," the agents who were to have the bill paid, "had also not only to find a purchaser but in effect to create one by getting up a company to purchase, and for this I think they are entitled to one per cent. on the £68,000," coming to a certain sum. And then he says—"As I have indicated above, I think Messrs Keegan and Welsh will be entitled to an additional commission from the company in connection with its formation." That of course is a little ambiguons. Whether by that he means an additional commission as on the purchase or an additional commission both on the purchase and on the flotation I cannot say, but I shall assume that he means the lesser of these two—merely an additional commission on the purchase.

Now the first thing which I think is wrong is the idea that there should be any commission charged against the sellers for the flotation of the company, and here let me make myself perfectly clear. When a company is promoted somebody of course must promote it, and he is generally known as the promoter, and in promoting a company he of course incurs a certain amount, it may be possibly a great deal, of expense. Presumably it is all with a view to his own future advantage in some way, but he, the promoter, or the band of promoters, whoever they may be, are the only people who are liable for that expense, though of course they may take any other person bound to relieve them of that expense. And accordingly, if for instance here Brash's trustees had agreed with a certain person that he was to promote the company and had agreed to pay the expenses, then they would have been bound to relieve him. Or, if they chose to do the work of promoting the company themselves and employed a law-agent, they must of course be liable to that law-agent for what he had done; but then they would be liable directly as promoters themselves and not in any way as the sellers of the subjects. To go on to the next step, of course promoters do not get up companies to benefit the world generally, but to benefit themselves, and therefore a very usual stipulation to put in the articles of association of the new company, and a very natural and proper one, is to make the new company relieve the promotors of the expense they have incurred in the promotion of the company. There have been plenty of decisions on that subject, and it has been perfectly well settled that a new company can never be liable in any expenses incurred before its birth unless that liability is assumed by the instrument which brings it into the world, namely, the memorandum and articles of association. Accordingly, this account seems to me to be stated in the wrong way. I do not mean that in this case Messrs Keegan & Welsh should not have been paid their commission for the floating of the company by someone, but that they ought to have been paid by someone with whom they had bargained beforehand to that effect. Brash's Trustees could never be liable as expressed in this award, for as sellers all they did was to sell something, for which to take a commission of one-half per cent. on the sale was obviously an adequate commission.

But now let me go on to the next step, and I think it will be made clear by taking first of all an ordinary transaction of a sale

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and purchase between A and B. Let me suppose that A sells a property to B, then A's law-agent is entitled to his commission according to the table of fees, and B's law-agent is entitled to his commission according to the table of fees. They are the same in amount, but the one is the commission of the seller and the other the commission of the buyer. Now let me suppose that B is not an individual but is a company—that it is a company which has just been brought into the world. With B's promotion expenses I have already dealt. When you come to a sale to B, supposing it was years afterwards, then of course the position would be precisely as I put it between the two individuals; but where the coming into the world of the company and the taking over of the property is one and the same thing—that is to say, where the only meaning of the company is to take over the property or business, as is the case here, and was the case with the Straiton Estate Company—then I do not think the accounts should show a charge for the same thing twice over, and really there the expenses of creating the company would be equivalent to the buyer's commission. Accordingly, to go back to the Straiton Company's case, or taking this case—for they are the same—suppose the whole thing were to be begun again, the proper way would be that the law-agent would be entitled to a commission, as on a sale, against the Firm of one-half per cent. on the value, and that over and above that the law-agent, if he were the person who had done the work of floating the company, would be entitled to commission on flotation, but that commission would be chargeable in the first place against the promoters, whoever the *de facto* promoters were who started the agent on the work, and that liability could not have been charged at all by way of relief against the new company, except in virtue of a provision inserted in the articles of association, or against anybody else unless by special bargain. And in a case like this the charge for the flotation of the new company would necessarily be the same thing as the purchase of the property by the new company; and therefore the new company, as such, could not have been liable for any further commission as buyers.

I have thought it better in the interests of everybody to go into this somewhat long discussion on this subject, so that there could be no doubt on the matters connected with it. Your Lordships, however, will observe that I have very carefully abstained from stating what I think is the proper commission for the flotation of this company; and I do so for the reason that I do not think that a general principle can be laid down for such matters. When you come to a commission for a multifarious business like the flotation of a company it is a thing that will vary enormously. I should say that, if people want to charge more than say one per cent., it would be well to bargain before they began, but if they do not I suppose we would have to arrive at the proper commission, not by a general rule, for I do not think there could be such a rule, but by informing ourselves what sort of work had been done, and then fixing what we thought an appropriate commission. The commission might vary enormously, for the flotation of some companies would call for very little except mere clerk's work, and inquiries as to whether the promised business was really being done, and minor investigations of that sort, while in other cases the preliminary work entailed might be of a most arduous description.

LORD M'LAREN—I agree in the decision, and assent to all the observations that have fallen from your Lordship in the chair. I shall add a sentence only on each of two points.

The one point is in reference to the proper mode of dealing with promotion expenses. While I think your Lordship's exposition of that part of the law is perfectly sound and irrefragible, I am not satisfied that in the award by Mr White Millar in the case of Brash's Trustees, which has been referred to, his decision was unsound with reference to the particular case in which it was given. I rather incline to think it had been misapplied in applying it to the present case, because, though I know nothing whatever about the case except what I see in the papers, I rather think that Brash's Trustees were the real promoters who employed the agents to get up the company. Then I think that the real promoters should pay the promotion expenses, unless they are able to induce the shareholders whom they take into their company to accept that liability as an element in the constitution of the company.

The other point, which I merely touch, is the rate of remuneration. Now, there are cases—suppose the case of companies that apply to the public for subscriptions, where the actual flotation—I mean the finding members willing to subscribe—is done by stockbrokers, and they receive a commission in accordance with the rules of their own profession for doing that business. In such cases the lawyer is merely a man of business who employs brokers and other sub-agents, and whose proper function is the preparing of the memorandum and articles of association. It is quite plain that in such a case the rate appropriate for remuneration to a law-agent would be less than in a case where he himself did the stockbrokers' work, and amongst his own clients and friends was at the trouble of finding people willing to put capital into the concern. I think it is only necessary to look at these cases in order to see that there cannot be an invariable commission, and in fact it would be desirable in all such cases that the rate should be agreed on in advance.

LORD KINNEAR—I agree with your Lordships in all that has been said, and I only desire to add, with reference to what Lord M'Laren has said as to Mr White Millar's award, that I agree with his Lordship, and I do not suppose that I differ from your

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Lordship in the chair, in thinking that we can express no opinion—for my part I have no opinion—as to whether the award in the case by Mr White Millar was right or wrong. That is not a question with which we are concerned, and if it had been raised directly by parties between whom he was arbiter we could not have entertained the question. But what I hold to be wrong is the statement of a rule for fixing commission, which is said to be embodied in the letter from Mr White Millar to Messrs Tods, Murray, & Jamieson, in so far as that is to be made applicable to the question now before us. I agree with your Lordship that the rule as so applied is not a sound rule, and therefore in all that has been said on that part of the question in your Lordships' opinions I desire to concur, without saying anything at all as to the soundness of the award in the case in which it was given.

LORD PEARSON concurred.

At the close of the advising the LORD PRESIDENT added—In so far as the observations of Lord M'Laren refer to Mr White Millar's award I entirely agree. My criticisms of course were upon the way in which the award was framed, and the application that was sought to be made of it to this case. The award itself may have been perfectly right, and indeed it probably was perfectly right if as a matter of fact Brash's trustees were the true promoters.

The Court pronounced an interlocutor of new assoilzing the defenders.

Counsel for the Pursuers and Reclaimers —Younger, K.C.—D. Anderson. Agents—Welsh & Forbes, W.S.

Counsel for the Defenders and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HORN & COMPANY, LIMITED *v.* TANGYES, LIMITED.

Process — Appeal — Competency — Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24 — *Sisting Process — Order to Find Caution and Sisting Procedure till Caution Found—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 69.

Held that an interlocutor pronounced in the Sheriff Court ordaining a limited company (in virtue of section 69 of the Companies Act 1862) to find caution for expenses of an action in which they were pursuers, and sisting procedure until such caution should be found, was an interlocutor sisting process, and therefore appealable.

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 69, enacts — "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

The Sheriff Court Act 1853 (16 and 17 Vict. c. 80), sec. 24, enacts—"It shall be competent, in any cause exceeding the value of £25 to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses . . .; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid. . . ."

This was an action of damages brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of John Horn & Company, Limited, coalmasters, having their registered office at 79 West Regent Street, Glasgow, against Tangyes, Limited, engineers, 96 Hope Street, Glasgow, for payment of £4000 as damages for breach of contract in connection with the supplying of a pump.

The Sheriff-Substitute (DAVIDSON) having allowed a proof, the defenders lodged a minute in which they stated—"The defenders aver that the pursuers have no assets, or at least insufficient assets to pay the defenders' costs in the event of the defenders being successful in their defence, and they crave that an opportunity may be given to them (the defenders) in terms of the 69th section of the Companies Act 1862, of producing credible testimony in support of the said averment, and that upon the following statement of facts being proved to the satisfaction of the Court, the pursuers be required and ordained to find sufficient security for such costs within a certain short space, and in the event of the pursuers failing to find such security that the action be dismissed. . . ."

On 12th October 1905 the Sheriff-Substitute (DAVIDSON) allowed a proof of the averment contained in the minute.

The pursuers appealed to the Sheriff, who ordained the pursuers to answer the defenders' minute.

Thereafter, on 6th December 1905, the Sheriff (GUTHRIE) pronounced this interlocutor—"Having considered the minute for the defenders . . . and the pursuers' answers thereto and heard parties' procurators, recals the interlocutor of 12th October last, ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found."

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The pursuers appealed.

The defenders objected to the competency of the appeal, and argued—The appeal was incompetent, as the interlocutor appealed against was not a final interlocutor and did not fall within the exceptions allowed by section 24 of the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80), viz., sisting process, giving interim decree, and disposing of the whole merits of the case. This was not an interlocutor sisting process. It was really an interlocutor ordaining the pursuers to find caution, although incidentally there had to be a stay of proceedings. The mere wording of an interlocutor was not conclusive—*Watson* v. *Stewart*, February 24, 1872, 10 Macph. 494, 9 S.L.R. 295; *Maxtone* v. *Bone*, May 28, 1886, 13 R. 912, 23 S.L.R 645.

Argued for pursuers — The appeal was competent. This was really an interlocutor sisting process. There was a stay of proceedings and that was equivalent to sisting process. Actions could be sisted to allow of documents being stamped — Mackay's Manual, p. 265.

LORD PRESIDENT—A preliminary point here has been taken on competency. The action is one raised by a limited company, and the defender conceived that he was in a position to have the 69th section of the Companies Act of 1862 applied. The 69th section says—[*His Lordship read the section*].

In view of that plea the defender lodged a minute in which he averred in general terms that the company was in such a condition that the assets would be insufficient to pay his costs, and he followed up that general averment by certain specific averments as to the condition of the finances of the company. That minute was answered by the pursuers, and upon consideration of the minute and answers the learned Sheriff-Substitute before whom the case depended allowed the minuter a proof of his averments. That interlocutor was appealed to the Sheriff by the pursuer, and after hearing parties the Sheriff came to the conclusion that there was enough in the pleadings to fulfil the conditions of the 69th section, and he therefore pronounced this interlocutor—he recalled the interlocutor of the Sheriff-Substitute — "ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found." Against that interlocutor the pursuers have taken an appeal to your Lordships' Court, and the competency of the appeal is challenged by the defenders upon the ground first of all that it is not a final interlocutor, and that not being a final interlocutor it does not fall within the exceptions which are contained in the Sheriff Court Act 1853, sec. 24—the exceptions to the rule of non-appealability. These exceptions are—sisting process, giving interim decree, and disposing of the whole merits of the case. Now it is true that the interlocutor does not say in so many words that it sists "process;" it says "procedure"; but I am clearly of opinion that in truth and fact this is an interlocutor sisting process and nothing else. And accordingly I think there ought to be an appeal allowed upon this matter. I am much moved by this consideration, that if this is not a competent appeal I do not know when the merits of this matter could be brought up, and as I think there would clearly be, as shown by the reported cases, an appeal in England, I am disinclined to think that a different result should be arrived at in this country and in England in working out section 69 of the statute. I am therefore of opinion that your Lordships should proceed to hear the appeal.

LORD KINNEAR—I am of the same opinion. On a consideration of the statute it seems to me that if the interlocutor be not an interlocutor disposing of the case it must either be an interlocutor carrying on procedure or else an interlocutor sisting procedure. I cannot imagine any third kind of interlocutor which neither goes on with the case nor stops the case. Now this is quite clearly not an interlocutor carrying procedure on, because it stops it. Accordingly I agree that the true meaning and effect of it is simply that the proceedings are not to go on until a certain thing has happened, and it is thus an interlocutor sisting process.

LORD PEARSON—I am of the same opinion also.

LORD M'LAREN was absent.

The Court held the appeal competent and proceeded to hear it.

Counsel for Pursuers and Appellants—Hon. W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Graham Stewart. Agents — Davidson & Syme, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

MACKINTOSH'S TRUSTEE AND ANOTHER *v.* STEWART'S TRUSTEES.

Process—Reduction—Reduction of Decree—Perjury by Party—Res judicata—Competency of Action of Reduction.

An action of reduction of a decree obtained *in foro* in a preceding action between the parties, or those whom they represent, on the ground simply that the party who obtained the decree committed perjury, is incompetent, inasmuch as no matter extrinsic of the matter of the preceding action is put in issue, and the question is *res judicata*.

Hugh Stewart, 56 Newington Buildings, Causewayside, Edinburgh, as trustee on the sequestrated estate of the late Galloway Mackintosh, tweed merchant, sometime in Elgin, and Mrs Marie O'Neill or Mackintosh,

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his widow and executrix-dative, raised an action against John Henderson, agent, Bank of Scotland, Lockerbie, and James Charles Stewart, law-clerk, Lockerbie, testamentary trustees of the late James Stewart, solicitor, Lockerbie. In it the pursuers sought, *inter alia*, to have reduced an interlocutor pronounced by Lord Wellwood (Ordinary), dated 13th July 1893, and interlocutors pronounced by the Second Division of the Court of Session, dated 1st November 1893 and 17th January 1894, in an action raised by the deceased Galloway Mackintosh against the deceased James Stewart concluding for payment of £1000 as damages. The interlocutors sought to be reduced assoilzied the defender James Stewart from the conclusions of the summons in the said action and found the pursuer Galloway Mackintosh liable in expenses (£125, 11s. 10d.).

The pursuers also concluded for a sum of £1500 as damages.

The pursuers, *inter alia*, averred that the late James Stewart had procured and carried through collusively and fraudulently on 18th December 1891 a pretended sale of the furniture and effects belonging to the late Galloway Mackintosh, and had by intimidating other purchasers under pretext of his rights as a landlord, by employing bogus bidders, by making use of a decree obtained on a petition of sequestration for rent irregularly served, and otherwise, fraudulently possessed himself of such furniture and effects at a price largely under their real value; that on the facts becoming known to the late Galloway Mackintosh, he on 6th February 1893 raised the said action in the Court of Session to recover damages laid at £1000, but that by the interlocutors sought to be reduced the Court assoilzied the defender the late James Stewart, and found the pursuer the late Galloway Mackintosh liable in expenses, taxed at the sum of £125, 11s. 10d., on failure to pay which sum the late Galloway Mackintosh had been made bankrupt on 18th July 1896.

The pursuers further averred—"The said judgments were procured by the said James Stewart by the said corrupt devices and by false and corrupt evidence. From the date of the said action being threatened he fraudulently and corruptly set himself to devise and did devise the deception of the Court. The case of Mackintosh was supported by a number of witnesses, and their depositions are referred to, as well as Lord Wellwood's comments thereupon. Mackintosh's witnesses were contradicted only by Stewart. If Stewart had not tendered himself as a witness and given the false evidence he did give Lord Wellwood and the Second Division of the Court would have decided the said action in favour of the said Galloway Mackintosh, because Mackintosh and his witnesses would have been believed by the judge but for the perjury and conspiracy of Stewart. . . . James Stewart, however, knowing that the case must be decided against him unless he tendered himself, went into the witness-box in order to swear falsely that the material evidence given for Mackintosh was untrue, and to falsely invent other evidence, both of which things he did." . . .

The pursuers also made averments of particular statements made by the said deceased James Stewart in evidence, which they alleged were false and perjured.

The defenders, *inter alia*, pleaded—"(2) *Res judicata*. (3) The pursuers' averments being irrelevant, *et separatim* the action being incompetent, decree should be pronounced dismissing the same."

On 25th January 1905 the Lord Ordinary (ARDWALL) assoilzied the defenders.

Opinion.—"This is an action at the instance of Hugh Stewart, the trustee on the sequestrated estate of the late Galloway Mackintosh, and of Mrs Mackintosh, who is described as widow and executrix-dative to the said Galloway Mackintosh, and it is directed against the executors of the deceased James Stewart, solicitor, Lockerbie. But at the discussion in the procedure roll it was stated that the argument was to proceed as if the trustee alone were pursuer, and that the only claim insisted in by him was in respect of pecuniary loss to the bankrupt estate, and not for solatium for injury to the feelings or reputation of the bankrupt who died on 7th April 1897, the widow's interest being in any reversion that might remain after satisfying the creditors in the sequestration, if indeed there are any creditors. The summons concludes ultimately for damages, but as a necessary preliminary for reduction of certain interlocutors of this Court, by which the deceased James Stewart was assoilzied from the conclusions of a summons at the instance of the said Galloway Mackintosh, and the latter was decerned to pay the sum of £125, 11s. 10d. of expenses. It was on this decree that the sequestration of Galloway Mackintosh proceeded, and accordingly, if the trustee is successful in this action it would seem that the ground of his own title would be cut away, and recal or reduction of the sequestration might at once be obtained by anyone having an interest.

"It is not said, and it does not appear, that any part of the said sum has been paid, and the only damage now sued for in the action appears to be the sum of £200, being the alleged expenses incurred by the deceased Galloway Mackintosh in the former action, the expenses of the present subsisting sequestration, and the loss claimed in the former action in respect of the dishonest sale of the deceased Galloway Mackintosh's furniture, which was alleged to have cost £147, 17s. 3d., to have been improperly appraised at £41, and to have been improperly sold for £38, 10s.

"The dates are of importance in considering the case. The alleged illegal acts of the late James Stewart were committed in 1891; the former action was raised on 6th February 1893, and finally disposed of on 17th January 1894; the estates of Galloway Mackintosh were sequestrated on 18th July 1896; Galloway Mackintosh died on 7th April 1897. His widow, one of the pursuers in the present action, was notwithstanding

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the sequestration appointed executrix-dative on 23rd July 1897. The act and warrant confirming the present trustee is dated as late as 18th July 1901. James Stewart died towards the end of 1902, and the present action was raised on 1st November 1904.

"The ground of reduction is that the decrees under reduction were obtained through the perjury of the late James Stewart.

"As a rule, the fact that perjury has been committed in the trial of any case is not a sufficient ground for reducing the judgment pronounced in such case (see *Lockyer* v. *Ferryman*, June 28, 1876, 3 R. 896, 4 R. (H.L.) 35; *Begg* v. *Begg*, 16 R. 550; and *Forster* v. *Forster*, January 21, 1871, 9 Macph. 445). It is maintained for the pursuer, however, that the above were all cases where the perjury was committed by witnesses other than the parties to the cause, and that in the present case the perjury of the defender in the former action being a fraud on his part forms a good ground of reduction in respect that the law will not allow a person to take benefit by his own fraud, and it is upon this principle that subornation of perjury, as distinguished from perjury, has been held to be a good ground of reduction of a decree following upon the trial in which it has been committed. I am of opinion, however, that the real distinction between perjury and subornation of perjury as a ground of reduction lies in this, that the former is committed in open court and that the judge or jury have thus an opportunity of deciding whether it is perjury or not, whereas subornation of perjury is a crime committed outwith the court, and as a rule is not exposed at the trial of the cause, and therefore is not an element entering into the decision of the cause. Accordingly, to allow decrees to be reduced on the ground of perjury would simply be opening the door to the re-trial of causes which had been heard and decided, and to which the plea of *res judicata* applies. The present is peculiarly a case for applying the rule against allowing decrees to be reduced on the ground of there having been perjury at the trial. Lord Wellwood's opinion in the case, which will be found in the reclaiming-note in the former action, and which is referred to by the pursuer on record, brings this very clearly out. He says—'Unfortunately here the evidence on neither side is free from objection. The whole truth has not come out, and I can say no more than that, in my opinion, the pursuer has failed to prove his case.' Then again—'I have anxiously considered the evidence in support of and in answer to these points, and have come to the conclusion that the pursuer has done no more than raise a case of suspicion. But it is not permissible to proceed on mere suspicion or surmise, however strong, and I do not think that on the evidence the charge is made out.'

"Again he says—'The most troublesome cases to decide on evidence are those in which, on certain points, the evidence on both sides is not trustworthy. But it does not follow that because, for instance, a defender's evidence is not to be believed on some points, the pursuer is necessarily entitled to succeed. In the present case, notwithstanding the doubt which I entertain in regard to parts of the evidence, I feel that I should not be justified in finding the charge against the defender proved upon the evidence presented to me.'

"His Lordship then goes on to point out that the evidence of damage is slight and unsatisfactory. I am therefore of opinion that in the present action the pursuer has not made out a relevant case for reduction."

. . . . . .

[*His Lordship then dealt with a plea of mora, which, if necessary, he would have sustained.*] . . . . . .

The pursuers reclaimed, and argued—The decrees complained of should be reduced since they had been obtained by the perjury of one of the parties to the action. No one was entitled to benefit by his own fraud—*Begg* v. *Begg*, February 27, 1889, 16 R. 550, 26 S.L.R. 402; Sir George Mackenzie's Works, vol. i, p. 42. An allegation of subornation of perjury entitled to inquiry—*Forster* v. *Forster*, January 21, 1871, 9 Macph. 445, 8 S.L.R. 319. The perjury of a party to an action was not to be distinguished from subornation of perjury. The case of *Snodgrass* v. *Hunter*, November 8, 1899, 2 F. 76, 37 S.L.R. 60, was not in point since there the question was of a single act of perjury by a witness—here of a fraudulent scheme by one of the parties, of which evidence was only obtainable after the death of the author. The interlocutor of the Lord Ordinary should be recalled and a proof allowed.

Argued for the defenders and respondents—Though subornation of perjury might be a good ground for inquiry, none was averred here, and the perjury of a party was in no wise different from that of any other witness and did not form a ground for an action of reduction—*Forster* v. *Forster* and *Snodgrass* v. *Hunter*, *ut supra*. To entitle to inquiry new evidence extrinsic to the matter in issue at the former trial and then unobtainable must be adduced—*Lockyer* v. *Ferryman*, March 6, 1877, 4 R. H.L. 32, June 28, 1876, 3 R. 882, 13 S.L.R. 572; *Phosphate Sewage Company* v. *Molleson*, July 8, 1879, 6 R. (H.L.) 113, 16 S.L.R. 822; *Flower* v. *Lloyd*, 1878, L.R., 10 Ch. D. 327. The doctrine of *res judicata* was conclusive against the pursuers in the present case. On the effect of a judgment obtained by fraud the *Duchess of Kingston's* case 2 Sm. L. Cas. 713 was also quoted. (On *mora* counsel referred to *Assets Company* v. *Bain's Trustees*, June 5, 1905, 42 S.L.R. 835, and January 13, 1903, 6 F. 676, 41 S.L.R. 517.)

At advising—

LORD KINNEAR—This is an action at the instance of the trustee on the sequestrated estate of the deceased Galloway Mackintosh and of his widow and executrix, against the executors of James Stewart also deceased. The conclusions of the summons are for damages for a fraud by which Mackintosh

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is said to have been injured, and as a necessary step towards that conclusion, for reduction of a decree of absolvitor, with expenses, obtained by Stewart in an action on exactly the same grounds which was brought against him by Mackintosh while they were both in life. The first pursuer, Mackintosh's trustee in bankruptcy, sets out in the condescendence that the sequestration was awarded on the petition of Stewart, founded upon an expired charge for payment of the amount contained in the decree under reduction, and the Lord Ordinary observes, with apparent justice, that if the action was successful the pursuer would as a consequence of his success cut away the ground of his own title to sue. But he is not the sole pursuer, and in the meantime the sequestration stands; and although there is a plea to title it was not argued that the action should be dismissed on this ground. I think therefore that we may consider and dispose of the case, as the Lord Ordinary has done, on its merits.

The action in which Stewart obtained the decree which it is now proposed to set aside was, as I have said, an action of damages on the ground of fraud; and the fraud alleged was precisely the same as that alleged in the present condescendence. In both cases it is averred that Stewart having by some not very intelligible means, with the aid of certain persons whom he induced to abet his fraudulent designs, obtained the control of certain judicial sales of furniture belonging to Mackintosh, succeeded in excluding honest bidders and in procuring a sale to himself at nominal prices. Without examining these averments in detail, it is enough to say that a record was closed in the first action and a proof allowed, and that on a careful consideration of the evidence the Lord Ordinary (Moncreiff) held the fraud not proved and assoilzied the defender, and that this judgment was affirmed by the Second Division. The pursuers now desire to set the judgment aside and to try the case over again on the allegation that the defender Stewart, now dead, who was examined as a witness, perjured himself in the witness-box, and so procured a wrong decision by a fraud upon the Court. The general rule may be stated in the words of Lord Justice James in the first case of *Lloyd* v. *Flower*, that a judgment which has been obtained in an action fought out adversely between two litigants *sui juris* and at arm's length cannot be set aside by a fresh action on the ground that perjury had been committed in the first. This is in accordance with many authorities, but it is enough to cite the judgment of Lord Cairns in *Lockyer* v. *Ferryman*—"I must say that I think the observations of Lord Gifford in the Court of Session are perfectly well founded that in every case where witnesses are called before a tribunal which is to judge of the facts spoken to by those witnesses, it is for that tribunal to say whether it believes or disbelieves them; if it believes the witnesses it is not for the defeated party afterwards to say I assert that those witnesses spoke what was not true, and on my assertion that they spoke what was not true I ask as a matter of right that there should be a new trial before another tribunal so that I may take my chance of what that other tribunal may determine upon what is deponed to by the witnesses. My Lords, there would be no end to litigation if that were held to be a sufficient and relevant ground for the reduction of a former decree."

But it is said that the present case is distinguishable on the ground that the perjury alleged is that of the defender himself, and the argument, as I understand it, was that a judgment obtained by the perjury of the successful party is in exactly the same position as a judgment obtained by subornation of perjury, and subornation of perjury has always been held to be a relevant ground of reduction, because no one can be allowed to benefit by his own fraud. I have no doubt that a sufficiently specific averment of subornation might be relevant to support a reduction; but the distinction between a case of that kind and a case founded only on the allegations of the falsity of the evidence given at a former trial, is not that there is fraud in the one case and not in the other. There is fraud in both. But the true distinction is that in the one case the question of fraud has been already tried and decided, and in the other an entirely new issue is raised, on which no decision has yet been given. The principle is that of *res judicata*. A judgment may be set aside on the ground of fraud, if the facts alleged to constitute fraud were not in issue when the judgment was given; but the successful party cannot be put a second time to proof or disproof of the same issues as were raised in the original action. This is clearly brought out in the opinion of Lord Justice James in *Flower* v. *Lloyd*—"When a judgment has been obtained by fraud there is power in the Courts of this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud and that fraud only. There cannot be a rehearing of the whole case until the fraud is established. The thing must be tried as a distinct and positive issue; you the defendant or you the plaintiff obtained that judgment by fraud, you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I wish to have the judgment set aside on the ground of fraud. That would be tried like anything else on evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried." The same view is stated in a somewhat different form by Lord Neaves in *Forster* v. *Forster*. His Lordship illustrates his opinion by reference to the obsolete use of reprobators, and says—"Reprobators were long in use in our law, but were not intended to give another opportunity of proving the reverse of the main issue. A litigant was allowed to protest and bring a reprobator on some collateral matter which at the time the parties were not prepared to try. But Lord Stair expressly says that the issue on which the parties have been convened cannot be retried on allegations

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that the witnesses swore falsely." If a judgment is to be set aside, therefore, on the ground of fraud, it must be on allegations raising a distinct and separate issue on which a verdict may be obtained independently of any retrial of the question already decided. The proper order of procedure is clear. The pursuer must in the first place reduce the judgment he complains of on the ground of fraud, and it is only when that has been done that he can have his case tried over again. But the pursuer in this case simply seeks to revive the original dispute, and for that purpose repeats in his condescendence every single matter which was in controversy before. There is no reason whatever alleged for setting aside the judgment, except that on these matters the defender gave false evidence. But that was just the question the learned Judge had to decide in the former case, and on the pursuer's own showing his decision cannot be reduced without retrying the whole case. The proposal is not to reduce the judgment in order to retry the case, but to retry the case in order to reduce the judgment. The only averment which has any semblance of novelty is that the pursuer is now in a position to disprove a certain statement which was made by the late defender incidentally in the course of his cross-examination. He appears to have said that he heard of the sales in question by a telegram which he received from a person named; and the pursuer says he can now prove by the evidence of this person that this statement was false. I cannot see that, by itself, this would do much to help the pursuer's case. It would not prove that the judgment was obtained by fraud, because it appears from Lord Moncreiff's opinion that he did not give credence to that particular statement. But the conclusive answer is that the credibility of the defender's testimony on the one side and the pursuer's on the other was the very matter for decision in the former action; and it could not be decided otherwise in the present action by contradicting the defender on a single isolated point. The extent to which that should affect his credit cannot possibly be measured without trying the whole case over again. The importance of contradicting a witness may vary indefinitely. The contradiction may utterly discredit his testimony or it may leave him unshaken on all substantial matters. It seems to me therefore out of the question to propose that a judgment should be set aside on any such ground as that; and especially that it should be so set aside after the death of the defender, when the Court which *ex hypothesi* is to decide upon his credibility cannot have his testimony. This, however, was the point on which the reclaimer's counsel most strongly relied. Every other point resolved into a mere plea for a retrial. I am for adhering to the interlocutor of the Lord Ordinary.

LORD M'LAREN—I concur.

LORD PRESIDENT—I also concur in all that has been said. When the peculiarities of this particular case have been removed the question that is really raised in it will be found to be a simple one. Litigation would be perfectly endless if judgments were to be set aside and cases reheard *ad infinitum* merely on the ground that the evidence formerly given was false, and so it has long been settled that it is no ground for reduction of a judgment delivered *in foro* that the evidence on which it proceeded was contrary to fact.

Therefore if reduction of a decree is to be obtained on the ground of fraud, it can only be where the fraud is something extrinsic to what happened in the former trial, and whether that can be made out is an issue of fact. Subornation of perjury is a plain issue of fact, and can be proved by examining witnesses as to what actually happened. But when it is the evidence of one of the parties himself that is said to be perjured, how are you to proceed to prove that he suborned himself to commit perjury? That question is an inquiry into what happened in the man's own mind, and that could not be proved by anything extrinsic to the former trial, but only by drawing an inference from what actually happened in the former trial. In other words, it would amount simply to going back to the old question that was decided in the previous trial, and that as I have said is not competent. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Crabb Watt, K.C.—Forbes. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders and Respondents—M'Clure, K.C.—Mackintosh. Agent—John Stewart, Solicitor.

Tuesday, February 6.

FIRST DIVISION.

GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED, PETITIONERS.

Process — Petition — Remit to Reporter— Consideration of Report — Motion to Dispose of Petition in Single Bills— Intimation of Motion to be Made to Keeper of the Rolls.

A party intending to move the Court to dispose in the Single Bills of an application which would in ordinary course be sent to the Summar Roll must intimate the motion to the Keeper of the Rolls, in order that the Court may have the opportunity of considering the matter beforehand.

On January 2, 1906, the General Accident Assurance Corporation, Limited, presented a petition to the Court under the Companies Acts 1862 to 1900, and especially under the Companies (Memorandum of Association)

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Act 1890, secs. 1 and 2, for the confirmation of a special resolution to alter the provisions of the memorandum of association with respect to the objects of the company.

On 13th January 1906 the Court remitted to G. M. Paul, Esq., C.S., "to inquire as to whether the proceedings have been regular and proper, and as to the reasons for the proposed alteration of the provisions" of the memorandum of association and to report.

Mr Paul reported in favour of the application being granted.

When the petition appeared in the Single Bills on the report, counsel for the petitioners moved that the prayer of the petition should be granted, and that, as the petition was unopposed and the report favourable, instead of the case being sent to the Summar Roll the matter might appropriately be disposed of in the Single Bills.

LORD PRESIDENT—We have had several applications of this kind before us lately. I have no objection to such applications as the present being disposed of in the Single Bills instead of being sent to the Summar Roll. But in future when such motions are to be made intimation of the motion must be given to the Keeper of the Rolls, in order that the Court may have an opportunity of considering the matter beforehand. We shall dispose of this matter in the Single Bills of to-morrow.

Counsel for Petitioners — Constable. Agents—Simpson & Marwick, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Exchequer Cause.

GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp Duty — Stamp Act 1891 (*54 and 55 Vict. cap.* 39), *First Schedule—Policy of Insurance—Accident Assurance with Clause Returning Part of Premiums on Assured Reaching Certain Age — Question if Accident Policy also a Life Policy—Appropriate Stamp.*

A policy of assurance against accident or illness contained a clause whereby the insurance company undertook to return to the assured on his attaining a certain age, or to his representatives at that time should he have died, the policy still being in force, a certain proportion of the premiums which had been paid under the policy, provided that no payment had been made under two of the preceding clauses.

Held that the policy was an accident policy and not a life as well as accident policy, and consequently that it was only subject to the accident insurance policy stamp of 1d. under the Stamp Act 1891.

The General Accident Assurance Corporation, Limited, General Buildings, Perth, appealed by way of stated case against a determination of the Commissioners of Inland Revenue regarding the stamping of an instrument presented to them on 22nd September 1904 by the Corporation for their opinion as to the stamp duty with which it was chargeable under the Stamp Act 1891.

The instrument which had been presented was in the following terms:—"This policy of assurance witnesseth that . . . having paid to the General Accident Assurance Corporation, Limited (hereinafter called the Corporation), the sum of two shillings and sixpence in consideration of the insurance hereinafter mentioned, from twelve o'clock noon on the day that this contract is dated until twelve o'clock noon on the first day of October 1904, the Corporation will pay to the assured, or in case of death the assured's legal personal representatives, in the following events, the sum or sums hereinafter mentioned as payable in respect thereof, that is to say:—

"*A.* The sum of four pounds per month . . . [*this clause dealt with disablement through illness*]. . . . . .

"*B.* The sum of four pounds per month . . . [*this clause dealt with disablement from personal injuries caused by accident*]. . . . . .

"*C.* The sum of one hundred pounds if the injury received as aforesaid shall within ninety days from the happening thereof result—(1) in death solely from such injuries; (2) in the entire loss by the complete severance at or about the wrist or ankle joints of one hand and foot, of both hands or feet, or in the entire and permanent destruction of the sight of both eyes. . . . . .

[*Here followed clauses giving increased benefits in certain events, or after the assurance had been in existence certain times.*] . . . . . .

"*D.* Return of Premium.—So soon as the assured under this policy shall reach the age of sixty-five years, or in the event of the previous death of the assured (the policy in either alternative being in full force and effect), the corporation agrees to return to the assured, or to such assured's heirs, executors, administrators, or assigns, 50 per cent. of all premiums which have been paid to the corporation under this policy, not exceeding in the aggregate the sum of £12, provided that no payment has had to be made under clauses C 1 or C 2 of this policy. . . . . ."

The Stamp Act 1891 (54 and 55 Vict. cap. 39), by section 1, imposes the stamp duties specified in the First Schedule to the Act.

The First Schedule includes:—"Policy of Life Insurance—

Where the sum insured does not exceed £10 - - - - -	£0 0 1
Exceeds £10 but does not exceed £25 - - - - -	0 0 3

. . . . . .

And see sections 91, 98, and 100.

Policy of Insurance against Accident and Policy of Insurance

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for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury or by way of indemnity against loss or damage of or to any property - - - - - - £0 0 1

And see sections 91, 98, 99, and 100."

Section 91 of the Act provides—"For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance."

Section 98—"(1) For the purposes of this Act the expression 'policy of life insurance' means a policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident, and the expression 'policy of insurance against accident' means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publications containing the notice only from accident or violence or otherwise than from a natural cause. (2) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury."

Section 99 allows of the one penny duty on a policy of insurance other than a sea or life insurance being denoted by an adhesive stamp, and section 100 imposes a penalty on parties not issuing a duly stamped policy or acting on a policy not duly stamped.

The stated case set forth—"The Commissioners were of opinion that the instrument was not only an accident insurance policy but also a life insurance policy, in respect that it provided that so soon as the assured should reach the age of 65 years, or in the event of his previous death, the said corporation agreed to return to him or his heirs, administrators, executors, or assigns, 50 per cent. of all the premiums paid to the corporation, not exceeding in the aggregate the sum of £12. They accordingly assessed upon the instrument the Accident Policy Duty of 1d., and the *ad valorem* Life Policy Duty of 3d., and required payment of the sum of 4d., whereupon the said corporation paid to the Cashier of Stamp Duties at Edinburgh the said sum of 4d., and the said instrument was thereupon stamped with the stamps denoting the said duty of 4d., so assessed as aforesaid, and also with the particular stamp provided by the said Commissioners under the said Act of Parliament to denote and signify that the full amount of stamp-duty with which the instrument was by law chargeable had been paid. But the said Corporation, by their agents, Messrs Simpson & Marwick, W.S., Edinburgh, declared themselves dissatisfied with the determination of the said Commissioners on the following grounds: That the instrument was properly chargeable as an accident insurance policy only, or, in any case, that it was not chargeable both as an accident and as a life policy; that the condition 'D' providing for a return of premium was not even if it had stood alone a life insurance within the meaning of the statute, because it contained no obligation to pay any definite sum, but in any case that on a fair construction of the instrument as a whole, it was substantially a sickness and accident policy and nothing more; that the said condition was entirely subsidiary to the main purpose of the instrument, and was no more chargeable with the separate duty as a life insurance than were the other conditions in the instrument chargeable with a separate duty as agreements. The Corporation therefore required the said Commissioners to state and sign the case on which the question with respect to such stamp-duty arose, together with their determination thereon, which the Commissioners do hereby state and sign accordingly.

The question for the opinion of the Court is whether the said instrument, in the circumstances above set forth, is liable to be assessed and charged with the said Accident Insurance Policy Duty of 1d. and the Life Insurance Policy Duty of 3d. in terms of the foresaid Act, or with the said Accident Insurance Policy Duty of 1d. only, or if not liable to be assessed and charged with both or either of these duties, with what other duty it is liable to be assessed and charged."

Argued for the appellants—In the instrument in question there were none of the essentials which are found in a life assurance policy proper. There was here (1) no contract of hazard, (2) no provision for the payment of a sum certain in the event of death, and (3) no relation between the sum certain and the annual premium to be paid by the person insured. It was true that in certain events the Corporation undertook to make certain payments to the assured or his representatives, but such payments were really rebates. There was here no risk run to get back a capital sum. The following authorities were referred to—*Dalby* v. *The India and London Life Assurance Company*, 15 C.B. 365, at p. 387; *Fryer* v. *Morland*, (1876) L.R. 3 Ch. Div. 675, *per* Jessel, M.R., at p. 685; *Mortgage Insurance Corporation, Limited* v. *Commissioners of Inland Revenue*, (1887) L.R. 20 Q.B.D. 645, *aff.* 31 Q.B.D. 352; *Lancashire Insurance Company* v. *Commissioners of Inland Revenue*, [1899] 1 Q.B. 353; *Prudential Insurance Company* v. *Commissioners of Inland Revenue*, [1904] 2 K.B. 658; Porter's Laws of Insurance, pp. 1-19.

Argued for the respondents—The instrument was really a composite policy. Primarily no doubt it was an accident policy, but inasmuch as it contained an obligation to do or pay something in the event of an occurrence dependent upon a life it must also be regarded as a policy of life insurance — *Prudential Insurance Company*, (*cit. supra*), *per* Channell, J.

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At advising—

LORD PRESIDENT—The question arising in this stated case is as to what stamp should be affixed upon the policies of a certain General Accident Insurance Company. The policy before your Lordships is one in common form used by that company. By the provisions of the schedule of the Stamp Act of 1891 there is charged upon a policy of insurance against accident the sum of one penny. There is also charged in the same schedule, in respect of a policy of life assurance, a sliding scale—where the sum assured does not exceed £10 one penny, where it exceeds £10 and does not £25 threepence, and so on. In regard to the present policy it has been determined by the Commissioners of Inland Revenue that it ought to be stamped with a stamp of fourpence, that is to say, one penny as an accident policy and threepence as a life policy for a sum exceeding £10 but not exceeding £25. It is against that determination that this stated case is brought, the contention of the Insurance Company being that the instrument in question is sufficiently stamped with one penny appropriate to an accident policy. The matter of course turns on the instrument. Now, the policy of insurance in question is in this form—it recites that a payment of 2s. 6d. has been made at twelve o'clock noon on the 1st of September, and in respect of that the Insuring Corporation, Limited, bind themselves to pay the sums thereinafter mentioned—[*reads provisions A, B, and C in policy*]. Then there are certain other stipulations with which I need not trouble your Lordships, and then comes the clause upon which really the whole matter turns. It is headed D, and is to the following effect —[*reads clause D*]. I ought to explain, to make the whole matter completely intelligible, that although the original premium is only 2s. 6d. for a month, there is a provision for an extension of the whole stipulations of the policy provided that another 2s. 6d. is paid in each successive month. Now, the provisions of the Stamp Act which deal with this are these. First of all, there are the two clauses in the schedule which I have already recited, and then there are a few other sections. Section 91 determines that "For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced; and the expression 'insurance' includes 'assurance.'" It is evident that that section really does not take the matter much further, because it relegates us to what may be called the common law knowledge of what a contract of insurance is. Then the policies of insurance are distinguished. Section 98 defines what is a policy of life insurance—"For the purposes of this Act the expression 'policy of life insurance' means a policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives, except a policy of insurance against accident," &c. It does not seem to me that these definitions in the statute go far towards the ascertainment of this question, because, after all, we are relegated to what may be called our common law knowledge of what these contracts of insurance are. Now, it seems to me that when we are come to the schedule, the general scheme of the Stamp Act may be said to charge duties upon different instruments of a certain known character, and if an instrument falls within that character, then the duty that is in the schedule is to be charged upon it, and in general no other duty. I can best explain what I mean by the following example. As your Lordships are very well aware, there is a sixpenny duty for any agreement, but supposing a particular instrument falls under the category that is denoted in the schedule, and is stamped with an appropriate stamp under its provisions, nobody ever supposed that you could therefore go on and say that it must always also be stamped with a sixpenny agreement stamp, because as matter of fact in the instrument there are many things which, taken by themselves, might be said to be, and indeed are, agreements. Accordingly the first thing that I think we have to discover is what is the general character of this instrument before us. Now, as to that, I do not think there can be any doubt. There is no doubt that it is an accident policy, and indeed the Inland Revenue concede that, because they propose that it should be stamped with a penny stamp. Now, I am not for one moment saying that you might not have upon the same piece of paper some other instrument so tacked on or incorporated that while it was on the same piece of paper yet it would not lose its distinctive character; and that a company or individual could contract with another person in one deed by which they should effectuate both a policy against accident and also a policy of life insurance I do not doubt. But the point is, has that been done here? Now, I cannot think of any better test—at the same time I think it is a true one—than to take the second so-called contract and see if it would stand alone; that is to say, to use the current expression, whether it would stand upon its own feet. Looking at what is said to be the contract of life insurance here, and testing it by that test, I have no hesitation in saying that it would not. The clause which I have read would be a meaningless contract of life insurance if it were not for what had gone before, and accordingly the result on my mind is this, that that clause does not, in any true sense of the word, constitute a contract of life insurance at all, and that it is merely a stipulation for a reduction of the premiums in certain events.

Accordingly I have come to the conclusion that the determination of the Commissioners is wrong, that this policy is truly an accident policy and nothing else, and that it is appropriately stamped if it bears a one penny stamp.

LORD M'LAREN—It is quite conceivable that in an instrument or policy two separate contracts might be made which were re-

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spectively chargeable with different rates of duty. If the same policy were to insure a ship against the perils of the sea, and also to insure the fidelity of the master or the supercargo, I should not doubt that these two obligations were separately stampable; but there are in almost every deed collateral obligations incidental to the main purpose of the deed, which, if one could conceive of them standing alone, might fall under some other denomination of liability to stamp duty. Now it follows, therefore, that what we have to consider here is whether there is a separate and independent contract of life insurance, or whether we have merely a provision which may benefit the party during his life but which is truly incidental. I agree with your Lordship that the latter is the true view of this instrument, and for the reasons which your Lordship has stated. I was specially influenced by this, that the provision upon which the Board of Inland Revenue found is a provision for return of a proportion of the premiums at a definite age, provided that no claim has previously been made against the company in respect of death, sickness, or accident. That condition could have no meaning apart from the main purpose, and therefore I must hold that it is collateral to that purpose, and that it is not intended as a separate and independent obligation.

LORD KINNEAR—I concur.

LORD PEARSON was not present.

The Court pronounced this interlocutor:—

"Find that the instrument referred to in the case is liable to be assessed and charged with the Accident Assurance Policy Duty of 1d. only, and is not liable to be assessed and charged with the Life Assurance Policy Duty of 3d., and therefore order the sum of 3d., being the excess of duty paid by the appellants, to be repaid to them by the Commissioners of Inland Revenue, and decern."

Counsel for the Appellants — Guthrie, K.C. — Constable. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—The Solicitor-General (Clyde, K.C.)—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, February 9.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

GUTHRIE *v.* GUTHRIE.

(Case reported by Lord Ordinary to Inner House.)

Parent and Child — Custody of Child — Failure of Divorced Spouse to Deliver Child—Application for Warrant to Officers of Law to Take Child into Custody — Warrant to be Granted by Inner House—Administration of Justice.

In an action of divorce at the instance of a husband against his wife, the Lord Ordinary granted decree and found the pursuer entitled to the custody of a female pupil child, the only child of the marriage. The defender having left the house where she had been residing, taking the child with her, and no information as to her whereabouts being obtainable by the pursuer, he applied to the Lord Ordinary to grant warrant to officers of law to take the child into custody and deliver her to him.

The Lord Ordinary being of opinion that the order craved could not competently be pronounced in the Outer House, reported the case to the First Division.

The Court, in the circumstances stated by the Lord Ordinary, pronounced the interlocutor craved, but was of opinion that it could not competently have been pronounced in the Outer House. *Leys* v. *Leys*, July 20, 1886, 13 R. 1223, 23 S.L.R. 834, *followed*.

In an action of divorce for adultery at the instance of Alexander Hunter Guthrie, grocer's assistant, 13 Tolbooth Wynd, Leith, against Mrs Margaret Little or Guthrie his wife, then residing with her mother at 50 West Bowling Green Street, Leith, the Lord Ordinary (ARDWALL) on 27th January 1906 pronounced decree of divorce, and found the pursuer entitled to the custody of Agnes Little Guthrie, the only child of the marriage. At the date of the decree the said child was nearly four years of age.

The defender having failed to deliver the child the pursuer applied to the Lord Ordinary for a warrant to officers of law to take the child into custody wherever it might be found and to hand it over to him.

On 9th February 1906 the Lord Ordinary reported the case to the First Division.

His Lordship stated that since the date of the decree complaint had been made by the pursuer that he had been unable to obtain the custody of his child; that for reasons stated by the defender's counsel he (his Lordship) had twice continued the case and appointed a place and date at and on which the child should be handed over to the pursuer; that the pursuer went on the date specified to the place appointed for delivery, but the defender failed to appear or to hand over the child; that on

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31st January the defender left her mother's house taking the child with her; that continued inquiries as to her whereabouts had been made without success; that neither her father nor her mother knew anything of her movements; that no information about her could be obtained from her law-agent, her neighbours, or the police; and that in these circumstance he had reported the case as, in his opinion, a mere order *ad factum præstandum* would not be sufficient. His Lordship also stated that he thought the course followed in the case of *Leys* v. *Leys*, July 20, 1886, 13 R. 1223, 23 S.L.R. 834, might be suitably followed here, but that, in his opinion, the interlocutor there pronounced could not competently be pronounced in the Outer House.

[In answer to the Lord President, counsel for the pursuer stated that the defender's counsel and agent had both retired from the case.]

LORD PRESIDENT—I have no doubt that the interlocutor suggested by Lord Ardwall is one which could scarcely be pronounced by the Lord Ordinary but only by the Inner House.

The precedent for it is in the case of *Leys* v. *Leys*, 13 R. 1223. The only question is as to the expediency of granting it at this stage. I am clearly of opinion that it is expedient to do so. This seems to be a deliberate attempt to evade the orders of the Court. It would only be to make the evasion of these orders more easy and to cause further delay if we were to compel the pursuer to wait till he could obtain extract of the interlocutor pronounced by the Lord Ordinary and then charge.

I am therefore of opinion that the interlocutor which Lord Ardwall has suggested should be pronounced.

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was absent,

The Court pronounced this interlocutor:—

"The Lords in respect that it is reported by the Lord Ordinary in the cause that the defender had left her father's house, where she had been formerly residing, on Wednesday, 31st January 1906, taking with her the pupil child of the marriage, to the custody of which the pursuer was found entitled by the Lord Ordinary's interlocutor of 27th January 1906; that continued inquiries have been made to discover her whereabouts without success; that her father and mother state that she left their house on said 31st January 1906 and that they know nothing of her movements since, and that her law-agent, the police, and neighbours in the district can give no information concerning her since that date: Grant warrant to messengers-at-arms and other officers of law to take into their custody the person of the pupil child, Agnes Little Guthrie, wherever she may be found and deliver her into the custody of the pursuer; and authorise and require all Judges Ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying this warrant into effect; and authorise execution to pass on a copy of this deliverance and warrant herein contained, certified by the Clerk of Court; and decern *ad interim*."

Counsel for the Pursuer—J. G. Jameson. Agent—P. F. Dawson, W.S.

Saturday, February 10.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

LUNNIE *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Negligence—Master and Servant—Common Employment—Negligence of Fellow-Servant—Accident to Boy Assisting Servant but not in Employment.

The father of a boy ten years of age brought an action against a railway company for damages for personal injury to his son. He averred that A, a carter in defenders' employment, and acting in the ordinary course of his employment, negligently, in view of the boy's age, requested his son's assistance and left him in charge of his horse and lorry within the entrance to a goods station of defenders', where the boy was injured through B, another carter in defenders' employment, negligently running his lorry into A's lorry. The defenders denied liability.

Held that the action must be dismissed, inasmuch as the boy, whether assisting A voluntarily or at his request, could be in no better position as regards claims against A's master than A himself, and that the principle of common employment therefore applied. *Potter* v. *Faulkner*, (1861) 1 B. and S. 800, *approved*.

This was an action raised in the Sheriff Court at Glasgow by Patrick Lunnie, 96 Richard Street, Anderston, Glasgow, as administrator-at-law for his pupil son William Lunnie, against the Glasgow and South-Western Railway Company, concluding for £200 damages for personal injuries received by the son.

The pursuer averred—"(Cond. 1) Pursuer's son William Lunnie is ten years of age, and resides with his father, who is a labourer. (Cond. 2) On or about the 7th day of March 1905 pursuer's son was requested by a carter in the employment of the defenders to hold a horse while he was, in the course of his ordinary employment with the defenders, delivering goods in a factory in Richard Street, Glasgow. (Cond. 3) Pursuer's son did so, and thereafter was requested by defenders' carter to accompany him to College Street Goods Station,

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which he did. While there the defenders' carter left pursuer's son in charge of his horse at the entrance to the defenders' station. While taking charge of the horse and lorry at the entrance to said station, pursuer's son was run into and injured by another lorry also belonging to the defenders, the carter of which carelessly and negligently ran into the lorry of which pursuer's son was in charge, and injured him. (Cond. 4) Defenders' carter, Carr, was negligent in requesting so young and inexperienced a boy to assist him, and in particular in leaving him in sole charge of the lorry at so crowded and busy a station. He was, however, acting within the scope of his employment in requesting and permitting pursuer's son to assist him, as it was necessary to have some one in charge of the lorry during his absence on defenders' business, and defenders are liable for his negligence. (Cond. 5) Defenders are also liable in damages for said accident in respect that it directly arose out of the negligence of one of their carters, who drove into the cart in which pursuer's son was sitting and injured him. . . . "

The pursuer pleaded—"Pursuer's pupil son having sustained injury through the negligence of defenders' servants while engaged on defenders' business, is entitled, as administrator-in-law on behalf of his said son, to reparation as craved."

The defenders pleaded—"(1) The pursuer's statements are irrelevant."

On 22nd June 1905 the Sheriff-Substitute (DAVIDSON) sustained the first plea-in-law for the defenders and assoilzied them from the conclusions of the action.

Note.—"I have no doubt that on his first ground of action the pursuer has failed to state a relevant case. There is no statement that the carter had special authority to ask anyone to assist him in his work, and the ordinary rule of law is that he had none. Even on the assumption that he had such authority, the pursuer's case on this point is self-destructive, for he cannot connect the accident with the fault of carter number one; as his story proceeds it comes to be evident that the accident is ascribable wholly to the fault of carter number two. As regards the other branch of the case, I feel myself bound by the decision of the Appeal Court of England in the case of *Potter* v. *Faulkner*, 1 Best and Smith (Q.B.) 800. I may say that I am quite unable to concur in the reasoning which led the learned Judges to the conclusion they arrived at in that action, nor can I understand how the doctrine of *collaborateur*, as it is called, should be applied to a person who is not a fellow-servant of the workman said to have been at fault because he was assisting such a workman. Had it not been for *Potter's* case I should have had no difficulty in allowing a proof; but that case seems to me to settle the point, and I must follow it and dismiss the action."

The pursuer appealed, and argued—(1) The first-mentioned carter was negligent in asking such a young and inexperienced boy to assist him, and the defenders were responsible for this negligence. (2) The second-mentioned carter was negligent in driving carelessly. Assuming that the first carter had no authority to employ the boy, there was no room for the doctrine of *collaborateur*. *Potter* v. *Faulkner*, 1861, 1 B. and S. 800, laid down no absolute and general rule. It had not always been followed even in England—*Cleveland* v. *Spier*, 1864, 16 C.B. (N.S.) 399—and should not be followed in Scotland. Assuming that the boy was employed, the doctrine of common employment was not a hard and fast rule, and did not apply to an accident arising from the chance meeting of two carters who happened to be in the same employment. Such a fortuitous circumstance was not a risk incident to their employment which it could be said had been undertaken—*Johnson* v. *Lindsay & Company*, [1891] A.C. 371, Lord Herschell, at 377; *Auld* v. *M'Bey*, February 17, 1881, 8 R. 495, 18 S.L.R. 312; *Engelhart* v. *Farrant & Company*, [1897] 1 Q.B. 240; *Wright & Roxburgh*, February 26, 1864, 2 Macph. 748, Lord Cowan, at 756; Glegg on Reparation, p. 376. Even on the assumption they were in a common employment, they were not fulfilling a common employment—"*The Petrel*," [1893], P. 320. In any case a little boy of ten could not be said to have understood or undertaken such a risk—*Bartonshill Coal Company* v. *M'Guire*, June 17, 1858, 3 Macq. 300, Lord Chancellor, at 311, in explaining *O'Byrne* v. *Burn*, *Morrison* v. *M'Ara*, March 6, 1896, 23 R. 564, 33 S.L.R. 384.

Argued for the defenders (respondents)—It was not averred that the first carter (Carr) had authority to employ the boy, or that it was necessary to employ him. (2) The boy was in the same position as the carter, and the doctrine of *collaborateur* applied. The carters had a common master, were in the same branch of his employment, and on his premises the accident occurred. [The pursuer here was given an opportunity of amending his record and substituting "outside the entrance" for "at the entrance," but declined to make this alteration.] The boy undertook a part of the carter's work, and a volunteer could be in no better position than the person he assisted—*Potter* v. *Faulkner* (*supra*); *Woodhead* v. *The Gartness Mineral Company*, February 10, 1877, 4 R. 469, at 498, 14 S.L.R. 320; *Degg* v. *The Midland Railway Company*, 1857, 1 H. & N. 773. The same principle had been given effect to in Scotland in *M'Ewan and Others* v. *The Edinburgh and District Tramway Company, Limited*, March 18, 1899, 6 S.L.T. 400, where also the volunteer, as here, was a boy. In *The Petrel* (*supra*) the ships might never have met at all; here the carters might expect to meet two or three times a day.

At advising—

LORD JUSTICE-CLERK—The facts in this case are extremely simple as averred by the pursuer. They are that one of the defenders' drivers of lorries had taken a little boy with him on to his lorry to assist him. What the assistance was we do not know, but it is certain that he was taken

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to assist in the work of the lorryman. We are relieved of a difficulty as to where the accident happened to the boy, because it is said to have happened at the yard of the defenders, and it is therefore to be taken that it was in the yard. The pursuer got an opportunity of amending if he wished to make his statement more specific, but he declined to do so on the ground that it had been ascertained that "at" the yard meant "in" the yard. Therefore we must take it that at the time this happened the boy was inside the defenders' yard. Now, the question might arise whether the boy had any business to be there, but that would be a question depending upon facts to be ascertained, and I do not lay any stress upon it. We are dealing with a question of relevancy, and I assume he was there to assist the driver, and I assume the driver took him there to assist him. Now, his undertaking to assist the carter, and the carter taking his assistance, placed him in a position and relation to the company of being an assistant to one of their servants. It cannot be maintained that he was anything else. A servant of course may or may not be entitled to take assistance from another, and another person may volunteer assistance without having any right whatever to do so; but the question is whether in such circumstances as these a volunteer giving assistance is doing the master's work. In regard to that I think there can be no question whatever that he is doing the master's work, taking it upon the footing that the carter was entitled to take his assistance. I think the law has been very clearly established that a person who volunteers to assist in work can be in no better position, as in a question between him and the master, than if he were a servant, and that such person necessarily comes under the law of common employment. Here there is no doubt whatever that if another carter had been assisting the carter whose lorry was standing there and was run into, that carter would not have been entitled to recover damages because another carter belonging to the same employment ran into him when he was assisting a brother carter. The only difficulty which is created in the case in my mind, if there is a difficulty, is caused by the view which the Sheriff-Substitute who decided it—and I think his decision is perfectly right—has expressed. He says he does not understand the ground upon which he decides it although there are precedents for it. I do not understand that at all. I think the principle is clear enough that a master is not to be liable for people who come and do his work without being asked to do it, any more than he is liable to a man employed to do the work in a question between him and another in his employment. The Sheriff-Substitute decided that upon the English case of *Potter* v. *Faulkner*. I think it right to point out that that question has been well and fully decided in our own Courts already. It is very distinctly and clearly decided in the case of *M'Ewan* v. *Edinburgh District Tramways Company*, 6 S.L.T. 400. In that case a boy who had been allowed by a driver of one of the tramway cars to assist as a trace-boy—not being employed by the company but being employed by the servant to assist him—was injured. It was distinctly held there that there was no claim whatever of damages against the company, because the boy assisting the employee was in exactly the same position as if he had been employed himself. "It is said that the pursuer was 'invited or accepted and authorised'"—I am now reading from the opinion of Lord Pearson in that case—"by the driver and conductor to take the place of a trace-boy who was temporarily absent. But whether invited or accepted he took his place in the ranks of the company's servants, and it is quite settled that, if a person does that, it is immaterial in applying the doctrine of common employment that he was a volunteer and that there was no express contract of service between him and the company." Now, that seems to me fully to apply to this case, and is in my opinion in accordance with the previous decisions that have been pronounced in this country. The only other question which could have arisen was the question of youth, but it does not seem to me to arise in this case, because it looks very like the case quoted in which the boy was 11 years old, and Lord Pearson says—"I am not aware that youth has ever been admitted as an answer to the defence of common employment." If it were suitable to put a boy of eleven to act as a trace-boy, the fact of his being a boy would not in my opinion make any difference whatever. At all events, even if it were improper work to be given to a boy, that is not the question before us. The question before us is whether or not when a person volunteers to assist another in an employment and his assistance is accepted, and an accident happens in the course of the work being done, through the fault of another servant, the master is liable. I hold the master is not liable, on the principle that they are in common employment, and therefore a party who is in that employment must take the risk. I move your Lordships to affirm the judgment of the Sheriff-Substitute.

LORD KYLLACHY—I am of the same opinion. I confess I find no particular difficulty in following the reasoning of the learned Judges in the case of *Potter*. The principle of that decision was, I think, just this, that a person who without the privity of a master assists, whether as a volunteer or otherwise, a servant of that master, can be in no better position as regards claims arising against the master in case of accident than the servant whom he volunteered to assist, or who, without the privity of the master, employed him so to assist. That is the principle, and it seems to me to be entirely just and to be decisive of the present question.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court dismissed the appeal, affirmed the interlocutor appealed against, and of new assoilzied the defenders.

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Counsel for the Pursuer (Appellant)—C. N. Johnston, K.C.—Cochran Patrick. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders (Respondents)—Guthrie, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S.

Saturday, February 10.

SECOND DIVISION.

[Lord Dundas, Ordinary.

POLLOKSHAWS CO-OPERATIVE SOCIETY, LIMITED *v.* STIRLING MAXWELL.

Superior and Vassal—Casualty—Redemption—Calculation of Redemption Price—Building Site—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

A co-operative society purchased certain subjects which were at the date of the purchase, and had been for years previously, covered with buildings. With a view to the erection of new buildings they demolished these, and when the ground was bare, except for the foundations of the new buildings, brought an action against the superior concluding for declarator, *inter alia*, that the redemption price of the casualties was a certain sum which was arrived at by taking as a basis of the calculation the value of the subjects if let on a lease of ordinary duration for such a purpose as a builder's yard.

Held (*aff.* the Lord Ordinary (Dundas), that in estimating the "yeir's mail" the subjects must be regarded as a building site, and that inasmuch as, on the evidence, £67, 10s. would have been a fair feu-duty, that sum, with the addition of the fifty per cent. required by statute, the casualties being exigible only on the death of the vassal, *i.e.*, £101, 5s., was the amount payable for the redemption of the casualties.

Superior and Vassal—Casualty—Redemption of Casualties—Payment of Outstanding Casualties—Time before which Payment must be Made—"Before Redemption shall be Allowed"—"Allowed"—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

Section 15 of the Conveyancing (Scotland) Act 1874 has the following proviso:—"And provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid." . . .

Held (*per* Lord Dundas, Ordinary) that, where agreement has failed, redemption is only "allowed" when the decree of the Court is pronounced, and consequently that a casualty being due and outstanding at the raising of the action did not make incompetent an action brought by a vassal for the redemption of the casualties of his holding.

Superior and Vassal—Casualty—Redemption of Casualties—Date of Redemption—Date at which Casualty to be Estimated—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

In an action by a vassal for redemption of casualties, *held* (*per* Lord Dundas, Ordinary) that "the date of redemption" as at which "the amount of the highest casualty" is to be "estimated" is the date at which the matter becomes litigious by the raising of the action.

By the 15th section of the Conveyancing (Scotland) Act 1874 it is provided—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable: And failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms, viz.—In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of fifty per cent. . . .: And provided always, that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid . . . and that the redemption shall apply only to future and prospective casualties."

This was an action brought on 7th September 1904 by the Pollokshaws Co-operative Society, Limited, against Sir John Maxwell Stirling Maxwell of Pollok, to have it found and declared (1) "that the pursuers are entitled to redeem the casualties which may hereafter become due and payable or exigible to the defender, as superior of the subjects . . . for the said subjects," which were there described, and (2) "that the redemption price of the said casualties (inclusive of an addition of fifty per cent. thereon) amounts to £26, 1s. 3d. sterling, or such other sum, more or less, as may be ascertained in the course of the process to follow hereon to be the amount of the highest casualty, estimated as at the date of signeting hereof, inclusive of said addition of fifty per cent." The subjects in question extended to 1495 square yards or thereby and were situated in Main Street, Pollokshaws. The sum of £26, 1s. 3d. pursuers arrived at by adding £4, 7s. 6d., at which part of the subjects in question were let, and £13, which pursuers averred was the annual value of the remainder, and adding to the result the additional fifty per cent. as required by the statute.

The pursuers had become proprietors of these subjects (which had been feued in or prior to 1752) at Martinmas 1903, the purchase price, including the buildings which then stood thereon, being £1350. At the date of the purchase and for many years prior thereto the ground had been covered

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with buildings, but on acquiring it the pursuers, with a view to erecting new buildings, had proceeded to demolish the then existing buildings. At the date of signeting the summons the old buildings had, with one unimportant exception, been removed and the ground was bare except that there had been laid for the new buildings concrete foundations, and on these certain walls had been raised to a height of about two feet above the ground. The subjects (*i.e.*, the old buildings on the ground) had been let for the year from Whitsunday 1903 to Whitsunday 1904 for £107, 12s. 6d., and were entered in the valuation roll for 1903-04 at £135, 2s. 6d. The defender averred that the annual value was not less than this sum, and offered to accept as the basis of calculating the redemption, the sum of £86, 2s., which was the sum paid by the pursuers on the 17th October 1904, after the raising of the action and lodging of defences, as a casualty in respect of their entry. Casualties were exigible only on the death of the vassal.

The defenders, *inter alia*, pleaded—"(1) The pursuers' statements being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The pursuers being, at the date of raising the action, still due to the defender a composition in respect of their implied entry with the defender, the action is premature and should be dismissed. (4) *Separatim*—In respect that payment of all prior due casualties is a statutory precedent to redemption, and that a casualty was still due when the action was raised, the date at which the redemption price fell to be estimated had not arrived, and the action is therefore incompetent, and falls to be dismissed. (5) In respect that the sum at which the pursuers seek to redeem the casualties is inadequate, having regard to the yearly rental or value of the subjects at the present time, the defender should be assoilzied. (6) The pursuers, as vassals, having at their own hand demolished the buildings, which, at their entry, formed the security for the defender's rights as superior, the value of the subjects in a question with him, if they thereupon claim to redeem the casualties of superiority, is to be taken as it stood before they commenced the process of demolition, and not just as the process of demolition is complete."

On 8th March 1905 the Lord Ordinary (DUNDAS) pronounced this interlocutor:—"Repels the first, third, fourth, and sixth pleas-in-law for the defender: Finds that the redemption price of the future casualties ought to be ascertained upon the basis of the true yearly value of the subjects described in the summons as at 7th September 1904, being the date when the action was raised, having in view their actual condition as at that date, and all their potentialities and capacities in the direction of feuing or otherwise: *Quoad ultra* continues the cause."

Opinion.—"The pursuers became proprietors in 1903 of certain lands in the burgh of Pollokshaws, of which the defender is the superior, and which were originally feued out by an ancestor and predecessor of his in or prior to 1752. The leading conclusion of the summons is . . . [*His Lordship here narrated the conclusions of the summons as above quoted.*] . . . The defender states preliminary pleas to the effect that the action is (*a*) premature, and (*b*) incompetent. These pleas are based upon the allegation that, when the action was raised, a composition of a year's rent of the subjects, due by the pursuers to the defenders in respect of their implied entry at Martinmas 1903, had not been paid. The summons was signeted on 7th September 1904, and it is admitted that on 17th September 1904, after defences had been lodged, a composition of £86, 2s. was paid to and accepted by the defender as the adjusted amount of that composition. The receipt, which is in unqualified terms, is produced in process. . . . [*His Lordship here stated a contention that the casualty had been paid or tendered prior to the raising of the action, which was based on correspondence, but which he found unnecessary to decide.*] . . . The point, I think, must be decided upon a construction of section 15 of the Conveyancing (Scotland) Act 1874, and particularly of its proviso 'that before any such redemption, otherwise than by agreement, shall be allowed any casualty which has become due shall be paid.' In my opinion, where agreement has failed, and the matter is litigated, the redemption is only 'allowed' when the decree of the Court is pronounced. It seems to me that this is the proper and natural meaning of the words used, and that any other reading might be productive of hardship and injustice to the vassal. The preliminary pleas stated by the defender may now be briefly examined. Plea 3 states that the action is 'premature,' because at the date of raising it the pursuers were due to the defender a composition. This plea, in my judgment, proceeds upon an erroneous construction of the statute. The composition was admittedly paid on 17th October 1904, and I think, for the reasons which I have indicated, that that was timeous payment. Plea 4, which goes to the competency of the action, begins with the words—'In respect that payment of all prior due casualties is a statutory precedent to redemption.' So far I agree. But it proceeds thus—'and that a casualty was still due when the action was raised, the date at which the redemption price fell to be estimated had not arrived and the action is therefore incompetent.' This, in my opinion, is false reasoning. I think, as I shall explain immediately, that the redemption price payable in satisfaction of future casualties must be estimated as at the date of the action, but, as I have already stated, the amount of any outstanding casualty may, in my judgment, be adjusted at any time before redemption is 'allowed' by the Court. I am therefore against the defender in regard to his preliminary pleas.

"The question upon the merits of the case relates to the mode in which the redemption price is to be ascertained, or, in other words, the proper principle upon which the 'amount of the highest casualty, estimated as at the date of redemption,'

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ought to be calculated. The facts are peculiar, and the question is an interesting one. It appears from the defender's statement of facts and the pursuers' answers thereto, that when the latter acquired the subjects, which are situated in Main Street, Pollokshaws, the ground was, and had been for years, covered with buildings, yielding a yearly rental of somewhere over £107. The pursuers, after acquiring the subjects at Martinmas 1903, warned the tenants to remove from the buildings, which were vacated about April 1904, and, with a view to erecting new buildings, they proceeded to demolish the buildings then existing. The parties are agreed that at the date of raising the action the buildings had all (with I think one unimportant exception) been removed, and the ground was practically bare, except that concrete foundations for new buildings had been laid by the pursuers. Parties did not seem to be quite at one as to how far towards completion these new buildings have now proceeded, but the fact does not seem to be material. In these circumstances the parties concurred in asking me to decide upon what basis in principle the redemption price (assuming that the action is allowed to proceed) ought to be ascertained. The pursuers argued that when the action was raised, the ground, being in the condition above indicated, was capable of yielding only a very modest rental, but that upon that rental, plus 50 per cent. extra, the defender's rights must be estimated. The defender, on the other hand, maintained in terms of his sixth plea-in-law that the value of the subjects 'is to be taken as it stood before they' (*i.e.*, the pursuers) commenced the process of demolition, and not just 'as the process of demolition is complete.' I think the first point is to determine what the statute means as 'the date of redemption' as at which 'the amount of the highest casualty' is to be 'estimated.' It appears to me that that date must be taken to be that at which the matter becomes litigious by the raising of the action, and that this is made clear by the case of *School Board of Neilston*, 15 R. 44, and the later case of *The City of Aberdeen Land Association, Ltd.*, 2nd July 1904, 41 S.L.R. 647. If this be so, then I think that the 'highest casualty' should be 'estimated by ascertaining what at that date (in this case 7th September 1904) would have been the true yearly value of the subjects, having in view their actual condition, and all their potentialities and capacities in the direction of feuing or otherwise. The case of *Neilston School Board*, to which I have referred, carries one far in that direction. There, in an action for redemption of future casualties, the value of the subjects for the purpose of computing the redemption price was taken upon its actual and not upon a future or conjectural basis, although the ground had been bought avowedly for the purpose of erecting school buildings upon it. The defender's proposal seems to be to value the subjects upon the footing that they were covered with buildings which did not in fact exist at the time when, as I hold, the amount of the highest casualty must be estimated. This in my judgment is an unsound view, and is not in accordance with the case of *Neilston School Board*. It is also, I think, not in accordance with the principles laid down in the important case of *Earl of Home* v. *Lord Belhaven*, 5 F. (H.L.) 13. I shall therefore repel the 1st, 3rd, 4th, and 6th pleas for the defender; pronounce a finding in the sense above indicated as to the principle upon which the redemption price should be ascertained; and *quoad ultra* continue the cause. If leave to reclaim is desired, I will of course grant it."

Thereafter the Lord Ordinary allowed a proof, and on 1st July 1905 pronounced this interlocutor:—"Finds and declares that the pursuers are entitled to redeem the casualties which may hereafter become due and payable or exigible to the defender, as superior of the subjects and others described in the summons, for the said subjects, and decerns: And further, finds and declares that the redemption price of the said casualties amounts to £101, 5s. sterling, being the amount of the highest casualty estimated as at the date of the signeting of the summons, with an addition of fifty per cent., and decerns: *Quoad ultra* continues the cause: On the motion of the pursuers grants leave to reclaim."

Opinion—"On 7th September 1904 the subjects in question were not let, and did not produce rent to the pursuers, who were in the natural possession of them. The problem therefore is to ascertain 'the sum for which they might then be let.' (*Blantyre* v. *Dunn*, 20 D. 1188, Lord Curriehill, 1198.) This clearly involves an estimate of some sort, and one must consider upon what basis the estimate ought to be made. The decided cases establish that a feu is within the expression in the Act 1469, c. 36, 'as the lands are set,' and that when the lands are sub-feued the stipulated *reddendo*, if adequate and not illusory, forms the measure of the superior's claim for a composition, and not the rental actually derived by the feuar. (*E. of Home*, 5 Fr. (H.L.) 13, Lord Davey, 16; *City of Aberdeen Land Association, Limited*, 6 Fr. 1067.) The subjects here in question were, at the date at which the casualty falls to be assessed, admittedly and undoubtedly 'a building site,' although they were practically bare at the time. They had been covered with buildings for many years prior to 1904, and are now so covered, and their appropriate use was as a site for buildings. Now, I think that the result of the evidence is that a fair feu-duty, if these then vacant lands had been sub-feued in 1904, would have been not less than £67, 10s., and I consider that that must be taken as 'the sum for which they might then be let.' It represents, in my judgment, the true yearly value to the pursuers, or to anyone whom they had put in their place, of this building site at the time. Mr Craigie pointed out that by the terms of their titles the pursuers are prohibited from sub-feuing without the consent of the superior, but while,

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of course, the superior could not compel the pursuers to feu, the state of the title does not appear to me to affect the legitimacy of referring to the feu-duty which might have been obtained if the prohibition had been non-existent, or had been waived by the superior, in order to estimate the true yearly value of the ground at the date in question. Mr Craigie further argued that, in fixing the amount of the composition I must have regard to the rent which could have been got for the subjects in 1904 upon a lease for one year only. I know of no authority for this proposition, which I consider to be unsound, and which would, I apprehend, lead to extraordinary results if universally applied. The pursuers' proposal is to treat the subjects as if they had been let for one year only for a purpose to which they never were put in fact, and which was not their appropriate use, viz.—as a store yard for a contractor or a builder, or for some other similar purpose. This seems to me to err in favour of the vassal as gravely as the defender's original proposition, embodied in his sixth plea-in-law, erred in favour of the superior. Mr Craigie laid great stress upon the view that 'wherever and so far as a payment or the conditions on the exercise of a right are determined by statute, there is no room for equitable considerations in applying it' (per Lord Davey in *E. of Home*, 5 Fr. (H.L.), at p. 16); and similar doctrine may be found in the case of *Lord Belhaven*, 23 R. 423, which was decided upon a construction of the Aberdeen Act. But in these cases there were actual rents or royalties during the years respectively in question, and the Court, in holding that these must be taken as fixing the amount of the composition, pointed out the error, in such circumstances, of departing from the plain direction of an Act, and substituting, upon considerations of supposed equity, for the actual rent of the year a sum arrived at either by taking an average of the rents of other years or by way of a percentage upon a basis of capitalisation. The doctrine therefore which I entirely accept seems to me to have no application to the present case, where I find no actual rent, and must arrive, by some method of estimation, at what the 'yeir's mail' should be held to be. I do not think that the present case is precisely governed by any of the preceding decisions, because the facts are different and peculiar; but the conclusion which I have reached seems to me to be in harmony with the principles laid down in those cases. I therefore assess the composition at the sum of £101, 5s., being the sum of £67, 10s. with an addition of 50 per cent., and find and declare accordingly."

The pursuers reclaimed. In the course of the hearing in the Inner House it was pointed out that the Lord Ordinary had not dealt separately with the part of the subjects actually let (a temporary building let as a hall) at £4, 7s. 6d., but parties agreed that this was a small matter, and that its not being dealt with separately was of no moment.

Argued for pursuers—What had to be determined was the sum for which the lands might have been let at September 7, 1904, if let on a lease of ordinary duration (not necessarily, as the Lord Ordinary had represented their argument, on a lease for one year only)—*Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188, Lord Curriehill at 1198. In the same street an adjoining stance was let as a builder's yard on a five years' lease at £10 per annum, and the proportionate yearly value of the ground in question was not more than £13. The Lord Ordinary had taken as the sum for which the ground might be let the feu-duty which he estimated would have been obtained if the lands had been sub-feued in 1904. An estimated feu-duty had never been taken as the annual letting value. He had reached the sum of £67, 10s. by taking 5 per cent. on the purchase price of £1350—a price which represented not merely the ground but also the buildings on it at the date of purchase. This method of arriving at the yearly value was contrary to *Earl of Home* v. *Lord Belhaven and Stenton*, May 25, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607; and *City of Aberdeen Land Association, Limited* v. *Magistrates of Aberdeen*, July 2, 1904, 6 F. 1067, 41 S.L.R. 647. Further, as regarded about two-thirds of the ground in question, there was a prohibition against subinfeudation; of this the Lord Ordinary, when he pronounced the interlocutor of 8th March, was not aware—that portion had no "potentialities and capacities in the direction of feuing." In estimating its yearly value the ground ought not to be treated as a building site—the vassals might, after the action was raised, have changed their minds and not built. That a vassal proposed to build did not affect the basis of calculating the redemption price of casualties—*School Board of Neilston* v. *Graham*, November 16, 1887, 15 R. 44, 25 S.L.R. 51. [Lord Kyllachy asked for a reference to *Cockburn Ross* v. *Governors of George Heriot's Hospital*, June 6, 1815, F.C. App., 6 Pat. App. 640, 2 Ross's Leading Cases (Land Rights) 193.]

Argued for the defender—The sum for which the land might be let—the principle laid down by Lord Curriehill in *Blantyre* v. *Dunn*, *supra*—must form the basis of the redemption price, because here there was no actual rent—*Stewart* v. *Bulloch*, January 14, 1881, 8 R. 384, 18 S.L.R. 240. For this reason too *Home* v. *Belhaven*, *supra*, and similar cases, were inapplicable. The prohibition against subinfeudation applied only to about one-third not two-thirds of the ground, but in any case it could not affect the annual value of the ground, for it might have been let on a long lease—long enough to make it worth while the tenant building—99 or even 999 years; feu-duties and tack-duties equally fell under the Act of 1469, cap. 36; and a feu was but a perpetual lease—Stair, ii, 3, 34, ii, 4, 16, ii, 4, 21. The ground had for many years been dedicated as a building site, and had at the raising of the action again begun to be applied as such. This distin-

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guished it from *The School Board of Neilston*, *supra*, and it fell under the saving clause of the Lord Justice-Clerk's opinion therein. That case, moreover, dealt with a ground annual, a *debitum fundi*, not with a contract of location. The commencement of building operations showed that to the pursuer the value was as a building site, and the open market was not necessarily the test of value—*M'Laren* v. *Burns*, February 18, 1886, 13 R. 580, 23 S.L.R. 398; *Hill* v. *Caledonian Railway*, December 21, 1877, 5 R. 386. To ascertain the appropriate use of the ground and the year's rent therefor, the whole year must be looked at, not one isolated day in it when it happened to be bare—*Houstoun* v. *Buchanan*, March 1, 1892, 19 R. 524, 29 S.L.R. 436.

At advising—

LORD JUSTICE-CLERK—The subject in respect to which a casualty has to be fixed in this case is one which up to 1904 was occupied by buildings, and which, although it was not occupied by buildings at the date of the summons, was in an unoccupied state solely because the buildings were pulled down with a view to the immediate erection of new buildings which have since been placed upon the ground. It was therefore plainly a building site, and the question to be decided is for what could it be let at the date of the raising of the action in these circumstances. The pursuers maintain that this should be ascertained by a consideration of what could be got for the site, not as a building stance but as a piece of bare ground let for a year for some temporary purpose, such as a builder's yard or any similar use to which a piece of ground on which there was no immediate prospect of buildings being put up might be put for a time. I can see no ground for taking any such course in estimating the fair value from year to year of this ground, which was only for the moment a site without buildings actually standing on it, but which never for any year of time stood in that position. The facts in this case are peculiar, and I agree with the Lord Ordinary that it cannot be ruled by any previous decision. But I agree with him also that in taking the course he has done, he infringes in no way any principle on which any of the decided cases is based. I think the assessment of the fair feu-duty at the sum at which he has fixed it, is a perfectly fair assessment on the data before him, and must be taken as "the sum for which they might then be let."

I would therefore move that his judgment be affirmed.

LORD KYLLACHY—I am of the same opinion. I am entirely satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Craigie, K.C.—J. D. Millar. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defender (Respondent)—Wilson, K.C.—Chree. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, February 10.

SECOND DIVISION.

CORBET'S TRUSTEES *v.* ELLIOTT'S TRUSTEES AND OTHERS.

Succession—Vesting—Vesting subject to Defeasance—Conditional Institution of Class Members of which not Ascertained—Direction to Sell and Divide—Effect on Postponement of Vesting.

A truster directed his trustees to hold his heritable property and apply the annual proceeds for the maintenance of A, declaring that if A should be survived by lawful issue his trustees should hold the heritable property and apply the proceeds for the maintenance and education of said issue, and should convey it to said issue equally on their attaining majority; but in the event of A not having lawful issue, or of his issue dying before majority, then his trustees were to "thereupon sell said heritable property and divide the free proceeds thereof as follows:—viz., one-fourth part thereof to the children of B equally, one-fourth to the children of C equally, one-fourth to E, one-fourth to F, whom failing to his children equally *per capita*." A survived the testator and died unmarried.

In a special case dealing with the provisions to B's children, *held* that vesting was not postponed till the death of A, but took place *a morte testatoris* in the children of B alive at the time of the testator's death, subject to defeasance in the event of A dying leaving issue.

Forbes v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1, *commented on*.

Succession—Vesting—Uniform Period of Vesting—No Presumption in favour of.

Per Lord Kyllachy—"I think it is clear both on principle and authority that there is no general presumption as against vesting of different provisions at different periods."

Succession—Vesting—Destination to Issue—Contingencies depending on Birth or Survivance of Issue—Conditional Institution of Issue—Suspensive or Resolutive Condition.

Per Lord Kyllachy—"It is now, I apprehend, settled law that destinations to issue or contingencies depending on the birth or survivance of issue operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event of no issue in fact existing.

Thompson's Trustees v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346,

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and *Wylie's Trustees* v. *Wylie and Others*, 29th November 1902 (reported *infra*), *referred to.*

The Reverend Adam Corbet, who died on 11th October 1896, left a trust-disposition and settlement by which he conveyed his whole means and estate to trustees for various purposes. The tenth purpose was in the following terms:—"I direct my trustees to hold and manage my heritable properties in Aberdeen, including feu-duties and ground-rents there belonging to me, and expend and apply the free yearly proceeds and revenue thereof for the maintenance and comfort of my half-brother Robert Corbet, commencing at the first term of Whitsunday or Martinmas after my death, and subject to this declaration, viz., that the interest of the said Robert Corbet in the same shall be purely alimentary, and shall not be assignable by him, or attachable for his debts or deeds, declaring that if the said Robert Corbet shall have and be survived by lawful issue, my trustees shall hold and manage said heritable property, ground-rents, and feu-duties, and expend and apply the free annual revenues or proceeds thereof for the maintenance, upbringing, and education of said issue, and shall convey said heritable property, feu-duties, and ground-rents to said issue equally on their attaining majority; but that if the said Robert Corbet shall not have lawful issue, or having lawful issue, that all of them shall die before majority, my trustees shall thereupon sell said heritable property, feu-duties, and ground-rents, and divide the free proceeds thereof as follows, viz., one-fourth part thereof to the children of the said James Corbet equally, one-fourth part thereof to the children of the said Mrs Christian Corbet or Davidson equally, one-fourth part thereof to the said Mary Frances Henry, and one-fourth part thereof to the said William Stewart—whom failing, to his children equally *per capita*."

Robert Corbet died on 29th April 1904 unmarried. James Corbet died on 20th August 1892. He had a family of five, viz., one son and four daughters. The son predeceased the truster unmarried; two daughters survived the truster, but predeceased the liferenter Robert Corbet, leaving representatives; two daughters survived the truster and the liferenter Robert Corbet.

A special case was brought to determine the rights of James Corbet's children and their representatives under the tenth purpose of the settlement. The first parties to the case were the Rev. Adam Corbet's trustees, the second, third, fourth, fifth, sixth, seventh, and eighth parties were the representatives of the two daughters who had predeceased the liferenter, the ninth parties were the two daughters who survived the liferenter.

The questions of law submitted to the Court were, *inter alia*—"(1) Did the one-fourth of the estate of the late Dr Adam Corbet destined to the children of James Corbet by the tenth purpose of the said trust-disposition and deed of settlement vest *a morte testatoris* in the children of Dr James Corbet alive at the death of the truster, but subject to defeasance in the event of the said Robert Corbet dying leaving issue? or (2) Was vesting of the said one-fourth postponed till the death of Robert Corbet the liferenter?"

Argued for the second, &c., parties—There was vesting *a morte testatoris* in James' children subject to defeasance in the event which did not happen of Robert leaving issue—*Snell's Trustees* v. *Morrison*, November 4, 1875, 4 R. 709; *Taylor, &c.* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, 15 S.L.R. 776; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The fact that the members of the class were not finally ascertained did not prevent vesting *a morte testatoris*—*Forbes* v. *Luckie*, January 26, 1838, 16 S. 374; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1. And the fact that the class took its vested right subject to defeasance was also immaterial—*Houston* v. *Houston's Trustees*, 1894, 1 S.L.T. 403, 2 S.L.T. 118; *Cumming's Trustees* v. *Anderson*, November 15, 1895, 23 R. 94, Lord M'Laren, p. 97, 33 S.L.R. 77. The direction to sell and divide did not postpone vesting—*Ballantyne's Trustees* v. *Kidd*, February 18, 1898, 25 R. 621, 35 S.L.R. 488. And the destination of William Stewart's share did not affect the present question, inasmuch as the conditional institution of his children did not suspend vesting in him and even if it did, there was no presumption of law in favour of the same period of vesting for all provisions under a settlement.

Argued for the ninth parties—Vesting was postponed until the death of Robert Corbet, because the estate, to one-fourth of which James Corbet's children became entitled, did not come into existence until that event—*Adam's Trustees* v. *Carrick*, June 18, 1896, 23 R. 828, 33 S.L.R. 620; *Graham's Trustees* v. *Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163; *Roberts' Trustees* v. *Roberts*, March 3, 1903, 5 F. 541, 40 S.L.R. 387; *Alves' Trustees* v. *Grant*, June 3, 1874, 1 R. 969, 11 S.L.R. 559. Vesting in a class *a morte* subject to defeasance could only take place where the members of the class were ascertained at the date of death—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, at 208, 26 S.L.R. 146. In the cases of *Snell's Trustees* and *Taylor, cit. sup.*, the question of the possibility of vesting in an unascertained class was not considered. The cases of *Corbett's Trustees* v. *Pollock*, June 18, 1901, 3 F. 963, 38 S.L.R. 723, and *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450, indicated that the doctrine of vesting subject to defeasance would not be extended to such a case as the present. The destination to William Stewart and his children must be read along with the destination to James Corbet's children, as there was a legal presumption in favour of a uniform period for the vesting of provisions under a settlement. Now, the conditional institution of William Stewart's children had the effect of postponing vesting in his case and there-

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fore also in the case of James Corbet's children.

LORD KYLLACHY—In this special case I am of opinion that the first question falls to be answered in the affirmative. Apart from the destination-over to the possible issue of the liferenter, there could, I apprehend, be no possible obstacle to vesting *a morte* in the existing children of James Corbet, and it is now, I apprehend, well settled that destinations to issue, or contingencies depending on the birth or survivance of issue, operate generally not as suspensive but as resolutive conditions, and have therefore no effect in the event which occurred here of no issue in fact existing. This principle—first recognised in the cases of *Snell's Trustees* v. *Morrison* (4 R. 709), and *Taylor* v. *Gilbert's Trustees* (5 R. (H.L.) 217)—was fully formulated in the opinions and accepted and applied by the whole Court in the recent case of *Thompson's Trustees* v. *Jamieson* (2 F. 479); and it appears to me to be decisive of the present question.

It is said that the children of James Corbet are here instituted as a class and not named individually; and that as the membership of the class might fluctuate between the death of the truster and the period of division, there could be no vesting *a morte* in a class which was thus in a sense indefinite. But it is now, I apprehend, too late to urge that particular argument. If not previously, it was expressly negatived in the case of *Forbes* v. *Luckie* (16 S. 374). And that case has been followed by several other cases of a later date—the accepted doctrine being that there may quite well be vesting *a morte* in the members of a class existing at the date of vesting, subject it may be to diminution of shares *pro tanto* if before the date of division new members of the class come into existence. All this will be found explained in Lord Corehouse's judgment in the case of *Forbes* v. *Luckie*, in the judgment of Lord Colonsay in the case of *Carleton* v. *Thomson* (5 Macph. (H.L.) 151), and in the judgment of Lord Cairns in the case of *Miller* v. *Finlay's M. C. Trustees* (2 R. (H.L.) 1).

It was also contended that vesting *a morte* was—as regards one of the shares of residue (a share not here in question)—excluded by the existence of a destination-over to the legatee's (W. Stewart's) issue, and that this being so there was a strong presumption against different periods of vesting with respect to different parts of the residue. To this, however, there are two answers. In the first place, I think it clear, both on principle and authority, that there is no general presumption as against vesting of different provisions at different periods. The scheme of the settlement may require or presume uniform vesting; but it is, I think, impossible to say that there is anything of that kind here. Further, and in the next place, it appears to me that upon the principle already referred to, accepted as I have said by the whole Court in the case of *Thompson's Trustees* v. *Jamieson*, the destination-over to William Stewart's children is entirely consistent with vesting *a morte* in William Stewart, subject to defeasance in the event of his dying before the period of payment leaving children. I had occasion to consider that question some years ago in the Outer House in the case of *Wylie's Trustees*, November 1902 (*reported infra, next case*) in which a similar question arose, and in which my judgment may be referred to. There was a reclaiming-note to this Division of the Court, but on the particular point in question the reclaiming-note was not, I understand, pressed.

LORD LOW—The questions in this case depend upon the construction to be put upon the tenth purpose of the trust-disposition and settlement of the deceased Rev. Adam Corbet, who died upon 11th October 1876. He there directed his trustees to hold his heritable properties in Aberdeen (which consisted of houses, building-ground, and feu-duties), and to apply the free yearly proceeds for the maintenance of his brother Robert Corbet as an alimentary provision, "declaring that if the said Robert Corbet shall have and be survived by lawful issue, my trustees shall hold and manage said heritable property and expend and apply the free annual proceeds thereof for the maintainance, upbringing, and education of said issue, and shall convey said heritable property to said issue equally on their attaining majority."

If, however, Robert Corbet should not have issue, or if they should all die before majority, the truster directed his trustees to sell the heritable properties and to divide the free proceeds into four parts, and to pay "one-fourth part to the children of the said James Corbet" (also a brother of the truster) "equally, one-fourth part to the children of the said Mrs Christian Corbet or Davidson" (a sister of the truster) "equally, one-fourth part to the said Mary Francis Henry" (a niece of the truster), "and one-fourth part to the said William Stewart" (a nephew of the truster), "whom failing equally to his children *per capita*."

Robert Corbet was never married, and died on 29th April 1904, and the question is whether the one-fourth of the price of the heritable properties destined to the children of James Corbet vested in them *a morte testatoris* or at the death of Robert Corbet.

It was contended, in the first place, that vesting, even subject to defeasance, could not take place in the children of James Corbet until Robert Corbet's death, because the estate to one-fourth of which they were given right did not come into existence until that event. That argument was founded upon the fact that if Robert Corbet left issue the trustees were directed to divide the actual heritable properties among such issue, and that it was only in the event of failure of such issue that the heritable properties were to be converted into money, which was the subject of the bequest to James Corbet's children and the other parties named. I do not think that the argument is sound, because it seems to me that the direction to sell was merely

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intended to simplify administration. The number of persons favoured in the event of Robert Corbet dying without issue might have been very considerable, and it is of course much more convenient to divide money among a number of people than land or houses.

Now, if the direction to sell at the particular date does not affect the question of vesting, the destination to be construed is, when stripped of superfluities, in form a very simple and familiar one. It is really a destination to Robert Corbet in liferent allenarly and to his children *nascituri* in fee, whom failing to the children of James Corbet. That is the kind of case to which the doctrine of vesting subject to defeasance has been held to be applicable; and the only ground upon which it was maintained that vesting subject to defeasance did not take place in the children of James Corbet at the truster's death was that the individuals composing this class — James Corbet's children — were not then ascertained, James Corbet being alive, and it being possible that additional children might be born to him.

That argument was founded upon the well-known exposition of the law of vesting subject to defeasance which was given by Lord President Inglis in the case of *Steel's Trustees* (16 R. 204). His Lordship there figured the case of a destination of a fund to the children of the testator in liferent allenarly and their children if any in fee, whom failing to another person or class of persons in absolute property, and his statement of the law applicable to such a case, upon a consideration of all the authorities, was, that "if the person or persons so called are known, or the individuals composing the class are ascertained at the death of the testator, the fee will vest in them, subject to defeasance, in whole or in part, in the event of the liferenters or any of them leaving issue; if they are not so known and ascertained, the fee will not vest until the occurrence of the event which will determine who are the persons called, or until the individuals composing the class are ascertained."

Now, if no more is meant by that passage than that where there is a destination to a class of persons there can be no vesting unless and until such a class comes into existence, then there is nothing in the Lord President's dictum inconsistent with the view that vesting took place in James Corbet's children *a morte testatoris*. If, however, what was meant was that where the destination is to the children of A, and A has children at the death of the testator, vesting cannot take place in them if it be possible that the number of the individuals composing the class may be increased by the subsequent birth of children, there is, so far as I can find, no prior authority for the proposition.

Now, I find in the decisions that in some cases a destination to the children of A has been held to vest the fund in the children existing at the death of the testator to the exclusion of children subsequently born, and in other cases in the children existing at the death of the testator and also in children subsequently born as they come into existence, but I find no case in which, in the absence of anything of the nature of a survivorship clause, or of a contingency personal to the legatees, vesting *a morte* has been negatived when children were then in existence, for the sole reason that the number of the children might be increased by subsequent births.

The leading cases upon the subject appear to me to be *Forbes* v. *Luckie*, 16 S. 374; *Carleton* v. *Thomson*, 5 Macph. (H.L.) 151; and *Miller* v. *Finlay's Trustees*, 2 R. (H.L.) 1.

In the first of these cases the testator directed his executors to pay the interest of the estate to his daughter Mrs Lawrie, and after her death "to pay the whole remainder and residue of my estate to the whole children of the said Mrs Lawrie to be lawfully procreated of her body, share and share alike." The testator died in 1811, at which date Mrs Lawrie had two children. Both of these children predeceased Mrs Lawrie, who survived until 1836 but had no other children. It was held that the residue had vested in the two children at the death of the testator. It is plain that that conclusion could not have been arrived at if vesting depended upon whether the whole individuals composing the favoured class had been ascertained, because Mrs Lawrie might have given birth to children after the death of the testator. The ground of judgment was put very shortly by Lord Fullarton, who said that he saw no reason "for denying effect to words, although relating to children to be procreated, which would confessedly have created a vested right in an individual named."

In *Carleton* v. *Thomson*, Lord Colonsay, who delivered the judgment of the House, after referring with approval to *Forbes* v. *Luckie*, stated the law in the following terms:—"The circumstance that some of the members of the favoured class were unborn at the testator's death is no obstacle to the right vesting in each of them so soon as they respectively come into existence, although the amount of the benefit to accrue to each may not be then ascertainable. That is quite settled."

That is a very distinct and unequivocal statement of the law.

The case of *Miller* v. *Finlay's Trustees* is a somewhat striking illustration of the doctrine that the postponement of the period of payment until the termination of liferent rights, will not prevent vesting in a favoured class of feears, even although it is possible that the members composing the class may be increased in numbers between the death of the testator and the termination of the liferents. The case related to an *inter vivos* trust, the truster having disponed a heritable property to trustees. The purposes of the trust were for payment of the yearly income to the truster during his life, and after his death to his wife if she should survive him, and "after the determination of the foresaid liferents in trust for the whole lawful children of the present marriage" between the truster and his wife, "share and share

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alike." It was further declared that "the fee or principal of the shares of the said children shall be payable after the determination of the said liferents, and after the whole children who shall have survived" the spouses "and who shall be alive shall have attained majority."

This Court held that nothing vested in the children until the termination of the liferents, the main ground of judgment being that the declaration which I have quoted in regard to the fee or principal of the shares amounted to a condition of survivorship. The House of Lords, however, held that vesting took place at the date when the trust was constituted, in children then born and in others as they came into existence.

It was argued that in all these cases the children in whom vesting was held to have taken place were institutes, whereas here the question arises in regard to conditional institutes who are to take only in the event of failure of issue of the liferenter. I do not think that that distinction is well founded. In cases similar to the present, in which the doctrine of vesting subject to defeasance has been applied, the question has always arisen because the class called as institutes did not exist at the death of the testator and might never come into existence. Of course if they do come into existence the bequest in their favour will take effect. But that consideration has been held not to prevent vesting taking place in the conditional institutes, subject to defeasance in the event of the children first called coming into existence. In other words the conditional institutes take subject to the condition that they shall be divested if the class instituted comes into existence. That condition, however, is resolutive and not suspensive of the right, and therefore to suspend vesting there must be something in the destination to the conditional institutes themselves—such as a survivorship clause—which would in any event, even if they had been institutes, have prevented them taking an immediate right. I think that the authorities to which I have referred show that there is no element of that kind in this case, and accordingly I concur with your Lordship that the first question should be answered in the affirmative.

I have only a word to add in regard to what Lord Kyllachy said about the destination of one fourth of the fund to "William Stewart, whom failing, to his children *per capita*." I by no means desire to indicate any disagreement with the views expressed by Lord Kyllachy, but merely to say that the question of the effect of that destination appears to me to be one upon which there is a great deal to be said upon both sides, and that I have not formed any opinion upon the subject because it did not appear to me to have any direct bearing upon the present case.

LORD STORMONTH DARLING—I think the first question should be answered in the affirmative.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the first question in the affirmative.

Counsel for First Parties — Ingram. Agents—Dalgleish & Dobbie, W.S.

Counsel for Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Parties—Macfarlane, K.C.—Grainger Stewart—Nicolson—J. H. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.—F. J. Martin, W.S.

Counsel for Ninth Parties—M'Lennan, K.C.—Chree. Agent—Alexander Ross, S.S.C.

Saturday, November 29, 1902.

OUTER HOUSE.

[Lord Kyllachy, Ordinary.

WYLIE'S TRUSTEES *v.* WYLIE AND OTHERS.

(Referred to in preceding case.)

Succession — Vesting — Vesting subject to Defeasance—Conditional Institution of Issue—Suspensive and Resolutive Conditions.

A marriage contract provided that the trustees should during the subsistence of the marriage pay to the wife or to her husband if he survived her the annual proceeds of the trust funds, and with regard to the capital that it should "belong to the child or children of the said intended marriage, . . . share and share alike, . . . declaring that if any child of the said intended marriage shall have predeceased the said term of payment" (in the event which happened the death of the liferentrix) "leaving lawful issue, such issue shall succeed to the share of such child so predeceasing."

The liferentrix survived her husband and died survived by several children and predeceased by a son A, who was survived by a daughter B, who survived the liferentrix.

Held that a contingency depending merely upon the existence or survivance of issue fell to be read as a resolutive and not as a suspensive condition, and accordingly that a share of the capital vested originally in A, subject, however, to defeasance in the event, which happened, of his predeceasing the term of payment leaving lawful issue, and therefore that B took in her own right as conditional institute.

By a marriage contract it was provided that the trustees should during the subsistence of the marriage pay over to Mrs Elizabeth Crosbie or Wylie, the wife, or to her husband Alexander Henry Wylie, if he survived her (which he did not), the free interest or annual proceeds of the property thereby conveyed; "and with regard to the disposal of the capital or remainder of the principal of the said trust funds, when

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the same may become available, and of the free interest or annual proceeds to accrue thereon, after the death of the longest liver of the said Elizabeth Crosbie and Alexander Henry Wylie . . . the said capital and proceeds thereof shall belong to the child or children of the said intended marriage and be payable at" [as matters turned out, at the death of the liferentrix Mrs Wylie] . . . declaring that "if any child of the said intended marriage shall have predeceased the said term of payment leaving lawful issue, such lawful issue shall succeed to the share of such child so predeceasing."

Mrs Wylie died in 1901 predeceased by her husband and survived by six children, and predeceased by one, Napier Wylie, who died in 1900 married and leaving an only child Miss A. M. Wylie. In 1897 Napier Wylie had assigned to the Scottish Metropolitan Life Assurance Company, Limited, his whole right and interest in the marriage contract fund.

In an action of multiplepoinding raised by the marriage contract trustees claims were lodged by the Scottish Metropolitan Life Assurance Company, Limited, and by Miss A. M. Wylie. The former contended that a right to one-seventh share of the funds vested in Napier Wylie so as to pass to his assignees in virtue of the assignation of 1897; the latter contended that she took the one-seventh share in her own right as conditional institute.

LORD KYLLACHY—. . . . "It remains to consider only one other question, the question, namely, whether the share of Mr Napier Wylie, who predeceased his mother, vested in him so as to pass to his assignees or creditors. The affirmative is maintained by an insurance company from whom he seems to have borrowed money. The negative is maintained on behalf of his only child—a daughter—who claims to take his share in her own right as conditional institute.

"I am of opinion that the latter is the correct view. A child existing, and being in the event which happened expressly instituted, it is not, I think, possible to hold that Mr Napier Wylie had an absolute vested right which he could assign to the child's prejudice.

"It may be conceded that, apart from a single contingency, Napier's right was vested and absolute. But there was one contingency which did affect his right, namely, that introduced by the clause of the contract which declares as follows:—'Declaring that if any child of the said intended marriage shall have predeceased the said term of payment leaving lawful issue, such lawful issue shall succeed to the share of such child so predeceasing.'

"It seems to me that this clause introduces a real contingency, a contingency depending on a conditional institution, which cannot by any stretch of construction be ignored or treated as inoperative. There was indeed a doctrine which was some time ago in favour and which determined the decisions in such cases as *Hay's Trustees* v. *Hay*, 17 R. 961, and *Ross's Trustees* v. *Ross*, 12 R. 378, a doctrine to the effect that destinations to heirs or issue did not constitute proper conditional institutions, but were merely the expressions of derivative rights, and therefore practically inoperative. But it must, I think, now be acknowleged that that doctrine is no longer tenable. It was emphatically disapproved in all the opinions in the House of Lords in the case of *Bowman* v. *Bowman* 1 F. (H.L.) 69, and still more recently in the opinions of at least a large majority of the whole Court here in the case of *Thompson's Trustees* v. *Jamieson*, 2 F. 470. The latest case on the subject is the case of *Parlane's Trustees* v. *Parlane*, 4 F. 805, where this is acknowledged by Lord M'Laren with the assent of the other Judges of the First Division.

"Neither again can the contingency be in this case overcome by the conditional institution being referred—as was found possible in many cases, notably in the case of *Bowman*—to some period other than the period of division. In all—or nearly all—the cases quoted by Mr Chree that was the ground of judgment, or if I might say so the door of escape. But that is here impossible. It is not merely the doctrine of *Young* v. *Robertson*, 24 D. (H.L.) 1, which is here involved; it is the express words of the deed. For the conditional institution here is expressly referable to the predecease by the primary institute of the period of division.

"The question therefore is what is the effect of this real and operative, and as I think quite unambiguous, conditional institution of Napier Wylie's issue? Up to a recent date and according I think to a preponderance of authority going back for a long period, the result would have been suspension of vesting—suspension which would in this case have operated to defeat Napier Wylie's right even if he had died without issue. One does not wonder that such a result was always reached with reluctance, but it was, as I have said, the result reached in I think I may say many cases going back for a long period.

"Fortunately however this Court, with the approval of the House of Lords, has of late years found the means of redressing this anomaly, and of doing so without unnecessarily postponing vesting, and without on the other hand sacrificing the interests of issue if they existed. For it has now I think to be taken as an established rule of construction that a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition. In other words, in a case like the present there is no suspension of vesting, but vesting subject to defeasance—defeasance in the event of the primary legatee leaving issue. This general doctrine was expressly affirmed by at least five of the Judges in the recent case of *Thompson's Trustees* v. *Jamieson*, 2 F. 470, and was in effect I think affirmed by the whole Court. I may add that it had previously been recognised if not formulated in various cases. Particularly it was recognised and formed an alternative ground

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of judgment in Lord Rutherfurd Clark's opinion in the case of *Byars' Trustees*, 14 R. 1034—a case which I rather think has been a good deal misunderstood.

"The result is that as regards Napier's share under the marriage contract it goes to his child, and that the competing claims fall to be repelled."

The Lord Ordinary pronounced an interlocutor upholding the contention of Miss A. M. Wylie.

Counsel for Pursuers and Real Raisers—Younger — T. B. Morison. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Scottish Metropolitan Life Assurance Company — Dundas, K.C. —Chree. Agents—Wishart & Sanderson, W.S.

Counsel for Miss A. M. Wylie—Fleming —Blackburn. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, February 20.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth-Darling.)

MAGISTRATES OF CRIEFF *v.* YOUNG.

Justiciary Cases—Small Debt Appeal—Oppression—Deviation from Statutory Form—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 141 *and* 339 *—Action by Commissioners for Expense of Street Paving—Appeal Against "Any Order, Deliverance, or Act of the Commissioners"—Proof Allowed that Work was Improperly Executed—Small Debt (Scotland) Act* 1837 (7 *Will. IV, and* 1 *Vict. cap.* 41), *sec.* 31.

In a small debt action for the proportion of the cost of paving the street applicable to the defender's property which abutted thereon, the defence was stated that the operations in question had been improperly executed and had damaged the property. The Sheriff-Substitute allowed a proof, and repelled an objection by the pursuers to the competency thereof, taken on the ground that the defender had not appealed at the time and in the manner provided by the Burgh Police (Scotland) Act 1892, sec. 339, and that the pursuers consequently were entitled to decree without inquiry. After proof and on consideration of a report from a civil engineer to whom he had remitted, the Sheriff-Substitute dismissed the action. The pursuers appealed. *Held* that the small debt appeal was incompetent, as there was no oppression or deviation in point of form from the statutory enactments on the part of the Sheriff, but at most only an error in law.

Opinions (*per* Lord Justice-Clerk and Lord Stormonth Darling) that the appeal under section 339 of the Burgh Police (Scotland) Act 1892 was not the respondent's remedy in such a case as was here disclosed.

The Small Debt (Scotland) Act 1837 (7 Will. IV, and 1 Vict. cap. 41), sec. 31, which gives an appeal against any decree pronounced under the Act to the next Circuit Court of Justiciary, and failing such Court to the High Court of Justiciary at Edinburgh, contains this proviso—"Provided always that such appeal shall be competent only when founded on the ground of corruption or malice or oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts, section 141—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the Commissioners, cause footways before their properties respectively on the side of such street to be made, and to be well and sufficiently paved, or constructed with such material and in such manner and form and of such breadth as the Commissioners shall direct. . . ."

Section 339—"Any person liable to pay or to contribute towards the expense of any work ordered or required by the Commissioners under this Act, and any person whose property may be affected, or who thinks himself aggrieved by any order, or resolution, or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Sheriff or to the Court of Session by lodging a note of appeal within fourteen days after intimation of the order or deliverance of the Commissioners complained of, or within fourteen days after the act of the Commissioners complained of, with the sheriff-clerk of the county in which the burgh is situated if the appeal is made to the Sheriff, or with any principal Clerk of Session at Edinburgh if the appeal is made to the Court of Session, which note of appeal shall state the grounds of such appeal, and be signed by the appellant or his counsel or agent, and the Sheriff or Court shall order a copy of the appeal to be served on the Clerk to the Commissioners, and appoint him within six days after such service to lodge answers thereto, and shall thereafter hear parties and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, varying, or redressing the order, resolution, deliverance, or act appealed against, and shall award such costs to either of the parties as the Sheriff or Court shall think fit, provided always that the judgment of the Sheriff-Substitute shall be subject to review by the Sheriff, and, subject to this

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appeal to the Sheriff, the judgment of the Sheriff-Substitute shall be final, and not subject to review by any other Court."

This was an appeal at the instance of the Provost, Magistrates, and Councillors of the burgh of Crieff, in an action brought by them in the Small Debt Court at Perth against Robert Young, 36 East High Street, Crieff. The Sheriff-Substitute (SYM) had dismissed the action.

The action was raised on 26th July 1904, and concluded for payment of £8, 6s. 5½d., which the appellants averred was due to them by the respondent as his share of the cost incurred by the appellants in laying a concrete pavement in East High Street, Crieff. The appellants had served notices on the respondent and others requiring them to lay the pavement in terms of sec. 141 of the Burgh Police (Scotland) Act, and on failure to comply therewith had carried out the work themselves.

The respondent defended the action and stated as his grounds for doing so that "the work executed by the pursuers has not been done in a proper and workmanlike manner, in respect that the defender's property has been unnecessarily damaged by reason of the levels of the pavement being heightened.—The alterations have not been carried out in accordance with the notice served upon the defender.—The alterations have not been carried out in accordance with the plans referred to in the notice served upon the defender."

The case was called in Court on 12th August 1904. Subsequently the Sheriff-Substitute allowed a proof, and after several continuations proof was ultimately appointed to proceed on 13th December 1904. The appellants averred that on that day their agent "stated a preliminary objection to the effect that the respondent not having appealed in the manner provided by the Burgh Police Act 1892, was not entitled to a proof. The Sheriff-Substitute refused to consider the preliminary objection, and ordered the proof to proceed under reservation of questions of competency and relevancy. Evidence was accordingly led on that day, and the case was continued till 20th January 1905 for hearing. The book containing the roll of small debt causes bears that on that date the case was taken to avizandum, but in point of fact the case was continued indefinitely to await the conclusion of the proof in a similar case pending in the Small Debt Court at the instance of the appellants against Andrew M'Gregor, V.S., Crieff. On 27th February the appellants' agent enrolled the case, and moved that in respect of the extent of the proof which had been led, and the long period of time which it occupied, and for other reasons, the Sheriff should remit the case to the ordinary roll. This motion was refused. The agents of the parties were heard on the proof, and thereafter the Sheriff-Substitute, instead of deciding the case upon the evidence which he had heard, remitted without the appellants' consent to Mr G. P. K. Young, C.E., Perth, 'to see suitable remedy for pavement carried out,' and continued the case till 2nd May. Mr Young presented a report to the Sheriff suggesting that certain alterations should be carried out. On 2nd May the case was continued till 5th May for hearing. On 5th May the parties were heard, and thereafter the Sheriff-Substitute made another remit to Mr Young without the appellants' consent to see the work mentioned in his report carried out to his satisfaction, and to report further. No intimation of the work proposed by Mr Young was made to the appellants, nor was any order made by the Sheriff requiring them to carry it out. Mr Young made no further report. The case was enrolled on 2nd June, but was continued till 9th June, when parties were heard and avizandum made. On 27th June a judgment was pronounced by the Sheriff-Substitute in which he stated that having been given to understand that the appellants did not desire to carry out the work, which he had previously intimated would be necessary to be done before he could give decree, he was of opinion that they were not entitled to decree in the circumstances. He therefore dismissed the case and awarded the defender expenses. The appellants have suffered and will suffer great prejudice by the actings of the Sheriff-Substitute. The respondent is only one of a number of ratepayers who are liable for the cost of laying down the pavement so far as it is opposite to their property. Due notice in terms of the Burgh Police Act 1892 was given to all the parties concerned, and intimation made to them of their right to appeal against the resolution of the appellants as provided in said statute. No appeal was taken by any of the parties against the work proposed to be done or the method of carrying it out, and it was incompetent for the respondent after the work was done to plead in defence to an action for payment of his share of the cost that the work had been carried out to the injury of his property. Several ratepayers besides the respondent are still due to the appellants their respective shares of the cost of paving. If the Sheriff-Substitute's judgment stands the appellants will be unable to recover the expense incurred by them under and in accordance with their statutory powers."

The appellants complained of the decree of the Sheriff-Substitute for the following reasons:—"Firstly, the Sheriff-Substitute refused to consider the argument of the appellants' agent when he proposed to debate the preliminary plea as to the competency of the respondent's leading evidence, but ordered the proof to proceed. Secondly, notwithstanding that evidence was led at considerable length the Sheriff-Substitute refused to decide the case on the facts before him, but remitted to Mr Young to see that the pursuers provided a suitable remedy for the alleged defects without having required the appellants to provide any such remedy. Thirdly, on Mr Young's report being presented, the Sheriff again remitted to him to see the whole alterations suggested by him carried out notwithstanding the appellants' objection.

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Fourthly, the appellants were never called upon to do the work, or at all events no order was pronounced by the Sheriff requiring them to do it. Fifthly, the Sheriff-Substitute refused to decide the case on its merits, but dismissed it on account of the appellants' non-fulfilment of a condition which he had not imposed upon them, and which he had no right to impose. Sixthly, the Sheriff-Substitute delayed pronouncing judgment for more than seven days after finally hearing parties in the case. Seventhly, the Sheriff-Substitute refused the motion of the appellants' agent to remit the case to the ordinary roll. Eighthly, the procedure adopted by the Sheriff-Substitute was *ultra vires*, and a deviation from the statutory forms, which caused substantial injustice to the appellants, and was oppressive within the meaning of sec. 31 of the Small Debt Act 1837 (1 Vict. cap. 41)."

Argued for the appellants—In the proceedings before the Sheriff there had been such variation from the statutory form as resulted in the prevention of substantial justice. The proceedings had also been incompetent. Section 339 of the statute gave a right of appeal, and if that appeal was not taken in the prescribed way the question could not be raised later in answer to an action for payment of the money due. The allowance of proof here was therefore incompetent. If the Sheriff was satisfied that notice had been duly given, and that the Commissioners had done the work in consequence of the defender's failure to do it himself, he was bound to give decree for the sum sued for without further inquiry. *Maclachlan* v. *Tennant*, May 4, 1871, 2 Coup. 45, 8 S.L.R. 497, was an example of the kind of incompetency which occurred in the proceedings here. The case was not decided on the evidence, but dismissed because the Commissioners had not done what they were never ordered by the Sheriff to do. There was a failure of the Sheriff-Substitute here to comply with the requirements of the Small Debt Amendment Act 1889, section 10, inasmuch as he did not give judgment within seven days after making avizandum.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK—This action was raised by the Corporation of the town of Crieff to recover a certain sum of money which they say they had expended on behalf of the respondent in paving the street, and which he was liable to repay. I presume that what it was proposed to do under the notice which was served on the respondent was to be done according to plans and specifications which were in the hands of the magistrates, and were open to the inspection of all parties interested. The Corporation did the work themselves, as in the circumstances they were entitled to do. The work so done must have been done either in conformity with the plans and specifications or not in conformity with them. Which was the case here we do not know. The municipality called on the respondent to pay for it, and they say they were entitled to a decree *de plano*, and that the Sheriff-Substitute acted oppressively in not giving this decree. The Sheriff-Substitute, after a proof, found that the work had not been properly executed, and he gave the municipality an opportunity of putting it right. It is not said that he did anything wrong in giving them this opportunity, but it is said that no proof ought to have been allowed. I think he was entitled to allow a proof; but if he was not that was merely a mistake in law with which we cannot interfere. The Sheriff-Substitute was satisfied on the proof that something remained to be done to put matters right before the respondent could be called upon to pay, and he remitted to Mr Young, C.E., Perth, to see it carried out. There was nothing oppressive in remitting to a person to look at the plans and specifications and see that they were complied with. On the remit Mr Young reported what ought to be done, and the municipality refused to do it. The Sheriff-Substitute thereupon refused to give decree for the sum claimed.

If it be true that the work was not done which ought to have been done, there was nothing oppressive in refusing decree. If the work had been properly done, there was a mistake in law with which we have nothing to do. I cannot see anything oppressive in what was done.

We are told that the respondent ought to have taken an appeal to the Sheriff under section 339 of the Burgh Police (Scotland) Act 1892. I cannot see how there was anything to appeal against under that section. The respondent was willing that the appellants should do the work, If he had found while the work was going on that something was being done which was not satisfactory he could not possibly appeal against that under section 339.

The appeal under section 339 must be against some order or resolution or deliverance. Here there was nothing of that kind to appeal against. If an appeal had been taken, what could the Court have been asked to set aside? The only basis for the argument is that section 339 says—"Any order, or resolution, or deliverance, or act of the Commissioners." I cannot take that word "act" as meaning something quite different from "order" or "deliverance." Further, it certainly cannot be intended to apply to some physical act. The appeal must be against something which can be laid on the table of the Court to which the appeal is taken. On the whole matter I am of opinion that none of the pleas stated ought to be sustained.

LORD KYLLACHY—I am of opinion with your Lordship that the appeal ought to be dismissed.

LORD STORMONTH DARLING — It must always be remembered that the grounds on which we can entertain an appeal from the Small Debt Court are very limited and really resolve into this, whatever name may be given to it, that some substantial injustice has been done. This appeal is taken

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upon grounds which it is attempted to bring under the head either of oppression or deviation from statutory form. I am of opinion that the appellants have entirely failed to show anything which can be called either the one or the other.

I also agree entirely with what your Lordship has said as to the respondent not being bound to find his remedy under section 339 of the Burgh Police Act.

The Court dismissed the appeal.

Counsel for the Appellants—D. Anderson. Agents—Alex. Campbell & Son, S.S.C.

Counsel for the Respondents — Munro. Agents—Philip & Greig, S.S.C.

Tuesday, February 20.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

CLAYTONS *v.* H.M. ADVOCATE.

Justiciary Cases—Fraud—Fraud in Connection with Betting on Horse-Races—Fraudulent Tampering with Post Letters—Relevancy.

An indictment set forth that A fraudulently obtained from B, a postman, letters consisting of envelopes which had been stamped with the official postmark indicating that they had been posted before noon on a certain day, and did in the afternoon of the same day enclose in the envelopes notes offering to make bets with C, a bookmaker, that certain horses would win certain races, which races A knew had already been run earlier in the same afternoon, and won by the said horses; that A transmitted by post the notes to C, and did thus pretend to C that he was offering *bona fide* bets on races which had not been run when the notes were written and posted, thereby inducing C to accept the bets so offered, and to pay to A the proceeds thereof, which he appropriated.

Held that the complaint was relevant —*Wood and White* v. *H.M. Advocate*, October 23, 1899, 3 Adam 64, 2 F. (J.C.) 6, 37 S.L.R. 18, *followed; H.M. Advocate* v. *Hodkinson and Morton*, March 24, 1903, 4 Adam 219, 40 S.L.R. 834, *commented on.*

Thomas Clayton and John Clayton, miners, Maddiston, Stirlingshire, were charged in the Sheriff Court of Stirling, Dumbarton, and Clackmannan at Falkirk, at the instance of H.M. Advocate, on an indictment which, *inter alia*, set forth—"(3) On 27th September 1905, place last above libelled, you did fraudulently obtain from the said George Andrew Gray a post letter consisting of an envelope addressed to John Morrison, Melville Street, Falkirk, which had been stamped with an official postmark indicating that it had been posted before noon on that day, and did on the afternoon of the same day enclose in said envelope a note offering to make bets with the said John Morrison that a horse named 'Bushy Boy' would win the Lambourne Welter Handicap Race, and a horse named 'Crepuscule' would win the Ilsley Selling Handicap Race, both at Newbury, Berkshire, which races had, as you knew, already been run earlier in the same afternoon, and had, as you knew, been won by the said horses respectively, and you did, time and place last libelled, transmit the said envelope with said note enclosed by post to the said John Morrison, and it having been received by him, you did thus pretend to him that you were offering *bona fide* bets on races which had not been run when the note was written and posted, and did induce him to accept the bets so offered, and to pay to you as the proceeds thereof in Falkirk on 28th September 1905 the sum of £5, 1s. 8d.; and (4) on 30th September 1905, place libelled on in the second charge, you did fraudulently obtain from the said George Andrew Gray two post letters, one being an envelope addressed to the said John Morrison, and the other an envelope addressed to James M'Cabe, 32 Philip Street, Bainsford, Falkirk, . . . [*the charge here was in similar terms to the preceding charge but dealing with bets on different horses at other race meetings*] . . . and did induce the said John Morrison to accept the bets so offered to him and to pay to you, as the proceeds thereof, in Falkirk, on 2nd October 1905, the sum of £2, 13s. 7d., and did induce the said James M'Cabe to accept the bets so offered to him, and to pay to you, as the proceeds thereof, in Falkirk, on 2nd October 1905, the sum of £6, which three sums mentioned in this and the preceding charge, amounting to £13, 15s. 3d., you appropriated."

On the 22nd of January 1906 the accused were called upon to plead before the Sheriff-Substitute at Falkirk (MOFFAT), when an objection to the relevancy of the indictment was stated on their behalf, to the effect that the third and fourth charges, above quoted, were defective, in respect that they contained no relevant allegation of anything amounting to a crime, according to the law of Scotland.

The Sheriff-Substitute having repelled this objection, the accused pleaded not guilty and were subsequently tried before the Sheriff-Substitute and a jury. The jury unanimously found them guilty of the said third and fourth charges of the indictment and the Sheriff-Substitute sentenced Thomas Clayton (who was also found guilty of the second charge in the indictment, not mentioned above, and not dealt with in the present suspension) to three months' imprisonment, and John Clayton to two months' imprisonment.

The accused brought a bill of suspension, and pleaded—"The warrant or sentence complained of should be suspended with expenses as craved, in respect (1) that the charges against the complainers were irrelevant, as no account should be taken at criminal (any more than at civil) law of gambling and betting transactions—*H.M. Advocate* v. *Hodkinson and Morton*,

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1903, Court of Justiciary Reports, vol. iv, p. 219. . . ."

Argued for the complainers—The policy of the civil law was to ignore betting or gambling transactions. Everything was to be done to discourage them. Accordingly, such contracts could not be enforced. Where there could be no contract there could be no crime. The civil and criminal law ought to go hand in hand, and Lord Young had stated in *H.M. Advocate* v. *Hodkinson and Morton*, March 24, 1903, 4 Adam 219, 40 S.L.R. 834, that the civil and criminal law were the same in this matter. In the case of *Wood and White* v. *H.M. Advocate*, October 23, 1899, 3 Adam 64, 2 F. (J.C.) 6, 37 S.L.R. 18, the point raised here was not argued, and therefore it could not be regarded as an authority for the respondent.

Argued for the respondent—The crime here consisted in fraudulently tampering with the letters. It made no difference that that was done in connection with betting or any other pursuit—*Wood and White* v. *H.M. Advocate* was exactly in point here, and covered this case. The only difference was that in the one case the fraud was committed by tampering with telegrams and the other with letters.

LORD JUSTICE-CLERK—I have no doubt that the complaint is relevant. Had it not been that there is a decided case which is practically the same as this one, and in which it was held that such an act as is charged here could be libelled as a crime at common law, I should have hesitated to decide this case at once, in view of the judgment of Lord Young in the Dumfries case of *Hodkinson*.

I have not had time to read the report of that case with care, and I do not know whether the circumstances there were at all similar to those in the present case. If they were different then that case is not in point here, but if they were the same then I cannot agree with what Lord Young is reported to have said. I do not think, however, that the words of Lord Young which are founded on were necessary to the decision of that case, while on the other hand the decision in the case of *Wood*, which is in point, appears to me to be quite sound, and I agree with it. There the Court, in similar circumstances, had no difficulty in holding that the charge was a good charge at common law.

It is said that the point argued here was not argued in the case of *Wood*. But the decision covers the present case, and I am of the same opinion as there stated, namely, that what is here charged was a crime. I therefore think that this bill of suspension should be refused.

LORD KYLLACHY—I am of the same opinion. The case is, I think, ruled by that of *Wood*, 3 Adam 64, and for myself I see no reason to doubt the soundness of the judgment in that case.

LORD STORMONTH DARLING—I concur. Perhaps it is right to observe that the observations of Lord Young in the case of *The Lord Advocate* v. *Hodkinson*, 4 Adam 219, are purely *obiter*.

The Court refused the bill of suspension.

Counsel for the Complainers — J. A. Christie. Agent — James F. Macdonald, S.S.C.

Counsel for the Respondent — Solicitor-General (Ure, K.C.)—W. Thomson. Agent —W. S. Haldane, W.S., Crown Agent.

Tuesday, February 20.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth-Darling.)

CLARK *v.* DYKES.

Justiciary Cases—Police—Gaming—Betting—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—"*House, Room, or Place*"—*Enclosure*—"*Act in any Manner in Conducting such Gaming*"—*Accused not the Occupier of Premises nor his Employee.*

A person was charged with a contravention of section 407 of the Burgh Police (Scotland) Act, in that he had conducted betting within a certain enclosed piece of ground. The enclosure was open to members of the public at certain times on payment of a penny each, was entered by a door in which an enumerating turnstile was fixed, and was fitted up as a quoiting ground, but the real purpose of the enclosure was for making bets in. The accused was not the tenant or occupier of the ground, nor employed by him, but the gatekeeper directed parties on entering, to where the accused was standing making bets, and gave them a card with particulars of regulations for betting. *Held* (1) that the enclosure was a "place," and (2) that the accused was a person "conducting such gaming or betting" therein within the meaning of the section.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 407, enacts—"It shall be lawful for the chief-constable or any constable of police, having good grounds for believing that any house, room, or place is kept or used as a gaming or betting-house, to enter such house, room, or place, and if needful to use force for the purpose of effecting such entry, and to take into custody all persons who shall be found therein, and to seize all tables for and instruments of gaming found in such house, room, or place, and all moneys or securities for money found therein; and the owner or keeper of such gaming or betting house, or other person having the care or management thereof, and also any person who shall act in any manner in conducting such gaming or betting, shall be liable in a penalty not exceeding £50, . . . and every person found within such premises without lawful excuse shall be liable in a penalty not exceeding £10."

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This was an appeal by way of stated case from the Burgh Police Court of Govan, in which Harry Clark, stoker, 25 Mair Street, Govan, the appellant, sought to have a conviction quashed which had been obtained against him at the instance of Thomas Dykes, writer, Glasgow, Burgh Prosecutor of Govan.

The complaint set forth—"That Harry Clark, stoker, residing at 25 Mair Street, Govan, did on the 26th and 28th days of April 1905, within the enclosed piece of ground or place situated in Lorne Street in the burgh of Govan, which piece of ground or place is enclosed by a wooden paling and door under lock and key, use said enclosed piece of ground or place as a betting-house for conducting betting, all contrary to section 407 of the Burgh Police (Scotland) Act 1892, whereby the said Harry Clark is liable in a penalty not exceeding £50, and, in default of immediate payment, to imprisonment for a period not exceeding two months."

It appeared that the appellant had been apprehended within the said enclosed piece of ground on 28th April 1905.

The Magistrate found the following facts proved:—"1. That the appellant admitted that he is a bookmaker, and had practised his calling off and on for at least five years.

"2. That the ground in question is a private enclosure situated at the corner of Lorne Street and Brand Street, Govan. That it is of a square shape, and consists of about 1100 square yards. That it is enclosed on the north and east by a bill-posting hoarding, 30 feet high, bounding said streets; on the south and west by gables of adjoining tenements, outhouses, and a high wooden fence. . . . That the ground is entered from Lorne Street by a door in the said hoarding, with an enumerating turnstile thereat, and said door is kept locked when the ground is not open to the public. That the enclosure is free of buildings or erections. That the said enclosure of 1100 square yards is part of a plot of ground of 2330 square yards, the remainder consisting of street and pavement.

"3. That Miss Annie Rush, 8 Montague Street, Rothesay, became the owner of the plot of ground on 2nd February 1904, paying for the same £327, and under burden of an existing feu-duty of £95, 12s. 9d. She stated that her intention was to have the ground built on.

"4. That the said enclosure was let to Alexander Eadie, 101 Maitland Street, Glasgow, for one year from 15th May 1904 at a rental of £25 per annum, and the said bill-posting hoarding on the north and east of said enclosure was let to the New Glasgow Bill-posting Company for the same period at a rent of £28 per annum, the bill-posting tenant being liable to removal on a month's notice. The combined rental is thus £53 per annum.

"5. That the said Alexander Eadie started business there about May 1904 under the name of the 'Lorne Quoiting Club,' which was painted on the door. There is no club, and the public were admitted to the said enclosure on payment of one penny at the turnstile, and there is no other charge.

"6. That the enclosure is suitable for quoiting, and that four quoiting pitches, each of the regulation length of 21 yards, have been marked off, and that quoits, a hammer for throwing, a rope for tugs-of-war, a putting ball, and iron pitchers, were in the said enclosure.

"7. That the said Alexander Eadie had in his employment John O'Neill, 114 Blackburn Street, Govan, who collected the admission money, and he was at the door on the two dates specified in the complaint. That the said Alexander Eadie was aware, and all the witnesses admitted, that betting men frequented the said enclosure.

"8. That from May 1904 to 1st April 1905 the said enclosure was generally open from about 11 a.m. to about 3 p.m. After 1st April 1905 the enclosure was also open from 5 o'clock p.m. till 6 o'clock p.m., and sometimes till 8 o'clock p.m., but few persons went there after 5 o'clock p.m.

"9. That on the 26th April 1905 the door was opened by the said John O'Neill between 10 o'clock and 11 o'clock a.m. and closed by him at 3·10 p.m., when the ground was empty. He opened the gate again at 5 o'clock p.m. and shut it at 8 o'clock p.m. After 5 o'clock p.m. only one person entered. On 28th April 1905 the door was opened by the said John O'Neill at 10·30 a.m., and the appellant was arrested within the enclosure at 1·40 p.m. of that date.

"10. That the appellant was present in the enclosure on said 26th April at 12·40 p.m. and remained there till 3 o'clock p.m. He was also present on said 28th April at 12·30 p.m. and remained until his arrest. That the appellant admitted that he visited the said enclosure on these dates for the purpose of making bets, and it was not proved that he was in the service or employment of the owner, tenant, or occupier of the premises.

"11. That on said 26th April the appellant admits that he, from about 1·30 p.m. to 2·30 p.m., engaged in making bets within the said enclosure with 130 men. These men with whom he made the bets were principally workmen out at meal hours. That the men on entering the ground were directed to where the appellant was standing, and went forward and gave the appellant a slip of paper with the names of horses thereon and money which he put in his pocket, entering the bets in a book. These workmen made their bets with the appellant as soon as they entered the enclosure, and left at once. That on said 28th April the appellant admits that between 12·30 p.m. and the time of his arrest he engaged in making bets within said enclosure with 29 men. That these men made their bets with the appellant as soon as they entered the enclosure, and left at once. That on said 28th April several men received money from the appellant within the enclosure.

"12. That during the whole of said 26th April seven men threw quoits or pitchers at different times, but only amusing themselves and not playing a game, only throwing them half length and for a short time. That during the whole of said 28th April four

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men played quoits at different times in the same manner, and two of the four men played pitchers in a like manner.

"13. That for some time previous to said 26th April quoiting was occasionally played within the enclosure, but no matches or prolonged games were played, and the real purpose of the enclosure was as a place for making bets in.

"14. That when the appellant was apprehended there was found on his person 29 slips of paper with the names of horses written thereon and a note-book, along with £3, 9s. 7d. in silver money, and these were taken possession of by the police, and are produced in the case. The names of the horses stated on the slips before referred to were the names of horses running in races on or about 28th April.

"15. That when any person entered the enclosure on said 28th April, and paid the admission money to the said John O'Neill, he received from him a yellow card giving particulars of regulations for betting.

"16. That the appellant was the only person within the enclosure on the dates mentioned, viz., 26th and 28th April, who conducted the business of bookmaking.

"On these facts the presiding Magistrate convicted the appellant of the offence charged, and fined him in the sum of £30 with the alternative of thirty days' imprisonment."

The question of law for the opinion of the Court was—"The appellant being neither the owner, tenant, nor occupier of the said enclosure, nor in the service or employment of such owner, tenant, or occupier, and having entered the said enclosure for the purpose of making bets, and made bets therein, was the Magistrate right in holding that there was a contravention of sec. 407 of the Burgh Police (Scotland) Act 1892, and in convicting the appellant of the offence charged?"

Argued for the appellant—(1) Section 407 was not applicable here. It only applied to a house, room, or building of some kind—*Wright* v. *Smith*, December 19, 1903, 4 Adam 316, 6 F. (J.C.) 18, 41 S.L.R. 198. The present case was distinguishable from *Flannagan* v. *Hill*, December 20, 1904, 4 Adam 480, 7 F. (J.C.) 26, 42 S.L.R. 224, where the ground was found to be unsuitable for quoits and there was no free access by a turnstile. Here the ground was not only suitable for quoits, but was regularly used for that purpose. The section only applied to a place used for the sole purpose of betting. (2) The appellant was merely a visitor to the enclosure and had no connection with the management. In *Flannagan's* case it was found that some connection existed between the accused and the proprietor or keeper of the ground—*Henretty* v. *Hart*, December 17, 1885, 5 Coup. 703, 13 R. (J.C.) 9, 23 S.L.R. 269.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK—The first question is whether the Magistrate has erred in holding that the enclosure in this case was a "place" in the sense of section 407 of the Burgh Police (Scotland) Act 1892. It has already been decided that an enclosure such as this is a "place" within the meaning of the Act, and even if my opinion were the other way I should not go back on a decision of this Court to that effect. The next question is, was it kept or used for the purpose of making bets? That is a pure question of fact, and the Magistrate has held it proved that the real use of the enclosure was as a place for making bets, and that the appellant and others resorted to it for the purpose of making bets and did make bets. The Magistrate has found that the appellant admitted having gone to that place for the purpose of making bets, that men who went to the ground were directed to the appellant by the man at the gate, John O'Neill (who was the servant of the tenant of this enclosure), and that they handed to the appellant slips of paper with the names of horses thereon and sums of money which he put in his pocket, entering the bets in a book.

It is also proved that when any person entered the enclosure and paid the admission money O'Neill handed to him a card giving particulars of regulations for betting. Was that evidence on which the Magistrate was entitled to find that the place was carried on for the purpose of betting, and that the appellant was in the position of one who was conducting such gaming or betting? I have no doubt that it was. In these circumstances I have no hesitation in saying that the Act applies. I notice that in a previous case where this question did not arise I am reported to have said that "whatever is included in the term 'place,' it must be a closed place, and one which is occupied by the accused either as owner or tenant." That is a rather too restricted statement, and, as it is put, is inaccurate.

Here we have the case of a person in the enclosure for the purpose of betting, to whom those who enter are directed by the servant of the tenant, who supplies them with betting cards, and I have no doubt that he was a person who conducted a business of betting in this place.

LORD KYLLACHY—I agree with your Lordship. I cannot doubt, upon the facts stated, that this enclosure was a "place" within the meaning of the Act—a place kept and used for the purpose of betting. The Magistrate has found that "the real purpose of the enclosure was as a place for making bets in." That I think is conclusive.

It remains, however, to consider whether the appellant was in the sense of the Act a person "conducting such gaming and betting" within the enclosure. Now, having regard to the context, I should hesitate to say that the appellant was within that description merely because, having obtained admission to the place simply as a member of the public, he was in the way of making bets there with other members of the public similarly admitted. It may be—I so assume—that, if not himself the owner or keeper of the place, or the person

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in charge of the same under the owner or keeper, he required at least to be using it as a betting-place in concert or association with the owner or keeper, and with his permission and licence. But so assuming, it appears to me that there is quite enough in the facts found to shew that that is the true position. The Magistrate finds, in point of fact, (1) "That the men, on entering the ground, were directed to where the appellant was standing, and went forward and gave the appellant a slip of paper with the names of horses thereon, and money, which he put in his pocket, entering the bets in a book." He also finds, in point of fact, (2) "That when any person entered the enclosure on said 28th April and paid the admission money to the said John O'Neill he received from him a yellow card giving particulars of regulations for betting."

It appears to me that these findings involve the conclusion that the appellant was, by the evidence led, sufficiently identified and associated with the owner or occupier of this enclosure in conducting within it the business of betting.

LORD STORMONTH DARLING — I say nothing as to this being a "place" within the meaning of the Act, for I so entirely agree with what has been said that it is unnecessary to add anything.

With regard to the other question, as to whether the appellant was identified with the owner or occupier of the betting-place, I should just wish to say this. The appellant maintained that he must be shown to have been in the service or employment of the owner or keeper of the enclosure. I do not agree in that. The section makes the owner or keeper of such house, room, or place, and also any "other person having the care or management thereof" (I presume as his servant) liable to prosecution; but then it goes on to add "and also any person who shall act in any manner in conducting such gaming or betting," which is a much wider description and does not necessarily imply any contractual relation. The Magistrate has held that the appellant falls under that description, and I think the facts found proved by him are amply sufficient to justify this finding. The appellant admits that within an hour on one of the days libelled he made bets with 130 persons in the way stated in the case. Persons who entered the enclosure were directed by the occupier's servant to where the appellant was standing, made their bets with him, and immediately left. That was quite a business-like proceeding and showed the real purpose of their and his being there. That the appellant was there with the occupier's sanction for the purpose of making bets, and did make them, cannot be doubted, and the Magistrate's conclusion that "the real purpose of the enclosure was as a place for making bets in" seems to me to have been amply justified. I agree that we ought to dismiss the appeal.

The Court answered the question in the affirmative and dismissed the appeal.

Counsel for the Appellant—Hunter, K.C. — A. A. Fraser. Agent — J. Struthers Soutar, Solicitor.

Counsel for the Respondent — Wilson, K.C.—M. P. Fraser. Agents—M. J. Brown, Son, & Co., S.S.C.

Wednesday, February 21.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

MACKAY *v.* MILLER.

Justiciary Cases—Police—Burgh—"Aerated Water Shop"—Sale of Aerated Waters for Consumption Off the Premises—Burgh Police (Scotland) Act 1903 (3 *Ed. VII, cap.* 33), *sec.* 82, *sub-sec.* 1.

A person having been supplied in a confectioner's shop with aerated water for consumption off the premises, the keeper thereof was convicted of a contravention of the Burgh Police (Scotland) Act 1903, sec. 82 (1), in not having his premises registered in terms thereof. *Held*, on appeal, that the shop in question was not an aerated water shop within the meaning of the subsection, and therefore did not fall to be registered under the Act.

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 82 (1), enacts:—"Every person who shall keep, or suffer to be kept or used, or use any house, building, part of a building, or other premises, as an ice-cream shop or aerated water shop without being registered in a register to be kept by the town council, who are hereby required to keep a register for that purpose, in which they shall enter the names of applicants without charge, shall be liable to a penalty not exceeding five pounds, and in the event of such premises being continued to be kept or used for such purpose after conviction, to a continuing penalty not exceeding five pounds for every day during which the offence is committed or continued."

This was an appeal by way of stated case from the Burgh Police Court of Clydebank, in which David Mackay, confectioner, 11 Park Drive, Whiteinch, the appellant, sought to have a conviction quashed which had been obtained against him at the instance of George Jordan Miller, solicitor and Burgh Prosecutor, Clydebank.

The complaint, which was brought under the Burgh Police (Scotland) Acts 1892 and 1903, set forth — "That David Mackay, confectioner, 11 Park Drive, Whiteinch, did, on 4th November 1905, within the shop occupied by him at 231 Glasgow Road, Clydebank, keep, or suffer to be kept and used, said shop at 231 Glasgow Road aforesaid, as an aerated water shop, without being registered in the register kept by the town council of Clydebank under and in virtue of the Burgh Police (Scotland) Act 1903, contrary to said Burgh Police (Scotland) Act 1903, sec. 82, sub-sec. 1, thereof,

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whereby the accused is liable to a penalty not exceeding £5, and in default of immediate payment thereof to be imprisoned for a period not exceeding one month."

The following facts were stated by the Magistrate:—"1. That the Provost, Magistrates, and Councillors of the burgh of Clydebank had, in terms of section 98 of the Burgh Police (Scotland) Act 1903, adopted Part II of the said Act containing section 82 thereof, and thereafter made byelaws under said last-mentioned section which were confirmed by the Sheriff of Stirling, Dumbarton, and Clackmannan, at Dumbarton, and also by the Secretary for Scotland, and came into force within said burgh on 16th June 1905. A copy of the byelaws was produced.

"2. That the appellant kept a shop at 231 Glasgow Road, Clydebank, as a confectioner's and aerated water shop prior to 16th June 1905. That about that date the appellant ceased to sell aerated waters, after being called upon by the Burgh Police to register said shop as an aerated water shop, in terms of said section, until on or about the 1st day of October last, when he resumed the sale of aerated waters therein for consumption off the premises, without having said shop registered in terms of said last-mentioned section as an aerated water shop in the register kept by the Town Council of Clydebank.

"3. That on the date libelled, about half-past ten o'clock at night (half an hour after the time for closing aerated water shops registered under the Acts), the appellant's shop was open for business, and that his shop girl Jane Lister sold to Maxwell Grahame, apprentice blacksmith, residing at 7 Union Street, Clydebank, one bottle of lemonade in a corked or closed bottle, which the said Maxwell Grahame carried out of the shop for consumption elsewhere.

"4. That the appellant had since the beginning of October last been selling aerated waters in said shop for consumption off the premises, and that the sale of confectionery and of aerated waters for consumption off the premises were the only businesses or trades carried on in said shop; and that the appellant's shop was not registered in terms of said Act as an aerated water shop.

"At the close of the proof, and after hearing appellant's agent for the respondent, I was satisfied from the facts admitted and proved that this was an aerated water shop, and I accordingly found the appellant guilty of keeping or suffering to be kept and used his said shop as an aerated water shop without being registered as libelled, and fined him in the sum of 7s. 6d., or, in default of immediate payment thereof, sentenced him to be imprisoned for the space of three days."

The question of law for the opinion of the Court was:—"Does the registration required by section 82, sub-section (1), of the Burgh Police (Scotland) Act 1903, apply to a person who keeps a shop for the sale of aerated waters not for consumption on the premises, and whose only other stock-in-trade is confectionery?"

Argued for the appellant—This case was ruled by *Vellutini* v. *Forsyth*, November 15, 1905, 43 S.L.R. 51. What was hit at by the statute was a particular class of shop known as ice-cream and aerated water shops, not at a confectioner's shop where aerated water was sold over the counter for consumption off the premises. It would be ridiculous to apply the section to a hotel, a chemist's or baker's shop, and equally so to a confectioner's. The conviction in this case was dated two days before the judgment in *Vellutini's* case.

Argued for the respondent—This case was widely different from *Vellutini's* case. In that case there was only one sale of aerated water, while here the Magistrate held as a fact that such sales had been going on for over a month. Further, here he held as a fact that the shop was an aerated water shop in the sense of the statute. Lord Dunedin in his opinion in *Vellutini's* case expressly saved a case where that was done. The fact that here the aerated water was sold for consumption off the premises did not exempt the shop from the operation of the statute, as its provisions were quite general.

LORD KYLLACHY—I have no hesitation in saying that in my opinion this conviction cannot be allowed to stand. The question really is, whether every shop in which aerated water is sold, although for consumption off the premises, is an "aerated water shop" in the sense of the statute. I do not think that that is a possible proposition. I am inclined to think that the conjunction in the section of "aerated water shop" with "ice-cream shop" is at least very suggestive to the effect that consumption on the premises is what the Act was intended to strike at. But whether that be so or not, I am clearly of opinion that there is nothing in the facts stated from which it is possible for us to infer that this is an "aerated water shop" in the sense of the statute. I am therefore for answering the question stated to us in the negative.

LORD STORMONTH DARLING—The Magistrate here has held that because the appellant had in his confectioner's shop at Clydebank for a month before the date libelled sold aerated water for consumption off the premises, and on the day libelled had made one sale of lemonade also for consumption off the premises, he was in the position of keeping an aerated water shop and required to have his shop registered. I agree with your Lordship that that finding cannot be justified on any possible reading of this singular statute.

LORD JUSTICE-CLERK—I am of the same opinion. If the Legislature passes a statute of so nebulous a character, affecting the liberty of the subject, it is necessary in the public interest, in my view, that it be construed in the strictest manner possible.

The Court answered the question in the negative and quashed the conviction.

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Counsel for the Appellant—Crabb Watt, K.C.—T. B. Morrison. Agents—Adamson, Gulland, & Smart, S.S.C.

Counsel for the Respondent — Munro. Agents—Douglas & Millar, W.S.

Wednesday, February 21.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

MACRORIE *v.* CRAWFORD.

Justiciary Cases—Complaint—Relevancy—Clerical Error—Amendment—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 5.

A complaint charged the accused with contravening the Salmon Fisheries (Scotland) Act 1868, inasmuch as he had committed two distinct offences, (1) and (2), under different sections of the Act. The prayer of the complaint sought conviction "of the aforesaid contravention." An objection to the relevancy of the complaint on the ground of ambiguity, taken during the trial and after part of the evidence had been led, was sustained, and a motion by the prosecutor for leave to amend the prayer of the complaint by adding the letter "s" to the word "contravention" therein, was refused by the Sheriff, who assoilzied the accused.

Held that the proposed amendment was competent and should have been allowed.

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), section 5, enacts—"No objection shall be allowed by the court to any complaint under this Act for any alleged defect therein in substance or in form, or for any variance between any such complaint and the evidence adduced on the part of the prosecutor or complainer at the hearing thereof not changing the character of the offence charged; but if any such objection or variance shall appear to the court to be such that the respondent has been thereby deceived or misled, it shall be lawful for the court to adjourn the hearing to some future day, and at the same time, or at any stage of the proceedings, to direct such amendment to be made upon the complaint as may appear to be requisite not changing the character of the offence, and such amendment shall be authenticated by the signature or initials of the judge or clerk of court."

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), section 70, enacts—"No trial shall fail or the ends of justice be allowed to be defeated by reason of any discrepancy or variance between the indictment and the evidence, but the indictment may, unless the court see just cause to the contrary, be amended at any time before the case for the prosecution is closed so as to cure any such discrepancy or variance, and any amendment so allowed to be made shall be sufficiently authenticated by the initials of the clerk of court: Provided always that such amendment shall not be allowed unless the court shall be satisfied that such discrepancy or variance is not material to the merits of the case, and that the person accused cannot be prejudiced thereby in his defence on the merits."

This was an appeal, by way of stated case, from the Sheriff Court of Ayrshire at Kilmarnock, by Wilfrid Clarke Macrorie, Solicitor, Ayr, as clerk to the Fishery Board for the district of the river Ayr, against a finding of the Sheriff-Substitute (MACKENZIE), whereby the Sheriff had sustained an objection to the relevancy of a complaint against David Crawford, miner, Ballochmyle Row, Auchinleck, and had assoilzied him.

The complaint, which was brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, the Salmon Fisheries (Scotland) Acts 1862 and 1868, and the Criminal Procedure (Scotland) Act 1887, set forth—"That David Crawford, miner, residing at Ballochmyle Row, in the parish of Auchinleck, has contravened sections 18 and 19 of the Salmon Fisheries (Scotland) Act 1868 in so far as the said David Crawford did (first) on Thursday, the twelfth day of October 1905, on the river Ayr, at the back of the dam-dyke at Barskimming Mill, and at that part of said river situated in the parish of Mauchline and county of Ayr, use fish roe for the purpose of fishing, and (second) did also, on the said twelfth day of October 1905, from the river Ayr, at the back of the said dam-dyke at Barskimming Mill, and from that part of said river situated in the said parish of Mauchline and county of Ayr, wilfully take or destroy eight or thereby smolts or salmon fry, and did have said smolts or salmon fry in his possession, whereby the said David Crawford is, under the said Salmon Fisheries (Scotland) Act 1868, and the said Salmon Fisheries (Scotland) Act 1862, liable to a penalty not exceeding £2 for the first of said offences, and is also liable to a penalty not exceeding £5 for the second of said offences, besides the expenses, and also to forfeit the said salmon roe and smolts or salmon fry, and failing payment of said penalties and expenses, is liable to poinding and imprisonment for any period not exceeding six months for each of said offences, but all subject to the modifications and provisions of the said Summary Jurisdiction (Scotland) Act 1881. May it therefore please your Lordship to grant warrant to cite the said David Crawford to appear before you to answer to this complaint, and thereafter to convict him of the aforesaid contravention, and to adjudge him to suffer the penalties provided by the said Acts, and to declare the said salmon roe and the said smolts or salmon fry forfeited."

The Sheriff-Substitute gave the following facts in the stated case:—"Respondent appeared with William David M'Jannet, writer, Irvine, his agent. No objections were stated at this stage of the proceedings to the competency or relevancy of the com-

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plaint or proceedings. The respondent pleaded not guilty, and that plea was recorded.

"The complainer and appellant thereupon proceeded to lead evidence and examined one witness. At the conclusion of his examination the respondent's agent objected to the complaint as irrelevant, ambiguous and incompetent, in respect that while two distinct contraventions of different sections of The Salmon Fisheries (Scotland) Act 1868, were charged, in the prayer the Court was asked to convict the respondent 'of the aforesaid contravention.'

"The complainer thereupon moved the Court to allow him to amend the complaint by altering the word 'contravention' in the prayer thereof to 'contraventions.' The complainer did not expressly consent to the point of irrelevancy and incompetency being discussed at this stage, but without taking any objection he argued the points raised.

"I refused the complainer's motion, sustained the objection, and assoilzied the respondent from the complaint."

The following questions of law were submitted for the opinion of the Court:—"1. Whether the refusal to grant leave to amend was erroneous in point of law? 2. Whether the objection taken by the respondent's agent to the relevancy and competency after the plea had been recorded and evidence begun to be led was competent? 3. Whether the complainer by his own failure to expressly take any objection to the discussion of the said point of irrelevancy and incompetency is barred from insisting in this appeal."

Argued for the appellant—The complaint was relevant as it stood, and in any case the amendment proposed by the prosecutor was competent. The word "aforesaid" in the prayer on a fair construction applied to both charges in the complaint. The Sheriff was bound to allow the amendment, which consisted in the correction of a mere clerical error and did not alter the nature of the charge, in terms of section 5 of the Summary Procedure (Scotland) Act 1864. In any case, the objection to the relevancy of the complaint came too late—*Macleod* v. *Macdonald*, March 18, 1903, 4 Adam 195, 5 Fraser (J.C.) 77, 40 S.L.R. 566.

Argued for the respondent—Section 5 of the Summary Procedure (Scotland) Act 1864, conferred a power on the Judge to order an amendment in certain circumstances. The Sheriff here made no such order. (In answer to the Court as to the effect of section 70 of the Criminal Procedure (Scotland) Act 1887)—The amendment proposed here was one going to the very root of the matter, and was most material to the merits of the case, and further, if allowed would have seriously prejudiced the respondent. Two distinct offences were charged while conviction was only asked on one offence, but the respondent could not tell on which—*Aitcheson* v. *Neilson*, March 12, 1897, 2 Adam 284, 24 R. (J.C.) 44, 34 S.L.R. 524. It was incompetent to allow an amendment which changed a bad complaint into a good one—*Jamieson* v. *Donald*, May 29, 1896, 4 S.L.T. 57.

LORD JUSTICE-CLERK—I do not think it is necessary to decide any of the questions raised in this case except one. The word "contravention" was used in the prayer in the singular, whereas there were two charges in the complaint. The question is whether it was competent to add the letter s for the purpose of correcting the mistake. As to that I have no doubt whatever. It in no way alters the substance of the charge which was brought against the respondent.

The complaint set out that he had committed a contravention of two provisions of the Salmon Fisheries Acts, and that he was liable to a penalty for each of the said offences. There is, therefore, no question of notice raised in the case. And as to the mere omission of the letter s, that might have had no effect, because there might have been a conviction for only one offence which could be specified in the conviction. But as I said I have no doubt that it could be corrected. The section of the Summary Procedure Act which provides for amendment says that an amendment shall not be allowed which changes the character of the offence. Here there is no such change. It was a mere clerical blunder, which could not mislead as to the charge or charges made in the complaint. The correction ought to have been allowed.

LORD KYLLACHY—I agree. I am unable to understand on what ground it could be held that the amendment was incompetent. I have no doubt of the competency of correcting during the trial what is merely a clerical error.

LORD STORMONTH DARLING—I entirely agree.

The Court answered the first question in the affirmative and sustained the appeal.

Counsel for the Appellant—T. B. Morison. Agent—James Ayton, S.S.C.

Counsel for the Respondent — Munro. Agent—William Croft Gray, S.S.C.

Wednesday, February 21.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

HACKSTON *v.* MILLAR.

Justiciary Cases—Evidence—Criminal Evidence Act 1898 (61 *and* 62 *Vict. cap.* 36) *sec.* 1 (*f*) (*iii*)—*Persons Accused Jointly under One Complaint—One Accused Electing to Give Evidence in his Own Defence—Evidence of One Accused Incriminating Another — Right of Latter to Cross-Examine.*

One of several accused brought a suspension of the conviction obtained against him, on the ground that some of the other accused had elected to give evidence on their own behalf, and had

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given evidence incriminating him, and the magistrate had refused to allow him to cross-examine those who incriminated him. *Held* that the cross-examination was competent, and in the circumstances should have been allowed. *The King* v. *Hadwen and Ingham*, [1902] 1 K.B. 883, *approved*.

The Criminal Evidence Act 1898 (61 and 62 Vict. cap. 36), sec. 1, enacts—"Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person: Provided as follows . . . (*f*) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (iii) he has given evidence against any other person charged with the same offence."

In the Burgh Police Court at Hamilton Thomas Hackston, George Street, Greenfield, Hamilton, along with four other persons, was charged at the instance of John Millar, chief-constable and burgh prosecutor, Hamilton, with having committed a breach of the peace. All the accused were tried before one of the magistrates of the burgh on 9th October 1905. Having all pleaded not guilty, evidence was led, and Hackston and two others of the accused were convicted, and each was fined twenty shillings, and in default was sentenced to fourteen days' imprisonment.

Hackston brought a bill of suspension in which he averred that in the course of the trial all the accused other than himself were examined on oath at their own request. Three of the accused gave evidence which tended to incriminate him. Thereupon his agent claimed to be allowed to cross-examine two of them, but the Magistrate, sustaining an objection by the agent acting on their behalf, refused to allow such cross-examination, holding that it was incompetent under the Criminal Evidence Act 1898.

The respondent denied in his answers that the evidence of the other accused was of a nature tending to incriminate the complainer, but in other respects he admitted the truth of the facts above stated.

The complainer pleaded—"(1) The Magistrate having acted wrongously, unjustly, illegally, and oppressively in refusing complainer's agent to cross-examine the accused, who had given evidence incriminating the complainer, the conviction complained of should be quashed, with expenses. (2) On a sound construction of the Criminal Evidence Act 1898, the complainer's agent should have been allowed to cross-examine the other accused giving evidence on their own behalf when such evidence incriminated or tended to incriminate the complainer, and this having been refused, the conviction should be set aside, with expenses."

Argued for the complainer—Section 1 (*f*) (iii) of the Criminal Evidence Act 1898 was enacted to meet such cases as this, and allowed cross-examination where one of a number of accused in his evidence tried to incriminate another. The point was directly decided in *Hadwen's* case, [1902] 1 K.B. 883. The judgment of Wright, J., in that case was sound and put the matter in the proper light. The Act of 1898 made an accused person a competent witness for the defence, whether he was the only accused or not; therefore he might under the Act be examined on behalf of the other accused as well as on his own behalf. Even if the common law did not allow cross-examination by one accused of an ordinary witness for another accused, yet that was altered by the Act where the witness was a party. The dicta of Lord Shand in *Ayr Road Trustees* v. *Adams* (*cit. infra*), relied on by the respondent, were *obiter*.

Argued for the respondent—It was denied that any evidence was given by the other accused incriminating the complainer. There was no note on the face of the proceedings of the questions asked and the answers to them, or of the questions proposed to be asked on behalf of the complainer in cross. The proper course for the complainer here was to have applied for a separation of trial. He could then have competently cross-examined. In the case of *Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326, at p. 338, 21 S.L.R. 224, Lord Shand explained the law in civil matters with regard to the rights of co-defenders to cross-examine each other's witnesses. Except by special arrangement that was incompetent. The principle of law as to evidence was the same in criminal as in civil cases. The common law of England and Scotland were at one on this matter, as was shown by the opinion of Wright, J., in *Hadwen's* case. Under the 1898 Act, sec. 1 (*f*), iii, it was the prosecutor who was contemplated as making the cross-examination if any.

LORD JUSTICE-CLERK—There is no doubt that this statute of 1898 may lead to embarrassing situations. A person who is charged with an offence is now a competent witness, even when he is charged along with other persons under one complaint. In such circumstances he is thus put in a position where he may try to exculpate himself by giving evidence calculated to incriminate the others.

It is quite true that in such a case it would be the duty of the presiding magistrate or judge to tell the jury to disregard any statement by one accused tending to incriminate the others. But we must keep in view that even so it is a very difficult thing to dissociate from the case in hand either in the mind of judge or jury anything which may be said in the witness-box and which appears to be true.

The statute by section 1 (*f*) guards a person who is being examined in his own defence against being asked questions tending to show that he has been charged or convicted of previous offences or is of bad

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character. But under sub-section (iii) of (*f*) there is an exception made in the case of his having given evidence against any other person charged with the same offence. Now, here the allegation is that during the trial the other accused were each examined on oath at their own request, and each of them gave evidence tending to incriminate the complainer, and that the complainer's agent was prevented from cross-examining them by the Magistrate on the ground that such cross-examination was not allowed by the Act of 1898. The proposal was that the cross-examination should be conducted by the representative of the prisoner who had been incriminated, but it has been argued here that if cross-examination is competent at all under the statute it should be by the prosecutor.

It seems to me that this would be a less difficult case to decide if the proper materials were before us. We ought to have known what the nature of the questions was which were going to be asked in cross-examination, but there is no record of that here, and no note even, in the proceedings, of the Magistrate's refusal to allow cross-examination.

Dealing with the case as we have it, however, we have before us in the sister kingdom a case where it has been decided that in a case such as this cross-examination of one prisoner by another, or on behalf of another, is competent. I think it would be unfortunate that there should be any difference between the two kingdoms on a matter of this kind, especially where we have the opinion of such an eminent Judge as Mr Justice Wright on the point. Of course his opinion is in no way binding upon us, but it is entitled to our consideration and respect.

Mr Justice Wright says "I can find nothing in the Act except section 1 (*f*), iii, which tends to abrogate the ordinary common law rule that the evidence of one defendant cannot in a criminal trial be received as evidence either for or against another defendant, the reason being that otherwise there would be a great danger that one defendant would be tempted to exculpate himself at the expense of his co-defendant. I have had some doubt whether clause (*f*) iii does get over the difficulty, but I think that it can be construed as dealing with evidence given by one prisoner not only in his own defence but also with the object of making a case against the other prisoner. If that is so, and I am not disposed to decide otherwise, it follows that there may be cross-examination of the one prisoner by the other."

I am very clearly of opinion that the view of the provisions of the statute there expressed is the correct one, and I fully concur in it. It follows, therefore, that this conviction should be suspended.

LORD KYLLACHY—I concur. I entirely adopt the views expressed by Mr Justice Wright in the case referred to.

LORD STORMONTH DARLING—I am entirely of the same opinion. I wish to add, however, that, taking the present case on the footing on which your Lordship has put it, no question arises as to the right of one accused person to cross-examine an ordinary witness called on behalf of another who is being tried along with him. I therefore express no opinion on that matter.

The Court quashed the conviction.

Counsel for the Complainer—T. Trotter. Agent—Francis Green, L.A.

Counsel for the Respondent—R. S. Horne. Agents—Carmichael & Miller, W.S.

Friday, February 23.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

COOK *v.* M'NEILL.

Justiciary Cases — Evidence — Competency of Evidence—Statements Made by Accused during Preliminary Inquiries Used as Evidence against Him.

In a prosecution of a person for reset of stolen goods, the prosecutor adduced the evidence of two police constables to show that the accused had made a certain statement to them during the preliminary inquiries in the case and before any charge had been preferred against the accused with regard to the stolen goods. *Held* that the statement of the accused was of the nature of precognition, and that it was therefore incompetent to use it as evidence against him in subsequent proceedings.

This was an appeal by way of stated case from the Burgh Police Court of Arbroath, in which James Cook, the appellant, sought to have a conviction quashed which had been obtained against him at the instance of Duncan M'Neill, Burgh Prosecutor, Arbroath.

The complaint set forth that James Cook did "on 9th December 1905, within the shop in High Street, within the burgh of Arbroath, occupied by the appellant's firm David Cook & Sons, plumbers, there, reset from John Donaldson, a fish dealer, residing in Lindsay Street, and William Hardie, a labourer, residing in Abbey Park, both of Arbroath, or from one or other of them, four hundredweight and ninety-one pounds or thereby of lead, the same having been dishonestly appropriated by theft, the said property so resetted having not exceeded in value the sum of ten pounds sterling."

After certain objections had been repelled the case had gone to proof.

The case stated by the Magistrate contained, *inter alia*, the following facts:—"Evidence was then led by the prosecutor and the accused.

"On William Wilson, sergeant of police, Arbroath, and police-constable Watt, Arbroath, being examined as witnesses for the prosecutor, the accused's agent objected to their evidence on the ground that it was made up of statements made by the appellant to them.

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"The objection was repelled, on the ground that the statements were made by the accused to the constables when making inquiry about the lead, and that they were made voluntarily and without force and fear, and before any charge was made against the accused.

"The facts admitted or proved in evidence are as follows, viz.—On 14th December 1905 the said William Hardie, Robert Forbes, a labourer residing in West Abbey Street, Arbroath, and the said John Donaldson, were charged at the Police Court, Arbroath, with having on 9th December 1905, from the High Street Foundry occupied by James Keith and Blackman Company, stolen four hundredweight and ninety-one pounds or thereby of lead, or otherwise, time and place libelled, the accused did reset the said lead, the same having been dishonestly appropriated by theft.

"The said William Hardie and Robert Forbes pled guilty to theft, and were fined twenty shillings each or fifteen days' imprisonment. The said John Donaldson pled not guilty, and the charge against him was adjourned till 16th December, bail having been fixed at two pounds. On 16th December the diet was deserted against Donaldson *pro loco et tempore*. The appellant James Cook was in attendance on a citation by the police as a witness for the prosecution on this occasion, but was not called in the circumstances.

"On 21st December 1905 the said John Donaldson was charged at the Police Court at Arbroath with having on 9th December 1905, in West Abbey Street, Arbroath, or some other place within the burgh to the complainer unknown, resetted from the said William Hardie and Robert Forbes, or one or other of them, the lead before referred to. He pleaded not guilty, but was convicted on evidence and fined one pound or fifteen days' imprisonment. The appellant James Cook was cited by and examined as a witness for the prosecution. He did not receive an indemnity guaranteed by the prosecutor against proceedings against himself, but was warned that he did not require to state anything that was calculated to incriminate himself. There was no charge then against the appellant.

"On 14th December 1905 the said police-sergeant William Wilson and constable Watt went to the premises of the appellant's firm in High Street to make inquiry about the lead in question and the charge against the said John Donaldson. There was then no charge against the appellant. The previous day, viz., 13th December, constable Watt saw the appellant at his dwelling-house with reference to the theft of the lead. The evidence of the constables objected to was to the following effect, viz.—That the appellant voluntarily and without being forced stated to them, *inter alia*, that Donaldson had sold the lead to him, that Donaldson represented to him that it was part of an old water tank which he had bought in the country, and that he (the appellant) had paid Donaldson £2, 0s. 6d. for it; that the lead had been brought in bags to his firm's premises by Donaldson, assisted by Hardie; that the appellant could not say whether he had paid the money to Donaldson or Hardie, but that he had entered Hardie's name in his firm's books as he did not know Donaldson's first name.

"The appellant James Cook gave evidence on his own behalf. His statement in the witness-box was practically the same as he made to the constables.

"After hearing the evidence of six witnesses for the prosecution and one witness for the appellant and the appellant himself, the magistrate found the charge of reset of the lead in question by Cook proved by facts and circumstances, and fined him one pound or fourteen days' imprisonment. There was no evidence to show that Cook had been told directly that the lead had been stolen. The Magistrate deduced and inferred Cook's guilty knowledge that the lead had been stolen from the facts and circumstances proved only."

The questions of law for the opinion of the Court were, *inter alia*—"(3) Was the evidence of police-sergeant Wilson and police-constable Watt competent in the circumstances? (4) Was the Magistrate entitled to hold that the charge against the appellant was proved by facts and circumstances?"

Argued for the appellant—The evidence of the police officers here was mere hearsay evidence, and, further, was of the nature of a precognition of the accused. On both these grounds it was incompetent. There was no evidence here that the accused knew the lead was stolen property—*Ritchie* v. *Pilmer*, December 20, 1848, J. Sh. 142.

Argued for the respondent—If a charge had been preferred against the accused, then if the officer wished to ask questions he must warn him first, but his voluntary statements might be proved and used against him. The statements here in question were made before any charge had been preferred. They were not precognition but merely inquiries made by the police-constables. In any case the statements were not really material to the conviction, because the Magistrate stated that the accused himself repeated in the witness-box exactly what the constables represented that he had told them—*Smith* v. *Lamb*, March 16, 1888, 1 White 600, 15 R. (J.C.) 54, 25 S.L.R. 429.

LORD JUSTICE-CLERK—I think this case may be disposed of without going into the question whether the prosecutor was barred from proceeding against the appellant. That is a very difficult question, and if it were necessary to go into it we should require to be more fully informed as to the facts and circumstances than we are at present.

I think we can deal with the case on the third objection alone. It is, that among the witnesses who were examined in the proceedings against the appellant there were two who narrated in the witness-box what the appellant had previously told them in precognition. That the statements

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made to these witnesses had been made freely and without force or fear I think is of no consequence at all when it is admitted that they were in the nature of precognition. I take it to be well established that no person is liable to have brought up in criminal prosecution against him at any time what he has said in precognition, not because there is any reason to suspect bad faith on the part of the prosecutor, but because the people who take the precognitions are searching for evidence in order to prove a crime, and what they take down or afterwards remember of what has been said to them is apt to be coloured by their desire to make out a good case. So clearly has this been established that even when a prospective witness has died after precognition it is not competent to prove by the evidence of the precognoscers what he said to them. And it is also competent for a witness to ask that his precognition be delivered up to him to be destroyed before he can be called on to give evidence.

I think we should answer the third question in the negative.

LORD KYLLACHY and LORD STORMONTH DARLING concurred.

The Court answered the third question in the negative and quashed the conviction.

Counsel for the Appellant — Chapel. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent — Graham Stewart. Agents—Webster, Will, & Company, S.S.C.

TEIND COURT.

Tuesday, February 20.

(Before the Lord President, Lord M'Laren, Lord Kinnear, Lord Pearson, and Lord Salvesen.)

ELGIN GUILDRY FUND SOCIETY *v.* MINISTERS OF ELGIN AND OTHERS.

Teinds—Valuation by Sub-Commissioners—Action of Division, Approbation, and Valuation—Action of Approbation at instance of Proprietor of a Part only of Lands Valued—Competency.

In 1629 a valuation of the teinds of the lands of A was made by the Sub-Commissioners. In 1900 the proprietor of a part of the lands of A raised an action of division, approbation, and valuation to have the Sub-Commissioners' valuation approved, and to apportion the share of the *cumulo* valuation applicable to his portion of the lands. The owners of the other parts of the lands were not parties to the action but were called as defenders. *Held* that it was competent for the owner of part of the lands valued to sue for approbation without the concurrence of the proprietors of the rest of the lands.

Teinds—Valuation—Report by Sub-Commissioners—Terms of Report—Terms Constituting a Valuation by Consent.

A report by Sub-Commissioners narrated that the titular and others appearing "condiscendit yat ye rentall of ye teind scheiffs" of certain lands "suld be valued to ye auld rentall, viz.— . . ."

Held that these words constituted a valuation.

The report by the Sub-Commissioners, appointed for valuing the stock and teinds of the lands within the presbytery of Elgin, which dealt with a considerable number of separate subjects, contained a passage that before them on 4th December 1629 "Comperit Williame Torrie, Andrew Anand, twa of ye Ballies of Elgin, and Nicholas Dunbar, Clerk yair of, and in name of yame selffis, and of ye Prowest, Baillies, Counsell, and Comunitie of ye sayd Burghe, declarit that thay requyrit no waluaime of ye teindis of ye croftis of Elgin, being vsuallie led frome the Stoik, and thairvpone ane rewerend fayer in God, Jon Bischoip of Murray, titular of ye samyne, requyred instrument, lyikas ye said reverend fayer and persones abon named condiscendit yat ye rentall of ye teind scheiffs of ye Grischiplandis of landis of Elgin suld be valued to ye auld rentall, viz., fywe chaldiris, twelff bollis, ane firlet victuall."

On 12th January 1900 the Guildry Fund Society of Elgin, who claimed to be the proprietors of portions of the "Grieship lands of Elgin," raised an action to have the *cumulo* valuation contained in said report divided in proportion to the extents of the portions of the lands possessed by them and other proprietors, to have the report approved in so far as concerned the pursuers' lands and others described, and to have the portion of the *cumulo* valuation apportioned to the pursuers' lands declared the constant yearly value of the teinds, parsonage and vicarage, of their said lands. The defenders called, in addition to the Lord Advocate as titular, included (1) a large number of individuals, &c., who were stated to be the proprietors of the other portions of the Grieship lands included in the said report, but who, however, did not compear, and (2) the Rev. Robert Macpherson and the Rev. William Moffat, collegiate ministers of the parish of Elgin, who compeared and lodged defences.

The compearing defenders, *inter alia*, pleaded—"(1) The action is incompetent, *et separatim*, irrelevant. (2) The pursuers have no title to demand approbation of the Sub-Commissioners' report of 1629 as regards the whole of the Grischip lands. (5) Decree of approbation and division should be refused in respect that the Sub-Commissioners' report of 1629 contains no valid or sufficient valuation to be approved of."

Argued for the compearing defenders—(1) *Competency of Action*—The action was incompetent without the concurrence of all the proprietors of the whole lands valued. Though in previous cases such an action had been successfully sued by

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one of several proprietors, no objection had been raised by the other proprietors to the competency of such a proceeding, and the question had not been considered by the Court—*Campbell of Glendaruel* v. *Officers of State*, August 4, 1773, M. 15,762; *Elibank's Trustees* v. *Hope*, January 23, 1891, 18 R. 445, 28 S.L.R. 295; *Campbell* v. *M'Lachlan*, February 6, 1822, Shaw's Teind Cases 19; *Hill* v. *Walker*, February 19, 1823, Shaw's Teind Cases 44. If the pursuers were successful in this action the shares of the *cumulo* sum would have to be apportioned over the whole of the lands valued, which in the present case would be impossible, as one of the proprietors, Lord Seafield, had in 1816, by decree of the Court of Teinds, obtained a valuation of a portion of the lands included in the sub-valuation of 1629, and he was therefore barred from recurring to the sub-valuation. (2) *Insufficiency of Report as a Sub-valuation*—The report of the Sub-Commisioners did not constitute a valid sub-valuation. It narrated in the passage relating to the Grieship lands of Elgin that the parties appearing "condiscendit yat ye rentall of ye teind scheiffs" of the lands "suld be valued to ye auld rentall . . ." whereas with regard to other lands included in the same report it was expressly stated that "the Sub-Commissionaris . . . waluis the teinds of the landis to be wourthe . . ." In view of the express terms of valuation being used in part of the report, the terms used in connection with the Grischip lands could not be held to constitute a valid sub-valuation; in this respect the present case differed from that of *Duke of Montrose* v. *Earl of Camperdown*, June 7, 1875, 2 R. 772, where no part of the report contained express words of valuation. The report was further invalid, as it did not bear that all the parties interested were called, the titular, the Bishop of Moray, and the superiors, the representatives of the burgh of Elgin being the only persons mentioned as appearing—*Ferguson* v. *Gillespie*, February 4, 1795, M. 15,768, 3 Pat. App. 534; *Brydie* v. *Johnstone*, December 20, 1832, 11 S. 229; *Simpson* v. *Ewing*, December 8, 1882, 10 R. 313, 20 S.L.R. 228; Erskine ii, 10, 35.

Argued for pursuers—(1) *Competency of Action*—The action was competent and the correct procedure had been followed—Connel on Teinds, i, 222; Elliot's Teind Court Procedure, p. 82; Juridical Styles, ii, 239; *Earl of Fyfe*, 1887, not reported; and *Campbell of Glendaruel*, &c., above cited. (2) *Sufficiency of Report as Sub-valuation*—The expression "condiscendit" in the report meant "consented" or "agreed." By the King's letter of February 1628, under whose authority the Sub-Commissioners acted, it was declared "that the old rental shall stand for a valuation where the parties consent or do not object thereto"—*Duke of Montrose* v. *Earl of Camperdown*, *supra*. The titular and the representatives of the burgh of Elgin were all the parties interested, as would appear from the peculiar nature of the tenure of the lands in question as to which a proof was asked.

LORD PRESIDENT—This is a summons of division, approbation, and valuation, and it is presented at the instance of the Elgin Guildry Fund Society, who own certain lands in the neighbourhood of Elgin. They assert that their lands form part of the Grieship lands of Elgin, which were in 1629 the subject of a valuation by the Sub-Commissioners for the Presbytery of Elgin. There seem to have been at that date certain lands held by the burgh of Elgin. I do not particularise as to the tenure upon which they were held, as on this point there seems to be some ambiguity, further than that they were held by the burgh for the burgesses. In the year 1802 portions of these lands, which were held partly in runrig and partly in commonty, were the subject of two actions of division of runrig and division of commonty. There were also certain mosses which were originally held by the burgh. They were not included in the two actions, but are alleged by the pursuers to have originally been pertinents of the lands which were the subject of these two actions. Now, the pursuers, claiming to be proprietors of portions of the lands of Grieship and of the moss wards which previously pertained thereto, ask the Court to approve of a valuation of the teinds affecting those lands and contained in a report of the Sub-Commissioners of 1629, and they produce the report of the Sub-Commissioners of 1629 which bears to value the lands of Grieship. Several answers have been made by the defenders, who are the ministers of the parish, and who have considerable pecuniary interest in not allowing this report to be approved.

The first answer that they make is that the present action is incompetent. They say that upon this ground—The pursuers do not allege that they are proprietors of the whole lands of Grieship; they only allege that their lands are parts or portions of these lands of Grieship, and they accordingly go on, after asking approbation of the decree, to ask a division of *cumulo* valuation of the teinds of Grieship so as to fix the proper proportion of that valuation applicable to their own lands. The defenders accordingly say that as the pursuers are in that position they cannot competently bring this action for approbation in respect that they have not got joined with them as pursuers all the other persons who are proprietors of the lands of Grieship. They further say that they never could get these other proprietors to join, because, at least in the case of one of them, he would be in a position that he could not join in such an action. The meaning of that is that one of the proprietors is Lord Seafield, and that Lord Seafield seems at some period subsequent to 1630 to have obtained a valuation of his own lands at his own hand before the High Court, and of course it is familiar law that if you choose to get your lands valued by the High Commission, or by this Court as coming in place of the Commission, you cannot after that recur to a sub-valuation of earlier days and have that sub-valuation approved.

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Counsel have been very diligent in this case, and have really brought before your Lordships the whole of the authorities that are to be found on the question. This particular point seems never to have been actually decided. It is also the fact, I think, that there are only two cases at most in which an action *de facto* has been pressed by one alone of the proprietors of a particular parcel of lands valued in the report of the Sub-Commissioners, and in neither of those actions does the point raised here seem to have been contested. Accordingly, it cannot be said to be a decided point. But I am bound to say that I have come to the conclusion that upon principle there is no reason whatever why this action should not be competent, and I think, though not decided in terms, it is really practically settled by a series of cases decided a long time ago in which the Court allowed several persons—several independent proprietors—to come forward to have a decree of approbation of a valuation which applied to all their lands, and thereafter to have that *cumulo* valuation divided. I refer to the cases included in Morison, of which an example may be found in the case of *Campbell of Glendaruel* (Mor. Dict., p. 15,762).

It seems to me that if that is once conceded the other matter follows as a corollary. After all what is it these pursuers are doing? They come to this Court to have a valuation of the teinds of their lands, and they have got a separate value of their own lands, and consequently have a right and interest to have the teinds of their land valued. Now, they can have the teinds valued in one of two ways—either by valuation of the teinds as they are, or, if there is extant a report of a Sub-Commissioner, they may have a valuation by way of approbation of that sub-report. Accordingly the pursuers ask you to look at the report, and they point out that it purported to value lands which included their lands. I quite understand that there might have been a great deal to say if it had been argued that the right of looking at the report was a sort of undivided matter that could only enure to the benefit of the one person who had originally been proprietor of the lands at the time that the Sub-Commissioners made their investigations. But that was not the view the Court took more than a century ago, for if that had been the view they never would have allowed cases of the kind of *Campbell of Glendaruel* to go on. The interests were not joint but separate interests between persons who had had no connection with each other except the fact, which does not establish connection, that all their lands when put together might be the amount of lands valued at the time of the sub-report. Accordingly it seems to me that the present pursuers are entitled to proceed with their action.

Of course when they have got the approbation there arises the question of division, and on the question of division other parties are interested besides them, but they of course properly called the other parties though we have not got them as pursuers. They have called them as defenders, and accordingly they will be here, if they choose to come, to prevent an unjustly small portion of the valuation being put on the pursuers. But that is a matter with which the defenders, who represent the parish, do not seem to me to have any concern. So far I have dealt with the point of competency.

The next point that was argued was on the terms of the Sub-Commissioners' report itself. It was argued that the report was not a valuation at all, because it did not contain words affecting to value the subjects, and the argument was chiefly based on the fact that in other portions of the report they do use words affecting to value other subjects. But I cannot say that I think that when looked into this objection has any force in it. After all, these Sub-Commissioners, as has been said before, were not lawyers, not men of skill excepting the practical skill of valuing the lands, and their reports are no more really than a recital of what they had done. When you come to the report you find a statistical report of what they had done. The parties who appeared were the Bishop of Murray, who was titular of the teinds, and two bailies of Elgin, whose teinds of the crofts of Elgin seem to have been drawn apart from the stock, and then the report goes on—"Lyik as the said reverend father (John Bishop of Murray as titular) and persons above named" (the two bailies and clerk of Elgin above named) "condiscendit that the rental of the teind scheiffis of the Grischip landis of Landis of Elgin suld be valued to the auld rental, viz." Now that seems to me quite enough. That is a perfectly proper proceeding in a case where they were going to value by rental bolls. I think that is all that is wanted; and if authority is needed on the question I think there is practically ample authority in the case cited to us, the *Duke of Montrose* v. *Earl of Camperdown*, 2 R. 772.

That being so, I advise your Lordships to repel such pleas as are inconsistent with the opinions I have stated, and *quoad ultra* remit the case to the Lord Ordinary in order to take proof of the whole matters therein.

LORD M'LAREN—I am also of opinion that the pursuer ought to be allowed to prove his case, because I am not satisfied that any valid objection is stated to his title to sue the valuation. It is always open to a heritor whose teinds are valued in the report of Sub-Commissioners to bring up the report for approval. From a very early period it has been settled that where the teinds of a parish or a presbytery are included in one valuation, it is competent to the proprietor of any subject named in the report to apply to the Court to have the teinds of this subject valued. This was not a personal privilege, nor was it confined to the original nominee and his heirs, but belonged to the owners of the lands, because it was as a heritor that he obtained decree.

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Now, when you get the length of saying that this is a document the benefit of which goes to the owner of the subject, be he heir or singular successor, you cannot stop there, for if the lands are divided it follows that each owner of the divided portion must be entitled to go on and ascertain the value of this portion. How that is to be done is a subordinate question. I do not see any difficulty, if the case is proved, in approving of the decree as a whole, and following it up to a conclusion by limiting it to the interest of each particular pursuer. That would in no way prejudice the rights of persons interested in other lands. But it is a condition of the pursuer obtaining approbation that he should show that the land he is now possessed of was included in the subjects named in the report, and that it has come to him by a title subsequent to the date of the report. Of course if his title originated at a date prior to the report, then his lands would not be included at all, because they could not be held to be included in a valuation to which the only parties were the Bishop of Moray and the community of Elgin. I therefore think that proof should be allowed.

LORD KINNEAR—I am entirely of the same opinion, and have nothing to add to what your Lordship has said.

LORD PEARSON—I am of the same opinion.

LORD SALVESEN—I also concur.

The Court pronounced an interlocutor repelling the first, second, and fifth pleas for the defenders, and allowing, before further answer, a proof as to the pursuers' land being included in the subjects named in the Sub-Commissioners' report, and remitting to the Lord Ordinary on Teinds to take the proof and to report, with expenses.

Counsel for the Pursuers — M'Lennan, K.C.—Brodie Innes. Agents—Mustard & Jack, S.S.C.

Counsel for the Compearing Defenders—Johnston, K.C.—Constable. Agent—J. B M'Intosh, S.S.C.

COURT OF SESSION.

Wednesday, February 21.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

WALLACE *v.* WALLACE'S TRUSTEES.

Partnership—Copartnery for a Fixed Term—Death of Partner Immediately on Expiry of Fixed Period without New Agreement—Question of Continuance of Partnership—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *secs.* 27 *and* 32.

A partnership agreement was entered into for five years "from and after the first day of January" 1895. One of the partners died on the morning of the 2nd January 1900. No new express agreement had been entered into.

Held that the partnership was dissolved and that there had not been in fact a "continuance of the business by the partners" in the sense of section 27 of the Partnership Act 1890 so as to infer a continuance of the partnership.

Partnership—Copartnery for Fixed Term—Continuauce of Partnership after Expiry of Term—Rights and Duties of the Partners—"As they were at the Expiration of the Term"—Partnership Act 1890 (53 *and* 54 *Vict. cap.* 39), *sec.* 27 (1).

Opinion (*per* Lord Mackenzie, Ordinary) that the words "at the expiration of the term" in section 27 (1) of the Partnership Act 1890, where that section says that in a partnership for a fixed term continued beyond the term "the rights and duties of the partners remain the same as they were at the expiration of the term," are equivalent to "during the partnership term."

The Partnership Act 1890 (53 and 54 Vict. cap. 39) enacts, sec. 27—"*Where partnership for term is continued over, continuance on old terms presumed*—(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will; (2) a continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership." Sec. 32—"*Dissolution by expiration or notice*—Subject to any agreement between the partners, a partnership is dissolved (*a*) if entered into for a fixed term, by the expiration of that term. . . ."

On 29th April 1905 Forbes Thomson Wallace, solicitor, 40 Marchmont Crescent, Edinburgh, raised an action of accounting against William Shepherd, solicitor, Royal Bank House, Leven, Fife, and others, the testamentary trustees of his father the late Forbes Thomson Wallace, bank agent, Leven.

The pursuer, who had an interest in the residue of his father's estate, made averments to the effect that the assets of the trust estate had not been properly realised. "(Cond. 6) In particular, the defenders have failed to realise and give credit in their accounts for certain payments which fall to be made to the estate of the deceased by his partner the defender William Shepherd. Mr Shepherd had been in partnership with the deceased since 1890, and from the period from 1st January 1895 under a copartnership agreement dated 28th February 1895. . . . . (Cond. 7) The said copartnership agreement was in force at the date of Mr Forbes Thomson Wallace's death and . . . Mr Shepherd was bound to pay to the defenders one-half of the profits of the business for the five following years in so far as they

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exceeded the sum of £500 per annum. . . ."

The said copartnership agreement dated 28th February 1895 contained the following clauses—"*First.*—The parties hereto agree to continue to carry on the said business under the same firm name for a period of five years as from and after the 1st day of January 1895. . . . . *Fifth.*—In the event of a dissolution of the copartnery by the death of either partner during the subsistence of this agreement, it is agreed as follows:—(*First*) In the event of the death of Wallace the books of the firm shall be brought to a balance by Shepherd as at the date of Wallace's death, and the proportion of profits due to him ascertained. Shepherd shall carry on the business, and for a period of five years subsequent to Wallace's death the profits of said business, as shewn by the balance sheet to be made up annually by him, which shall be final, shall, in so far as they exceed five hundred pounds per annum, be paid, one half to the representatives of Wallace, and the other half together with the said sum of five hundred pounds per annum shall belong to Shepherd. (*Second*) In the event of the death of Shepherd the books shall be brought to a balance by Wallace as at the date of Shepherd's death, and the proportion of profits due to him ascertained. Wallace shall carry on the business and shall pay to the representatives of Shepherd for a period of five years subsequent to the date of his death the sum of one hundred pounds per annum."

The late Forbes Thomson Wallace, the partner and truster, had died on 2nd January 1900.

The defenders, *inter alia*, pleaded—"(4) The said partnership not having been continued after the term fixed by the said agreement for its expiry, the defenders should be assoilzied. (6) In any event the provisions of the said contract for the interest of the representatives of the deceased were not of such a nature as to be held continued."

On 23rd December 1905 the Lord Ordinary (MACKENZIE) allowed a proof.

Opinion. — "The pursuer brings this action of accounting against the defenders, as trustees under his late father's testamentary settlement, and also as individuals. The action proceeds on the footing that the defenders have failed to ingather the assets of the trust estate.

"The late Forbes Thomson Wallace, the truster, had been in partnership with William Shepherd, one of the defenders. They had carried on a banking, law, and insurance business in Leven under a partnership agreement dated 28th February 1895, for five years from 1st January 1895. This term expired on 31st December 1899. Mr Wallace died on 2nd January 1900. Two questions arise at this stage of the case—(first) whether the partnership was continued after the term had expired on 31st December 1899, and (second) whether, if so continued, the provisions of a certain article in the partnership agreement (to be afterwards referred to) were carried forward into the partnership at will.

"The first question depends upon fact, because section 27 of the Partnership Act 1890 provides as follows—[*his Lordship quoted the section supra*].

"Accordingly the only point argued under this head was whether there was a sufficient averment of a continuance by the partners, or either of them, of the business after the expiration of the term specified in the partnership agreement. I am of opinion that the pursuer's averments in regard to this are quite sufficient to entitle him to inquiry.

"Inasmuch, however, as success on the first question would not avail the pursuer, unless the second question (which does not depend on disputed fact) is to be decided in his favour, it is necessary that it should be disposed of now. It is whether the provisions of article fifth of the partnership agreement are to be held as carried forward if subsequent to 31st December 1899 there was a partnership at will.

"Article fifth provides—[*his Lordship quoted article 5 of copartnership agreement supra*].

"The defenders did not contend that the provisions of article fifth are inconsistent with a partnership at will. Their argument was that this article provides only for the dissolution of the copartnery by the death of either partner during the subsistence of this agreement, and that this agreement terminated on 31st December 1899. I am of opinion that this is much too narrow a construction. I think that when partners continue business after the expiry of their original contract, without making any new agreement, the original contract is held to be renewed by tacit relocation, and all the articles of the original contract, so far as they are applicable to a partnership at will, are carried forward to regulate the rights and obligations of the partners *inter se*.

"It was also contended, on a construction of section 27 (1) of the Partnership Act (quoted *supra*), that 'the rights and duties remain the same as they were at the expiration of the term' in the case of a partnership continued after the term has expired; that if the late Mr Wallace had died prior to 31st December 1899 the rights conferred by article fifth would have vested in his executors, but that as he survived that date no right had as at the expiration of the term vested in him, and therefore nothing was transmitted to his executors. I am of opinion that the expression 'at the expiration of the term' is equivalent to 'during the partnership term,' and that therefore the argument upon the terms of the section is met by the same consideration which (as already explained) seem to me sufficient to negative the argument for the defenders, founded on the opening words of article fifth.

"I am therefore of opinion that if it is proved the partnership continued after 31st December 1899 the provisions of article fifth were carried forward. . . . . ."

The defenders reclaimed, and argued—The averments for the pursuer were vague and not such as to infer a continuance of the partnership. The facts which the Act required to establish a presumption of continuance were absent, and there was

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no averment of agreement to continue, therefore the partnership must be held to have expired.

Argued for the pursuer and respondent—The averments were such as to instruct an agreement between the partners that the firm should continue after the expiry of the period fixed for its duration. The business had been continued after that date in the sense of sec. 27 (2) of the Partnership Act 1890. The fact of 1st January being a holiday was immaterial, and the partnership had continued in the sense of the agreement thereanent.

LORD PRESIDENT—This is a case in which a beneficiary brings an action because he conceives that the trustees of his father's settlement, under which he is a beneficiary, have not made good a claim against a person who was a partner with the deceased truster. The claim is thus one for certain profits in respect of a partnership.

The deceased truster and the person in question were partners in a law business, and had a partnership agreement, dated 28th February 1895, the currency of which was for "five years as from and after" 1st January 1895. The partnership accordingly expired either upon the midnight of 31st December 1900 or on the midnight of 1st January 1901. I do not think it necessary to decide the question as to the precise meaning of the term "from and after"—in other words, as to the exact terminus of the partnership. The partnership agreement had a clause in it that in the event of the death of the senior partner, who was the truster, during the subsistence of the partnership agreement, the business should thereafter be carried on for a period of five years subsequent to his death by the surviving partner, and that the surviving partner should give a certain portion of the profits to the representatives of the predeceasing partner.

Now, what happened was this. No arrangement was made as to making any new partnership agreement, and the senior partner died at 7 o'clock on the morning of 2nd January 1901. The pursuer alleges that the partnership was continued, and that the clause as to carrying on the business for five years must be read into the new partnership. The matter seems absolutely determined by the sections of the Partnership Act which have been referred to. Sec. 32 of that Act says—"Subject to any agreement between the partners, a partnership is dissolved, (*a*) if entered into for a fixed term, by the expiration of that term." Well, that was the case here, and therefore, *prima facie*, the partnership was dissolved at the latest at midnight of 1st January. Then sec. 27 deals with the case of a partnership being continued after the term has expired as follows:—"(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will; (2) a continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership."

Now, these words seem to me to be perfectly clear. How can you have a continuance of the partnership without partners? The thing is impossible. And, accordingly, the continuance of the business — which is presumed to be a continuance of the partnership—must be a continuance "by the partners or such of them as habitually acted therein;" so that still, in order to a continuance of the partnership, there must be partners. Here it was impossible, after the death of the truster, that there could be a continuance of the partnership, because there were no partners, and it is impossible—supposing one takes the earlier date—that there could be a continuance of the business after 1st January without this continuance of partnership, because there was no time to infer that such continuance was consented to by the partners. The 1st of January was a holiday, and it seems improbable that any business was done in the office on that day. The continuance of the business is matter of fact, and the fact could never be gathered from a mere casual performance of some ordinary duty by one of the partners on a single day. Accordingly, it seems to me that the pursuer's case entirely fails.

I cannot help thinking that the Lord Ordinary had not noticed this matter where he says—"The only point argued under this head was whether there was a sufficient averment of a continuance by the partners, or either of them, of the business after the expiration"—that is not the phrase of the statute—"of the term specified in the partnership agreement." You cannot have a continuance of the partnership by one of the partners.

Accordingly, I cannot think there is really any room at all here for proof, and that the defender ought to be assoilzied.

LORD M'LAREN—I agree with your Lordship that it is not necessary for the purposes of this case to determine whether the partnership in question expired on the last day of December or on the first day of January. There is a rule — a well-known rule — for computation of time which is applied to cases where the law itself introduces a time limit, the most familiar examples being the law of deathbed and the sixty days for cutting down preferences under the Act of 1696. Under that law the rule is to exclude the first day and to include the whole of the last day of the term, but it is not to be assumed that this applies to the interpretation of words fixing the time in a written contract or agreement. In the interpretation of a contract the question always is, what was the intention? It is very unlikely that parties entering into a contract for years would intend to make it begin on the second instead of the first of January, and end on

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the first of January instead of 31st of December. It is, however, unnecessary to decide the point in this case, for we are all satisfied that it would be impossible — whether or not the first day of the year is to be included in the partnership—to draw any inference from the carrying on of business for a single day, and especially where that day is a public holiday. Now, it is not averred that the partners had entered into any new agreement before the expiry of the duration of the copartnership. I have no doubt that such an agreement is capable of parole proof, because partnership is a consensual contract. It may be continued by verbal agreement on the terms of the old written agreement. The evidence would, of course, have to be clear. The Court would not readily hold that two experienced men of business left a matter of that kind to a verbal understanding, knowing very well how to put down their agreement on paper. But no such agreement is averred.

I am of opinion that the 27th section of the Act has no application to this case, because, as I read the section, it is a condition of the two propositions there formulated that there is a partnership in existence —that is, a plurality of persons interested in the business. It is quite enough under the second branch of the section that one of the two should continue to do the work if that has been the practice of the firm—*e.g.*, where there is an active partner and a sleeping partner, but before the 27th section can take effect you must have two persons in the partnership from whose actings, or the actings of one of them, you are to infer a resolution to continue the old business. Now we have not got that, because by a strange coincidence the death of one of the partners occurred within a day after the expiry of the partnership.

I am therefore of opinion that there is no averment here of the continuance of the partnership, and accordingly there can be no proof.

Lord Kinnear—I quite agree with your Lordships. The statute provides that where there has been a contract of copartnery for a fixed term, and that term has expired, the partnership may be continued without an express agreement, provided it is continued in fact by the partners, or by such of them as habitually acted during the term, without any settlement or liquidation of the partnership affairs. That last condition seems to me to imply that, before it can be presumed against a former partner that he is continuing the business, he should have some opportunity of showing that he does not intend to do so by taking some steps, at all events, towards the settlement or liquidation of the partnership affairs. But without laying weight on that consideration it is, at all events, clear enough that what the statute imperatively requires is continuance of the business by the partners, or, at all events, by those partners who have during the fixed term habitually acted therein. Now, in the present case, the deceased man, who is said to have continued the partnership, died on the morning of 2nd January before the business hours began. The fixed term of partnership admittedly came to an end on either the 1st or 2nd of January. Assuming it came to an end on 1st January, the question is whether the dead man did anything to show that he and his partner were continuing the business as before, or allowed his partner to do anything to show that they were continuing the business as before, and to show a continuance of the business. Now, I agree with your Lordships that there is nothing averred on record from which it is possible to infer—even if some business had been done by the surviving partner just as it would have been done at any time before the arrival of the fixed time—a continuance of the business in the circumstances set out. In the ordinary course of affairs, if one partner of a firm is actually lying on his deathbed, it may be absolutely indispensable, and, at all events, perfectly reasonable, that the surviving partner should see that the business does not come to an end. The question is not whether the business, but whether the partnership, continued when the surviving partner like a reasonable man attended to the business though the other partner was no longer in life. But it is not averred that the surviving partner did anything whatever. Lord M'Laren pointed out at an early stage of the discussion that the day was a public holiday—New Year's Day —and therefore there is no room to presume that the surviving partner did anything in the business at all. At all events there is no averment.

It appears to me, therefore, that the conclusion your Lordships have reached is perfectly sound. There is nothing averred to show that the business was continued at all during the time that may have elapsed between the expiration of the fixed term and the death of the deceased man—at all events nothing to show that it was continued as a partnership. I therefore agree that the interlocutor under review should be recalled.

Lord Pearson concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Defenders and Reclaimers —The Dean of Faculty (Campbell, K.C.)— Sandeman. Agents — Thomas White & Park, S.S.C.

Counsel for the Pursuer and Respondent — Macfarlane, K.C. — Dunbar. Agent— Thomas Henderson, W.S.

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Tuesday, February 27.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

DA PRATO AND OTHERS *v.* MAGISTRATES OF PARTICK.

Statute—Bye-Law—Ultra vires—Powers of Magistrates — Hours of Closing — Ice-Cream Shops—Burgh Police (Scotland) Acts 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 316, 317, 318, 380 (6); 1903 (3 *Ed. VII. cap.* 33), *sec.* 82 (2).

Under the Burgh Police (Scotland) Act 1892, sec. 380 (6), ice-cream shops may only be open between the hours of 5 in the morning and 12 midnight. The Burgh Police (Scotland) Act 1903, sec. 82 (2), empowers town councils of burghs to make bye-laws (subject to confirmation by the Sheriff and Secretary for Scotland) in regard to the hours of opening and closing ice-cream shops within the limits prescribed by the Act of 1892, subject to the proviso that the hours for business are not to be restricted to less than 15 hours daily.

The town council of a burgh duly passed a bye-law making it illegal for such premises to be kept open except between 7 o'clock in the morning and 10 o'clock at night.

In an action for reduction of the bye-law at the instance of the ice-cream vendors of the burgh, on the ground that it was unreasonable, oppressive, and *ultra vires*, the pursuers averred that unless the bye-law was reduced their businesses would be ruined, as they would be precluded from doing business during the most profitable period of the 24 hours.

Held (1) that the only ground upon which the Court could proceed was that of *ultra vires;* (2) that the pursuer's averments were irrelevant to support such a case, as they disclosed nothing which on the face of the bye-law showed it to be *ultra vires.*

By the Burgh Police (Scotland) Act 1892, sec. 380, sub-sec. 6, every person is subjected to a penalty of £5 who "being the occupier of a building or part of a building or other place of public resort for the sale or consumption of provisions or refreshments of any kind, or for the sale or consumption of tobacco and cigars, opens his premises for business before 5 o'clock in the morning, or keeps them open or does business therein after midnight, unless specially allowed by the magistrates."

Secs. 316, 317, 318 of the same Act confer on the police commissioners power to make bye-laws subject to confirmation by the Sheriff and Secretary for Scotland.

Sec. 82 of the Burgh Police (Scotland) Act 1903 provides as follows by sub-sec. 1 that ice-cream shops must be registered; by sub-sec. 2 "Section 316 of the principal Act (the Act of 1892) shall be deemed to confer power on the town council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily, and the provisions of the principal Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly."

The Provost and Magistrates of Partick on 3rd December 1904 passed a bye-law in the following terms:—"The Provost, Magistrates, and Councillors of the Burgh of Partick, in virtue of the powers conferred upon them by the Burgh Police (Scotland) Acts 1892 to 1903, and particularly section 82 (2) of the Act of 1903, and sections 316 and 317 of the Act of 1892, and of other powers, do hereby make and enact the following bye-law:—1. No person registered in terms of section 82 (1) of the said Burgh Police (Scotland) Act 1903 to keep or use any house, building, part of a building, or other premises as an ice-cream shop or aerated water shop shall keep such premises open or suffer them to be kept open except during the hours between seven of the clock in the morning and ten of the clock at night on any day."

The bye-law was confirmed by the Sheriff of Lanarkshire and by the Secretary for Scotland.

In May 1905 Mansueto da Prato and others, vendors of ice-cream and aerated waters, registered under sec. 82 (1) of the Burgh Police (Scotland) Act 1903, brought an action against the Provost, Magistrates, and Councillors of the Burgh of Partick and others for reduction of the bye-law.

They averred, *inter alia*—"(Cond. 8) The said bye-law is illegal, incompetent, and *ultra vires*, and in contravention of section 82, sub-section 2, of the Burgh Police (Scotland) Act 1903, which confers 'powers on the town council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than 15 hours daily,' in respect that in fixing 7 a.m. as the opening hour the Commissioners include in the minimum of 15 hours allowed by statute hours which cannot reasonably be regarded as 'hours for business.' It is the true intention and meaning of the statute that the said minimum of 15 hours during which business can be carried on shall be the usual and convenient hours during which traders find it profitable and the public find it convenient that business should be carried on. No business in the articles in which pursuers trade is transacted in the burgh at so early an hour as 7 a.m. and none of the pursuers have opened or keep open their premises for business earlier than 9 a.m. The pursuers do little or no trade until about mid-day, as the defenders well knew when they fixed the hour of 7 a.m. as the opening hour. The said hour of 7 a.m. was not fixed upon any consideration of public need, convenience, or interest, but to enable the said defenders the Provost, Magistrates, and Councillors

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of the said burgh to maintain that the said 15 hours allowed by statute expire at 10 p.m. and so carry out extreme views held on the question of early closing which is not imposed by or under the authority of any statute, and that wholly irrespective of the necessities of the pursuers' business and regardless of the consequences which follow to the pursuers. In point of fact the hours during which the public most desire to purchase the commodities which the pursuers sell are later than 10 o'clock p.m., and in Glasgow those carrying on the same business as the pursuers carry on business until midnight. The said bye-law operates as a prohibition of the pursuers' business during the hours between 10 and 12 o'clock p.m. and constitutes a serious and illegal attempt to encroach on the pursuers' liberty of trade. The said bye-law will also destroy the pursuers' said established business connection in the supply of suppers, food, ice-cream, aerated waters, &c., during the hours between 10 and 11·15 p.m., and so strike at the volume of the pursuers' business turnover as to render the lawful carrying on of their business impossible. If allowed to stand the said bye-law will cause such loss and damage to the pursuers that they believe and aver they will be forced to cease their said businesses altogether. (Cond. 9) Moreover, such restriction is not merely an invasion of the pursuers' rights as citizens conducting a lawful calling, but it is also against the interests of the public. No public necessity exists for such restriction, as no evil of any kind is traceable to the pursuers' businesses. On the contrary, the pursuers' shops, situated as they are in the main thoroughfare of Partick, are great public conveniences, and are resorted to by an average of 750 customers every night after 10 o'clock. The hours from 1 afternoon to 12 at night are the hours in which nearly all the pursuers' trade is done, and their shops are now the only places in which food can be obtained after 10 o'clock in Partick. The enforcement of the said bye-law will destroy the pursuers' business altogether and result in similar businesses, though of a much inferior kind, being started in the back or side streets of the burgh and in smaller and less sanitary business premises."

They pleaded—"(1) The said bye-law being incompetent and illegal, and unauthorised by statute, should be reduced. (2) The said bye-law being *ultra vires* of the defenders, *et separatim* being unreasonable and oppressive, should be reduced or otherwise declared null and void. (3) In respect the said bye-law operates as an absolute prohibition of the businesses which the defenders under the powers of the statute were empowered to regulate, it is *ultra vires*, and the pursuers are accordingly entitled to decree in terms of the conclusions of the summons. (4) The pursuers being by law entitled to open their premises during fifteen hours for business in each day, the defenders have no power to make bye-laws restricting said hours for business, or substituting hours which are not hours for business."

The defenders pleaded, *inter alia*—"(2) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the summons. (3) The bye-law in question being legal and valid and warranted by statute, the defenders should be assoilzied from the conclusions of the summons."

The Lord Ordinary (ARDWALL) on 1st November 1905 sustained the second plea-in-law for the defenders and dismissed the action.

Opinion.—"There seem to be two points for decision in this case—first, whether the bye-law complained of is *ultra vires*, next whether it is unreasonable; and the question which has been so well argued by Mr Morison and Mr Crabb Watt is whether the Court can interfere on one or other or both of these grounds. Now, if this bye-law is *ultra vires* the Court would be bound to set it aside at the instance of any person aggrieved thereby. It is said to be *ultra vires* because it restricts the natural right and liberty of the pursuers to carry on business within certain hours which they say are the best for carrying on their business, and a case was cited by Mr Morison where a bye-law prohibiting hawkers from carrying on business in certain parts of Toronto was held to be *ultra vires*. But then the question of *ultra vires* is to be judged of by the powers of the Corporation making the bye-law, and the Privy Council held that in that case the Corporation's powers were limited to regulating the business of hawking, and did not extend to prohibiting it in any part of Toronto. That is the case—*Virgo* v. *The Municipal Corporation of the City of Toronto*, 1896, App. Cas. 88. But here it cannot be said that this case is on all fours with that at all, because by the section of the Act restriction of the hours in the way of opening and closing premises is expressly given; it confers power on Town Councils to make bye-laws 'in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily.' Now, it is not easy to see how bye-laws can be made with regard to the hours of opening and closing premises without in some way restricting carrying on trade at some time or another. But it is said that what is added makes the bye-law complained of *ultra vires*. The Act proceeds as follows—'The hours for business not being more restricted than fifteen hours daily,'—and it is argued that means the hours in which business can *profitably* be carried on are not to be restricted to less than fifteen hours, and that by this bye-law they are really restricted to thirteen, as ice-cream shops do no business before 9 a.m. and do most of their paying business between 10 and 12 p.m. I think if anything so absurd were done as the only time for being open should be during the night, I should say that that would be *ultra vires*, for that would be plainly against the true meaning of this clause. But the clause seems to be satisfied if within *reasonable* hours the pursuers have fifteen hours during

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which their shops may be kept open, and I cannot say that allowing them to be open between seven in the morning and ten at night is not sufficient compliance with the terms of this clause and does not give them fifteen hours daily for business. I accordingly am not prepared to hold that this bye-law is *ultra vires*. It is said whether it is so or not it is at all events so unreasonable that this Court is entitled to set it aside and ought to do so. I do not assent to this contention. If the pursuers can prove that between seven and nine in the morning there is absolutely no business done in such shops, and that, on the other hand, between ten and twelve at night is the time that really they make enough money to pay their rents and to pay their rates to these magistrates, I think that that would prove that the bye-law was unreasonable and had been passed in disregard of the interests of persons carrying on a perfectly legitimate and harmless trade, for while alcoholic refreshments frequently lead to disturbances and crime, ice-cream cannot be said to be other than an innocuous form of refreshment. But the question comes to be, is this Court entitled to judge of this matter? I am of opinion that it is not for this Court to judge whether the bye-law is reasonable or unreasonable in view of the trade that is being carried on. I think that all such questions must be held to be left by statute to the decision of the two authorities without whose consent and concurrence these bye-laws cannot be passed, namely, the sheriff of the county and the Secretary of State for Scotland. I think it is for them to decide what is reasonable and what is unreasonable with reference to the trades affected thereby, and if they are of opinion that the bye-laws are reasonable and ought to be passed I do not think this Court is entitled practically to review their decision. Accordingly, I am not disposed to allow a proof of the pursuers' averments. Such proof could only show that the bye-law prevented the pursuers carrying on a profitable business during the prescribed hours. Even if this were true, however, I could not set aside this bye-law merely because it inflicted hardship on these pursuers. They must submit, as other traders have to do, to the passing of such bye-laws by municipalities who have been clothed with *quasi* legislative powers by Act of Parliament. I accordingly sustain the second plea-in-law for the defenders, and dismiss the action, with expenses."

The pursuers reclaimed, and argued—The bye-law was *ultra vires*, unreasonable, and oppressive, and ought to be reduced. To that end the pursuers should be allowed a proof of their averments. The bye-law was *ultra vires*, because whereas the only power conferred on the Town Council was a power of regulating ice-cream businesses, the Town Council by the present bye-law had to all intents and purposes prohibited such businesses. Further, section 80 (2) provided for an allowance of at least fifteen "hours for business," and the meaning of that was fifteen hours in which there was a reasonable chance of business being done, but under the bye-law complained of they did not get that, a large portion of the hours allowed being utterly useless. Even if the bye-law was not technically *ultra vires* it could be reduced if it were unreasonable and oppressive. The case of *The Municipal Corporation of the City of Toronto* v. *Virgo*, [1896] A.C. 88, was directly authoritative. The following were also referred to:—Lumley on Bye-laws, p. 85; *Scott* v. *Glasgow Corporation*, July 27, 1899, 1 F. (H.L.) 51, 36 S.L.R. 965; *Eastern District Committee of Dumbartonshire County Council* v. *Police Commissioners of Clydebank*, October 19, 1893, 21 R. 12, 31 S.L.R. 22; *Duncan* v. *Crighton*, March 10, 1892, 19 R. 594, 29 S.L.R. 448; *Eastburn* v. *Wood*, July 14, 1892, 19 R. (J.C.) 100, 29 S.L.R. 844; *Dunsmore* v. *Lindsay*, December 19, 1903, 6 F. (J.C.) 14, 41 S.L.R. 199; *Rae* v. *Hamilton*, June 17, 1904, 6 F. (J.C.) 42, 41 S.L.R. 633.

The defenders and respondents argued—The Court could only reduce the bye-law if it was *ex facie ultra vires*. That could be inferred from the cases cited by the pursuers *supra*. The bye-law here was within the powers conferred by the Legislature, and the Court could not interfere—*Crichton* v. *Forfar County Road Trustees*, July 20, 1886, 13 R. (J.C.) 99, Lord M'Laren at p. 101, 23 S.L.R. 840. There was no room for proof, for the averments on record were irrelevant.

LORD JUSTICE-CLERK—I see no ground for reversing the judgment of the Lord Ordinary. This Act of Parliament and consequent regulations may or may not be for the benefit of the community, but the administration of them is entrusted to the magistrates of the different places to which they apply, and they must be assumed to be *bona fide* exercising their reasonable judgment in doing what they do. We cannot test the amount of common sense they possess. The only question which we can deal with is whether they have acted *ultra vires*. The magistrates here have done, in the case of ice-cream and aerated water shops, practically the same thing as they have done in the case of public-houses as regards closing at night. The magistrates have come to the conclusion that it is advisable that public-houses and hotels should be closed against service to visitors or strangers coming into these places after ten o'clock at night. Many people hold the contrary view, many people agree with them; but in the exercise of their discretion they have fixed ten o'clock as the time of closing. That they could fix ten o'clock as the time for closing other places of refreshment which are struck at by the Act of 1903 I have no doubt. They cannot close every place, but they can close those places over which the Act has given them jurisdiction as regards the hours of keeping open; and they have held, while giving the fifteen hours which are allowed by the Act, that it is the best mode of exercising their discretion to fix the hours between seven o'clock in the morning and ten o'clock at night. I am unable to see anything in

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that in contravention of the Act of Parliament. But then it is said that if this be done the ice-cream shops or aerated water shops in Partick will not be able to carry on their business at a profit, and therefore must cease carrying on their business, and that that was not the intention of the statute. The intention of the statute is that for the general benefit of the community the magistrates should fix suitable hours for closing these premises; and they having fixed what they consider suitable hours for closing these premises, the question how that may affect the business of persons who sell such commodities as ice-cream and aerated water may be doubtful. But if it has a tendency to stop what is a legitimate business, it is for the Legislature to interfere and put that right. But it would not do for us, merely upon averments that the bye-law will have that effect, to hold that it was *ultra vires* to pass the bye-law. Therefore upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD KYLLACHY—I am entirely of the same opinion and have nothing to add.

LORD STORMONTH DARLING—The state of the law with regard to ice-cream shops apparently is that for some reason which is not disclosed on the face of either of the Acts of Parliament the Legislature thought fit to regulate the hours during which they were to remain open. They did so by the Act of 1892 in this way. They fixed the hour in the morning before which, and the hour at night after which, they were not to be open, and that left a period of nineteen hours at the utmost for business. They gave no power at that time to any local authority to fix different hours. But in 1903, by sec. 82 of the Act of that year, they did give power to town councils of burghs to make bye-laws in regard to the opening and closing of these shops, guarding it only by this, that the hours for business were not to be restricted to less than fifteen daily. That being read along with the previous Act of 1892, the effect was to retain the earliest possible hour of five and the latest possible hour of twelve, and within that margin to allow the local authority to select any period of fifteen hours, subject to the control of the Sheriff of the county and the Secretary for Scotland. The Magistrates of Partick have fixed the fifteen hours within those limits, and the purpose of this action is to reduce the bye-law of September 1904. It is perfectly plain that we can only give effect to these conclusions if we are prepared to hold that the bye-law is *ultra vires*. I agree with the Lord Ordinary and with your Lordships that no relevant case has been presented to that effect. An averment of that kind, I think, must proceed upon something which on the face of the bye-law shows it to be *ultra vires*. There is nothing on the face of the bye-law to impeach its validity. Here the averments, even taking them at their highest as we are bound to do, come to no more than this, that if the bye-law is allowed to stand, the pursuers, who are all the ice-cream dealers in Partick, will find their business ruined, and will have to close their shops. But that averment, when examined, really comes to no more than this, that they anticipate that they will find their business so unprofitable that it will not be worth carrying on. The persons who had to judge of the probable effect on the pursuers' business, taking all the local circumstances into account, were the same persons who had to judge of the reasonableness of the bye-law which was about to be passed, namely, the Magistrates in the first instance, the Sheriff in the second, and the Secretary for Scotland in the third. All these authorities have considered the matter; all have concurred in passing the bye-law, and it seems to me that we should not be justified by the result of any proof that might be adduced in quashing the bye-law on the ground that it was likely to be followed by these results. I therefore entirely agree with your Lordships.

LORD LOW was not present.

The Court adhered.

Counsel for Pursuers and Reclaimers—Crabb Watt, K.C.—T. B. Morison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Guthrie, K.C.—C. D. Murray. Agents—Simpson & Marwick, W.S.

Saturday, March 3.

FIRST DIVISION.

MAGISTRATES OF ABERCHIRDER *v.* BANFF DISTRICT COMMITTEE AND OTHERS.

Expenses—Process—Interlocutor—Taxation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*)—*Interlocutor in Ordinary Form Giving Expenses to a Defending Public Authority—Proper Time to Move for Expenses as between Agent and Client.*

In an action against the District Committee of a County Council and the County Road Board the defenders were found entitled to expenses. The interlocutors were in ordinary form.

The defenders having presented a note to the Lord President in which they craved his Lordship to move the Court to direct the Auditor to tax their account as between agent and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893, and stated that the Auditor had refused to do so on the ground that he had no warrant to tax the account otherwise than as between party and party—*held* that the defenders' motion not having been made before the interlocutors were signed was not timeous, and note *refused.*

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The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) is entituled "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

Section 1 enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. (*c*) . . ."

This was a note to the Lord President for (1) the Banff District Committee of the County Council of the County of Banff, and (2) James Campbell, LL.D., Old Cullen, and others, the County Road Board of the County of Banff, defenders and respondents in an action against them at the instance of the Provost, Magistrates, and Councillors of the Police Burgh of Aberchirder, pursuers and reclaimers.

The action had concluded for (1) reduction of certain minutes or resolutions of the defenders the Banff District Committee and the Road Board, and (2) declarator that the District Committee was bound to maintain and repair the roads, streets, and lanes of the Burgh of Aberchirder.

On 13th January 1905 the Lord Ordinary (Low) had assoilzied the defenders from the conclusions of the action and had found them entitled to expenses except those incurred for a discussion in the Procedure Roll.

The pursuers had reclaimed, and on 20th October 1905 the First Division had pronounced this interlocutor—"Adhere to the said interlocutor, refuse the reclaiming note, and decern; Find the defenders entitled to additional expenses since the date of the interlocutor reclaimed against, and remit the account thereof, together with the account of the expenses found due by the interlocutor reclaimed against, to the Auditor to tax and to report."

The note, after narrating the provision as to expenses of the Public Authorities Protection Act 1893, sec. 1 (*supra*), stated—"The defenders have lodged in process their account of expenses made up in accordance with said statute as between solicitor and client, but on the same being submitted to the Auditor of this date (27th February 1906) he refused to receive or consider the same, on the ground, as he alleges, that he has no warrant to tax the account otherwise than as between party and party. The defenders are therefore under the necessity of presenting this note.

"May it therefore please your Lordship to move the Court to pronounce an interlocutor directing the Auditor of Court to proceed with the taxation of the said account . . . as an account of expenses between solicitor and client."

On the note appearing in the Single Bills counsel for the Burgh of Aberchirder (the pursuers in the action) argued that the note was incompetent and should be refused on the ground that it was too late now to move for expenses as between agent and client. The motion now made was doubly belated as the Lord Ordinary had only allowed ordinary expenses. An award of expenses in ordinary form carried only expenses as between party and party, and such award could not be altered after the interlocutor granting it was signed—*Wilson's Trustees* v. *Wilson's Factor*, February 2, 1869, 7 Macph. 457, 6 S.L.R. 285; *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862, 25 S.L.R. 606. The Auditor was not to be made a judge of whether the Act applied; the Court must decide that and intimate its decision in the interlocutor.

Argued for defenders—The case of *Fletcher* (*cit. supra*) was inapplicable, as there the Court had applied its mind specially to the question of expenses; that was not so here. In England the practice was to tax such an account as between agent and client without a specific finding to that effect. The words of the statute were imperative; that being so, the words "as between agent and client" should be read in—*Shaw* v. *Hertfordshire County Council*, [1899] 2 Q.B. 282. All that was asked here was a direction to the auditor. No alteration of the interlocutor awarding the expenses in question was necessary. The motion was therefore competent.

Lord President—I am clearly of opinion that this motion is too late. Under section 1 of the Public Authorities Protection Act provisions are made as to the timeous prosecution of actions "where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority," Then sub-section (*b*) provides, "wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client."

Now, I am not doubting that the decisions in the English courts which have been quoted are right, namely, that if the court is satisfied that an action falls under the first section of the Act and finds expenses in favour of the defendant these expenses must be as between agent and client. But in many cases questions may arise as to whether an action does fall under the first section, and so, according to the universal practice of this Court, it is necessary for a person wishing to benefit by the section to make a motion before the interlocutor in the cause is signed, to allow the Court to determine whether the section is applicable or not. In the present case this was not done, and the interlocutor found expenses in the ordinary terms, and the Court has no power to alter that interlocutor. The

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defenders asked the Auditor to tax the account as between agent and client, and the Auditor refused as he found no warrant for doing so in the interlocutor. The application to alter the interlocutor is too late, and it is vain to quote to us English cases as to the rules of procedure in our own Court. There is a perfectly appropriate time for such a motion being made, and the present contention would lead to this, that such questions as to whether or no a party was a public authority would be left to the decision of the Auditor.

LORD M'LAREN—It is a well-established rule by practice in this Court that where expenses are to be given on any other than the ordinary scale, this should be specified in the interlocutor awarding expenses. The Public Authorities Protection Act is not the only illustration of the application of that rule. There is, for instance, the very familiar case where the question is whether expenses are to be given against trustees or a judicial factor individually or in a representative capacity.

In such cases it is settled that the Court has no power to alter what is contained in its interlocutor awarding expenses. In a well-known case as to individual or collective liability, which went to a Court of Seven Judges, it was held that the only question was the construction of the interlocutor which was under consideration.

I agree with your Lordship in thinking that the practice of the English Courts cannot be a guide to us in settling what is the proper time in this Court at which application ought to be made for carrying out the provisions of the Act. I do not know whether, if this motion had been made at the proper time, it would have been granted; but it was not made, and we have no power to alter or amend our interlocutor.

LORD KINNEAR—I concur.

LORD PEARSON—I agree on the ground that the motion is made too late.

The Court refused the prayer of the note.

Counsel for Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders and Respondents—Clyde, K.C.—Chree. Agents—Alex Morison & Co., W.S.

Saturday, March 3.

FIRST DIVISION.

[Lord Johnston, Ordinary.

A B *v.* C B.

Husband and Wife—Nullity of Marriage—Impotency—Incapacity of Woman—Absence of Structural Defect—Impracticability of Consummation—Circumstances in which Impracticability Inferred.

Seven months after the marriage, a husband brought an action of nullity against the wife on the ground of her impotency. The spouses had separated three and a-half months after the marriage, but prior to that date the husband, who was able and anxious to consummate the marriage and had had sufficient opportunities, had used every means to that end short of physical violence, but without attaining his object. There was no structural incapacity in the wife. No reason was suggested for a wilful refusal on her part.

Held (1) (*aff.* Lord Ordinary Johnston's opinion) that incapacity on the part of the woman was not restricted to cases where some structural incapacity existed, but included cases where consummation was impractical, an inference to be drawn from the facts; and (2) (*rev.* Lord Ordinary Johnston) that in the circumstances of the case incapacity on the part of the woman was to be inferred, and consequently that the man was entitled to decree.

On 3rd January 1905 A B (the man) brought an action against C B (the woman) to have it declared that a marriage between them, which had been celebrated on 10th June 1904, was null, on the ground that the defender was at the time of the marriage, and was still, impotent.

The facts proved and the circumstances of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 22nd November 1905 pronounced this interlocutor—"Finds that the pursuer has failed to adduce evidence by which the alleged impotency of the defender is established, or from which it can be inferred; therefore dismisses the summons and decerns: Finds the defender entitled to expenses down to and including 17th March last, under deduction of £5, 5s. paid *ad interim* under the interlocutor of 17th February last, and of £5 paid voluntarily on 17th March last; allows an account to be given in," &c.

Opinion.—"The pursuer A B seeks to have his marriage with the defender C B, which was solemnised on 10th June 1904, annulled on the ground of her impotency. The parties lived together until 24th September 1904, and the summons was signeted on 3rd January 1905, less than seven months after the marriage.

"The evidence is so narrow and the case so complicated by the briefness of the period of cohabitation, and by the conduct of the wife towards the litigation, that it is necessary to deal with it with care.

"The pursuer necessarily undertakes the onus of showing, as the ordinary form of summons sets forth, 'that the defender was at the time of the pretended marriage between her and the pursuer, and still is, impotent and unable to consummate marriage by carnal copulation.' Has he satisfied that onus?

"His averment is the general one, that 'the defender is impotent and unable, either from malformation or from functional or nervous defects in her constitution, or from some other cause or causes to the pursuer more particularly unknown, to have connection with the pursuer.'

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"I may premise that I am satisfied that there is no collusion in the case, and also that there is no reason for entertaining the suggestion that, as alleged by the defender, but not attempted to be proved by her, there had been any antenuptial intercourse. Further, there is nothing to suggest impotency on the part of the pursuer.

"Otherwise the evidence is as follows:—The marriage took place at Perth on Friday, 10th June 1904, in the evening. The pursuer swears that he sought intercourse that night, but desisted on his wife pleading fatigue. The parties went to Dollar on Saturday, 11th June, and the pursuer swears that he attempted intercourse that night, but that his wife would not allow him to effect penetration. On Tuesday, 14th, the parties were at Stanley, and the pursuer swears that he again attempted intercourse that night, but was again unsuccessful. The pursuer being an engine-driver in railway employment was on the night shift from Thursday, 16th. But he swears that on coming home on Sunday, 19th, at 4 a.m.—'I went to bed beside my wife. I attempted to have connection with her, but was unsuccessful. She refused me.' From this date on the pursuer does not speak to particular dates. But he puts the facts thus—'(Q) On the night of the Monday of the following week' (*i.e.*, either 20th or 27th June) 'did you attempt to have connection with her?—(A) I attempted it occasionally before I was told I should have had "better luck," but I do not remember the dates. I cannot tell how many times I attempted it. I tried it until I was tired. I did not succeed at any time. She would not let me do it at all. I never succeeded in penetrating her private parts. She always kept her legs close, bar once. I believe that would be the third week, but when I got a certain length she refused altogether, and when I said she was no use to me she said I should have had better luck. Her legs were open on that occasion, but I did not succeed in penetrating. I never attempted to use force. I left her about the 24th September. I cannot say how many times I attempted to have connection with her. (Q) Very often?—(A) Yes, I tried until I was tired of it any way.' And in cross he adds—'I began to despair and give it over about a month or six weeks after the marriage.' And in answer to the Court—'After I made the last attempt to have connection with her we always slept in separate rooms.'

"This is the whole direct evidence to the facts, and it must be accepted, on the defender's admission to the doctors who examined her, that the marriage never was consummated. But it must be remarked, before going to the medical evidence, that the wife's mother was alive and readily accessible to the parties, and that so far as the pursuer was concerned no attempt was made to interest her in the defender her daughter, or to get her or any other discreet and experienced married woman to advise the defender, nor did the pursuer communicate his difficulty either to a medical man or, so far as appears, to anyone else, until after he had left his wife. So far as the defender is concerned there is no suggestion that she consulted anyone either.

"The medical evidence was that of Drs Carruthers and Bisset of Perth. They did not examine the defender on any remit from the Court, but she voluntarily submitted to their examination within a month of the separation, at least on 25th October 1904. We are left in doubt whether it was prearranged or not, but I understood it was, as she was found in bed at the doctors' coming. The gist of Dr Carruthers' evidence is that the condition of the hymen was consistent with connection having taken place at some time, but not proof that it had ever taken place; that the vagina was normal in size; but that in passing two fingers gently up there was a slight spasmodic action causing a distinct grasp of the fingers in the passage, which would be increased in the act of sexual connection; that the passage of the fingers caused appreciable pain; and that there would be an increase of pain in the course of the sexual act. Dr Carruthers further stated:—'There was nothing in the physical appearance to account for her declining. There was really nothing to hinder connection if it had been forced'; and in cross, 'I asked her if she refused, and she said no; she was willing. I said "Can you explain, if you were both willing, how no connection took place?" and she said she could not. . . . Of course the spasm was there and there would be extreme pain in connection. (Q) Is not that quite usual?—(A) Not always; not so bad as this. We sometimes come across women who are nervous and excitable for a little while, and who gradually reconcile themselves to the duty of a wife, but this spasm is a matter of unconsciousness. I have had no experience of a woman refusing her husband to have connection for a time and then getting over that. It may be medically true that such is the case. I strongly recommended reconciliation between the parties. The defender said she thought it was impossible.' And in answer to the Court he added:—'Supposing I had been told that the attempts had been, say, a dozen times, and had been unsuccessful, I would have recommended that they should have been continued further if the parties were both willing. I have seen the spasm frequently in other cases. It did not amount to an abnormality, but it rather exaggerated the pain more than usual. The defender said she was anxious to do her duty as a wife, and said it was an extraordinary thing that they were both willing and yet never had been able to have connection, which I could not understand.'

"Dr Bisset corroborates Dr Carruthers regarding the physical condition ascertained by their examination, viz., that he 'found a slight constriction of the orifice—a spasm.' But in cross he adds, 'I did not see anything to prevent the defender having connection with her husband,' and in answer to the Court, 'I saw nothing to prevent connection that could not have been overcome. The spasm I noticed was more than is usually found to exist in a newly married

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woman. It did not amount to malformation or an unhealthy condition.'

"Now, the whole of this evidence must be taken in the light of the facts that the pursuer and the defender commenced their married life with the ordinary natural affection of a newly married couple, that there is nothing on which to base the suggestion that the defender might be impotent *quoad* her husband though not *quoad* another man, *i.e.*, that it was a personal matter; and that there is no suggestion that the failure to consummate the marriage was due to excitability on the part of the defender, still less to anything that could be denominated hysteria.

"In these circumstances I confess I think the evidence comes short of what is required to satisfy the Court of the defender's inability to consummate the marriage. I would even go the length of saying that the medical evidence rather goes to establish the contrary. But it was ably argued on the authorities, that I must accept it as proved in the absence of rebutting evidence that there had been continued refusal to permit intercourse, and that such a state of facts entitled, and if entitled I suppose bound, the Court to infer practical incapacity.

"The term 'practical incapacity' has been used in England. But though I take no exception to it on matter of principle I think it requires to be applied with very great caution.

"The received doctrine on which the power of the Court to annul a marriage on the ground of the impotency of one of the spouses rests is that marriage is a consensual contract, completed by the consent of the spouses, whether there exists impotency or not, but that the consent is given on the implied condition on each side that the other side is capable of marital intercourse, which condition is resolutive of the marriage if the capacity be found not to exist. And as in the case of other resolutive conditions the nullity requires to be declared. The contract, that is the marriage, stands, unless the spouse to whom the condition is not implemented takes steps to set it aside.

"But there is this anomaly in the law—the end of marriage, besides conjugal association, is the procreation of children, and conjugal intercourse is the means to that end. Impotency is properly incapacity *procreandi* and not merely *copulandi*. Yet the law does not inquire into the capacity *procreandi*, but merely into the capacity *copulandi*. So long as sexual intercourse is possible the husband may be incapable of generating, the wife may be sterile. This may not be logical, but it is defended on the ground that capacity for intercourse is a fact that can be ascertained by evidence; capacity to procreate, unless in exceptional cases, is rather matter of speculation. The sole question for the Court, therefore, is not potency or impotency in the proper sense, but the capacity or incapacity of the spouse in question to have sexual intercourse with the other. The Courts have discriminated between structural incapacity, or incapacity arising from malformation, and practical incapacity where there is no malformation. On the evidence it cannot be suggested that the defender suffers from any structural incapacity. It is necessary, therefore, to ascertain what is meant by practical incapacity.

"There have been few cases in Scotland on this subject for a long time past, except two or three which have not gone beyond the Outer House, and these latter have rested for authority upon English decisions. But there is one Scottish case to which I may refer, *A B* v. *C B*, 12 R. (H.L.), 36, because of what is said on the subject of length of cohabitation, a point to my mind of great importance here. The rule of the canon law, adopted to some extent in England, was that three years' cohabitation without consummation raised a presumption of incapacity, where incapacity could not be practically proved at an earlier point of time.

"The rule is thus explained by Dr Lushington in a passage quoted by the Lord Chancellor (Selborne), at p. 41:—'I am of opinion that a triennial cohabitation is not an absolutely binding rule. It is a convenient and fitting rule, and one not to be departed from on slight ground. Still circumstances may arise, as in the present case, to justify the Court in dispensing with it. I am not aware that there is any magic in three years. I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the Court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it ought never to be driven *sine gravissima causa* after such a cohabitation as is proven in this case' (that was less than three years) 'to order a return.' Within recent times the canon law requirement of a triennial cohabitation has not been recognised in Scotland. But I venture to think that the object of the rule, as stated by Dr Lushington, viz., where there is no direct evidence, and the Court is driven to inference, to provide that sufficient time be afforded for ascertaining beyond a doubt the true condition of the party in question, should be recognised in Scotland, and that grave risk of miscarriage of justice is run if with insufficient time deductions are drawn from circumstances not absolutely conclusive, which the lapse of more sufficient time might subvert; and here I think in the circumstances the time has been insufficient safely to admit of the deduction.

"The term 'practical incapacity' is found I think first used by Lord Penzance in the case of *G.* v. *G.*, L.R., 2 Prob. Div. 287. He there says the basis of the interference of the Court is not structural defect but the impossibility of consummation. 'If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect), the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically im-

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possible, if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting.' But then in the case in which he applied these views there had 'been nearly three years' cohabitation, and therefore ample opportunity had been afforded for any mere temporary difficulty to pass away.'

"The same principle was applied by Sir James Hannan in *H.* v. *P.*, L.R., 3 Prob. Div. 126. But the parties had cohabited for more than three years, and any attempt by the husband to consummate the marriage resulted in either fainting or violent hysteria on the part of the wife. Sir James said—'The rule appears to be this: the impediment in the way of intercourse must be physical, and it must not arise from the wilful refusal of the wife to submit to her husband's embraces.' The husband's attempts brought on hysteria, 'so that he could not effect his purpose without employing such force as, but for the marriage, would have amounted to rape. Every feeling is arrayed against the idea of a husband having recourse to such violence. If, then, the husband finds it impossible to have connection with his wife, except upon such conditions, it is practically impossible for him to have any connection at all.'

"In a subsequent case—*S.* v. *A.*, L.R., 3 Prob. Div. 72—Sir James Hannan, after saying 'a wilful, wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence,' added this important statement of the law—'Recent cases only establish this in advance of previous decisions, viz., that when a woman is shown not to have had intercourse with her husband after a reasonable time for consummation of the marriage, if it appears that she has abstained from intercourse, and resisted her husband's attempts, the Court will draw the inference that that refusal on her part arises from incapacity.'

"The statement of the present position of the law may, I think, well rest there, and the question must always be: From the circumstances, can the Court draw the inferences that something more than seemingly wilful refusal must have animated the spouse complained of? In the circumstances, is it to be inferred from the lapse of time that has occurred that that something more cannot be overcome, but amounts to practical incapacity?

"In the circumstances of this case, if I were driven to a decision as at 24th September 1904, when the husband left his wife after barely three months and a half of married life, during the first six weeks of which only there had been proper conjugal cohabitation, I could no more satisfactorily conclude that there was incapacity on the part of the wife than that there was wilful, wrongful refusal. I do not in fact think that either has been proved. My view of the facts is this—

"There has been no consummation of the marriage. The defender is capable of intercourse. But she must endure some pain, at least at first, in the sexual act. There is nothing approaching hysteria or incapacity to control herself in her case. There has been no attempt to obtain advice, explanation, and encouragement for her, and the husband has not recognised that it may even be possible that he himself might take advice with good results. In these circumstances, in my opinion, the time and opportunity has not been sufficient to infer practical incapacity from the failure so far to consummate the marriage. The case is a very different one from *B.* v. *B.*, L.R. (1901), Prob. 39.

"The Outer House cases which were referred to were *AB* v. *YZ*, 8 S.L.T. 253, *AB* v. *CD*, 38 S.L.R. 559, *M.* v. *G.*, 10 S.L.T. 284, and *AB* v. *CD*, 10 S.L.T. 286. They go further in readiness to draw the presumption than any of those which have occurred in the English courts. But none of them come up to the present.

"The case is made more difficult owing to the conduct of the defender towards the litigation. Lord Stormonth Darling, who took the proof, stopped it at the close of the pursuer's evidence, and on 17th March 1905 pronounced an interlocutor, based I understand on an undertaking by the parties, given on his advice, by which, on their agreeing to resume cohabitation, he sisted further procedure till 18th July next.

"On 13th July the pursuer lodged a minute stating that notwithstanding the agreement to resume cohabitation, the defender had not done, and persistently refused to do, so, and therefore craved a renewal of the sist for such period as might be deemed expedient, that the defender might have a further opportunity of resuming cohabitation with him. But this suggestion was not accepted by the defender, and on 18th July 1905 I found myself obliged to appoint the proof to be resumed on 10th November 1905. The defender, however, prior to the diet fixed, lodged a minute in which she stated that 'the pursuer has taken no interest in, or shown any affection or regard for the defender, nor has he made any reasonable provision for resuming cohabitation with her. The defender is now satisfied that the pursuer does not desire her to reside with him, and does not intend to treat her as his wife. In these circumstances, while the defender adheres to her defence as stated on record, she respectfully desires to intimate that it is not her intention to appear at the diet of proof fixed for 10th November unless otherwise ordered by the Court.'

"Accordingly when the proof was called on 10th November the defender did not appear except by counsel, who intimated that he was instructed merely to watch the case, but not otherwise to intervene. I intimated that the pursuer would be allowed in these circumstances to supplement his proof on any point he thought desirable and even to call the defender. But he elected to stand on his proof as led and I thereafter heard counsel for him.

"The result is most unsatisfactory. In any other class of case I should, I think, have been bound to hold the defender confessed. But in a matrimonial cause the

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Court is in a peculiar position. And I think that it would be against public policy were I to pronounce decree of nullity of marriage practically by default, or by reason of the contumacy of the defender.

"The question which I now have to determine therefore is—Can I accept the conduct of the defender as an admission on her part of the impotency alleged, or as evidence from which I can draw the inference of practical incapacity, which I cannot draw from the evidence? Or must I regard her attitude as virtually wilful, wrongful refusal. I experience the utmost difficulty in deciding this point. And if I had had any evidence of provision made for cohabitation and advances made by the pursuer with a view to resumption of cohabitation on anything like proper and generous terms, and rejected, I should possibly have been able to reach the inference required. But left as I am to judge on the evidence as led, and on the minutes of the parties, I feel unable to overcome the conclusion at which I had arrived, that the medical evidence was affirmative of the possibility of consummation, and that in the circumstances there had not been sufficient opportunity. After what has come and gone since 24th September 1904 the attitude of the defender is not perhaps altogether to be wondered at, but regarding it judicially I think it now amounts to wilful, wrongful refusal. If this is continued the pursuer may have his remedy by divorce for desertion, but I do not think that he has proved his case for decree of nullity of the marriage.

"I shall therefore dismiss his action, finding the defender entitled to expenses only down to 17th March last, under deduction of five guineas of interim expenses allowed by the interlocutor of 17th February last, and of a further sum of £5 voluntarily supplied on 17th March last."

The pursuer reclaimed, and argued—The pursuer was willing and anxious to consummate the marriage, and had made repeated attempts to do so. These had been unsuccessful because of the defender's refusal to permit consummation. The defender's refusal was due (*a*) to physical causes, (*b*) aversion to the husband, or (*c*) aversion to the act. From the refusal of the defender after sufficient time and opportunity the Court would infer impracticability or impotency—*G.* v. *G.*, 1871, L.R. 2 P. & D. 287, 25 L.T.R. 510; *S.* v. *A.*, 1878, L.R. 3 P. Div. 72, 39 L.T.R. 127; *F.* v. *P.*, 1896, 75 L.T.R. 192; *E.* v. *E.*, 1902, 87 L.T.R. 149; *B.* v. *B.* [1901], P. 39; *M.* v. *G.*, 10 S.L.T. 264; *A B* v. *C D*, 10 S.L.T. 266; *A B* v. *G Z*, 8 S.L.T. 253; *C B* v. *A B*, March 5, 1885, 12 R. (H.L.) 36, 22 S.L.R. 461. There had been sufficient time and opportunity here. The fact that there was no structural defect on the part of the defender did not overturn the inference from the other facts proved—*G.* v. *G.*, *cit. supra*, *per* Lord Penzance, p. 291.

Counsel for the defender watched the case but did not address the Court.

At advising—

Lord President—This is an action of declarator of nullity of marriage at the instance of a husband against a wife, on the ground of impotency. The case is important in this respect, that the class of facts which we find here does not seem to have been the subject of decision in the Inner House, though facts nearly, although not identically, the same in their complexion have been adjudicated upon in the Outer House and in England. I do not think it necessary to investigate the history of the law. It has long ago been settled that impotency on the part of one spouse at the time of the marriage continuing thenceforth is a ground for the voidance of the marriage at the instance of the other, which will be given effect to unless there is a personal bar to be drawn from the solemnisation of marriage in the knowledge of both parties of the defect, or to be inferred from the extreme age at which the marriage is contracted. Further, it is now well settled that a person is in law impotent who is *incapax copulandi*, apart from the question of whether he or she is *incapax procreandi*. The only difficulty therefore that arises is in the proof—a proof as to which the Court is bound to be satisfied, lest marriages should be avoided either by collusion or in cases where the fact that there has been no copulation is due to wilful refusal.

The primary fact as to which the Court must be satisfied is that the marriage has never in fact been consummated. As to this no general rule can be laid down, yet it is here that I think we have the greatest safeguard against the abuse of this remedy. For it is certain, as a matter of ordinary experience based on observation of human nature, that however unhappy in the sequel marriage may become, and however strong the motives which may prompt the desire of one or other or both of the spouses to part company, in the vast majority of cases consummation will follow marriage at no distant interval. In the present case, without quoting the evidence, I may say I am thoroughly satisfied that consummation never did take place, and the Lord Ordinary is of the same opinion. But then comes the question, was the non-consummation due to impotency or to some other cause. Now, the proof that is available in such a question evidently differs according to the sex of the spouse complained of. Nature has arranged that in a certain sense man shall be the active and woman the passive participant in the sexual act. It results that medical evidence will in most cases be directly available to prove incapacity in the case of the man, in comparatively few in the case of the woman. That being so, the question that arises in the present case, and is I think undecided by this Court, is whether incapacity in the woman is to be confined to those cases, admittedly rare, where there is what has been termed structural incapacity. I see no reason so to confine it, and I am content to adopt in terms the words of a very great authority on such subjects, the late Lord Penzance, in the case of *G.* v. *G.* (L.R. 2 P. & D. 287).

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He said—"The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted, but the basis of the interference of the Court is not the structural defect but the impracticability of consummation." I understand the Lord Ordinary to agree also on this view of the law. He has, however, refused decree on the ground that the evidence falls short of satisfying him that the non-consummation was due to inability on the part of the defender. Now, I admit this is a question of fact, and each case must be judged on its own circumstances. But in so far as a general rule can be laid down, I am again content to take the standard laid down by Lord Penzance. "The impossibility," he says, "must be practical. . . . The question is a practical one, and I cannot help asking myself what is the husband to do? . . . Is he by mere brute force to oblige his wife to submit to connection? Everyone must reject such an idea." And the same rule was expressed in somewhat different language by Sir Francis Jeune in the case of *F.* v. *P.* (75 L.T. 192), when he said that if it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife.

I do not think it necessary to review the details of the evidence in this case. I content myself with saying that I am satisfied that the following facts have been proved:—(1) That the marriage never was actually consummated. (2) That the husband was able and anxious to consummate and had more than sufficient opportunities, free from any circumstances of a disturbing nature, either mental or physical, on which to attempt consummation. (3) That, short of physical force, he adopted all ordinary expedients to induce the wife to admit connection. (4) That no reason whatever is suggested for a wilful refusal on the part of the wife, and that the whole probabilities of the case point to an opposite conclusion. In the circumstances I think that the Court is entitled to draw the inference that there was here a practical incapacity on the part of the wife, and that the husband is entitled to the remedy he asks for.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court recalled the interlocutor of the Lord Ordinary of 22nd November 1905 save in so far as it dealt with expenses, and found, declared, and decerned in terms of the conclusions of the summons, finding the defender entitled to expenses since the date of the said interlocutor.

Counsel for the Pursuer and Reclaimer—Munro. Agent—Jas. Campbell Irons, S.S.C.

Counsel for the Defender and Respondent—Lyall Grant. Agents—Cowan & Stewart, W.S.

Tuesday, March 7.

SECOND DIVISION.

COUPER *v.* M'KENZIE.

Ship—Collision—Limitation of Liability—Fishing-Boat—Fishing-Boat Registered only in Fishing-Boat Register under Part IV of Merchant Shipping Act 1894 *Entitled to Limitation of Liability—Merchant Shipping Act* 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 2, 373, 503, 508.

Section 503 of the Merchant Shipping Act of 1894 limits a shipowner's liability in certain cases of loss of life, injury, or damage. Section 508 provides that this benefit shall not extend to any British ship which is not recognised as a British ship within the meaning of the Act. Section 2 provides, sub-sec. 1, that every British ship (with exceptions enumerated in sec. 3 not here in point) shall be "registered under this Act;" sub-sec. 2, that any such ship "not registered under this Act" shall not be recognised as a British ship.

Held that a British fishing-boat registered only in the Fishing-Boat Register under Part IV of the Act, and not under Part I, was a British ship registered under the Act within the meaning of sec. 2, and that its owner was entitled to the limitation of liability conferred by sec. 503.

Ship—Collision—Limitation of Liability—Fishing-Boat—Tonnage—Deduction of Crew Space—Surveyor's Certificate—Registration—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60).

In calculating the tonnage of a steam fishing-boat, registered only under Part IV of the Merchant Shipping Act 1894, for the purpose of the limitation of the owner's liability under sec. 503, *held* that the owner was entitled to deduct crew space which was certified by a Board of Trade surveyor, although neither the certificate nor any entries in connection with it had been registered in the register appointed to be kept under Part I of the Act.

Expenses—Ship—Collision—Petition for Limitation of Liability—Respondent Opposing Limitation Liable for Expenses Caused by Opposition—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 504.

In a petition for limitation of liability brought under sec. 504 of the Merchant Shipping Act 1894, the respondent, who opposed the petition, contending unsuccessfully that the petitioner was not entitled to the benefit of limitation, *held* liable to the petitioner in such expenses as had been caused by his contention.

Statute—Statutory Law—Interpretation—Previous Legislation.

Per Lord Kyllachy—"I should doubt much whether the courts of law are at liberty, in construing Acts of Parliament, to do so with reference to the

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course of previous legislation, or to inferences which they may be disposed to draw from previous statutes as to the probable intentions of the Legislature."

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) is divided into Parts, of which Part I, headed "Registry," includes sections 1 to 91; Part IV, headed "Fishing-Boats," includes sections 369 to 417; and Part VIII, headed "Liability of Shipowners," includes sections 502 to 509.

Section 503 enacts—"(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say)— . . . . (*d*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts (that is to say)— . . . . (*ii*) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of their ship's tonnage. (2) For the purposes of this section—(*a*) The tonnage of a steamship shall be her gross tonnage without deduction on account of engine room; and the tonnage of a sailing ship shall be her registered tonnage: Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto."

Section 504—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent court, and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just."

The other sections of the Act which are of importance for the purposes of this report are quoted in the opinion of Lord Stormonth Darling, *infra*.

George Couper, fishcurer, Helmsdale, presented a petition under section 504 of the Merchant Shipping Act 1894 for limitation of liability in respect of damage caused by the "Pansy" in collision. From the statements made by him in his petition it appeared that he was the registered owner of the British steam sea fishing-boat 'Pansy' of Helmsdale, the gross tonnage of which was 72·61 tons. The berthing accommodation for seamen and apprentices and appropriated to their use amounted to 13·20 tons, which, being deducted, left a tonnage of 59·41 tons. The 'Pansy' was not registered under Part I of The Merchant Shipping Act 1894. She was registered under Part IV of The Merchant Shipping Act 1894. She was measured, and her deductions in respect of crew accommodation were ascertained with a view to registration under Part I of the Act, but the registration under Part I was never carried through. Her measurements were duly made by a Board of Trade surveyor with a view to registry under Part I of the Act, and these measurements were adopted as correct when she was registered under Part IV of the Act, conform to certificate granted by him.

On 22nd February 1905 the "Pansy" came into collision with the British sea fishing-boat "Swift," of Burghead, 21 miles to the north-west of the Butt of Lewis. The collision was due to the fault of those in charge of the "Pansy," for whom the petitioner was responsible, but without actual fault or privity upon his part. The "Swift" was seriously damaged, and a claim was made by her owners against the petitioner. He was also threatened with other claims, and, in particular, an action had been raised in the Court of Session against him at the instance of Daniel M'Kenzie, fisherman, Burghead, a member of the crew of the "Swift," concluding for over a £1000 of damages. Couper accordingly presented the present petition under section 504 of the Act craving the Court to limit his total liability as owner of the "Pansy" to £8 per ton on 59·41 tons, *i.e.*, to a sum of £475, 2s. 8d.; and further, under section 504, to rank the various claimants to the proportions of that sum to which they might respectively be found entitled in the present process.

Daniel M'Kenzie opposed the petition, and lodged answers, in which he stated, *inter alia*—"The register entry of the said British steam sea fishing-boat 'Pansy' in the register of fishing-boats, under Part IV of the Merchant Shipping Act 1894, is referred to for its terms, beyond which no admission is made. The amount of the berthing accommodation for seaman and apprentices, and appropriated to their use, is not entered in said register. Denied that the petitioner's liability for loss and damage caused by said collision is limited under section 503 of the Merchant Shipping Act 1894, and that the petitioner is entitled to have his liability limited under the said Act. The said section applies only to the owners of 'ships, British or foreign,' registered under said Act. The said fishing-boat 'Pansy' was not registered as a British ship under said Act, as provided by Part I thereof, and is therefore not entitled to recognition as a British ship, or to the benefits, privileges, advantages, or protection enjoyed by British ships, within the meaning and under the provisions of the

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said Act. The petitioner, as owner of the said 'Pansy,' is therefore not entitled to limitation of liability under section 503 of the said Act, and the prayer of the petition accordingly should be refused. The respondent further maintains that the said 'Pansy' not having been registered under the said Act, and the measurements and deductions contained in the surveyor's certificate produced by the petitioner not having been entered in the register of British ships appointed to be kept by the said Act in terms of Part I thereof, the said certificate is inadmissible as evidence of measurements and deductions, and is ineffectual and of no force or effect whatever, and the petitioner is not entitled to found thereon for the purpose of making the deductions claimed."

Argued for the petitioner—(1) The privileges of sections 503 and 504 of the Merchant Shipping Act 1894, as to limitation of liability, were admittedly by section 508 restricted to 'recognised' British ships, and by section 2 (2) the only recognised British ships are those 'registered under this Act.' The "Pansy," however, was a British ship, (section 1 (*a*), section 742), and her registration in the Fishing Boat Register under Part IV, section 373 to 375 of the Act, was registration 'under this Act,' and it was unnecessary for her to be in addition registered under Part I. The words of section 2 (1) were "shall be registered under this Act," not "under Part I of this Act," which would have been the expression used had the respondent's contention been sound. Throughout the Act, wherever a section applied to one Part only, the words used were "this part of this Act." The scheme of the Act was to have one register for fishing boats, and one for other vessels, but there was nothing in the Act, or in common sense, to indicate that in matters of privilege the one was in a better position than the other. If the respondent were right, a fishing boat, to obtain the ordinary advantages of a British ship, would have to be twice registered, which was very improbable. (2) The petitioner was entitled to deduct 13·20 tons in respect of space occupied by seamen and apprentices.—Act of 1894, sections 503, sub-section 2 (*a*), 210, Schedule 6 (3). It was evidenced by a certificate of a Board of Trade surveyor, which was all that was required by the Act.

Argued for the respondent—(1) The respondent was not entitled to the privileges conferred by sections 503 and 504 of the Act, these being conferred solely on British ships registered under Part I of the Act—see section 2 (2). Looking to the terms of section 2 it was further plain that the ship must be registered actually as a British ship; that could only be done under Part I, the part of the Act which dealt with British ships, whereas the "Pansy" was only registered as a fishing boat under Part IV, which was obviously insufficient. The same result was arrived at if the question were dealt with historically. [The respondent's argument on this point is summarised by Lord Stormonth Darling in the third paragraph of his opinion. Besides the Acts and sections referred to by his Lordship, and those already quoted, the respondent referred to Merchant Shipping Act 1854, secs. 503, 504, the Merchant Shipping Acts Amendment Act 1862, section 54, the Sea Fisheries Acts 1843 and 1883, the Sea Fisheries (Scotland) Amendment Act 1885, the Sea Fishing Boats (Scotland) Act 1886, and Orders in Council 24th March 1902]. The "*Andalusian*," 1878, 3 P.D. 182, was an authority for the proposition that only a "recognised British ship" was entitled to limitation of liability. (2) There could be no deduction allowed for crew space, as the measurements and deductions comprised in the certificate had not been entered in the Register of British Ships under Part I of the Act—Act of 1894, section 6, 116, 14, 503 (2) (*a*), 77 (1), 77 (3), 79 (1) (*a*), i, Schedule 6 (3).

Lord Kyllachy—The question in this case is whether the petitioner's vessel the "Pansy" required to be registered under Part I of the Act of 1894. She was undoubtedly registered as a British sea-fishing boat under Part IV of the Act, but the respondent says that although a British fishing boat, she is also a British ship, and as such is bound also to register under Part I. It is not disputed, that if being bound so to register under Part I, she does not do so, she is thereby debarred from recognition as a British ship; and further, that if so debarred, she is, under section 508 of the Act, expressly deprived of the limitation of liability provided by the 503rd section in favour of all ships, British or foreign, the limitation which her owners seek to make good in the present petition.

It must be acknowledged that the question thus raised is a large one. For I agree with the petitioner's counsel that it virtually applies to all sea-fishing boats, that is to say, to all sea-fishing boats not propelled by oars whatever their tonnage. In other words, the exemption under section 3, sub-section 1, does not, so far as I see, cover sea-fishing boats, even if under fifteen tons' burthen; while the exemption in sub-section 2 of the same section applies only to a particular class of vessels fishing or trading on the shores of Newfoundland or in the Gulf of St Lawrence. Hence the respondent's contention seems to involve among other results, this, that all British sea-fishing boats, if they have registered only under Part IV of the Act of 1894, are in the position of being offenders against the Act, and are thereby subject not only to the penalty of non-recognition as British ships with all the disabilities thence arising, but also to the further penalty of being liable to detention at any port until a certificate of registration—that is to say, a certificate of registration under Part I—is produced by the master. This is plainly involved in the provisions of section 2, sub-section 3, which, if the respondents are right, so enacts in express terms. It is not a question of option to register, option, which if not exercised involves the loss of certain *privileges*. There is much more involved than the loss of privileges; and even as

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regards privileges, the loss, it will be observed, results really because being required to register, the vessel by not doing so is in default, and is thus under the Maritime Code really in a position of outlawry.

It must also be acknowledged that the question being thus large, the proposition maintained by the respondent—having regard to the general scheme of the Act—is somewhat difficult. For not only does the Act of 1894 (differing from the previous Act of 1854, which was passed before there was any registry of fishing ships) recognise a separate registry of fishing ships, but also, by partly incorporating the provisions of the Act of 1868 (which first established that register), makes careful provision for the expansion of that register by Order in Council. It provides, by section 373, subsection 3, *inter alia*, that "Her Majesty may by Order in Council apply to the entry of fishing boats in the Fishing Boat Register, and to all matters incidental thereto, such, if any, of the enactments contained in this or any other Act relating to the registry of British ships, and with such modifications and alterations as may be found desirable." It is not, I apprehend, doubtful that it would under this power be competent to the King by Order in Council to make, if it was thought proper, the Fishing Boats Register under Part IV a complete counterpart of the Register of British Ships under Part I. For example, there might be added to it, *inter alia*, a more or less complete code of conveyancing, such as regards Scotch fishing boats was added to the 1868 Act by the Scotch Statute of 1886. And other additions might be figured. But if the respondent is right, there would still be required of all fishing boats the double registration for which he (the respondent) contends. However complete and perfect the Fishing Boat Register might be, no Order in Council could overrule the statutory provisions of Part I of the Act of 1894, or relieve sea-fishing boats, as being also (if not propelled by oars) British ships, from the *ex hypothesi* obligation to register under Part I of the Act. Now, that is a view of the statute and of its operation in quite possible circumstances from which I confess I shrink.

On the other hand, I am quite alive to what the respondent has called his "historical" argument. I am not, I confess, impressed by the initial point of that argument, to the effect that, if the petitioner is right, the Act of 1894 made in this matter, and by, as he says a mere change of phraseology, a large innovation on the existing law. It quite certainly did make a large innovation. It did so by for the first time recognising fishing boats—that is to say, vessels of whatever size and however propelled engaged in sea-fishing—recognising them as a separate class having a separate register. But so far I fail to see that there is anything surprising. A codifying statute, such as the Act of 1894, might quite well be expected to enlarge the scope of the previous legislation. Perhaps, however, the observation which really falls to be made is not so much that, if the petitioner is right, an innovation was by the Act of 1894 made on the existing law, but that on the same assumption it is not quite intelligible why it was not made sooner—that is to say, immediately after the passing of the Act of 1868—the Act by which, as I have already said, the existing Fishing Boat Register was established. And I acknowledge that, so far as it goes, that particular observation is just. For it is quite true—at least it seemed to be common ground—that from 1868 to 1894 double registration was necessary with respect to all British sea-fishing boats which were also British ships—that is to say, which were not propelled only by oars. It was so, and could not be otherwise; because the Act of 1854 could not, of course, recognise a Fishing Boat Register which was in 1854 non-existent; while between 1868 and 1894 there was apparently no enactment touching the matter except the Scotch Act of 1886 already referred to.

After all, however, courts of law are not called upon to explain or justify the course of legislation upon this or other matters. Indeed, I should doubt much whether they are at liberty, in construing Acts of Parliament, to do so with reference to the course of previous legislation, or to inferences which they may be disposed to draw from previous statutes as to the probable intentions of the Legislature. Their duty, I apprehend, is to interpret in its natural sense the language of the particular enactment which is before them. And the particular enactment here to be construed is, I apprehend, simply the second section of the Act of 1894—the existing Merchant Shipping Act—which section is expressed thus—"Every British ship shall, unless exempted from registry, be registered under this Act." The whole question is what is meant by the words "*under this Act.*" Do these words cover, and are they satisfied by, registration under Part IV of the Act? Or do they cover only, and are they satisfied only by, registration under Part I of the Act?

Now, applying ordinary principles of construction, I am unable to hold that registration "under this Act" means, and means only, registration under Part I of the Act. *Prima facie* registration under Part IV is as much registration under the Act as registration under Part I. Nor can I conceive any reason why, if Part I only was meant, that should not have been expressed. It would have been easy, if it had been intended, to use the words "under this part of the Act"—a phraseology in fact used in nearly all the subsequent parts; and, as I have said, I can conceive no reason why, if the respondent is right, that should not have been the phraseology used here. I, of course, admit the possibility of even plain words being controlled, and their natural meaning displaced, by glosses derived from the context, or perhaps also from the general scheme of the particular statute. That though difficult is not impossible. But in the present case nothing was brought under our notice at the discussion which seemed to justify such a

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proceeding. Nor, having gone over the statute with as much care as I could, have I discovered anything tending in that direction. Moreover, having regard to the really penal character of the enactment under construction, or, at least, the penal consequences attaching to its breach, I have myself difficulty in figuring the kind of gloss, short of declaration plain, which would in such circumstances be sufficient. I do not, however, propose to pursue this part of the argument. For I have had the opportunity of reading the judgment which is to be delivered by Lord Stormonth Darling, and I content myself with expressing my entire concurrence with his opinion. For the same reason I do not think it necessary to say anything as to the sufficiency of the surveyor's certificate (a certificate, as it appears, obtained by the petitioner when it was proposed to register his vessel under Part I) as satisfying the requirements with respect to deductions of section 503, sub-section 2 (*a*), and the relative schedule (No. 6) attached to the Act. I agree with what Lord Stormonth Darling says upon that subject. The result is that, in my opinion, we should repel the respondent's answers and grant the prayer of the petition.

LORD STORMONTH DARLING—Before the owner of any British ship can apply, as this petitioner does, for limitation of his liability under section 504 of the Merchant Shipping Act 1894, it is necessary for him to show that his ship is recognised as a British ship, for it is provided by section 508 that "nothing in this part of this Act (which includes section 504) shall be construed to . . . extend to any British ship, which is not recognised as a British ship within the meaning of this Act." The reason of this condition is to be found in section 72 of the Act, which provides that "where it is declared by this Act that a British ship shall not be recognised as a British ship, that ship shall not be entitled to any benefits, privileges, advantages or protection usually enjoyed by British ships," and as sections 503 and 504 confer a benefit or privilege on the owner, it naturally follows that he must be in a position to claim the benefit so conferred. It is admitted that the petitioner is the owner of the British steam sea-fishing boat "Pansy" of Helmsdale, the gross tonnage of which is 72·61 tons, and that she is entered in the Fishing Boat Register under Part IV of the Merchant Shipping Act 1894, but is not registered in what may be called the General Registry of British ships under Part I. Now, Part I, after dealing with the qualification for owning a British ship, enacts, by section 2 (1), that "every British ship shall, unless exempted from registry, be registered under this Act;" again, by section 2 (2), that "if a ship required by this Act to be registered is not registered under this Act, she shall not be recognised as a British ship;" and yet again, by section 2 (3), that "a ship required by this Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the registry of the ship." Section 3 then proceeds to state certain exemptions from registry, which do not affect such a vessel as the "Pansy."

The question is whether the "Pansy's" registration under Part IV is sufficient to entitle her to recognition as a British ship, and therefore to the benefits of sections 503-4, or whether she is not so entitled without registration under Part I. In support of the latter view it is urged by the respondent that, in order to recognition as a British ship, there must be registration as a British ship, which can only (he says) be effected under Part I. The petitioner, on the other hand, maintains that the "Pansy" is "registered under this Act" by being registered under Part IV, and that the penalty of non-recognition as a British ship attaches, not to a ship which is registered under a different part of the Act, but only to a ship which, being required by the Act to be registered, is not registered at all. This question is, I think, difficult, and it is certainly novel, but I have come to think that the petitioner's argument ought to prevail.

The chief difficulty I have felt in coming to that conclusion is founded on what I may call the historical argument. The Act of 1894 was the first Merchant Shipping Act which contained any reference to a register of fishing boats. But the thing itself had existed since the passing of the Sea Fisheries Act 1868. That was an Act to carry into effect a convention with France, which required that all British and French fishing boats should be lettered and numbered and have official papers, and should for that purpose be entered or registered in a register for sea-fishing boats. The Act of 1868 accordingly, by sections 22 to 24, proceeded to establish such a register, and the Merchant Shipping Act of 1894, while repealing these clauses by the 22nd Schedule, substantially re-enacted them by sections 373 to 375. These sections make entry in the Fishing Boats Register compulsory on every fishing boat which is not exempted by Order in Council, and declare (see section 373 (3)) that if a fishing boat required to be so entered is not so entered, she shall not be entitled to any of the privileges or advantages of a British fishing boat, these being apparently the privileges or advantages secured by the convention, and by legislation and Orders in Council affecting fishing boats as such. In any view, I do not think that section 373 (3) affects the present question one way or other. It is, however, plain that between 1868 and 1894 no entry in the Fishing Boats Register under the Act of 1868, would have carried with it the right to limitation of liability under the then existing Merchant Shipping Act, for the simple reason that the Act then in force (at least as regards limitation of liability and the register) was the Act of 1854, which contained a clause (section 516) in similar terms to section 508 of the present Act. Therefore no vessel, however well registered in the then existing Fishing Boats Register, could at that time have been "a recognised British ship," if

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not entered in the only registry which the Act of 1854 provided.

But while I have felt the force of this argument, I greatly doubt whether it is permissible in the construction of a statute to go back to a state of things which the statute has expressly changed. Before 1894 the Merchant Shipping Act enacted only one register. Now it enacts two. If, instead of providing that every British ship (and this is admittedly a British ship) shall be registered "under this Act," and if not registered "under this Act," shall not be recognised as a British ship, it had substituted the words "under this part of this Act," the case would have been clear in favour of the respondent. One may conjecture that in using the phrase "under this Act" the draftsman had his attention fixed on the fact that in former Merchant Shipping Acts there had been only one register. Even so, he varied the language, for the corresponding sections of the Act of 1854 did not contain the words "under this Act" but the words "shall be registered in manner hereinafter mentioned." But all this is mere conjecture. The language must be taken as it stands, and when, in a statute containing 14 Parts and 748 sections, you find that almost in every Part, including Part I, express reference is made to "this Part of this Act," shutting off the Parts as it were into watertight compartments, it is reasonable to conclude that there is some meaning, and not merely inadvertence, in the rare cases where the reference is to "this Act" alone.

Now, if that be the correct construction of section 2 (1) and (2), it cannot be doubted that the "Pansy" is "registered under this Act" by being registered under Part IV, nor that being so registered she is entitled to recognition as a British ship. She is in fact a British ship, because her ownership is British, and by section 742 the word "ship" includes "every description of vessel used in navigation not propelled by oars." Nor do I think that there is any warrant for the respondent's argument that she must be registered "as a British ship." I do not find that these words are used in the Act of 1894 itself. It is true that they occur in section 15 of the Sea Fishing Boats (Scotland) Act 1886, which is still in force. But the plain purpose of that section is to prevent the confusion that might arise if transfers, mortgages, and transmissions of a fishing boat were allowed to be made both in the General Register of British Ships and in the Fishing Boat Register; and when it refers to registration "as a ship" under the provisions of the Merchant Shipping Act 1854 (which in 1886 was still law), it does no more than state a fact. The General Register, whether as formerly under the Act of 1854, or as now under Part I of the Act of 1894, is a register of British ships and nothing else.

What seems to me more significant, is that the Act of 1894 itself, the schedules attached to the Order in Council of 24th March 1902, passed by virtue of that Act, and the Sea Fishing Boats (Scotland) Act 1886 (above referred to), all recognise that a fishing boat may be entered in both registers. In this very case of the "Pansy," it appears that proceedings were commenced for registration under Part I, but for some reason were never carried through.

It was not explained to us what advantage is to be gained by a mere optional registration in one register when registration in another is compulsory. Probably it has something to do with the deductions from tonnage allowed by section 79, and with the practice which, I understand, prevails in England of charging port dues on the tonnage instead of, as in Scotland, on the length of keel. Even in the case of a Scottish fishing boat, if she frequents English ports, it may, I suppose, be worth while to register under Part I. But however that may be, the optional character of registration under Part I seems to me conclusive of the point that the "Pansy" cannot be described as "required by this Act" to be so registered under penalty of not being recognised as a British ship. And if registration of a fishing boat under Part I is not compulsory, I fail to find any warrant for denying to her owner the benefit of sections 503 and 504, or subjecting her to the penalties which attach to non-registration. In short, the question all comes round to the true construction of section 2 (1) and (2), and in my opinion registration of a fishing boat under Part IV is as good for the purposes of that section as registration under both Parts I and IV would be.

A minor question was raised by the respondent as to the deduction from the gross tonnage of 13·20 tons claimed by the petitioner in respect of berthing accommodation for seamen and apprentices. This deduction is evidenced by the certificate of a Board of Trade surveyor, which is the proper evidence required by section 210 and the sixth schedule of the Act. It is noteworthy that Part II of the Act (to which section 210 and the sixth schedule belong) are, by section 263 (3), made expressly applicable to fishing boats as respects Scotland. On the other hand, section 371, to which some reference was made by counsel for the petitioner, occurs in a part of the Act which is not applicable to Scotland unless where expressly mentioned (section 372). But, apart from the mere question of how the deduction is to be proved, the warrant for making it is to be found in section 503 itself, which provides, by (2) (*a*), that "the tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room . . . provided that there shall not be included in such tonnage any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulation scheduled to this Act with regard thereto."

I am therefore of opinion that we should repel the answers, and should grant that part of the prayer of the petition which asks us to limit the liability of the petitioner in respect of the loss and damage there mentioned, to the sum of £475, 2s. 8d., and *quoad ultra*, if necessary, continue the petition.

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LORD LOW—I have had an opportunity of reading the opinion which has just been delivered by Lord Stormonth Darling, and it seems to me to cover the ground so completely that I do not think I can usefully add anything more. But I may say that having heard the exposition of the law given by Lord Kyllachy I concur with every word which he has said.

LORD JUSTICE-CLERK—That is my position also.

The Court limited the liability of the petitioner to the sum of £475, 2s. 8d.

The petitioner moved the Court to find the respondent liable to him in such part of the expenses of the petition as were attributable to the respondents having unsuccessfully opposed his claim to limitation of liability. He admitted his liability for the other expenses of the petition.

The respondent contended that the petitioner was bound to pay the whole expenses of proceedings caused by a collision due to the fault of those for whom the petitioner was responsible—*Carron Company* v. *Cayzer, Irvine, & Company, &c.*, November 3, 1885, 13 R. 114, 23 S.L.R. 81.

LORD JUSTICE-CLERK—I have no doubt that in a case of this kind the petitioner, who is seeking to get the benefit of the limitation of liability provided by the Act, should bear all reasonable expenses incurred for that purpose. But this is a different matter. The respondent here appeared for the purpose of showing that the petitioner was not entitled to the benefit of the limitation, and I think he should bear the expense thereby incurred.

LORD KYLLACHY, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court pronounced this interlocutor—

"Find the petitioner liable in the expenses of this process, except such expenses as have been caused by the respondent's contention that the petitioner was not entitled to proceed under the petition: Find the respondent liable to the petitioner in said last-mentioned expenses."

Counsel for Petitioner — Aitken, K.C. —Spens. Agent—F. J. Martin, W.S.

Counsel for Respondent—Orr, K.C.—J. D. Millar. Agents—Inglis, Orr, & Bruce, W.S.

Wednesday, March 7.

SECOND DIVISION.

[Lord Johnston, Ordinary.

AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES *v.* FLANAGAN.

Water—Water Rates—Supply at Meter Rate or at Domestic Water Rate—Dwelling-House—Private Dwelling-House—Airdrie and Coatbridge Waterworks Act 1846 (9 *and* 10 *Vict. cap. cclxxxviii*), *sec.* 52—*Airdrie and Coatbridge Waterworks Amendment Act* 1892 (55 *and* 56 *Vict. cap. cxvii*), *sec.* 46—*Airdrie, Coatbridge, and District Water Trust Act* 1900 (63 *and* 64 *Vict. cap. xcviii*), *sec.* 42.

A public-house which had no sleeping accommodation used water mainly for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, *i.e.*, the washing of casks and bottles and other trade utensils. The available supply of water of the District Water Trustees was more than was required for domestic and ordinary purposes, and when that was so it was provided that the trustees "shall, if so required, contract" for a supply to "public baths, wash-houses, works, manufactories, railways, or other premises" at a meter rate and upon terms to be agreed upon or to be fixed by the Sheriff.

Held that under the District Water Acts the occupier of the public-house was entitled to a supply of water at meter rates, and that the Water Trustees were not entitled to charge their general domestic water rate.

Opinions (*per* Lord Kyllachy and Lord Low—*doubting* Lord Stormonth Darling and the Lord Justice-Clerk) that the public-house was not a "private dwelling-house."

Observations (*per* Lord Kyllachy) on the general scheme of the statutes.

By section 52 of the Airdrie and Coatbridge Waterworks Act 1846 (9 and 10 Vict. cap. cclxxxviii) it is provided — "And be it enacted, that the company shall, when required by the owner or occupier, furnish to every private dwelling-house or part of a dwelling-house in any street within the foresaid district and within one hundred yards of which any pipe of the company shall be laid, a sufficient supply of water for the domestic uses of every such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or yearly value of such dwelling-house or part of a dwelling-house supplied with water by the company; . . . provided also that a supply of water for domestic purposes shall not include a supply of water for horses or cattle, or for washing carriages, or for any trade or business whatsoever, and which charge for water supplied shall be over and above the rent hereinafter provided to be paid for the service pipe

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and other apparatus provided by the company."

By section 55 of the same Act it was provided—"And be it enacted that it shall be lawful for the company to supply any person with water for other than domestic purposes at such rates and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water." [This section was repealed by section 23 of the Airdrie, Coatbridge, and District Water Trust Act 1900.]

By section 46 of the Airdrie and Coatbridge Waterworks Amendment Act 1892 (55 and 56 Vict. cap. cxvii), it is provided—"No person shall be entitled to require, nor shall the company be bound to supply any dwelling-house with water (otherwise than by meter or by special agreement), when any part of such dwelling-house is used for any trade or business purpose for which water is required."

By section 42 of the Airdrie, Coatbridge, and District Water Trust Act 1900 (63 and 64 Vict. cap. xcviii) it is provided—"No person shall be entitled without special agreement with the Trustees to use the water supplied through the pipes of the Trustees except for domestic and ordinary purposes, but when there is a supply of water more than is required for such domestic and ordinary purposes within the limits of supply, the Trustees shall, if so required, contract with any person or persons within such limits to supply public baths, wash-houses, works, manufactories, railways, or other premises, within the limits of supply, with water at such rate per one thousand gallons and upon such terms and conditions as may be agreed on, or in the event of disagreement either as to the ability of the Trustees to give the supply, or as to the rate, terms, or conditions on or in respect of which the supply is to be given, the same shall be fixed by the Sheriff of the county of Lanark upon summary application by either of the parties, and the decision of the Sheriff shall be final: Provided that so far as possible the rate for such supply of water shall be uniform to all persons in the same circumstances and requiring the same extent of supply: Provided further, that when water is thus supplied from such surplus it shall not be lawful for the Trustees to charge the parties obtaining the same both with the domestic water rate (where such rate is chargeable) in respect of the premises for which such supply is given and also for the supply of water obtained by them. Any rate or payment for water supplied under this section may be recovered by the Trustees in the same manner as the domestic water rate."

The pursuers in this action, the Airdrie, Coatbridge, and District Water Trustees, were incorporated by the Airdrie, Coatbridge, and District Water Trust Act 1900 (63 and 64 Vict. cap. xcviii), which Act at the same time enabled them to acquire the undertaking of the Airdrie and Coatbridge Water Company incorporated by the Airdrie and Coatbridge Waterworks Act 1846 (9 and 10 Vict. cap. cclxxxviii). The defender in the action, James Flanagan, carried on business as a wine and spirit merchant in a public-house at 78 Main Street, Coatbridge, which had no sleeping accommodation. The Water Trustees and Flanagan having failed to agree as to the rate at which, and the terms and conditions on which, the water required for these premises should be supplied, Flanagan made summary application under section 42 of the Act of 1900 (above quoted) to the Sheriff of the county of Lanark to fix the same.

On 15th August 1904 the Sheriff-Substitute (MACKENZIE) allowed a proof as to the amount of water required by the petitioner, the cost of giving the supply, and any other facts relevant to the question raised by the petition as to the rate to be paid by the petitioner, and on 5th November 1904 he pronounced this interlocutor—"Having heard the procurator for the petitioner and counsel for the respondents on the proof and productions and considered the cause, Finds in fact (1) that the petitioner is the occupant of a public-house at 78 Main Street, Coatbridge, for which he requires a supply of water, and that the said public-house is within the limits of the respondents' water supply district; (2) that the said supply is required in part for domestic and in part for trade purposes, and that the total amount required is less than 200,000 gallons during the half-year; (3) that the available supply of water from the works of the respondents is more than is required for domestic and ordinary purposes within the limits of the respondents' supply district; (4) that the petitioner and respondents have failed to agree as to the rate at which and the terms and conditions on which the water required by the petitioner should be supplied; and (5) that it is reasonable that the supply should be given at the rate at which and on the terms and conditions on which the respondents supply water by meter to other parties: Finds in law that as the supply is not required entirely for domestic purposes, and the parties have failed to agree as to the conditions on which it should be given, the petitioner is entitled to have water supplied to him by meter at a reasonable rate per thousand gallons: Therefore fixes the rate at which, and the terms and conditions on which the petitioner is to be supplied by the respondents with the water required for his said public-house as follows—the rate to be 8½d per thousand gallons, with a fixed minimum charge of one pound sterling per half-year; a meter rent to be paid by the petitioner in terms of the respondents' table of rates and charges, and the terms and conditions of supply in other respects to be in accordance with the terms and conditions set forth in the said table of rates, so far as applicable to the supply of water by meter."

Note.—"This is an application by a publican carrying on business in Coatbridge to have the rate at which and the terms and conditions on which he is entitled to have a supply of water for his premises fixed. The application is brought under section 42 of the Airdrie, Coatbridge, and

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District Water Trust Act 1900, which provides . . . (*quotes section down to proviso*) . . . The petitioner alleges that the supply required by him is not for domestic but for trade purposes, and that he has failed to come to an agreement with the Trustees as to rate at which it should be given, and on these grounds contends that he is entitled to have a supply by meter at a rate fixed by the Sheriff.

"The application is opposed by the Water Trustees, who assert, in the first place, that the water required by the petitioner is required solely for domestic and ordinary purposes, and, in the second, that he is already in receipt of a supply by agreement with them, and contend on each of these grounds that the petition is incompetent.

"The first question between the parties is, accordingly, one of fact. Is the water required by the petitioner required for domestic and ordinary or is it required for trade purposes? The evidence shows that it is required for drinking, washing floors, glasses, casks, jars, and bottles, flushing a water-closet and urinal, and to a very small extent for mixing with whisky to reduce its strength.

"Are these then domestic and ordinary or are they trade purposes? The petitioner maintains that they do not belong to the first but to the second category, in respect (1) that the premises are not a dwelling-house but a place of business, and (2) that the water is used solely for the purposes of his trade as a publican. In support of the first branch of his argument the petitioner founds upon section 52 of the Airdrie and Coatbridge Waterworks Act 1846, which provides for a supply of water being given to dwelling-houses for domestic purposes. It enacts that the water authority shall furnish a sufficient supply to every 'private dwelling-house' for the domestic uses of such dwelling-house and the occupier thereof, but that a supply for domestic purposes shall not include a supply for any trade or business whatever. Now I do not think that the word 'private' adds any force to the word 'dwelling-house,' and there is authority for the view that under the Waterworks Clauses Acts anything is a dwelling-house which is a house and in which water is required for domestic purposes; *per* Buckley, J., in *South-West Suburban Water Company* v. *St Marylebone Union*, L.R. 1904, 2 K.B., at p. 179-180. I accordingly reject the first branch of the petitioner's argument.

"As regards the second, I am of opinion, on the authority of the same case, that some of the purposes for which water is required by the petitioner for his premises, viz., drinking, the washing of floors, and the flushing of closets and urinals, are domestic and ordinary purposes, but I cannot place the washing of casks, jars, and glasses, used in the course of his business, in this category. These, in my opinion, are trade purposes, and I may add that the petitioner has never been treated by the respondents as a person using water for purely domestic purposes, for a reference to their table of rates shews that he has not been charged the domestic rate, but a special rate applicable to spirit shops and coming under the heading of 'special charges for supplies for other than domestic purposes.' Indeed, they did not suggest until the day of the proof that they proposed to dispute his statement as to the purposes for which he required the supply. The conclusion, therefore, at which I arrive is that the petitioner requires a supply of water in part for domestic and in part for trade purposes. That being so, he is not entitled to a supply of water even for domestic purposes except by agreement with the respondents, for under section 46 of the Airdrie and Coatbridge Waterworks Amendment Act 1892, the Trustees are not bound to supply any dwelling-house with water when any part of such dwelling-house is used for any trade or business purpose for which water is required.

"The next question is whether the petitioner has already got a supply by agreement with the Trustees. It appears to me that he has not. They have never agreed to treat him as a domestic consumer, or to charge him the domestic rate. What they have done is to attempt to impose upon him a special rate on the ground that the supply given is not for domestic purposes, and to this he objects. The parties are therefore not agreed as to the terms upon which the supply is to be given, and the effect of their disagreement is that the respondents might, in virtue of their powers under section 46 of the Act of 1892, have refused to supply his premises. Had they done so it could not have been suggested that the petitioner was receiving a supply by agreement, and the fact that they have not taken what would have been an extreme and unreasonable step, but have allowed the petitioner to receive a supply pending a settlement of the difference between them, cannot be held to have put an end to that difference and effected an agreement as to the terms on which he should have the use of their water.

"For these reasons I am of opinion that the objections to the competency of the application are unfounded.

"It remains to consider what rate the petitioner should pay. On this point section 42 of the Act of 1900 provides that so far as possible the rate for such supply shall be uniform to all persons in the same circumstances and requiring the same extent of supply. Unfortunately, however, there do not appear, so far as the evidence goes, to be any other spirit shops or premises of a like character in the district receiving a supply by meter, and therefore there are no persons in exactly the same position as the petitioner with whom a comparison can be made. The respondents have, however, advertised rates for supplies by meter, and one of these rates is applicable to the case where the consumpt is less than 200,000 gallons during the half-year. The petitioner contends that this rate is applicable to his case, his consumpt being below the amount mentioned, and in my opinion it lies upon the respondents to show that it is not. I am also of opinion

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that they have failed to do so. Their engineer said that the Trustees had not estimated for small supplies by meter, but it is evident, from the fact that there is a fixed minimum charge of £1 per half-year, that the Trustees have at least contemplated the possibility of the consumpt under a supply by meter falling to a very small amount. Further, the respondents' engineer admitted that if that minimum charge were retained the increase in rate which would be required in the case of small consumers would not 'amount to so much.' The reasons also which he gave for a higher rate being fixed were not very convincing. The first was that the cost of inspection was the same whether the supply was big or little, but as the annual cost of such inspection is only 11s. or 12s. it bears a very small proportion even to the amount of such a supply as the petitioner requires, and so far as the expense in question is concerned the interests of the Water Trust will be in any event amply safeguarded if the fixed minimum be retained. The second and only other reason given in favour of a higher rate was that, if a large number of shops were taken out of the class assessed on rental, and if a less return were obtained by the charge per meter, that would lead to an increase in the domestic rate. To this I think there are two answers. In the first place, there is no evidence that the alteration in the mode of rating would lead to a less return being obtained, and in the second, even if this were proved, it might be a reason for making a general revision of the rates charged for meter supplies, but would not be a justification for treating a single individual differently from all other persons receiving a supply by meter. For these reasons I am of opinion that the rate payable by the petitioner should be fixed at 8¾d. per 1000 gallons, but in order to guard the respondents against the possibility of loss, I think also there should be a fixed minimum charge of £1 per half-year payable in the event of the rate yielding less than that sum. It was suggested by the petitioners' procurator in the course of the proof that there was no statutory basis for such a charge. I cannot agree to this. The statute authorises me not only to fix the rate but also the terms and conditions on which the supply should be given, and as it seems to me to be a most reasonable condition that there should be a fixed minimum charge, and as the amount of the minimum charge mentioned does not appear to be excessive, I see no reason why I should not make it one of the conditions on which the petitioner should obtain the supply which he requires. No objection was taken to the other conditions in the table of rates applicable to supplies by meter, and accordingly I make them also applicable to the petitioner's case."

On 20th December 1904 the Water Trustees brought this action to have it found and declared "that for the supply of water furnished and to be furnished by the pursuers to the defender in his premises at 78 Main Street, Coatbridge, aforesaid, the pursuers are entitled to charge against the defender the rate authorised to be charged for a supply of water for domestic purposes, in terms of the 52nd section of the Airdrie and Coatbridge Waterworks Act 1846; and that the defender is not entitled to demand that the water furnished and to be furnished to him in his said premises should be charged to him at a rate per thousand gallons, so long as the pursuers permit him to use for trade purposes the water supplied to him for domestic purposes," and to reduce the interlocutors of 15th August 1904 and 5th November 1904 of the Sheriff.

On 13th June 1905 the Lord Ordinary (JOHNSTON) assoilzied the defender from the conclusions of the summons.

Opinion.—"The question raised in this case is whether the Airdrie and District Water Commissioners are entitled to charge their general domestic water rate upon public-house premises, or whether the publican is entitled to a supply of water at meter rates.

"It was the accepted condition of the argument (1) that the public-house had no sleeping accommodation. (2) That the water was mainly used for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, for the washing of casks and bottles, and other trade utensils. (3) That to be charged at meter rates, at least on the scale fixed by the Sheriff-Substitute, would be a saving to the publican, and a corresponding loss to the Water Commissioners, and through them to the general inhabitants, whose rates would be indirectly raised, the more so that the judgment would be followed by numerous similar claims.

"The Airdrie and Coatbridge Water Trustees were incorporated by the Local and Private Act of 1900, which at the same time enabled them to acquire the undertaking of the Airdrie and Coatbridge Water Company, which had been incorporated by the Local and Private Act of 1846, and had obtained further power under subsequent Acts.

"By section 23 of the Act 1900, 'all the powers, rights, privileges, and authorities of the company under the Company's Acts were transferred to and vested in the Trustees.

"By the same section, section 55 of the Act of 1846 was repealed absolutely, and by section 33 the Company's Acts were repealed generally, so far only as regarded the existence of the company. The repeal of section 55 is important. For it was that section of the 1846 Act which empowered the company, and which, but for its repeal, would have empowered the trustees to supply persons with water for other than domestic purposes. Such supply is now regulated by the Act of 1900, section 42.

"This provides that no person shall be entitled to use the water supplied 'except for domestic and ordinary purposes,' unless by agreement. But if there is surplus water 'the Trustees shall, if so required, contract' with any person to 'supply public baths, wash-houses, works, manufactories, railways, *or other premises*' with water at

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meter rates, on such terms as may be agreed upon, or may be fixed by the Sheriff.

"Now, on this provision the first observation that suggests itself is, that the initial prohibition is not absolute. The Trustees may waive the requisition to supply by meter if they choose to sanction the use of water supplied for domestic and ordinary purposes for such minor trade purposes as are in question here.

"The second matter for consideration is, is there any limitation on the power to requisition? The supply of public baths, public wash-houses, works, manufactories, and railways at meter rates is provided for. Does the addition of '*or other premises*' add anything, and if so, what? It is clear that it is not capable of extensive interpretation without limit, else every user of water might demand a supply at meter rate, whatever the nature of his premises. Yet the context will not admit of a strict *ejusdem generis* interpretation being applied. I think that the context requires a reasonable and liberal interpretation to be given to the words '*or other premises*,' so that premises where water is required not merely for sanitary, &c., purposes but for the prosecution of trade or businesses of any description must be held to be included.

"But it is clear that while in hardly any case will the trade use, applying the term comprehensively, be exclusive of some domestic use, yet in one set of cases the trade use will predominate, as in the case of a large manufactory, while in another set of cases the domestic use will predominate, as in the case in question, of the public-house. And the crux is in all cases to determine who has the right to dictate the mode of supply. Are the Trustees entitled to say to the requisitionist, you shall take as for domestic supply, but may use what you require for your trade purpose without any further charge; or may the requisitionist say to the Trustees, you must supply me by meter for my trade, and I shall use what I choose for domestic purposes; and the necessity for determining arises from the fact that the enactment I have paraphrased above is followed by the proviso that where water is supplied from such surplus it shall 'not be lawful for the Trustees' to charge both the domestic rate and the meter rate. This proviso would appear to keep the balance fairly by leaving it in the hands of the Trustees to charge according to the predominating use of the water, the domestic rate where the trade use is a mere ancillary, the meter rate where the domestic use is a mere ancillary. If that were all I should have no difficulty in deciding the question raised. But there is a parenthesis in the proviso which I think creates the real difficulty—the option to the Trustees to charge the domestic rate is only 'where such rate is chargeable.' When and where then is it chargeable?

"For the power to charge the domestic rate recourse must be had to the company's original Act of 1846, section 52. That section requires the company on demand 'to furnish to every private dwelling-house' a sufficient supply of water 'for the domestic use of such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or value of such dwelling-house.' I find no other right to demand a domestic supply, and no other authority to charge the domestic rate. The final question is, does 'private dwelling-house' include a public-house, though it be merely a public-house in which water is used for all the domestic uses to which it can be applied in any private residence, but in which the publican does not reside in the ordinary sense of the term. On the one hand, 'private dwelling-house' has a natural meaning which excludes the public-house or shop. On the other hand, the proviso at the end of the section contemplates the possibility of a trade supply within the same premises to which a domestic supply is given. For it says that a supply of water for domestic purposes shall not include a supply for any trade or business whatsoever. This read along with section 55, now repealed, would admit, under the Act of 1846, of a double supply to the same premises, one by rate for domestic purposes, and the other by meter for trade purposes. But this is abrogated by the 1900 Act, which repealed the 55th section of the Act of 1846, and disallowed the double charge on the same premises. I think it probable that the framer of the Act of 1900 did not fully realise the result of carving upon the Act of 1846, and combining it with the Act of 1900, instead of repealing it, and making comprehensive provisions in this new Act to cover the whole field. The consequence is one frequently seen in public as well as in private Acts. But as I cannot find justification for giving the term dwelling-house anything but its naturally received meaning in the Act of 1846, section 52, I cannot find warrant for charging a public-house which does not come within that category with the domestic rate, and therefore I cannot hold that the trustees have the option of the Act 1900, section 42, to charge the publican the domestic rate in preference to that by meter. It is for the Sheriff-Substitute to remedy any injustice by fixing a rate for any class of persons using water mainly for domestic purposes, but not chargeable at the domestic rate, which will put them on a fair equality with those who, also using water wholly or mainly for domestic purposes, are charged the domestic rate.

"I cannot therefore grant the declarator craved, and the reduction is dependent on it.

"The interlocutor will assoilzie the defender with expenses."

The pursuers reclaimed, and argued—The main distinction in the Acts was between water used for ordinary and domestic purposes, and water used for other purposes. Here water was mainly used for domestic purposes. The enactment in section 42 of the Act of 1900, that no person should be entitled to use water except for domestic and ordinary purposes, inferred that for these purposes the defender was entitled to water. The proviso in the same section

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left it to the Water Trustees, where there was a double use, to say for which they would charge. Section 42 did not give to the defender a right to requisition a supply at meter rates, for a public-house did not fall under the category of "public-baths, washhouses, works, manufactories, railways, or other premises." The Trustees' option to charge the domestic rate was not taken away by the parenthesis "where such rate is chargeable" for the public-house was a "dwelling-house" within the meaning of section 52 of the Act of 1846, the word dwelling-house being used there for any house which required water for domestic purposes—*Cooke* v. *New River Company*, 1888, 38 Ch. Div. 56, Cotton, L.J., at 63, and Lindley, L.J., at 66; *South-West Suburban Water Company* v. *St Marylebone Union*, [1904] 2 K.B. 174, at 179-180. Nor did the word "private" add any force to the word "dwelling-house."

Argued for the defender (respondent)—The main distinction in the Acts was not between different uses of water, but between a private dwelling-house and other premises. The pursuers were only entitled to charge the domestic water rate against those who under section 52 of the Act of 1846 could requisition a supply for domestic purposes, *i.e.*, the owner or occupier of a private dwelling - house. The negative phraseology of section 42 of the Act of 1900 did not extend that class, and its proviso, if it gave an option, only did so in cases where the domestic rate was chargeable, *i.e.*, referred back to section 52 of the Act of 1846. A place where a person merely conducted his trade and did not reside was not a private dwelling-house; it fell under the category of "other premises" of section 42 of the Act of 1900, for these words must be construed widely because of the diversity of the preceding words. They admitted that if a scarcity of water arose they would not be entitled to a supply. In *Cooke* the hypothesis was that the plaintiffs were entitled to a supply, and a different Act was being construed.

At advising—

LORD KYLLACHY—In this case I agree with the Lord Ordinary and also with his ground of judgment, which I understand to be this—that the defender's public-house, which is simply a spirit-shop, is not in the sense of the pursuers' statutes a "private dwelling-house," and that consequently the defender has no right to demand, and the pursuers have no right to furnish, a supply of water for the uses of the said public-house at the rate applicable to "private dwelling-houses," under the 52nd section of the Statute of 1846.

That is, I think, sufficient to negative the first conclusion of the summons. And with respect to the second conclusion—in so far as it may be held to be independent—the result, I think, follows that the defender's premises not being a private dwelling-house there is no ground for excluding them from the category of "public baths, washhouses, works, manufactories, railways, or other premises," to which the pursuers are entitled and bound under the 42nd section of their Act of 1900 to furnish surplus water at meter rates.

It is not, I think, really necessary to say more. It is certainly not necessary to decide before they arise the various possible questions which have been suggested with respect to the rights under these statutes, of classes of premises quite different in character from the particular premises with which we have here to deal. In view, however, of some parts of the argument lately submitted to us it may perhaps be useful to note the view which I am disposed to take of the general scheme of the statutes.

In the first place, it seems to me to be fairly clear that the cardinal statutory distinction is not between different uses to which the water furnished may be applied, but between different classes of premises by which a supply may be claimed. In other words, the distinction is between, on the one hand, (1) "Private dwelling-houses" entitled under the 52nd section of the Act of 1846 to a preferable supply at a rental rate; and, on the other hand, (2) premises other than private dwelling-houses—premises such as those mentioned in the 42nd section of the Act of 1900, which by that section are entitled, if there be a surplus, to be supplied at meter rates. That is, as I read the clauses, the primary and leading distinction.

In the next place, however, while that is so, the matter of the use of the water when furnished is not left entirely unregulated. There is, of course, no restriction necessary as regards the uses of surplus water furnished at meter rates to trade premises—the premises mentioned in section 52. Such water is charged according to quantity, which is probably a sufficient safeguard against abuse. But as regards private dwelling-houses there is a quite necessary restriction, viz., this—that the water supply to such houses must not, unless by "special agreement" with the pursuers, be used otherwise than for domestic and ordinary purposes—that is to say, the domestic and ordinary purposes of a private residence. That had been provided in substance by the 55th section of the Act of 1846, and is now provided in terms by the first sentence of section 52 of the Act of 1900.

Then, lastly, the occupiers of private dwelling-houses being thus restricted, there is a counter restriction imposed upon the pursuers, viz., this—that in making their "special agreements" with the occupiers of private dwelling-houses, they shall in no case charge for water supplied to the same premises both the rental rate under section 52 and the meter rate under section 42. This is expressed by the proviso which forms the last sentence of the last-mentioned section—a proviso which, taken in connection with the provision for "special agreement" with which the section begins, raises perhaps the only difficulty which the scheme of the statute presents. That difficulty (which has nothing to do with the present case) is of course this—How is the occupier of a private dwelling-house to be

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charged by way of special agreement when he uses the water for non-domestic purposes within his private dwelling-house, and not, for instance, in adjacent and separate premises? Is the charge to be by rental or meter, or how? I suppose the answer really is that it is for the pursuers in that case to say on what terms they shall consent to the prohibited use. But as to that it is not I apprehend necessary to express any final opinion. It is enough for the present question that the scheme of the pursuers' statutes, whatever other questions it may involve, is at least in entire conformity with the Lord Ordinary's judgment.

LORD STORMONTH DARLING—The Lord Ordinary at the beginning of his opinion states it as the accepted condition of the argument before him (as it also was before us) that this public-house has no sleeping accommodation, but that water is mainly used in it for domestic purposes, *i.e.*, sanitary, cleaning, and cooking, and only to a very limited extent for trade purposes, *i.e.*, the washing of casks and bottles and other trade utensils. Taking it so, his Lordship indicates that, but for a parenthesis in the proviso to section 42 in the Act of 1900, he would have been in favour of keeping the balance fairly even between the individual inhabitant and the general body of ratepayers by leaving it in the hands of the Trustees to charge according to the predominating use of the water—the domestic rate where the trade use is a mere ancillary, the meter rate where the domestic use is a mere ancillary.

Now the purpose of the proviso is to forbid the Trustees to charge both the domestic rate and the meter rate in respect of the same premises, and the parenthesis on which the Lord Ordinary founds follows the reference to the domestic rate, and puts within brackets the words "when such rate is chargeable." These words carry you back to section 52 of the original Act of 1846. That section requires the company (in whose shoes the Trustees now stand), on demand by the owner or occupier, to "furnish to every private dwelling-house or part of a dwelling-house" a sufficient supply of water "for the domestic uses of every such dwelling-house and occupier thereof, at a rate not exceeding ten per centum of the yearly rent or yearly value of such dwelling-house." Then the Lord Ordinary says that he can find no other right to demand a domestic supply, and no other authority to charge the domestic rate. This is certainly true, for the declaratory conclusions of the summons are expressly laid upon section 52 of the Act of 1846. But when his Lordship goes on to express the opinion that the expression "private dwelling-house" has a natural meaning which excludes the public-house or shop here in question, I own that I should have great difficulty in going along with him. The terms "private dwelling-house" and "public-house" are no doubt antithetical in sound and appearance, but I am by no means sure that they are so in reality when they apply merely to the different situations in which water may be put to domestic uses. I am disposed to agree with the Sheriff-Substitute in the note to his interlocutor fixing the meter rate, that the word "private" does not add any force to the word "dwelling-house," and if this be so, the mere fact that nobody sleeps in this public-house or shop would not seem to me necessarily to prevent its being classed as a "dwelling-house" for the purposes of a water-works statute, when all the people who "dwell" in it during the day use water for exactly the same domestic purposes as if they occupied it both by day and night. In short, I should be inclined to construe such words of description *secundum subjectam materiam*, and to agree with Lord Lindley (speaking no doubt *obiter* and with reference to another but very similar statute) when he says, in *Cooke* v. *New River Company* (L.R. 38 Ch. Div. at p. 66), "I am disposed to think that anything is a dwelling-house within the meaning of this section which is a house, and in which water is required for domestic purposes." Moreover, I should be fortified in this view by the reflection that the Legislature cannot readily be supposed to have intended, that the occupiers of all the large class of houses which do not answer the strict description of "private dwelling-houses"—such as hotels, and even shops where large numbers of people spend the whole of their working day—should have absolutely no right to demand a supply of water for domestic purposes.

If therefore the solution of this question depended, as the Lord Ordinary has put it, entirely on the proviso in section 42 of the Act of 1900, coupled with section 52 of the original Act of 1846, I should have great difficulty in agreeing with his conclusion. But it seems to me that, even taking the word "dwelling-house" in its widest possible sense, the question is solved adversely to the pursuers by section 46 of the Company's Act of 1892, referred to by the Sheriff-Substitute. That clause provides—"No person shall be entitled to require, nor shall the company be bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) when any part of such dwelling-house is used for any trade or business purpose for which water is required."

Now the pursuers must maintain that the house here in question is a "dwelling-house," otherwise they have no right to charge it with the domestic rate under section 52 of the Act of 1846. But it is in fact "used for a trade or business purpose for which water is required," and therefore the consequence is, under the section I have quoted, that the pursuers are not bound to supply it with water, nor can the defender demand that they should, except by meter or by special agreement. There has clearly been no special agreement; and the defender not being bound to accept as a mere concession on the part of the pursuers that they will permit him to use such water as he requires for trade purposes on paying the domestic rate, what course

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was he entitled to take? Clearly, under section 42 of the Act of 1900, to apply summarily to the Sheriff to have it found that the pursuers were bound to supply him with water by meter, and to fix the rate and other conditions. That is the course which the defender actually took, and he has got a judgment in his favour. The pursuers have combined with their action of declarator conclusions for reduction of the Sheriff-Substitute's interlocutors as *ultra vires*. Probably that was the logical result of the pursuers' position. But I see nothing *ultra vires* in anything which the Sheriff-Substitute has done. On the contrary, I think he was bound to exercise his statutory jurisdiction in the event of disagreement and his decision is declared to be final.

Accordingly, it seems to me that, even on the most favourable view for the pursuers of the meaning of the phrase "dwelling-house" or "private dwelling-house," the Lord Ordinary was right in assoilzieing the defender, although I reach that result by a somewhat different route from his and from that of my brothers Lord Kyllachy and Lord Low. With one observation of the Lord Ordinary's I quite agree, where he says that probably the framer of the Act of 1900 did not fully realise the effect of leaving the Act of 1846 (and I would add the Act of 1892) standing, instead of working on a clean slate. But that is a kind of mistake (if it be a mistake) which is not confined to local and personal legislation.

LORD LOW—The first conclusion of the summons is for declarator that the pursuers are entitled to charge against the defender the rate authorised to be charged for a supply of water for domestic purposes in terms of the 52nd section of the Airdrie and Coatbridge Waterworks Act 1846.

By that section it is enacted that the Water Company "shall, when required by the owner or occupier, furnish to every private dwelling-house or part of a dwelling-house . . . a sufficient supply of water for the domestic uses of every such dwelling-house and occupier thereof." It is also provided that "a supply of water for domestic purposes shall not include a supply of water for horses or cattle, or for washing carriages, or for any trade or business whatsoever."

Although there have been subsequent Acts of Parliament dealing with the water supply of Airdrie and Coatbridge, the 52nd section of the Act of 1846 still regulates the right to demand a water supply for domestic uses, and the only persons who are given right to demand a supply for such uses are the owners or occupiers of private dwelling-houses. It follows that the domestic water rate can only be charged against such persons, and for a supply furnished for domestic use in such houses.

The question therefore is whether the defender's public-house is a private dwelling-house within the meaning of the enactment? If the expression "private dwelling-house" is to be read according to its natural and ordinary meaning, that question must be answered in the negative. I take it that the expression "private dwelling-house" denotes, according to the ordinary use of language, the house in which a man lives as his home, as distinguished from a house which he uses only for business purposes. The latter is the character of the defender's public-house. It is merely a shop; it has no sleeping accommodation; and although the defender may spend the greater part of his time there he does so solely for the purpose of carrying on his business of publican.

It was argued, however, that although the 52nd section of the Act of 1846 had never been repealed, it had been so far modified by an Act passed in 1900, that the test of the right to demand a domestic water supply came to depend not on the character of the house for which the supply was required, but the uses to which the water was to be put. If, it was maintained, the water was required wholly or chiefly for domestic purposes, then, whatever the character of the house, the owner or occupier could demand a supply of water, and the trustees were entitled to charge therefor the domestic rate.

The enactment founded on is contained in the 42nd section of the Airdrie, Coatbridge, and District Water Trust Act 1900. That section enacts that "no person shall be entitled without special agreement with the trustees to use the water supplied through the pipes of the trustees except for domestic and ordinary purposes," and then the section goes on to provide that when there is a supply of water more than is required for such domestic and ordinary purposes, "the trustees shall, if so required, contract with any person or persons to supply public baths, wash-houses, works, manufactories, or other premises," with water at such a rate per thousand gallons as may be agreed upon, and failing agreement, as may be fixed by the Sheriff.

It was mainly upon the first clause of that section that the pursuers rested their argument. They contended that the declaration that no person should be entitled to use the water except for domestic and ordinary purposes was equivalent to saying that every person was entitled to water for these purposes. I cannot adopt that view. To declare that no person shall use the water except for domestic purposes is in no way inconsistent with there being only a limited class of persons who can demand as matter of right a supply of water for domestic purposes, and accordingly I cannot find that the 52nd section of the Act of 1846 is in any way modified or altered by the 42nd section of the Act of 1900. Owners or occupiers of private dwelling-houses are still the only persons who can demand to be supplied with water for domestic use.

I therefore come to the conclusion that the defender could not require the pursuers to give him a supply of water for his premises under the 52nd section of the Act of 1846, but that he is entitled to demand a supply of surplus water in terms of the

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second part of the 42nd section of the Act of 1900. The application therefore which the defender made to the Sheriff to fix the rate per thousand gallons at which the pursuers were bound to supply his premises with water was quite competent, and the determination of the Sheriff upon that matter is final.

I am accordingly of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I have had considerable difficulty in this case, as I do not feel able to say that I concur in holding that the word "dwelling-house" is necessarily exclusive of places of business unless someone sleeps upon the premises. I am prepared, however, to concur in the decision on the grounds stated by Lord Stormonth Darling.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Solicitor-General (Ure, K.C.)—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Defender and Respondent—Hunter, K.C.—Grainger Stewart. Agent—James Purves, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Sheriff Court of Forfarshire at Dundee.

CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED *v.* KENNEDY.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3) — *Arbitration — Condition-Precedent to Jurisdiction of Arbitrator—Application for Arbitration before Master who Admits Liability has had Time to Consider Claim—Plea that Application for Arbitration Premature—Refusal of Sheriff to State a Case thereon.*

On 1st November 1905 an employer received from a workman a claim for compensation alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897. On 2nd November a petition under the latter Act was served on him at the instance of the workman. The employer admitted liability, but objected to the competency of the proceedings since there was no question at issue between the parties as required by section 1 (3) of the Act, and there had been no reasonable opportunity to admit liability. The Sheriff having found the defences irrelevant and awarded compensation with expenses, refused to state a case. *Held* that the Sheriff was bound to state a case, since questions of law were involved with regard to jurisdiction and competency.

The Workmen's Compensation Act 1897, sec. 1, sub-sec. (3), enacts, *inter alia*—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

Second Schedule, sec. 14, enacts—"In the application of this schedule to Scotland . . . (*c*) any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced."

This was a note presented by the Caledon Shipbuilding and Engineering Company, Limited, Lilybank Engineering Works, Dundee, appellants, to have the Sheriff-Substitute at Dundee (CAMPBELL SMITH) required to state a case in an arbitration between them and Robert Kennedy, apprentice shipwright, 59 Dock Street, Dundee, respondent, under the Workmen's Compensation Act 1897.

In the note the appellants stated that in the arbitration they had at once admitted liability, but had pleaded (1) that the application was incompetent; and (2) that it should be dismissed with expenses, in respect that (*a*) no question had arisen between the parties within the meaning of the Act when it was presented, and (*b*) reasonable opportunity was not given to the appellants to admit their liability. The Sheriff, however, had found the defences to be irrelevant and given the applicant compensation, with two guineas of expenses, and had refused to state a case. Further details of the circumstances of the case are given in Lord Pearson's opinion (*infra*).

Argued for the appellants—What was at stake here was the question of expenses. An award had been given when there was no question in dispute between the parties, which was incompetent, and the applicant had been given the expenses of obtaining such award. Since liability was admitted the petition was at most a claim. It could be nothing more until some question arose between the parties—Workmen's Compensation Act 1897, section 1, sub-section (3). The defenders were entitled to have an opportunity of settling, and that had not

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been given in the present case. There was no room for the Sheriff to act as arbitrator, nor was it necessary to have recourse to him in that capacity, the condition precedent, *i.e.*, dispute between the parties, being absent—*Field* v. *Longden & Sons* [1902], 1 K.B. 47. The application was therefore clearly premature. At least whether it was so or not was a question of law the Sheriff had to decide and on which his decision might be reviewed. He therefore should have stated a case and should now be required to do so.

Argued for respondent—The note should be refused. The case of *Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653, decided that an application for arbitration to the Sheriff was competent where no claim had been made and consequently no question could have arisen. An application was as competent in the circumstances of the present case. The action, further, was not brought prematurely and the defenders were dilatory in intimating their admission of liability. The Sheriff had an absolute discretion in the matter of expenses, and no appeal was competent against his decision therein. *Binning* v. *Easton & Sons*, February 24, 1906, 43 S.L.R. 312, was referred to.

At advising—

LORD PEARSON—The purpose of this note is to have the Sheriff-Substitute at Dundee required to state a case on certain questions of law said to have been determined by him in an arbitration under the Workmen's Compensation Act.

The applicants are a shipbuilding company in Dundee; and it is not disputed that on 14th October last the respondent while in their employment met with an accident which entitled him to compensation under the Act.

The material averments of the employers are as follows, and it will be understood that for the present purpose I take them only as their averments, and not as facts proved or admitted.

On 1st November they received from the respondent's agents a notice of the accident, and a claim in an alternative form, bearing to be in terms of the Employers' Liability Act 1880, or alternatively under the Workmen's Compensation Act. The employers at once forwarded the document to the Insurance Company in Glasgow with which they were insured against such accidents. On the next day, 2nd November, without any further notice or communication, the respondent presented a petition in the Sheriff Court at Dundee under the Workmen's Compensation Act, on which he obtained an order for service; and the petition was served on the employers on that date. The petition did not aver that any question had arisen between the parties as to the liability to pay compensation, or as to the amount or duration thereof, or that the employers had declined to admit liability for compensation, or to settle the same by agreement; and the employers say that no such question had in fact arisen, and that they were ready to admit liability under the Act and to settle the amount of compensation. On 4th November, they wrote to the petitioner's agents admitting liability and intimating that objection would be taken to the competency of the arbitration proceedings. At the first calling of the petition on 10th November, they admitted liability to pay compensation at the rate claimed by the respondent. They further pleaded that the petition was incompetent in respect that when it was presented no question had arisen between the parties within the meaning of section 1, sub-section 3, of the statute, and that no reasonable opportunity had been given to the employers to admit their liability.

On 10th November the Sheriff, after hearing parties, found the defences irrelevant; found the pursuer entitled to compensation at the rate of 4s. 6d. weekly as from the date of the accident until the further orders of Court; and found the defenders liable in £2, 2s. of modified expenses.

The employers thereafter duly lodged a minute craving the Sheriff to state a case for the opinion of the Court, but he refused to do so. By section 9 (c) of the Act of Sederunt of 1898 it is provided that if the Sheriff, on a draft case being submitted to him, is of opinion that "any question of law stated in it was not raised by the admissions made or the facts proved before him, or that the application for a case is frivolous, he may refuse to state or sign the case," specifying in a certificate the cause of the refusal. The Sheriff-Substitute's certificate is produced, and it sets forth as the cause of the refusal that the defender's sole contention as he understood it was that the action had been prematurely brought, and that therefore no expenses should be allowed to the pursuer; and that the Sheriff-Substitute was clearly of opinion that the action was not premature, and that the defenders' admission of liability was too late if they desired to settle without litigation, and so deprive the pursuer of his right to raise an action under the Workmen's Compensation Act.

Now it is clear upon that certificate of the Sheriff, and upon his findings of 10th November, that in order to reach those findings he had to determine certain questions of law, namely—(1) Whether, having regard to the terms of the statute, and particularly of section 1, sub-section 3, he had jurisdiction to entertain the petition; and (2) whether the petition was competent in the circumstances. These questions were both raised in the application to the Sheriff to state a case, though the form in which they were expressed was unfortunate. They were both treated as falling under the objection to the competency of the proceedings; and further, the questions as proposed to the Sheriff failed to distinguish accurately between law and fact. But it was not beyond the province of the Sheriff in settling the case to put it in proper shape in these particulars. I think he should have set forth, relatively to the

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question of jurisdiction, whether any and what question had arisen at the date of the petition as to the liability to pay compensation under the Act, or as to the amount or duration of compensation, and under what circumstances such question had arisen; and also, as regards the question of competency, whether the employers had any and what opportunity before the petition was presented of settling by agreement.

We have, of course, no concern at present with the merits of either of these questions of law. The Sheriff may have decided them quite rightly; but in my opinion the employers are entitled to have his determination reviewed on a case stated, just as the workman would have been entitled if the Sheriff had decided the other way.

The cases of *Fraser* v. *Great North of Scotland Railway Company* (1901, 3 Fr. 908) and *Field* v. *Longden & Sons* (1902, 1 K.B. 47), which were referred to at the discussion, may have to be considered at a future stage of this case. They certainly emphasise the view that it involves questions of law of some importance.

It was argued for the respondent that the present application is really brought in order to get rid of the Sheriff's award of £2, 2s. of expenses; and it was pointed out that by section 6 of the second schedule of the Act the costs are in the discretion of the Sheriff. But that section can only apply to a case where the proceedings were competently before him as arbitrator under the statute; and it is the prior question of jurisdiction and competency which is sought to be raised here.

I hold, therefore, that we should require the Sheriff to state a case under the statute.

LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court ordained the Sheriff to state a case as craved.

Counsel for the Defenders and Appellants—Younger, K.C.—Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Pursuer and Respondent—MacRobert. Agent—D. G. Mackenzie, W.S.

Friday, March 16.

SECOND DIVISION.

HUNT'S TRUSTEES *v.* HUNT AND OTHERS.

Succession—Vesting—Acceleration—Conditional Institution of Issue—Liferent of Whole Capital—Postponement of Vesting till Liferenter's Death—Liferent Reducible in Certain Contingency to One-Third—Contingency having Happened Effect on Vesting of Remaining Two-Thirds—Accumulation of Income—Intestacy.

A testatrix in her trust-disposition and settlement directed her trustees to pay to her husband during his lifetime if he survived her the net income of her estate, providing, however, that in the event of his contracting a second marriage the provision in his favour should be restricted to one-third. She further directed that "upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me," her trustees were to hold and apply, pay and convey, "the fee or capital of the residue of my said means and estate" to her children equally on majority, or in the case of daughters, marriage, "declaring that in the event of any of them predeceasing the period of payment and conveyance, and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue." No provision was made as to the disposal, (1) of the income which would be set free if the liferenter married, or (2) of such part of the capital as would in that event no longer be required for the restricted liferent.

The testatrix was survived by her husband and three children. The trustees paid the whole income to the husband until he entered into a second marriage, after which they continued to pay him one-third of the income and accumulated the remainder. The children all attained majority.

In a special case, *held* (1) that vesting was postponed until the death of the husband, and that his second marriage had not accelerated the date of vesting and payment of two-thirds of the estate; (2) that the accumulated income was not disposed of by the trust-disposition and settlement and accordingly fell into intestacy.

This was a special case brought to determine certain questions of difficulty arising out of a trust-disposition and settlement left by Mrs Mary Page M'Coll or Hunt, wife of Thomas Hunt, who died on 25th October 1885.

By her trust-disposition and settlement she conveyed her whole means and estate to trustees for certain purposes. The second and third purposes were as follow:—"(*Secondly*) I direct my trustees to hold and apply my whole means and estate in trust, and pay to my husband, the said Thomas Hunt, in the event of his surviving me, the net income or revenue arising therefrom during all the days and years of his life after my death, at such terms or times as they may consider proper, which income or revenue shall be paid to my said husband as a purely alimentary provision to him and shall not be assignable by him, nor affectable by his debts or deeds or the diligence of his creditors; but I provide and declare that in the event of my said husband entering into a second marriage, the provisions hereby conceived in his

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favour shall be reduced and restricted to one-third as from the date of such second marriage; and (*Lastly*) Upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me, I direct my trustees to hold and apply, pay and convey, the fee or capital of the residue of my said means and estate to and for behoof of my children equally among them, share and share alike, payable and to be conveyed to them on their respectively attaining the age of twenty-one years, or, in the case of daughters, on their being married, should that event happen before they attain majority: Declaring that in the event of any of them predeceasing the period of payment and conveyance and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving and the lawful issue of any child who may have deceased leaving such issue, such issue always being entitled equally among them *per stirpes* to the share which their parent would have taken on survivance. And I hereby specially authorise and empower my trustees and executors, in the event of the said income and revenue being in their opinion at any time insufficient for the requirements of my said husband and the children of our marriage, to pay to him such portion or even the whole of the fee or capital of the residue of my said means and estate as they in their discretion may see fit; and my trustees shall also have full power and liberty to advance from time to time as they may see fit to my children or their issue during their minority not only the income but also the fee or capital of their presumptive shares in whole or in part for their education, maintenance, advancement in life, or establishment in business; and with regard to such of the foregoing provisions, or of any provisions that may be made by me in any codicil hereto, as are in favour of or may fall to females, the same shall be purely alimentary and exclusive of the *jus mariti* and right of administration of their respective husbands. . . ."

The testatrix was survived by her husband and by three children, a son and two daughters, all of whom were major at the date of the special case. The husband entered into a second marriage on 14th September 1886. Up to that date the trustees regularly paid him the whole revenue of the trust estate, but after it they only paid him one-third and accumulated the remaining two-thirds in their hands. Questions having arisen as to the disposal of the estate, the present special case was submitted for the opinion and judgment of the Court. The parties of the first part were the trustees acting under the trust-disposition and settlement, the party of the second part was the testatrix's husband Thomas Hunt, and the parties of the third part were the children of the marriage between Thomas Hunt and the testatrix.

The questions of law submitted to the Court were the following:—"(1) Did the rights of the parties of the third part under said trust-disposition and settlement vest *a morte testatoris*, or at all events on their respectively attaining majority? Or (2) Is vesting postponed till the death of the said Thomas Hunt? (3) Did the re-marriage of the second party liberate two-thirds of the capital of said estate in the hands of the first parties from the burden of the provisions in said settlement in favour of the second party, and are the third parties entitled now to payment of said two-thirds of the capital of the estate equally among them? Or (4) Are the first parties bound to hold the whole capital of said trust estate until the death of the second party, paying the second party one-third of the income thereof, and on his death to pay over the capital to the third parties? (5) Does the accumulated income in the hands of the first parties fall to be added to the capital of said trust estate and dealt with by them as such? Or (6) Does the said accumulated income fall now to be divided equally among the third parties? Or (7) Does the said accumulated income fall into intestacy?"

The following were the contentions of the various parties. The parties of the first part maintained that they were bound to retain the whole trust estate in their hands and pay to the second party one-third of the net income thereof; further, that the parties of the third part had no vested right in the estate until the death of the party of the second part, or alternatively that they as trustees were bound to hold the whole trust estate in their hands until the death of the second party, and thereafter divide it and pay it to the parties of the third part. The party of the second part maintained that the income from the estate, which had accumulated in the hands of the first parties since the date of his said second marriage fell into intestacy, and that he was entitled to payment of one-third thereof as it accumulated in name of *jus relicti*. He was quite willing that the two-thirds of the capital, which by his second marriage might have been liberated from the burden of his liferent, should now be made available for instant division among his children, the parties of the third part, in the event of the Court being of opinion that such a course was competent. . . . In the event of its being held that the accumulated income did not form intestate estate, the party of the second part was willing that it should, if competent, be now divided among his children. The parties of the third part maintained that their interests in the estate vested *a morte testatoris*, or at all events on their respectively attaining majority, subject to the burden of the second party's liferent interest therein; that in consequence of the second marriage of the second party two-thirds of the capital of the estate was liberated from the burden of the provisions in the trust-disposition and settlement in favour of the second party, and to that

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extent the estate, with the income thereof which had accumulated in the trustees' hands since the date of the second marriage, fell now to be divided into equal shares and paid to the parties of the third part, or alternatively, that the accumulated income fell into intestacy, and that they were entitled now to payment of two-thirds thereof equally among them.

Argued for the first parties—This was a typical case of postponement of vesting till liferenter's death — *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632. The second marriage of the husband could not be taken, in the matter of vesting, as equivalent to his death in regard to two-thirds of the estate, as the result might be to give these two-thirds to persons other than those whom the truster had appointed to take. The interest of the issue of children prevented acceleration of vesting — *Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.), 45, Lord Watson, at p. 48, 27 S.L.R. 917; *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911. To give effect to the third party's contentions would involve reading into the will provisions which did not exist. As to the accumulations, the income followed the capital and the accumulations swelled the residue — *Logan's Trustees* v. *Logan*, June 24, 1896, 23 R. 848, 33 S.L.R. 638; *Gollan's Trustees* v. *Boath*, July 5, 1901, 3 F. 1035, 38 S.L.R. 762. There was always a strong presumption against intestacy. Truster's intention evidently was that whole estate should ultimately go to children or issue.

Argued for the second party—Vesting was suspended till death of liferenter. The accumulation of income fell into intestacy, there being no general bequest of residue which could cover accumulations. There was only a direction to divide "the fee or capital of the residue of my said means and estate," and the context showed that the expression must be read as referring to the estate as at the time of testatrix' death.

Argued for the third parties—The only object of postponement of vesting and payment being the protection of the liferent, there was no reason for the postponement of vesting or payment so far as the two-thirds of capital were concerned. So far, at any rate, his second marriage was equivalent to death—*Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201. There was no intestacy, and the accumulations followed capital.

At advising—

Lord Low—If the trust-disposition and settlement of Mrs Hunt had not contained the declaration restricting the liferent given to her husband in the event of his entering into a second marriage, I do not think that it could have been doubted that the fee of the residue of the trust estate did not vest in the truster's children or their issue until Mr Hunt's death. It was maintained, however, that the declaration to which I have referred had the effect, in the event which happened of Mr Hunt marrying again, of accelerating the period of payment and vesting as regarded a portion (namely two-thirds) of the estate.

The direction to the trustees in the second purpose of the trust is to pay the income of the trust estate to Mr Hunt during his life, declaring, however, that if he entered into a second marriage "the provisions hereby conceived in his favour shall be reduced and restricted to one-third as from the date of such second marriage." By the third purpose the trustees are directed, "upon the death of my said husband," to convey "the fee or capital of the residue of my said means and estate" to the truster's children, equally among them, payable to them on their respectively attaining majority, or in case of daughters on their being married should that event happen before they attained majority. It was, however, declared that in the event of a child predeceasing the period of payment leaving lawful issue, such issue should come in the parent's place, and that "in the event of any of them predeceasing said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue."

Nothing is said in the settlement in regard to the disposal of the two-thirds of the income which would be set free if Mr Hunt married, nor in regard to the disposal of such part of the capital as would in that event not be required to secure his restricted liferent.

Mrs Hunt was survived by three children who have all attained majority, and they claim that they are entitled to have immediate payment equally among them of two-thirds of the capital. They argued that the terms of the settlement showed that there was no reason for postponing the period of payment until Mr Hunt's death except to protect his liferent, and that, accordingly, his second marriage was, for the purposes of the settlement, equivalent to his death as regarded two-thirds of the capital.

In order to give effect to that view it would be necessary to take great liberties with the quite unambiguous directions in the third purpose. In that purpose there is (apart from the condition as to majority or marriage) only one term of payment, and only one set of beneficiaries who are given right to the whole residue. The contention of the third parties, however, involves reading into the third purpose a second period of payment as regards two-thirds of the residue, and also involves the possibility that, instead of the whole of the residue being divided among the same persons, two-thirds of it would be divided among one set of persons and one-third among another set; and further, that the persons who would only get one-third would be those who, according to the ordinary meaning of the language used, would be entitled to the whole. To give effect, therefore, to the contention of the third parties would be not to construe the settlement as it stands, but to read into it provisions which

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it does not contain. I am therefore of opinion that the first and third questions should be answered in the negative and the second and fourth in the affirmative.

The other questions in the case relate to accumulations of surplus income which have been made since Mr Hunt's second marriage, which took place in 1886. The first parties maintain that these accumulations fall to be retained by the trustees and added to the capital, while the second and third parties contend that the accumulations are undisposed of and fall to be dealt with as intestate succession of the truster.

The question is not without difficulty, but I am of opinion that the latter view must prevail. If the words of the settlement are read literally, the accumulations of income are not included in the residue which the trustees are by the third purpose directed to divide upon the death of Mr Hunt. What they are directed to divide is "the fee or capital of the residue of my said means and estate." The context shows that the expression "my said means and estate" must be read as referring to the means and estate belonging to the truster at her death which she had conveyed to her trustees, and, accordingly, I am unable to read the words "the fee or capital of the residue of my said means and estate" as including income accumulated after the truster's death.

It was argued that the language of the settlement was sufficient to show that the truster's intention was that, with the exception of so much of the income as might be required to meet the liferent provisions to Mr Hunt, the whole trust estate in the hands of the trustees should ultimately go to the truster's children or their issue.

I recognise the force of that argument, but my difficulty is that, while the truster has dealt in unequivocal terms with the capital of the means and estate belonging to her at her death, she has not expressed her intention in any way whatever in regard to income set free by her husband's marriage. What the first parties, therefore, ask the Court to do is to give effect to what presumably would have been the truster's wishes if she had thought fit to express them. To do so, however, would be, not to construe the settlement, but to make an addition to it which is quite incompetent. I am therefore of opinion that the accumulated income is undisposed of and falls into intestacy, and that, accordingly, the fifth and sixth questions should be answered in the negative, and the seventh question in the affirmative.

LORD JUSTICE-CLERK—I concur.

LORD KYLLACHY—I concur.

LORD STORMONTH DARLING—When a testator leaves a will professing to deal with his or her whole estate, one is always unwilling to find that the result is intestacy as regards a part of it.

But having had an opportunity of reading the opinion which has just been delivered by my brother Lord Low I have come to think that his conclusion is the right one.

The Court answered the first, third, fifth, and sixth questions in the negative, and the second, fourth, and seventh questions in the affirmative.

Counsel for the First Parties—C. N. Johnston, K.C.—Burt. Agent—A. F. Fraser, S.S.C.

Counsel for the Second Parties—Kemp. Agents—Whigham & Macleod, S.S.C.

Counsel for the Third Parties—Wark. Agents—Patrick & James, S.S.C.

VALUATION APPEAL COURT.

Saturday, March 10.

(Before Lord Low and Lord Dundas.)

PARISH COUNCIL OF EDINBURGH *v.* ASSESSOR FOR EDINBURGH.

Valuation Cases—Municipal Electric Light Undertaking—Method of Valuation—"Revenue" Principle or "Contractor's" Principle.

Held that in ascertaining the true yearly rent or value of a municipal electric lighting undertaking which had been in existence for ten years the "revenue" or "profits" method should be applied. *Opinions* that the "contractor's" principle (viz., a percentage upon the cost of the undertaking) might be usefully employed as a means of testing the amount arrived at by another method.

Valuation Cases—Municipal Electric Light Undertaking—"Revenue" Method of Valuation—Deductions for Depreciation.

An electric undertaking was carried on by a municipal corporation as undertakers under a Provisional Order. The necessary power stations were erected by and belonged to the corporation, together with the whole machinery and plant therein, and the electric mains, &c., throughout the burgh. *Held* that in ascertaining the true yearly rent by the "revenue" method no deduction fell to be allowed in respect of depreciation of lands and heritages, but that a deduction should be allowed for interest on tenant's floating capital and depreciation of tenant's chattels, and 6 per cent. allowed on the *cumulo* amount thereof.

Valuation Cases—Municipal Electric Light Undertaking—"Revenue" Method of Valuation—Deductions—Tenant's Profits—Power to Let Undertaking.

A municipal corporation carrying on an electrical undertaking was entitled by Provisional Order to make profit on the undertaking subject to certain restrictions as regards rate of charge for the supply of energy and the amount of profit which might be made. It was further entitled to let the undertaking to a tenant subject to similar

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restrictions. *Held* that in ascertaining the true yearly rent by the "revenue" method a deduction should be allowed for tenant's profits and 10 per cent. allowed in respect thereof on the balance obtained after deducting from gross revenue expenditure and interest upon tenant's capital.

Valuation Cases—Electric Light Undertaking—"Contractor's" Method—Valuation of Wayleaves.

Opinions that in valuing an electric light undertaking according to the "contractor's" method the value of wayleaves obtained by statutory authority would require to be included.

At a Court of the Magistrates of the City of Edinburgh, held at Edinburgh on 12th and 21st September 1905, to dispose of complaints and appeals against valuations made by the Burgh Assessor under the Valuation of Lands (Scotland) Acts, the Parish Council of the City of Edinburgh complained "that the following subjects, forming the electric light undertaking of the City of Edinburgh, are entered in the valuation roll of the City of Edinburgh at other than the just and true amount thereof, and crave that the value so entered should be altered to the amounts undernoted:—

Subject.	Present Value.	Value to be Substituted.
Dewar Place Station . .	£12,000	£20,941
M'Donald Road Station .	14,023	24,472
Mains throughout the burgh	19,246	33,587
Total . .	£45,269	£79,000

or in such proportions as the Court may determine."

The Magistrates dismissed the complaint and the Parish Council craved a case to be stated.

The following were the facts stated in the case:—"1. The electric light undertaking of the City of Edinburgh is carried on by the Lord Provost, Magistrates and Council (hereinafter called 'the Corporation') as undertakers under a Provisional Order granted by the Board of Trade under the Electric Lighting Acts 1882 to 1890, and confirmed by the Electric Lighting Order Confirmation (No. 6) Act 1891. The power stations at Dewar Place and M'Donald Road were erected by and belong to the Corporation, and the whole machinery and plant therein, and the mains, &c., throughout the burgh, are also their property. The Corporation are entered in the valuation roll as the owners and occupiers of the undertaking.

"2. Under the provisions of the said Provisional Order the Corporation are entitled to make profit on the undertaking, subject to the following limitations, viz.: (1) a restriction in the rate of charge for the supply of energy, and (2) a restriction in the amount of profit which may be made. As regards the rate of charge, section 25 of the Order provides that the prices to be charged by the undertakers for energy supplied by them shall not exceed those stated in the Fourth Schedule appended to the Order. The maximum prices fixed by that schedule are at such high rates as practically, in view of competition with gas and other methods of lighting, to amount to no restriction at all. As regards the restriction in the amount of profit, section 52 of the Order fixes a maximum rate of profit which may be made by the Corporation. Under that section the maximum rate of profit is declared to be the surplus of the revenue in any year not exceeding 5 per cent. upon the aggregate capital expenditure on the undertaking after meeting various heads of expenditure therein enumerated, including the payment of interest on borrowed money, contributions to a sinking fund required to be provided in respect of borrowed money, and payments to a reserve fund which, if the Corporation think fit, they can accumulate till it amounts to one-tenth of the aggregate capital expenditure on the undertaking. The said section 52 further provides that the Corporation shall apply the profits made by them on the undertaking, or the net surplus, to the credit of the burgh assessments, or at their option to the improvement of the burgh or in reduction of capital moneys borrowed for electricity purposes. The profit as shewn by the annual accounts has never in any year approached the said maximum.

"3. The Corporation have power to let the undertaking to a tenant, who would be restricted as regards making profit by the terms of section 25 of the Order and the Fourth Schedule, which fix the maximum rates of charge. The said maximum rates of charge being very high and not likely to be reached in the course of ordinary trading, the tenant would be practically unrestricted. The provisions of the Order in regard to letting or transferring the undertaking are contained in the 59th section. That section provides that the Corporation may, with the consent of the Board of Trade, and by deed to be approved by the Board of Trade, transfer the undertaking to any company or person, subject to such exceptions and modifications as may be specified.

"4. The total aggregate capital expenditure on the undertaking down to 15th May 1905 was £897,298. That sum does not include anything for renewals, which are intended to be paid for out of the reserve fund. The reserve fund now amounts to £75,967. At the close of last year's accounts, viz., 15th May 1905, the balance at the credit of the net revenue, after paying interest on loans £21,387, contribution towards liquidation of debt £27,950, and income tax £1073, but exclusive of any contribution to the reserve fund, was £21,142. That sum was disposed of as follows—£17,095 to the reserve fund and the remainder to the credit of the burgh assessments.

"5. The gross revenue of the electric light undertaking for the year ending 15th May 1905 amounted to the sum of £118,862, 12s. The working expenses, in which are included, *inter alia*, the total payments for repairs and maintenance of buildings, machinery, plant, and mains, tenants' rates and taxes and insurance, amounted to £43,981, 12s. 9d. That sum is made up as follows:—

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Coals and other fuel. . .	£13,762	3	4
Carbons for public lamps .	570	17	11
Oil, waste, water, engine-room stores, &c.	1,872	8	10
Salaries and wages . . .	8,847	9	8
Repairs and maintenance—			
Buildings	740	9	8
Machinery and plant . .	4,330	5	4
Instruments	23	16	7
Mains and cables . . .	2,257	3	8
Meters	827	1	3
Public lamps	911	14	3
Rates and taxes, £6481, 13s. 3d. whereof tenants' proportion	4,055	16	10
Insurance	1,091	5	5
General establishment charges	1,598	16	6
General expenses of management	2,769	6	7
Stationery and printing . .	210	12	2
Law expenses	112	4	9
	£43,981	12	9

"6. If the undertaking were to be carried on by a tenant, such tenant would require to have at least £102,000 of capital sunk in the business, whereof £22,000 would be working capital and £80,000 would be invested in tenants' chattels. In addition to these chattels the undertaking includes the following moveable plant — cables, £150,000, machinery, £175,000 — together, £325,000. Included in the undertaking also are properties owned and occupied by the Corporation which are separately entered in the valuation roll at the sum of £460.

"7. A very considerable amount of depreciation is constantly going on in the machinery and plant of the electric light undertaking. The Corporation do not set aside a sum each year out of revenue to provide a separate depreciation fund, but they make contributions out of revenue to the reserve fund, which is, *inter alia*, intended to meet depreciations. In estimating the profits of the undertaking for income tax purposes the Inland Revenue under a decision of the Commissioners of Income Tax made an allowance in respect of depreciation. That allowance for the year 1903–4 was £22,192, and for the year 1904–5 it is estimated on the same basis to amount to £22,405. The question of the allowance for depreciation was fully gone into before the Income Tax Commissioners on an appeal by the Corporation. The allowance given by these Commissioners in respect of depreciation is less in amount than the depreciation which actually goes on. On the basis taken by them the depreciation from the commencement of the undertaking in 1895 to Whitsunday 1905 would amount to a cumulo sum of £164,000.

"8. The Burgh Assessor arrived at his valuation of the electric light undertaking by taking varying rates of percentage on the cost. The following are the details of his valuation—

	Cost.	Rate of Percentage.	Valuation.
Dewar Place Station—			
Feu-duty			£20 2 0
Site ...	£6,806 5 0	4	272 5 0
Buildings	46,550 2 4	6	2,793 0 0
Fixed Machinery	118,855 6 0	7½	8,914 2 11½
	£172,211 13 4		£11,999 9 11½
			Say £12,000
Macdonald Road Station—			
Feu-duty			£382 1 0
Buildings	£70,614 8 10	6	4,236 17 4
Fixed Machinery	125,328 13 5	7½	9,404 3 0
	£196,003 2 3		£14,023 1 4
			Say £14,023
Mains, &c. throughout the burgh ...	£384,915 10 7½	5	£19,245 15 6½
			Say 19,246
			£45,269

"The rates of percentage taken by the Assessor are fair rates, and the amounts to which he applied these rates are correctly stated. The Assessor did not apply his rates of percentage to the present value of the buildings, machinery, plant, &c., of the undertaking, but to their prime cost. Higher rates of percentage were spoken to by one of the witnesses for the complainers, but these rates were intended to be applied to the present, *i.e.*, the depreciated value of the undertaking, and a valuation on that basis would not work out at a higher amount than that arrived at by the Assessor."

The Magistrates, having heard the evidence and the arguments for the parties, and considered the whole case, were of opinion—"1. That if the valuation were to be arrived at by taking the profits or revenue method, on the basis laid down by Lord Fraser in the case of the *Falkirk Gas Light Company*, 1883, 10 R. 651, it would, if such method were properly applied, amount to less than the sum fixed by the Assessor. In their view the valuation made up on this basis would be as follows:—

Gross Revenue . . .	£118,882	12	0
Deduct			
(1) Working Expenses . .	43,981	12	9
	£74,880	19	3
(2) Depreciation . . .	22,405	0	0
	£52,475	19	3
(3) Interest at 5 per cent. on tenants' capital, say £102,000. (It was proved that, in addition, the undertaking contained moveable plant included in the Assessor's valuation, amounting to £325,000)	5,100	0	0
	£47,375	19	3
(4) 20 per cent. for tenants' profits	9,475	3	10
	£37,900	15	5
(5) Properties owned and occupied by the undertakers, and separately entered in the roll	460	0	0
	£37,440	15	5

"A further deduction might require to be made in respect of interest on the £325,000 of moveable plant which the Magistrates on this basis did not require to deal with, since without that deduction a less sum than that fixed by the Assessor was brought out. In arriving at a valuation on this basis the Magistrates considered it was proper to make a deduction in respect of

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depreciation on machinery and plant (which was not included among the deductions allowed by Lord Fraser in the *Falkirk* case, the point not having been there raised), in respect that where a deduction is allowed for repairs a deduction should also be allowed for depreciation, if, as in the present case, it has been proved that a large amount of depreciation (beyond and not included in the payments for repairs) is constantly going on. The Magistrates further considered that it was proper to allow deductions in respect of repairs and insurance, as was done by Lord Fraser, and that the complainers' contention that these deductions should not be allowed on the ground that similar deductions required to be made from the rent under section 37 of the Poor Law Act of 1845, could not be upheld. The sum which requires to be entered in the roll under the Lands Valuation Act is the rent at which the subjects would probably let one year with another, and in arriving at that sum the deductions which afterwards fall to be made from it under the Poor Law Act, or any other statute, cannot be taken into consideration.

"2. That if the valuation were to be arrived at by taking the revenue method, on the footing that the Corporation were prohibited by statute from making any profit, as in the case of *Ayr Harbour Trustees*, 1894, 21 R. 807, and other similar cases, a deduction from the gross revenue would not be allowed in respect of tenants' profits, which would make the valuation on that basis £46,915. If, however, a deduction were to be allowed in respect of interest on the moveable plant, amounting to £325,000, not taken into account in the previous calculation, that deduction at 5 per cent. would represent £16,250, and the valuation would thereby be reduced to £30,665. The Magistrates considered that if this method was adopted in the present case, then, as was done in the *Ayr Harbour* case, it would be proper to allow as a deduction interest on the whole of the moveable plant, but they held that a deduction for tenants' profits must be made in the present case, since the Corporation under their Provisional Order can not only make large profits themselves, but can also let the undertaking to tenants who would be practically unrestricted as regards making profit.

"3. That a valuation made up on the basis of percentage on cost or contractors' principle would, with fair rates of percentage, give a maximum rent, and that to arrive at a fair rent the valuation made up on this principle may be tested by a valuation made up on the profits basis.

"4. That tested by a valuation on the profits basis properly applied to the circumstances of the present case, and taking the whole facts and circumstances into consideration, and especially keeping in view what a hypothetical tenant would be likely to give as rent one year with another, the amount fixed by the Assessor is not too low. The net revenue (without deduction for landlords' repairs, insurance, &c.) available for division between the landlord as rent and the hypothetical tenant being £79,000, no tenant could pay a rent of £79,000 as contended by the complainers, for that would absorb the whole sum. A tenant would have to advance £22,000 for working capital and £80,000 for tenants' plant. He would require to get (1) a sufficient sum annually to repay the principal of the latter of these advances with interest during the life of his rapidly depreciating plant; (2) an allowance to cover the risk of obsolescence of his plant; (3) some provision to cover the risk of rise in the working expenses, for example, the price of coal, and of diminished profits, or even loss in some years; and (4) a reasonable profit to himself for carrying on such an undertaking. The Magistrates considered that a tenant would make due and reasonable allowance on these heads, and after doing so he would not give a higher rent than the sum entered by the Assessor.

"They therefore unanimously dismissed the complaint."

Argued for the appellants—The proper method of valuation was the "revenue" method. The Assessor had wrongly proceeded upon the method of valuing by percentages of cost, *i.e.*, the "contractor's" method, which was now discredited. The proper valuation would be by the "revenue" method £79,000. This method of valuation had been adopted by the Lands Valuation Appeal Court in valuing electric undertakings in Glasgow, Dundee, and Leith—*Assessor for Falkirk* v. *The Falkirk Joint-Stock Gas Company, Limited*, February 24, 1883, 10 R. 651, 20 S.L.R. 427, *per* Lord Fraser; *Kinross & Milnathort Gas Light Company* v. *Assessor of County of Kinross*, May 30, 1890, 17 R. 850, 27 S.L.R. 631; *Magistrates of Glasgow* v. *Dempster*, October 3, 1884, 12 R. 3. The Assessor had left out of account the value of wayleaves, which were an asset, and even if the "contractor's" method were properly applied a very considerable addition would require to be made in respect of these—*Hay* v. *Edinburgh Water Company*, July 3, 1850, 12 D. 1240, *aff.* 1 Macq. 682. No allowance ought to be made for depreciation of heritage, for landlord's taxes, landlord's repairs, or landlord's insurance, which were properly burdens upon the rent. These the appellants had to allow as deductions from the rent appearing in the valuation roll under section 37 of the Poor Law Act 1845, and if deducted from the gross rental would be allowed twice over—*Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241; *Pumpherston Oil Company* v. *Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830. Machinery should be treated as heritage—*Assessor for Dundee* v. *James Carmichael & Company*, February 4, 1902, 4 F. 525, 39 S.L.R. 573; *Kirby* v. *Assessment Committee of Hunslet Union*, 22 T.L.R. 165. No allowance should be made for landlord's repairs. No deduction fell to be made from revenue under the head of tenant's profits. Although there was permission under the Provisional Order to let the undertaking it must be taken as worked by the Corporation for the benefit of the

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community, and any profits had to be used for the reduction of the price of electricity —*Ayr Harbour Trustees* v. *The Assessor for Ayr*, May 25, 1894, 21 R. 807, 31 S.L.R. 726. A power to let was of no importance if the rates could not be raised so as to earn a profit. The appellants conceded that a deduction of a percentage on tenant's capital should be made. The proper method was to take the gross revenue and deduct therefrom the working expenses and interest on tenant's capital.

Argued for the respondent—In the circumstances the "contractor's" method was the proper method of valuation. Cost was an element which could not be disregarded—*Edinburgh Gas Light Company* v. *Assessor for Leith*, March 9, 1887, 14 R. 583, 24 S.L.R. 420; *St Cuthbert's Co-operative Association* v. *Assessor for Edinburgh*, March 20, 1896, 23 R. 681, 33 S.L.R. 487; *M'Vitie* v. *Assessor for Edinburgh*, February 18, 1898, 25 R. 601, 35 S.L.R. 666; *Oakbank Oil Company, Limited* v. *Assessor for Mid-Lothian*, February 4, 1902, 4 F. 520, 39 S.L.R. 581. Electric light undertakings were comparatively new, and distinct from all subjects previously assessed, and no one could as yet say what was a proper percentage to allow for depreciation. Where the "revenue" method was employed in the valuation of gasworks, &c., great fluctuations were seen. Where the "contractor's" method had been adopted in the case of undertakings not dissimilar to the present one there was a steady increase of the assessment rateably with the value of the lands and heritages. Wayleaves should not be taken into account, as nothing had been paid for them. If, however, the "revenue" method were properly applied, the result was that a considerably lower assessment was arrived at than had been reached by the "contractor's" method. The Assessor was bound in the present case to make allowance for tenant's profits. The case was distinguished from those cited by the appellants. No doubt such deductions had been disallowed by the Court in the cases of gas and water works where a Corporation was debarred by statute from making profit out of them. Here, however, the statutes and Provisional Order explicitly allowed profit to be made. Further, it had been proved that there was serious depreciation in plant, and the Inland Revenue Commissioners had for many years allowed a certain sum in name of depreciation. The Assessor would be bound to allow a similar amount. The introduction of a hypothetical tenant raised speculative questions as to hypothetical landlord's repairs and hypothetical tenant's repairs. According to the appellants the burden of upkeep rested upon the landlord. But a tenant takes over premises in good repair and undertakes to maintain them in good repair during the currency of his lease. Therefore repairs and renewals are a burden upon the tenant, and depreciation ought to be allowed for in estimating the rent—*Assessor for Falkirk, supra, per* Lord Fraser at p. 655; *Magistrates of Glasgow, supra, per* Lord Shand at p. 332. Deductions should also be allowed upon tenant's chattels.

At advising—

Lord Low—The question in this case is what is the amount to be entered in the valuation roll as the yearly rent or value of the electric light undertaking of the City of Edinburgh.

Two methods of ascertaining the amount have been proposed. The first, which is the method adopted by the Assessor and approved by the Magistrates, is what has been called the "contractor's method," and consists of taking as the yearly value a percentage upon the cost of the various lands and heritages constituting the undertaking. The other method, for which the appellants the Parish Council of Edinburgh contend, consists in taking the actual amount of the receipts of the undertaking and deducting therefrom all necessary expenditure, including interest on moveable plant and floating capital, and cost of collection and management. The difference between these two amounts represents, according to circumstances, either the hypothetical rent or a free surplus which is available for rent on the one hand and tenants' profits on the other.

Now, for the purpose of ascertaining the yearly value of public undertakings such as that with which we are dealing, there is a strong body of judicial opinion in favour of the second of these methods, and the rules formulated by Lord Fraser in the case of the *Falkirk Gas Company* (10 R. 651) have been recognised as being generally applicable to such a case.

I by no means, however, regard the contractor's method as having been entirely negatived as a means of arriving at the yearly value of public undertakings. There may be cases in which it would be the most reliable method to adopt, and I am disposed to think that in most cases it might be useful as a means of testing the amount arrived at by another method.

The Assessor contends that in this case the value at which he has arrived upon the contractor's principle should be accepted, on the grounds (1) that the electric undertaking had not been in operation for a sufficiently long period to furnish a reliable basis for the revenue method; and (2) that the appellants could not complain of the valuation because it was larger in amount than that which would be arrived at by a proper application of the revenue method.

The former of these points appears to me to be untenable considering that the undertaking has now been carried on for a period of ten years; and in regard to the second point it is sufficient to say that, in my opinion, and for reasons which I shall state presently, a valuation properly worked out on the revenue method gives a much larger sum than that arrived at by the Assessor. That, however, may in large measure be accounted for by the fact that the Assessor has not taken into account the value of the ground in which the mains are laid. It was said that no value fell to be put upon that ground because the undertakers had statutory authority to lay the mains. I do

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not think that that makes any difference. The ground occupied by the mains is undoubtedly lands and heritages, and the fact that lands and heritages have cost the proprietor nothing is no reason for not valuing them.

I do not think that there is any serious controversy between the parties in regard to the proper way of arriving at the yearly value according to the revenue method except in regard to two matters. The first relates to depreciation, and the second to an allowance for tenants' profits.

In regard to the first point, the Assessor maintains that a reasonable sum for depreciation of the lands and heritages composing the undertaking (which he estimates at over £22,000) should be deducted from the gross revenue. The appellants upon the other hand contend that that depreciation of lands and heritages does not fall to be taken into consideration at all.

In my judgment the latter is the sound view. Of course when there is an actual lease the parties may make any arrangement they like but I think that, in undertakings of the kind with which we are dealing the general rule is that the tenant is not liable to replace portions of the heritage which become worn out, but that that is one of the obligations of the landlord. It was said that depreciation is always a charge against revenue, and I agree; but it forms a charge against the landlord's revenue, which, if the subjects are let, is the rent. Indeed, if in a lease of such subjects the tenant was taken bound not only to make ordinary repairs but also renewals, so as to prevent the heritage from deteriorating, I am not sure that that would not be a consideration other than the rent which would require to be taken into account in ascertaining the yearly value.

It was further urged that depreciation should be allowed on what have been called tenant's chattels. I think that that is a sound view, and one which has received recognition. Thus in the *Falkirk* case Lord Fraser said that in addition to the heritable subjects the tenant "must invest a considerable sum in moveable capital belonging to himself, upon which he is entitled to a percentage, which must be considerable because of the perishable nature of the articles." Now, a yearly percentage upon the cost of articles by reason of their perishable nature is just an allowance for depreciation. I shall consider by-and-bye the rate of percentage which should be allowed in this case.

The second question upon which the parties are at issue is whether a percentage should be deducted for tenant's profits?

That is a question which touches one of the most difficult problems raised by the Valuation Acts, the problem, namely, of determining the rent at which an undertaking might "be reasonably expected to let from year to year," when the statutory conditions under which it must be carried on prohibit the making of any profit at all. The present case does not altogether fall within that category, because the undertakers are, subject to certain conditions, empowered to let the undertaking to a tenant for a yearly rent, and such a tenant would be in a position to make a profit out of the business, because the rates charged at present for the supply of energy are greatly below the maximum allowed by the Act. But that does not solve the question whether, for the purpose of ascertaining the hypothetical rent, an allowance for tenant's profits falls to be deducted from the revenue which is the basis of the calculation. That revenue is the produce of the rates which are charged at present, and if these rates are no more than sufficient to meet the necessary and prescribed expenditure, it is plain that there is no room for deducting tenant's profits, because, as I have pointed out, a tenant would make his profit by raising the rates, which would simply mean that the revenue would be increased.

There is, however, some complication introduced by the fact that the undertakers are authorised to charge rates of an amount which, after meeting the necessary and prescribed expenditure, will yield a surplus or profit of 5 per cent. upon the aggregate capital expenditure, and if they were actually earning that profit I have no doubt that it would require to be taken into consideration.

Now the only statement in the case upon that point is where it is said—"The profit, as shown by the annual accounts, has never in any year approached the said maximum."

That statement implies that some profit is being made, although not nearly 5 per cent. upon the aggregate capital expenditure. Considering, however, how large the capital expenditure has been, even a trifling percentage of profits would amount to an important sum. I do not think that we can leave that fact altogether out of view and deal with the case as if the revenue ingathered was no more than sufficient to meet the prescribed expenditure. On the other hand, we cannot treat the undertaking as if it were a concern trading for private profit. If it had been of the latter character the recognised method of proceeding would have been to deduct from the gross revenue all the expenditure and a percentage upon tenant's capital, the balance being the fund available for tenant's profits and rent, and the latter sum being obtained by allowing 20 per cent. of the balance for tenant's profits. Now the undertaking here does not fall within either of the categories to which I have referred, but is a case intermediate between the two, although it probably approaches more nearly to the first than to the second. In the peculiar circumstances I think a substantially just result may be obtained by making an allowance for tenant's profits at one-half the rate usually allowed—that is, 10 per cent. instead of 20 per cent. upon the balance obtained by deducting expenditure and interest upon tenant's capital from the gross revenue.

There are before us three valuations based upon the revenue principle. The first is

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that prepared by the Assessor with the object of establishing his proposition that the revenue method brought out a smaller yearly value than the contractor's method. The Assessor, however, deducts £22,000 for depreciation, which, if the views which I have expressed be sound, is inadmissible, and if depreciation had not been deducted the yearly value given by the revenue method would, on the Assessor's own showing, have greatly exceeded that arrived at by the contractor's method.

The other two proposed valuations were made by Mr Cockburn Millar, C.A., and Mr Jackson, the Government Assessor of Railways and Canals, respectively. The amount brought out by Mr Millar is £77,447, while the figure arrived at by Mr Jackson is £71,123. The main difference between the two is that Mr Jackson allows much larger deductions for repairs and insurance than Mr Millar, and Mr Jackson estimates the tenant's capital at £76,000, as compared with £75,000 allowed by Mr Millar.

In regard to the latter point, I think that the tenant's capital should be taken to be £102,000. According to my reading of the case the Magistrates have stated as a fact that that amount of capital would be required, and if so that is conclusive. If, however, the question is open I arrive at the same result. It is not disputed that the tenant would require £22,000 of floating capital, and the question is, what amount would be required to supply tenant's chattels? Mr Newington, the resident electrical engineer to the Corporation of Edinburgh, has made up a list of the necessary tenant's chattels, the cost of which he puts at £80,000. Now, Mr Newington speaks with special knowledge of the undertaking, which the other witnesses do not possess, and therefore I think that his figures should be accepted.

In regard to repairs, I think that the principle upon which Mr Jackson proceeds is right, and therefore I propose that his statement should be adopted with the exception of the entry relating to tenants' capital, which, for the reason which I have given, should, I think, be taken at £102,000 instead of £76,000.

Further, Mr Jackson allows interest upon tenant's capital at the rate of 5 per cent. That was the rate taken by Lord Fraser in the *Falkirk* case, and it has been frequently applied since; but it seems to me to be plain that no hard and fast rule can be laid down in regard to the rate of interest which it is reasonable to allow, especially if it includes, as I think it ought to do, an allowance for depreciation upon the tenant's chattels.

I therefore propose to deal with the tenants' capital in this way. In so far as the tenants' capital consists of £22,000 of floating capital there is no question of depreciation, and accordingly I should not be disposed to allow a higher rate of interest if I were dealing only with that sum than 4½ per cent. On the other hand, the balance of £80,000 represents tenant's chattels, of which a list made up by Mr Newington was given. Many of these articles, and those in which the greater part of the capital would be invested, such as meters, accumulators, and arc lamps, are subject to very rapid depreciation, and accordingly I do not think that 5 per cent. would be a sufficient amount to allow for interest and depreciation. It is impossible in such a matter to obtain any precise figure, and the most that one can hope to do is, by considering the whole circumstances, to arrive at a result which will be approximately correct. That, I think, may be attained by allowing 6 per cent. upon the whole of the tenant's capital instead of 5 per cent. which was allowed in the *Falkirk* case. Therefore, from the sum of £74,923 brought out by Mr Jackson as the difference between revenue and expenditure I deduct, in the first place, 6 per cent. upon £102,000 of tenant's capital instead of 5 per cent. upon £76,000. That brings out a sum of £68,803, which I further reduce to the extent of 10 per cent. for tenant's profit, which leaves as the yearly value, in round numbers, the sum of £61,923.

LORD DUNDAS—I agree with your Lordship and have little to add. The Assessor is here in the position of defending his valuation against a complaint that it is too low, and is not in the more familiar situation of resisting an appeal upon the ground that he has overvalued the property in question. I agree with your Lordship in thinking that the Assessor has undervalued this undertaking. His valuation is based upon the "contractor's principle," viz., a percentage upon the cost of the undertaking. Now, as your Lordship has pointed out, the strong trend of recent decisions in this Court has been in favour of the view that in ascertaining the true yearly rent or value of public undertakings, the better principle to adopt is that contended for by the complainers and appellants, viz., the "revenue principle." Mr Jackson, the Government Assessor of Railways and Canals in Scotland, emphasises the advantage of adhering to this principle if uniformity is to be preserved in the valuation of public undertakings in Scotland. I do not, however, think that we ought to bind this Court to any absolute or hard-and-fast rule in the matter, especially as electric concerns are comparatively recent institutions in this country. We are not, in my judgment, in any way debarred by previous decisions from allowing ourselves to have regard to the "contractor's principle," so far as it may afford a useful comparison with or means of checking the result obtained, in any case, by the "revenue" method of assessment. I observe that the subsisting sphere of utility of the "contractor's principle" was summed up by Lord Moncreiff—(*St Cuthbert's Co-operative Association*, 1896, 23 R. 681, at p. 683) in these words—"I think the decisions on valuation by the cost of erection go no farther than this, that if there are other materials for estimating the annual value they should, as a rule, be adopted in preference, or at least be considered in conjunction

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with cost of erection." Now the Assessor in this case maintains that the appellants have no reason to object to his principle of valuation, because, if the "revenue principle" is to be applied, the result would be a lower valuation than that at which he has arrived. Your Lordship has pointed out, and I agree, that if the "revenue principle" is properly applied in this case the valuation will be much higher than that made by the Assessor. I make the further observation, that if the "contractor's principle" were to be followed out in the present case to its final conclusion it might well be that the figure arrived at would approximate more nearly to that which is claimed by the appellants than to that which is stated by the Assessor. The Dean of Faculty argued with much force that if the "contractor's principle" were to be adopted a very considerable addition would fall to be made on account of the electric undertaking's liability to assessment as proprietors in respect of their wayleaves. (He referred to *Hay* v. *Edinburgh Water Company*, 12 D. 1240, affirmed 1 Macph. 682. See also *M'Ewan* v. *Corporation of Glasgow*, 2 F. (H.L.) 25.)

Upon the manner and the extent to which depreciation ought to be considered and dealt with in this case, I agree with the views expressed by your Lordship. It seems to me that in a question of this sort, where we are not dealing with subjects actually let, the extraordinary cost of replacing parts of the heritable subjects which have become worn out and require to be replaced must be held to fall upon the landlord, and not upon the tenant. This cost, in my judgment, is not matter of deduction in ascertaining the letting value of the subjects, but is rather to be viewed as a burden upon the landlord's rent after that rent has been adjusted. A prudent landlord would provide, as by the Provisional Order the present undertakers are bound to (and do) provide, by way of a reserve fund. This view appears to me to be in accordance with Lord Fraser's opinion in *Falkirk Gas Company* (10 R. 651). I observe that in the often-quoted passage of that opinion (page 755) Lord Fraser included among the deductions to be allowed "the expense of renovating buildings, gasholders, mains." The word "renovating" is perhaps ambiguous. But, reading the whole context, I do not doubt that his Lordship meant renewals by way of repair, and not replacements involving the introduction of new heritable subjects. On the other hand, I consider that a deduction must be made, as Lord Fraser held, and as your Lordship holds, in respect of the tenant's importation into the concern of moveable capital, and that at a considerable percentage, looking to the perishable nature of the articles.

The question as to deduction in respect of tenant's profits is to my mind one of great difficulty. But I am prepared to hold that the result at which your Lordship has arrived, and the reasoning upon which it is based, are right. They appear to me to be in accordance with the decision of this Court in *Ayr Harbour Trustees* (1894, 21 R. 807), so far as the circumstances of that case are applicable to the case now before us. With regard to the apparent specialty in the present case, we are referred to the terms of the Provisional Order, and among the "facts admitted or held to be proved" the Magistrates state that "the profit, as shown by the annual accounts, has never in any year approached the said maximum." The mode in which your Lordship proposes to deal with this matter appears to me to afford an eminently reasonable solution, having regard to the existing circumstances, of which we are somewhat imperfectly informed.

The Court was of opinion that the determination of the Magistrates was wrong, and that the annual value of the Dewar Place Station should be entered at £14,014; the annual value of the M'Donald Road Station at £16,678; and the annual value of the mains throughout the burgh at £31,231.

Counsel for the Appellants—The Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—Kemp. Agents—R. Addison Smith & Co., W.S.

Counsel for the Respondents — Clyde, K.C. — Cooper, K.C., — Spens. Agents — Wishart & Sanderson, W.S.

Saturday, March 10.

(Before Lord Low and Lord Dundas.)

BRITISH LINEN COMPANY *v.* ASSESSOR FOR ABERDEEN.

Valuation Cases—Appeal — Competency—Appeal on Question other than Value—Appeal on Question of Ownership — Valuation of Lands (Scotland) Amendment Act 1879 (42 *and* 43 *Vict. cap.* 42), *sec.* 6 — *Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. cap.* 91) *and* 1857 (20 *and* 21 *Vict. cap.* 58).

Held that no question of title or ownership could be raised in the Valuation Appeal Court, which Court could only entertain questions as to valuation, and consequently that an appeal on the ground that the appellants' name had been erroneously entered in the valuation roll as proprietor of a certain heritable subject, was incompetent.

The Valuation of Lands (Scotland) Amendment Act 1879 (42 and 43 Vict. cap. 42), sec. 6 enacts—"It shall be lawful for any person interested to complain to the . . . magistrates of any burgh under the Valuation of Lands (Scotland) Acts, to the effect that any particular set forth in any entry in the valuation roll for such . . . burgh . . . other than the yearly rent or value of the lands and heritages to which such entry refers, has been set forth erroneously therein; and such complaint shall be made and disposed of in the same manner and subject to the same conditions and provisions (except in regard to the right of

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requiring a case to be stated) in and under which complaints that such yearly rent or value has been stated by the assessor in such valuation roll at other than the just and true amount thereof may be made and disposed of."

The provisions of the other sections of the different Valuation of Lands (Scotland) Acts bearing on the question at issue are given in the Judges' opinions *infra*.

At the Valuation Appeal Court held at Aberdeen on 13th September 1905 by the Magistrates and Town Council of the Burgh, the British Linen Company appealed against the following entry in the valuation roll for the Burgh for the year ending Whitsunday 1906—

Description and Situation of Subjects.		Proprietor.	Occupier.	Yearly Rent or Value.
Description.	Subjects.			
Land (Sites)	Great Northern Road	The British Linen Company as heritable creditors, per J. M. Kellas, agent, West End Branch, 484 Union Street	Proprietor	£3

The Company craved that the said entry should be deleted, or alternatively that the name of John Ogg, builder, Aberdeen, should be inserted as proprietor in their place, and contended "(1) that they are not proprietors of the said land sites in the sense of the Lands Valuation Acts; (2) that the said land sites have at present no assessable value; and (3) that the said John Ogg is the true proprietor of said land sites, and his name should be inserted as such if any entry is made thereanent."

After evidence had been led, by which certain facts unnecessary for this report had been established, the Magistrates "unanimously found that the appellants are proprietors of the building sites in question within the meaning of the Valuation Acts, and that the entry in the valuation roll ought to be allowed to stand for the following reasons, namely, . . ."

The Company having expressed their dissatisfaction with this determination, craved a case for appeal, and a case was stated. When the case came up before the Valuation Appeal Court the respondent, the Assessor, objected to its competency on the ground that the real question at issue was one of title or ownership, on which no appeal was allowed.

Argued for the respondent — The first contention of the appellants that their name was wrongly entered in the roll as proprietors of the subject raised a question of title or ownership. An appeal to this Court on that question was incompetent—Lord Kyllachy's opinion in *Cuninghame* v. *Assessor for Ayrshire*, March 30, 1895, 22 R. 596, 32 S.L.R. 453, was an authority for the proposition that no question could be raised here except as to valuation. There had been cases where a name had been struck off the roll on appeal, but in these cases the question of competency had not been raised. The provisions of the various Valuation Acts taken together negatived any right to raise that question here. The Act of 1854 gave no appeal of any kind to this Court, and dealt purely with the question of valuation. It gave no appeal even to the magistrates, except on the question of valuation. The Act of 1857 for the first time gave an appeal, but only on questions of value, and only where the assessor happened to be an officer of Inland Revenue. It was not till the passing of the Act of 1879 that an appeal was made competent whether the assessor was an officer of Inland Revenue or not, and section 6 of that Act for the first time noticed the question of the entry of the name of the proprietor, and provided that anyone aggrieved thereby might complain to the magistrates, but that their decision should be final. Suspension was therefore the only competent remedy open to a person whose name was wrongly entered in the roll—*Sharp* v. *Parochial Board of Latheron*, July 12, 1883, 10 R. 1163, 20 S.L.R. 771. The cases of *Ritchie* and *Bryden's Trustees* cited by the appellants did not apply, as the question of competency was not raised in them. As regards the second contention of the appellants there was no material stated in the case for considering it. There was no finding of the Magistrates with regard to it, and no note of facts held proved or admitted.

Argued for the appellants—The Assessor here was an officer of Inland Revenue, so the Act of 1879 was out of this case altogether. The 1879 Act did not take away an existing right of appeal but gave an additional one in a case where the assessor was not an officer of Inland Revenue. The construction put upon the Acts of 1854 and 1857 could not be different now from what it was before 1879, and if so it followed that this appeal was competent — *Henderson*, March 11, 1871, 11 Macph. 985, 9 S.L.R. 445; *Glass*, March 21, 1872, 11 Macph. 988, 9 S.L.R. 446; *Maitland* v. *Assessor for Midlothian*, February 10, 1888, 15 R. 592, 25 S.L.R. 318; *Symington & Sons* v. *Assessor for Coatbridge*, March 14, 1895, 22 R. 588, 32 S.L.R. 431; *Rule* v. *Abinger*, January 25, 1883, 10 R. 502, 20 S.L.R. 323. The *dicta* of Lord Kyllachy in the case of *Cuninghame* were not necessary to the judgment in that case. The cases of *Ritchie*, February 24, 1881, 9 R. 1244, and *Bryden's Trustees*, February 24, 1881, 9 R. 1244, were indistinguishable from the present case, and it was never suggested in these cases that the appeal was incompetent. The case of *Sharp* was not similar to the present case because there the assessor proposed to levy a double assessment on the same subject, and it was the double assessment that was struck at by the Court, no question of valuation being involved.

At advising—

LORD DUNDAS—This appeal is in my opinion incompetent and ought to be dismissed, upon the ground that it does not present any proper question of value for our decision. The accuracy of the latter statement, as matter of fact, does not, in spite of some argument to the contrary seem to me doubtful. There is no evidence at all as to the value of the "Land (Sites)' in question; the case contains no finding

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by the Magistrates in regard thereto, and we have in the case only an argumentative statement by the appellants and a counter statement by the respondent. The sole question raised by the case or determined by the Magistrates appears to me to be whether or not the appellants are "proprietors" of the heritage referred to within the meaning of section 42 of the Lands Valuation (Scotland) Act 1854, as being persons "in the actual receipt of the rents and profits thereof." The question therefore which was mooted but not decided in *Cuninghame* (1895, 22 R. 596) is here raised for decision, viz., whether the Valuation Statutes permit an appeal from the magistrates or Valuation Committee to this Court except upon proper questions of value? I have considered the various statutes as carefully as I can, but I do not propose to do more than indicate in outline the sequence of the principal sections of the statutes, upon a construction of which I have come to the conclusion that the views indicated by Lord Kyllachy in *Cuninghame's* case are sound and ought to be given effect to.

The leading Act, 17 and 18 Vict. cap. 91, makes provisions which require attention for appeals and for complaints against the assessor's valuation. As regards appeals, section 5 provides that on or before a certain date the assessor shall transmit to each person entered in his valuation a copy of the appropriate entry in the roll, along with a notice that if he "considers himself aggrieved by such valuation" he may appeal against the same to the commissioners or magistrates "in terms of this Act." Section 8 authorises the holding of a yearly "court for hearing appeals against valuations made by such assessors, as aforesaid, under this Act," and the deliverances of the commissioners or magistrates are declared to be "final and conclusive and not subject to review." Section 9 provides that all persons whose names have been entered by the assessor in the valuation roll shall be entitled to appeal to the commissioners or magistrates "with reference to such entry, provided always that the appellant shall, six days at least before such appeal is heard, intimate in writing to the assessor that he is to maintain such appeal and specify the amount of valuation which he alleges should be substituted for the amount stated by the assessor." Now the words "with reference to such entry" are certainly very wide, and if they stood alone would make it clearly competent for the person entered in the roll to appeal to the commissioners or magistrates upon matters connected with the entry other than that of value. And the words of the proviso have been said to be not imperative, but only directory, *e.g.*, *per* Lord Wellwood in *Symington* (1895, 22 R. 588). The respondents, however, urged that their effect was to limit the right of appeal to the matter of value only. The point is not strictly here before us for decision, but I may say that my opinion is adverse to the respondents' contention in regard to it.

The section in the Act of 1854 which deals with complaints is the 13th, and it relates to objections taken to any entry in the roll, not by the person entered but by a third party. The section provides that if any complaint is made to the commissioners or magistrates, sitting as an appeal court, to the effect that the yearly rent or value of any heritage has been entered in the roll "at other than the just and true amount thereof," they may make inquiry into such complaint and "may thereupon alter the amount" to such extent as may appear to them to be just. The jurisdiction of the Appeal Court is here, I apprehend, clearly limited to the question of value.

Under the Act of 1854, therefore, matters stood thus, that complaints (upon value only), and appeals (not in my judgment so limited), were competent to the commissioners or magistrates, but in regard to both appeals and complaints the determination of the commissioners or magistrates was final.

The next Act is that of 1857 (20 and 21 Vict. cap. 58). By its first section the commissioners or magistrates are authorised, if they think fit, to appoint an officer of Inland Revenue to be the assessor. The second section is one of great importance in the question now at issue. By its opening words it is provided that "all persons entitled to appeal against valuations made by the assessors appointed under the said Act" (*i.e.*, the Act of 1854) "shall also be entitled to appeal under and subject to the like rules and regulations against the valuations to be made by such officer or officers of Inland Revenue appointed as aforesaid under this Act." The section then enacts that if upon any such appeal any officer of Inland Revenue, or the person appealing, shall apprehend the determination of the commissioners or magistrates "to be contrary to the true intent of the said Act," (viz., 1854), such officer or person may require the commissioners or magistrates to state specially and sign the case upon which the question arose, together with the determination thereupon, to be submitted to the senior Lord Ordinary and the Lord Ordinary in Exchequer for their opinion thereon, and according to the opinion of these judges "the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed." The constitution of the Valuation Appeal Court was altered by the Act of 1867 (30 and 31 Vict. cap. 80) to its present condition—(section 8), which provides that "any valuation" which shall have been confirmed or altered in conformity with the opinion of the judges shall be final and not subject to review. An appeal to the judges was thus (by the Act of 1857, section 2), for the first time allowed, but it was confined to cases where the assessor was an officer of Inland Revenue. I think, also, although the language of the section is not as clear and precise as might be desired, that its intention was to confine the right of appeal to proper questions of value. I am to some extent influenced in arriving at this conclusion by the language of the 7th section of the Act of 1879, which will be presently alluded to. But even upon

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the terms of the section now under consideration I consider that "the valuation or assessment" upon which the judges were to state their opinion must be one which consisted of or at all events included a question of value or amount.

The only other statute to which reference need be made is that of 1879 (42 and 43 Vict. cap. 42). Section 6 makes an extension of the provisions of section 13 of the Act of 1854 in regard to complaints by third parties "to the effect that any particular set forth in any entry in the valuation roll . . . other than the yearly rent or value of the lands . . . has been erroneously set forth," and provides that "such complaint shall be made and disposed of in the same manner and subject to the same conditions and provisions (except in regard to the right of requiring a case to be stated) in and under which complaints that such yearly rent or value has been stated by the Assessor in such valuation roll at other than the just and true amount thereof may be made and disposed of." The effect of this section appears to me to be (*a*) that in regard to the right of an appeal to the commissioners or Magistrates, complaints are put upon the same footing as appeals, viz., that matters other than mere amount may competently be brought before those tribunals by complaint, as they could be (prior to 1857) by appeal; and (*b*) that by clear implication, though not by expression, a stated case to the Judges may be required in the case of complaints upon the point of value, though not in regard to other matters. I may observe that this last question was mooted but not determined by the Valuation Appeal Judges in *Rule* v. *Abinger*, 1883 (10 R. 502). So far, then, it seems to me that complaints and appeals (where the latter were from cases where the Assessor was not an officer of Inland Revenue) were made to stand *in pari casu*. This was no doubt a very right and proper footing. But then, for no apparent or to my mind conceivable reason, the result, if legislation had stopped short at this point, would have been that while a case might have been required upon a proper question of value, either upon a complaint or upon an appeal (when the assessor was an officer of Inland Revenue), no such right would have existed in the case of an appeal to the commissioners or magistrates when the assessor was not an officer of Inland Revenue. In order, as I conceive, to remedy this anomaly, section 7 of the 1879 Act was introduced. It enacted that in the case of persons entitled to appeal against valuations made by assessors who are not officers of Inland Revenue, it should be lawful for such person appealing, or for such assessor, "if he shall apprehend the determination of the" commissioners or magistrates upon such appeal as "to the yearly rent or value of the lands and heritages to which such appeal relates, to be contrary to the true intent of the said Acts," to require a stated case to the Judges, and according to the opinion of the Judges the "valuation or assessment which shall have been made the cause of the appeal shall be altered or confirmed." Now this section appears to me to provide in explicit terms that the stated case, where the valuation in question was originally made by an assessor who was not an officer of Inland Revenue, must be upon "the yearly rent or value" and not upon other matters, which, as I have pointed out, are as I read the Acts left to the final determination of the commissioners or magistrates so far as valuation purposes are concerned. The variation of language from that used in section 2 of the Act of 1857 is striking. I conceive that the intention of section 7 of the Act of 1879 was to make it quite clear that the case to the Judges must be upon "the yearly rent or value" in the category of appeals then under immediate consideration. It may possibly have been owing to some qualm in the mind of the draughtsman as to the less precise and specific language which had been employed in section 2 of the Act of 1857, that clause 3 of the 1879 Act was inserted, which provides that "the recited Acts and this Act shall be read and construed together, and may together be referred to as the Valuation of Lands (Scotland) Acts." As I have already observed, it is difficult, if not impossible, to imagine why the appeal by way of stated case should be intentionally confined by the Legislature within narrower limits when the assessor was not an officer of Inland Revenue than when he was such an officer. The later Act is, I think, definite and specific as to the scope of appeal intended to be allowed in the former category, and reading and construing the Acts together, as I am enjoined to do by the section last quoted, I consider that the scope of appeal applicable to the latter category of cases, which was introduced by the Act of 1857, must be held, in accordance with the reason and good sense of the matter, as well as upon a fair construction of the language of section 2, to be identical.

If the views which I have expressed are well founded this appeal is not competent. The result of this decision will not, I apprehend, be far reaching as regards the future practice of this Court. So far as I am aware, only four cases are recorded prior to this case, where the present objection to the competency of the appeal might have been sustained. In two of these (viz., *Peter Ritchie* and *Bryden's Trustees*, both reported under date 24th February 1881, 9 R. 1245), where the merits involved seem to be similar to those of the present case, the question of competency does not appear to have been in any way raised or noticed. It was, however, raised in the earlier case of *Glass* (1871, 11 Macph. 993), upon which the appellants here relied. The question there was whether two separate properties belonging to the appellant ought to be entered in the valuation roll in two or more entries or in one entry. The commissioners decided for separate entries. They stated a case to the Judges, but added a note to the effect that "a case to the Judges was only competent in a matter of valuation, and the question whether certain subjects were

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to be entered in two or more entries or in one entry they held was left to the discretion of the commissioners, and their decision was final." The Valuation Judges, Lords Ormidale and Mure, "held that the commissioners were right." That was their decision upon the merits of the appeal. But there is no trace in the scanty report of the case as to their Lordships' attitude towards its suggested incompetency, nor whether the point was pressed in argument or not. I presume that their Lordships must have held the appeal to be competent; and it appears to me to be at least probable that they did so upon the ground that a question of value was involved, because it appears from the report that the appellant's object in contending for a single entry was "to give him the benefit of having the house of Arlary valued along with the lands of Milnathort as regards the assessment for the poor's rates." I do not think that the case of *Glass* can be regarded as a reliable guide in this matter. The remaining case to be referred to is that of *Cuninghame* (1895, 22 R. 506), to which I alluded at the outset. No objection to the competency of the appeal was there stated or argued. Lord Wellwood considered it unnecessary to express an opinion in regard to it, because he thought that the question of value and the other questions raised were too closely mixed up to be separable. But Lord Kyllachy, while reserving entire his opinion upon the point, expressed very forcible views, for which he stated his reasons, adverse to the competency of the appeal. His Lordship's observations have not, of course, the weight of a decision, and he had not had the point debated by counsel. We have had the benefit of a full argument and the result has been to satisfy me that the views suggested by Lord Kyllachy were well founded. I believe that the opinion which I have now expressed is in accordance with Lord Kyllachy's reasoning as well as with the conclusion which he tentatively indicated.

Lord Low—I agree with your Lordship that we have no materials supplied to us in this case upon which we can form an opinion the one way or the other in regard to the yearly value of the piece of vacant ground in question, and indeed if it had not been that the appellants maintain that they are wrongly entered in the valuation roll as proprietors I do not suppose that they would have objected to the trifling sum which the Assessor fixed as the yearly value. The true object of the appeal is to obtain the opinion of the Court upon the question whether or not the appellants are proprietors of the ground within the meaning of the Valuation of Lands Act 1854?

That being the only question on the merits which is properly brought before us, and with which we could deal, the preliminary question has been raised, whether an appeal to this Court in regard to any entry in the valuation roll except that of the yearly rent or value is competent?

That appears to me to be a question of very considerable difficulty, owing to the perplexing manner in which the provisions of the different statutes dealing with appeals have been framed.

I agree with your Lordship that under the Act of 1854 an appeal is allowed to the commissioners of supply or to the magistrates, as the case may be, in regard to any of the particulars which the statute requires to be entered in the valuation roll. I do not think that it could be doubted that that was the case if it had not been for the proviso to the 9th section which your Lordship has quoted. The purpose of that proviso, however, was merely to regulate procedure, and I may observe that, even as a rule of procedure it is directory rather than imperative, because no penalty is attached to failure to give the notice required. I am therefore of opinion that the proviso cannot be read as qualifying the enacting part of the section, which when read along with other provisions in the Act, and notably those of section 5, seems to me to make it clear that the appeal allowed from the assessor to the commissioners or magistrates is not limited to the question of value only.

That, indeed, is not a matter upon which it is necessary that we should express an opinion, but I have referred to it—(1) because the Solicitor-General argued that no appeal was allowed even to the commissioners or magistrates except upon the question of value; and (2) because it has some bearing, as I shall show afterwards, upon the question of the limit, if any, which is placed upon the right of appeal to this Court.

That right was first conferred by the 2nd section of the Act of 1857, and with that section begin the difficulties of the question with which we are dealing. As your Lordship has pointed out, the section only gives a right of appeal where the assessor is an officer of Inland Revenue. Why, where the assessor was not an officer of Inland Revenue, neither he nor (what is much more surprising) a person whose name was entered in the valuation roll was given right to appeal is a question to which I have never heard, nor can I imagine, any answer. Perhaps it was a mere oversight, but if so it is remarkable that it was not corrected for two and twenty years, when the Act of 1879 was passed.

In so far as the language employed is concerned I think that the 2nd section of the Act of 1857 is wide enough to include an appeal in regard to any of the particulars entered in the roll, although it is also capable of being construed as limited to the question of value only. An appeal is given if the assessor, or a person whose name is entered in the roll, apprehends the determination of the commissioners or the magistrates "to be contrary to the true intent of the said Act" (*i.e.*, the Act of 1854). Now, that phrase is wide enough to include such a question as is raised in this case, because to enter in the roll as proprietor a person who is not proprietor is certainly contrary to the true intent of the Act.

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But then the section proceeds to say that, according to the opinion of the two Judges to whom an appeal is given, "the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed." I think that the scope of the appeal allowed by the section depends upon the meaning to be attached to the words "valuation or assessment," because it is plain that if these words are used as being equivalent to the words "yearly rent or value," and as not including anything more, the right to appeal, however wide the terms in which it may be given, is in effect limited to the one question of value.

Before considering the meaning of the words "valuation or assessment," however, I have something to say upon the 7th section of the Act of 1879.

One object of that section undoubtedly was to correct the anomaly created by the Act of 1857, the result of which was that, if the assessor happened not to be an officer of Inland Revenue, no appeal could be taken from the determination of the commissioners or magistrates. I confess that I should have thought that that was the sole object of the section, because I can imagine no reason why the right to appeal, or the scope of the appeal, should differ according as the assessor is or is not an officer of Inland Revenue; but here again the terms in which the section is framed give rise to much perplexity. If nothing more was intended than to put matters as regarded appeals in cases where the assessor was not an officer of Inland Revenue upon the same footing as in cases where the assessor was an officer of Inland Revenue, one would have expected that the provisions of the 2nd section of the Act of 1857 would simply have been declared to apply to the former case. But that is not what the 7th section does, because it makes no reference to the Act of 1857 at all, and the appeal which is allowed is expressly limited to the question of the "yearly rent or value." Why was that course followed? I can only suggest two answers, both of which appear to me to be unsatisfactory. In the first place, it may have been intended that the appeal should be limited when the assessor was not an officer of Inland Revenue. That, no doubt, would account for the absence of any reference to the 2nd section of the Act of 1857, and to the alteration of the terms in which the appeal was given. But here, as I have just said, the difficulty arises, that there is no conceivable reason why the right of appeal should be more limited in the one case than in the other. The other answer which I can suggest is, that it was thought that the 2nd section of the Act of 1857 did not make it sufficiently clear that the appeal was limited to the question of value. But if that was the view, why was not that section amended so as to make its meaning quite clear?

These considerations have occasioned me much hesitation in forming an opinion upon the question at issue, on account of the difficulty of finding any intelligible principle underlying the various enactments. There is, however, a provision in the 7th section of the Act of 1879 to which I have not yet referred, but which I think throws a good deal of light on the subject. That provision is that according to the opinion of this Court "the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed." There can be no question, I apprehend, that the words "valuation or assessment" are there used as meaning the yearly rent or value and nothing more. But the provision is identical with that which is contained in the Act of 1857, and I think that there is a very strong presumption indeed that the words "valuation or assessment" are used in both sections in the same sense. I say so because the subject-matter of both sections is the same—appeals, namely by the assessor or a party in regard to an entry in the valuation roll; the Courts from and to which the appeal may be taken are the same in both sections; and the words "valuation or assessment" are used in both sections as (in effect) defining what is the jurisdiction of the Court of Appeal.

Further, I cannot avoid attaching considerable importance to the fact that no reason can be suggested why the right of appeal given in the one section should be different from that given in the other, and seeing that the first section is open to construction and the second is absolutely clear, I think that the former must be construed so as to make it square with the latter.

There is another consideration which points in the same direction. Your Lordship has referred to the sections dealing with complaints—the 13th section of the Act of 1854 and the 6th section of the Act of 1879. By these sections complaints can be made by third parties to the commissioners or magistrates both in regard to the yearly value and to entries in the roll other than the yearly value. That is consistent with the view which I have indicated in regard to appeals to the commissioners or magistrates under the Act of 1854, namely, that appeals to these bodies are competent in regard to any entry in the roll. Again, as your Lordship has pointed out, a complaint in regard to the yearly value may be appealed to this Court from the commissioners or the magistrates, while a complaint in regard to any other entry cannot be so appealed. That appears to me to confirm the view that appeals to this Court under the 2nd section of the Act of 1857 and the 7th section of the Act of 1879 are limited to the question of value, because it enables the same principle to be consistently applied throughout. The result, therefore, appears to me to be this—(1) Any entry in the roll can be brought under review of the commissioners or magistrates, either by a person whose name is entered in the roll or by a third party; (2) the determination of the commissioners or the magistrates in regard to the yearly value can be brought under review of this Court either by the person whose name is entered in the roll, or by the assessor, or by a third party; but (3) no appeal at the instance of anyone is allowed

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from the determination of the commissioners or the magistrates in regard to any entry other than that of the yearly value.

I therefore concur with your Lordship that the appeal is incompetent and must be dismissed.

The Court dismissed the appeal.

Counsel for the Appellants — Dickson, K.C.—M'Phail. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondent—Solicitor-General (Ure, K.C.) — Chree. Agents — Gordon, Falconer, & Fairweather, W.S.

Saturday, March 10.

(Before Lord Low and Lord Dundas.)

HAWICK PARISH COUNCIL *v.* URBAN ELECTRIC SUPPLY COMPANY, LIMITED.

Valuation Cases—Electric Lighting Works —Principle of Valuation—"Contractor's" Principle or "Revenue" Principle.

A company was proprietor of electric works and of the mains connected therewith. The undertaking had been in operation for two and a-half years, and two balance-sheets had been issued. *Held* that the "revenue" or "profits" principle was rightly applied to arrive at the yearly value.

Valuation Cases—Electric Lighting Works —"Revenue" Principle—Deductions—Allowances for Repairs and Depreciation.

In applying the revenue or profits principle for the purpose of reaching the yearly value of electric lighting works erected two and a-half years previously, the magistrates allowed as deduction for repairs and depreciation of machinery not the amount expended as appearing in the balance-sheet but an estimated amount to be expended over a course of years. On an appeal the Court *approved* the yearly rent arrived at by allowing such estimated amount as a deduction.

At a meeting of the Magistrates of the burgh of Hawick, held at Hawick on the 11th and 28th September 1905, for the purpose of hearing appeals and complaints against the valuations by the Burgh Assessor in terms of the Lands Valuation Acts, there was submitted a complaint by the Parish Council of the parish of Hawick against the following entry:—

No.	Description of Subjects.	Proprietor.	Tenant and Occupier.	Yearly Rent or Value
20	Electric Works	Urban Electric Supply Co., Ltd.	said Company	£400
	Mains in Burgh	Do.	Do.	£400

The Parish Council asked that the valuation of the works should be increased to £675, and of the mains to the like sum of £675, or otherwise that the *cumulo* rent of the said lands and heritages should be increased to £1350.

The Magistrates having sustained the valuation, the complainers craved a case to be stated.

The case stated—"The said company are proprietors of electric works and of the mains connected therewith, constructed by them in the years 1902-03 and -04. The said works have been in operation about 2½ years. The following figures taken from the company's balance-sheet for 1904 show the expenditure upon the said lands and heritages allocated as between landlord and tenant, viz.—

CAPITAL.

	Landlord.	Tenant.
Lands	£0 0 0	£0 0 0
Buildings	7,265 2 7	1,000 0 0
Machinery	13,886 17 0	2,100 0 0
Accumulators	0 0 0	1,643 11 2
Mains (less £60 outside Burgh)	18,600 3 3	0 0 0
Meters	0 0 0	2,280 18 5
Electrical Instruments	900 5 0	364 5 2
Provisional Order	0 0 0	499 13 5
Wiring and Motors	0 0 0	3,185 10 2
Public Lamps	0 0 0	2,534 19 0
	£40,652 7 10	£13,608 17 4

"The feu-duty payable for the ground is £51. . . . . .

"Thereafter the complainers contended that in assessing the yearly rent or value regard must be had to the capital expenditure as well as to the profits of the preceding year. Upon the basis of the former they submitted the following statement or calculation of the rent on the percentage or 'contractor's principle,' viz.—

Cost of buildings	£7,265 0 0	
Allow for depreciation at 2½ per cent. per annum.		
Present value	£6,963 0 0	
Percentage at 6 per cent.		£417 0 0
Add feu-duty		51 0 0
Heritable machinery cost	£13,886 0 0	
Allow for depreciation at 10 per cent. per annum.		
Present value	£12,875 0 0	
Percentage at 7½ per cent.		965 0 0
Rent of buildings and plant		£1433 0 0
Cost of mains	£18,600 0 0	
Allow for depreciation at 10 per cent. per annum.		
Present value	£15,100 0 0	
Percentage thereon at 5 per cent.		755 0 0
Total rental		£2188 0 0

"Upon the basis of the 'profits principle' the complainers submitted the following calculation of the rent, proceeding upon the statement of the revenue and expenditure as contained in the balance-sheet of the company for the year 1904, viz.:—

Gross revenue			£3743 13 5
EXPENDITURE.			
Generation—			
Coals and other fuel		£396 13 2	
Oil, waste, &c.		43 16 2	
Proportion of salaries		36 17 0	
Wages		282 13 10	
Repairs—			
Machinery	£34 17 1		
Instruments and tools	3 4 9		
Accumulators	66 16 11		
	— —	104 18 9	
		£864 18 11	
Carry forward,		£864 18 11	£3743 13 5

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Brought forward,		£864 18 11	£3748 13 5
Distribution—			
Proportion of salaries	£13 19 8		
Wages . . .	14 12 4		
Repairs of meters,&c.	5 14 8		
		34 6 8	
Public lamps—			
Attendance and repairs .	£127 18 5		
Renewals . .	65 12 2		
		193 10 7	
Rates and taxes—one half for tenants		42 11 10	
Insurance		12 8 8	
Management—			
Proportion of salaries . .	£165 19 7		
Stationery and printing . .	18 10 4		
General establishment charges .	55.14 5		
		240 4 4	
			1388 1 0
Nett revenue			£2355 12 5
Allow 5 per cent. for tenant's floating capital £13,000			650 0 0
			£1705 12 5
Allow 20 per cent. for tenant's profit .			341 2 5
Leaving for rent			£1364 10 0

"The gross revenue for the year 1904, viz., £3743, 13s. 5d., contained in the balance sheet for the year as compared with the gross revenue of the previous year, viz., £2810, 7s. 3d., showed an increase of £932, 16s. 2d.

"The company accepted the figures stated by the appellants, subject to the following qualifications: — (1) That there should be included as a deduction the law expenses, £10, 10s. (2) That there should also be included as a deduction the head office printing expenses of the balance-sheet, £5. (3) That there should also be included as a deduction the expenses of audit, £27. (4) That the actual expenses of repair appearing in the balance-sheet for the past two years should not be regarded as indicating the expenditure one year with another, and in place thereof there should be included a sum representing the estimated annual average allowances for repairs and depreciation. They submitted a statement bringing out these as follows, viz.:—

ALLOWANCES FOR REPAIRS AND DEPRECIATION.

2½ per cent. on £1000 furniture and fittings .	£ 25 0 0
5 per cent. on £2100 of moveable machinery	105 0 0
15 per cent. on £1643 of accumulators . .	246 9 0
5 per cent. on £2280 of meters . . .	114 0 0
5 per cent. on £364 electrical instruments (moveable)	18 4 0
2½ per cent. on £15,986 heritable machinery, which, it would be presumed, a tenant would be required to keep in running condition	399 13 0
5 per cent. on £3185 wiring and motors .	159 5 0
2½ per cent. on £900 heritable electrical instruments	22 10 0
1 per cent on £18,600 mains and cables .	186 12 0
	£1276 13 0

and (5) That the floating capital required by a tenant should be stated at £14,378 in place of £13,000.

"Giving effect to these contentions, the Company put in a statement bringing out the yearly rent or value as follows, viz.:—

Gross revenue			£3743 13 5
EXPENDITURE.			
Generation—			
Coals and other fuel . .		£396 13 2	
Oil, waste, water, &c. . .		43 16 2	
Proportion of salaries . .		36 17 0	
Wages		282 13 10	
Distribution—			
Proportion of salaries	£13 19 8		
Wages . . .	14 12 4		
Public lamps, attendance, and repairs	127 18 5		
Public lamps,renewals	65 12 2		
Rates and taxes .	45 0 0		
Insurance . .	12 8 8		
Law expenses .	10 10 0		
		290 1 3	
Management—			
Proportion of salaries	£165 19 7		
Stationery and printing (local) . .	18 10 4		
Stationery and printing (head office)	5 0 0		
General establishment charges .	55 14 5		
Auditors' fees (Board of Trade) . .	27 0 0		
		272 4 4	
			1322 5 9
			£2421 7 8
Allowance for Repairs and Depreciation—			
As detailed above			1276 13 0
			£1144 14 8
Allow 5 per cent. on tenant's floating capital, say £14,378			718 18 0
			£425 16 8
20 per cent. tenant's profit . . .			85 3 4
			£340 13 4
ASSESSED RENT.			
On works		£170 6 8	
On mains		170 6 8	
			£340 13 4

"The company further replied and contended—(1) that the existing valuation of £800 had been arrived at last year on a consideration of the accounts shewing the actual expenditure and profits, and having regard to the whole circumstances, and was fixed as the probable amount of rent which one year with another could be obtained for the subjects, (2) that as there had been no change of circumstances to justify any increase of the valuation, it was right that the said valuation of £800 should be continued *in hoc statu*, (3) that the true method of arriving at the annual value was to consider what would be obtained from a tenant as rent one year with another, and for that purpose to take into account the profits which would be earned one year with another, (4) that in considering the probable rent it was proper to keep in view, *inter alia*, (*a*) that in an electrical undertaking like the present a large proportion of perishable plant is used, (*b*) that the expenditure in repairing and keeping up this plant varies greatly in different years—being almost nominal at the start, and portions requiring little or nothing done to them for three, four, or five years, and at intervals involving large expenditure, (*c*) that the frequency and extent of such repairs depends greatly on how the plant is used and looked after by those who work it, (*d*) that the actual figures appearing in the company's accounts for this year and

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last year, being the first two years of the working of the plant, are no proper measure of what a tenant would have to provide for one year with another, and of what he would require to take into account in estimating rent, (*e*) that many expensive machines and instruments are used in carrying on the undertaking, which because of their attachments may be regarded as heritable but which are in themselves perishable plant, and which, if the works were let, would require to be kept in running and working order by the tenant who used them, (*f*) that the allowances for such repairs, and for keeping the said plant in good working order, which are set forth in the statement produced by the company, are moderate and reasonable, as demonstrated by actual working and experience in similar undertakings, and were such as a tenant would require to take into account in estimating the profit to be earned and the rent to be paid for the subjects, and (*g*) with regard to the specific objection of the appellants as to the items of law expenses and auditors' fees, that these were necessary, because a Provisional Order had to be obtained by a tenant working such an undertaking, and an audit was compulsory. . . . . .

"The magistrates held it proved (1) that in an electrical undertaking like the present there is a large amount of plant and machinery both heritable and moveable which is perishable in the using, (2) that the expenditure required for keeping up and repairing such plant and machinery may vary considerably from year to year, and that although small in one year it may be very heavy in another year, (3) that the capital required by a tenant might be fairly estimated at the sum stated by the company, viz., £14,378, and (4) that having regard to the gross revenue hitherto earned by the company, and making reasonable allowance for such expenditure as would have to be borne by a tenant working the said undertaking, the rent at which one year with another the premises in their actual state might reasonably be expected to let from year to year was at Whitsunday 1905, and is at present, £800. They accordingly fixed the valuation at that sum and dismissed the appeal.

"The grounds of the Magistrates' determination were as follows:—(*a*) that in estimating what rent could be obtained for such an undertaking it is proper and necessary to take into account that a tenant would have to bear at least a large proportion of such expenditure on plant and machinery both heritable and moveable; and (*b*) that the actual expense of repair appearing in the balance-sheets for the past two years should not in the circumstances be regarded as determining the expenditure required one year with another, and that in place thereof there should be included a sum representing the estimated annual average allowance for repairs and depreciations."

The following were the grounds of appeal submitted by the appellants:—"The yearly rent or value of the said lands and heritages was not ascertained and assessed upon consideration of the facts as at Whitsunday 1905 or at present. In estimating the yearly rent of subjects which are in the occupation of the proprietor no particular method is laid down to the exclusion of every other but all are factors to be considered. Here the company have only been working two complete years, and the 'profits principle' does not form a reliable criterion by itself. The 'percentage' or 'contractors' principle,' which is the only one of the other recognised methods applicable to the present case, must therefore be taken into consideration as an element in fixing the probable rent. But even if the 'profits principle' be regarded exclusively the rules laid down in the case of gas companies—the case most nearly analogous to the present case—should apply. The deductions from the gross revenue which are allowed have been clearly fixed. Neither law expenses nor auditors' fees are proper deductions. In any event the latter should only be allowed so far as compulsory under Board of Trade rules. The amount as appearing from the evidence is £18. Only actual repairs to tenant's property are proper deductions. No allowance should be made for repairs on landlord's fixtures or heritage, nor for depreciation. The allowances claimed by the company are for theoretical repairs in the future, and these are deducted from the actual revenue of the company's second working year without taking into account the probable future increase. The company's theory as to certain repairs on landlord's property requiring to be undertaken by a hypothetical tenant implies a consideration other than rent, and the rent offered under such conditions could not be taken as a measure of the yearly value. The sum proposed by complainers as tenant's floating capital is reasonable. The costs of the Provisional Order cannot be taken into account. On whichever principle the rent is calculated the sum proposed by the complainers is the lowest at which it can be reasonably assessed. The result brought out by the company, showing a rent of £340 for heritage costing over £40,000, is sufficient to prove that it is based on an erroneous principle."

The respondents, the company, *inter alia* replied—"3, Although the principles which govern the assessing of gas companies may be followed in assessing electrical undertakings, considerable modifications require to be made. A gas company's capital is small relatively to its working expenses, but an electrical station's working expenses are comparatively small relatively to capital. . . . In gas companies the actual repairs form a fair basis of the annual average, but this is not so in electrical undertakings. Some years almost nothing is required; then a year will come involving a large expenditure which might bring out the rent at a minus quantity. The only equitable basis is to take the annual average as proved by the experience of similar undertakings. From the peculiar nature of the undertaking a large amount of most ex-

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pensive machines, instruments, etc., are needed, which, simply because they require special attachments, are heritable. They are all "perishable plant" which a tenant would be presumed to have to keep in running order. From the evidence no other arrangement could be possible, and therefore the annual average of these repairs should be allowed. The tenant's capital allowances as stated by the respondents is the lowest sum possible. As no tenant could work an electrical station of this nature without a Provisional Order, the cost of this must necessarily be provided for out of his capital. Although the rent brought out by respondents is only £340, they have submitted to a rental of £800 on account of the subjects being new and not fully tested as to output."

The arguments sufficiently appear from the contentions stated by the parties.

At advising—

LORD LOW—The principle of valuation adopted by the Magistrates is what is known as the profits principle, and that principle has been repeatedly recognised as the best method of ascertaining the yearly value of undertakings such as the one now under consideration. I am not sure that I altogether agree with what the Magistrates say in regard to the tenant's obligation to keep up machinery and plant which are of a heritable nature. But after careful consideration I have come to be of opinion that the amount fixed by the Magistrates is a fair estimate of the rent at which the subjects might reasonably be expected to let from year to year, and accordingly I think we should hold that their determination is right.

LORD DUNDAS—I agree. I think the Magistrates have arrived at a just decision.

The Court dismissed the appeal.

Counsel for Appellants—Hunter, K.C.—C. D. Murray. Agent—F. M. H. Young, S.S.C.

Counsel for Respondents—Cooper, K.C.—Steedman. Agents—Steedman, Ramage, & Bruce, W.S.

COURT OF SESSION

Thursday, March 8.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

HUNTER *v.* FERGUSON & COMPANY.

Reparation — Slander — Innuendo — Newspaper Articles.

In an action of damages for slander brought by a town councillor against the proprietors of a newspaper which had published certain articles commenting on his conduct while a member of the town council, *held* that the pursuer was entitled to an issue —"It being admitted that the defenders in the issues of 18th and 21st July 1905 of the *Ayr Observer and Galloway Chronicle* printed and published the articles contained in the schedule hereto annexed, Whether the statements contained in the said articles are of and concerning the pursuer, and falsely and calumniously represent that the pursuer took advantage of his position as a member of the Town Council of Ayr and convener of the Roads and Footpaths Committees thereof to throw the burden of taking over and repairing the footpaths of property belonging to himself upon the burgh, while he caused footpaths of a like character and in a like position belonging to other proprietors to be reconstructed at their expense; that he was thus unfaithful to the public trust reposed in him as a member of the Town Council of Ayr and committees thereof, and that in his municipal position he acted corruptly for his personal benefit, to the loss, injury and damage of the pursuer,"— that being a meaning which the ordinary reader might reasonably extract from the articles.

This was an action of damages for slander brought by Hugh Hunter against Messrs Ferguson & Company in respect of three articles published in the issues of the 18th and 21st July 1905 of the *Ayr Observer and Galloway Chronicle*, of which the defenders were the proprietors and publishers. The pursuer was from November 1903 until November 1905 a member of the Town Council of the burgh of Ayr, and also from December 1903 until November 1905 convener of the Roads and Footpaths Committee thereof. Damages were laid at £500.

The articles complained of were as follows:—"*Ayr Observer and Galloway Chronicle*, 18th July 1905.—'*Notes on Current Topics—Town Council Vagaries.*—One of the most disgraceful jobs I have seen perpetrated in Ayr for a long time is just now being carried out in Fort Street. A footpath in better condition than three-fourths of the best footpaths in Ayr, is presently being broken up at the instigation of one or two would-be important members of council, and is to be relaid at the cost of the proprietors. Several councillors know nothing about it, and the burgh surveyor is from home on holiday, so no information can be got from him, though I understand he disapproves of the action now being taken. Of course this means an action before the Sheriff, which doubtless will go against the town, and we poor ratepayers will have to pay for our representatives' blunder and ill-nature. The matter is made all the worse from the fact that a similar pavement in the same street was actually repaired at the expense of the town a short time ago, the only difference being that this favoured pavement belonged to a town councillor, and I am anxious to know if this is one of the perquisites of his office. This one-sided management must cease, and inquiry must be made into all

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properties possessed by councillors which are so favoured, and also whether there are any other interests being served in the same way. I know of other good footpaths which are to be condemned also, and I know of several which should have been relaid long ago but have not been relaid. Inquiry is wanted here also. Let us have at least the Sheriff's opinion, and let those who are perpetrating the job pay for it. I will return to this subject on Friday.'

"*Ayr Observer and Galloway Chronicle*, 21st July 1905.—'*Roads and Footpaths.*—The piece of bungling in Fort Street, to which I drew attention on Tuesday, has induced me to probe the matter still further. I regret to find the matter does not improve on acquaintance. The footpath now so unwarrantably condemned was sanctioned by the council some years ago, and to go before the Sheriff with such a trivial case, when pavements in the same street and of the same material belonging to the councillor who is the instigator of this action were paid for by the council, will place that council in a lamentable position. I do not envy Councillor Hugh Hunter when he is put into the witness-box to justify his action in this matter of tar macadam. The saving of his own footpath and his condemnation of another quite as good is not the least of the subjects on which he will have to give evidence. The virtue of tar on a roadway such as the Midton Road, where there is such heavy traffic, and the want of it in a pavement where there is so little traffic, is truly difficult to understand. It is, however, still more difficult to make it out, when we find the author of the tarring in Midton Road—the greatest blunder committed by amateur road-makers in our experience—is at the same time convener of the committee which has condemned an excellent footpath, regarding which no complaint was made, and burdening the proprietor with an expense which in the same circumstances have not been incurred by himself. This conduct is freely spoken of, possibly it is exaggerated, possibly it is altogether untrue, but it is not made without very good authority. I mention it, and I ask Councillor Hugh Hunter to contradict or explain it away, without waiting till November, when it will have a public inquiry, adding somewhat to its unpleasantness. . . . I do not expect town councillors to be infallible, but some even of little importance, riding on their commission and with a little brief authority, require some attention paid to them, as even in small things they can do a great deal of mischief.'

"*Ayr Observer and Galloway Chronicle*, 21st July 1905.—'*Roadmaking Craze.*—Town councillors, no matter how important they may be in their own estimation, have no right to throw away public money recklessly to satisfy a fad or a grudge. What can be thought of a councillor who at a ward meeting stated that tar macadam footpaths would soon add 1d. per pound to the rates, when he might have known it had not added that 1d. for a dozen years; and yet he wantonly sanctioned a throwing away of tar on roads which had the effect of spoiling them, and if persevered in would make the roads in Ayr intolerable as well as expensive. . . . The folly of the whole matter lies in a grandmotherly municipal rule which now seems to aim at everything being done for us at our own expense. Every obstacle is thrown in the way of architects, builders, and people who purpose building by rules and regulations which hampers every step taken to provide comfortable dwellings. Much expense has to be incurred even to be allowed to submit a plan, fees are enforced, as if officials were only paid by fees and not by an ample salary, and people sit in judgment on these plans who have fads and interests of their own, as if it were their duty, after their own ends were served, to prevent any improvement whatever being carried out. No one now will build a house within the burgh when a site can be got in proximity to the burgh boundaries. One reason is undoubtedly to escape the burgh taxation, but another is to escape the meddling and muddling of those from whom it should not be expected. In some places parties wishing to build houses receive every encouragement to do so; in Ayr, it is otherwise. I am glad to hear there will probably be some exposures soon of what this is likely to lead to.'"

The pursuer innuendoed these articles as subsequently set forth in the issue for the trial of the cause (*v. sup. in rubric*).

On 27th January 1906 the Lord Ordinary (SALVESEN) approved of an amended issue (*quoted supra in rubric*), and appointed it to be the issue for the trial of the cause.

Opinion—"This is an action of damages for defamation in respect of three articles published in the newspaper of which the defenders are proprietors. The pursuer, who was at that time a town councillor of the burgh of Ayr and convener of the Roads and Footpaths Committees thereof, says that the articles represent that he had taken advantage of his position to serve his own pecuniary interests, and had thus acted corruptly and in breach of the public trust reposed in him. On the assumption that the articles justify this innuendo, it was not maintained by the defenders that they were not actionable, but they contend that the articles do not go beyond fair criticism of the pursuer's conduct as a public man, and made no imputation on his character of a defamatory kind.

"It seems now settled that the Court will not withhold such a case as this from a jury unless it is satisfied that the words complained of are not reasonably capable of bearing the innuendo put upon them by the pursuer. Applying that rule to the present case, I am of opinion that the pursuer is entitled to an issue. There can be no doubt that the articles refer to the pursuer, who is mentioned by name. So far as complained of, they relate to a footpath opposite certain properties in Fort Street which had been directed by the town council to be relaid at the cost of the proprietors. The writer of the articles predicts that the result of this order will be an action

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before the Sheriff, which would doubtless go against the town, and that the ratepayers would have to pay for their representatives' blunder and ill-nature. The article then proceeds:—'The matter is made all the worse from the fact that a similar pavement in the same street was actually repaired at the expense of the town a short time ago, the only difference being that this foot-pavement belonged to a town councillor, and I am anxious to know if this is one of the perquisites of his office.'

"The second article speaks of the pursuer as the instigator of the action which the writer condemns and says—'I do not envy Councillor Hugh Hunter when he is put into the witness-box to justify his action in this matter of tar macadam. The saving of his own footpath and his condemnation of another quite as good is not the least of the subjects on which he will have to give evidence.' The third article relates chiefly to a criticism of the methods of paving adopted by the council and the pursuer's alleged inconsistencies in dealing with the paving of the footpaths and streets. It refers, however, to people 'who have fads and interests of their own, as if it were their duty, after their own ends were served, to prevent any improvement whatever being carried out.' Taking the articles as a whole, especially in view of the passages I have quoted, I am unable to affirm that they are not reasonably capable of being innuendoed as a charge against the pursuer of taking advantage of his position to throw the burden of taking over and repairing footpaths of property belonging to himself upon the burgh, while he caused footpaths of a like character and in a like position belonging to other proprietors to be reconstructed at their expense, which is equivalent to saying that in his municipal position the pursuer acted corruptly for his personal benefit. It is not necessary to affirm that the articles complained of can only bear this meaning or are not susceptible of another and non-defamatory construction. This is the question which the jury will have to decide if the case goes to trial.

"I may add that I thought it only fair to the defenders that the particular charge which the pursuer says they made against him in these articles should be formulated in the issue, and the pursuer has now altered the issue in accordance with my suggestion. I think there would be more risk of a miscarriage if the jury were asked simply to say whether the articles represented that the pursuer had been unfaithful to his public trust or had acted corruptly for his personal benefit, as diverse meanings might be put by the individual jurymen on these general words. I shall accordingly approve of the issue as now amended as the issue for the trial of the cause."

The defenders reclaimed, and argued—They did not maintain that the innuendo was not slanderous, but they maintained that it was not justified from the articles. These attacked the Town Council's illogical method of dealing with paving in the burgh. They were not directed against the pursuer's private character. The articles did not complain of the way pursuer's paving had been dealt with, but that the pavement of others had not been dealt with in the same way—the former was right, the latter wrong.

Argued for the pursuer (respondent)—If the articles could reasonably be read by an ordinary man as meaning the innuendo, that was sufficient to justify the issue, even if another non-slanderous meaning might also be possible—*Ritchie & Company* v. *Sexton*, March 19, 1891, 18 R. (H.L.) 20, 28 S.L.R. 945. Reference was also made to *Brims* v. *Reid & Sons*, May 28, 1885, 12 R. 1016, 22 S.L.R. 670.

LORD JUSTICE-CLERK—The case has been put upon the right footing by the pursuer. The question is not what is the meaning of these articles as derived from a critical reading of them, but what the words used would convey to an ordinary reader reading the articles as articles in newspapers are usually read. So reading them, I cannot help thinking that they convey the suggestion that something corrupt had been done by a member of the town council, who was convener of the committee charged with looking after streets and footpaths, and that he had obtained a favour improperly with regard to his own pavement. What the writer of the article wishes to know is whether this was a perquisite of the convener's office, and whether any others had been favoured in the same way. The first article would be enough by itself to justify the innuendo in the issue, but the other articles quoted give point to what has been said in the first. I think we should adhere to the interlocutor reclaimed against.

LORD KYLLACHY—I agree. I indicate no opinion as to whether a jury would be right or wrong in affirming the innuendo put upon the articles by the pursuer. On the question now before us I have had considerable difficulty, but I am not prepared to differ from the Lord Ordinary and your Lordships.

LORD STORMONTH DARLING—The innuendo in the issue proposed by the pursuer and approved by the Lord Ordinary throws a heavy onus on the pursuer, because, before he can get a verdict he must show that the articles mean that he acted corruptly for his personal benefit. The sting of the allegation as interpreted by the pursuer is that he aided and abetted in throwing upon the public funds the expense of repairing his pavement. The question at the trial will not be whether in fact he did so act, for in the absence of an issue of *veritas* the presumption will be that he did not. The question will be whether the articles fairly read alleged that he did. The pursuer may have difficulty in getting a verdict on this issue, but that an ordinary reader might reasonably extract the meaning innuendoed out of the articles I have no doubt, and that is enough at this stage of the case to entitle the pursuer to the issue proposed.

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LORD LOW—I agree. I have no doubt that these articles are reasonably capable of bearing the innuendo put upon them by the pursuer, and that is quite enough to enable us to adhere to the interlocutor of the Lord Ordinary

The Court adhered.

Counsel for the Pursuer (Respondent)—G. Watt, K.C.—Constable. Agents—Constable & Sym, W.S.

Counsel for the Defenders (Reclaimers)—Hunter, K.C.—Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Lord Johnston, Ordinary.

WALKER *v.* SMITH AND OTHERS.

Partnership — Mandate — Law-Agency — Implied Mandate—Power of Partner to Bind Firm — Partner of Law-Agent's Firm Borrowing Money on Security of Property Vested in Third Party—Obligation by Firm to Produce Deed Vesting Property in Partner Granted by the Partner.

It is not within the implied mandate of the partner of a firm of law-agents to grant a letter of obligation in the name of the firm undertaking to produce a deed vesting in him property on the security of which he is borrowing money, but which stands vested in a third party.

Agent and Client—Law-Agent Acting on Behalf of Lender—Scope of Authority—Borrower a Partner of a Firm of Law-Agents—Acceptance by Lender's Agent of Obligation Granted by Borrower in his Firm's Name to Produce Deed Vesting Security-Subjects in Borrower.

Held (*per* Lord Johnston, Ordinary) that a law-agent acting on behalf of a client, who was lending money to a member of a firm of law-agents, was not justified in accepting from the borrower, without ascertaining that he had his partners' authority, an obligation granted by him but in his firm's name undertaking to produce a deed vesting in the borrower the security-subjects which stood vested in a third party, and consequently that the lender could not on the obligation recover from the borrower's partners.

Bar — Mora — Contributory Negligence — Obligation by Partner in Name of Firm —Fraud of Partner—Delay in Enforcing Obligation.

A member of a firm of law-agents borrowing money for his own use granted an obligation in his firm's name undertaking to produce a deed vesting in himself the security-subjects which stood vested in a third party. The lender's agent accepted the obligation, but no steps were taken to enforce it. Nine years later the lender sought, on the obligation, to recover from the partners of the borrower's dissolved firm. *Held* (*per* Lord Johnston, Ordinary) that the lender could not recover from the partners other than the borrower inasmuch as her agent had contributed to the loss in not seeing that the obligation was fulfilled.

On 1st December 1904 Miss Annabella Walker raised an action for payment of the sum of £220, 13s. 4d. against William Kidd Smith, Robert Boyd, and William Cunningham Wilson, who had carried on business as law-agents in partnership under the firm name of Smith, Boyd, & Wilson, until the dissolution of the firm in 1896.

On 3rd July 1895 the defender Smith borrowed from the pursuer £200, and on the same date Smith granted to the pursuer a bond and disposition and assignation in security of certain ground-annuals, which was recorded on 4th July 1895. Along with the said bond and disposition and assignation the titles to the ground-annuals were delivered to the pursuer, and from these it appeared that the ground-annuals were vested in Dr William L. Muir, of Glasgow. In this transaction the pursuer's agent was W. P. M. Black, and at the settlement the defender Smith handed to him the following letter:— "11 West Regent Street,

"Glasgow, *3rd July* 1895.

"W. P. M. Black, Esq., Writer,

"Wellington Street.

"Dear Sir, *Loan of* £200.

"Referring to the settlement of this transaction to-day, we undertake to record and deliver to you (1) disposition and assignation in favour of Mr Smith, and (2) to bring down and exhibit to you clear search, and to purge the search of any incumbrances not at present disclosed in the search.—Yours faithfully,

"SMITH, BOYD, & WILSON."

The signature to this letter was written by the defender Smith. The pursuer also averred that at the settlement of the transaction Smith exhibited to Black a disposition and assignation of the ground-annuals purporting to be granted by Muir in favour of Smith, but the defenders Boyd & Wilson did not admit this, and averred that any such deed if produced must have been fabricated by Smith.

It was admitted by the pursuer that at the time the loan was made the pursuer's agent Black was aware that Smith was borrowing the money in connection with his own private business, and not on behalf of his firm.

The interest on the loan was paid by Smith until Martinmas 1900, but after that date, although making certain small payments, he failed to pay the interest with regularity. In 1901 he was sequestrated, and at the date of the action he was still undischarged.

In 1899 Smith, for the purpose of preparing a discharge and retrocession of the bond and disposition and assignation in security, had obtained from the pur-

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suer the titles to the ground-annuals, and thereafter the ground-annuals were disponed by Dr Muir to other parties. The bond and disposition and assignation in security being accordingly valueless, and the pursuer not having received repayment of the loan made by her, she brought the present action for the principal sum lent, together with the interest remaining due thereon.

The pursuer pleaded—"(1) The defenders having failed to implement the obligation condescended on granted by them in the pursuer's favour are liable to the pursuer in damages for the loss sustained by her in consequence of said failure, being the sum sued for, and decree should be granted as concluded for. (2) The pursuer having suffered loss and damage to the amount of the sum sued for through the fraudulent actings of the said William Kidd Smith as aforesaid, decree should be granted as concluded for."

The defenders Boyd and Wilson pleaded—"(3) The letter of obligation founded upon by the pursuer not being granted by the said William Kidd Smith within the scope of the partnership business, or with the authority of these defenders, is not binding upon them. (4) The pursuer's loss having been caused by William Kidd Smith's fraud, which does not bind these defenders, they should be assoilzied, with expenses. *Separatim*—the pursuer's loss having been contributed to by the negligence of her agent in not seing that the letter of obligation was fulfilled, she is thereby barred from suing the present action."

The defender Smith lodged defences, but did not appear when the case was called in the procedure roll.

On 26th May 1905 the Lord Ordinary (JOHNSTON) sustained the part of the fourth plea-in-law for the defenders Boyd and Wilson stated *separatim*, and assoilzied them from the conclusions of the summons, and decerned against the defender Smith for payment of £223, 16s. with interest on £200 at 5 per cent. in respect of his failure to appear.

Opinion.—"In this action the pursuer seeks to recover from the three defenders who were formerly in partnership as law-agents the sum of £220, 13s. 4d., being the amount of a loan of £200 made by her to the defender Smith on 3rd July 1895, with arrears of interest. This sum Smith admits that he borrowed. The security was to be a bond and disposition and assignation in security of certain ground annuals which Smith represented himself as having acquired from Dr William Limond Muir of Glasgow. Whatever the truth of the situation, the title to the ground annuals was still in the person of Dr Muir. The pursuer alleges that Smith exhibited to her agent a disposition and assignation of these ground annuals purporting to be executed by Dr Muir in his favour. This is neither admitted nor denied by Smith, but it is suggested by his former partners, the other defenders, that such deed if it ever existed was fabricated by Smith. Be the truth as it may, Smith was admittedly not infeft, and therefore the security which he granted wanted something to make it effectual. Accordingly, at settlement of the transaction the pursuer's agent Mr Black, writer, Glasgow, accepted a letter of obligation purporting to be signed by the firm Smith, Boyd, & Wilson, in which they undertook (1) to record and deliver to him a disposition and assignation in favour of Smith; and (2) to bring down and exhibit a clear search, and to purge any incumbrances not already disclosed. Smith has failed to make payment, and though she has other grounds for suing him this letter is the pursuer's only ground for suing his partners, the other defenders.

"Now, it is common ground that this letter was signed in name of his firm by Smith himself. There is no averment that he had special authority from his partners to grant the obligation therein contained. But the pursuer relies on Smith's right to sign the firm name, and on the alleged facts that the conveyancing of this transaction was firm business, and that such obligations as the letter imports are commonly granted by law-agents in course of business in relation to the settlement of conveyancing transactions.

"The record is overlaid with irrelevant and impertinent matter, and it is very difficult to extract the real case, but I think the above is, shortly put, the kernel of it.

"I do not think that these allegations are relevant to support the pursuer's claim against Boyd and Wilson, who were Smith's partners at the date of the letter. Assuming that the conveyancing of this transaction was firm business, and that charges for it passed through their books; assuming further that such obligations as the letter imports are often given by agents, and when acting for a client are within the mandate of a partner to give, still the transaction was Smith's private and personal transaction in the knowledge of the pursuer and her agent Mr Black, and Mr Black was not justified in taking from Mr Smith, who he knew was personally concerned, an obligation purporting to bind the firm and which he knew to have been signed by Smith himself, without ascertaining that he had his partners' authority. And it is not alleged that he had such authority or that they even knew that he had given such undertaking in their name. In my opinion Mr Black had no right to rely on the letter founded on. It was of no more avail to him or his client than if it had been simply signed by Smith in his own name.

"But while the pursuer's averments are not sufficient to support the conclusion of her summons, which would lead to dismissal of the action, it may well be that the defenders have set forth a defence entitling them to be assoilzied from the conclusions.

"Now, having received it in July 1895 Mr Black (and it is addressed to him, not to the pursuer) made no use of the letter of obligation from that date till 1904, a period of nine years, and the pursuer must now maintain not only that she has a *jus quæsitum* in that letter but that the de-

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fenders Boyd and Wilson are still under the obligation that it imputes. I could not in any view so hold. I think that the latter part of these defenders' fourth plea is well founded, viz.—'The pursuer's loss having been contributed to by the negligence of her agent in not seeing that the letter of obligation was fulfilled, she is thereby barred from suing the present action,' at least so far as they are concerned.

"Accordingly it is not enough to dismiss the action *quoad* the defenders Boyd and Wilson. They are, in my opinion, entitled to be assoilzied.

"I have every sympathy for the pursuer, but that sympathy will not justify me in imposing the loss which she has incurred in the manner above described upon the shoulders of innocent third parties.

"So far as the action is directed against Smith it is impossible to understand his defence, and as he has not appeared to explain or support it I shall give decree against him by default."

The pursuer reclaimed, and argued—(1) The defender Smith obtained the loan by fraud while acting in the ordinary course of the firm's business and within the scope of his apparent authority, and therefore the defenders Boyd and Wilson being the other members of the partnership were liable to make good the sum—*Beveridge* v. *Forbes, Bryson, & Carrick*, July 16, 1897, 5 S.L.T. 115; *Sadler* v. *Lee*, 1843, 6 Beav. 324; *Sawyer* v. *Goodwin*, 1866, 36 L.J. (Ch.) 578. Sections 10 and 11 of the Partnership Act 1890 (53 and 54 Vict. cap. 39) covered this case. (2) The defenders were liable in respect of the obligation undertaken by Smith in the firm's name. Although the letter containing the obligation was addressed to the pursuer's agent, yet the pursuer being a disclosed principal was entitled to sue on it—Evans on Principal and Agent (2nd ed.), p. 468; Bell's Principles, p. 224a. This was not the case of an obligation granted by a partner in connection with his own private and personal business, as in *Paterson Brothers* v. *Gladstone*, January 15, 1891, 18 R. 403, 28 S.L.R. 268. The obligation in question was in the course of what was ostensibly the firm's business, and, in its nature such as was frequently and according to general practice undertaken by law-agents in carrying through conveyancing transactions, and therefore section 5 of the Partnership Act 1890 applied. The circumstance that the money was received by Smith alone did not relieve the partnership of the obligation undertaken in its name—*Bryant, Powis, & Bryant, Limited* v. *La Banque du Peuple* [1893], A.C. 170; *Union Bank* v. *Makin*, March 7, 1873, 11 Macph. 499, 10 S.L.R. 301; *Dryburgh* v. *Gordon*, October 15, 1896, 24 R. 1, 34 S.L.R. 19. (3) The Lord Ordinary was in error in founding upon the interval which occurred between the granting of the obligation and the application for its enforcement by Black in 1904 as prejudicing the pursuer in this action. This was equivalent to holding that the pursuer was barred because of contributory negligence, but contributory negligence could not be pleaded as against a claim in respect either of a fraud on the part of the defender or of a written obligation granted by him. Further, it was not averred, as was necessary, that the defenders had suffered through this delay—Bell's Principles, 27a; and in point of fact the pursuer had applied for payment prior to 1904.

Argued for the defenders Boyd and Wilson—The Lord Ordinary's interlocutor was right. Black took the obligation from Smith merely in order to relieve himself from the trouble of making a search, and the obligation being one between the agents the pursuer was not entitled to sue on it. Further, the summons was irrelevant because the pursuer had no dealings or communication with the defenders' firm, nor did she in any way employ them, and it was not averred, nor was it the case, the firm or these defenders received or benefited by the money. The whole transaction was so clearly outside the scope of the partnership business that the pursuer could succeed only by showing that Smith was specially authorised by the other partners to grant the obligation—section 7 of the Partnership Act; and no special authority being averred the action ought to be dismissed. As no application was made to the firm for nine years the pursuer was in any case barred from suing.

At advising—

LORD PRESIDENT—The defenders in this case are the partners of a now dissolved firm of writers in Glasgow. While that firm was in existence one of the partners, the defender Smith, wished to borrow money and entered into negotiations with another writer named Black with a view to obtaining a loan from one of his clients, namely Miss Walker, the pursuer in this case. It is admitted that Black was aware that the loan was for Smith's personal use and not for the benefit of his firm. The security for this loan, it was agreed, was to be a bond and disposition and assignation in security of certain ground annuals in Glasgow. The defender Smith granted a bond and disposition and assignation in terms of this agreement and at the same time delivered to Black the titles to the ground annuals. These titles showed that the ground annuals were vested in a person of the name of Muir, which of course was a fatal defect because it was clear that the granter of the security was not possessed of that which he purported to assign. At the date for settlement Smith handed to Black a letter in these terms—[*his Lordship read the letter of 3rd July* 1895]—In this letter the signature of the firm was adhibited by Smith.

Upon receiving this letter Black paid his client's money to Smith, As a matter of fact no disposition in favour of Smith was ever recorded or given. Smith fell into pecuniary difficulties, and the ground annuals were transferred by Muir to other parties and the bond given by Smith became ineffectual. After the lapse of nine years this action has been brought against Smith and the other partners of

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his firm. There is, of course, no doubt that the pursuer is entitled to decree against Smith, although this is probably of no value, but the other partners are solvent and are liable in the obligations of the firm. Now, your Lordships will perceive that there is no averment, and it is not the case that the firm ever received the money paid by the pursuer. Had that been so the pursuer's case would have been very different, for in that case, however Smith might have abused his position, it would have been in the mouth of the pursuer to say as against the other defenders "The money passed into your coffers and you must account for it." In the present case the pursuer cannot urge this, and her right of action is based on the letter and the letter alone. It is true that the letter is addressed to Black, but this circumstance is immaterial because Black was the agent for and was acting on behalf of the pursuer.

Now, the Lord Ordinary has assoilzied the defenders Boyd and Wilson on the ground that Black, knowing that the loan was Smith's private and personal transaction, was not justified in taking from him an obligation purporting to bind the firm without ascertaining that he had his partners' authority or without obtaining their signatures, and on the further ground that the pursuer is barred owing to her negligence in allowing nine years to elapse without seeing that the letter of obligation was fulfilled. Now, I agree in the conclusion at which the Lord Ordinary arrives, but I prefer to rest the decision on another ground. I do not think that it makes it any better for the pursuer's case that she knew that the loan was obtained for Smith's private purposes, but then I hesitate to say that that knowledge so changed the situation as to render it necessary for the pursuer or her agent to see that the other partners of Smith's firm signed or authorised the signature.

There is, however, a fatal defect in the pursuer's case at the outset. The signature to the letter admittedly was adhibited by Smith and Smith alone, and therefore as no special authority to attach the signature has been proved, it is incumbent on the pursuer to show that this act was within Smith's implied mandate as a member of his firm. Now, it is true that the second obligation undertaken in the letter—the obligation to exhibit a clear search and to purge it of incumbrances—is one which is frequently given by law-agents, and the practice is so well established that I am prepared to hold that by the custom of the profession it has come to be within the mandate of the partner of a legal firm to undertake such obligations on behalf of the firm. But this is so, not because the undertaking of an obligation of this nature is such as would naturally fall within the mandate of a partner, but for an entirely different reason. It is common knowledge that for many years there was great difficulty in getting searches at short notice, and even now at certain times this is still the case, and it is out of the necessities of the situation that the practice has arisen. And there is further a slight extension of that practice, which also rests on grounds of common sense. I have no doubt that it is within a writer's mandate to bind his firm with reference to some deed which their client is under an obligation to grant. Suppose, for instance, that a bond is to be granted by the client of a firm and that the lender is satisfied as to the borrower's title, but that the actual deed in security, either because the borrower is abroad or for some other reason, is not executed. In such a case I quite understand that the borrower's agent might undertake to deliver the deed executed by his client, and I have no doubt that this obligation undertaken on behalf of the firm by one of the partners would bind the firm.

But while this is so I do not think it is possible to extend the rule so as to cover such an obligation as was undertaken by Smith in the present case. When Black received the titles he saw that Smith had no right whatsoever to assign the ground annuals, and to say that in these circumstances he bound his firm to produce a title which was the foundation of the borrower's right is to go entirely outside the ordinary mandate of the partner of a firm of law-agents. It is said by the pursuer that at the settlement a title was in fact produced though not delivered, but this is not admitted, and the matter is left in obscurity. In any case Black was put on his guard when he received the original titles, and he should never have trusted to Smith's undertaking that his firm would produce what it was not its business to supply. Accordingly I think that the action entirely fails with respect to the defenders Boyd and Wilson.

In coming to this conclusion I am fortified by the knowledge that the same result would ensue from the application of certain familiar general rules of law. It is an elementary rule that if money is lost by the fault or negligence of A, the Court, as between two innocent parties, will fix the loss on the party who made it possible for A to deal with the money in the manner which has led to the loss. If that rule be applied in this case there can be no doubt as to the result. Smith was, of course, directly in fault, but as between Black and Smith's partners, who made it possible for Smith to act as he did? It was the conduct of Black, for he acted quite wrongly as a law-agent in paying his client's money on such security as Smith offered. Accordingly, on the whole matter, I am for sustaining the Lord Ordinary's interlocutor, but on grounds other than those adopted by his Lordship.

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Maclennan, K.C. — Hamilton. Agent — Andrew H. Hogg, S.S.C.

Counsel for the Defenders, Boyd and Wilson (Respondents)—Hunter, K.C.—Wilton. Agents—Sturrock & Sturrock, S.S.C.

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Tuesday, March 13.

FIRST DIVISION.

[Lord Johnston, Ordinary.

WOOD & COMPANY *v.* A. & A. Y. MACKAY.

Contract—Reparation—Breach of Contract—Implied Warranty—Supply of Rope Slings by Shipowner to Stevedore—Accident through Defective Rope Sling to Stevedore's Employee—Liability of Shipowner.

Shipowners, following a general custom, supplied to the stevedore the rope slings required for unloading their vessel. A sling broke and caused injury to be done to one of the stevedore's employees, who recovered damages from him under the Employers' Liability Act. The stevedore brought an action against the shipowners to recover the damages paid and the expenses.

Held that the shipowners did not warrant the rope slings, which were no part of the ship's permanent equipment, but supplied them only to the approbation of the stevedore, and consequently that the shipowners were not in breach of contract and must be *assoilzied*.

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640, *distinguished*.

Dictum of Lord Young in *M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206, 28 S.L.R. 144, *approved*.

Relief—Reparation—Negligence—Contract—Action of Relief by Stevedore against Shipowner—Damages Paid to Stevedore's Employee Injured through Defective Rope Sling Supplied by Shipowner—Competency.

A stevedore, from whom one of his employees, injured through the breaking of a rope sling, had recovered damages under the Employers' Liability Act, brought an action of relief against the shipowner who had supplied the rope slings. *Held* that, assuming (what the Court held was not the case) the shipowner might be liable in damages for breach of contract as having warranted the rope slings, the action of relief was not the stevedore's competent remedy, inasmuch as the employee's claim was based on the negligence of the stevedore, without proving which he could not have succeeded, and the stevedore's claim against the shipowner was based on contract, and there could be no relation between them.

Ovington v. *M'Vicar*, May 12, 1864, 2 Macph. 1066, *approved* and *followed*.

Burrows v. *Marsh Gas and Coke Company*, L.R. 5 Exch. 67, 7 Exch. 96, *commented on* and *distinguished*.

Mowbray v. *Merryweather*, [1895] 2 Q.B. 640, *commented on*.

Expenses—Disallowance of Expenses on Ground of Unsatisfactoriness of Witnesses.

The unsatisfactoriness of the witnesses in a cause is not a ground for refusing the successful party his expenses.

On 4th June 1904 Wood & Company, stevedores, London, raised an action against A. & A. Y. Mackay, shipowners, Grangemouth, to recover, with expenses, £200, or alternatively £73, 19s. 9d., and £17, 16s. 2d., being one-half of the amount which one of their employees, Mellish, had recovered from them under the Employers' Liability Act as damages for personal injuries in an action by him in Southwark County Court, and one-half of their expenses in defending such action.

Wood & Company had been employed by A. & A. Y. Mackay to unload the latter's vessel "Thomas Haynes" in the Thames. In the course of this operation one of the rope-slings which had been supplied by the shipowners broke, the load was precipitated into the hold, and Mellish, who was at the work in the employment of Wood & Company, was injured.

The pursuers pleaded—"(1) The pursuer having suffered loss and damage as the result of breach of contract on the part of the defenders, the defenders are liable in payment of damages. (3) Alternatively, the pursuers having paid to the said James Mellish the whole amount of any claim competent to him in respect of his injury, the defenders, who were liable as joint delinquents jointly and severally with the pursuers in respect of such claim, should be ordered to make payment to the pursuers of the sum second concluded for with expenses."

The defenders pleaded—"(1) No title to sue. (2) The pursuer's averments are irrelevant. (3) The pursuers' averments so far as material being unfounded in fact, the defenders should be assoilzied."

A proof was taken, the import of which is given in the opinion of the Lord Ordinary (JOHNSTON) and of the Lord President.

On 8th June 1905 the Lord Ordinary assoilzied the defenders and found no expenses due to or by either party.

Opinion—"The s.s. 'Thomas Haynes,' of Grangemouth, belonging to Messrs A. & A. Y. Mackay, the defenders in this action, after a voyage from Grangemouth to Rostock with coal and from Rostock to Danzig in ballast, sailed from Danzig in December 1903 with a cargo of sugar in bags. She arrived in the Thames on Wednesday, 6th January 1904, and discharged into lighters on 7th, 8th, and 9th January. She carried a cargo of 14,000 bags, each bag weighing about 2 cwt. The discharge was conducted by Messrs R. T. Wood & Co., stevedores, London, the pursuers of the action. About two o'clock on Saturday a rope sling used in lifting the sugar bags broke, and the bags fell on a stevedore, Mellish, engaged in the discharge. He was severely injured, and raised an action in the County Court of Southwark against his employers, Messrs Wood, under the Employers' Liability Act 1880, founding on the 'defective condition of the plant used' in the business of discharging. A jury awarded him £117 damages.

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"In point of fact the sling in question had been supplied by the ship, and accordingly the stevedores, Messrs Wood, have now raised an action against Messrs Mackay, the shipowners, to recover the amount in which they had been held liable to Mellish, together with the costs to which they had been put in the Southwark action.

"Alternatively they claimed one-half of the sums they had been compelled to disburse as above, on the ground that in any view the defenders were liable as joint delinquents jointly and severally with them. Without finding it necessary to consider the legal question involved, I have come to the conclusion that I cannot in the circumstances entertain this alternative claim.

"But in determining the question which, under the pursuers' main claim, does arise on the evidence, I have found my task an extremely difficult one by reason of the conflicting evidence. That conflict is so direct and circumstantial that there is no possibility of reconciling the conflicting statements.

"There is, however, one question which emerges clearly enough. The pursuers aver that in terms of their contract and also by the custom of the Port of London, the defenders were bound to supply the tackle requisite for discharge, including slings, and did supply it. This the defenders deny. I hold it proved that the supply of tackle was not mentioned in the letters which constitute the contract for discharge, that there is no general practice of the port, but that the more widely general practice, as stated by the defenders' master, Captain Sim, is that the ship supplies all tackle, including slings, unless there is a stipulation to the contrary; that the ship in the present case acted on that footing, providing, if the evidence for the owners is believed, new rope for the purpose, and supplying the slings without demur or hesitation.

"But beyond that there appears to me to be no escape from the conclusion that there is false evidence on the one side or the other, and I cannot take refuge in any view of the demeanour of the witnesses. I had no ground for suspecting any, though I was favourably impressed with one, viz., the pursuers' witness Fraser. But I must add, that while I cannot look at it as evidence, it does to my mind affect the question of credibility to find from the notes of evidence in the Southwark County Court that the witnesses for the pursuers here gave account in substantial detail as they and their mates had given in the Southwark Court.

"The pursuers' witnesses say that there were no slings ready for them on Thursday morning the 7th January; that slings were in course of making, and that they were made from old rope which had been used in the running gear of the ship and its boats; that they proved so defective that one either broke or threatened to break in the first forenoon; that the foreman stevedore demanded new slings, and was referred from the second officer to the first officer, and by him to the master, and by him to the boatswain (probably a mistake for carpenter), and at last got 9 out of the 20 or 25 slings in all renewed with new rope, which was all the ship had on board; that another sling broke on the forenoon of Saturday 9th January, and a third (which caused the accident) after the dinner hour.

"The ship's witnesses, on the other hand, allege a full supply of new rope; that nothing but new rope was used; that there were no breaks except the break which caused the accident, and no demand to be supplied with fresh slings at any time by the stevedore's foreman. They further challenge the authenticity of the production No. 67 of process, alleged by the pursuers to be the identical rope which broke, and they throw the blame for the accident on deterioration of the new rope supplied by them through the reckless mode of discharge followed by the stevedore's men, particularly at No. 4 hatch where the accident occurred.

"To hold the scales between these two sets of partisans is not easy. Counting heads, the ship has it. But after renewed consideration I am unable to give implicit credence to the statements of either side. While I freely admit that I can have no certainty, the conclusion I have come to is this—I do not believe that the rope supplied was new rope, though doubtless the ship took such on board at Grangemouth. I do believe that some new rope was supplied on a second demand, but not enough to replace the whole slings. I do not believe that the discharge was as reckless as the ship's witnesses allege. The state of the tally disproves this, for instead of constant overloading of slings it shows somewhat remarkable regularity. In fact, out of about 700 slingfuls only about 25 exceed the orthodox number of six bags to the sling, and the average is below that number. Nor do I believe that the action of the men forming the gangs below, or of the gangway man or guyman on deck, though their methods were somewhat rough, was as reckless as is represented, *e.g.*, from comparing the depth of the hold with the length of the slings, if there was anything in contact with or chafing on the coamings of the hatches, it is evident it must have been principally the winch chain, and not the sling ropes, as alleged by the ship's witnesses. But I do hold it proved that in No. 4 hold on the forenoon of Saturday, 9th January, there was some overloading prior to the accident, though not such as should have perilled a sling in reasonably good condition.

"In these circumstances I think that I reach a just conclusion by adverting to the responsibilities *hinc inde*, and to the only bit of real evidence other than the tally books, viz., the rope, the authenticity of which, by the way, I see no reason to doubt.

"It appears to me that it was the duty of the ship's officers, if the ship was bound or accepted the obligation, to supply the slings as well as the rest of the tackle, to supply sound slings, and to be satisfied that they were sound before handing them over to the stevedore. I think that no fault

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could be imputed to the stevedore or his representative if he accepted them as sound without more than a general examination. But this part of the gear perishes in the using, and I think that on acceptance the duty of watching it and seeing to its continued soundness devolved on the stevedore who used it. His was the duty of rejecting it when necessary in the course of using, and the ship's to replace what was rejected. I think that the case is distinguishable from that of *Mowbray* v. *Merryweather*, [1895] L.R., 2 Q.B. 640. Now here *res ipsa loquitur*. If, as I think, the sling which broke was not new when given out, and probably even then of doubtful sufficiency, it certainly had become wholly insufficient long before the accident occurred. I entirely accept the evidence of Captain Cowie, and I think my own personal examination of the rope would probably have brought me to the same conclusion that the said sling should have been discarded long before it broke. Accordingly, even assuming that there was negligence on the part of the owners in supplying defective ropes, such was not the direct cause of the accident, but the neglect of the stevedore's foreman to reject timeously the rope supplied before it had become hopelessly insufficient.

"I therefore assoilzie the defenders; but in respect of my view of the unsatisfactoriness of the evidence I find neither party entitled to expenses."

The defenders reclaimed on the question of expenses, and the pursuers took advantage of the reclaiming-note to bring under review the Lord Ordinary's judgment on the merits.

Argued for the pursuers—The defenders undertook to supply the rope-slings for the discharge of the cargo, and as the accident to Mellish was due to the defective condition of one of the slings supplied, the defenders were liable to the pursuers in the amount of the damages awarded to Mellish and in the expenses of the action by Mellish. In a contract of sale where the goods were purchased for a special purpose it was an implied condition of the contract that the goods should be reasonably fit for that purpose, and the vendor was liable for the natural consequences of a breach of that condition—*Randall* v. *Newson*, [1877] L.R., 2 Q.B.D. 102; Addison on Contracts, 10th ed., p. 586; and the same rule applied to the contract between the pursuers and the defenders—*Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; *Burrows* v. *Marsh Gas Company*, L.R., 5 Ex. 67, 7 Ex. 96. The pursuers' liability to pay damages to Mellish was the natural consequence of the defenders' failure to supply ropes fit for the discharge of the cargo, and therefore the pursuers were entitled to recover the sums paid by them from the defenders — *Mowbray* v. *Merryweather*; *Burrows* v. *Marsh Gas Company*, *supra*. The defenders being aware that the ropes were to be used by the pursuers' workmen were under a duty to take care that the ropes were in a fit state to be used without risk or danger to the workmen. They had failed in their duty and were liable for the injury to the pursuers' workman which resulted from their negligence —*Heaven* v. *Pender*, 11 Q.B.D. 503; *Traill* v. *Actieselskabat Dalbeattie*, *Limited*, June 7, 1904, 6 F. 798, 41 S.L.R. 614. The present action was based on breach of contract and could not be considered as an action of relief. On the question of the liability of the defenders jointly with the pursuers, *Palmer* v. *Wick and Pulteneytown Steam Shipping Company*, *Limited*, June 5, 1894, 21 R. (H.L.) 39, [1894] A.C. 318, 31 S.L.R. 937, was cited, but this argument was not pressed.

Argued for the defenders — The pursuers had ample opportunity of inspecting the slings supplied by the defenders and accepted them. There was no implied condition in the contract that the ropes should be suitable for the discharge of the cargo or for any special purpose. All that the pursuers were bound to supply under the contract were ropes to the satisfaction of the pursuers, and the pursuers' acceptance of the ropes discharged the defenders. The accident to Mellish was due to the pursuers' negligence in not properly inspecting the ropes before or during their use, and was not caused by, nor was it the natural consequence of, the defenders' action in supplying ropes which were found to be defective. *Mowbray* v. *Merryweather*, *cit. sup.*, was distinguishable, because in that case the defendant admitted that he was in breach of his warranty. The pursuers were under no duty to the workmen who used the rope. In *Heaven* v. *Pender* the defenders were liable because they set up a staging in which there was a trap and invited the plaintiff to use the staging—*Caledonian Railway Company* v. *Warwick*, November 26, 1897, 25 R. (H.L.) 1, [1898] A.C. 216, 35 S.L.R. 54; and in the opinion of Esher, M.R., in *Heaven* v. *Pender* an exception was made as to the case where opportunity of inspection was given, and that exception covered the present case. This was an action of relief. But the criterion of the pursuers' liability in the action at the instance of Mellish was their negligence, and the damages were awarded in respect of that negligence, whereas in the present case the only ground on which it was averred that the defenders were liable was breach of contract. Hence as the criterion of liability was not the same in both cases the pursuers could not enforce relief—*Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066.

At advising—

LORD PRESIDENT—The pursuers in this action, Messrs Wood & Company, carry on business as stevedores in London. They entered into a contract with the defenders Messrs Mackay, who are shipowners in Grangemouth, to unload a vessel belonging to the defenders which was in the Thames. In the course of that unloading a rope sling, which was being used to unload the cargo which consisted of sugar in bags, broke, and the sugar bags thereby released

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fell upon one of the stevedores' workmen named Mellish and injured him. Mellish brought an action against Wood & Company in the County Court of Southwark and recovered damages from them for the injury he had sustained. His action in the County Court was rested, as being for more than the sum of £50 it needed to be, upon the Employers' Liability Act. The present action is an action of relief at the instance of Messrs Wood against the shipowner, upon the ground that it was the shipowner's business to supply the slings of rope for the operation of unloading the cargo, that he did so supply the slings, and supplied a faulty sling, and that the consequent claim at the instance of Mellish, and the damages he had to pay, were the natural result of that fault upon the part of the shipowner. Now, there has been a very voluminous proof, and the Lord Ordinary's judgment not only analyses it but makes considerable comments upon it. I do not propose in any way to go through the proof, but I propose to lay down the various conclusions in fact which I have come to after a careful consideration of that proof. I think, first, that it is proved that by the custom in the trade it was part of the duty of the shipowner here to provide slings made of rope for the discharge of the cargo, and I think it is proved that that was a duty which the defenders in this case entirely knew of and undertook. Secondly, I think it is proved that the actual sling in process is clearly identified as the particular sling which broke. Thirdly, I think it is proved that that particular sling was not a fit sling for the purpose for which it was being used, being obnoxious to a defect which is technically known as short hemp; and fourth, I think that that defect of short hemp is a defect which could have been perfectly well ascertained by an inspection of a quite easy character by anybody who was conversant with the business and knew the quality of rope. Now, the Lord Ordinary, who I think has practically come to the same conclusion on the facts, although he has not perhaps formulated them in such distinct propositions as I have done, disposed of the case thus—He considered that whatever were the obligations originally extant as between the pursuer and the defenders, nevertheless from the nature of the subject, namely, rope, and from the nature of the operation to which that rope was subjected, namely, the using of it in slings for the purpose of discharging a cargo, there was a duty cast upon the pursuer to watch the rope and to note its condition from time to time as the operation proceeded; that if he had done so, inspection would have revealed that there was something wrong; that if an accident happened it was really owing to his own negligence, and that he cannot recover for it. It was very strongly contended that that view of the Lord Ordinary was wrong, and in particular it was contended that it was diametrically opposed to the view of the Court of Appeal in England in the case of *Mowbray* v. *Merryweather*, ([1895] 2 Q.B. 640). That case is not binding on us, but, on the other hand, it is authority which we always treat with great respect, and if the principles laid down in an English case are right we should follow them upon principle against the judgment of a Lord Ordinary which we thought was wrong. Now, no doubt *Mowbray* v. *Merryweather* bears a striking similarity to the present case, although in certain particulars to which I shall advert it is not the same. The facts in *Mowbray* v. *Merryweather* were these. As here, there was a contract between a firm of stevedores and a shipowner to discharge cargo from a ship. The shipowner there had agreed in terms to supply all necessary cranes, chains, and other gearing reasonably fit for that purpose. What broke in that case was a link of a chain of a permanent crane—I take it, an ordinary ship's crane worked with a donkey-engine—and there was an admission that the defect in the chain was of such a kind that it could have been discovered by inspection—that is to say, by the inspection of anybody who knew the quality of iron and could recognise an iron flaw when he saw it. There, as here, the result of the breaking of the link of a chain was that a bale of goods fell upon a stevedore's workman. There, as here, the injured workman brought an action against the stevedore, founding upon the provisions of the Employers' Liability Act. The case then differs a little in this respect, that instead of going to trial, as occurred in the case immediately before your Lordships, the stevedores in the case of *Mowbray* v. *Merryweather* did not contest the action but paid the injured workman a sum which, it was not a matter of controversy, was a perfectly proper sum for them to pay upon the assumption that there was liability, and then they raised, as here, an action of relief in respect of the sum which they had so paid. The Court of Appeal gave judgment for the sum. As I say, that case certainly bears a strong resemblance to the present case, but there are certain points of difference, and one of them crops up at the very outset. You cannot read the judgment of the learned Judges who decided that case without seeing that the whole starting-point of their judgment is that they held that there was a warranty, an implied warranty, upon the supplying of the chain of the crane that it should reasonably be fit for the purpose for which it was supplied. Now, the first question that therefore arises is whether the obligation—I will not use the word "warranty" in case it may not be strictly accurate — which was upon the shipowner here was precisely the same as the obligation which was found to be on the shipowner in the case of *Mowbray* v. *Merryweather*. I am inclined to think it was not, and the distinction arises naturally enough from the distinction of the articles employed. The article in the case of *Mowbray* v. *Merryweather* was part of the permanent fittings of the ship, namely, the chain of the crane, and it was obviously impossible for the firm of stevedores, if they were to use it, to interfere with or do anything with it. Therefore, having regard to the subject material, I think that I

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certainly would agree with two things that the English Court there said—namely, first, that from promising to supply the crane on board the ship there was an implied promise also to supply a crane that was fit for the purposes of discharging ordinary cargo—and nobody said that it was anything else than ordinary cargo; and secondly, that having got that obligation there was not necessarily cast upon them a duty of from time to time going and examining this permanent fitting, namely, the crane chain. But here we have to do with a perfectly different article. The articles here are slings made of rope for slinging bags of sugar. Those slings are not part of the permanent apparatus of the ship. As matter of fact they are just bits of rope which are spliced into a loop and are then made up as a sling, and they are really made up of rope *ad hoc*. Now, there is not much evidence as to what the precise custom in this matter is; and although I am prepared to hold, in accordance with the finding I have already expressed to your Lordships, that it is clear that the duty of supplying was undertaken by the shipowner, I think that that duty was not of the nature of an absolute warranty to supply something that would be under all circumstances fit for the work it had to perform, but was a duty to supply slings to the approbation of the person who was to use them. If that is the true view, then I think one comes directly under the authority of a dictum of Lord Young, which has, I think, been several times referred to with approval, delivered in the case of *M'Gill* v. *Bowman* (18 R. 206). That was a case in regard to the fault of a miner's kettle. The actual decision does not touch this point, because it was held in fact there that the accident was not due to the fault in the material at all, but was due to negligence on the part of the person who worked it; but Lord Young, upon a general question which had been argued in the case, dealing with the question of material, says—"If I have painters to work in my house and undertake to supply the ladders to the master's satisfaction, and do so, am I subject to an action by one of the painters if the ladders prove too weak? Surely not. I think that would be an entirely erroneous proposition." I think that is sound law, and accordingly if the true construction of the obligation here was to supply slings to the satisfaction of the other party, then I think the case may be safely disposed of on that ground.

But I do not propose to stop there, because I think there is something more to be said upon the case of *Mowbray* v. *Merryweather*. This action as raised is an action of relief. Now, relief means of course, that A is bound to relieve B of a liability which has been found against B. Now, what was the liability of B here? What was the liability of the stevedore? The stevedore's liability in the action which was raised against him rested on his want of inspection—that is to say, his negligence, and his negligence alone. It did not rest pon the ground that the rope was *de facto* unfit. It seems to me that that proposition is abundantly clear from two circumstances. In the first place, it is clear from the undoubted law of *Wemyss* v. *Mathieson*, 4 Macq. 215, which is a House of Lords decision and cannot be controverted. That case laid down in most clear terms what has always been considered as law since then, that as between a workman and his employer it is not enough for the workman to say that the employer *de facto* supplied insufficient material or an insufficient machine. He must show that in doing so he was guilty of some negligence. Therefore the workman here could not have recovered against the stevedore unless he showed that as matter of fact there was some fault on the part of the stevedore. The same thing arises upon the Employers' Liability Act. The reason of course why he raised his action under the Employers' Liability Act in this particular case is obvious. He claimed more than £50, and according to the rules of process in England he could not have got more if he had gone to a County Court; whereas raising it under the Employers' Liability Act he could get more, but being under the Employers' Liability Act, he could not recover under the first sub-section unless he could show, over and above the fact that the ways and means were not in proper condition, the further fact that there had been want of due inspection on the part of the master or those whom he put in his place. But as I have pointed out, precisely the same result for practical purposes would have occurred if he had raised his action at common law in the High Court instead of raising his action under the Employers' Liability Act in the County Court. Now, all that therefore comes to this. He could not have recovered unless he had shown that there had been negligence, which negligence in this case everybody knows meant want of inspection on the part of the stevedore. How can it be said that the stevedore, being cast in a suit in which he must have been successful had it not been for his own negligence, can ever recover upon an action for relief against the shipowner against whom he has only got a breach of contract and nothing else? On this matter I confess that I think there is nothing more to be said than has already been said by an authority which is binding on us, namely, by the late Lord President Inglis, when he was Lord Justice-Clerk, in the case of *Ovington*, 2 Macph. 1066. The facts in *Ovington* were these—A workman was killed by the breaking of a chain. His representatives either sued or made a claim against his employer, and his employer paid. The employer then brought an action of relief against the maker of the chain, and sought to have him ordained to pay the sum he had paid to the workman's representatives. The chainmaker was assoilzied in that case upon two grounds. In the first place, the employer came into Court without saying that he had been guilty of any negligence at all, and the Lord Justice-Clerk pointed out that upon his own statement in his own pleadings,

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upon the law of *Wemyss* v. *Mathieson*, he had had no liability towards the workman's representatives, and that he need never have paid at all; and therefore it was not a relevant action as against a person with whom the pursuer had a contract to claim as damages something which, upon the pursuer's own showing, he need not have paid. But his Lordship also went further, and said that in any case there could not be an action of relief, because the *criteria* of the two cases were perfectly different. The one rested upon the question of *quasi*-delict, the other rested upon a question of breach of contract. With all that I thoroughly agree, and when I come to *Mowbray* v. *Merryweather*, although I do not say that the judgment is necessarily wrong, there are certain dicta of the learned Judges in it with which I cannot concur. It may be that the judgment is not wrong for quite another reason. One of the learned Judges in that case says that in the case before him the injured workman might have had a direct action against either the stevedore, being the action which he did promote in the County Court, rested upon the Employers' Liability Act, or against the shipowner upon the doctrine of *Heaven* v. *Pender*, and then he applies that by saying, if he could really have had it directly against the shipowner, it is no hardship on the shipowner to say that he must just pay the same in an action of relief as what he would have had to pay if he had to pay it in a direct action against himself. I think it may very well be that there would have been an action upon the doctrine of *Heaven* v. *Pender* (11 Q.B.D. 503) in *Mowbray's* case. I think it equally clear there could not have been an action upon the doctrine of *Heaven* v. *Pender* in this case, because the whole of that doctrine depends upon the article in which the defect occurred being part of what I may call the permanent fittings of the place. In *Heaven* v. *Pender* the facts were that a staging was kept by the dock proprietor for the purpose of painting and otherwise attending to ships which were in his docks, and the accident was caused by the breaking of one of the ropes by which the staging was slung. That staging was just as much a permanent work as the cranes on the quays, the gangways, and so on. Now, the principle of the decision in that case might very fairly be applied to the case of the permanent ship's crane in *Mowbray* v. *Merryweather*, but it cannot possibly be applied to a thing like a rope-sling, which is only provided *ad hoc*, and from time to time. Now, having regard to the resemblance in this respect of *Mowbray* v. *Merryweather* to *Heaven* v. *Pender*, I do not for a moment suggest that the decision arrived at in *Mowbray* was wrong. But there are certain expressions of opinion in that case with which I do not agree. The Master of the Rolls says on page 643—"It is true that he"—that is the injured man—"could not have recovered unless, as between himself and the plaintiffs, the plaintiffs had been guilty of want of care, but the plaintiffs say that as between themselves and the defendant they were not bound to examine the chain, because the defendant had warranted it sound, that they had a right to rely on that warranty, and did rely on it, and the defendant cannot rely on a duty to use due care which was owed, not to him, but to the workman. Therefore they say that all that has happened as between themselves and the workman was the natural result of the defendant's breach of warranty, and they are entitled to recover in this action the amount which they have had to pay as damages to the workman." I cannot agree with that course of argument at all, because I think it obscures the true meaning of consequentiality by the expression "all that has happened between themselves and the workman." There is also another portion of the judgment with which I do not agree, and which I find very great difficulty in understanding, namely, that portion of the judgment where their Lordships profess to prefer the opinion expressed by Baron Martin in the case of *Burrows* v. *Marsh Gas & Coke Co.* (L.R. 5 Ex. 67) to that expressed by the Scottish Judges in the case of *Ovington*. I have already stated what was laid down there. I am utterly unable to see that the judgment of Baron Martin in the case to which I have referred had anything to do with the same class of facts as that dealt with in *Ovington*. The facts in the former case were these—A person contracted with a gas company for the supply of a pipe to convey gas from the main into his own premises. The company supplied that pipe, but there was a leak in the pipe supplied. The consequence was that the premises became charged with gas, and the owner of the premises, having occasion to have some other small job done upon the premises, employed a gasfitter. This gasfitter was not in the service of the company which supplied the pipe, and it was a mere accident that it was a gasfitter who was employed. This man came into the premises and, as I understand, probably noticing a smell of gas, was so foolishly negligent as to carry a naked light. There was an explosion and the premises were wrecked. The action was brought by the owner of the premises against the contracting company for the damages thereby caused, and it was held that he was entitled to recover, the explosion being the natural result of the faulty pipe which was supplied, and that it was no answer for them to say that this would never have happened if it had not been for the negligence of the other person who was on the premises. That seems to me a perfectly right judgment, and I agree with every word that Mr Baron Martin said in that case; but what application that has to the question raised in *Ovington* I confess I am entirely unable to discover. In order to make it an analogy to *Ovington*, the action ought not to have been at the instance of the proprietor of the premises. It ought to have been at the instance of the injured man, who I suppose for the moment to be a servant of the

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person on the premises. I feel constrained to say that not only do I think the judgment of *Ovington* perfectly right in itself, but I think it is utterly untouched by the authority with which in the English Court it was supposed to be inconsistent. The result of the application of these principles is not doubtful. Here the whole gravamen of the charge against the stevedore lay in his own negligence. Without that negligence the charge could not have prevailed, and accordingly, whatever may be the damages for supplying a faulty rope, assuming that the contract is different from what I have suggested it is—that is to say, assuming the contract is to provide a sound rope—whatever the measure of damages may be between the injured man and the party primarily liable, it cannot be the measure of damages in an action of relief where the criterion of liability is something perfectly different, and depends on the negligence of the party who is making the claim in the action of relief.

Accordingly I am of opinion that the defender is entitled to prevail.

The Lord Ordinary has deprived the defender of his expenses upon what I confess seems to me a somewhat novel ground—the unsatisfactoriness of the witnesses. I do not find any reason for that ground, and I am not aware I ever saw it before. In a case of this sort, according to the usual rule, I think expenses must follow the result. The only thing I would say now in regard to the subject of expenses—and I say it of set purpose, in order that the Auditor may take heed to it—is that I think that here there was not the slightest justification for printing the proof in the proceedings in the action before the County Court. It is not evidence and never could be.

Lord M'Laren—Supposing there was a relevant claim in this case, it seems perfectly clear that the criterion of liability would not be the same in this case as it was in the action against the stevedore. If the rope had given way the first time it was tried, then probably the criterion would have been the same, because then the rope would be fairly proved to be insufficient for the purpose, and the question would be, was there fault solely on the part of the shipmaster who supplied the rope—on the theory that the stevedore was entitled to trust to his assurance—or were they both negligent in having used the rope which both were bound to examine, and yet which neither of them did in fact examine. But then this sling did not give way until it had been in use for a considerable time. The unloading of the vessel extended over a period of two days, and it appears from the evidence that these slings do wear out very quickly under the stress and jerks to which they are exposed, that in point of fact several of them had given way while in use, and that this was an accident that did not surprise anyone. That being the state of the facts, it is quite conceivable that the County Court Judge, or the jury, might have been well founded in holding that there was negligence on the part of the stevedore in using a sling which was insufficient—using it after it had ceased to be sufficient—and that he was liable for reasons which did not necessarily involve liability on the part of the shipmaster who supplied the slings. But I think the key to the solution of this question is that the shipmaster in supplying the sling is not held to give a warranty as to its sufficiency. If it were a contract of sale, then the common law, which has now been embodied in the Sale of Goods Act, provides that he is held to warrant that the article supplied is fit for the purpose; but I am not prepared to extend that principle to the case where, under an executory contract, the person for whose benefit something is to be done undertakes to supply materials. I think this case is quite in the same region as the case put by Lord Young of a householder agreeing to give the use of a ladder to a painter. In such a case he might warrant, but he does not necessarily warrant, the sufficiency of what he supplies; but he must act in good faith and with reasonable care. I see no reason to doubt that in this case the mate who supplied the slings did act with reasonable care, that he supplied what, according to his information, had been purchased from a good firm, and that from his own knowledge he had good grounds of believing them to be good and sound slings. That evidence has not, in my judgment, been displaced by anything in the case, and I have come to the conclusion that there is no legal ground of responsibility affecting the shipowners, because I think their servants are not proved to have been guilty of any negligence in the duty they had undertaken, which was only to furnish slings such as they believed to be sound, but without necessarily warranting them.

Lord Kinnear—I agree in all respects with your Lordship in the chair.

Lord Pearson—I concur.

The Court pronounced this interlocutor:—

"Adhere to the said interlocutor in so far as it assoilzies the defender from the conclusions of the summons: *Quoad ultra* recal the said interlocutor: Find the defenders entitled to expenses both in the Inner and the Outer House, and remit," &c.

Counsel for the Pursuers and Respondents—A. Moncrieff—Cowan. Agents—Drummond & Reid, W.S.

Counsel for the Defenders and Reclaimers—Younger, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

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Tuesday, March 13.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Pearson, Ordinary.

H. M. ADVOCATE *v.* SIR MARK J. M'TAGGART STEWART AND SPOUSE.

Succession — Destination — Marriage-Contract—Jus Crediti—Fund Destined in Marriage-Contract to Spouse's Nearest Lawful Heirs—Question whether Fund Carried by a Will or by the Contract.

Where in a marriage-contract, which on failure of issue destines the fee of the funds contributed by one spouse to that spouse's nearest lawful heirs, it is intended that such destination should be indefeasible, the intention must be expressed in clear and unambiguous terms and will not be inferred from such a fact as the parents, from whom the funds were coming, being parties to the contract.

Revenue—Estate Duty—Settlement Estate Duty—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*b*), 21 (1), *and* 23 (14)—*Trust Constituted Prior to Act—Fund to be Held by Trustees till Death of Party and then to be Invested in Estate to be Entailed—Death of Party Subsequent to Act.*

A testator died in 1867. His trustees, who paid inventory duty, were directed to hold the residue of his estate till the death of A, when it was to be invested in land which was to be entailed. A died in 1902.

Held that estate duty and settlement estate duty were payable on the value of the residue of the testator's estate—*per* Lord President on the ground that within the meaning of section 2 (1) (*b*) of the Finance Act 1894, the residue was property in which a person other than the deceased, *i.e.*, the trustees, had an interest which ceased on the death of the deceased, and duty was payable to the extent to which a benefit accrued from the cessor of that interest; *per* Lord Pearson, Ordinary, on the ground that the residue constituted entailed property, which by section 23 (14) was not settled property within the meaning of the Act, and so was excluded from the exemption granted by section 21 (1) to property settled by a person dying before the Act on which inventory duty had been paid.

Revenue — Estate Duty — Propulsion of Estate—Deed of Gift—Use of the Property Subsequent to Propulsion and Gift—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*b*) *and* (*c*)—*Finance Act* 1900 (63 *Vict. cap.* 7), *sec.* 11.

A lady, heiress of entail in possession, some years previous to her death, granted a deed of propulsion of the estate in favour of the next heir, her daughter, and also granted in the daughter's favour and that of the daughter's husband, a deed of gift of her whole personal property including the furniture of the mansion-house of the entailed estate. The deeds were duly completed and possession was taken, but the lady continued to live with her daughter in the mansion-house, where she occupied a bedroom and had the use of the public rooms.

Held (*rev.* Lord Ordinary (Pearson), who subsequently in the Division *dissented*) that the propulsion and deed of gift were effectual to exclude a claim for estate duty on the value of the entailed estate and the personal property on the lady's death, her occupation subsequent to the cession having been not an incident of proprietorship but the privilege of a guest.

Revenue — Estate Duty — Propulsion of Estate—Use of Part of Estate Subsequent to Propulsion—Estate Surrendered Indivisible.

Held by Lord Pearson, Ordinary, that where there has been a deed of propulsion of an estate, the estate surrendered is, so far as regards estate duty, indivisible and if a benefit in any part is retained, the whole claim for exemption from estate duty fails.

Revenue — Estate Duty — Deed of Gift — Separable Entities Gifted—Property not in View of Parties—Accumulations by Trustees Unlawful under Thellusson Act (39 *and* 40 *Geo. III, cap.* 98)—*Failure to Formally Notify Deed of Gift to Trustees.*

Testamentary trustees continued to make accumulations in accordance with the trust after such accumulations were unlawful under the Thellusson Act, and this was not discovered by anyone till the death of a lady to whom such unlawful accumulations fell. The lady had some years prior to her death granted a deed of gift of her whole personal property in favour of her daughter and her daughter's husband. The husband was the leading trustee and the law-agents who managed the trust had prepared the deed of gift, but no formal intimation of the deed of gift had been made to the trustees.

The Court, while holding the deed of gift effectual to exclude a claim for estate duty on the rest of the property, *held* that estate duty was payable on the value of the unlawful accumulations.

The Finance Act 1894 (57 and 58 Vict. cap. 30), in Part 1, which includes sections 1–24, deals with estate duty, and by sec. 1 imposes such duty upon the principal value of all the property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act. Sec. 2 (1) provides—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such

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interest, but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole. (*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, if these sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom . . ."

Section 38 (2) of the Customs and Inland Revenue Act 1881 (44 Vict. cap. 12), as amended by section 11 of the Customs and Inland Revenue Act 1889 (52 Vict. cap. 7), and the above-quoted section of the Finance Act 1894, reads in sub-sec. (2)—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz.—(*a*) Any property taken as a *donatio mortis causa* made by any person dying after the first day of August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. (*b*) . . . (*c*) . . ."

Section 21 (1) of the said Finance Act 1894 enacts—"Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act in respect of which property any duty mentioned in paragraphs one and two of the first schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act 1881" (in this case inventory duty) "has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

Section 23—"In the application of this part of this Act to Scotland, unless the context otherwise requires . . . (14) The expression 'settled property' shall not include property held under entail. . . ."

The Finance Act 1900 (63 Vict. cap. 7), sec. 11, enacts—"(1) In the case of every person dying after the 31st March 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bona fide* made or effected twelve months before the death of the deceased, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise. (2) This section shall, *inter alia*, apply in Scotland to the conveyance or discharge of any liferent in favour of the fiar, or to the propulsion of the fee under any simple or tailzied destination."

On 13th March 1905 the Lord Advocate, on behalf of the Commissioners of Inland Revenue, raised an action against Sir Mark J. M'Taggart Stewart, Bart., and his wife, Lady Marianne Susanna Ommaney or M'Taggart Stewart, to recover certain death duties alleged to be due (1) on a certain sum of money stated to have formed part of the property, and to have been carried by the will, of Mrs Church, aunt of Lady M'Taggart Stewart; and (2) on certain property alleged to have passed to the defenders on the death of Mrs Ommaney M'Taggart, Lady M'Taggart Stewart's mother.

Mrs Sarah M'Taggart or Church, who, surviving her husband and her father, died on 14th October 1877 without issue, but leaving a will, was the younger daughter of the late Sir John M'Taggart, Bart., of Ardwell. Her marriage contract, to which her parents were parties, "on the third part," after mentioning the intended marriage, narrated—"In contemplation of which marriage it has been agreed that, before the solemnisation thereof, the said Sarah M'Taggart should settle her property and affairs in manner after mentioned, and that the said James Church" (the husband) "and the said Sir John M'Taggart and Lady Susan M'Taggart" (the mother) "should respectively come under the obligations hereinafter contained in her favour . . ." In it she conveyed to trustees her whole *acquisita* and *acquirenda*, and "without prejudice to the said generality the sum of £10,000, hereinafter guaranteed by her said father and mother . . . or any larger sum of money to which she may become entitled by or through the marriage settlement of her said father and mother . . . or by or through the last will and testament, or disposition and settlement, *mortis causa*, of her said father and mother, or either of them, or by or through the death of both or either of her said father and mother," in trust for her own liferent, exclusive of the *jus mariti* and right of administration of any husband, and after her death "in trust for behoof of her children or issue to be born of the marriage

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between the said James Church and Sarah M'Taggart in fee . . . and failing issue of the said marriage, or lawful descendant thereof, then for behoof of the nearest lawful heirs of the said Sarah M'Taggart as at the time of her death in fee." The contract contained declarations as to the payment of the liferent and the fee, as to apportionment, and with regard to a child predeceasing the time of vesting, "and failing any child or lawful descendant of such child of the said intended marriage at the death of the said Sarah M'Taggart, or at any time thereafter before the said trust property shall have become vested, the same shall belong and be made over to the nearest lawful heirs of the said Sarah M'Taggart as at the time of her death, with power nevertheless to the said Sarah M'Taggart, if she shall think fit, of her own free will, by a writing under her hand, subscribed by her in presence of and attested by two credible witnesses, to confer" a liferent in whole or part upon the husband if he survived. Sir John M'Taggart and Lady Susan M'Taggart undertook, under their own marriage contract or otherwise, to make good on the death of the longer survivor of them, to Mrs Church or her trustees, at least the £10,000.

Sir John M'Taggart dying on 13th August 1867 left a trust-disposition and settlement, the seventh purpose of which was—"I direct and appoint my trustees to realise and convert into money the whole trust property hereby assigned and conveyed to them which may remain after fulfilling the purposes above mentioned; and . . . I direct and appoint my trustees to lay out and invest the whole residue of my trust funds so to be realised, with the accruing interest or dividends arising therefrom, periodically, as the same shall accumulate, on security of heritable property or estates in Scotland, or in the Government stock or the funds of Great Britain, and that during the lifetime, after my decease, of the said Mrs Susanna M'Taggart or Ommanney, who is named to succeed me as the first heir of entail to my estate of Ardwell; and at her decease I direct and appoint my trustees to apply the whole trust funds then remaining, with the interest or dividends arising therefrom, in paying off or reducing *pro tanto* the debts or incumbrances which at my decease may affect my said entailed estate of Ardwell and others; and in case any surplus shall remain after paying off all said debts or incumbrances, I direct and appoint my trustees, as soon as they conveniently can, to expend such surplus in the purchase of lands and heritages in Wigtownshire or in the stewartry of Kirkcudbright, and to settle and secure the lands and heritages so to be purchased by a deed or deeds of strict entail upon the same series of heirs, and under the same conditions, provisions, limitations, restrictions, clauses irritant and resolutive, and other clauses, as are contained in the deed of entail of the estate of Ardwell and others already executed by me. . . ."

The accumulation hereby directed, so far as subsequent to 13th August 1888, was struck at by the Thellusson Act (39 and 40 Geo. III, c. 98).

Mrs Susanna M'Taggart or Ommanney, subsequently called Ommanney M'Taggart, was the elder daughter of Sir John M'Taggart, and the only child other than Mrs Church who survived him. On his death she succeeded to the entailed estate of Ardwell. The defender, Lady M'Taggart Stewart, was her only child. Mrs Ommanney M'Taggart, who died on 28th September 1902, executed in favour of the defenders, on 27th August 1894, a deed of gift of her whole personal property, and on 23rd May 1895 a deed of propulsion of the fee of the entailed estate of Ardwell in favour of her daughter, the next heir, which was duly recorded. As to the effect given to these two deeds by the parties thereto, a joint minute was lodged in which it was admitted—"1. Upon the execution by her of the *deed of gift* dated 27th August 1894, the whole funds and investments belonging to Mrs Ommanney M'Taggart (except a sum of about £100 which was at her credit with her brokers, and a few pounds which were at her credit at her bankers) were transferred to the defenders and the transfers duly registered, and the defenders thereafter drew the whole interest and dividends upon the said securities and applied them for their own use and behoof, and thereafter dealt with them as their joint absolute property down to the year 1899, when the shares, etc., remaining in their joint names were transferred to the name of Sir Mark and now stood in his name. The whole dead and live stock and other fungibles and furniture were taken possession of by the defenders, and were thereafter treated by the defenders and recognised by Mrs Ommanney M'Taggart as belonging absolutely to the former, who sold and dealt with the stock, etc., without reference to Mrs Ommanney M'Taggart. 2. The jewellery was handed over by Mrs Ommanney M'Taggart to the defender Lady Stewart, and was never thereafter used by Mrs Ommanney M'Taggart. 3. The value of the funds, exclusive of furniture and farm stock, etc., received by Sir Mark and Lady Stewart under the said deed of gift amounted to £36,500, the furniture was of the value of £2500, and the dead and live stock was of the value of £500. 4. Prior to the execution by Mrs Ommanney M'Taggart of the *deed of propulsion* dated 23rd May 1895 the defenders for some years lived a part of every year with Mrs M'Taggart at Ardwell, and Mrs M'Taggart went with the defenders to London and elsewhere, and stayed at Southwick a part of every year. 5. Up to the date of the deed of propulsion Mrs Ommanney M'Taggart paid the whole wages both of the indoor and outdoor servants upon the estate of Ardwell, and paid the whole household and estate expenses, and generally managed the estate through her factor and received the rents. From and after the date of the deed of propulsion the defender Lady M'Taggart Stewart received the whole rents of the estate, took over the whole

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management of the household and of the estate, paying the whole wages and upkeep, with the exception of Mrs Ommanney M'Taggart's maid, whose wages she paid herself. 6. Mrs Ommanney M'Taggart after the date of the deed of propulsion resided at Ardwell House. After 1901, when she suffered an accident, she occupied one special room in the house, and was attended to by the defenders and their family. 7. Mrs M'Taggart, in conversation with members of the family, referred on more than one occasion after the date of the deed of propulsion to her position as having parted with all that she possessed except the dividend on a sum of £1000 of Government stock, which was held by her marriage-contract trustees, and to her being no longer the mistress of the house. After the date of the deed of propulsion she lived and continued to live in family with the defenders. The deed of propulsion was recorded on 28th May 1895. Shortly after the date of the deed of propulsion the defenders assumed the name 'M'Taggart' as part of their surnames in accordance with the conditions of the deed of entail. 8. The mansion-house of Ardwell before referred to is situated in the eight merk land of Ardwell, which is one of the subjects included in the deed of entail referred to on record. 9. The defender Sir Mark M'Taggart Stewart was at the date of the said deed of gift the leading and managing trustee under the trust-disposition and settlement of Sir John M'Taggart, and codicils thereto, referred to on record. Messrs Tods, Murray, & Jamieson, W.S., Edinburgh, were at that time, and still are, solicitors for the trustees and also for the defenders, and prepared the said deed of gift in their favour, and immediately after it was signed were, and still are, custodiers of it. The only other trustee at the date of the said deed of gift and up to the present time was, and is, Mr Charles A. Maclean, writer, Wigtown."

The pursuer pleaded—"(1) The unlawful accumulations of income being intestate succession of the said Sir John M'Taggart, one-half whereof devolved on Mrs Church as an heir *in mobilibus*, and was *in bonis* of her at her death, and disposed of by her will, inventory duty and temporary estate duty and legacy duty are due in respect of her share, and the defenders are liable therefor as intromitters with or possessors of the funds, or as persons having or taking the burden of the execution of her will or the administration of her estate. . . . (3) On a sound construction of section 2 (1) (*b*) of the Finance Act 1894, and of section 11 of the Finance Act 1900, the estate of Ardwell should be deemed to have passed on Mrs Ommanney M'Taggart's death, notwithstanding her deed of propulsion; and Lady M'Taggart Stewart, the heiress of entail in possession, is accountable for the duty leviable in respect of the property so passing. (4) Should the sum of £20,000 applied to the extinction of the debt on Ardwell be regarded as not liable to estate duty as part of the residue and accumulations passing on Mrs Ommanney M'Taggart's death, then, in ascertaining the principal value of Ardwell for the purposes of estate duty, no allowance or deduction should be made, under section 7 of the Finance Act 1894, on account of the debt paid off. (5) The residue and lawful accumulations having on Mrs Ommanney M'Taggart's death passed in the sense of section 1 of the Finance Act 1894 are chargeable with estate duty, and the defender Lady M'Taggart Stewart is liable therefor in terms of section 8 (4) of the said Act. (6) In so far as the residue and legal accumulations have been or have yet to be applied to the purchase of lands to be entailed, settlement estate duty as well as estate duty is chargeable under section 23 (16) of the Finance Act 1894, and ought to be accounted for and paid by Lady M'Taggart Stewart, the heiress of entail in possession of Ardwell. . . . (8) Under section 2 (1) (*c*) of the Finance Act 1894 the furniture and plenishing in the mansion-house of Ardwell, and the unlawful accumulations of income, including Mrs Church's share, if it belonged to Mrs Ommanney M'Taggart, must be deemed to have passed on Mrs Ommanney M'Taggart's death, and estate duty in respect thereof ought to be accounted for and paid by the defenders."

The defenders were prepared to admit that succession duty under the Succession Duty Act 1853 (16 and 17 Vict. cap. 51) was payable in respect of Mrs Church's share of the unlawful accumulations, and in respect of the entailed estate, but otherwise maintained that the pursuer's averments were irrelevant and insufficient, and the claim for estate duty on the value of the entailed estate and of the furniture and plenishing excluded by the deeds of propulsion and gift and the possession following thereon.

On 3rd January 1906 the Lord Ordinary (PEARSON) pronounced this interlocutor—"Finds (1) that the direction in the will of the late Sir John M'Taggart to accumulate the income of the residue of his estate ceased to be operative as at 13th August 1888, and that the accumulations made after that date, amounting to £49,000 or thereby, became intestate succession of Sir John M'Taggart; that his heirs *in mobilibus ab intestato* were his two daughters Mrs Church and Mrs Ommanney M'Taggart; that Mrs Church's half of the said accumulation, amounting to £24,500 or thereby, fell under the conveyance of *acquirenda* in her antenuptial contract of marriage, whereby the trustees therein named were directed to hold the trust funds, failing issue of the marriage or lawful descendant thereof, for behoof of the nearest lawful heirs of Mrs Church as at the time of her death in fee: Finds that on a sound construction of the said contract of marriage, the said sum of £24,500 or thereby was, in the event which happened, *in bonis* of Mrs Church at her death in 1877, and was carried by her will; and finds that the same is subject to inventory duty, temporary estate duty, and legacy duty accordingly: Finds (2) that the residue of Sir John M'Taggart's estate and the accumulation thereof prior to 13th August 1888 were property passing on the death of Mrs

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Ommanney M'Taggart on 25th September 1902, within the meaning of the Finance Act 1894; and that having regard to section 23, sub-section 14, of said Act, the saving clause contained in section 21, sub-section 1, thereof, does not apply to the sum of £29,626 or thereby, which his trustees have expended in the purchase of lands to be entailed as directed, nor to the balance of the trust funds now held by them for the purpose of carrying out the said direction: Finds that the said property is subject to estate duty and settlement estate duty accordingly; reserving the question raised in the pursuer's fourth plea-in-law as to the sum of £20,000 applied in extinction of debt on the entailed estate: Finds (3) that notwithstanding the granting by Mrs Ommanney M'Taggart of the deed of propulsion of the entailed lands of Ardwell and others, dated 23rd and recorded 28th May 1895, the provisions of the Finance Act 1894, section 2, sub-section 1, head B, and of the Finance Act 1900, section 11, apply so as to make the entailed lands of Ardwell and others subject to estate duty, as property passing on the death of Mrs Ommanney M'Taggart, in respect that *bona fide* possession and enjoyment of the said property was not assumed thereunder immediately upon the surrender, divesting, and disposition thereof, contained in the said deed of propulsion, and thenceforward retained to the entire exclusion of the granter, or of any benefit to her: And finds, further, that settlement estate duty is also payable in respect of the said entailed estate: Finds (4) that notwithstanding the granting by Mrs Ommanney M'Taggart of the deed of gift, dated 27th August 1894, the provisions of the Finance Act 1894, section 2, sub-section 1, head C, apply so as to make the furnishing and plenishing in the mansion-house of Ardwell, and Mrs Ommanney M'Taggart's share of the accumulations of the income arising from the residue of Sir John M'Taggart's trust estate from and after 13th August 1888, subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart, in respect that *bona fide* possession and enjoyment of the said property was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to her: And with these findings appoints the cause to be enrolled for further procedure, and grants leave to reclaim."

Opinion.—"Sir John M'Taggart of Ardwell died on 13th August 1867, survived by two daughters, Susanna (Mrs Ommanney M'Taggart) and Sarah (Mrs Church). Sir John left a will, dated in 1865, in which he directed his trustees to accumulate the income of the residue of his estate during the life of Mrs Ommanney M'Taggart, his eldest daughter. Upon her death they were directed to apply the accumulations in the first place in paying off debt secured on his entailed estate of Ardwell; and any surplus was to be expended in the purchase of lands in Wigtownshire or the Stewartry, to be entailed on the same series of heirs.

"Mrs Ommanney M'Taggart died on 28th September 1902, having survived her father for thirty-five years. The trustees had continued to make the accumulations during her lifetime, and it does not appear to have occurred to anyone that the direction to accumulate ceased to have effect on the expiry of twenty-one years after the testator's death, namely, at 13th August 1888. The accumulations made from and after that date became intestate succession of Sir John M'Taggart, and his heirs *in mobilibus ab intestato* as at the date of his death were his two daughters above named.

"The first question in the case has to do with Mrs Church's half of these 'unlawful' accumulations. Mrs Church died on 14th October 1877, having survived both her father and her husband. There was no issue of her marriage, and she left a will disposing of her whole estate. Although Mrs Church died before any of these accumulations accrued, it is not disputed that one-half of them, amounting to about £24,500, devolved on her and fell within the conveyance of *acquirenda* in her antenuptial contract of marriage. The contention for the Crown is that there having been no issue of the marriage, the purposes of the marriage contract failed, and that these accumulations were *in bonis* of Mrs Church at her death, and passed under her will. On this footing a claim is made for inventory duty, temporary estate duty, and legacy duty on the sum above mentioned. The defenders reply that the purposes of the marriage contract did not fail, that there having been no issue the marriage trustees held the fund 'for behoof of the nearest lawful heirs of Mrs Church as at the time of her death in fee'; and that it fell to Mrs Ommanney M'Taggart, her sister, as her nearest lawful heir.

"The solution of the question depends on the true construction of the contract of marriage. Do the considerations of this contract, regarded as a whole, extend to and include the nearest lawful heirs of Mrs Church, failing issue of the marriage and their lawful descendants? In my opinion they do not, though I admit the question is one of some difficulty. The defenders point out that the wife's parents were parties to the contract, and that as the deed bears, it had been agreed in contemplation of the marriage that the wife 'should settle her property and affairs in manner after mentioned,' and that her parents should come under the obligations therein contained in her favour. Then, besides the general conveyance to trustees by the wife of her *acquisita* and *acquirenda*, she specially conveyed a sum of £10,000 guaranteed by her father and mother; and the whole property was to be held by trustees for the wife's liferent use only, exclusive of the rights of Mr Church and of any future husband; and after her death for the children or issue of the marriage in fee, and failing issue of the marriage or lawful descendant thereof, for behoof of the nearest lawful heirs of the wife as at the time of her death in fee. It is said that Sir John M'Taggart had an interest to stipulate, and

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did stipulate, as matter of contract, that her money (including the above-mentioned sum of £10,000 which he undertook to apportion to Mrs Church) should be kept in the family, and that Mrs Church should have no power to will it away. It is further pointed out that power is reserved to Mrs Church by a formal writing duly tested to confer the liferent of the trust property or part thereof upon her husband if he should survive her; and it is asked why this clause should have been inserted if she had already the right to dispose of the trust funds absolutely after her death. I think this argument is founded on a misconception arising from the collocation of this clause and the position it holds in the deed; for I hold it to be clear that it is an over-riding clause empowering her to confer a liferent on her husband after her death, even against the children or heirs of the marriage. But for this clause the right of the children or issue of the marriage would have been paramount, and would upon the death of the wife have excluded all right on the part of the surviving husband; there being an express direction to the trustees to pay to the children or issue on the death of the wife. This being so, I do not find in this deed any sufficient ground for holding that the destination to Mrs Church's nearest lawful heirs is contractual. *Prima facie*, and according to the ordinary conveyancing practice of Scotland, I think it is not so, and it would in my opinion require more explicit language in the contract to take it out of the ordinary rule, which I take to be that such a destination following upon the provision for the heirs of the marriage confers no *jus crediti*, and is defeasible; see the opinions in *Ramsay*, 10 Macph. 120; *Murray's Trustees*, 3 Fr. 820. Nor do I think that the cases cited for the defenders advance the argument in any material degree, namely, *Romanes*, 3 Macph. 348; *Mackay*, 11 R. (H.L.) 10; and *Macdonald*, 20 R. (H.L.) 89; and (as to the meaning of nearest heirs) *Blair*, 12 D. 97; *Haldane's Trustees*, 17 R. 385; *Gregory's Trustees*, 16 R. (H.L.) 10. They all seem to me quite distinguishable from the case in hand. I therefore sustain the claim of the Crown on this head, subject to the ascertainment of the amount of the duty.

"The second question for decision arises on the claim of the Crown for estate duty under the Finance Act 1894, in respect of the passing of the residue of Sir John M'Taggart's estate, and the lawful accumulations thereof, upon the death of Mrs Ommanney M'Taggart in 1902. Of course the residue passed on Sir John's death in 1867 to his testamentary trustees, in whose hands also the accumulations accrued during the twenty-one years after his death. But it appears to me that this does not solve the question for decision, which is, whether the property passed on Mrs Ommanney M'Taggart's death in 1902, within the meaning of the Finance Act 1894, section 1. It is true that under that Act, when property has once passed under a settlement, duty is not again payable until it passes out of settlement into the person of one competent to dispose of it. But I do not think that the operation of the statute is necessarily excluded by the consideration that if it had been enacted earlier, estate duty would have been payable in respect of this property at an earlier stage. I think that depends not upon what might have happened, but upon whether the statute itself recognises the circumstances which exist in this case as conferring an exemption from duties which would otherwise have been payable according to its terms. The question really turns upon whether section 21, sub-section 1, applies to this case, and in my opinion it does not. It is true that Sir John's trustees paid inventory duty on the residue of his estate shortly after his death. But the saving or exemption in section 21, sub-section 1, is enacted only in respect of settled property. Now, in the clause applying the Act to Scotland (section 23, sub-section 14), it is enacted that 'the expression settled property shall not include property held under entail'; and so far as regards that part of the fund in question which was held by the trustees for the purpose of purchasing land to be entailed, it must, I think, be regarded as property held under entail (see the opinions in *Lord Advocate* v. *Stewart*, 4 Fr. (H.L.) 11, as to the meaning of sub-sections 14 and 16). I hold, therefore, that to that extent section 21 does not apply, and that the claim of the Crown must be sustained. This, however, leaves over for separate treatment the sum of £20,000, which, in pursuance of the primary purpose of the trust, was applied out of residue in paying off the debt upon Ardwell. It has not been made clear to me on what ground this sum is to be held as subject to estate duty. But, as is indicated on record, there may be a question as to whether it is deductible in valuing the lands of Ardwell for the purposes of estate duty—(plea 4 for the pursuer). This question was not developed in the argument, and I presume that it was intended to be reserved for the adjustment of the account.

"The third group of questions relate to the effect of certain transactions which took place in 1894 and 1895 between Mrs Ommanney M'Taggart on the one hand and the defenders (her son-in-law and daughter) on the other. These took shape in three deeds. The first was a deed of gift by Mrs Ommanney M'Taggart in favour of the defenders, dated 27th August 1894, bearing to be granted for certain good causes and considerations, and out of love, favour, and affection. By this deed she conveyed and made over to the defenders her whole personal and moveable estate and effects then belonging or addebted to her, including sums of money, bonds, shares, and other investments, and her furniture and plenishing in Ardwell house, and the live and dead stock and crops at Ardwell and on the home farm. The second deed was a minute of lease dated 3rd October 1894, by which she let to the defenders the mansion-house of Ardwell, and the stables and offices, gardens and policies, at a rent of £100 a year, the lease to be for a year from

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Whitsunday 1894, and thereafter to be determinable by either party on six months' notice. The third deed, which superseded the lease, was a deed of propulsion of the entailed lands and estate of Ardwell, by which, on the narrative that she was heiress of entail in possession of that estate and that her daughter, the defender Lady M'Taggart Stewart, was the heiress next entitled to succeed, she disponed the estate to her daughter and the heirs-male of her body and to the other heirs called in the deed of entail. This deed of propulsion was dated 23rd and recorded on 28th May 1895.

I consider first whether estate duty is due on the passing of the entailed estate of Ardwell to Lady M'Taggart Stewart upon the death of her mother in 1902, or whether the deed of propulsion affords a good answer to the claim. This is a case of property in which the deceased had an interest ceasing on her death; but by section 2 (sub-section 1, *b*) of the Finance Act 1894 such property is to be regarded as passing on the death, within the meaning of section 1. Then the case of such property having been surrendered during life by the deceased to any person entitled to an estate or interest in remainder or reversion in such property, is dealt with by section 11 of the Finance Act 1900. That section enacts . . . [*quotes sub-section* (1) *of section, supra*] . . . The section further provides that it shall apply in Scotland to the propulsion of the fee under an entail. Now, the minute of admissions shows that Mrs Ommanney M'Taggart had previously been in use for some years to have the defenders living with her during a part of every year at Ardwell house, and that she was in use to go with them to London and Southwick; and that after the deed of propulsion in 1895 she lived on at Ardwell in family with the defenders, paying her own maid, and (after 1901, when she suffered an accident) occupying one special room in the house and being attended to by the defenders and their family. It is admitted, on the other hand, that while Mrs Ommanney M'Taggart had been in use to receive the rents, pay all wages, and generally to manage the estate through a factor down to the date of the deed of propulsion, after that date this was all done by Lady M'Taggart Stewart, with the exception above mentioned. Now, it may well be said, upon these facts, that in a very real sense *bona fide* possession and enjoyment of the property was assumed by Lady M'Taggart Stewart immediately upon the propulsion, and thenceforth retained by her. But that is not enough to bring the case under the exempting provisions of the section. The possession and enjoyment of the property must have been immediately assumed and thenceforward retained 'to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.' Now, upon the admissions, I cannot affirm that that was the position here. It is said that Mrs M'Taggart was virtually or practically excluded, and that any benefit remaining to her was so small as to be negligible. Having regard to the minute of admissions, I do not think it was so small as was represented in argument; but anyhow, the words of the section appear to me to have been carefully selected so as to avoid all questions of degree, and to bring the matter to the stringent but simple test of 'entire exclusion.' It is further argued that the property or interest surrendered by the deed of propulsion should not be regarded in the question of liability to duty as one and indivisible; and the duty should only attach to so much of it as was enjoyed by her, either alone or jointly with others. This view, it is said, would exclude from liability to duty the whole estate except her own room, or except the mansion-house, or except the eight merk land of Ardwell, which is the parcel of ground on which the mansion is situated. I think that the statute regards the thing surrendered as indivisible, and that if any benefit is retained or enjoyed in point of fact the whole claim for exemption falls.

"The remaining questions have to do with the claim for estate duty in respect of the furniture and plenishing in the mansion-house of Ardwell, and in respect of Mrs Ommanney M'Taggart's half of the 'unlawful' accumulations of income. These bring in for consideration a statutory provision (Finance Act 1894, section 2, sub-section 1, *c*), which, while it applies to a different subject-matter, is substantially the same in intention and effect as that which I have just considered. It is a typical example of the difficulties which follow on legislation by reference, for it involves the combination of two clauses in the Inland Revenue Acts of 1881 and 1889, and the introduction into the combined clause of several important drafting amendments. The result is a clause which does not appear in any statute, but which will be found in the 5th edition of Hanson's Death Duties, p. 110; and the effect of it is to include as liable to estate duty 'property taken under any gift whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.' Now, it is admitted by the defenders that both the furniture and plenishing in Ardwell House and Mrs Ommanney M'Taggart's half of the 'unlawful' accumulations passed to them under the deed of gift which was dated 27th August 1894. As to the furniture, the argument is substantially the same as that which I have just dealt with as regards the entailed estate itself. There is a total gift of the furniture, and there is not in point of fact an assumption and retention by the donee of the possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to her. As to the accumulations, they were accruing year by year in the hands of the trustees, and although they were 'unlawful' this did not occur to anyone until after Mrs Ommanney M'Taggart's death. For that very reason none of the parties supposed that they

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were included in the deed of gift, and they were in fact retained by the trustees until after Mrs M'Taggart's death, when they were handed over to the defenders. Certainly this is very far from the 'possession and enjoyment assumed by the donee immediately upon the gift,' which is necessary to satisfy the requirements of the statute. All that can be said is, that the terms of the gift were wide enough to cover this fund; and that although apparently no formal intimation of the deed of gift was made to Sir John M'Taggart's trustees, yet (as set forth in the minute of admissions) the defender Sir Mark Stewart was at the date of the deed of gift the leading and managing trustee under Sir John's will, and his solicitors were the trustees' solicitors and also custodiers of the deed of gift which had been prepared in their office. Even, however, if this be held as equivalent to intimation and to a transfer of possession of the subject of the gift, it cannot possibly be represented as amounting to the 'enjoyment' of it, which is one of the requirements of the statute. I therefore sustain the claim of the Crown on this head also."

The defenders reclaimed, and argued—(1) *Mrs Church's Share of Unlawful Accumulations.*—The marriage contract of Mrs Church was a document containing a contract between the spouses and the wife's parents who were parties thereto. Her share of the "unlawful" accumulations passed to her sister under the destination therein to nearest lawful heirs. That the deed was contractual was shown by its terms and the carefully selected series of heirs. There was also the extraneous obligation by the parents to pay £10,000 on the condition of the daughter's surrender of her expectations which were to be settled under the destination aforesaid. The power to liferent her husband in the trust estate was unnecessary if the destination to nearest lawful heirs was revocable. The cases of *Blair* v. *Blair*, November 16, 1849, 12 D. 97; *Haldane's Trustees* v. *Sharp's Trustees*, January 30, 1890, 17 R. 385, 27 S.L.R. 303; and *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787, showed that nearest lawful heirs here meant heirs *in mobilibus*, viz., Mrs M'Taggart; and the cases of *Lyon* v. *Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568 (*disting.* the case of *Watt* v. *Watson*, January 16, 1897, 24 R. 390, 34 S.L.R. 267); *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, 9 S.L.R. 106; and *Murray' Trustees* v. *Murray*, May 31, 1901, 3 F. 820, 38 S.L.R. 598, showed that a destination in a marriage-contract to persons neither ascendants nor descendants was not necessarily testamentary and revocable but might be binding. The contractual specialties in the present case withdrew it from the general rule laid down in the case of *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88, 31 S.L.R. 279. The "unlawful" accumulations therefore passed under the marriage-contract destination and succession duty only was due. (2) *Residue and Lawful Accumulations.*—As to the claim by the Crown for estate duty on the residue and lawful accumulations under Sir John M'Taggart's settlement which it was contended passed at the death of Mrs Ommanney M'Taggart in 1902, the corresponding duty had already been paid in 1867, and consequently, under section 21 (1) of the Finance Act 1894, there was no liability for estate duty. Granted that the Act of 1894 by section 23 (14) enacted that "the expression settled property shall not include property held under entail," it did not apply, since the property here in question might never have been entailed, since the heirs on whom it was to have been entailed might have died before the time for entailing had come and so defeated the trust purposes. In view of the case of the *Lord Advocate* v. *Stewart*, May 15, 1902, 4 F. (H.L.) 11, 39 S.L.R. 617 (*sub voce Lord Advocate* v. *Sprot's Trustees*) there could be no such constructive entail. Here no one could have carried out a disentail, which was the true test, and there was no beneficial enjoyment in the last owner which was necessary to passing under the Act. The fund was simply contingently settled estate and duty was not exigible under the Act of 1894. (3) *Entailed Estate and Moveables Gifted.*—As to the effect of the deed of gift and the propulsion of the fee of the entailed estate, these absolutely divested the donor and granter thereof; possession was taken of the moveables physically, and by transference of the stocks and shares, and of the estate by infeftment. The property would have been open to the diligence of the donees' creditors, and the donor was entirely excluded in the sense of the Finance Act 1894. Her continued residence in the mansion-house was merely that of a guest, and the statutory requirement as to exclusion was fulfilled. (4) *Unlawful Accumulations.*—As to the "unlawful" accumulations, they were carried by the deed of gift. That deed was in favour of Sir Mark Stewart, one of the trustees of the deceased Sir John M'Taggart, to whom consequently no formal notice was necessary. It was also known to the trustees' agents, for they prepared and preserved the deed. Such knowledge gave the deed the force of an intimated assignation—*Jameson* v. *Sharp*, March 18, 1887, 14 R. 643, 24 S.L.R. 453 (*sub voce Mantach* (*Davidson's Trustee*) v. *Sharp and Others*); *Browne's Trustee* v. *Anderson*, December 7, 1901, 4 F. 305, 39 S.L.R. 226; and *Paul* v. *Boyd's Trustees*, May 22, 1835, 13 S. 818—and divested the donor. Duty was not therefore exigible.

Argued for the respondents and pursuers—(1) *Mrs Church's Share of Unlawful Accumulations.*—The share of "unlawful" accumulations falling to Mrs Church passed by her will. The case of *Murray* v. *Murray's Trustees*, *ut supra*, established the rule, that destinations in a marriage contract to others than ascendants and descendants on the dissolution of the marriage without issue were testamentary and revocable, and the present case fell within that rule. This general rule was also contained in *Macdonald* v. *Hall*, *ut supra*, per Lord Watson.

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There was nothing in the parents being parties to this deed; it was to be interpreted according to the cases, or if it had been intended that this destination, contrary to rule, was to be irrevocable, that should have been expressed without ambiguity. The duties sued for were therefore due. (2) *Residue and Lawful Accumulations.*—As to the residue of Sir John M'Taggart's estate and the "lawful" accumulations thereon, that passed in the sense of sec. 1 of the Finance Act 1894 on Mrs Ommanney M'Taggart's death—Soward's Estate Duty, 4th ed. 105; till then it could not be known who should take it. Settled estate was such as was in trust for any person by way of succession; therefore this was not such settled estate as came under the exemption granted by sec. 5 (2) or sec. 21 (1) of the Finance Act 1894, and the definitions in sec. 22, sub-sec. 1, (H) and (I), could not be applied. In any event there was a "cesser of an interest" in the sense of sec. 2 (1) (*b*) of the statute—*Attorney-General* v. *Beech*, [1899] A.C. 53, and *Earl Cowley* v. *The Commissioners of Inland Revenue*, [1899] A.C. 198, *per* Lord Macnaghten, 211. The three requisites to "passing" were (1) the existence of the property at date of death; (2) a change of hands; (3) that the change should be at a point of time determined by the death, whether the person deceased had an interest or not; and these requisites were present here. The exemption granted by sec. 21 (1) to property settled prior to 1894 which had paid a duty, did not apply, for this was entailed property which was excluded by sec. 23 (14). It had been argued not that it was not entailed but merely that it could not be disentailed. (3) *Entailed Estate and Moveables Gifted.*—The deed of propulsion of the estate and the deed of gift had not been followed by the entire exclusion of the granter from all enjoyment in the sense required by sec. 11 (1) and (2) of the Finance Act 1900, so as to relieve from liability for estate duty. (4) *Unlawful Accumulations.*—The constructive intimation of the transference of the "unlawful" accumulations to Sir Mark Stewart as a trustee was of no effect, since he was without knowledge that they came under the deed of gift at all.

At advising—

LORD PRESIDENT—I do not consider it necessary to recapitulate the facts of this case, as they are most accurately and succinctly given in the note of the Lord Ordinary. On the first question I agree with the result at which he has arrived and the grounds on which he has put his judgment. The argument of the reclaimer was based entirely on the fact that the father Sir John M'Taggart was a party to Mrs Church's marriage contract. I do not think that meant more than this, that he was content to become bound to ensure a certain provision to Mrs Church, which provision should be destined in the way in which the law of Scotland holds the destination granted shall be construed. It is a natural and indeed an every day occurrence for a parent to be a party to his child's marriage contract, but I have never heard it before suggested that that fact altered what are otherwise well understood rules of construction, and accordingly if it was wished to make a destination to heirs whomsoever of the spouse from whose side of the family the money came, not defeasible but a true *jus crediti*, I think that would have to be expressed in clear and unambiguous language. On this point therefore I am of opinion that the Crown should prevail.

On the second point also I agree with the result which the Lord Ordinary has reached, but I propose to rest my judgment on a different ground. For an explanation of the functions of the first and second sections of the Finance Act I refer to the judgment of Lord Macnaghten in the House of Lords in the case of *Lord Cowley*. Now, it appears to me that the residue and the lawful accumulations did not "pass" on the death of Mrs Ommanney M'Taggart. They had passed on the death of Sir John, but that is of no moment, because Sir John died before the passing of the Finance Act. All that happened on the death of Mrs Ommanney M'Taggart was that the direction then came into effect for the trustees to pay. But then, although they did not pass, I am of opinion that in view of the second section they were "deemed to pass," because in terms of that Act (*b*) they were property in which a person other than the deceased (*i.e.*, the trustees) had an interest which ceased on the death of the deceased, and duty falls to be paid on the extent to which a benefit accrues from the cessor of that interest, *i.e.*, upon the whole amount which then becomes a benefit to the heir of entail. The question of exemption under section 21 (1) does not arise in this view, and it is obviously no answer to say that if the Finance Act had been in force at Sir John's death settlement duty would have been paid and no more would have been exigible at Mrs Ommanney M'Taggart's death. I think therefore that on this point the Crown must prevail.

Upon the third point I am unable to agree with the result at which the Lord Ordinary has arrived. The question is a question of fact which I am bound to dispose of as a jury upon an issue of fact. Now, the facts here are not left to be drawn by inference from testimony; they are settled by a joint minute of admissions. This seems to me to exclude all inference except such as falls to be drawn from the terms of the admissions themselves. What then do we find? First, we find that seven years before her death Mrs Ommanney M'Taggart, so far as conveyance is concerned, made a complete transference of her property. The conveyance was completed in every way it could be—infeftment was taken on the heritable property—in the case of incorporeal moveables which required written transference, such written transference was effected by transfers of stocks and shares, and in the case of corporeal moveables, physical possession was taken of the furniture. No one doubts that supposing, for instance, in 1900 Lady M'Taggart

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Stewart had become bankrupt, her creditors could have sold the stocks and shares and the furniture and attached the rents of Ardwell. As to all this the Lord Ordinary takes the same view, but his Lordship points out that the statute demands something more, viz., that the possession and enjoyment of the thing transferred must be assumed by the transferree and retained by him "to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise"; and he holds that the fact that Mrs Ommanney M'Taggart continued to occupy a bedroom in Ardwell and to have the use with the rest of the house party of the public rooms shows that she was not entirely excluded from any benefit. In his judgment on this point the Lord Ordinary treats the matter as if it was one of degree, and says that by using the general words "benefit" and "otherwise" the statute says that greater or less degree is not to make a difference. In this view I agree. If it once comes to a question of degree I think the Lord Ordinary's view of the statute is right. But before it comes to a question of degree there is I think something else to be noticed. I hold it clear that the benefit from which the cedent must be excluded must be a benefit which was part of his property before the cession. Any other reading would I think drive the clause mad, because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of duty is held as non-existent. It therefore in the end comes to be a question of fact whether the occupation of the bedroom and other rooms of the house which Mrs Ommanney M'Taggart had after the cession is in truth the same as that she had before. It seems to me that the admissions in the joint-minute show conclusively it was not. Before the cession her occupation was one of the incidents of her proprietorship; after, it was only the privilege of a guest. To say in general terms, as was said in the argument for the Crown, that she "got the good of the estate" as much after the cession as before seems to me to beg the question. Very likely her actual enjoyment of life was not made less because she no longer pocketed the rents or sat at the head of the table. I do not think one can analyse existence in such a fashion. Two of the prime necessities—air and sunshine—never depended on her proprietary rights. The question seems to me always to revert to a simple question of fact, namely, after the cession was she the old proprietrix retaining a benefit of her old estate, or was she a guest getting as a guest what the new proprietrix chose to give her. As a juryman reading the minute of admissions I pronounce unhesitatingly for the latter view. On this point I am therefore of the opinion that judgment should go against the Crown.

There remains, however, one other matter to dispose of which the Lord Ordinary in the view he took was not obliged to consider. I allude to the position of Mrs M'Taggart's half of the illegal accumulations. These had fallen to Mrs M'Taggart but nobody had adverted to it. They were carried by the generality of the words in the deed of gift, but then as no one had thought of it no further steps were taken to carry into effect the transference. It was argued for Lady Stewart that as Sir Mark knew of the deed of gift, and as he happened to be a trustee of Sir John, this knowledge was equivalent to a formal intimation to the trustees. I doubt if this was sufficient, but at any rate I think such an implied intimation, without anything more, falls quite short of the assumption of possession by the transferee which is necessary under the statute, and which was really and effectively done in the case of all the other property falling under the deed of gift.

LORD M'LAREN—I concur.

LORD KINNEAR—I also concur.

LORD PEARSON—I agree with your Lordships on the first point arising on the construction of the marriage contract of Mr and Mrs Church.

I also agree that duty is payable in respect of the residue and the "lawful" accumulations as on the death of Mrs Ommanney M'Taggart. I have some difficulty in adopting your Lordships' ground of judgment on that part of the case, because I think it really assumes that the fund produced by the residue and the "lawful" accumulations was settled property within the meaning of the Act, that being the most familiar case to which the enactments as to the cesser of an interest apply. This view elides the application of the provisions of sec. 23, sub-secs. 14 to 17, as to Scotch entailed estate, which seem to me to apply here. But whichever ground of judgment is adopted, the result, I take it, is the same.

On the question as to the effect of the deed of gift and the deed of propulsion I regret I am unable to concur in the judgment proposed, so far as it is adverse to the Crown. I may be excused from going into the subject at length, as I have already done so in the note to my interlocutor. But I may say that in my view the sections have been carefully framed so as to avoid as far as possible all questions of degree, and to bring the matter to the simple test of "entire exclusion." For my part I think the main difficulty in applying the statute to the case of a complex gift, such as we have here, lies in ascertaining how far the subject-matter of the gift is to be regarded as one and indivisible, when you come to apply to it the statutory words as to the possession and enjoyment of the donee and the entire exclusion of the donor. But these difficulties are here in great measure avoided by the circumstance that the claim is limited to three subjects —the entailed estate, the furniture and plenishing, and one-half of the "unlawful" accumulations. Each of these may in my opinion be regarded as a *unum quid*, and as to each the test provided by the statute

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itself is of comparatively easy application. The subject of the gift is to be chargeable with duty unless the *bona fide* possession and enjoyment of it shall have been assumed by the donee, and retained by him to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. Applying these words to the admitted facts, I hold that the whole claim for duty on this head should be sustained.

The Court pronounced this interlocutor—

"Affirm findings (1) and (2) in said interlocutor; *Quoad ultra* recal finding (3), and in place thereof find that the provisions of the Finance Act 1894, section 2, sub-section 1, head *b*, and of the Finance Act 1900, section 11, do not apply so as to make the entailed lands and others subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart; and find further that settlement estate duty is not payable in respect of the entailed estate, but that succession duty is payable: Recal finding (4), and in place thereof find that the provisions of the Finance Act 1894, sec. 2, sub-sec. 1, head *c*, do not apply so as to make the furnishing and plenishing in the mansion-house of Ardwell subject to estate duty as property passing on the death of Mrs Ommanney M'Taggart: Further find that Mrs Ommanney M'Taggart's share of the accumulations of the income arising from the residue of Sir John M'Taggart's trust estate from and after 13th August 1888 is subject to estate duty as property passing on her death: Find no expenses due to or by either party, either in this Court or in the Outer House, and remit to the Lord Ordinary in Exchequer Causes to proceed as may be just."

Counsel for the Reclaimers and Defenders—The Dean of Faculty (Campbell, K.C.)—Clyde, K.C.—Earl of Cassilis. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents and Pursuers—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue.

Wednesday, March 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GRANT *v.* CITY OF EDINBURGH AND OTHERS.

Property—Common Property—Clause Prohibiting Pro Indiviso Proprietor from Suing a Division.

A feu-charter contained a grant of a *pro indiviso* share of certain subjects with a clause prohibiting the feuar from suing a division. *Opinions* that the prohibiting clause was of no effect, at least as against a singular successor in the feu.

Property—Common Property and Common Interest—Rights of Proprietors—Square and Street Held in Common Property by Proprietors of Adjoining Houses—Conveyance of Square and Street to Improvement Trustees—Extinction of Common Interest.

In the feu-charters of the houses round a square there was conveyed to the individual proprietor by bounding titles (1) his house and (2) in common property the street and garden ground in the centre of the square. The individual proprietors sold their interests in the street and garden ground to Improvement Trustees.

Held (1) that the individual proprietors in addition to their interest as *pro indiviso* proprietors had had a common interest in the street and garden ground, but (2) that such common interest had been extinguished by the conveyances of the common property to the Improvement Trustees.

Property—Common Property—Rights of Proprietor—Servitude—Sale of Interest in Common Property with Restriction on Use—Validity of Restriction.

The individual proprietors of a subject held in common property, by separate conveyances sold their interests to trustees stipulating that the subject should not be built upon. *Held* that, at least as against a singular successor of the trustees, the restriction was of no effect inasmuch as it was not competent for a *pro indiviso* proprietor to impose a servitude *non aedificandi* on the common property, and consequently that one of the former proprietors had no title to prevent building over part of the subject.

On 5th February 1904 John Grant, bookseller, 31 George IV Bridge, Edinburgh raised an action against (1) the Provost, Magistrates, and Councillors of Edinburgh, (2) the Incorporated Edinburgh Dental Hospital and School, (3) John Falconer King, analytical chemist, Edinburgh, and (4) the Governors of George Heriot's Trust. In it he sought to have it declared, *inter alia*, "(*first*) That the pursuer, as proprietor of the subjects known as 31 and 33 George IV Bridge, Edinburgh, and the south portion of the tenement known as 35 George IV Bridge there, and the possession had by the pursuer's authors and by him under his and their titles, is entitled to erect on that area or piece of ground immediately to the south of the said subjects, situated between the southern wall thereof and the northern boundary of Chambers Street, . . . buildings rounded on an angle similar to that of the tenement now existing on the east corner of Chambers Street, within the City of Edinburgh, and according to plans and elevations submitted to and approved by the said defenders, the Lord Provost, Magistrates, and Councillors of the City of Edinburgh."

The pursuer, *inter alia*, pleaded—"(3) The opposing defenders have no right, title, or interest to oppose the declarator concluded

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for. (4) The defenders the Lord Provost, Magistrates, and Town Councillors of the City of Edinburgh, are barred *personali exceptione* from opposing the declaratory conclusions of the summons."

The defenders the Incorporated Edinburgh Dental Hospital and School stated that they had an agreement with the pursuer that if the above declarator was granted he should only exercise the rights declared with their consent and concurrence, and subject to that restriction concurred in moving the Court to grant the declarator.

The defenders George Heriot's Trust, *inter alia*, pleaded—"(4) The present defenders having a right of property in common with others in the area of ground referred to in the summons, the pursuer is not entitled to decree of declarator as craved. (5) The area in question being affected by a real condition prohibiting division or building, the pursuer is not entitled to decree of declarator as craved. (6) *Separatim*, the present defenders being in right to enforce a servitude *non ædificandi* affecting the ground in question, the pursuer is not entitled to decree of declarator as craved."

The following narrative of the facts of the case is taken from the Lord President's opinion:—"This is an action of declarator at the instance of John Grant, proprietor of heritable subjects presently known as 31 and 33 George IV Bridge, and it seeks to declare the pursuer's right to build on the strip of ground 41 feet in length and 39 feet in breadth, or thereby, which lies between his premises and Chambers Street. The defenders called were the Lord Provost, Magistrates, and Town Council of Edinburgh, being the successors of two bodies of Improvement Trustees, the Governors of George Heriot's Trust, Mr John Falconer King, and the Edinburgh Dental Hospital, these parties between them representing the whole proprietary interest in Brown Square as will be presently explained. The pursuer's contention was resisted only by the two first-mentioned defenders. The Lord Ordinary repelled the defence as far as proposed by the Lord Provost and Magistrates, and they have acquiesced in that interlocutor, but he sustained the defence for Heriot's Hospital, and it is against that interlocutor that this reclaiming note is taken.

"The facts of the case are not very intelligible without a plan, but they may briefly be stated as follows:—In or about the year 1760 the ground in question which formed portion of a piece of land known by the name of 'Society' was acquired by an Edinburgh builder of the name of Brown. Upon this ground he constructed a square of houses with a pleasure ground enclosed by railings in the centre to which he gave the name of Brown Square. He had seemingly got orders for most of the houses before he embarked in his speculation, and having constructed them and having laid out the street and pleasure ground, he granted dispositions to the various purchasers. I shall presently advert to the titles which were given, but in the meantime it is enough to say that the ten purchasers who got dispositions from Brown, and whose houses, marked from 10 to 19, formed the west and north of the square, between them possessed all right to both street and garden of the square. In 1827 an Act of Parliament was passed which constituted Improvement Commissioners, who, *inter alia*, were empowered to form what is now known as George IV Bridge. In order to do this they acquired the whole of the west side houses of Brown Square, and also the westmost of the northern side, No. 15. This, therefore, left the only other proprietors Nos. 16, 17, 18, and 19. George IV Bridge was formed on a higher level than Brown Square. Its parapet railing formed the west side of Brown Square which otherwise, except the slicing off of a minute corner in the north-west angle, remained unaltered. In 1867 another Improvement Act was passed. The Commissioners were the Lord Provost and Magistrates of the City of Edinburgh, but although they were treated at that time as a separate body, *qua* Improvement Trustees, it is not matter of controversy that the present Lord Provost and Magistrates have by subsequent legislation in them all the rights and are subject to all the liabilities which pertained to the Improvement Trustees of 1827 and 1867. The purpose of the Act of 1867 was, *inter alia*, to form what is now known as Chambers Street, connecting the line of the Bridges on the east with George IV Bridge on the west. Chambers Street as executed is situated so far on the ground formerly occupied to the south of Brown Square including the whole of the central pleasure ground. By this time, 1867, the state of the proprietorship of Brown Square was as follows:—No. 16 being the westmost house but one on the old north side, plus a portion of old No. 15, was in the hands of Miss Currie and others, No. 17 was in the hands of Bartholomew, No. 18 in the hands of M'Caskie's Trustees, and No. 19 in the hands of Crombie. All else was in the hands of the Lord Provost and Magistrates as successors of the Improvement Trustees of 1827. Accordingly, the Lord Provost and Magistrates took conveyances of their rights in the Square from the various parties residing in it. I shall advert particularly to this hereafter, but it is sufficient now to say that in each of the conveyances so taken the Lord Provost and Magistrates bind themselves not to object to each of the proprietors bringing forward the line of his building to Chambers Street which now occupied the area of the old pleasure ground, and which thus formed a means of access to the other streets of the town. None of them did so at that time, and the piece of street between the old pleasure ground railing and the houses was rearranged by the Magistrates on a slope so as to accommodate itself to the altered level of Chambers Street."

The original disposition of No. 19 Brown Square by Brown, which was to one David Dalrymple, advocate, is, so far as necessary,

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given in the opinion of the Lord President, *infra*.

The disposition dated 13th and recorded 14th May 1873, granted by Crombie, the then proprietor of No. 19 Brown Square, and author of the defenders, George Heriot's Trust, in favour of the Improvement Trustees of 1867, ran thus:—"I, John Crombie, dyer in Edinburgh, in consideration of the sum of £100 sterling paid to me by 'The Trustees under the Edinburgh Improvement Act 1867,' do hereby sell, alienate, dispone, convey, assign, and make over from me, my heirs and successors, to the said Improvement Trustees, their successors and assignees for ever, according to the true intent and meaning of the said Act, heritably and irredeemably, All and Whole the street and also the enclosed green area or pleasure ground situated in Brown Square, as shown on the plan annexed and signed as relative hereto, in so far as the same belongs to me in common with the other proprietors thereof, which street and green area or pleasure-ground are distinguished on the plan referred to in the said Improvement Act by the No. 71, Area I., together with all rights and pertinents thereto belonging, and all such right, title, and interest in and to the same as I and my foresaids are or shall become possessed of or are by the said Act empowered to convey, which subjects and others are parts of All and Whole that house or tenement of land in the Society, or Brown's Buildings, of Edinburgh, and ground whereon the same is built, enclosed green area or pleasure-ground, all situated in the county of Edinburgh, more particularly described in the instrument of sasine in my favour, dated the 12th and recorded in the Particular Register of Sasines, Reversions, &c., within the sheriffdoms of Edinburgh, Haddington, Linlithgow, and Bathgate, the 13th days of June both in the year 1835, but always with and under the burdens, conditions, provisions, restrictions, and declarations specified, contained or referred to in my titles to the said subjects and others so far as the same are now applicable, and also under the real burdens following, *videlicet*, that the ground hereby disponed shall only be used by my said disponees and their foresaids for the purpose of forming a roadway or street betwixt South Bridge Street and George the IV Bridge in virtue of said Improvement Act, all as shown on said plan, but they shall not be entitled to build upon the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house, but the plans and elevations of any buildings so to be erected shall be submitted to my disponees for their approval before execution. . . ."

On 10th November 1904 the Lord Ordinary (KYLLACHY) pronounced this interlocutor —"Finds that the authors of the pursuer were in 1874 proprietors of certain buildings at the north-west corner of Brown Square, which buildings occupied in whole or part the sites of the two houses formerly Nos. 15 and 16 Brown Square, and had a frontage to Brown Square comprising the whole frontage of the said house No. 16 and part of the frontage of the said house No. 15: Finds that as such proprietors, and as possessing or being held to possess in common with the other proprietors on the north side of the Square proprietory rights and interests in (1) the street (or pavement and causeway) on the north side of said Square, and (2) the enclosed pleasure ground then forming the centre of said Square but now incorporated in the new street called Chambers Street, they (the pursuer's authors) did by disposition dated in December 1874 and January 1875, dispone to the Edinburgh Improvement Trustees acting under the Improvement Act of the year 1867, their whole right and interest in the said street and pleasure ground, and did so in consideration (1) of a pecuniary payment, and (2) of certain reserved rights and privileges including (*a*) a restriction against the said trustees either building on the said street—that is to say, the said carriageway and pavement—or using any part of the common ground to which the disposition applied otherwise than for the purpose of forming the said proposed street now called Chambers Street, and (*b*) an engagement by the said trustees to permit or at all events not to object to the pursuer's said authors and their successors bringing forward their buildings at any time they should think fit to the north building line of Chambers Street, being a line substantially coincident with the northern boundary of the said pleasure ground forming the centre of the Square: Finds that the pursuer now proposes and has brought the present action to declare his right to bring forward the said buildings now belonging to him to the said north building line of Chambers Street, and that the other proprietors in Brown Square, with the exception only of the defenders the Governors of Heriot's Trust, who now own the house at the north-east corner of the Square, make no objection to his doing so: Finds, however, that the pursuer's said proposal is opposed by (1) the Magistrates and Town Council of Edinburgh as claiming a right of property in the ground proposed to be occupied; and (2) the said Governors of Heriot's Trust as claiming right under their titles to prevent building upon any part of the said street or pleasure ground formerly belonging in common property to them and the other proprietors in Brown Square: With respect, however, to the opposition of the said Magistrates and Town Council, Finds (1) that the Improvement Trustees under the Act of 1867 (being the Magistrates and Town Council acting separately in that capacity) had full power under said statute, and in particular, *inter alia*, under sections 16, 25, and 30 thereof, to make as part of the transaction by which they acquired the ground necessary for the construction of Chambers Street the arrangements with the pursuer's authors and the other proprietors on the north side of Brown Square which they in fact

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made; and in particular had full power to make it part of the consideration agreed to be paid to the pursuer's authors for their interest in the said ground, that the pursuer's said authors should have right without objection by the trustees or the public to bring forward their buildings to the line of Chambers Street, and thereby to close up that part of Brown Square, to the same effect as if the trustees themselves had done so at the time or afterwards; Finds (2) that in any event the objection now taken by the defenders, the Magistrates and Town Council, is barred and excluded by the said arrangement having been made, and still being a condition of the title under which the said Improvement Trustees held, and the said defenders now hold, part of the ground, now and for the last thirty years, occupied by Chambers Street; Finds (3) that the said objection is further barred and excluded by the terms of sections 114, 115, and 116 of the Act 52 and 53 Vict. cap. 106 (passed in the year 1889), whereby, *inter alia*, the Improvement Trust of 1867 was brought to an end, and its undertaking transferred to the Magistrates and Town Council, and whereby the latter became, *inter alia*, liable to fulfil the whole obligations undertaken by the Improvement Trustees so far as then unimplemented; Finds therefore that the only objection to be considered is that of the defenders, the Governors of Heriot's Trust, but with respect to said objection finds that on the just construction of the said defenders' titles, and of the disposition executed by their author John Crombie in favour of the Improvement Trustees, dated in May 1873, the defenders' said authors retained, and the defenders as his successors still retain, not only as against the Improvement Trustees and the other defenders, but as against the pursuer and the other proprietors in Brown Square, a common interest, equivalent to a servitude *non ædificandi*, sufficient to entitle them to prevent the bringing forward of the pursuer's houses, or the other houses on the north side of the Square, beyond the present line of the sunk area walls of the said houses; Finds accordingly that without the consent of the said defenders (the Governors of Heriot's Trust), the pursuer's proposed operations cannot proceed: Therefore, and in pursuance of the foregoing findings, repels the defences stated by the Magistrates and Town Council, and as against them declares and decerns in terms of the conclusion of the summons; on the other hand, sustains the defences of the defenders, the said Governors of Heriot's Trust, and assoilzies these defenders from the conclusions of the summons, and decerns."

The pursuer reclaimed. The defenders, the Provost, Magistrates and Councillors of Edinburgh, acquiesced in the Lord Ordinary's judgment. The defenders, George Heriot's Trust, appeared in support of it.

Argued for the reclaimer—The present owners of No. 19 were really claiming a servitude *non ædificandi*. No such servitude existed, nor could any evidence of it be found in the titles. The burdens referred to in the disposition by Crombie to the Improvement Trustees as being in his titles, and subject to which the property was conveyed, were the common property rights which had all perished, as the town took the property for its improvement scheme free from all burdens. The reservation made as to not building was merely *quoad* the trustees who purchased, and not *quoad* the other proprietors. There was no *jus quæsitum* here. A *pro indiviso* proprietor could not in selling his share create a servitude over the rest of the property—not at least without consent of all the other *pro indiviso* owners. The Improvement Trustees acquired the whole interest of all the *pro indiviso* owners, so that no rights were left in any of the former owners. The respondents therefore had no title to object. No independent servitude was ever created in favour of each house. The common interest of all to have the ground kept open disappeared by the act of the proprietors themselves in selling the common property to the Improvement Trustees.

Argued for the respondents—The Improvement Trustees acquired the right of the various proprietors at different times. There was no wholesale transaction with the *pro indiviso* owners. The proprietors did not dispone all their rights. The ground to the north of that acquired by the Improvement Trustees was reserved. The foundation of the respondents' title was the disposition to David Dalrymple. By that disposition a servitude *non ædificandi* was created over the common property. The respondents were in right of that servitude along with the Improvement Trustees—*Governors of George Watson's Hospital* v. *Cormack*, December 14, 1883, 11 R. 320, 21 S.L.R. 237. The various proprietors in Brown Square had more than a mere servitude; they had a common interest in the garden ground and street, entitling them to have it kept in that condition. That common interest was not conveyed to the Trustees. It was reserved to the effect at least of entitling any one of them to prevent the ground being built on. That was equivalent to a servitude *non ædificandi*. That was obviously the plain meaning of the conveyance to the Trustees. The dispositions were to be interpreted equitably, and not in a technical sense. No. 19 therefore had a servitude over the common property, and over Nos. 15 and 16 to the effect at least of preventing the ground being built on. The conveyances might not have created servitudes *de novo*, but they certainly reserved what were equivalent thereto. The following authorities were referred to—*Tailors of Aberdeen* v. *Coutts*, December 20, 1834, 13 S. 226, *aff.* 3rd August 1840, 1 Rob. App. 296; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; *Johnston* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791; *North British Railway Company* v. *Park Yard Company, Limited*, June 20, 1898, 25 R. (H.L.) 47, 35 S.L.R. 950; Bell's Principles,

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sec. 994; *Mearns* v. *Massie*, December 5, 1800, Hume's Decisions, 736.

At advising—

LORD PRESIDENT—. . . [*After narrating the facts as given supra*]—. . . The pursuer is the singular successor of Currie. He proposes now to avail himself of the arrangement with the Lord Provost and Magistrates and to put his house forward, and this he has been found in a question with them entitled to do. The defenders, Heriot's Hospital, are the successors of Crombie. They object, and their right to do so has been affirmed by the Lord Ordinary. At first sight it seems difficult to see the defenders' interest to take up this point. Their own access to Chambers Street and thence to the town in general is in no ways interfered with. It is said that the proposed building will block the oblique view of George IV Bridge, and I think the Dean added, the setting sun. That is true, but the right must be judged of by the rights in Brown Square, and it is only a supervening accident that by the formation of George IV Bridge they had an uninterrupted prospect in that direction, as when their rights were constituted the prospect was blocked by the west side of Brown Square. Their only remaining interest, therefore, seems to consist in the right of emerging into Chambers Street by going, not straight up in front of their own door where the gradient is good, but by going *via* the north west-corner of the old Square, a proceeding which cannot save an inch of distance and substitutes a very bad gradient for a good one. Yet, slender as the interest is, it is enough if the title is sufficient, though in reality it is too clear to be misapprehended that their real interest arises from the fact that they are interested in the Heriot Watt College at the east which has no legal right in the matter. The question is one of title and one of great nicety and difficulty. Now, the state of the title at the formation of the Square is accurately set forth in the joint minute which parties lodged before the second discussion. That minute sets out that by contract of feu of certain dates in 1760 and 1762, James Brown, wright in Edinburgh, acquired "all and haill those parts and portions of Society whereon the ten houses of Brown Square were afterwards built," from Jean Hamilton and John Cleghorn. By the feu contract it was provided that "it should be lawful to the said James Brown and his foresaids to divide, sell, and dispose of the subjects thereby feued out and buildings erected thereupon in parcels," and there were certain provisions about feu-duties with which I need not trouble your Lordships. James Brown, in accordance with this provision, conveyed the ten houses erected by him on the feu to certain parties. In the minute there follows a narration of the original disponees of each of the houses numbered one to ten, with which I need not trouble your Lordships. The general scope of the titles is there set out, but I shall take that in a moment when I come to look at the particular title which was the title of the author of the complainer here. Each of the ten disponees, in exercise of the right conferred upon them by the feu contract, obtained from the superior a charter in his favour containing the provisions of the disposition on which it followed, and upon the precepts contained in the said charters instruments of sasine were expede, and those instruments of sasine contained prohibitions which I shall in a little notice. The precise form of the title may be conveniently taken from the title to David Dalrymple, who is the author of the opposing party, Heriot's Hospital. David Dalrymple's title has somewhat unfortunately not been printed, because, as I shall have occasion presently to remark, at the first stages of this case the parties really pled upon the wrong deed, but it is for all practical purposes sufficiently set forth in article 3 of the statement of facts for the Governors of Heriot's Hospital, which is printed in the record. That disposition is this—"All and haill that house or tenement of land in the Society or Brown's Buildings of Edinburgh, and ground whereon the same is built, with the fore and back courts and buildings thereon and two cellars below the street on the front of the said house, and whole parts, pendicles, and pertinents thereof as the same is presently possessed by the said Mr David Dalrymple himself within the town and territory of Edinburgh and sheriffdoms thereof, now bounded and described as follows, viz.—By the passage or vennel leading from the Society to the closes called Robertson's and Scott's closes upon the east, the yard belonging to the representatives of Thomas Smith, brewer, on the north, the large house or tenement with the said buildings presently possessed by, and the property of, Mr John Swinton, advocate, on the west, and the new street on the front of the said buildings on the south part." I call your Lordship's attention to that because you see that this title begins with a conveyance of the house proper by what is indubitably a bounding charter, and the south boundary is the new street. Therefore the conveyance of the house is undoubtedly exclusive of the street. But then it goes on with a further conveyance, "As also I hereby sell and make over in favour of the said David Dalrymple and his foresaids in common property with the other proprietors of the said new buildings, the said new street and enclosed green or area of pleasure ground fronting the same in proportion to his share of the separate property before disponed, bounded as follows," and then the boundary there is given, and a north boundary, which is equivalent of course to the south boundary of the house that had just been disponed, is "by the parapet wall and iron rails in the front of the said buildings on the north." The conveyance then goes on "with all right, title, interest, claim of right, property, possession," and so on. It then proceeds to say that these are conveyed under the declaration that "it shall not be in the power of the said Mr David Dalrymple or his foresaids to pursue for a division of

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or build upon the said common property, it being agreed to by all parties concerned that the same shall remain an open area in all time coming." Now, that title (and all the other titles as I have already said were in similar terms) shows perfectly clearly what was the scheme of conveyancing under which these properties were granted and this ground laid out. The scheme was to give each house as separate property, and to give it as a subject with bounding titles, excluding by the boundaries the idea of any property in the street effeiring to the house. On the other hand, the middle ground, consisting of the street and pleasure ground, was given to all the proprietors in common. That ground again being described by boundaries excluded any idea of property effeiring to it outside the boundaries. But the property was common property. Now, clearly so long as it remained common property there could be no alteration in the scheme of its occupation, because, of course, it is familiar law that where property is held in common you cannot alter that property by disposition or otherwise without the assent of all the common proprietors. They must concur in any act done to the common property, and accordingly it made a complete protection for each of the owners, *pro indiviso*, of this common property against any action of the others which would alter the *status quo*. The framers of this disposition went one step further. They seemed to have considered that although that was so while it remained common property, yet it was incumbent upon them to prevent a change from its being common property, and accordingly they put in as a real burden this clause which I have already referred to, "It shall not be in the power of the said Mr David Dalrymple or his foresaids to pursue for a division." I have no doubt whatsoever that that clause is a nullity, although I am not altogether so surprised to find it in a conveyance of this date, because it is quite certain—as I think Lord M'Laren drew attention to in the course of the debate—that before the days of Mr George Joseph Bell the law of Scotland upon the law of common property, common interest, and joint property as distinguishable from each other was not very accurately understood, and it is the fact—as indeed our attention is called to the fact by Mr Bell himself—that the institutional writers treated these subjects somewhat inadequately. But the subject is quite well understood now. It was made very clear by Mr Bell and it has been elucidated since his day by frequent decisions, and I have no hesitation in saying that to give a thing in common property and at the same time to say that you are not to pursue a division is an impossibility according to the law of Scotland, just as great an impossibility as to give a person the property in fee and at the same time to tell him that he is never to dispose of it. The position of common property is very peculiar, because all the owners hold together in common, and they have, if I may so express it, a metaphysical right in every minutest atom of which the property is composed; and as it would be from the motive of public policy an absolutely cumbrous state of matters to keep for perpetuity where the particular joint proprietors may in time coming be each represented in their interests by a plurality of persons, the law of Scotland has always held that the state of joint property may be brought to an end at the instance of any one of the joint proprietors pursuing a division or a division and sale. Therefore I have no doubt that that provision that was put in was bad. At the same time I have equally no doubt that the scheme for practical purposes was effectually carried out, because there was another result which, I think, flowed in law. Side by side with common property, there is another right well known now to the law of Scotland which is denominated common interest. The whole matter of common property and common interest is most carefully explained by Mr Bell, and the passage in which he deals with the subject is sec. 1086 of his Principles. He there says—"A species of right differing from common property takes place among the owners of subjects possessed in separate portions, but still united by their common interest. It is recognised in law as 'common interest.' It accompanies and is incorporated with the several rights of individual property. In such cases a sale or division cannot resolve the difficulties which may arise in management; but the exercise and effect of the common interest must, when dissensions arise, be regulated by law or equity"; and then he gives as an illustration the common law in regard to flatted tenements in Edinburgh. I think that although he gives that illustration it is only an illustration, and I think that the learned editor in modern times, Sheriff Guthrie, who has edited with great advantage to the profession Bell's Principles a great many times, in the addition which he puts to that section—which of course is an addition in which he purports to give what Mr Bell himself would have given if he had seen the later decisions—puts it quite rightly and accurately represents the law. The addition which he puts is this—"Where neighbouring owners or tenants have a common interest in anything, as in a road giving a common access or an area or green for light and common use, their rights are ruled on similar principles—that is to say, by the titles constituting their rights as interpreted by law or equity. Anyone of the community is entitled to maintain the existing state of possession against the others." I think that, as I say, is an accurate description, and I think that this position emerged out of these titles, although, as I say, I do not think that it was a position which the framers so well understood as they did the question of common property. In the familiar instance which has often come before the Courts, that of laying out of squares, the property remains in the superior, and yet each of the feuars who have no property in the square has a common interest in the square; and I do not doubt that the same result follows in law

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where the only difference you make is that the property of the square instead of being in the superior is held in common property by the feuars themselves, because held in common property by the feuars themselves as here it is a perfectly separate property. It is a property in which each individual owner is only partially interested because he is only a *pro indiviso* proprietor; and therefore I see no difficulty in law in holding that the result of these titles was not only to create a right of common property in the square and the street, but also to create a right of common interest in the individual houses in the square and the street. I think a very appropriate illustration of this doctrine is the case of *Mackenzie* v. *Carrick*, reported in the seventh volume of Macpherson. It is an important case in my view, because, as I shall presently explain, I think in this case a great deal, if not everything, turns upon the true appreciation of what precisely was the true legal character of this right. The rubric of that case is as follows—"Certain feuars of urban subjects were bound by their titles to leave 'a lane or passage of the breadth of 12 feet' along the east side of their respective feus, for the use of themselves, the other feuars, and the neighbourhood. Each proprietor was taken bound to causeway the portion of the lane on his own feu. *Held* that a feuar who was proprietor of subjects on each side of the lane was not entitled to erect a bridge over it." Now, your Lordships see there, so far as the abutment of the legs of the bridge was concerned, the feuar was in perfect right, because he had the property on both sides of the lane; but he had projected a bridge over the lane, and had done it in such a way as not in any way to interfere with the use of passage; and therefore the question truly came to be whether the right was a right of servitude or a right of common interest. If it had been a right of servitude, the operation could not have been objected to, because no one said that he put the bridge at such a low level that any ordinary traffic such as goes through towns could not perfectly well have used the lane. Accordingly, the Lord Justice-Clerk, in delivering the judgment of the Court, said—"The question is, under that obligation was there created a mere right of servitude, or a right of a higher kind? I think there was not a mere right of servitude. It is frequently most difficult to distinguish, in a case of conventional servitude, between a right of servitude and a right of property, and in the treatise of Pardessus on Servitudes (sec. 231, vol. i, 525) he tells us that the first duty of a judge is to ascertain the intention of parties—a matter of difficulty from different words having equivocal meanings." His Lordship then goes on to notice the various meanings of the words "passage" and "lane" and comes to the conclusion that the right in question was one of common interest and not a mere servitude. Accordingly, following that case, I think that here there was created by this conveyance these two rights, not inconsistent, but having this effect, that even although that clause against division, as I have already said, was bad, I think the practical end was attained in the other way, and I think that the interest of the feuars here was just the same as that of the feuars in the case of *Mackenzie* v. *Carrick;* or if one wishes another illustration, just the same sort as was illustrated in a case which was quoted to us, namely, the case of *Watson's Hospital* in 11 R. 320, the only difference there being that the garden ground in that case did not belong in common to the various house proprietors, but remained the property of the superior.

Well now, that being, as I read it, the state of the title at that time, what is the next step. The next step of course is what happened in 1867. Then, as I have already recited to your Lordships, the improvement body, by this time the Magistrates, approached these various proprietors and proceeded to acquire from them their rights in order to make the street. I do not think that you can take these transactions quite apart. I think you must take the transactions as they were, as a whole, but still for the moment, not looking at anybody's title except the opposing person's title, what do we find there. I think I told your Lordships that by 1867 the present proprietors Heriot's Hospital, or the David Dalrymple of the title I have just been examining, were represented by John Crombie. Now, Mr Crombie's disposition in favour of the Edinburgh Improvement Trust is to be found in the appendix, and it runs thus—In consideration of a certain sum "I do hereby sell" &c. "all and whole the street and also the enclosed green area or pleasure ground situated in Brown Square, as shewn on the plan annexed and signed as relative hereto, in so far as the same belongs to me in common with the other proprietors thereof, which street and green area or pleasure ground are distinguished on the plan referred to in the said Improvement Act by the No. 71, Area I, together with all rights and pertinents thereto belonging. . . ." Now, a subordinate question was raised by the parties upon the mere terms of the disposition. When you look at the plan which is annexed to that disposition there is a red dotted line upon it, denoting the northmost extremity of the street which was then in embryo, namely Chambers Street, and parties contended that the words "as shewn upon the plan annexed and signed as relative hereto" meant that the disposition was limited to the portion of ground which ended, so to speak, with the north of Chambers Street, and that it did not include the portion of ground which was between the new north of Chambers Street, or the old railing of the north side of the green enclosure which is the same thing, and the houses themselves. I think it sufficient for me to say that I think that proposition cannot be supported. One cannot look at the plan without seeing that that red line is not put there as a boundary line at all to limit or tax the words of the disposition, but that it is merely put there for what it purports to be, namely, an in-

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dication of where Chambers Street is going to go. The whole plan bears that out, and I do not need to insist on the matter. Therefore I come without hesitation to the view that the disposition is "all and whole the street and the enclosed green area in as far as the same belongs to me in common with the other proprietors thereof." In other words, it is a disposition out and out of his whole rights under David Dalrymple's conveyance which represented the ground held in common—that portion of territory delimited in the original disposition by means of boundaries—excluding the house but comprehending the whole of the garden ground and the street. By so doing, what did he do? Crombie, it seems to me, parted with his whole interest, and he therefore not only, as everybody admits, gave up such rights as he had as a common proprietor, because after this conveyance he was a common proprietor no longer, but he also, it seems to me, as clearly gave up the right that he had, in my view of the titles, of common interest, and for this very good reason that by his own act the subject of the common interest had perished so far as he was concerned. He had given it up and given it away to somebody else. Accordingly, stopping for a moment at that dispositive clause it seems to me that Crombie after that was naked as regards all interest either of common proprietorship or of common interest so far as this centre space and the street were concerned. But then there is another clause which of course one must give effect to. He goes on to say—"And also under the real burdens following, *videlicet*, that the ground hereby disponed shall only be used by my said disponees and their foresaids for the purpose of forming a roadway or street betwixt South Bridge Street and George IV Bridge in virtue of said Improvement Act, all as shown on said plan, but they shall not be entitled to build upon the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house." Now, those are two perfectly different conditions. The first seeks in words to impose a servitude *non ædificandi* upon what he was conveying. I said a moment ago that I thought at the first aspect of this case the parties had taken a quite wrong view of the title, because such argument as we had at that time was directed to the supposed effect of this servitude. From the outset I had the greatest difficulty in understanding how, consistently with the law of Scotland, there could be said to be created a servitude *non ædificandi* upon a *pro indiviso* right, and I therefore was not surprised at the further hearing to find that the learned Dean of Faculty refused to argue that point, because upon principle it seems to me abundantly clear. It all flows from what I have already had occasion to advert to, namely, the peculiar metaphysical right that a *pro indiviso* proprietor has along with all the others in each atom of which the ground is composed. It is an obvious absurdity to suppose that he, the owner of that metaphysical right, can constitute a servitude *non ædificandi*, which is nothing if it is not real as against metaphysical. He has no possibility of affecting anybody's property against his own, and what would be the sense or the use of a servitude *non ædificandi* over the metaphysical conception of the piece of property belonging to him, the other pieces which go to make up the whole being *ex hypothesi* free. It is perfectly clear that the right of a *pro indiviso* owner is so peculiar that only certain things can be done with it, and I notice that with that unconscious accuracy that great writers like Mr Bell sometimes have—when perhaps they are not actually thinking of the thing at the moment—Mr Bell in his description of common property, section 1073, speaks of it thus—"Although the whole subject cannot be disposed of otherwise than by mutual consent, each joint-owner may sell his own *pro indiviso* right, the purchaser coming into his place. The right may also be adjudged to the same effect." I say unconscious accuracy, because there, you observe, he stops at conveyance and what comes to compulsory conveyance, adjudication, and he does not seem to have an idea that you could in any way burden or affect it in a way which would be practically meaningless, unless you could also affect the rights of your co-proprietors. No doubt that sentence of Mr Bell is not exhaustive, and there is no doubt that to the words adjudge and convey you may also perfectly well add the words "dispose of in security." In point of fact there is at least one reported case which gives an illustration of that fact, and that is the case of *Schaw* v. *Black*, reported in 16 Rettie, 336. *Schaw* v. *Black* is a very illustrative case as showing the principles upon which all this depends, because I think the judgment of Lord Kinnear in that case really takes precisely the same view of these rights as I do, and although Lord Kinnear's judgment was in that case reversed, I do not think the reversal affected the soundness of the principles laid down in the judgment, because the reversal went upon a specialty which does not seem to have been argued before his Lordship. Lord President Inglis and the other Judges of this Division at that time were very careful to say that they decided the case upon the specialty altogether, and did not in any way controvert Lord Kinnear's views. In that case there had been a bond and disposition in security constituted by the owner of a *pro indiviso* right, and the creditor raised an action of maills and duties in which he concluded for the share of the rents that effeired according to the proportion of the *pro indiviso* right of his cedent. The tenants did not object to pay, and the other parties did not object that he should be paid, and the only person who lodged defences and objected to the action going on was the granter of the bond and disposition in security. Now, Lord Kinnear held that the peculiarity of the position of a *pro indiviso* owner was this, that he really could not do anything

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without the assent of the other proprietors, and that therefore as they were not the co-pursuers in the action, the action must be dismissed. The Inner House, without, I think, in any way controverting the accuracy of Lord Kinnear's views as to the situation upon the title, pointed out this, which did not seem to have been argued before his Lordship, namely, that all the other parties here consented—that is to say, they were in the same position as if they were pursuers—and the only person who objected being the debtor under the bond and disposition in security, it was not in his mouth to raise any of these objections. Now, that appears to me perfectly sound, and, accordingly, it seems to me that you can only do with the *pro indiviso* right any operation which deals with that *pro indiviso* right alone. Take the case of a bond and disposition in security or a real burden for a sum of money. There is no difficulty, however many changes the property may go through, in always holding that these burdens affect your own share, because, supposing there is an action of division, as always must be competent, there is no conveyancing difficulty in holding that the real burden or the bond and disposition in security, which began life by sticking to the *pro indiviso* right, may go on with the same reason to stick to the right which the person gets instead of the *pro indiviso* right, namely, the right to a certain separate share of the property. But how can you apply that to a thing like a positive servitude. Supposing you have a piece of land in *pro indiviso* property and go through an action of division in the old style, what would happen? What was done was that you had a scheme of division which a jury settled, and after the lots had been settled as representing the various *pro indiviso* interests, lots were drawn and the particular piece of property which came to belong to any *pro indiviso* owner in severalty was settled by lot. Could there be a more absurd result than that this so-called positive servitude, which is of no use, unless it is one over the property as a whole, then came to apply to the particular lot which came to belong in severalty to the old *pro indiviso* proprietor—a lot which might be at the other end of the territory as far as the separate property was concerned. Therefore for all these reasons I think it abundantly clear that this clause in the disposition of 1873 did not effectuate a servitude. Now, that being so, it seems to me that the objector's title here is gone. It may be said that it was a foolish conveyance in 1873, upon the views that I have taken, because, as he had parted with the street in front of his own house, he might have had it occupied by buildings, and not have been able to get into his house at all. The answer to that is a practical one. He knew perfectly well whom he was parting to—to a body of Improvement Trustees—and also, as far as they were concerned, he took them bound, as in a question with them, that he himself would be allowed to build on the piece of street exactly opposite his own ground and come out to Chambers Street. I am quite aware that upon the principles of conveyancing that would not be a good real right, for the reasons I have already stated, available as against somebody else, if the Improvement Trustees had afterwards been able to dispone; but as a practical matter it was quite good enough, because nobody supposed that the Improvement Trustees were going to build houses on the north part of Brown Square, and as far as they were concerned he bound them to allow him to bring his house forward whenever he chose.

I am bound to say that I am fortified in this judgment, which of course has necessarily proceeded upon very technical lines, when I look at the equity of the matter. I have rested my judgment, as I think I am bound to do, on a matter of title, entirely upon the titles and nothing else; but if I do look at the correspondence which has been produced in the proof here and see what happened, I can perfectly well see that the whole of these three north proprietors were making a bargain at that time by which it was contemplated that they should be able to bring their houses forward. Indeed this very clause in Crombie's disposition allowing him to bring his house forward is in one sense perfectly inconsistent with the idea that he thought he was going to be prevented by any of the other proprietors on the north side, and he cannot object, I think, if the same law is applied to him as he would have wished to apply to them.

Upon the whole matter therefore I hold that the objector here fails, and that the pursuer is entitled to his declarator. I do so to summarise my judgment in a single sentence, because I think that the original title consisted in a disposition of common property, the right to which has obviously gone by the conveyance of 1873, and that the other right that there was, was not an independent servitude in favour of the houses held in particular property, but was a right of common interest, the subject of which was also equally parted with in 1873, and that therefore upon the whole matter the pursuer is entitled to the declarator which he seeks.

Lord M'Laren—For my part I do not doubt that the thing called common interest has subsisted in Scotland for as long as there have been cities and towns in this country, because we know that it has been the habit of proprietors in our burghs to build their residences *in strata* one over the other, and no one has ever supposed that the proprietor of the lower flat was entitled to remove a part of a gable with the effect of bringing down the house of his neighbour above him. I think there is also abundant evidence that common interest in a subject lying outside the structure or tenement also existed, because in our time we have numerous examples of ancient paved courts in which the owners of the surrounding houses have severally a right which would prevent encroachment on the court by any proprietor whoever he might be. But this case illustrates or proves that

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towards the end of the eighteenth century, when there came to be a great deal of building in this city, conveyancers were somewhat at a loss, in endeavouring to secure the right of their clients to the curtilage of the ground attached to a street, to know to what legal category they ought to refer that right—a right which as a practical thing was perfectly well known and which the law recognised. In some cases it was thought that it came under common property, in others servitude, and again it was sometimes referred to the category of real burden. In the present case the garden of Brown Square was conveyed to the owners in common property. Agreeing with your Lordship, I think no distinction can be taken between the case where the curtilage of the street is vested jointly in the proprietors and the case where it is reserved to the superiors. The legal title to the property must be vested in some one, but then whoever has it is affected by the rights of all the proprietors of the street who have interest in this garden or curtilage. Now, the attempt was unsuccessfully made to assure the right of common property against intervention by going through the form of making the proprietor renounce his right to sue a division. Such an obligation might possibly be binding on the original grantee and his heirs, but certainly could not be enforced against a singular successor, because it is an obligation of the same class as the condition *non alienandi sine consensu superiorum*, which by Act of Parliament is declared to be of no effect. I think the attempt to class such rights as servitudes has not been very successful, because in the case of a servitude each person who is interested in the subject that they are to enjoy in common has a right dependent upon and limited by his own titles, and the rights of different owners in the subject that they are to possess in common might be different, whereas the peculiarity of the description of right which we call common interest is that the rights of all the persons who have it are equal. Then I say nothing about real burdens, because that is rather a name descriptive of an encumbrance than of a condition qualifying the right of the legal owner of the estate. It was due to Mr Bell that this sort of right came to be recognised as a thing *sui generis* to which the name common interest was given—a right which, though not falling under any of the categories I have referred to, was a restriction upon the use of property which the law would recognise. While it is necessary that the property of the garden should be vested in some one—and I think it was perfectly proper from the point of view of a conveyancer to vest the garden ground in the proprietors—there is in the title of each a clear indication that this garden was intended to be maintained in perpetuity for the benefit of all, and that in my opinion is sufficient to give rise to the right of common interest which, as is now admitted, belonged to all the proprietors of the houses in the Square. That being so, the Improvement Trustees purchased from the different proprietors their rights in the garden and the road. But for the Parliamentary powers which the Improvement Trustees possessed, that purchase would have done no good. It would merely have vested them in the legal title to the ground, but they would have been affected by the common interest, and no alteration could have been made upon it without the consent of the householders. But then this body of Trustees when they became purchasers were enabled by their Act of Parliament to take the property, paying compensation of course, free from these conditions. They proceeded to make Chambers Street, taking as much of the ground as they wanted for that purpose, and the part of the garden which remained in their hands was the subject of an arrangement of the nature of a compromise, the Trustees on the one hand undertaking not to build upon the ground, and on the other not to object to the proprietor of the house building upon the ground *ex adverso* of his house. It seems to me that the result of this arrangement is that the common interest which the proprietors had in the garden ceased by reason of their conveyance to a body who had statutory powers to take the property free from conditions, and the rights of the proprietors now depend entirely upon the terms of the contract with the Trustees, which binds those Trustees not to object to building on the ground. It follows, in my opinion, that Mr Grant is entitled to build, as he proposes, *ex adverso* of his house. I do not enter more fully into the question because I concur in all respects with the judgment which has been delivered by your Lordship in the Chair.

Lord Kinnear—I also agree entirely with what your Lordship has said, and I only add that I think that when the titles have been clearly understood as your Lordship has explained them, the question at issue really comes to depend upon a very narrow point indeed, and is capable of being simply stated. The grounds upon which the Governors of Heriot's Hospital object to the pursuer being allowed to build in the way he proposes are stated in the Lord Ordinary's interlocutor, and I do not think they can be more effectively stated than in his finding that by the conveyance by Mr John Crombie in 1873 to the Improvement Trustees, he retained, and the defenders as his successors still retain, not only as against the Improvement Trustees, but as against all the proprietors in Brown Square, a "common interest, equivalent to a servitude *non ædificandi*, sufficient to entitle them to prevent the bringing forward of the pursuer's houses or the other houses on the north side of the Square beyond the present line of the sunk area walls of the said houses." The only criticism I should venture to make upon that statement is that a common interest is one thing, and a servitude *non ædificandi* is another and different thing in law, and it is not quite clear to my mind whether his Lordship meant to say that the legal right in the defenders

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was one of common interest on the one hand or of servitude on the other. The question whether there was retained by Crombie in his disposition any common interest or any servitude which would enable him to prevent the other proprietors on the north side of the Square building must depend upon the terms of the title which he granted to the Improvement Trustees; but then, of course, the true meaning and effect of his conveyance to the Improvement Trustees must depend in the first place upon what was the nature of his own right in the subjects conveyed. Therefore, I venture to think, the point really comes to depend upon a comparison between the title given to Crombie and the title given by Crombie to the Improvement Trustees, in order to see whether Crombie had vested in him any right in the street or public garden over and above the right which he expressly conveyed to the Improvement Trustees, or, in other words, whether he divided the right in which he was originally vested in the street and public garden, retaining part of it for himself and conveying another part of it to the Improvement Trustees. Now, that depends in the first place upon the nature of Crombie's title, which your Lordship has examined, and therefore I do not think it necessary to go into it more closely than to say that it is to my mind perfectly clear on a construction of these titles that there are two entirely separate and distinct subjects given by Brown to Mr David Dalrymple, Crombie's author. In the first place, he gives a separate and exclusive right of property in the house or tenement of lands on the north side of the Square, specially described in the conveyance, bounded by the street upon the south; and in the second place, he conveys a totally different kind of right, a common right along with the other proprietors in the street and enclosed green or area of pleasure ground bounded by his house. Nothing can be clearer upon the description of the title than the distinction between these two rights—an exclusive right of property in the house which stops at the street, and a common right of property in the street and enclosed green or area of pleasure ground bounded by his house. What then did Mr Crombie convey to the Improvement Trustees? It appears to me, upon a fair construction of his title, that it is not open to question that he gave them all the right of common property that he had exactly as it stood in him, whatever the nature of that right was. What he had in common with the others was the right of common property in the street and pleasure ground, and what he dispones to the Improvement Trustees is just the street and enclosed area or pleasure ground "in so far as the same belongs to me in common with the other proprietors." Now, I think that upon the execution and delivery of that conveyance Crombie was absolutely divested of all right of property in the common subject, the street and the pleasure ground, and that his disponees were vested in his place. I do not think it necessary to consider, for the purpose of determining what really was conveyed, the particular method by which the right given to Crombie and his authors in the street and pleasure ground was intended to operate. It was a common right of property in terms; and although I quite agree with your Lordship that the framers of the conveyance did not very distinctly understand what the distinction between common property and common interest was, and also that for the purpose of maintaining unaltered the particular mode of occupation and enjoyment contemplated, there was attached to the right of property a condition against division which would probably have been ineffectual, still the fact remains that the right vested in Crombie was a right of property in common with others, that the property was still undivided, and that the entire right as it stood in him was conveyed by Crombie to the Improvement Trustees, he reserving absolutely nothing to himself from the conveyance. Now, that would make an end of the question were it not that he goes on to attach a condition to the conveyance, and I rather think that it must be upon that condition the Lord Ordinary has proceeded when he found that Crombie had retained a "common interest equivalent to a servitude *non ædificandi*." There is nothing else but the condition to suggest it. But there was no right of any kind in him which he could retain if he conveyed away the street and pleasure ground, because his own right stood upon a mere conveyance of the street and pleasure ground in common property with others, and that is exactly what he gave to his disponees. If, therefore, he has a servitude by virtue of this condition, it is not a right already vested in him apart from the right of property which he conveys away, but a new right which he stipulates for himself—a new right of servitude in which his house is to be the dominant tenement and the common property which he is conveying is to be the servient tenement. The condition is that the street and pleasure ground are conveyed under this burden among others, that the ground disponed shall only be used by the disponees and their foresaids for the purpose of forming a roadway, "but they shall not be entitled to build on the same, nor shall my said disponees or their foresaids be entitled to object to me or my successors in the said house building upon the intermediate ground between the said new street and the said house." Now, that is said to constitute a servitude *non ædificandi* which forms a good and effective burden upon the land conveyed. I think the answer as your Lordship has given it is perfectly clear. What was conveyed was nothing but a *pro indiviso* right in common ground, and it is a legal impossibility for one of several *pro indiviso* proprietors to impose a servitude on the common property. That arises of necessity from the nature of the right which is vested in him, and in your Lordship's exposition of that right I entirely concur. If he and his co-proprietors were part owners, so that each had a title in himself to his own share, it would be

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simple enough for each by his own separate act to burden his own share with a servitude or with any other liability which could be made effectual upon land. But *pro indiviso* proprietors are not part owners but joint owners; and since each and all of them are proprietors of each and every part of the subject held in common, it is impossible to impose a servitude upon their separate rights since they have no separate right, and just as impossible for one by his own separate act to impose a servitude upon the common property. The only way of creating a servitude on property held on these terms is by the whole proprietors combining and imposing a burden, not upon their rights *pro indiviso*, but upon the subject itself. That one *pro indiviso* proprietor out of a number should, by a conveyance of his own interest in the common property, create a servitude by contract with his disponee, either upon his own interest which he is giving away, or upon the common property, is, in my opinion, for the reasons your Lordship has given, a legal impossibility.

The conclusion I come to is, in the first place, that there was no separate and independent right of servitude vested in the proprietor of Mr Crombie's house over the common property, but merely a right of common property, and in the second place, that when he conveyed his whole right of property in the street and pleasure ground it was impossible for him to create over that subject a servitude in favour of his own house or in favour of any other dominant tenement. On the whole matter therefore I entirely concur with your Lordship.

LORD PEARSON—I concur.

The Court pronounced this interlocutor—

"Recal the said interlocutor in so far as it finds with respect to the objection of the defenders the Governors of Heriot's Trust, 'that on the just construction of the said defenders' titles and of the disposition executed by their author John Crombie in favour of the Improvement Trustees, dated in May 1873, the defenders' said author retained, and the defenders as his successors still retain, not only as against the Improvement Trustees and the other defenders, but as against the pursuer and the other proprietors in Brown Square, a common interest equivalent to a servitude *non ædificandi* sufficient to entitle them to prevent the bringing forward of the pursuer's houses or the other houses on the north side of the Square beyond the present line of the sunk area walls of said houses;' and in so far as it 'finds that without the consent of the defenders the Governors of Heriot's Trust the pursuer's proposed operations cannot proceed,' and in so far as it 'sustains the defences of said Governors, and assoilzies them from the conclusions of the summons,' and finds them entitled to expenses: *Quoad ultra* adhere to the said interlocutor, and further repel the defences stated for the defenders the Governors of Heriot's Trust, and find, declare, and decern against the defenders in terms of the conclusions of the summons, but under the declaration always that any rights hereby declared in favour of the pursuer shall be exercised by him only with the consent and concurrence of the defenders the Incorporated Dental Hospital and School and their assignees and successors in title: Find the pursuer entitled to expenses as against the defenders the Governors of Heriot's Trust, but excluding therefrom the expenses so far as caused by the opposition of the Magistrates and Town Council of Edinburgh; and remit the account of said expenses to the Auditor to tax and to report," &c.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—Guthrie, K.C.—T. B. Morison. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders and Respondents The City of Edinburgh—W. J. Robertson. Agent—Thomas Hunter, W.S.

Counsel for the Defenders and Respondents The Dental Hospital—A. Moncrieff. Agents—Stuart & Stuart, W.S.

Counsel for the Defenders and Respondents The Governors of George Heriot's Trust—Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agent—Peter Macnaughton, S.S.C.

Thursday, March 15.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

JOHNSTONE *v.* HENDERSON.

Process—Caution for Expenses—Reclaiming Defender—Trust Deed for Behoof of Creditors Granted after Reclaiming.

A defender in an action reclaimed and subsequently executed a trust deed for behoof of creditors. On the trustee's refusal to sist himself in the action, the pursuer, in a note, craved the Court to ordain the reclaimer to find caution for expenses. The Court *refused* the prayer of the note.

On 17th May 1905 Alfred Johnstone, stockbroker, 10 St Andrew Square, Edinburgh, raised an action against William Henderson, 12 Affleck Street, Aberdeen, to recover a sum of £499, 2s. 5d., which he averred and pleaded was the balance due to him on the purchase and sale of certain stocks which he had carried through for the defender. By interlocutor dated 1st December 1905 the Lord Ordinary (ARDWALL) granted decree in favour of the pursuer for the sum sued for with interest and expenses. Against this judgment the defender reclaimed on 15th December 1905, and on 29th December he granted a trust deed for behoof of creditors. On 30th January 1906 the trustee intimated to the respondent's agents that he would not proceed with the reclaiming note nor sist himself as a party thereto.

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The respondent presented a note asking the Court to ordain the reclaimer to find caution for expenses.

In the Single Bills the reclaimer argued—The general rule was that a defender was not bound to find caution—*Weir* v. *Buchanan*, October 18, 1876, 4 R. 8, 14 S.L.R. 18; *Buchanan* v. *Stevenson*, December 7, 1880, 8 R. 220, 18 S.L.R. 132—although it might be more stringent when the defender was in reality insolvent as he was not in the present case—*Stevenson* v. *Lee*, June 4, 1886, 13 R. 913, 23 S.L.R. 649. But even in the case of an insolvent defender caution was not invariably required—*Taylor* v. *Fairlie's Trustees*, March 1, 1833, 6 W. and S. 301—but the matter was one of circumstances. Here the pursuer was the only non-acceding creditor, and the decree reclaimed against had been greatly instrumental in bringing about the defender's financial difficulties; caution should not be ordered.

Argued for the respondent—The whole matter lay in the discretion of the Court. In the present case the reclaimer was practically bankrupt, and in spite of inhibition had disponed to a trustee who refused to sist himself in the action. The respondent's position was not that merely of a pursuer as he was in possession of a judgment. The reclaimer should find caution.

At advising—

LORD PRESIDENT—In this case a motion has been made that the defender should be ordained to find caution as a condition of being allowed to proceed with his reclaiming note. The only reason that was given for the motion being granted was that the judgment in the Outer House was against the defender, and that the defender had executed a trust deed in favour of his creditors. I have looked into the authorities, and it is not easy to extract from them any rule other than the general doctrine that in a case of insolvency a pursuer is usually bound to find caution but a defender is not. There may, of course, be special circumstances, but in this case there are no special circumstances. The defender has been found to be wrong by the Lord Ordinary. He has taken a reclaiming note, which is his right. To compel the defender to find caution would in effect be to force him to acquiesce in the judgment against him. I do not think that we can grant this motion unless your Lordships are prepared to go the whole length of saying that wherever a defender has granted a trust deed for creditors he must as a general rule be ordained to find caution. That does not seem to me to be an expedient general rule. There are obvious distinctions between the position of a person who has been sequestrated and the position of a person who has granted a trust deed. Accordingly, there being no special circumstances brought to our knowledge, I think the reclaiming note ought to be allowed to proceed in the ordinary manner.

LORD KINNEAR—I agree. I would only say in addition that it would, in my opinion, require a very exceptional ground to justify an order upon a defender to find caution merely because he has granted a private trust deed for creditors. I know of no authority for so restricting the right of defence. The distinction between an insolvent who has become bankrupt and an insolvent who has granted a private trust deed is vital. In the case of a bankrupt his whole estate vests in the trustee to the entire exclusion of the diligence of creditors, and therefore if a contending litigant obtains a decree for expenses he cannot enforce it against his opponent or his estate unless the trustee in bankruptcy has made himself a party to the suit. But in the case of an insolvent who grants a trust deed his property is not protected in any way but is still open to the diligence of any creditor who may not have acceded, and even to the diligence of the creditors who have acceded so long as any other creditor holds out.

We cannot, in my opinion, compel a defender who has not been divested of his estate, however little, to find caution at the instance of the very person who has called him into Court, merely because his circumstances make it doubtful whether he will be able to meet the pursuer's costs if he is unsuccessful. He is still entitled to say that decree shall not pass against him until he has been heard.

LORD M'LAREN and LORD PEARSON concurred.

The Court refused the note with expenses modified to two guineas.

Counsel for the Reclaimer and Defender—Aitken, K.C.—Wilton. Agents—Mackay & Young, W.S.

Counsel for the Respondent and Pursuer—Morison—Ballingall. Agents—P. Morison & Son, S.S.C.

Thursday, March 15.

FIRST DIVISION.

[Jury Trial.

CAMPBELL AND OTHERS *v.* SCOTTISH EDUCATIONAL NEWS COMPANY, LIMITED.

Reparation—Slander—Process—Jury Trial—Action of Damages for Slander—Application for New Trial on Ground Verdict Contrary to Evidence.

In actions of damages for slander a motion to set aside the verdict as being contrary to evidence and to grant a new trial is to be granted or refused on precisely the same grounds as in any other action. *Ross* v. *M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190, *approved*.

Observations per Lord President on criterion to be applied in reviewing verdicts in such cases.

Expenses—Jury Trial—Slander—Verdict for Defender on Pursuer's Issue—No Verdict Returned on Defender's Counter

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Issue of Veritas—Motion by Pursuer for Modification of Expenses.

A jury, in an action of damages for slander, returned a verdict for the defender on the pursuer's issue, and following the direction of the presiding judge, to which no exception was taken, found that it was unnecessary to return a verdict on the defender's issue of *veritas*. The pursuer asked a modification of the expenses in respect of the issue of *veritas*, which had not been established. The Court *granted* the defender his expenses without modification.

Process—Jury Trial—Issues and Counter Issue—Verdict on One Issue only.

The Lord President—"In a case where the verdict on one of the issues tabled exhausts the case and leads either to decree as craved or to absolvitor, any answers on the remaining issues is matter not of right but of convenience."

On 21st March 1905 John Campbell, joiner, Donald Blair, grocer, and Peter M'Intyre, baker, all of Tarbert, raised an action of damages for slander against The Scottish Educational News Company, Limited, Edinburgh, concluding for £250 each. The case was heard before the Lord President and a jury, and the jury returned a verdict for the defenders, finding for them on the first issue, and finding it unnecessary to return a verdict on the other issues. The pursuers applied for and obtained a rule and the case now came before the Court on the rule.

The issues for the pursuers were in the following terms:—"It being admitted that the defenders published the article printed in the appendix hereto—(1) Whether the said article is of and concerning the pursuer . . . . and falsely and calumniously represents that the pursuers combined to secure the dismissal of Robert Aird from the post of teacher in the Tarbert School solely from motives of personal hostility to him, and not in the *bona fide* discharge of their duties as members of the School Board of Tarbert, to the loss, injury, and damage of the pursuer . . . . (2) Whether the said article is of and concerning the pursuer . . . . and falsely and calumniously represents that he had preferred and subsequently circulated what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him, to the loss, injury, and damage of the pursuer . . . ."

A counter issue on behalf of the defenders was also submitted in the following terms:—"(1) Whether in or about 1904 the pursuer . . . conceived feelings of personal hostility to the said Robert Aird, and whether in consequence thereof the said . . . in October 1904 preferred what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him from his office of headmaster, and did on said pretext, on or about 24th November, and in conjunction with the said . . . and . . . cause the said Robert Aird to be dismissed from said office."

The important portion of the article in the *Educational News*, of which paper the defenders were proprietors, upon which the action was based ran as follows:—". . . After years of a steady policy of building up a secondary department, in which evidently both the School Board and the headmaster took a deep interest and a proper pride, a change of policy occurred on the part of the School Board coincident with the return of a new set of members to that body. The staff was cut down to such an extent that the efficiency of the work was maintained only by the special efforts of the headmaster and staff. H.M. Inspector frankly pointed out the folly of the policy (dictated purely by motives of economy); the County Council withdrew its grants; the intelligent and educated minority of the School Board never ceased to protest. Yet all to no effect. It is not often that what may, without offence, be styled the 'working-class' element in the community is so short-sighted as to cut off deliberately the one agency by which their children may hope to make good the difficulties and drawbacks which handicap them in their onward and upward struggle for existence. Yet this is what we find in Tarbert. The teacher had warmly identified himself with the success of the higher work, and did not hesitate to express his regret at seeing the work, so carefully fostered for years, so ruthlessly demolished in an hour. The consequence to him has been serious. The opposition of the majority of the School Board to the policy with which he was identified developed into personal hostility to himself. 'We must get rid of this pestilent fellow.' But the small cunning which is never very far away from the mainsprings which move certain types of mind at once suggested that to dismiss a teacher for such an alleged reason would be to court the public condemnation which it would assuredly call forth. Some other ostensible reason must therefore be found to put before the public as the reason for his dismissal. This was done in Mr Aird's case by making a charge against him in connection with his absence from school on the afternoon of Friday the 21st October 1904, an absence due to temporary indisposition as is conclusively proved by the testimony of competent witnesses, even as the baseless charge is refuted as conclusively by the same testimony. But one more degree of cunning is here introduced. It is not necessary to allege 'cause' in dismissing a teacher. The *ipse dixit* of a bare majority is sufficient so long as the other obligatory processes of the Mundella Act are duly observed. Therefore the Tarbert School Board 'dismisses'—as it believes—Mr Aird by legal process, and gives no reason for its action. That of course does not hinder the unofficial and subterranean diffusion of the story of the alleged cause of the School Board's action, and the story has been spread abroad in that amorphous and indefinite form which is warranted and expected to do the most harm to Mr Aird, and at the same time safeguard his traducers. . . ."

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The Lord President's charge to the jury at the trial was as follows:—"Gentlemen of the Jury—This case has been conducted with very great ability, and in a certain way with very great moderation, by the learned gentlemen on both sides of the bar. It is a case of a kind that has been committed by the law to the determination of a jury, and not to a judge, and accordingly I am afraid that I cannot relieve you of the responsibility that is put upon you of deciding these matters, nor even of telling you how I think you ought to decide them. But what I can do for you, and what I hope to do, is to bring your minds precisely to the question that you have got to decide. In the course of the very able speech to which you have just listened, there is I think only one remark which I must rather caution you against, and that is the remark with which it concluded. It may be perfectly true that the effect of your verdict may be rather more far reaching than the confines of this case, and that its effect may be on the one side or on the other as the learned counsel put it. But, gentlemen, you have not got anything to do with that. You have not got to think what the effect of your verdict is going to be elsewhere. You have taken an oath to do justice in this case between these two parties, and you have got to do that without fear or favour, reflecting that, after all, the consequences of that do not depend on you, you having done your duty.

"The action as you know very well is an action brought against a newspaper by three private individuals, members of this School Board, who say that newspaper has slandered them. Gentlemen, it is certainly the case that those who go into public life in this country must not hope to indulge in the luxury of a very thin skin. Public life as we like it to be conducted, and as most of us believe it is on the whole for the public benefit that it should be conducted, subjects those who take public positions to very free criticism. And those of us who have been in public life for many years would really I think scarcely ever have been out of court if we had always rushed into the law courts whenever we saw a criticism which we thought was somewhat intemperate and unjust. But at the same time, while that is so, it is undoubtedly the case that there is a line not very easy to define and yet I think commending itself to any man of common sense—there is a line of criticism which must not be crossed. You must confine your criticism to the man's public actions. I do not say that you may not impute motives to him. I think it is a better style of criticism which does not impute motives, whether in the political or any other world. But as long as his motives are kept to purely public actions, then I cannot say that that is a thing which a person can come to a jury and attack. But when you go further, and under the guise of attacking a man's public life you really attack his private character, and state or insinuate that he has been guilty of a disgraceful action in his private character, and that by means of that disgraceful action he has done certain things in public life, then it is a libel, it is a slander, and unless it can be justified upon the truth of it, an action of damages will lie, just as if the whole matter had happened in the domain of private life, and there had not been anything in respect of public life at all. I do not think I need comment further upon these matters, because I think it is a matter really of common sense. It is a matter I have no doubt that is absolutely present to all of your minds as men who read newspapers and appreciate the advantages of a free press, and who see that a free press must not be debased into a licence for attacking private people.

"Let us now apply this general principle to the particular case in question. Now, in the case in question there is tabled before you a certain article. The issue on which it is put before you puts this question of fact—'Whether the said article is of and concerning the pursuer.' No doubt there is a separate issue—of course you have three of them; but as I have already said I do not think it is probably necessary to have two issues at all; and I think for all purposes we may be content with the second. I do not think there is really any difference between them. I think your verdict would naturally be the same on the first or the second as it would be on both—either for the pursuer or the defender. But it is easier to explain my remarks if you confine attention to the second issue, 'Whether the said article is of and concerning the pursuer John Campbell, and represents that he had preferred and subsequently circulated what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him.' Now, gentlemen, I do not think you will have any difficulty in feeling that that is a good innuendo as the term is, that is to say, that that is a charge of having done something which oversteps the bound of public criticism. That is to say, in other words, that if you do falsely and calumniously represent that somebody else has preferred and subsequently circulated a false charge against a man as a pretext for dismissing him, and has dismissed him, you do go beyond public criticism, and you allege that the person has done something which is disgraceful in itself, and doubly disgraceful when it is used as a cloak to doing something which is not consistent with public duty.

"I do not think you will have any difficulty so far. That really is not a question for you at all, because unless the Court had originally thought it a good innuendo, that is to say, a slanderous innuendo, they would not have laid the matter before you at all. The next question really, which is the first question for you, is whether that is to be truly carved out of the article. And this, as Mr Ure said, does not mean whether by any possible twisting of the words of the article you could hold that such a meaning is possible. But it means—What do you as men of ordinary common sense think that article means? Now, in a case of this

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sort, where it deals with matters with which you are all quite familiar—I mean this question of school board and teacher, and so on—the real point is, that you are the best judges of that yourselves. I mean that although it is quite customary and common for persons, for pursuers before the Court, to bring witnesses to say, 'Well I read the article and I thought it meant so and so'—in a case of this kind I do not think that so much matters as what your own view of the reading of the article as men of common sense would be. The point really on which I think your judgment on the matter ought to turn—and I tell you it is a question for you and not for me—would be this. Supposing you had been for your summer holidays in Tarbert, and that you had got a copy of this *Educational News*, and read that article about people all strangers to you—only names, so far as you are concerned—still, if you had nothing better to do and read the article, what sense would you have taken out of it? Would you have taken or not taken the sense put to you in this issue? Would you have said—'Well, I do not know who this John Campbell is; I never heard of him before; but I see this newspaper writer says that John Campbell circulated what he knew to be a false charge of neglect of duty against Robert Aird, a schoolmaster, as a pretext for dismissing him, and on the top of that he did dismiss him.' That is the test I put to you. Of course here one or two people were put into the witness-box to say that this was the meaning of the article, and they said 'Yes,' and I am bound to say there was not much cross-examination put to them. But after all I am bound to say that I do not attribute much to that evidence one way or the other. There are some cases where you would have had to have evidence of a technical character, or with regard to a foreign language, or terms of art, which the ordinary juryman might have been expected not to know about, and then it would have been quite good evidence in order to put you in what might be called an intelligent frame of mind. But this matter is dealing with everyday life, in which you have as intelligent a mind as the witnesses. And it is just for that reason that a case of this sort is given to a jury instead of to a judge. It is not that we are not men of the world too, and do not understand, but it is because you do not want to get—and that is the criterion of it—so much what I might call the trained mind to say what is the meaning of it. But the point is, What does the man in the street, to use an ordinary expression, what does he think of it? Because it depends on what the man in the street thinks whether it is a libel or not. For it is the man in the street, the men among whom the circulation of a newspaper goes, who are the judges as to whether it is fair ordinary criticism in this article, or if there is libel. Therefore the first question in this case—and you cannot stir a foot until you have solved it yea or nay—is taking this article and reading it, of course by those passages which I do not need to comment upon—they have been commented upon again and again to you—reading that article as men of common sense, do you take from it the sting, the innuendo as it is called technically, that the article represents that they had preferred and subsequently circulated what they knew to be a false charge of neglect of duty against Mr Aird as a pretext for dismissing him, and dismissed him?

"Now, of course, if you cannot take that out of it, you must find for the defenders on the first issue, and of course there is an end of the case. You do not need to go any further. But if, on the other hand, you think that the meaning of the article is that, then we have to go on to the second portion of the case. You will then have found that the article is 'of and concerning the pursuer,' and represents that he preferred, and so on. But there are two words you will have noticed I left out—'falsely and calumniously.' The law upon that matter is this, that when a statement is libellous or scandalous, the law always presumes it is false unless the other person can prove it is true. And therefore if you have considered that this is a slanderous statement, as I have said, then you start with the presumption that it is a false statement, unless the other person can show you that it is not false. And that is the meaning of the counter issue, and that is why the counter issue goes, you will see, exactly on the lines of the issue. The counter issue to which I now ask your attention is this—'Whether in or about 1904 the pursuer John Campbell conceived feelings of personal hostility to the said Robert Aird, and whether in consequence thereof the said John Campbell in October 1904 preferred what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him from his office of headmaster.' You will notice that is exactly an echo of the words that are in the other issue. It would not have been, for instance, a counter issue to have put—'Whether on such and such a date Mr Aird was drunk and was unfit for his duties.' That would not have come up to the sting—the innuendo. Accordingly, if you come to the conclusion that your verdict ought to be for the pursuer on the first issue, you have then got to start with the idea that the thing is false, unless the other party the defender proves that it is true. The onus or weight of that, as lawyers say, is on the defender. It is for him to show. The question you meet on the second issue depends of course upon a question of fact, and it is with regard to the elucidation of that fact that we have had these three long days of evidence, not too long in this sense, that I do not think any time has been wasted, and it is not for you or me to complain of our duty. . . .

"I hope I have made it clear that you have two steps to consider. The first is whether that innuendo, which as I say I do not think there is any doubt is a good innuendo, of charging something more than true criticism—whether that is to be gathered out of the article. If it is not, the case is at an end, and you will find a verdict

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for the defenders. But if it is to be fairly gathered out of the article, then we must take it that it is a false and calumnious charge, unless the defenders to your satisfaction make you say yea to the question in the counter issue, and not to any other. There are two issues on one certain point. If you give the first issue in favour of the pursuers, you will give the second in favour of the pursuers also."

On the return of the jury, when the foreman had intimated that they found for the defenders "on the ground that there was no libel in the article complained of," counsel for the pursuers asked for a verdict on the counter issue. The foreman, however, said the jury thought that their verdict would cover everything, and the Lord President said they were quite right, it did so, and there was nothing more to be said. A verdict finding for the defenders on the first issue and finding it unnecessary to return a verdict on the other issues was thereafter, with the Lord President's approval, recorded.

Argued for the defenders—A new trial should not be granted. The Court would not, save as to whether the words used applied to the pursuer or did not, disturb the verdict of a jury on a question of slander, and certainly not where the question involved public conduct. The innuendo, held possible by the Court, having gone to a jury, and the jury having found as ordinary readers that it was not in the words used, there was no room for a second jury considering it. The article complained of was fair criticism of the pursuers in their public capacity and was not slanderous. The jury had so found, and it was for them to decide—*Sexton* v. *Ritchie & Co.*, March 18, 1890, 17 R. 680, 27 S.L.R. 536, 18 R. (H.L.) 20, 28 S.L.R. 945; *Waddell* v. *Roxburgh*, June 9, 1894, 21 R. 883, 31 S.L.R. 721. There were only two cases in Scotland in which the Court had set aside a verdict in cases of slander, viz., *Smith* v. *Gentle*, January 31, 1844, 6 D. 565; and *Ross* v. *M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190. In England there was no case where the verdict had been set aside where it was left to the jury to say whether the article in question was or was not a libel—Odgers on Slander (4th ed.) p. 105; *Australian Newspaper Company* v. *Bennett*, [1894] A.C. 284. On the evidence the verdict was right.

Argued for pursuers—The case of *Ross* v. *M'Kittrick* showed that the Court would set aside a verdict in a slander action if contrary to evidence, just as in any other kind of action. If the charge here was baseless (as the facts proved showed) the jury were not entitled to find that there was no libel. The article charged the pursuers with inventing a reason which they knew to be false. The jury could not reasonably attribute any other meaning to the article. That being so the pursuers had been slandered. There was no such rule as the defenders contended for in regard to verdicts in slander cases. The verdict here was clearly contrary to evidence and must be set aside.

At advising—

LORD M'LAREN—This case raises an interesting question as to the limits within which the Court will exercise its undoubted jurisdiction in correcting the errors which may be found to have influenced a jury in its verdict. In actions other than these which are founded on defamation the same difficulty has not presented itself, because the respective functions of the judge and jury in such cases are well understood. Relief will always be given against a verdict that is plainly in disregard of the directions of the judge, and the Court will, in general, grant a new trial where the verdict is against the weight of the evidence. I think there is much force in the argument of the Solicitor-General—though I should not be prepared to assent to it in the unqualified terms in which he formulated it—that the Court as a general rule will not be disposed to interfere with the verdict of a jury in cases of defamation. The Court, I think, will be especially reluctant to do so where the verdict is in favour of the defender, because one cannot help observing that juries are very ready to make an award of damages if any real ground exists for doing so. The case of *Ross* v. *M'Kittrick* (14 R. 255) is a clear authority for the proposition that the verdicts of juries in cases of defamation are not exempt from review. That was a case relating to private character, for the pursuer was slandered in his trade. I agree with the argument of the Solicitor-General that the caution which the Court always exercises in such cases will be exercised with peculiar care where the libel in question is one affecting public conduct, or public character generally, because people who undertake public duties, whether in Parliament or local bodies, invite criticism of their public acts, and as such criticism is not always in the best taste, it may often happen that things are said which are hurtful to the feelings of an individual, though they do not allow ground for an action of damages. In the case where a man's public character is attacked, if the jury put a benevolent interpretation on the words used, I should be slow to interfere with their verdict. The present case cannot be regarded as exceptional. The pursuers undertook to establish that the defender had made a charge affecting the conduct of certain members of the School Board of Tarbert, the charge being that they had dismissed the schoolmaster upon a false ground, upon the pretext that he had on one occasion been absent from his duties, while the real reason was the hostility of the pursuers with respect to the teacher's views on higher instruction and greater efficiency in the school. A charge of that kind may or may not be libellous according to the sense in which it is read. If we read it as meaning that these members of the Board, actuated by private hostility to the teacher, had perverted their office and dismissed him in circumstances which did not warrant dismissal, I should have little doubt that this would amount to a slander for which the law would give redress. If,

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on the other hand the charge only meant that that the pursuers had not approached the question with that judicial calm and fair mindedness which was necessary to enable them to exercise a sound judgment as to whether the defender had acted honestly in the matter—if that were the case it would be a very serious charge, and it would be a matter upon the balance of which the pursuers performed their proper duty, and left a reasonable impression thereupon.

I can see no inconsistency between the suggestion that the jury were of opinion that the article complained of was fair criticism on the public conduct of the pursuers, and I cannot say that the language used excludes such a meaning. It is a point of view, and a view which the jury were entitled to take. Although I might not have agreed with the view taken by the jury, because I rather think the article does convey fair criticism. I am unable to say that it is so demonstrably and clearly beyond the verdict of reasonable men that no reasonable jury could take a different view. I am of opinion that we ought not to interfere with the verdict.

LORD KINNEAR—I have come to the same conclusion. I am of opinion—and I have the less hesitation in saying so because I am only repeating the opinion of Lord Adam—*Ross* v. *M'Kay*, 14 R. 256—that we should grant no rule to enter a new trial without considering in every case the same grounds as I may have done. The functions of the judge and the jury appear to me to be the same in the one case of libel as in the other. The law is for the judge and the question of fact for the jury. It makes no difference that in the present instance an issue is put to the whole libel and the jury are asked to say whether the words bear the meaning put on them in the innuendo. I understand the law to be that the question whether words in the libel are capable of the defamatory meaning averred is a question of law for the Court; but when the Court has decided that it is so capable it is a question for the jury whether, in the circumstances of the case, the language complained of did convey the meaning which the pursuer ascribes to it. The issue sent to the jury here was—"... *Has Lord* [redacted] *made the averments* [redacted] *to his loss, injury, and damage?*" The questions of fact therefore put to the jury were—Does the article in question relate to the pursuers? Does it represent that he preferred and maintained a charge which he knew to be false as a mere device for dismissing the teacher? Did he do so intending to injure the pursuers? and, Was the charge a false one?

Reading the language complained of with reference to the circumstances in which it was published the jury returned a verdict for the defenders. I think that verdict must be treated as any other verdict would be treated. The verdict is not to be set aside merely because we disagree with it. If all we think of it is that we should not have agreed with it, then to set it aside would be to take upon ourselves the function of the jury. On the other hand, if it is apparent that the jury have not duly performed their functions, and have given a verdict which no reasonable jury, properly instructed, would have given, as the late Lord President put it, if it is impossibly to say the Court will set it aside, and that whether it be a verdict on a question of relevancy or on any other question of fact. The question then is, is the verdict before us in the present case such a verdict? Could no reasonable jury discharging their duty honestly under proper direction so, would have given it? I am disposed to agree with the observation of Lord M'Laren that if there be any difference in the function of the Court in dealing with different verdicts we should probably be more reluctant to disturb a verdict in cases of this kind than in others. But still the true question we have to determine is just the same, and if a jury has returned a perverse verdict in an action for defamation we are bound to set it aside in the same position as if it had been in any other case of fact. But considering the verdict in question in that way I am of opinion that the jury may very reasonably have come to the conclusion that the article in question did not contain the specific charge produced by the pursuer. It is enough to say that on either side of the bar points of criticism have been brought forward for opposite views as to the meaning of the article, and that being so it is really a question for the jury to say whether ordinary people would be likely to read it as conveying the defamatory imputation complained of by the pursuer.

LORD PEARSON—I am of the same opinion.

LORD PRESIDENT—I presided at this trial and I fully agree with the view of the case which has been taken by your Lordships.

The Solicitor-General in his able argument strove to prove that a motion for a new trial on the ground of the verdict being contrary to evidence, in a case of this sort stands in a different position from such a motion in any other case. His argument was that here the Court had granted an issue upon an innuendo and the jury had said that the words complained of did or did not bear the meaning put upon them in the innuendo that ended the matter. I am satisfied that that is not sound. I adopt what your Lordships have said and think the case is governed by *Ross* v. *M'Kay*, 14 R. 256. But then we must consider what is the criterion to be applied in reviewing verdicts in such cases. After all according to our practice the determination of the Court as to whether a certain document will or will not bear an innuendo is just a judgment on relevancy. If the innuendo which is tabled is an impossible one, the Court in saying so simply say that the case is not relevant. But what is the criterion by which we are to judge whether the innuendo is proved? I do not think, so far as I am concerned, I can express the matter better than in the words I used to the jury in this case—"What do you, as men of

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ordinary common sense, think that article means?" I go on to say that one or two people were put into the witness-box to say what was the meaning of the article. "But after all I am bound to say that I do not attribute much to that evidence one way or the other. There are some cases where you would have had to have evidence of a technical character, or with regard to a foreign language, or terms of art, which the ordinary juryman might have been expected not to know about, and then it would have been quite good evidence in order to put you in what might be called an intelligent frame of mind." On further consideration I think there might be added to that also evidence of a local character which would tend to show that certain expressions when read by people in that locality would bear a different meaning from that which they have to people in other parts of the world who have not the local knowledge. "But the point is—what does the man in the street, to use an ordinary expression, what does he think of it? Because it depends on what the man in the street thinks whether it is libel or not." I adhere to that view and think the criterion is — what would ordinary people think?

To give a new trial we must say that the jury had gone so far wrong that their verdict did not and could not represent what would be ordinary opinion on the matter.

I agree with what your Lordships have said as to this case. Although I myself think the article went somewhat beyond fair criticism, yet the point is so narrow that I cannot say the jury went so far wrong in giving the verdict which they did as to warrant us giving a new trial. Therefore I agree with your Lordships as to discharging the rule.

The Court discharged the rule and of consent applied the verdict.

Counsel for the defenders having moved for expenses, counsel for the pursuers opposed the motion.

Argued for the pursuers—The defenders had not substantiated their defence, for the counter issue had not been adjudicated upon. [LORD PRESIDENT—It seems to me that before you go into that you must first say I was wrong in directing the jury that they need not consider the counter issue.] No expenses should be allowed *quoad* the case relating to the counter issue—*Stoppel & Company* v. *Maclaren & Company*, December 18, 1850, 13 D. 345; *Johnston* v. *Smellie's Trustees*, July 15, 1856, 18 D. 1234; *Lord Clinton* v. *Brown*, July 10, 1874, 1 R. 1137, 11 S.L.R. 665; *Shepherd* v. *Elliot*, March 20, 1896, 23 R. 695, 33 S.L.R. 495. [LORD KINNEAR—This should have been raised at the trial by excepting. It is really equivalent to saying that there has been a miscarriage and that the issues have not been exhausted.] The defenders ought to have moved to have the counter issue upheld, not having done so *sibi imputent*—*Wardlaw* v. *Drysdale*, May 17, 1898, 35 S.L.R. 693.

Argued for the defenders—The defenders were bound to state all their defences whether it were necessary to prove them or not. The pursuers had failed in their case and the defenders were entitled to full expenses—*King* v. *Reilly*, May 31, 1849, 11 D. 1095. In cases tried with a jury no modification of expenses would be allowed unless there had been divided success on the issues. There was no reason why this case should be treated exceptionally.

LORD PRESIDENT—In this case the motion is to apply the verdict and find the defenders entitled to expenses. The question which has been raised, and which in the particular circumstances is a novel one, is as to whether in view of the fact that there was a counter issue not adjudicated upon, there must not be a direction to the Auditor to deal with the expenses connected with that branch of the case in a different manner from the expenses of the rest of the case.

The course of procedure here was as follows:—There was an issue whether the innuendo could be drawn from the statements made by the defenders, and there was a counter issue whether, assuming that it could, the statements in question were true. I told the jury at the trial that if they came to the conclusion that there was no libel, that ended the case, and they need not consider the counter issue. The jury returned a verdict for the defenders on the first issue. The junior counsel for the pursuer then asked that they should return a verdict on the counter issue. The foreman of the jury then said that they understood that an answer to the counter issue was not required, as in their opinion the verdict they had given covered the whole case. I thought they were right, and so did not direct the jury to return a verdict on the counter issue.

Whether my direction was right or wrong, I think the true answer to the pursuer's contention—an answer which it is impossible to get over—is the fact which was pointed out by Lord Kinnear, that even assuming my direction to have been wrong, the only way of submitting it to review was by bill of exceptions. This not having been done, the question may be allowed to end there.

But I think it well to express an opinion on a matter of principle. In a case where the verdict on one of the issues tabled exhausts the case and leads either to decree as craved, or to absolvitor, any answer on the remaining issue is matter not of right but of convenience.

Where a judge thinks that the verdict on the first issue may result in a motion for a new trial being granted, he may ask for a verdict on the other issue also. But I do not think a party has the right to ask for a verdict on the second issue when the verdict on the first issue exhausts the case. I think therefore that the direction which I gave to the jury was right.

For the purpose of this discussion it is matter of practical importance from its bearing on the question of expenses. It seems to me that the criterion in awarding

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expenses is first of all what is laid down in the Act of Sederunt, 15th July 1876, that a pursuer who is unsuccessful in one branch of his case will not be allowed expenses. By "unsuccessful" the Act I think means that his opponent has been successful. I do not think the present case falls under that head. Again, apart from the Act of Sederunt, I think the Court may order that expenses may not be awarded to a party if by his conduct unnecessary matters have been gone into thereby causing additional expense. I do not think this case falls under that head either.

Further, I agree with all that was said by Lord President Robertson in *Shepherd* v. *Elliot*, 23 R. 695, as to the principles on which the Court proceeds in awarding expenses in actions tried with a jury.

As this case does not fall within any of the categories I have indicated, I think we should follow the ordinary rule, apply the verdict, and find the defenders entitled to expenses.

LORD M'LAREN—I am of the same opinion. It cannot be said that the defenders have failed on the counter issue because in the circumstances it came to be unnecessary in the view of the Judge and the jury to consider it. Accordingly, the provisions in the Act of Sederunt as to disallowing the expenses of a part of the litigation in which a party has been unsuccessful do not apply. I think we must consider that in the proper conduct of the case it was necessary that the witnesses in regard to the counter issue should be examined, and that the expense of bringing forward these witnesses should be expenses in the cause. I see no reason for treating this case exceptionally.

LORD KINNEAR — I am of the same opinion.

LORD PEARSON—I also agree.

The Court found the defenders entitled to expenses.

Counsel for Pursuers—Guthrie, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders—The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents—Kirk, Mackie, & Elliot, S.S.C.

Friday, March 16.

SECOND DIVISION.

MACFARLANE'S TRUSTEES *v.* MACFARLANE AND OTHERS.

Succession—Vesting—Survivorship—Conditional Institution—Accretion—Clause of Exclusion—Substitution of Issue for Parents—Parents' Rights Conditional—Effect on Children's Rights—Clause of Exclusion as to Original Shares Applicable to Accrescing Shares.

A testator who died in 1863 directed his trustees twelve months after the decease of the longest liver of himself and spouse to convert his estate into cash, divide the proceeds into a certain number of parts, and "pay" certain of them to the children of his son A. There followed immediately declarations to the following effect—(1) That the shares in question should not be payable to the grandchildren till the death of both parents, who were meantime to receive the income; (2) That E, one of the grandchildren (otherwise provided for) should not participate in the bequest; (3) That in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parents' share.

There were four grandchildren, C, D, E, F. The testator's widow died in 1871; the survivor of the grandchildren's parents in 1904. C died without issue in 1883. D died in 1895 leaving issue still surviving. E died in 1880 leaving a son G surviving. F was still alive.

In a special case brought to determine the rights of parties in the succession to C, *held* (1) that vesting of the grandchildren's shares was postponed till the death of their mother in 1904; (2) that the express exclusion of E sufficed *per se* to exclude his son G; (3) that D's issue, as conditional institutes and in their own right, took only D's original share of the bequest and not the proportion of C's share which would have accresced to D had D survived the liferentrix; (4) that the whole of D's share by the express clause of survivorship was carried to F.

Martin v. *Holgate*, (1866) L.R., 1 E. & I. Ap. 175, and *Young* v. *Robertson*, 1862, 4 Macq. 337 (second case), *discussed*.

This was a special case brought to determine certain questions arising on the trust-disposition and settlement of Alexander Macfarlane of Thornhill, who died on 11th March 1863. By his trust-disposition and settlement he conveyed his whole estate to trustees for various purposes.

By the *second* purpose the truster directed his trustees to pay to his spouse Mrs Helen Mitchell or Macfarlane, in case she should survive him, an annuity of £200 sterling, and also to allow her the liferent use of the mansion-house of Thornhill and others. By the *third* purpose he further directed his trustees, after payment of said annuity, to pay and divide the free income arising from his heritable estate and also from his moveable estate, until divided as therein appointed, among his children or grandchildren (whose share of income should be paid as after appointed) according to the proportions of the residue of his estates payable to them as thereinafter directed. By the *fourth* purpose the truster directed his trustees, within twelve months after his decease, or sooner if his trustees should be in a position to do so (after setting aside

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such a sum as, together with the income of heritage, should be sufficient to provide for his widow's annuity), to convert his moveable estate into cash, and pay and divide the same among his sons and daughter and grandchildren in the proportions thereinafter directed, the grandchildren's shares to be deposited in bank or invested as thereinafter mentioned. By the *fifth* purpose the truster directed his trustees at the expiry of twelve months after the death of the survivor of himself and his wife to invest 1/24th share of his means and estate for behoof of Alexander Macfarlane junior, his eldest son, and Mrs Marion Clark Scott or Macfarlane, his spouse, in liferent allenarly, and Alexander Macfarlane *tertius*, their son, in fee; said liferent to the spouses being terminable, and said provision being payable to the flar on his attaining twenty-five years of age, an event which happened. By the *seventh* purpose the truster, on the narrative that the existing children of his marriage were his sons Alexander and Robert and his daughter Helen, then Mrs M'Micking, directed his trustees, on the expiry of twelve months after the decease of the longest liver of himself and his said spouse, or so soon thereafter as, in the opinion of his said trustees, should be advantageous for the interest of the trust, to convert the whole of his estates, heritable and moveable, into cash, so far as not then done, and to divide the same (including therein the proceeds of his heritage and certain other sums therein mentioned) into twenty-four equal parts or shares, and pay the same (with the exception of the one twenty-fourth part or share dealt with in the fifth purpose) to and among his children, namely, Alexander Macfarlane junior seven parts, Robert Macfarlane eight parts, Mrs M'Micking five parts, "and to the children of the said Alexander Macfarlane junior, my son, the remaining three parts or shares, and which three parts or shares shall not be paid to my said grandchildren as aforesaid, but shall be invested by my said trustees on good security, and the annual income or interest derived therefrom shall be made payable to my said son Alexander Macfarlane and Mrs Marion Clark Scott or Macfarlane, his spouse, during their joint lives, and to the said Alexander Macfarlane, my son, during his life, in case he survive his said spouse, and to his said spouse, in case she survive him, so long as she shall continue his widow, and that half-yearly for and during the whole period of their respective lives; and upon the death of the longest liver of my said son and his spouse, or in the event of her entering into a second marriage, I direct and appoint my said trustees to divide the said three twenty-fourth parts or shares equally between and among his children (the said Alexander Macfarlane *tertius*, my grandson, being always excluded from participation in such division), share and share alike." By the *eighth* purpose of his said trust-disposition and settlement the truster further provided as follows:—"In the event of the death of any one or more of my said children before the period of division above pointed out, without leaving lawful issue of his, her, or their bodies, I hereby direct and appoint my said trustees to pay and divide the share of such deceaser or deceasers equally among the survivors of the children of Alexander Macfarlane junior, my son, share and share alike, but should such deceaser or deceasers leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parent's share; and in the event of the decease of any of my said grandchildren before the period of payment of their shares, without leaving issue of his, her, or their bodies, then and in that case I direct my trustees to pay and divide the share of such deceaser or deceasers equally among his, her, or their brothers and sisters, but should such grandchild or grandchildren leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parent's share."

The truster was survived by his widow and by his two sons Alexander Macfarlane junior and Robert Macfarlane, and his daughter Mrs Helen Macfarlane or M'Micking (with the two latter and their shares this case is not in any way concerned).

The truster's widow died on 22nd March 1871. Alexander Macfarlane junior died on 1st October 1871. Mrs Marion Clark Scott or Macfarlane never remarried and died on 9th October 1904. Alexander Macfarlane junior was survived by four children, the only ones of the marriage, the youngest of whom was born in 1861, namely, Alexander Macfarlane *tertius*, John Scott Macfarlane, Jane Scott Macfarlane, and Robert Craig Macfarlane.

Alexander Macfarlane *tertius* died on 3rd October 1880, leaving an only son, William Henry Macfarlane (the *fifth party* to the special case).

Jane Scott Macfarlane married James Ferrie, and by her antenuptial contract dated 8th December 1883 conveyed to trustees the whole property belonging to her or that might belong to her during the marriage. Her marriage-contract trustees were the *third parties* to the special case. She died on 26th February 1895 without leaving a settlement, survived by her husband and four children, who were the *fourth parties* to the special case.

John Scott Macfarlane died intestate and unmarried on 16th September 1883.

Robert Craig Macfarlane was still alive and was the *second party* to the case.

On the death of Mrs Marion Clark Scott or Macfarlane on 9th October 1904, the 3/24th shares of the truster's estate, destined by the seventh purpose to the children of Alexander Macfarlane junior, became divisible. Questions of difficulty having arisen with regard to them, and in particular as to the date of vesting of the shares, and as to the succession to the share destined to John Scott Macfarlane, a special case was presented for the opinion and judgment of the Court (the trustees of Alexander Macfarlane senior being the *first parties*), in which the questions were the following:—"(1) Did the right to said 3/24th shares of the truster's estate vest in the beneficiaries not later than the date of the death of the trus-

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ter's widow in 1871? Or (2) Was vesting postponed until the death of Mrs Marion Clark Scott or Macfarlane in 1904? (3) In the event of question 2 being answered in the affirmative, does the lapsed share of the said John Scott Macfarlane accresce and now fall to be paid by the first parties—(*a*) To the party of the second part alone? Or (*b*) Equally between the second party and the representatives of Mrs Fernie? Or (*c*) Equally between the second party, the representatives of Mrs Fernie, and the fifth party? (4) In the event of branch (*b*) or branch (*c*) of question 3 being answered in the affirmative, does Mrs Fernie's share of said accrescing share fall to be paid to the parties of the third or to the parties of the fourth part?"

The second party contended that vesting in the grandchildren was postponed to the date of the death of the liferentrix Mrs Marion Clark Scott or Macfarlane in 1904—*Young* v. *Robertson*, [1862] 4 Macq. 314; *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421. As the only grandchild alive at that date he was, under the eighth purpose, entitled to the whole of the lapsed share of John Scott Macfarlane. In any event the express exclusion of Alexander Macfarlane *tertius* entirely barred the fifth party, his son, from taking any share.

The third parties contended that vesting took place in 1871 at the death of the truster's widow—*Wood* v. *Neill's Trustees*, November 6, 1896, 24 R. 105, 34 S.L.R. 107; *Fairgrieve and Others* (*Stirling's Trustees*) v. *Stirling and Others*, 34 S.L.R. 80. There was a distinct direction in the seventh purpose to pay; the liferents were merely burdens on the fee. The eighth purpose properly construed did not apply to the three shares in question, but to the twenty shares with which the case was not concerned. Accordingly they were entitled to one original share and one-half of John Scott Macfarlane's share. If, however, vesting were postponed as regarded original shares until 1904, that did not apply to accrescing shares, and the share which would have fallen to John Scott Macfarlane vested as at the date of his death in 1883 in his then surviving brother and sister, viz., the second party and Mrs Fernie. They accordingly, as her marriage-contract trustees, were entitled to one-half thereof. The case of *Martin* v. *Holgate*, quoted below, and founded on by the fourth and fifth parties, was opposed to *Young* v. *Robertson*, [1862] 4 Macq. 337 (second case). They also referred to *Cattanach's Trustees* v. *Cattanach*, November 28, 1901, 4 F. 205, 39 S.L.R. 154; *White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660.

The fourth parties contended that vesting took place in 1904, and that they as issue of Mrs Fernie took under the conditional institution in the eighth purpose as conditional institutes and in their own right or otherwise in virtue of the *conditio si institutus sine liberis decesserit*, not only the original share destined to her but also the proportion which would have accrued to her of John Scott Macfarlane's share if she had survived the liferentrix. They founded on *Martin* v. *Holgate*, L.R. 1 H.L. 175; M'Laren on Wills and Succession, i, 704; Jarman on Wills, 5th ed., ii, 1045; Theobald on Wills, 6th ed., 649; *in re Woolley*, [1903] 2 Ch. 206. Their parent's right might be conditioned on her survivance of a certain person or event, but it did not follow that these conditions were to be held as attaching also to the children's interest.

The fifth party maintained that vesting took place in 1871. The exclusion of his father Alexander Macfarlane *tertius* was contained only in the seventh purpose and was not repeated in the eighth purpose that dealt with accrescing shares. Accordingly as an heir *in mobilibus* of John Scott Macfarlane he would succeed to part of his share. Otherwise, if vesting did not take place until 1904, *Martin* v. *Holgate* and the other authorities quoted above applied, and he took part of the share which would have fallen to John Scott Macfarlane.

At advising—

LORD KYLLACHY—This question relates to 3/24th parts of the estate of the late Alexander Macfarlane senior which are bequeathed to his grandchildren—the children of his son Alexander Macfarlane junior. The gift is in the first place expressed absolutely, and in favour of all the grandchildren as at the death of the truster's widow. But then it is immediately qualified by declarations to the effect (1) that the shares in question should not be payable to the grandchildren till the death of both their parents, who are meantime to receive the income; (2) that one of the grandchildren Alexander Macfarlane *tertius* (who had a special provision otherwise) should not participate in the bequest; and (3) that in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parent's share.

There were in all four grandchildren, three sons and a daughter. The truster's widow died in 1871. The survivor of the grandchildren's parents died in 1904. Between those dates three of the four grandchildren died. One (John Scott Macfarlane) died without issue in 1883. Another (the daughter Mrs Fernie) died in 1895 leaving issue, who all still survive. The third predeceaser was Alexander Macfarlane *tertius*, the grandchild excluded from the bequest. He died in 1880 leaving a son who still survives.

The first question is whether the interests in the bequest of John Scott Macfarlane and Mrs Fernie vested in them in 1871 at the death of their grandmother, or only on the death of their mother, the survivor of their parents, in 1904. I am of opinion that the latter is the correct view upon the terms of the settlement. The clauses of survivorship and conditional institution

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are expressly referable to predecease of the *period of payment;* and it is not, I think, possible to contend that the period of payment referred to was any other than the period at which the liferent of the last survivor of the grandchildren's parents expired. That is the sole period at which the actual payment of the grandchildren's shares is directed.

The next question is, whether the fifth party, the child of Alexander Macfarlane *tertius*, takes a share of the thus lapsed share of John Scott Macfarlane. He claims to do so on the footing that the conditional institution of issue applies as well to devolved as to original shares. In his case, however, no such question, in my opinion, really arises. His father Alexander Macfarlane *tertius* was expressly excluded from the bequest, and that being so the fifth party cannot, it seems to me, take any interest which his father could not have taken were he now alive.

The remaining question is, whether Mrs Fernie's children take, as conditional institutes and in their own right, not only her original share of the bequest (as to which there is no dispute), but also the proportion which would have accrued to her if she had survived, of the share of her predeceasing brother John Scott Macfarlane. As to that we had an ingenious argument founded on the English case of *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175. And it is true that, if the event had here occurred of the death of one or more of Mrs Fernie's children between their mother's death in 1895 and the period of division in 1904, there might have been an interesting question as to whether, on the doctrine of *Martin* v. *Holgate*, such deceasing children took on their mother's death an independent vested interest—not contingent on their surviving the period of division—in their mother's original share. But that question, which was the only point argued or considered in the case of *Martin* v. *Holgate*, does not of course arise here. We have here to deal only with an accrescing or devolved share, the share of John Scott Macfarlane, as to which there is an express clause of survivorship carrying, in the event which occurred, the shares in question to the second party, his surviving brother. Now, having carefully considered both the arguments and the judgments in the case of *Martin* v. *Holgate*, I have come to the conclusion that the decision in that case is here inapplicable. In other words it appears to me to be clear that with respect to devolved shares the ruling decision is that of *Young* v. *Robertson*, 4 Macq. 337. I mean the decision under the second appeal in that case, which practically I think rules this particular question.

Lord Stormonth Darling—The testator, who died in 1863, was survived by his wife and three children. His wife, to whom he left a liferent annuity and other provisions, died on 22nd March 1871. The general scheme of his settlement was, that at the expiry of twelve months from the decease of the longest liver of himself and his spouse his trustees should convert the whole of his estates, heritable and moveable, into cash (subject to certain options to his children about his heritable estate), and divide the same into twenty-four equal parts or shares. Twenty of these shares were to be paid in specified proportions to his children or their issue. The remaining four shares were to go to his grandchildren, the children of his eldest son Alexander Macfarlane. Of these four shares one was separately dealt with by the fifth purpose of the settlement, with the effect of giving it to his grandchild Alexander Macfarlane *tertius* when he attained twenty-five years of age. No question arises about that one-twenty-fourth share. The controversy relates entirely to the vesting of the remaining three-twenty-fourth shares, of the value of £2300 or thereby, the directions as to which are to be found in the seventh and eighth purposes of the settlement.

By these directions the three shares were to be liferented by the testator's son Alexander and his wife Mrs Marion Macfarlane and the survivor, being the father and mother of the family to whom the fee was destined. The father died on 1st October 1871. The mother survived till 9th October 1904. At the death of the father the family were four in number—(1) Alexander *tertius*, whom I have mentioned above and who died on 3rd October 1880; (2) John Scott Macfarlane, who died unmarried on 16th September 1883; (3) Jane Scott Macfarlane, who entered into an antenuptial contract of marriage on 8th December 1883, married Mr J. A. Fernie, and died on 26th February 1895, leaving four children who survive; and (4) Robert Craig Macfarlane, who also survives.

Although the words of the seventh purpose profess to give the three shares "to the children of the said Alexander Macfarlane junior, my son," they must be read in connection with the words which follow, where the testator directs his trustees, upon the death of the longest liver of the said son and his spouse, "to divide the said twenty-three parts or shares equally between and among his children (the said Alexander *tertius*, my grandson, being always excluded from participation in such division)." The reason of this exclusion was plainly that Alexander *tertius* had got a whole share to himself by the operation of the fifth purpose. At his death, however, he left a son, who is the fifth party to the case, and claims to participate through his father in the share which would have fallen to John Scott Macfarlane had he survived the liferentrix. The other claimants (not counting the trustees of the testator) are Robert, the only surviving grandchild, the marriage-contract trustees of Mrs Fernie and the Fernie children.

The eighth purpose of the settlement, on the terms of which the question mainly turns, deals first with the contingency of the death of any of the testator's own children before the period of division (*i.e.*, twelve months after the decease of the testator's widow) without leaving lawful issue. With

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that part of the clause we are not concerned. But then the clause goes on to provide—"And in the event of the decease of any of my said grandchildren before the period of payment of their shares without leaving lawful issue of his, her, or their bodies, then and in that case I direct my trustees to pay and divide the share of such deceaser or deceasers equally among his, her, or their brothers and sisters, but should such grandchild or grandchildren leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parents' share."

Now, what is the "period of payment" there mentioned? Clearly, as it seems to me, the death of the longest liver of Mr and Mrs Alexander Macfarlane, which took place on 9th October 1904. Before that date three of the grandchildren had died, two leaving issue, viz., Alexander and Mrs Fernie, one leaving no issue, viz., John. The issue so left, by force of the clause which I have just quoted, would undoubtedly "be entitled to their parents' share." But Alexander *tertius* was by the 7th purpose expressly excluded from participation in the division which was to take place on the death of the liferentrix, and therefore I fail to see how his son, as representing him, could possibly take anything which his father could never have taken. With regard to Mrs Fernie, her issue are admittedly entitled to take her original share; but with regard to the share which would have accresced to her by her survivance of John, if she had also survived the liferentrix, I think that her issue are excluded by the express terms of the 8th purpose, even apart from the decision on the second point in the leading case of *Young* v. *Robertson*, 4 Macq. 314 and 337—the point relating to the appeal of John Lawford Young. The claim of her marriage-contract trustees could only succeed on the footing that a right had vested in her at the date of her marriage-contract in 1883, which is inconsistent with the declared date of payment, and therefore of vesting, being 9th October 1904.

An argument was founded by the fourth and fifth parties on the case of *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175, as affecting the right which is said to have accresced from John. That was a case of the highest authority, decided in the House of Lords in 1866 by the same Law Lords who had decided the case of *Young* v. *Robertson* four years before. It dealt with a direction to trustees to pay the proceeds of the testator's estate to his wife for life, and "after her decease to distribute and divide the whole amongst such of my four nephews and nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead leaving issue, such issue shall be entitled to their father's or mother's share." Three of the nephews predeceased the testator's widow, two of them without ever having had a child, one of them leaving a daughter, who herself predeceased the widow. In these circumstances it was held that this daughter, upon her father's death, took a vested interest in the share which if he had survived he would have taken, on the ground that the fact of the gift to the parent being contingent did not affect the nature of the gift to the issue, which was an independent bequest. The declaration by the House undoubtedly bore that the daughter took a vested interest in one-fourth of the residuary estate of the testator, which implied that her representatives took, not merely her father's original share, but that they participated with the surviving uncle and aunts in the share which had been destined to one of the uncles who had predeceased the testator's widow. The share of the other uncle had lapsed by his predeceasing the testator.

Now, all I can say about that case is, that if there is any inconsistency between it and *Young* v. *Robertson* (which is difficult to believe, as the tribunal was the same and the interval of time between the two decisions was so short), *Young* v. *Robertson* must rule, as being an appeal from Scotland expressly governed by a series of Scottish decisions. Undoubtedly there the declaration of the House, differing in result from the declaration in *Martin* v. *Holgate*, admitted the appellant John Lawford Young to the share originally given to his father, but debarred him from participating in the share of a legatee (William Macdougall) who had died before the appellant's father. Now, it is only as regards the share accrescing from John Macfarlane that the case of *Martin* v. *Holgate* is founded on. It is not required to help the claim of the fourth parties to their mother's original share, which is not disputed. It cannot help the fifth party to claim as his father's share what his father was excluded from for a reason independent of survivance. It thus touches only a small part of the case, and it seems to me that to apply it here would be inconsistent with the whole tenour of this particular deed, and particularly with the express direction that, in the event of any of the grandchildren dying before the period of payment without leaving issue, the share of such deceaser should be paid to his, her, or their brothers and sisters.

I am therefore for answering the first question in the negative, the second question in the affirmative, and branch (*a*) of the third question in the affirmative. The fourth question and branches (*b*) and (*c*) of the third question are superseded.

LORD JUSTICE-CLERK—That is my opinion also.

LORD LOW was absent.

The Court pronounced this interlocutor:—

"Answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative; answer branch (*a*) of the third question of law therein stated also in the affirmative: Find it unnecessary to answer the fourth question of law therein stated."

Counsel for the First and Second Parties—Munro. Agents—Murray, Lawson, & Darling, S.S.C.

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Counsel for the Third Parties—Ingram. Agent—David Philip, S.S.C.

Counsel for the Fourth Parties—Paton. Agents—Ross & M'Callum, S.S.C.

Counsel for the Fifth Party — Laing. Agent—J. Ferguson Reekie, Solicitor.

Friday, March 16.

SECOND DIVISION.

[Lord Johnston, Ordinary.

WOLFE *v.* ROBERTSON.

Process—Misnomer—Jurisdiction—Review—Small Debt Court—Diligence—Suspension—Misnomer of Party Obtaining Decree—Finality of Decree—Attempt to Suspend Diligence following Decree — No Distinction between Suspension of Decree and Diligence following it — Action of Damages for Wrongful Poinding—Justices of the Peace Small Debt (Scotland) Act 1825 (6 *Geo.* IV, *c.* 48), *secs.* 14 *and* 15.

By secs. 14 and 15 of the Justices of the Peace Small Debt (Scotland) Act 1825 it is provided that small debt decrees shall not (except in cases not here in point) be "subject to advocation, nor to any suspension, appeal, or other stay of execution . . . nor . . . reduction before the Court of Session."

A, registered under the Moneylenders Act 1900 as carrying on business at X under the name of "the Exchange Loan Company," lent a sum of money to B and took in exchange a bill drawn by himself in the name of "The Exchange Loan Company, Limited," payable at X and accepted by B. B having failed to repay the advance, A raised an action against him on the bill in the Small Debt Court under the Act of 1825 in the name of "The Exchange Loan Company, Limited," and obtained a decree in the following terms:—"Find the above-designed B liable to the also above-designed Exchange Loan Company, Limited, in the sum of . . . and hereby decree and ordain . . . execution to pass hereon by poinding . . ." B throughout knew that A was the Exchange Loan Company, Limited, and, although present in Court, raised no objection to the instance of the action. A proceeded afterwards to poind B's effects. B brought a suspension on the ground that it was incompetent to do diligence on the decree because of the inaccurate addition of the word "Limited" to A's registered name. He also brought an action for damages for wrongful poinding.

The Court, *holding* that all objections to the decree and diligence were foreclosed by secs. 14 and 15 of the Act of 1825, *refused* the suspension and *assoilzied* the defender in the action for damages.

The Justices of the Peace Small Debt (Scotland) Act 1825 provides, sec. 14—"The decree given by the said justices in any case competent to them by this Act shall not be subject to advocation, nor to any suspension, appeal, or other stay of execution, excepting only in the case of consignation, as hereinbefore provided for the purpose of a rehearing before the justices, nor shall be set aside or altered in an action of reduction before the Court of Session on any other ground except that of malice and oppression on the part of the justices, nor shall any such action of reduction be at all competent after the expiration of one year from the date of the decree of the justices."

Section 15 provides that in case of a reduction being brought on the ground of malice and oppression the pursuer must find sufficient caution.

Andrew Robertson was under section 2 of the Moneylenders Act 1900 (63 and 64 Vict. cap. 51) registered as carrying on business as a moneylender at 429 Lawnmarket, Edinburgh, under the name of the "Exchange Loan Company" (without the addition of the word "Limited"). On 13th February 1904 he advanced a sum of money to Manuel Wolfe and two others, who in return accepted a bill in the following terms:—

"Edinburgh, 13th February 1904.

"£3, 0s. 0d.

"One day after date pay to us or our order, within our office at 429 Lawnmarket here, the sum of three pounds sterling, for value received.

"*To* Freda Funk, broker, 18 South Richmond Street, Edinburgh.
Walter Funk, broker, 2 Pleasance, Edinburgh.
Manuel Wolfe, rag merchant, 13 Richmond Place, Edinburgh."

Exchange Loan Co., Ltd.
Freda Funk.
Walter Funk.
Manuel Wolfe.

Being unable to get payment of his advance, Robertson, under the name of the Exchange Loan Company, *Limited*, brought an action against Wolfe and the other two debtors in the Justice of Peace Small Debt Court, Edinburgh. When the case was called in Court the two other debtors allowed decree in absence to go out against them. Wolfe was present in Court and consented to decree and took no objection to the instance of the action. Decree was accordingly given on 31st October 1904, finding the defenders liable to the "above designed Exchange Loan Company, Limited, pursuers, in the sum of three pounds ten shillings with six shillings and seven pence of expenses," and decerning and ordaining "instant execution of arrestment, and also execution to pass hereon by poinding after a charge of ten free days." Throughout the whole transactions there was no doubt that Wolfe knew that Robertson was really the person with whom he was dealing, and that the Exchange Loan Company, Limited, was simply a business name assumed by him. On the 15th of June Robertson executed a poinding of Wolfe's effects under the above decree. After the poinding was partially executed Wolfe paid £2 to account

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of the amount in the decree, taking no objection either to the decree or the diligence which had followed upon it. Subsequently, however, he brought a note of suspension and interdict in the Court of Session against Robertson, in which he sought to interdict "the respondent and all others from proceeding in any manner of way with any diligence whatever against the complainer upon or in virtue of an alleged or pretended decree obtained at the instance of a pretended company styled the Exchange Loan Company, Limited, 429 Lawnmarket, Edinburgh, against the complainer."

In his averments he stated—"(Stat. 2) There is no such company as 'The Exchange Loan Company, Limited,' nor has there ever been such, and the complainer is not indebted in any way to any such company. Although the said pretended company is non-existent and fictitious, yet the respondent is executing the said decree with the view of putting the money which is said to be the property of said non-existent company into his own pocket. He has already extorted a sum of £2 from the complainer, which he has appropriated to his own uses."

He pleaded—"(1) The pretended decree in question being at the instance of a non-existent pursuer, and the respondent having illegally and unwarrantably threatened, and still threatening, to put the said decree into force without lawful authority, interdict should be granted as craved, with expenses."

Subsequently, when the case was before the Inner House, the complainer added an amendment, in which he stated that he had ascertained and averred that there was already an "Exchange Loan Company, Limited," registered under the Companies Acts, and carrying on business in England.

Simultaneously with the note of suspension and interdict Wolfe brought an action against Robertson in the Court of Session in which he sued him for the sum of £250 as damages for wrongful and illegal poinding.

In his answers the defender stated, *inter alia*—"Admitted that in raising and following forth said action under which said decree was pronounced, the defender represented 'The Exchange Loan Company, Limited.'" In the Inner House he added the following amendment:—"The defender is registered under the Moneylenders Act 1900 under the name 'The Exchange Loan Company,' of which company he is the sole partner. The addition of the word 'Limited' to the name of said company was made by the defender in the *bona fide* belief that he was entitled to do so. Throughout the transactions condescended on, the pursuer was well aware that the defender was really the person with whom he was dealing, and that the Exchange Loan Company, Limited, was simply a business name assumed by him."

The defender pleaded in the action for damages, *inter alia*—"(1) The action is incompetent and untenable in respect that the small debt summons, decree, and warrant following thereon, are *ex facie* regular and valid, and are not liable to be challenged or set aside in the present action. (2) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (4) The decree libelled on, and the whole proceedings following thereon, having been legal and regular, can afford no ground for damages against the defender."

On 19th January 1906 the Lord Ordinary (JOHNSTON) pronounced (1) an interlocutor in the note of suspension and interdict granting the interdict craved: (2) an interlocutor in the action for damages repelling the first, second, and fourth pleas-in-law for the defender, and assigning a day for the adjustment of issues.

Opinion.—"There are here two actions arising out of the same circumstances—a suspension and an action of damages. They must I think be separately considered. And the suspension is first in order.

"It is a suspension, or rather a suspension and interdict, against any diligence proceeding against the complainer in virtue of a certain Justice of Peace Small Debt decree, of date 31st October 1904. It is not a suspension of the decree itself. The decree proceeds on a small debt summons at the instance of the Exchange Loan Company, Limited, 429 Lawnmarket, Edinburgh, against Freda Funk, Walter Funk, and Manuel Wolfe, the latter being the only complainer, and on the summons decree went out against the defenders for £3, 10s. and 6s. 7d. of expenses, and containing the usual warrant to poind after a charge of ten days. The action proceeded on a bill for £3, all as set forth in the account annexed to the summons. There is no objection to the regularity of the procedure.

"The person against whom the suspension and interdict is brought is a certain Andrew Robertson, moneylender, 429 Lawnmarket, Edinburgh, and the ground of suspension is that there is not, and never has been, any such company as the 'Exchange Loan Company, Limited,' that the company is non-existent and fictitious, that the complainer is not indebted to such company, that in suing the complainer along with the two Funks, and obtaining decree against them, the respondent made use of the name of this fictitious company, and that he is now using the decree so obtained for his own behoof.

"I read the defences as an admission that there is no such limited company as the 'Exchange Loan Company, Limited.' The defender was bound, on the complainer's challenge, to give specific information as to its constitution and registration, and I do not understand the averment that the respondent represented the 'Exchange Loan Company, Limited,' as anything but an admission that he illegally used the name of a fictitious limited company to represent himself in a transaction in which he was really principal, and in the action which he raised upon it.

"The decree itself is protected under the Justice of Peace Small Debt Act 1825 (6

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Geo. IV, cap. 48), section 14. Except under the provision for re-hearing there is no possibility of review except by reduction, and reduction must be brought within a year from the date of the decree, and can proceed only on the ground of malice and oppression on the part of the justices. It was open to the complainer when cited, or on an application for re-hearing, to take an objection to the instance—in fact, a double objection, viz.—(1) That a descriptive firm cannot sue without the addition of three of its partners, or the whole if less than three—*Antermony Coal Company*, 4 Macph. 1017, per Lord President Colonsay; and (2) that the Exchange Loan Company, Limited was non-existent and fictitious. But the opportunity passed, and whether any other remedy is open, review under the statute cannot now be had, and the decree must stand for what it is worth—*Bell* v. *Gunn*, 21 D. 1009, and similar authorities.

"The question remains whether, standing the decree, the complainer has any remedy. The Act, section 14, *supra cit.*, says that the decree shall not be subject to advocation, &c., 'or any other stay of execution.' But I do not think that that stands in the way of the relief sought. It is true that the Court refused to interfere with diligence proceeding where a trifling and innocent mistake had been made in the Christian name of a defender in a small debt summons *dummodo constabat de persona* (*Spalding* v. *Valentine & Company*, 10 R. 1092), but *cf.* the second part of *Gray* v. *Smart*, 19 R. 692. But here there has been no innocent mistake. An act has been committed which the Court will utterly discountenance, viz., the unauthorised assumption of the style of a limited company. I cannot find that there is any penalty imposed by the Companies Acts on such assumption, but it is nevertheless a fraud on these Acts, and may well be an element in fraud at common law. But one thing is certain, that at any step the Court will stop an individual using the name of such a fictitious limited company. The decree may stand. I may not be able to suspend diligence upon it by the company in whose name it proceeds. But as there is no such company that is immaterial. But the statute puts no obstacle in my way in stopping the use by an individual of the decree which he has obtained in the name of a fictitious company. The decree is not his warrant, and he has no right to use it, though he has deceived the justices into granting it.

"I shall therefore make the interdict perpetual, with expenses.

"In the matter of the action for damages for wrongful and illegal poinding in the circumstances above narrated there are certain preliminary pleas which require to be considered. . . .

[*His Lordship discussed pleas* 1, 2, *and* 4 *for the defender.*]

"I shall therefore repel the 1st, 2nd, and 4th pleas for the defender, and appoint issues to be lodged, reserving to hear the parties as to whether the case should not be sent to proof."

Robertson reclaimed in both actions.

Argued for the appellant—The respondent's case was without substantial foundation; admittedly he was the appellant's debtor, and admittedly it was really the appellant who had pounded his effects, so that there was no room for the suggestion that any injustice had been done or was going to be done to the respondent. Undoubtedly, however, the instance in the small debt action was technically bad, and if timeous objection had been taken the action would have been dismissed. But the decree was now unchallengeable—Small Debt Act 1825, sections 14 and 15; *Bell* v. *Gunn*, June 21, 1859, 21 D. 1008—and further, the diligence authorised by the decree was also unchallengeable, there being no distinction under the Small Debt Acts between a suspension of the decree itself and of the diligence following it—Act of 1825, section 14; *Wilson* v. *Scott*, November 21, 1890, 18 R. 233, 28 S.L.R. 127; *cf.* also *Graham* v. *Findlay*, February 22, 1845, 7 D. 515. Diligence could therefore be done by the respondent as representing the Exchange Loan Company, Limited, and it was absurd to say that the addition of the word "Limited" affected the question; it was a mere nominal misdescription, which was a matter of no moment—*Spalding* v. *Valentine & Company*, July 4, 1883, 10 R. 1092, 20 S.L.R. 724; *Turnbull* v. *Russell*, November 15, 1851, 14 D. 45; *Keene* v. *Aitken*, February 15, 1875, 12 S.L.R. 308. On the assumption, however, that the Exchange Loan Company, Limited, was a fictitious person the bill fell to be treated as payable to bearer, and the respondent as such could do diligence on it—Bills of Exchange Act 1882, section 7 (3); *Bank of England* v. *Vagliano Brothers*, (1891) A.C. 107. As to the action of damages, no damage had been suffered, but the decree being unchallengeable damages could not be awarded against a party who had proceeded under it—*Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333.

Argued for the respondent—The Lord Ordinary's view that this was a fraud against the Companies Acts was a sound one. The Court would do nothing to further such a fraud. If there was a real company in existence known as the "Exchange Loan Company, Limited," it alone could proceed upon the decree; if there was not, clearly the appellant could not avail himself of the fiction. The cases cited by the appellant were all cases of mere error in description. This was an error *in persona*, and therefore *in essentialibus*. He referred to *Brown* v. *Rodger and Another*, December 13, 1884, 22 S.L.R. 225; Kerr on Fraud and Mistake, 300.

Lord Kyllachy—In this case as presented to the Lord Ordinary the ground of suspension was this, that the respondent being registered as a moneylender, as carrying on business under the name of the "Exchange Loan Company," and having drawn under that name, with the word "Limited" added, a bill which the complainer accepted, and under the same name

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and with the same addition sued the complainer in the Justices Small Debt Court and obtained decree for the amount of the bill, it was incompetent to do diligence on this decree by reason of the said inaccurate addition to the respondent's registered name.

It was conceded that if objection had been taken in the Small Debt Court it must have been found that the instance was defective, and that the action must have been dismissed, not indeed because the word in question was added to the respondent's trade name, but upon the broader ground that a person suing under the descriptive title of a firm or company of which he is the sole partner must conjoin with the descriptive name his own proper name as such sole partner. That is a rule of process about which there can be no doubt.

On the other hand, it was also conceded, and is also not doubtful, that no objection being taken to the instance, and decree having gone out, such decree is absolutely protected from challenge or from stay of execution except upon certain special grounds, and then only if the challenge is brought within one year after the date of the decree. That is the effect of the 14th and 15th sections of the Small Debt Act of 1825, 6 Geo. IV, cap. 48—the Act under which the action was brought.

Accordingly, it is common ground—and the Lord Ordinary has so held—that this decree, as a decree in favour of the respondent under the name of "The Exchange Loan Company, Limited," is absolutely unchallengeable, and, moreover, that the summons and decree setting forth correctly the respondent's address in Edinburgh, there can be no question as to the identification of the respondent as the person to whom, under the name in question, the decree belonged.

The Lord Ordinary, however, seems to have been of opinion that although the decree is unimpeachable and there is no question as to whom it belongs, the respondent is yet debarred from enforcing it by reason of the addition in the summons of the word "Limited" to the trade name under which he is registered, his Lordship's view apparently being that the said addition involved a representation that the respondent was really a corporation under the Companies Acts, and that such a misrepresentation, although of no materiality in the circumstances, and involving no prejudice to the complainer, yet somehow put the respondent beyond the pale of the law, making the decree as a foundation for diligence a dead letter, and thus warranting a stay of execution.

I am unable to concur in this view of the situation. It is not, it will be observed, suggested that if the decree had been taken simply in favour of the Exchange Loan Company, or of the Exchange Loan Company Registered, or with the addition of some other purely fanciful designation, there would have been any difficulty. Any objection to the instance being foreclosed (as decided in the case of *Bell* v. *Grieve*, 21 D. 1008) by the finality of the decree under the statute, it is of course equally excluded as against the diligence which the decree authorises, and authorises without charge or other procedure. That is expressly provided by the 14th clause of the statute, which declares that, except as therein mentioned, the justices' decree shall not be subject, *inter alia*, to any stay of execution. In other words, as pointed out by the Lord President in *Wilson* v. *Scott*, 18 R. 233, there is no room under the Small Debt Statute for any distinction between a suspension of the decree itself and of the diligence following upon it. And that being the rule generally as regards all objections to the "instance," as other objections all go to the validity of the decree, I am quite unable to see why the objection now urged should be in a different position. In particular, I am, I confess, unable to see why an absurd but quite irrelevant assumption of corporate status should, more than any other unfounded assumption, involve such disabilities as the Lord Ordinary assumes. It may be very wrong and very absurd for either a pursuer or a defender to design himself in an action as possessing a status, social or legal, which he does not possess. But I do not know of any enactment or rule of law which attaches to such a proceeding the supposed penal results.

I am therefore of opinion that the stay of execution asked in the suspension should be refused, and I think for the same reasons that the action of damages should be thrown out. I may add that I have not overlooked the amendment made by the complainer the other day, which was that he had ascertained and averred that there was already an "Exchange Loan Company, Limited," registered under the Companies Acts, and carrying on business in England. It was said that this brought into the case an element not merely of assumption of title but of personation. But it appeared, and appears to me, that apart from other considerations—considerations with which I have already dealt—this particular objection is quite sufficiently met by the fact that upon this summons and decree there was no room for doubt as to the respondent's identity. He is described under his registered trade name, and his correct address is set forth as I have already said.

LORD STORMONTH DARLING—I concur.

LORD JUSTICE-CLERK—I am unable to agree with the result at which the Lord Ordinary has arrived. The respondent in this suspension holds a decree of the Small Debt Court for a debt found due to him, and I agree so far with the Lord Ordinary that that decree cannot be reviewed by this Court, it being impossible to review a Small Debt proceeding. But I am unable to see how it can be rendered nugatory by a suspension of diligence upon the decree. The claim of the respondent in the suspension when before the Small Debt Court was for payment of the amount of an acceptance which he held, and which it is not disputed and cannot be disputed was an acceptance by the complainer in respect of a loan

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granted to him, the amount of the loan being paid to him by the respondent in exchange for the accepted bill, which thus became the property of the respondent. The ground of the complainer's suspension is that the drawer of the bill is on the face of it a company—The Exchange Loan Company, Limited—and that there is no such company. The respondent's averment is that he did business under that name, that this was well known to the complainer, and that no objection was taken in the Court when his summons in that name was raised, although the complainer was present when the case was before the Court and consented to decree.

It is plain that the decree went out against him on his acceptance on the face of the bill, and if he was to object to the instance he had opportunity to do so, and allowed decree to pass. Thereafter he paid £2 to account to prevent the sale of his goods under a poinding, and no diligence was pressed further against him.

I am unable to see how it can be objected successfully in a suspension to the rights of the holder of a bill for value, that the lender of the money has used a particular name as drawer. He is claiming his debt in respect he holds the bill, and unless it can be alleged that the acceptance was obtained by fraud, or that the holder of the acceptance has obtained possession of the document illegally, there can be no defence to the diligence used upon it. There can be no stay of execution upon such a decree in the ordinary case, and I see no ground for holding that the assumption of a name, whatever it may be, shall entitle the debtor on a bill to suspension of diligence.

It was urged that the complainer has ascertained that there does exist in England a company of the same name as that adopted by the respondent. I am unable to see how this can affect the question. A bill may be drawn in a name which is quite common, and there may be a question of fact who the actual individual who used the name was. But that cannot affect the obligation of the acceptor to meet his obligation when it falls due to the holder of his acceptance, for the holder has it as a warrant for diligence, and unless his right so to hold it can be impugned on some special ground, he is entitled to the assistance of a law court to enforce the obligation under it.

I therefore agree with your Lordships in recalling the judgment of the Lord Ordinary.

LORD LOW was absent.

The Court recalled the interlocutors in both actions, refused the suspension, and assoilzied the defender in the action for damages.

Counsel for the Reclaimer—M'Lennan, K.C.—Forbes. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Trotter. Agent—Francis Green, Solicitor.

Friday, March 16.

SECOND DIVISION.

BROWN *v.* BROWN.

Poor's Roll—Circumstances Warranting Admission.

A porter earning 23s. a week, with no children, who had been found to have a *probabilis causa litigandi*, *held* entitled to admission to the poor's roll in order to defend an action of adherence and aliment brought against him by his wife, and to raise an action of divorce on the ground of adultery against her, she having been already admitted to the poor's roll.

The Lord Justice-Clerk *dissents* from the opinions expressed by Lord Young in the following cases—*Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, 22 S.L.R. 356; *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, 22 S.L.R. 865; *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601; *Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752.

John Cunningham Brown, porter, 16 Archibald Place, Edinburgh, applied for admission to the poor's roll in order to defend an action of adherence and aliment brought against him by his wife, and to raise an action against her for divorce on the ground of adultery. She was on the poor's roll.

On 24th January 1906 the Court remitted the application to the reporters on *probabilis causa litigandi* to report whether the applicant had a *probabilis causa litigandi*, and also whether, in the circumstances of his application, he was otherwise entitled to the benefit of the poor's roll.

On 2nd March 1906 the reporters reported that the applicant had a *probabilis causa litigandi*, but that they did not think him entitled to admission to the roll.

The facts were as follows:—The applicant was a porter, thirty-seven years of age, married, without children, employed at the General Register House, Edinburgh, at a salary of sixty pounds a year or twenty-three shillings a-week. He had no means whatever beyond his salary.

Brown moved to be admitted. His wife opposed the motion on the ground that his circumstances did not warrant his admission.

Argued for the applicant—He was entitled to admission, the test being, could he, looking to the whole circumstances of the case, bear the ordinary costs of litigation. He could not—*Miller* v. *Gordon*, March 8, 1828, 16 S. 812; *Robertson*, July 8, 1880, 7 R. 1092; *Stevens* v. *Stevens*, January 23, 1885, 12 R. 548, 22 S.L.R. 356; *Anderson* v. *Blackwood*, July 11, 1885, 12 R. 1263, 22 S.L.R. 865; *Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826, 25 S.L.R. 601; *Macaskill* v. *M'Leod*, June 30, 1897, 24 R. 999, 34 S.L.R. 752. See especially Lord Young's opinion in the last four cases. The following special circumstances were strongly in his favour—his wife was already

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on the poor's roll, the proceedings were consistorial, he was a defender, being defender in the action of adherence and aliment, and pursuer in the action of divorce only because of it; if not admitted he would have to pay aliment, his own costs and his wife's costs—Act of Sederunt, 21st December 1842, section 16.

Argued for the objector—The question was whether the applicant was in necessitous circumstances. He was not, looking to the wages he earned, and the fact that he had no dependents—*Robertson, cit. sup.*, governed the case, where Lord President Inglis laid it down that a man earning twenty-three shillings a-week was not except in exceptional circumstances entitled to get on the roll. See also *Muir*, February 1, 1850, 12 D. 632; *Mackenzie* v. *Campbell*, March 18, 1892, 29 S.L.R. 594. The Lord Ordinary had power to dispense with the payment of Court dues — The Clerks of Session (Scotland) Regulation Act 1889, section 9.

LORD JUSTICE-CLERK—Cases of this kind must be dealt with, first, upon general rules, and second, on considerations which the Court may think justify departure from such general rules. Lord President Inglis in the case of *Robertson* (7 R. 1092), laid down the general rule that a man with 23s. a-week is not entitled to the benefit of the poor roll, but that special circumstances may justify the admission of such a person; and in that case the applicant in the special circumstances was admitted. In this case the peculiarity of the position is that the applicant is not really a pursuer. He has been brought into Court by his wife. She demands adherence and aliment, having been away from her husband for eighteen months. He says that in order to meet this claim he wishes to bring an action of divorce. The reporters on *probabilis causa* report that he has a *probabilis causa*. His wife practically compels him to bring such an action, for I must assume at this stage that what she is trying to do is to extract aliment for the purpose of enabling her to live in adultery. If he is not admitted the applicant must pay his wife's costs, his own costs, and aliment to his wife. I think these are special circumstances enough to justify admission to the roll in this case.

In coming to this conclusion I desire to say that I do not assent to the opinions delivered by Lord Young in the cases cited. I do not think the views expressed by his Lordship are to be accepted as correctly stating the grounds on which the Court ought to decide such questions.

LORD KYLLACHY—I am of the same opinion. The special circumstances here are sufficient to justify the admission of the applicant.

LORD STORMONTH DARLING—I agree.

LORD LOW—I also agree.

The Court admitted the applicant.

Counsel for the Applicant — Melville. Agent—W. H. Hamilton, S.S.C.

Counsel for the Objector—Laing. Agent—J. B. Lorimer, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff-Substitute at Perth.

YEAMAN *v.* LITTLE.

Bankruptcy—Election of Trustee—Appeal—Competency—Error of Sheriff in Deducting Amount of a Vote which in Fact had not been Given—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 71.

At a meeting of creditors for the election of a trustee in a sequestration objection was taken to a number of votes for one of the two candidates on a ground which the Sheriff subsequently upheld. The Sheriff, misled by the parties themselves, in giving effect to his judgment disallowed the vote of a creditor who, according to the minute of the meeting, had in fact not voted, and deducted the amount of it from the candidate's total. By doing so the Sheriff was led to declare the wrong candidate in a majority and trustee. The unsuccessful candidate brought an appeal.

Held that the appeal was incompetent inasmuch as the Sheriff had exercised his jurisdiction and his decision was, under section 71 of the Bankruptcy (Scotland) Act 1856, final.

Farquharson v. *Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573, *distinguished.*

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), section 71, enacts—"*Judgment by Sheriff as to Trustee Final.*—The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any court or in any manner whatever."

At a meeting of creditors, held at Perth on 27th January 1906 for the purpose of electing a trustee or trustees on the sequestrated estates of Thomas Warrand Farquharson, of Cammock and Whitehills, Glenisla, votes to the value of £971, 1s. 1d. were given for John Yeaman, solicitor, Alyth, and to the value of £581, 10s. 5d. for John Little, solicitor, Perth. Objections were taken to a number of the votes and, *inter alia*, to a number given for Yeaman on the ground that the Justice of the Peace before whom the oaths bore to have been taken was a "solicitor" and a "procurator in an inferior court," contrary to 6 Geo. IV, c. 48, section 27. The Sheriff-Substitute (SYM) sustained this objection, and after a scrutiny of the votes, by interlocutor of 13th February 1906 found Little to be in a

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majority, and declared him elected trustee. Against this interlocutor Yeaman now brought an appeal in the First Division.

It appeared that among the votes for Yeaman objected to by Little was one by a Mr George Gordon, ironmonger, Alyth, on the sum of £55, 1s. 3d. Gordon's name did not appear in the minutes of the meeting of creditors as having voted for Yeaman, but the Sheriff-Substitute having been misled by the parties themselves into thinking that Gordon had voted, deducted the value of his vote (£55, 1s. 3d.) from Yeaman's total, with the result that Little was in a majority of £33, 17s. 4d. Had this not been done Yeaman would have been in a majority of £21 or thereby.

Little objected to the competency of the appeal on the ground, *inter alia*, that review was excluded by section 71 of the Bankruptcy (Scotland) Act 1856.

Argued for the appellant — The appeal was competent. Even assuming that the Sheriff-Substitute was right in regard to the meaning of the Act 6 Geo. IV, c. 48, he had exceeded his jurisdiction in deducting £55, 1s. 3d., the vote of George Gordon, Mr Gordon not having voted, or at all events his vote not having been recorded in the minutes of meeting of creditors. Where the Sheriff had exceeded his jurisdiction appeal was not excluded. His duty was to declare elected the person chosen by the majority of the vote of creditors. Here he had not done so. The following cases were referred to—*Farquharson* v. *Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573; *Rankine* v. *Douglas*, July 19, 1871, 9 Macph. 1053, 8 S.L.R. 669; *Wylie* v. *Kyd*, May 21, 1884, 11 R. 820, 21 S.L.R. 693; *Moncur* v. *Macdonald*, January 8, 1887, 14 R. 305, 24 S.L.R. 225; (*Sampson* v. *Campbell*, June 29, 1849, 11 D. 1208, was also referred to on another point).

The respondent was not called upon.

LORD PRESIDENT — The scheme of the Bankruptcy Act undoubtedly was to put an end to appeals on such matters as the election of a trustee. This was forcibly put by Lord Adam in a case not referred to at the bar—*Wylie* v. *Kyd*, (June 21, 1884, 11 R. 968, 21 S.L.R. 693). This scheme was carried out by the finality clauses of the Act. The appellant admits that as a result we cannot go into the merits. He founds his appeal on what was decided in *Farquharson* v. *Sutherland*, 15 R. 759. That case is a binding authority on us for what it decided. It is not, however, desirable that we should extend the doctrine of *Farquharson* v. *Sutherland* one inch, because to do so would be against the undoubted policy of the statute. The ground of decision was that the Sheriff had declined to exercise his jurisdiction, and what the Court did was simply to send the case back to him. In the present case the Sheriff did exercise his jurisdiction. He counted the votes wrongly, being, as it appears, led into the mistake by the parties themselves. In my opinion the fact that the Sheriff counted the votes wrongly does not differ from the position if he had made a wrong determination in law and counted a vote which should not have been counted, or not counted a vote which should have been counted. In my view, then, this case falls within the finality clause.

LORD KINNEAR — The purpose of the Legislature was clearly to prevent sequestrations being hung up by litigation between persons contending for the office of trustee. The statute, accordingly, declares in the most imperative manner that the judgment of the Sheriff declaring the person elected to be trustee shall be final and in no case subject to review in any court or in any manner whatever. I cannot doubt that this prohibition of appeals applies whether the Sheriff has made a mistake in fact or in law. The ground of judgment in the case of *Farquharson* v. *Sutherland* is made quite clear by the Lord President, viz., that the Sheriff had declined to exercise his jurisdiction and the Court held he must perform the functions imposed on him by the statute. Here the Sheriff did perform the duty imposed on him by the statute, and the only complaint is that in the exercise of his jurisdiction he made a mistake for which the parties before him appear to have been responsible. It does not matter whether his decision was right or wrong. It is his decision as to the election of trustee, and is therefore final.

LORD PEARSON—My experience in sequestrations has made me very unwilling to relax the stringent provisions of the statute as to appeals. In this particular case there is further the speciality that the parties both misled the Sheriff into the miscount of the votes. This speciality distinguishes the case from *Farquharson* v. *Sutherland*.

LORD M'LAREN was not present.

The Court refused the appeal.

Counsel for Appellant—Younger, K.C. —Grainger Stewart. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondent—Clyde, K.C.— Constable. Agents — Beveridge, Sutherland, & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, March 17.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

AVERY *v.* HILSON.

Justiciary Cases—Record—Note of Documentary Evidence — Failure to Note — Letter Produced and Read in Court— Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 16.

The Summary Procedure (Scotland) Act 1864, section 16, enacts—"It shall not be necessary in any proceeding

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under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the Schedule (I) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in.

In a suspension of a summary conviction, *held* that where a letter had been produced at the trial, read in Court, and put to one of the witnesses as written by her, it fell to be noted in the record of proceedings, and that this not having been done the conviction fell to be quashed.

John Avery, station agent, Sprouston, brought a suspension, to have a conviction quashed which had been obtained against him in the Sheriff Court of Roxburgh at Jedburgh, at the instance of Sidney Hilson Procurator-Fiscal of Court there. The complaint under which he was convicted charged him with a breach of the peace.

The complainer averred in his note of suspension that in the cross-examination of his wife, Mrs Jemima Work or Avery, one of the witnesses for the prosecution, his agent had produced and read to her a letter written by her to a Mr Halliday, superintendent of stationmasters, minimising the charge against the suspender, which letter was put in evidence and handed to the clerk but had not been noted in the minute of procedure.

He pleaded—"The conviction and sentence complained of should be suspended as craved with expenses in respect . . . (2) that the record of the proceedings at the hearing does not contain any note of the production by the complainer's agent of the letter by Mrs Avery to the said Mr Halliday of date 19th November 1905."

The Court remitted to the Sheriff-Substitute (BAILLIE) to inquire and report with reference to the averments as to the circumstances, as to how and to what extent the document was made use of during the trial, and whether it was by the complainer or respondent "produced in evidence" and "put in."

The Sheriff-Substitute reported as follows:—"In his cross-examination of Mrs Avery the complainer's agent read out a letter written by her to Mr Halliday, and asked her if she had written it, and she deponed she had. This letter was thereafter left by the agent lying on the procurators' table, and after the trial was found lying on the table by the Sheriff-Clerk Depute and taken into the Sheriff-Clerk's office. The complainer's agent subsequently on that same day claimed it and took it away, and a week later brought it back and wished to lodge it in process, when the Sheriff-Clerk declined to receive it. This letter was produced in evidence, *i.e.*, in the sense that its contents were put to the witnesses, but was not "put in" by complainer's agent, though if it had been so "put in" I should have taken into consideration whether or not it had any value in detracting from Mrs Avery's evidence."

Argued for the complainer—The Sheriff-Substitute had reported that this letter had been produced in evidence, and used in evidence. Use in evidence and put in evidence were synonymous. It was immaterial whether the document was relevant to the issue or not, so long as it was in fact used as documentary evidence at the trial, It had been so used here, and therefore it ought to have been noted in the record of proceedings. The provision of the statute was imperative on that point—*Marshall* v. *Phyn*, December 10, 1900, 3 Adam 262, 3 F. (J.C.) 21, 38 S.L.R. 171; *Bell* v. *Mitchell*, November 16, 1905, 43 S.L.R. 53.

Argued for the respondent—It was admitted here that the complainer himself failed to put in this document. He could not now found upon an omission which was the result of his own failure to do so—*Ogilvie* v. *Mitchell*, June 17, 1903, 4 Adam 237, 5 F. (J.C.) 92, 40 S.L.R. 841; *Marshall* v. *Phyn*, quoted above. The mere fact that a document had been read out in Court did not make it evidence. The document here in question was not in fact evidence at all. Therefore it could not fall within the description "documentary evidence," which the statute required to be noted.

LORD KYLLACHY—In this case I say nothing as to the first part of the complaint—that relating to the paper mentioned in the first part of the Sheriff's report.

The case for the complainer is now rested entirely upon the Sheriff-Clerk's omission to make a note of a certain letter, which, it appears, was produced at the trial by the complainer's agent and read in open Court. It is said that the letter, being thus produced and read in Court, was documentary evidence, which, whether competent or incompetent, was in fact used as such in the course of the trial, and that that being so the Sheriff-Clerk was bound to note it. I am afraid this proposition is incontestable. I am of opinion that such a document, so produced and used at the trial, ought to have been noted by the Sheriff-Clerk, and therefore that the objection is good, and the conviction must be set aside.

LORD STORMONTH DARLING—I agree.

LORD JUSTICE-CLERK—That is my opinion also.

The Court quashed the conviction.

Counsel for the Complainer—Trotter. Agent—R. Macdougald, S.S.C.

Counsel for the Respondent—J. R. Christie. Agent—A. Elliot Keay, Solicitor.

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Saturday, March 17.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling.)

VALLANCE *v.* CAMPBELL.

Justiciary Cases — Police — Betting and Gaming—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—*Person Conducting Betting in a House, Room, or Place—Person a Trespasser.*

A person was convicted of a contravention of the Burgh Police (Scotland) Act 1892, sec. 407, in that he had conducted betting in a common passage, off a public street, serving as an entry to two dwelling-houses. The accused was not owner, tenant, or occupier of any part of the building, and had merely trespassed therein for the purpose of carrying on betting. *Held* on appeal that the accused, being a trespasser only, was not a person conducting betting in a house, room, or place within the meaning of sec. 407.

Question whether the passage was a place within the meaning of sec. 407.

Wright v. *Smith*, December 19, 1903, 4 Adam 316, 6 F. (J.C.) 18, 41 S.L.R. 198, *considered* and *followed*. *Clark* v. *Dykes*, February 20, 1906, 43 S.L.R. 389, *distinguished*.

Justiciary Cases—Burgh—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 4—"*Street*"—*Common Passage.*

Opinion that a common passage, leading from the public street and serving as the entry to two dwelling-houses, the passage and houses forming one building under the same roof, was not a "street" within the meaning of the Burgh Police (Scotland) Act 1892, sec. 4.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 407, enacts—"It shall be lawful for the chief constable or any constable of police, having good grounds for believing that any house, room, or place is kept or used as a gaming or betting house, to enter such house, room, or place, and, if needful, to use force for the purpose of effecting such entry, and to take into custody all persons who shall be found therein, and to seize all tables for and instruments of gaming found in such house, room, or place, and all moneys and securities for money found therein; and the owner or keeper of such gaming or betting-house, or other person having the care or management thereof, and also any person who shall act in any manner in conducting such gaming or betting, shall be liable in a penalty . . ."

Section 4 defines certain words and expressions in the Act, and, *inter alia*—"(31) 'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

This was an appeal by way of stated case in which Thomas Vallance sought to have a conviction quashed which had been obtained against him at the instance of John Campbell, burgh prosecutor, Kilmarnock, in the Burgh Police Court there.

The complaint, which was brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, the Criminal Procedure (Scotland) Act 1887, and the Burgh Police (Scotland) Act 1892, was—"That Thomas Vallance, commission agent, residing at 51 Commercial Road, South Side, Glasgow, did on the 10th day of November 1905, within the passage situated at 1 Bond Lane, Kilmarnock, leading to the dwelling-houses occupied by Daniel Sloan, hawker, and Elizabeth Morgan or Lennan, widow, both residing there, which passage is part of the building there occupied as dwelling-houses as aforesaid, and under the same roof as said dwelling-houses, use said passage as a betting house for conducting betting, all contrary to section 407 of The Burgh Police (Scotland) Act 1892, whereby the said accused is liable in a penalty . . ."

The case as stated set forth—"At the trial of the cause on 17th November 1905 the appellant's agent objected to the relevancy of the complaint in respect (1) the *locus*, as described, is not a place within the meaning of the section of the statute founded on; and (2) that the *locus* given falls within the definition of 'street' according to section 4 of the statute founded on. The Magistrate repelled these objections, the appellant pled not guilty, and proof was led. The Magistrate held the following facts proved—(1) That the appellant is a bookmaker, and was often seen in the passage in question. (2) That on the date libelled in the complaint the appellant was stationed in the passage in question for a considerable time, and during half-an-hour between one and two o'clock afternoon of that day many men were seen to enter the passage, hand slips of paper and money to the appellant, who put the slips of paper in an envelope and the money into his pocket, wrote in a note-book, tore out leaves, and handed these leaves to the persons who had given him the slips of paper and money. (3) That two members of the Kilmarnock Police Force, after observing the appellant's proceedings (from premises across the street, immediately opposite) entered the passage in question, when the appellant went into one of the houses entering from the passage (that occupied by Daniel Sloan, named in the complaint) and was there taken into custody by the police. No arrest was made in the passage referred to, nor was the appellant searched there. (4) That while in the house referred to, the appellant took an envelope from his pocket when the constables appeared, and threw it into a dark corner behind the door of the house, where it was found and taken possession of by the police at the time. That this envelope was found to contain thirty betting slips on horse races being run

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that day. (5) That there was found on the person of the accused, when taken to the police office and searched, three sporting newspapers, a note-book with cash entries, three business cards, a bookmaker's rule-book and ready reckoner, five unused envelopes, a note-book, and £37, 3s. 4½d. in money. (6) That the passage in question No. 1 of Bond Lane, is about 13 feet in length and 3 feet 4 inches or thereby in width, and forms the entry to two dwelling-houses, one upon each side of the passage, which are in the separate occupation of the persons named in the complaint. That it is part of a two-storey building, the access to the upper flat of which is by an entrance separate from this passage, and forming No. 3 Bond Lane. That the passage in question enters from Bond Lane, Kilmarnock, and forms No. 1 of that Lane, is completely closed at the back, and has a door at the entrance, which, though kept open during the day, generally is closed and bolted at night."

The Magistrate held it proved that the appellant used the passage in question as a betting-house, that he acted in conducting betting therein, and that such passage was a place within the meaning of section 407 of The Burgh Police (Scotland) Act 1892, convicted the appellant of the offence charged, and fined him in the sum of £40 with the alternative of two months' imprisonment.

The questions of law for the opinion of the Court were, *inter alia*—"(1) Was the Magistrate right in repelling the objections to the relevancy of the complaint stated by the appellant. (2) Is the passage in question a place within the meaning of section 407 of The Burgh Police (Scotland) Act 1892, and not a street within the meaning of section 4 of that statute. (3) Was the Magistrate right in holding that on the facts held proved there was a contravention of section 407 of The Burgh Police (Scotland) Act 1892 and convicting the appellant of the offence charged.

Argued for the appellant—The appellant was convicted under section 407 of the Act, which only applied to a "house, room, or place." But the *locus* here did not fall within that description. The offence might have been dealt with under the provisions of the statute against betting in a street, but that had not been done. The case of *Wright* v. *Smith*, December 19, 1903, 4 Adam 316, 6 F. (J.C.) 18, 41 S.L.R. 198, ruled this case, and was indistinguishable from it. In *Flannagan* v. *Hill*, December 20, 1904, 4 Adam 480, 7 F. (J.C.) 26, 42 S.L.R. 224, it was held that the offender must have a right of user of the place, and also that the place must be enclosed. Both these elements were wanting in this case. There was no connection or relationship of any kind between the appellant and the owner or occupiers of the premises. Counsel also referred to *Powell* v. *Kempton Park Race Course Company*, [1897] 2 Q.B. 242, *affirmed* [1899] A.C. 143.

Argued for the respondent—The *locus* here was not a "street" within the meaning of the statute, but it was a "place" within the meaning of section 407, under which section the complaint was brought. It satisfied all the requirements of a "place." It had a door and was enclosed, and it was private in the sense that it could only be used by the occupiers and their friends. No association with the owner or occupier was necessary on the part of the appellant in order to bring him within the statute—*The Queen* v. *Humphrey*, [1898] 1 Q.B. 875; *Brown* v. *Patch*, [1899] 1 Q.B. 892; *M'Inaney* v. *Hildreth*, [1897] 1 Q.B. 600; *Liddell* v. *Lofthouse*, [1896] 1 Q.B. 295; *Bows* v. *Fenwick*, [1874] L.R., 9 Com. Pleas 339; *Shaw* v. *Morley*, [1868] L.R., 3 Exch. 137; *Flannagan* v. *Hill*, *cit. supra*.

At advising—

LORD JUSTICE-CLERK—This is a prosecution under the Burgh Police Act 1892. The charge against the accused was that within a passage situated in a certain place in Kilmarnock, "which passage is part of the building there, occupied as dwelling-houses as aforesaid, and under the same roof as said dwelling-houses," he used "said passage as a betting-house for conducting betting," and so on. Now, the words of the statute under which the charge is made are—"It shall be lawful for the chief constable or any constable of police, having good grounds for believing that any house, room, or place is used as a betting-house." There is a special enactment elsewhere as regards streets, forbidding carrying on betting business in the street. The Magistrate properly held that this was not a part of the street in the sense of the statute, and therefore if the accused were to be attacked at all, it must be under the words "house, room, or place." Now, the question what is a "place," is a difficult one. I do not for a moment think that it could be held to mean *any* place. It must be a place to a certain extent *ejusdem generis* with those which are previously set forth. I do not think that is of much consequence in this case, because, undoubtedly, this passage was substantially a part of the building in which the betting was carried on. But the question is whether any person who goes into the entry of a house, or goes into a passage, and there makes bets is liable to a prosecution under the Act for carrying on the business of betting in that "place." We have held in a previous case—*Wright* v. *Smith* (4 Adam 316)—that there must be some relation between the person who does the thing and the owner or occupier of the place—that is to say, there must be a concert, as it were, that the place is to be used for that purpose. It cannot constitute user of a "place" that any person goes in and bets there. We decided that in the case of *Wright* v. *Smith*. I should like to say what I said in another case before us recently, that if I expressed myself as I appear to have done in the case of *Wright* v. *Smith*, I stated the matter too narrowly. The words I used were applicable to the facts of that case, but they ought not to have been stated with so much restriction. My words were—"Now, whatever is included in the term 'place,' it must be a

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closed place and one which is occupied by the accused either as owner or tenant." I do not think it is necessary that he should be either the owner or the tenant, if he occupies it under some association with or relation to those who are owners or tenants of the place. In a case we had before us the other day—*Clark* v. *Dykes* (43 S.L.R. 389)—a man in an enclosure surrounded by a fence in which there was a gate, was properly convicted in respect that it was plain upon the evidence stated by the Magistrate, that the party who had the place either as owner or occupier allowed it to be used by the person who was doing the betting as a place for betting. Now, according to the facts which are before us here, there is no such case. The questions put before us in this case are very fully and well stated by the Magistrate. The first is—"Was the Magistrate right in repelling the objections to the relevancy of the complaint stated by the appellant?" I think he was. The second question is—"Is the passage in question a place within the meaning of section 407 of the Burgh Police (Scotland) Act 1892, and not a street within the meaning of section 4 of that statute?" I am quite prepared to hold that the latter part of that question must be answered affirmatively—that it is not a street. But it does not therefore follow that it is a place within the meaning of section 407 of the Burgh Police Act, because that would depend upon circumstances, not necessarily merely the circumstance that it was a place. It must be a place in some relation or other to the occupation. The third question is—"Was the Magistrate right in holding that on the facts held proved there was a contravention of section 407 of the Burgh Police (Scotland) Act 1892, and convicting the appellant of the offence charged?" I am of opinion that he was not right in convicting. It may be a very serious thing that while a party may be convicted of carrying on a business of betting on the street, he may be able to evade that by going into a common passage with which he has nothing to do. I do not think the statute has met such a case, unless it be proved that he is there occupying the place not as a mere trespasser—as a person simply walking into an entry and doing betting business. There must be something to connect him with the occupation as there was in *Clark's* case. Of course, if that be the correct view, this conviction cannot stand, and the fourth question would not require to be answered, because if a person is not convicted, any money found upon him when he was apprehended cannot be kept. I think we should answer the questions according to the views I have expressed.

LORD KYLLACHY—I entirely agree. Whether this entry was or was not a place in the sense of the statute it is not necessary to decide. But assuming it to be so, I am of opinion that the context of the enactment which constitutes the offence implies that the person using the house, room, or place for conducting the business of betting does so in conjunction or association with, or at all events with the permission and licence of the owner or occupier. Like the case of *Wright* v. *Smith*, and differing from the case of *Clark* v. *Dykes*, which was the other day before us, the present case does not contain that element. Therefore I am of opinion, as I have said, with your Lordship that this conviction should be set aside.

LORD STORMONTH DARLING—I agree.

The Court quashed the conviction.

Counsel for the Appellant—A. M. Anderson. Agent—D. Hill Murray, S.S.C.

Counsel for the Respondent—Wilson, K.C.—Munro. Agents—Macpherson & Mackay, S.S.C.

Saturday, March 17.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth-Darling.)

MASSEY *v.* LAMB.

Justiciary Cases—Procedure—Summary Prosecution—Right of Accused to Adjournment—Adjournment Refused but after Evidence for Prosecution had been Led Granted—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 11.

The accused in a summary complaint, who had not had a copy of the complaint but only a notice to attend served upon him, was refused an adjournment, although subsequently, after the evidence for the prosecution was concluded, an adjournment was granted. *Held* in a suspension that the refusal was a fundamental error vitiating all the subsequent proceedings.

Justiciary Cases—Review—Suspension—Competency—Exclusion of Review save by Circuit Court—Fundamental Error—Refusal of Adjournment—Aberdeen Police and Waterworks Act 1862 (25 *and* 26 *Vict. cap. cciii*), *secs.* 515 *and* 516.

The Aberdeen Police and Waterworks Act 1862, by sec. 515, provides that no proceedings under it shall be subject to any form of review or stay of execution "unless in manner or on some one or more of the grounds hereinafter mentioned"; and sec. 516 allows an appeal to the next Circuit Court to be held in Aberdeen on certain grounds.

The accused in a complaint under the Aberdeen Police and Waterworks Act 1862, having been convicted, raised in the High Court a suspension, on the ground that when brought before the magistrate he had, after pleading but before any witness was examined, asked an adjournment, which adjournment the magistrate had, contrary to sec. 11 of the Summary Procedure (Scotland) Act 1864, refused. The respondent pleaded that the suspension was incompetent in view of the provisions of the Special Act.

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Held that as the refusal was a fundamental error, vitiating all the subsequent proceedings, suspension in the High Court was competent.

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 11, provides—"Any respondent brought before the Court by a warrant of apprehension under the authority of this Act shall be entitled to require a copy of the complaint and also to require that the hearing shall be adjourned for a period of not less than forty-eight hours, and such requisitions shall be complied with if made before the examination of any witness on the merits shall have commenced. . . . ."

The Aberdeen Police and Waterworks Act 1862 (25 and 26 Vict. cap. cciii), sec. 515, provides—"No warrant granted by the magistrate or citation made in pursuance of the provisions of this Act, and no charge or complaint and no proceeding or trial before the magistrate, and no order or sentence of the magistrate thereon, or any certified copy or short extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocation, or appeal or to any other form of review or stay of execution unless in manner and on some one or more of the grounds hereinafter mentioned." Section 516 provides—"Any person who feels aggrieved by any order or sentence of the magistrate may within fourteen days of its date appeal to the Court of Justiciary at the next Circuit Court to be held at Aberdeen in the manner and under the rules, limitations, and conditions contained in an Act passed in the twentieth year of the reign of His Majesty King George the Second, chap. 43, for taking away and abolishing heritable jurisdictions in Scotland, on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviations in point of form from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground."

Allan Massey, medical student, Devonshire Road, Aberdeen, brought a suspension of a conviction obtained against him in the Police Court at Aberdeen at the instance of Robert Lamb, advocate in Aberdeen, the Procurator-Fiscal of Court.

The complaint, which was brought under the Aberdeen City Acts 1862 to 1900, the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, set forth that the accused did, "on 10th November 1905, in Union Street, Aberdeen, throw missiles, and thereby break a pane of glass in the 'destination' case of a tramway car, ... and this he did to the obstruction and annoyance and danger of the residents and passengers, and contrary to the Aberdeen City Acts 1862 to 1900, and particularly the Aberdeen Police and Waterworks Act 1862, sec. 134, as amended by sec. 147 of the Aberdeen Municipality Extension Act 1871, whereby . . . . "

In his note of suspension the complainer made averments, *inter alia*, that he, without an agent, not having received a copy of the complaint but only a notice to appear, attended the Court on November 20 not expecting the case to be then proceeded with, and after pleading not guilty, before any witness was examined, asked an adjournment, which adjournment was refused, although on the conclusion of the evidence for the prosecution an adjournment was allowed.

He pleaded—"(1) It having been the duty of the Magistrate, under section 11 of the Summary Procedure Act 1864, to adjourn the diet of 20th November 1905 for a period of not less than forty-eight hours, his refusal to do so rendered the whole subsequent proceedings incompetent, and the conviction complained of ought to be suspended. (2) The refusal of the Magistrate to adjourn the diet of 20th November 1905, being in the whole circumstances oppressive, the conviction complained of ought to be suspended."

The respondent, who denied the complainer's material averments, *inter alia*, pleaded—"(1) The sentence complained of being subject to review only in the manner and on the grounds set forth in section 516 of the Aberdeen Police and Waterworks Act 1862 the present suspension is incompetent, and ought to be refused, with expenses. . . . (3) The proceedings having been in all respects regular, no ground exists for suspending the sentence complained of."

The record of procedure did not bear that any motion for adjournment had been made, and parties were at issue as to what took place at the trial. The Court therefore remitted to the Sheriff (Crawford) to inquire and report as to what took place at the trial on 20th November 1905.

The substance of the Sheriff's report was to the effect that, after pleading, the complainer had asked for an adjournment; that the prosecutor proposed to go on with his proof, intimating that he would not object to an adjournment after that was concluded, and that the Magistrate expressed his assent to the prosecutor's proposal to call his witnesses, and decided to proceed before the complainer indicated any acquiescence to that proposal.

Argued for the complainer—The refusal of an adjournment was an error on the part of the Magistrate which vitiated all subsequent proceedings. There was here a wilful deviation from statutory direction which applied to all trials. That took this case out of the restriction on the right of appeal provided by the Aberdeen Police and Waterworks Act of 1862. What took place here amounted to a fundamental nullity, and therefore suspension in this Court was competent in spite of the finality clause of the Special Act. Other Special Acts contained like finality clauses, and there were many cases where suspension had been held competent in similar circumstances—*Collins* v. *Lang*, November 3, 1887, 1 Wh. 482, 15 R. (J.C.) 7, 25 S.L.R. 19; *Bell* v. *M'Phee*, July 18, 1883, 5 Coup. 312, 10 R. (J.C.) 78, 20 S.L.R. 825; *M'Kenzies* v. *M'Phee*, January 28, 1889, 2 White 188, 16 R. (J.C.) 53, 26 S.L.R. 272; *MacArthur* v.

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Campbell, March 18, 1896, 2 Adam 151, 23 R. (J.C.) 81, 33 S.L.R. 550; *Reid* v. *Neilson*, June 11, 1898, 2 Adam 546, 25 R. (J.C.) 82, 35 S.L.R. 755; *Gray* v. *M'Gill*, February 27, 1858, 3 Irv. 29; *Mahon* v. *Morton*, February 6, 1856, 2 Irv. 383.

Argued for the respondent—The refusal to grant an adjournment was at most oppression, and that was one of the grounds on which suspension was excluded by the Special Act. Unless the words of sections 515 and 516 were read out of the Act altogether this suspension was plainly incompetent. This Court had never quashed a conviction in similar circumstances to this except in cases where no offence had been committed, or some radical illegality appeared *ex facie* of the proceedings, or there was a fundamental nullity in the proceedings. Here there was no *ex facie* irregularity, and certainly no fundmental nullity, although what took place might possibly be annullable in a competent appeal to the Circuit Court under the special statute—*Walker* v. *Lang*, November 25, 1867, 5 Irv. 506; *O'Brien* v. *M'Phee*, October 30, 1880, 4 Coup. 375, 8 R. (J.C.) 8, 18 S.L.R. 22; *Mackenzie* v. *Lang*, November 9, 1874, 3 Coup. 29, 2 R. (J.C.) 1. By way of contrast with these cases were *Kidger* v. *M'Phee*, November 22, 1888, 2 Wh. 107, 16 R. (J.C.) 24, 26 S.L.R. 65; *Marr* v. *M'Arthur*, May 29, 1878, 4 Coup. 53, 5 R. (J.C.) 38, 15 S.L.R. 579.

Lord Justice-Clerk—It has certainly been decided in past cases that suspension may be granted in respect of fundamental nullity in the proceedings in a lower court although there is a statutory exclusion of redress by the ordinary method. The question before us is whether the present case is one of that kind. We must proceed upon the report of the Sheriff in this matter, and he believes the evidence that a motion for adjournment was made and was not granted. There is no mention on the record of such a motion having been made. If such a motion was made I have no doubt the refusal amounts to a fundamental nullity. If a judge refuses to do what is his statutory duty, all the subsequent proceedings in the case are bad. I think this is a case in which suspension ought to be granted.

It is said that the accused acquiesced in the case being proceeded with and is therefore barred from pleading the nullity. But he probably was not aware of his right to demand an adjournment; and there is nothing in the record to show that he knew he had any such right and offered to waive it. If such a thing had occurred it should have been recorded. Whether if it had, it would have affected the question, I do not say. But if a statutory requirement is not carried out for any reason, the procedure ought to be recorded and the facts not left to depend upon recollection. It was the duty of the Magistrate to tell the accused what his right in the matter was, and to have given the adjournment to which he was entitled.

I think we ought to suspend the conviction.

Lord Kyllachy—I think it is in accordance with previous decisions that we should suspend this conviction.

Lord Stormonth Darling—In this case at the previous hearing we found that the parties were directly at issue as to the facts of what took place at the trial of the accused before the Magistrate on 20th November. That being so, the course we took was to remit to the Sheriff to report as to what actually took place on that occasion. The Sheriff has now reported, and your Lordship has stated the substance of his report, which confirms the main averment of the accused, viz., that before the examination of any witness an adjournment was asked for by him and was refused.

If that was so I agree that all the proceedings which followed were practically a dead letter. It is evident that it may be of vital importance to an accused person when he is first brought before the Court to have a delay of 48 hours in order to get up his case and make arrangements for his defence. From all that he was debarred by the decision of the Magistrate, and it appears that he had no agent present, and was under the necessity of cross-examining the witnesses for the prosecution himself. But apart from any consideration of hardship or prejudice, it is enough for our decision that the statute requires by section 11 that such a demand for an adjournment if made shall be acceded to.

On the further point as to the jurisdiction of this Court to entertain this suspension I agree that the previous decisions warrant us in holding that, in spite of the provisions of the Special Act as regards appeals, we, as the High Court, are bound to quash a conviction where it appears that a fundamental error in procedure has been committed. This was a mistake made on the very threshold of the case, and nobody can say what the course of the trial would have been if it had not been made.

The Court suspended the conviction.

Counsel for the Complainer—M'Lennan, K.C.—A. R. Brown. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondent — Hunter, K.C.- Macmillan. Agents—Alex Morison & Co., W.S.

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COURT OF SESSION.

Saturday, March 17.

SECOND DIVISION.

Lord Ardwall, Ordinary.

THE BRITISH LINEN COMPANY v. COWAN.

Bill of Exchange — Forgery — Adoption — Silence as a Personal Bar to Disclaiming Liability—General Right of Persons Receiving Letters regarding Matters with which not Concerned.

A person whose name had been forged to a bill, of the existence of which he was ignorant, held not to have incurred any legal obligation towards the holder, by adoption of his signature or otherwise, because of the fact that he had not repudiated a number of former bills, bearing the same forged signature, in answer to past-due notices requesting him to have them retired, even on the assumption that he fully understood the import of the notices he received.

Observed by Lord Ardwall, expressly approved by the Lord Justice-Clerk and Lord Stormonth Darling — "I consider it to be the right of every person who receives a letter or other document regarding a matter in which he has no concern, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense."

The British Linen Company raised an action against Alexander Cowan, farmer, Spittalhill, Fintry, for (1) the sum of £450, with which the present report is not concerned, and (2) the sum of £70 contained in the following bill:— "Spittalhill,

"£70 stg. Fintry, 17th October 1904

"Four months after date, pay to me or my order, within the office of the British Linen Company Bank, Balfron, the sum of £70 sterling. ALEXANDER COWAN.
DAVID MOIR.

"To Mr David Moir, farmer,
Craigievern, by Balfron.
(Indorsed thus)—
Pay the British Linen Coy.,
or order.
ALEXANDER COWAN."

The bill was discounted with the pursuers, and on 20th February 1905 (when it fell due) presented for payment at their office, Balfron, and payment not having been made it was duly protested for non-payment. Notice of dishonour and that the bill had been protested for non-payment was sent to the defender on 21st February 1905, with a request that it should be retired. That request was not complied with and the present action was raised.

The defender's defence was that the bill was a forgery and neither of his signatures genuine. The pursuers originally maintained that they were genuine, but the Lord Ordinary ARDWALL, after a proof upon the whole case, found that the signatures were forged by David Moir, and in the Inner House, when the case was heard upon a reclaiming note, the pursuers acquiesced in his finding upon this point. The case accordingly came to turn upon the following pleas stated by the pursuers:—"2. The defender having homologated and adopted the signatures in question as his genuine signatures, is now barred from objecting that they are forged. 3. The defender having, as condescended on, by his failure timeously to intimate to the pursuers the alleged forgery, induced them to . . . discount the said bill, is barred from disputing his liability thereunder."

The facts disclosed at the proof in so far as they bore on these pleas were briefly as follows.

The bill of 17th October 1904 was forged by David Moir. The defender knew nothing of its existence until, shortly before it fell due and when David Moir was on the verge of insolvency, it was brought to his notice by a representative of the British Linen Company. He at once repudiated it and stated that his signatures were forgeries.

The bill of 17th October 1904 was, however, the last of one of two series of forged bills which had been running on since January 1891, bearing either to be drawn by the defender on David Moir and accepted by him, or drawn by David Moir on and accepted by the defender. The defender's signature was always forged by David Moir. When these bills became overdue, past-due notices in ordinary form were regularly sent to the defender, and during the period subsequent to January 1891 it was proved that the defender received some twenty-seven, of which the following is a specimen:—

"British Linen Company Bank
Balfron, 12th Feby. 1904.

"Mr Alexr. Cowan, farmer,
Spittalhill, Fintry.

"SIR,—Your bill on David Moir, dated 8th October and payable 4 m/ thereafter, for £70 sterling, is lying in my hand under protest for non-payment; be so good as order it to be retired immediately.—I am, Sir, your most obedient servant,

(Initl.) J. K. N. J. MACADAM, *Agent.*
" J. M."

The actual history of the bill sued on as given by the British Linen Company's agent at Balfron was as follows:—"As regards the history of the £70 bill, the one sued for in the present action, on 19th July 1902 a bill for £25 was drawn by the defender on Mr Moir and discounted with the bank. That fell due on the 22nd of September. On the following day a past-due notice was sent to the defender. There was a renewal of the bill on 24th September for £20. That renewal fell due on 25th October, and on 24th October it was paid. On 4th December 1902 Mr Moir discounted a bill for £70 drawn by the defender on him, which fell due on 7th January 1903. On 8th January I notified the defender

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that that bill was past due. On the 23rd of January it was renewed for the same sum. On 10th March 1903 it became due, and on 11th March 1903 I notified the defender of that with a past-due notice. The bill was renewed on the 12th of March and again fell due on the 13th of April. On the 14th of April the defender was notified that it was past due. It was neither paid nor renewed until some time after the 14th of April. On the 16th of May Mr Moir renewed the bill for £25 by paying £45 in cash in two payments, £30 and £15. It was renewed to the extent of £25, the due date being the 19th of June. Before it become due, namely, on 4th June, that bill was paid and a new bill taken on the following day, the 5th of June, for the old sum of £70. That renewal fell due on the 8th of October. It was then renewed and fell due on the 11th of February, and the defender was notified on the 12th of February that it was past due. It was renewed twice and fell due on the 17th of October, and a past-due notice was sent to the defender on the 18th of October. It was again renewed and discounted on the 28th of October and fell due on the 20th of February 1905, and a past-due notice was sent on the 21st February 1905 to the defender. The bill was noted and protested in due course, and I produce the protest of the bill dated 20th February 1905. In carrying out these bill transactions Mr Moir called at the bank and saw me. He got the renewal bill drawn out and signed it. The practice always is that when a party to the bill is in, we get the signature. He took the bill away with him to get it signed by the defender. He either brought it back or sent it back duly signed. Mr Moir sometimes called back with it duly signed on the same day upon which he had taken it away."

Although the defender had received these notices he never paid any heed to them or took any steps, either by writing or orally, to disclaim his signature, although he was occasionally in person at the British Linen Company Bank. Similarly the British Linen Company never drew his attention to the fact that he had never in any way acknowledged the receipt of any of these notices. The defender's evidence amounted to this, that he remembered and knew nothing about these notices, and the Lord Ordinary accepted his statement as true.

On 5th July 1905 the Lord Ordinary pronounced an interlocutor in which he assoilzied the defender from the conclusions of the summons.

Opinion.—"This action concludes (*first*) for the principal sum of £450 and £21, 1s. 11d. of interest." [*His Lordship then dealt with the question.*] "The sum second sued for is the sum of £70 sterling contained in a bill dated 17th October 1904, and bearing to be drawn by the defender upon and accepted by the said David Moir payable four months after date. The defender alleges that his signature to this bill is also a forgery." [*His Lordship stated it as his opinion that it was a forgery.*] "It was maintained, however, for the pursuers that by his conduct the defender had homologated and adopted the signature in question as his genuine signature. It is proved that two series of bills, of one of which the bill in question is the last, have been running on from January 1891 down to the present time. All these bills either bore to be drawn by the defender on David Moir and accepted by him, or drawn by the said David Moir on and accepted by the defender, and are all set forth in a certified list of bill transactions, which shows the whole history of the bills in a very convenient form. The facts set forth in the certified list were completely proved by the evidence led for the pursuers. From this list it appears that over a period of between twelve and thirteen years some twenty-seven notices that certain of these bills were past due were sent to the defender, and that he took no notice of these notices. It is said that in this way he had rendered himself liable in payment of the bill in question. I cannot adopt this view, and I do not think it is supported by authority. On the contrary, I think the authorities all go to show that silence *per se* when a notice regarding a bill is sent to a person who did not sign it will not infer adoption against such person. The nearest case to the present which was quoted to me is the case of *Boyd* v. *Robertson*, 1854, 17 D. 159, in which an issue of adoption was refused to a charger on a bill, who averred that intimation had been sent to the suspender of the dishonour of certain bills of prior date in the same handwriting, of which intimation he had taken no notice, and the judgments delivered in the House of Lords in the case of *Mackenzie* v. *The British Linen Company*, 1881, 8 R. (H.L.) 9, seem to apply directly to the present case. The whole decisions of any importance on this matter are reviewed in that case by Lord Watson, and it would be presumption in me to attempt to go over the same ground. The case mainly relied on by the bank in that case, as well as the present, was *Urquhart* v. *Bank of Scotland*, 9 S.L.R. 508, and that decision is examined by Lord Watson and shown not to apply to *Mackenzie's* case. For the same reasons I hold that it does not apply to the present, being distinguished from it by these facts that in *Urquhart's* case it was proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June 1870 he had given the forger money to retire one of these bills which was known by him to be forged. No such circumstances exist in the present case. Upon general principles I cannot too strongly repudiate the idea that one person can fasten liability upon another with regard to a matter with which that other had no previous concern, by writing him letters or sending him documents which *ex facie* demand an answer, and afterwards founding upon the fact of no answer being received to them as inferring liability of some sort on the part of the person to whom they were sent. I consider it to be the right of every person

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who receives a letter or other document regarding a matter with which he has no concern, to destroy that document at once, and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense. In the present case it appears from the proof that the defender never saw any of the bills mentioned in the list, never knew of their existence, and that he paid no attention to any of the past-due notices which were sent to him, and I think it would be monstrous to hold that by so doing he should be held to have incurred any liability whatever to the pursuers. But the fact of the pursuers founding upon his silence with regard to these past-due notices raises this inquiry—why did they never mention the matter of these bills during all these years, when, time after time, the defender took no notice whatever of the intimations which were sent to him, and, although he was passing constantly through Balfron, never once called at the bank to inquire whether the bills regarding which notices had been sent to him had been taken up or not. Surely that state of matters demanded in their own interest some attention from the bank, and I can only interpret their neglect in this matter and their carelessness with regard to the guarantees, by supposing that they did not want to interfere with a lucrative business by raising any questions about these bills, and that, if they had suspicions, they disregarded such in the confidence that should the guarantees or bills turn out to be forged, the well-to-do Mr Cowan would pay up rather than expose his brother-in-law to a prosecution for forgery.

"A strong attack was made by counsel for the pursuers on the credibility of both the defender and David Moir, and he specially founded on what he termed the defender's incredible evidence regarding the past-due notices which undoubtedly were sent to him by the bank. At first sight I must say that it seems somewhat extraordinary that the defender did not distinctly remember having received notices such as those shown him at the proof over and over again within the last twelve or thirteen years, but when it is considered that the average number of such notices was about two in the year, that the defender's attitude of mind was that he knew nothing about the bills to which these notices referred, and knew that he had never signed any such bills, and accordingly paid no attention whatever to the notices, but just threw them aside or destroyed them, it is not surprising that he says he does not know whether he received all these notices. I think his attitude of mind is very well expressed in the following question and answer:—'(Q) Do you say that you never received these various notices?—(A) I cannot say I never received them, but if I got any of them I would not know what they were.' He was thereafter subjected to a pretty stringent cross-examination, in which, although it appears to me that he was perhaps acting too much on the defensive, yet he did not impress me as saying what he thought or knew to be untrue, and I am bound to say that the manner in which both he and Moir gave their evidence impressed me with the belief that they were speaking the truth to the best of their knowledge and belief, and were credible witnesses." [*His Lordship then dealt with certain other objections to the defender's credibility, &c.*] "The result I have arrived at, accordingly, is that it is established by the proof that the signatures to the documents libelled are not the signatures of the defender, and that he is entitled to absolvitor with expenses."

The pursuers reclaimed, and argued—The defender's statement that he had not received or at any rate had not understood the notices was incredible. He ought to have informed the bank that the signatures were forgeries. He did not do so, and must accordingly be held to have homologated his signatures. They referred to the following authorities — Bell's Principles, sec. 27a; *Boyd* v. *Union Bank of Scotland*, December 12, 1854, 17 D. 159; *Maiklem* v. *Walker*, November 16, 1833, 12 S. 53; *Warden* v. *British Linen Company*, February 13, 1863, 1 Macph. 402; *Brown* v. *British Linen Company*, May 16, 1863, 1 Macph. 793; *Urquhart* v. *Bank of Scotland*, June 14, 1872, 9 S.L.R. 508; *Mackenzie* v. *British Linen Company*, February 11, 1881, 8 R. (H.L.) 8, 18 S.L.R. 333; *Freeman* v. *Cooke*, (1848) 2 Wel. Hurl. & Gordon, Exch. 654; *Ogilvy* v. *West Australian Mortgage and Agency Corporation*, [1896] A.C. 257.

Argued for the respondent—The Lord Ordinary was right in believing the respondent's statement that he knew nothing about the bills or his forged signatures. If that were so, the reclaimers' case was ended. Assuming, however, the contrary, a person might become liable on his forged signature in one of two ways, viz., by authorisation, or by adoption and consequent bar or estoppel from pleading the forgery. There was no suggestion here of authorisation. As to adoption, you could not adopt by mere silence, but must do something active, or at any rate before mere silence could suffice three things at any rate were requisite, none of them forthcoming in the present case; there must be knowledge on the part of the defender that his signature had been forged; knowledge that the pursuers were relying on it, and a change for the worse in the pursuers' circumstances caused by that reliance. The cases of *Boyd* and *Freeman*, *cit. sup.*, were altogether in respondent's favour. In the cases relied upon by the pursuers there was this important difference, that the bill had always actually been laid before the party; here nothing except vague notices.

At advising—

LORD JUSTICE-CLERK—The sole question now to be decided in this case is whether a bill, on which the signature of the defender is proved to be a forgery, can be founded

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upon to make him liable in its amount in respect that the pursuers have proved that he homolgated and adopted the signature as being genuine.

The contention of the pursuers is founded on the following facts:—(1) that a series of bills bearing to be drawn by the defender and accepted by David Moir had been discounted by the pursuers, each being, although the amounts varied, practically a renewal of the bill preceding it; (2) that notices of the bills being past due were sent in ordinary form to the defender; (3) that the defender did not send any reply to or take any notice of the intimations; (4) that he never saw any of the bills or knew of their existence except in so far as he received the notices; (5) that there is no evidence that he ever knew that David Moir was forging his name. The case turns upon what the defender did or did not do, not as regards the bill founded on, but as regards previous bills, of which this one is in sequence. The fact is that he never saw or knew of this bill until his attention was specially called to it; he at once repudiated it as a forgery, which it was. Thus there is nothing to found upon as regards the bill in question. The case is that he had put himself in such a position as regards the course of bills previously that he has no right to plead that he is not liable on the present bill, though forged, because of what he had done or failed to do in regard to previous bills. I cannot assent to any such idea. But even if it were sound I am of opinion that it would have no application to this.

The case really comes to this test—Is a person who does nothing by word or deed liable to be held in law to have homolgated and adopted as his an alleged writing of his which has been forged by another? I am clearly of opinion that no such legal deduction can be drawn of homologation or adoption in such a case. Passivity can never constitute an unreal obligation into a real, can never make a man into a debtor who has neither said nor done anything to make him a party to the obligation, which has no existence apart from some action on his part. What action might be sufficient is a different question. It is possible that very little in the way of overt action, if it was unmistakable, might be sufficient. But here there is no action even of the most shadowy kind. I concur entirely in the words of the Lord Ordinary as regards the proposal to draw conclusions from the fact that a person who receives notices from which some obligation may be implied, and sends no reply, when his Lordship says—"I consider it to be the right of every person who receives a letter or other document regarding a matter in which he has no concern, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might I think be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense."

I demur entirely to the idea that an obligation can be set up against anyone by plying him with notices of which he takes no notice, or when it is found that he takes no notice, lying by and doing nothing, and then coming forward and saying "Silence gives consent." That saying is not a maxim in law, either criminal or civil, in cases where the parties have never been in joint contact in any way in regard to the matter in question, all communication having been from one side only.

In all I have said hitherto I have assumed that the party receiving the notices, read them and understood their import and effect to be as the pursuers maintain them to be. But in this case the pursuers have another difficulty to encounter even if their proposition in law were sound. For it is necessary to assume in order to the success of their contention in that view, viz., that it be proved that the defender knew and understood the notices which were sent to him. Mere proof that they were transmitted could never be sufficient. They must be brought home to him as committing him to their contents as understood and accepted by him as inferring obligation against him, before it could be held—even if that were the law—that inaction on his part after receiving the notices fastened on him an obligation which the document to which the notice referred did not do, seeing that it was forged. Now that, if a relevant subject for inquiry, would depend entirely on fact. But in this case we have the Lord Ordinary expressing a very strong opinion as to the defender's honesty and truthfulness, and accepting as undoubted fact the allegation of the defender that he did not understand the notices as referring to any obligation undertaken by him. In the general case the Court will always accept the view of the judge who tried the case on the trustworthiness of evidence, but of all cases in which his view as to credibility of a particular witness should receive effect this case is the strongest, where throughout the attention of the judge would be fixed upon the point of trustworthiness of a witness's testimony.

Therefore I have no doubt in this case in accepting the Lord Ordinary's opinion, the result of which is that it never was brought home to the defender's mind that he was being held by the bank as a debtor under the bills.

On both grounds therefore I am in favour of adhering to the Lord Ordinary's judgment.

Lord Kyllachy—In this case I agree entirely with the judgment of the Lord Ordinary. I agree with him in his view of the evidence, as to which, even if I inclined to differ, I should be slow to do so, considering that he saw and heard the witnesses, and formed, as he tells us, so decided an impression particularly as to the credibility of the defender. I agree with him also in his view of the law applicable to the case so far as it involves questions of law. In particular, I agree that the present case is really ruled by the case of *Boyd*, 17 D. 159, to which his Lordship refers, and by the opinions, if not the judgment, in the case of

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Mackenzie, 8 R. (H.L.) 9, to which he also refers, not to speak of the carefully reasoned judgment of Lord Shand pronounced in the latter case in the Court of Session, a judgment which was approved without qualification in the House of Lords, and to every word of which I am glad to have the opportunity of subscribing.

In view, however, of the importance of the question and of the uncertainty which (if one may judge from the recent argument) seems still to prevail as to the state of the authorities, I may perhaps add one or two observations with respect to the bill for £70 as to which alone the pursuers reclaim.

The leading observation, and perhaps the most crucial, is I think this—that as regards the particular bill which is here in question, there is no impeachment whatever of the defender's conduct. It is not suggested that he saw or heard of it, or knew of its existence before at earliest the 7th of February 1905, when it was still current, and when the acceptor's insolvency being declared, he (the defender) at a meeting with the pursuers' accountant at once repudiated his signature.

Accordingly, the case against the defender is not that he adopted this particular bill, but that he (as it is said) adopted certain previous bills which were also forged, and of which, although retired by the acceptor, he got notice as they became due. That is really the only case made against the defender, and it rests upon this—not that he did anything, or wrote or said anything, but that he omitted to reply to the said notices, and to inform the bank, that he had signed no bills and denied liability. In other words, the proposition of the pursuers is really this—that although he (the defender) was not even their customer and owed them no duty beyond what he owed to every member of the public, he was yet bound to answer their notices, and, not doing so, must be held to have adopted the said previous bills, and by anticipation also adopted the subsequent bill to which this action relates.

Now, it must be acknowledged that this is a doctrine entirely novel. I think I am safe in saying that in no previous case in which, a defender's adoption of a particular bill being alleged, and his conduct with respect to that bill being found unimpeachable, he has nevertheless been held liable by reason of something imputed to him with respect to previous bills where his name had been used. There was certainly no such suggestion made in the case of *Mackenzie*, where the element in question existed, but where even in the Court of Session the only use sought to be made of it was that of supporting an averment that the particular bill there in question had been discounted with the defender's actual knowledge and authority. On the other hand, in the case of *Boyd*, which I have already mentioned, the proposition was advanced, and was by an unanimous judgment rejected. I was therefore throughout the debate somewhat anxious to ascertain the exact basis of the pursuers' argument, and doing my best to analyse it, it seemed to me to involve at least these four propositions—(1) That as matter of fact the defender had for some time known, or been bound to know, that his name was being forged by his brother-in-law upon bills discounted from time to time with the pursuers; (2) That so knowing, or being bound to know, he was also bound to anticipate that the same thing would or might continue indefinitely; (3) That being bound so to anticipate, he thereby incurred a legal obligation to warn the pursuers by informing them of what he believed or suspected; and (4) that being so bound, but remaining silent, he thereby accredited, and must be held to have accredited, his brother-in-law to the pursuers as a person who had his authority in time coming to discount bills bearing his signature.

Now, of course, if the Lord Ordinary is right in his view of the facts, and in particular of the defender's evidence, the basis of this whole argument is displaced. But assuming, *arguendo*, the contrary, I think it right to state—to do so as distinctly as possible—that in my humble opinion not one of the above propositions can be supported either on principle or authority.

In the first place, I consider that it is an arbitrary and quite illegitimate inference that the acquiescence in what is past involves acquiescence with respect of the future. That is just the kind of argument which was advanced and negatived in the recent case of *Carron Company* v. *Mercer Henderson*, 23 R. 1042, 33 S.L.R. 736, which we have lately had more than once to consider.

But further, and in the next place, I am quite unable to see upon what legal principle a person can be held legally bound to answer letters addressed to him by persons to whom he stands in no special relation, in order to warn such persons of errors under which they appear to labour, or risks which they appear to run. Moral duties of that kind there may be, although in such matters moral duties may be sometimes conflicting. But legal obligations and moral duties are different things. And if prejudice follows from reliance on people doing what they are under no legal obligation to do, I am afraid that persons so relying must just take the consequences.

I am quite aware that there was at one time in this Court a disposition in such matters to overlook, or rather ignore, the distinction between perfect and imperfect obligations. And the high water-mark of that tendency was, I humbly think, reached in the cases of *Urquhart* and *Mackenzie*. But as I have already said, the decision in the case of *Mackenzie* was reversed by the House of Lords; and I think that nobody reading the judgments in that case can fail to be satisfied that the reversal was opportune. It has since been, I think, quite recognised that the case of *Urquhart* was in effect overruled by the case of *Mackenzie*, and that the judgment of Baron Parke in the case of *Freeman* v. *Cooke* (2 Exch. 654) (referred to and approved in the House of Lords judgments) expresses correctly the limits within which liabilities

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may arise from mere silence, whether followed or not followed by prejudice to other persons. That distinguished Judge, after explaining the liabilities arising by way of estoppel from actual representations, proceeds thus—"And conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As for instance, a retiring partner omitting to inform his customers in the usual mode of the fact that the continuing partners are no longer authorised to act as his agents, is bound by all contracts made by them with third parties on the faith of their being so authorised." It appears to me that if any doubt existed as to what Baron Parke meant by the words "duty cast upon a person by usage of trade or otherwise," the illustration with which the sentence ends is fairly conclusive on that subject.

LORD STORMONTH DARLING—I agree with your Lordships and the Lord Ordinary.

When in a matter of this kind, turning largely on credibility, the Judge who saw and heard the witnesses declares his belief that what one of the parties to the case said in the witness-box was substantially true, it would be very difficult for a Court of Review to decide against that party, except upon some view of the law altogether independent of his testimony.

Now, there is no law, as it seems to me, which requires us to hold that a man whose name has been forged to a bill, and who knows nothing about it except that he has not signed it, incurs any legal obligation towards the holder by non-repudiation of that bill, and still less of former bills bearing the same name, in answer to notices requesting him to have them retired. I particularly concur in what the Lord Ordinary says about its being the right of every person, who receives a letter or other document regarding a matter with which he has no concern, to destroy that document at once, and take no further notice of it. He must not, it is true, do anything active to deceive or mislead the other person, as by adopting the bill in question in the knowledge that it was forged. But mere silence can never have that effect.

LORD LOW was absent.

The Court adhered.

Counsel for the Reclaimers — Younger, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondent — Scott Dickson, K.C.—Horne. Agents—Duncan Smith & Maclaren, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

[Lord Dundas, Ordinary.

COOPER & COMPANY *v.* JESSOP BROTHERS.

Arbitration — Process — Jurisdiction — Petition to Appoint Arbiter — Decision in Petition of Questions of Fact and Law — Allowance of Proof in the Petition — Competency of Proceedings and of a Reclaiming Note — Arbitration (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 13), *sec.* 3.

In a petition to appoint an arbiter under section 3 of the Arbitration (Scotland) Act 1894 the Lord Ordinary without proof repelled objections that the Court had no jurisdiction, that there was no binding agreement between the parties, and that the reference clause relied on, viz., "any dispute arising from this contract to be settled by arbitration here in the usual way," was part of the agreement, and allowed a proof as to the "usual way." The respondents, who were English merchants, neither residing nor carrying on business in Scotland, reclaimed, on the ground that the Lord Ordinary had exceeded his jurisdiction, such proceedings in the petition not being in contemplation of the statute. The petitioners objected to the competency of the reclaiming note.

Held that in the circumstances (1) the reclaiming note was competent, and (2) the interlocutor of the Lord Ordinary should be recalled and process sisted until the questions at issue between the parties had been decided by appropriate proceedings in a competent Court.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), section 3, provides—"Should one of the parties to an agreement to refer to two arbiters, refuse to name an arbiter in terms of the agreement, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court on the application of the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing." Section 6—"For the purposes of this Act the expression 'the Court' shall mean any sheriff having jurisdiction or any Lord Ordinary of the Court of Session."

On December 19, 1905, H. G. Cooper & Company, merchants, Glasgow, presented a petition, under section 3 of the Arbitration (Scotland) Act 1894, to appoint an arbiter to represent an arbiter whom they averred Jessop Brothers, Ossett, Yorkshire, ought to have appointed under an alleged agreement.

Jessop Brothers lodged answers. The following paragraph therefrom summarises their objections to the granting of the prayer of the petition:—"The respondents

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respectfully submit (*a*) that the Court has no jurisdiction to entertain this petition; (*b*) that there is no binding agreement, and accordingly no agreement to refer to arbitration; (*c*) that in view of the terms of the alleged arbitration clause the Court has no power to appoint an arbiter; and (*d*) that, as assuming the petitioners to be right in their contention, their claim is for damages which an arbiter would have no power to assess, it is unnecessary and inexpedient that an arbiter be appointed."

The circumstances of the case and the averments of parties are sufficiently given in the opinion (*infra*) of the Lord Ordinary (DUNDAS).

On 2nd February 1906 the Lord Ordinary pronounced the following interlocutor:—"Repels heads (*a*), (*b*), and (*d*) of the objections stated by the respondents in the last paragraph of their answers: Before further answer allows the parties a proof of the averments contained in the sixth paragraph of the petition and in the last sentence of the third paragraph of said answers, and to the petitioners a conjunct probation: Appoints the proof to proceed on a day to be afterwards fixed, and grants leave to reclaim."

Opinion—"This is a rather peculiar application. The petitioners, merchants in Glasgow, aver that in August 1905 they contracted to buy from the respondents, Jessop Brothers, Ossett, Yorkshire, a considerable amount of 'shoddy' for manure purposes. The alleged contracts were made by correspondence. The first point, in my judgment, is to ascertain the true scope and terms of the contract as disclosed by the correspondence, in so far as these bear upon the respondents' objections to the jurisdiction of this Court to entertain the petition, and its power to apply the Arbitration (Scotland) Act 1894 to the facts of the case. On 28th July 1905 the respondents sent to the petitioners by post two separate samples of shoddy. On 8th August the petitioners wrote to the respondents enclosing copy of telegrams which had passed between the parties, 'accepting 120 tons shoddy, No. 2, as per sample received from you,' and awaiting confirmation. On 10th August the respondents confirmed the order. Then, on 11th August, the petitioners wrote to the respondents 'We duly received your telegram and letter of 10th inst., and we now beg to enclose sale note for the shoddy.' In a P.S. they suggested further dealings with the respondents. In this letter the petitioners enclosed the 'sale note' dated 10th August. This document, partly printed and partly typewritten, bears to confirm the purchase, and contains at its close the printed words 'Any dispute arising from this contract to be settled by arbitration here in the usual way.' The respondents in the succeeding letters, while they wrote as to further business dealing with the petitioners, took no notice of the words about arbitration above quoted, and did not repudiate or object to them. In these circumstances the petitioners aver that it was a part of the contract that disputes under it should be settled by arbitration at the place and in the manner indicated. The respondents, on the other hand, contend that the contract for the sale and purchase of the shoddy was completed by the letters between the parties dated 8th and 10th August to which I have referred, and that the subsequent transmission of the sale note by the petitioners' letter of 11th August was of no effect or consequence, and did not import into the already concluded contract any agreement to refer disputes to arbitration. I think that this contention of the respondents is unsound. Where the constitution of a contract depends upon a correspondence, one must, I apprehend, read the correspondence fairly as a whole (*Hussey* v. *Horne-Payne*, 4 App. Ca. 311), and further, I think that the respondents, by not in any way repudiating or objecting to the clause of arbitration, are personally barred from saying that that clause does not form a part or term of their contract. My view upon this point is fortified by the correspondence which passed between the parties in regard to the second of the two contracts which are now in question. On 19th August 1905 the petitioners offered to accept a further quantity of shoddy 'at same price and same terms as last,' and on the same day they sent to the respondents the sale note, which contains words identical with those in previous sale note as to the settlement of disputes arising under the contract. On 21st August the respondents accepted the order, making no reference or demur to the condition about arbitration. I hold, therefore, that the clause 'Any disputes arising from this contract to be settled by arbitration here in the usual way' is truly a part of both of the contracts in question between the parties.

"The next thing seems to me to be to ascertain the exact meaning of the words just quoted. There was not, and I think there could not have been, any doubt suggested that 'here' means in Glasgow. The petitioners maintain that the words 'to be settled by arbitration here in the usual way' are, upon a sound construction, equivalent to such words as 'to be settled by arbitration in the usual way in the shoddy trade in Glasgow.' I agree with this contention. The words used must, I take it, be held to mean something, and they occur in documents relating to commercial transactions in shoddy entered into by purchasers of that material carrying on business in Glasgow. Now, the petitioners state that they believe and aver that 'the usual way of arbitration in the shoddy trade in Glasgow is . . . for each party to nominate an arbiter, and for these parties to appoint an oversman.' They have therefore nominated an arbiter to act for them, and the principal crave of the petition is that the Court should 'appoint an arbiter to represent the arbiter whom Messrs Jessop Brothers fell to have appointed under the agreement;' and the petitioners found upon section 3 of the Arbitration (Scotland) Act 1894. It is important to observe that the respondents admit 'that disputes have arisen with regard to said

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contracts.' They state, however, 'that there is no shoddy trade in Glasgow, and no practice in said trade either in Glasgow or in Yorkshire with regard to arbitration.' The respondents contend that assuming that the words in regard to arbitration form part of the contracts, they leave quite undetermined the form of tribunal or the mode by which the arbitration is contracted to be carried out, and therefore (*M'Millan & Son, Limited*, 5 Fr. 317) that the Court is not in a position to appoint an arbiter under the statute. But, as I have already said, I think that the construction of the words fairly imports an agreement to refer disputes to arbitration in 'the usual way' (if such there be) 'in the shoddy trade in Glasgow.' Upon this point therefore the petitioners are, in my judgment, entitled to a proof of their averments of such usage. A somewhat similar proof was allowed and was successful in the case of *Douglas & Company*, 2 Fr. 575. That was not a petition under the Act here in question, but the defender in the action proved what was 'the customary manner of the timber trade' in regard to arbitration, with the result of excluding, *primo loco* at all events, the intervention of the Court.

"Up to this point therefore I am of opinion that the respondents are contractually bound to refer disputes under the contracts to arbitration in Glasgow, and that if the petitioners can prove the alleged usage of the shoddy trade there, I am entitled and bound, in terms of section 3 of the Arbitration (Scotland) Act 1894, to appoint an arbiter to act on behalf of the respondents in the matter.

"I must now consider the other objections put forward by the respondents. They state in their answers that the disputes which have arisen under the contracts relate to which of two samples sent by them to the petitioners is the 'Sample No. 2' referred to in the correspondence; that the parties are at variance as to this; and that 'in these circumstances the respondents maintain that there was never any *consensus in idem*, and accordingly that there is no binding contract and no agreement to refer to arbitration.' In my judgment this objection affords no good ground for refusing the petition. The terms of the written contract between the parties disclose no ambiguity as to the samples sent, and if the dispute which has arisen is of the nature suggested by the respondents I think that their remedy would be by way of reduction or rescission of the contract. The case of *Buchanan* v. *Duke of Hamilton*, [1878] 5 R. (H.L.) 69, upon which they relied, and in which there was no completed contract in writing, appears to me to belong to a quite different category of law from the questions here under consideration. The only other objection stated by the respondent is to the effect that, if the petitioners' contention in regard to the question last dealt with is correct, the respondents would be unable to implement the contract; that the claim against them would resolve itself into one for damages; and that an arbiter has, apart from special stipulation, no power to deal with a claim of that nature. But even if matters should take the course indicated, I see nothing in that which should disentitle the petitioners to go (if otherwise entitled to do so) to arbitration, and to obtain such findings as the tribunal may think fit to pronounce. On the whole matter, I propose to repel heads (*a*), (*b*), and (*d*) of the respondents' objections, and before further answer to allow a proof upon the short point to which I have already referred."

The respondents reclaimed.

The petitioners maintained that the reclaiming note was incompetent, and on that point argued—The Lord Ordinary was final, since he acted here in a ministerial and not in his judicial capacity—*Magistrates of Glasgow* v. *Glasgow District Subway Company*, November 8, 1893, 21 R. 52, 31 S.L.R. 70. The ministerial character in which he acted was not affected by the fact that some incidental inquiry might be necessary—*Binning* v. *Easton & Sons*, January 18, 1906, 43 S.L.R. 312. The definition of Court in section 6 of the Act coupled a Lord Ordinary and a sheriff, and would seem to exclude appeal. The only similar section was section 5 of the Married Women's Property Act 1881 (44 and 45 Vict. cap. 21), where no appeal was given though inquiry was necessary. In all Acts where appeal was contemplated it was provided for, *e.g.*, as in section 6 of the Distribution of Business Act 1857 (20 and 21 Vict. cap. 56). In the case of *Robertson* (cited *infra*) there was not as here a special jurisdiction conferred, the Court in the Act there in question — the Law Agents Act 1873 — being defined as the Court of Session. The Lord Ordinary had not made, possibly might not make, any appointment; he could not accordingly (even assuming no agreement to arbitrate) until he did so be said to have exceeded his jurisdiction, as the Sheriff had in *Farquharson* v. *Sutherlands*, June 16, 1888, 15 R. 759, 25 S.L.R. 573. If any review were competent it should have been by suspension or reduction.

Argued for respondents—The reclaiming note was competent. Without proof the Lord Ordinary had repelled their objection that, being an English firm carrying on business in Yorkshire where the alleged contract was to be performed, they were not subject to his jurisdiction; without proof he had also repelled their objections that he had not authority to entertain the petition because there was no binding agreement, and because, in any event, on a just construction it included no agreement to arbitrate. A reclaiming note was the appropriate method of review. Assuming the Lord Ordinary was merely explicating his power under the Act it would have been urged, and probably rightly, that he was final, and under *Earl of Camperdown* v. *Presbytery of Auchterarder*, November 6, 1902, 5 F. 61, 40 S.L.R. 45, an action of reduction was incompetent. Assuming the mere making of an appointment was administrative, yet in repelling these objections the Lord Ordinary was acting in a judicial

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capacity. In any event the petitioners were in a dilemma, for either in repelling the objections the Lord Ordinary acted in an administrative capacity, in which case by determining questions of right he had exceeded his jurisdiction, or in a non-administrative capacity, in which case appeal was competent, for unless a statute expressly excluded it, there was the right to appeal—*Robertson, Petitioner*, July 18, 1876, 3 R. 1104, 13 S.L.R. 665—but the Act here in question nowhere said the Lord Ordinary was to be final; on the contrary, the authority was primarily given not to him but "the Court." There was a case under this Act in each Division where a reclaiming-note had been allowed without opposition—*M'Millan & Son, Limited* v. *Rowan & Company*, January 16, 1903, 5 F. 317, 40 S.L.R. 265; *Hallpenny* v. *Dewar*, May 24, 1898, 25 R. 889, 35 S.L.R. 696; and in *Stewart* v. *Marquis of Breadalbane*, January 14, 1903, 5 F. 359, 40 S.L.R. 259, and March 3, 1904, 6 F. (H.L.) 23, 41 S.L.R. 373, the Sheriff-Substitute appointed an overseman and an appeal was taken to the Sheriff, the Court of Session, and the House of Lords. There had been appeals under the English Act (52 and 53 Vict. cap. 49), and the object of the Scotch Act was to assimilate the laws of the two countries. (Reference was also made to Russell on Arbitration, p. 49.)

The parties were then heard on the merits of the reclaiming note.

Argued for the respondents (reclaimers)—The proceedings before the Lord Ordinary were incompetent. He had no jurisdiction. The respondents were an English firm carrying on business in Yorkshire. Assuming a contract, it was made by correspondence, and the *locus* of it was England as the *locus solutionis*. Further, there had not been personal service. Moreover, the Lord Ordinary had no authority or jurisdiction, because there was no binding contract. For the labels of the two samples must have got mixed, possibly through their fault, but also possibly, as they maintained, either through petitioners' fault or in *transitu*; there was therefore no *consensus in idem*. The Lord Ordinary was not entitled to assume this against them without a proof—*Duke of Hamilton* v. *Buchanan*, January 25, 1877, 4 R. 328, 14 S.L.R. 253, June 8, 1877, 4 R. 854, 14 S.L.R. 545, *aff.* March 8, 1878, 5 R (H.L.) 69, 15 S.L.R. 513. Assuming a contract, it was completed before the sale notes were sent. A sale note was not the proper place to introduce a new term into a contract. A so-called reference clause to arbitration "in the usual" way printed on "merchant" sale notes could not be construed according to the nature of the goods. It was too vague to receive any effect—*M'Millan, cit. supra. Douglas & Company* v. *Stiven*, February 2, 1900, 2 F. 575, 37 S.L.R. 412, was not decided under this Act, and the reference clause was not as vague. In *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311 (referred to by the Lord Ordinary), neither party thought the letters at the time contained the whole contract.

Argued for the petitioners (respondents)—This was a Scotch contract which they were seeking to enforce, but in any case the respondents had appeared, which cured any objection to the citation. There was a completed contract; the suggestion that the labels had been interchanged was a mere theory; and this idea was repudiated by the respondents in the correspondence. The sale notes were in each case acknowledged, and the clause of arbitration formed part of the agreement—*Jacques Serreys & Company* v. *Watt*, February 12, 1817, F.C. "Here" meant in Glasgow; there was accordingly prorogation of the jurisdiction of the Scotch Courts. "In the usual way" meant in the usual way in the shoddy trade in Glasgow—*Douglas* v. *Stiven, cit. supra*, and Lord Ordinary Stormonth Darling at p. 318 of *M'Millan* referring thereto. The Lord Ordinary was entitled to inquire into and decide incidental matters necessary to explicate his jurisdiction.

At advising—

LORD KYLLACHY—This is a petition presented to a Lord Ordinary under the Arbitration (Scotland) Act 1894, which Act among other things provides (in substance) that when there exists between parties an agreement to refer to a single arbiter, or an agreement to refer to two arbiters, and one of the parties refuses, in the one case to concur in naming the single arbiter, or in the other case to name one of the two arbiters, the nomination necessary may be made by a Sheriff having jurisdiction, or by "any Lord Ordinary of the Court of Session." The petitioners are merchants in Glasgow who allege that an agreement exists between them and the respondents, who are an English firm, to refer certain disputes between them to arbitration, one arbiter to be named by each. So alleging they have applied by petition to Lord Dundas to name the arbiter whom the respondents, the English firm, are, they say, bound but refuse to nominate.

The English firm have lodged answers to the petition in which they submit various points both of fact and law. They deny to begin with that the agreement, of which the alleged agreement to refer is said to be part, was a concluded agreement. They deny further that, supposing it was so, it included on its just construction any agreement to arbitrate. They further deny that, even assuming the alleged agreement to arbitrate to have been duly made, it was an agreement to arbitrate in either of the two ways required by the statute. They therefore deny in result the Lord Ordinary's jurisdiction to entertain the petition; and they do this also upon a separate ground, viz., that the respondents neither reside in nor carry on business in Scotland, and are not subject to the jurisdiction of the Scotch Courts.

The Lord Ordinary has apparently considered that he was bound to deal with all the questions thus raised as if they had occurred in an ordinary litigation between resident Scotsmen. He has decided them all with one exception against the respon-

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dents; and with regard to the excepted question he has allowed a proof. As against this proceeding the present reclaiming note is directed, and the first question is as to the competency of the reclaiming note.

The petitioners maintain that the reclaiming note is incompetent, doing so on the ground, as I understood, that the Lord Ordinary's function under the statute is ministerial and not judicial, and that that being so his determinations are not subject to review. I cannot, however, assent to the proposition that this reclaiming note is incompetent. The Lord Ordinary at least professes to act judicially. He has not granted the application *de plano* making an appointment simply for what it is worth. He has decided various questions of mixed fact and law. He has also, as I have said, allowed a proof. And the respondent's complaint is that in so doing he has gone beyond the statute and exceeded his jurisdiction. I am unable to doubt that in such circumstances a reclaiming note is quite competent as a mode of redress.

We have therefore to consider whether the Lord Ordinary has in fact exceeded his jurisdiction—in other words, whether he has proceeded in a manner not contemplated and not authorised by the statute. And as to that, as already indicated, the case of the reclaimers, or as I shall continue to call them, the respondents, is two-fold. In the first place, they, the respondents, contend that the statute does not on its just construction contemplate that, in the case which occurs here, of the parties to an alleged agreement to arbitrate being *bona fide* at issue as to whether such an agreement exists, the Lord Ordinary shall on application under the statute by one of the parties set agoing an ordinary litigation for the purpose of determining, finally or provisionally, questions as to the existence, or as to the construction of the disputed agreement. They say, on the contrary, that although the Lord Ordinary, or the Sheriff if the application be made to him, may be entitled to consider whether there is *prima facie* an agreement satisfying the statutory conditions, and having done so may make for what it is worth, or in *hoc statu* refuse to make, the nomination asked, yet in a case like the present his proper course, and the course which the statute contemplates, is to sist process until the dispute between the parties has been settled by appropriate proceedings in a court of competent jurisdiction.

That is the first view of the matter, and one which would if correct be applicable although the parties (the petitioners and respondents) were both as I have suggested resident Scotsmen. But the respondents' second contention is this, that the above course (the sisting of process) is doubly appropriate, and indeed quite necessary, where one of the parties—the respondent in the application—is as here an Englishman, not subject in any way to the jurisdiction of the Scotch Courts—that is to say, not so subject unless he shall be held to have in effect prorogated the jurisdiction of the Scotch Courts by becoming a party to the alleged but disputed contract of reference.

Now, I must say that there appears to me to be undoubted substance in these contentions. We should not, I think, desire to lay down any hard and fast rule as to how far the Lord Ordinary or the Sheriff may go in making inquiries incidental to the discharge of his statutory function, even if it should be held (what we do not require to decide) that that function is purely ministerial. But I do not, I own, see my way to affirming that according to the scheme of this statute the Lord Ordinary or the Sheriff is bound, or indeed entitled, to initiate under the application made to him a judicial process with regard to such matters as are here in controversy—matters as to which he has, *prima facie*, no jurisdiction, and as to which confessedly his alleged jurisdiction depends wholly upon its being established—(1) that there was a concluded agreement between the parties; (2) that such concluded agreement includes a certain clause of reference which the one party maintains but which the other party denies to be part of the agreement; (3) that this clause of reference, which admittedly does not, *prima facie*, satisfy the conditions of the Arbitration Act, may yet be made to do so by proof of an alleged but disputed custom of trade in Glasgow; and finally (4) that said clause of reference, *ex hypothesi*, thus set up by proof amounts on its just construction to a prorogation by both parties of the jurisdiction of the Scotch tribunals.

It appears to me that these are all of them at least highly disputable propositions, and yet each of them must be affirmed before the Lord Ordinary has or can have jurisdiction to deal with the matters in question, particularly as between parties one of whom as has been said is an English firm not (apart from prorogation) subject to the jurisdiction either of the Sheriff of Lanarkshire or of the Court of Session.

I am not in such circumstances prepared to affirm the Lord Ordinary's interlocutor. On the contrary, I am of opinion and propose to your Lordships that the correct course is to recal the interlocutor, and to remit to the Lord Ordinary to sist process until the questions at issue between the parties as to the existence and construction of the alleged agreement of reference have been determined by appropriate proceedings in a competent court.

LORD LOW—The Arbitration Act provides that where there is an agreement to refer to arbitration, and where one of the parties refuses to concur in the nomination of an arbiter, or refuses to name an arbiter as the case may be, the Court (as defined by the Act) may, upon the application of the other party, appoint an arbiter. The jurisdiction conferred upon the Court therefore is merely to appoint an arbiter if the condition of matters described in the Act exists. There may, however, be questions which it is necessary to determine before an arbiter can be appointed, such as

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questions of the competency of the application, and I see no reason to doubt that the Court constituted by the Act has power, within certain limits, to determine preliminary questions which are necessary to explicate its jurisdiction. I say "within certain limits," because it seems to me to be clear that the procedure authorised by the Act was intended to be of a summary nature, and that it was not contemplated that an application under the Act should be used for the determination of questions requiring investigation and procedure appropriate to an action in the ordinary Courts, but not appropriate to an application to a special tribunal constituted for a special and limited purpose, and whose statutory functions are ministerial rather than judicial.

It is probably impossible to formulate any precise rule defining upon the one hand the class of questions which may be competently dealt with in such an application as being necessary to explicate the jurisdiction of the Court, and those upon the other hand which must be determined by the ordinary tribunals. Each case, I imagine, must be dealt with according to its own circumstances, and in the present case I am of opinion that the questions raised in the petition and answers cannot competently be disposed of in the present proceedings.

The respondents are English, and they have not been made subject to the jurisdiction of the Scotch Courts unless they can be held to have prorogated jurisdiction by agreeing that any dispute arising from their contract with the petitioners should be settled by arbitration in Glasgow. But there is a question which appears to me to be one of considerable difficulty, whether the arbitration clause is part of the contract at all, and there is a further question, what is the meaning of the clause, and whether it is not so vague and indefinite that it is impossible to give effect to it. Again, the respondents aver (and I think relevantly) that there is no binding contract, or that it may be set aside on the ground that the parties were not at one as to its subject-matter. These are all questions which must be determined before it can be ascertained whether or not the circumstances exist in which alone an application can be made under the Arbitration Act, and it seems to me that to use such an application as if it included the action or actions necessary for the determination of these questions would be to go altogether outside of the scope and purview of the Act. I therefore agree with your Lordships that the most convenient course is to sist this application in order that the parties may have an opportunity of obtaining judgment upon the questions between them in an appropriate action and before a competent tribunal.

I may add that I entirely adopt the views expressed by your Lordship in regard to the competency of this reclaiming note.

LORD STORMONTH DARLING and the LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to sist process.

Counsel for the Petitioners (Respondents)—Younger, K.C.—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondents (Reclaimers)—Hunter, K.C.—Chree. Agents—Macpherson & Mackay, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Dundas, Ordinary.

STEWART *v.* STEWART.

Husband and Wife—Divorce—Separation and Aliment—Process—Action of Separation and Aliment Raised Pending Action of Divorce on Same Grounds—Competency—Lis alibi pendens.

A wife raised an action of divorce against her husband on the ground of adultery. Having changed her mind as to the remedy she desired, she thereafter raised an action of separation and aliment against him on the same grounds without having abandoned the divorce action. The defender pleaded—"The action is incompetent" and "*Lis alibi pendens.*"

Held that the action was competent, it being open to the defender in the event of the pursuer not proceeding with or abandoning the action of divorce to move that it be dismissed with expenses.

Process—Abandonment—Minute of Abandonment—Minute not in Statutory Form—Crave as to Expenses—Expenses Carried by Minute in Statutory Form—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10.

A pursuer in an action of divorce, after a proof on the question of jurisdiction in which she had been successful, and the expenses of which had been paid her by the defender, changed her mind as to the remedy she desired, and with a view to bringing an action of separation and aliment lodged a minute of abandonment. The minute was not in statutory form inasmuch as it contained a crave that she should be allowed to abandon on payment merely of any expenses the minute itself had caused. *Held* that the minute of abandonment must be in statutory form.

Opinions that a minute in statutory form would carry payment of the full expenses, including repayment of the expenses already paid to the pursuer in connection with the question of jurisdiction.

Section 10 of the Judicature Act 1825 (6 Geo. IV, cap. 120), *inter alia*, provides that a pursuer has power "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent."

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On 16th February 1905 Mrs Marion Fletcher or Gordon Stewart, wife of James Gordon Stewart of Newburgh House, Newburgh, Aberdeenshire, raised an action of divorce against her husband on the ground of adultery. The defender admitted on record that he had committed adultery but pleaded no jurisdiction. A proof was accordingly led, with the result that the Lord Ordinary (DUNDAS) on 26th July 1905 repelled the defender's plea of no jurisdiction and found the pursuer entitled to expenses, which were paid on 14th December 1905. Thereafter on 8th January 1906, a reclaiming-note meanwhile having been lodged by the defender and on his motion refused, the pursuer, who had changed her mind as to the remedy she desired, lodged a minute of abandonment.

The minute of abandonment was in the following terms:—"Brown, for the pursuer, stated to the Court that the pursuer abandoned and hereby abandons this action in terms of the statute, and in respect the expenses of the action to date have already been disposed of, he craved and hereby craves the Court to dispense with a remit to the Auditor to tax the defender's expenses and to modify the same."

On 19th January 1906 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuer is liable, as a condition of abandoning the cause in terms of the statute, to make payment to the defender of the taxed amount of the expenses incurred by him in the cause, including repayment to him of the expenses already paid by him to her under the interlocutor, dated 26th July 1905: On the motion of the pursuer grants leave to reclaim."

Note.—"After a long and expensive proof upon the question of jurisdiction, in which the pursuer was successful, she now lodges a minute of abandonment. In my opinion this minute in its present form could in no event be sustained, because I think that it is well settled that a minute of abandonment in terms of the statute infers payment of 'full expenses,' and that it must not contain any qualification or reservation whatever, whether in regard to expenses or otherwise—*Adamson, Howie, & Company*, 1868, 6 Macph. 347, per Lord Inglis, 358; *Scott* (*Mackay's Trustee*) v. *Thurso Harbour Trustees*, 1895, 23 R. 268. But the form of the minute might be amended. I understand that what is in my judgment the irregular matter in it was introduced in order to raise sharply for my decision an important issue between the parties in regard to the question of expenses. The pursuer's counsel maintained that the only expenses which she is liable to pay to the defender as a condition of abandoning the action under the statute are such slight expenses as may be incurred incidentally to the presentation of her minute, and that these might be modified by me to avoid the cost of a remit to the Auditor. (*See* per Lord Shand in *Hare* v. *Stein*, 9 R. 910.) The defender's counsel, on the other hand, contended that the sole condition upon which the action can be abandoned in terms of the statute is payment by the pursuer to the defender of the taxed amount of expenses incurred by him in the cause, including repayment to him of the expenses which he has paid to the pursuer in obedience to my interlocutor of 26th July 1905. In my opinion the defender's contention is well founded. The statute (6 Geo. IV, c. 120, sec. 10) gives to a pursuer a power or privilege 'to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent.' It was frankly stated for the pursuer that her purpose in abandoning this cause is to bring another action in a different form, by which, if she succeeds in it, she will be in a position to obtain better financial terms from her husband. I think that if the pursuer raised the present action without due foresight, or without duly counting the cost, that is her affair. My duty is to abide by and enforce the terms of the statute. It appears to me that I cannot do so otherwise than by sustaining the defender's view of the matter as regards her liability to pay his 'full expenses.' The pursuer's counsel relied upon the terms of the fifth clause of the General Regulations appended to the Act of Sederunt, 15th July 1876. In my judgment that clause has no application whatever to the present question. I am not here considering the effect of a general finding of expenses in a concluded cause, nor the merits of the case. I have simply to deal with a minute of abandonment under the statute.

"No specialty in my judgment arises from the fact that this is a consistorial action, because (1) the statute makes no reference to any distinction in regard to such actions, and (2) there was evidence in the proof led before me that the pursuer is possessed of a certain amount of separate estate.

"In the circumstances which have arisen I shall not make a remit to the Auditor at this stage, but simply pronounce a finding in the sense which I have indicated, in order that the pursuer may have an opportunity of reconsidering her position in the light of the views which I have expressed."

The pursuer reclaimed, and argued—The effect of sec. 10 of the Judicature Act of 1825 and sec. 15 of the Act of Sederunt of 11th July 1828 read together gave the pursuer right to abandon her action on payment of the expenses incident to the abandonment. These were all that were due now, for the previous expenses had been disposed of in the minuter's favour. The minute of abandonment must not be made to put the defender in a better position than if he had won—*Lockhart* v. *Lockhart*, July 15, 1845, 7 D. 1045. There was no reservation here as to a new action—*Adamson, Howie & Company* v. *Guild*, June 26, 1867, 6 Macph. 347, at p. 358. The minute therefore being practically in common form should be allowed—*Scott* v. *Thurso Harbour Trustees*, December 11, 1895, 23 R. 268, 33 S.L.R. 202. A wife was not bound in a question with her husband to pay expenses as a condition of abandonment—

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Steedman v. *Steedman*, March 19, 1887, 14 R. 682, 24 S.L.R. 476.

In the course of the reclaimer's argument the Lord President invited consideration of the question whether a pursuer might not competently bring an action of separation and aliment without formally abandoning a pending action of divorce. Counsel for the reclaimer thereupon moved the Court to sist the case in order that the pursuer might raise an action for separation and aliment against the defender, and the discussion was adjourned on the understanding that the pursuer would proceed with the action of separation and aliment, and that thereafter the Court would dispose of the pursuer's motion to have the divorce action sisted, and also of the reclaiming-note dealing with the minute of abandonment.

On 15th February 1906 the pursuer raised the action of separation and aliment against her husband before the same Lord Ordinary (DUNDAS). The defender lodged defences to this action, and pleaded, *inter alia*—"(1) The action is incompetent. (2) *Lis alibi pendens*."

The Lord Ordinary reported the case to the First Division.

The pursuer at the same time lodged a note to the Lord President stating that the action of separation and aliment had been raised, and craving his Lordship to move the Court to sist further procedure in the action of divorce.

Counsel for the defender objected and opposed the crave of the note.

Argued for the defender—It was incompetent to go on with the second action without abandoning the first. Neither by the device of a "sist" nor by that of "conjunction" could the pursuer have two inconsistent and different remedies concurrently. She might have either but not both on the same grounds. The only authority in the pursuer's favour was a dictum of Lord St Leonards in *Geils* v. *Geils*, November 30, 1852, 1 Macq. 255, at p. 267, quoted by Lord Fraser (H. & W., p. 905). A pursuer might get separation, and thereafter on new facts get a divorce, but she could not on the same facts get both. Two inconsistent actions at the same time and on the same *media concludendi* could not be brought and could not live together.

Argued for pursuer—There was no inconsistency in the Court granting separation and then granting divorce — Ersk. Inst., i, 6, 19. A pursuer was entitled to elect a second remedy and depart from the first. It was not necessary to go through the mere technicality of abandonment. The plea of *lis alibi pendens* was inapplicable, for the *lis* was not the same, viz., in the one case it was divorce, in the other separation. The second action was not incompetent. A pursuer could bring an action with alternative conclusions. Questions of status were not in the same domain of law as questions of contract — they involved considerations of public policy and expediency. The pursuer was entitled to proceed with her action of separation without first abandoning her action of divorce.

At advising—

LORD PRESIDENT—We have here to dispose of two matters, the one being a reclaiming note in the divorce action by the pursuer against a finding of Lord Dundas pronounced on a minute of abandonment lodged by the pursuer, and the other a report by Lord Dundas in an action of separation and aliment between the same parties.

The divorce action was raised first and contained conclusions for divorce and for divorce alone. The ground of divorce which was put forward was adultery. The husband joined issue in that action upon the preliminary question of jurisdiction, and a proof and argument took place upon that question, the result being that the Lord Ordinary held that the jurisdiction had been established. As in the pleadings, so far as upon the merits, the defender had admitted the act of adultery, there would then in ordinary course have only remained an allowance of proof, because of course in a consistorial case a mere admission in the pleadings is not sufficient. But before that took place the pursuer, who had changed her mind as to the remedy she would propose to take, lodged a minute of abandonment. This minute of abandonment was not in the ordinary and correct form—a mere abandonment in the terms of the statute—but had a crave with regard to expenses, the meaning of which undoubtedly was designed to be, that she should be allowed to abandon the action merely upon payment of any expenses the minute itself had caused, in respect that she had already been paid the expenses which had been incurred in the matter of the jurisdiction to which I have alluded. That minute, so couched, the defender objected to, and Lord Dundas upon considering it pronounced the following interlocutor:— . . . [quotes interlocutor *supra*] . . . Before I come to deal with the merits of that I proceed with my narrative. After a certain amount of discussion on the reclaiming note the pursuer made what I may call an alternative motion, that is, the pursuer proposed through her counsel that even although we should be of opinion with the Lord Ordinary on the findings in the interlocutor that we should grant a sist of the action, the avowed purpose being that the pursuer might then proceed to raise an action of separation which is now the remedy she declares she wishes. Your Lordships thought that the matter might be more expeditiously dealt with if for the moment we superseded giving any judgment upon the reclaiming note and the motion for the sist, allowing the pursuer to raise her action of separation and aliment in order to see if that action could go on. Accordingly the pursuer did raise before Lord Dundas an action of separation and aliment, founding of course upon the same *media concludendi*—the act of adultery—and to that action the defender lodged defences in which he pleads *lis alibi*

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pendens and incompetency, these pleas of course being both based upon the same substratum of fact, namely, the dependency of the divorce action. Lord Dundas reported the case, so that in that action your Lordships are now really to give your opinions as to what judgment Lord Dundas should give on these pleas in the procedure roll.

Referring now to the reclaiming note in the action of divorce, so far as Lord Dundas' opinion is concerned I agree with him. I am not quite certain whether he really ought to have pronounced any such opinion, because I rather think the strict and accurate method of dealing with the matter should simply have been this, to refuse to accept any minute which was not in the pure words of the statute, and thus to leave for after consideration what the effect of that minute was. His Lordship did not take that view, and as he has pronounced an opinion on what is the true effect of the minute under the statute, I see no harm at least in saying that I think his Lordship has taken completely the correct view, and accordingly if there was to be a minute of abandonment here it would have to be in the absolute terms of the statute, which would carry the whole expenses.

Well now, that being so, there comes the second question of the motion for a sist. Now that question, although of course it comes up in this action, really must depend upon what view we are going to take of the other action, and accordingly I leave this action again for a moment to go to the second action.

The question is, is it or is it not possible for a spouse to raise an action of separation or aliment while there is an action of divorce pending. I am of opinion that it is possible. In the first place, I see no reason to doubt that the summons could have been brought with alternative conclusions for divorce or separation and aliment. It is of course, I quite see, unusual that that should be done where there is only one and the same *medium concludendi* and where the pursuer is clearly entitled to either remedy, but I can conceive several cases where the alternative conclusions would, in my opinion, be quite appropriate. For instance, if a wife believed that her husband had committed adultery, and also believed that he had been guilty of cruelty—I am supposing that the wife wished to get divorce *a vinculo*, but yet it is quite obvious that as a matter of fact she might not be able to substantiate adultery against her husband and yet might well be able to substantiate cruelty. Now, I cannot see any incompetency or unreasonableness in a case of that kind of raising an action with alternative conclusions and saying "I propose to show my husband has been guilty of adultery, but if I fail and cannot get divorce then I sue for a separation and aliment on the ground of cruelty." It would seem to me to be quite an abuse of process to say that the wife in this situation must not raise an action with alternative conclusions but must betake herself first to whatever remedy she prefers, and having failed, try again with another action.

Accordingly, I begin my consideration of this question by settling in my own mind that an action with alternative conclusions would be competent.

Well now, if an action with alternative conclusions would be competent, I see no reason why you should not have these conclusions which are alternative in two separate actions. It is perfectly true you cannot get decree in both actions, at least concurrently. It is perfectly true, also, that if you did proceed to get decree in the divorce action it would thereafter be quite impossible to get decree in the separation and aliment. It is not quite clear if you got decree in the separation and aliment, that you might not go on to get decree in the divorce. But while I think all these things are possible I am not for one instant suggesting that a person could do so and simply keep the judge in the dark as to what her proceedings were to be. I think, as the ordinary master of the procedure before him, that the judge would be perfectly entitled to put the pursuer, before she actually asked for a decree, to her election as to which remedy she was going to ask. Nay more, I can understand that the judge also would be entitled to know precisely what form of proof was to be granted. But these are all matters which do not go to competency, but simply to general command over the process, for a judge must have power to keep the litigation within due bounds. Accordingly, I am of opinion that these two pleas are bad pleas and that in this action of separation and aliment the pursuer here is entitled to go on, and that if she proves the proper medium she is entitled then to ask for decree in that action, notwithstanding that there is in the Court another action, namely, an action for divorce.

But reverting now to the first action, I do not think the pursuer is entitled to a sist. I quite agree that it must just suffer the fate of other actions. If she does not abandon it she need do nothing, and then the matter lies with the other party, and then I think, as in every action, the one party can always ask that the action should be disposed of either by absolvitor or dismissal, although I do not think absolvitor is the proper decree in a consistorial case. Accordingly, it seems to me that if the pursuer does nothing the defender is perfectly entitled to have the action of divorce dismissed. The result of that would be, of course, that he would have a finding of expenses as against her, but these expenses would not be made a condition-precedent to her proceeding with the separation action, which would be the result if we decided that the divorce action must be first abandoned under the statute.

I therefore think what we should do is, in the original case, *i.e.*, the action of divorce, (1) refuse the reclaiming note, and (2) refuse the motion to sist, and remit the case to the Lord Ordinary; and in the separation and aliment case we should instruct his Lordship to repel the pleas of *lis alibi pendens* and incompetency and proceed with the action as shall be just.

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LORD M'LAREN—I may say frankly that after hearing the argument I am disposed to think the first action should be got out of the way, but after conferring with your Lordships and considering the tendency of recent decisions to restrict the plea of *lis alibi pendens*, I am not prepared to take a different view. I have not the least doubt that an injured wife is entitled to bring an action with alternative conclusions, and the only difficulty would be if by bringing the action at a later stage the other parties should be put to additional expense. Now that cannot be said here, for the proof which took place was confined to the question of jurisdiction. If the pursuer here had gone to proof on the merits, and had afterwards sought to change the issue from divorce to separation, it might very well be that your Lordships would have made it a condition that expenses should be paid, but that point does not arise here. I am satisfied that neither the plea of incompetency nor that of *lis alibi pendens* ought to be allowed to prevail.

LORD KINNEAR—I agree entirely with your Lordships, and think the Lord Ordinary was absolutely right in holding that the minute of abandonment could not be sustained inasmuch as the statutory condition had not been complied with, and therefore as far as that question goes we can only adhere. On the second point, I agree with your Lordships in thinking that there is nothing incompetent in raising the action of separation when the other action is in Court, and that the pleas of incompetency and *lis alibi pendens* must be repelled. But it does not follow that the pursuer is entitled to a relaxation of all the ordinary rules of procedure to such an extent as to put her exactly in the same position as if she had brought one action at the outset with alternative conclusions. It appears to me that her motion for a sist should be refused. Each case will then follow the ordinary course of procedure before the Lord Ordinary.

LORD PEARSON—I entirely agree with your Lordship, subject to a qualification in regard to one point. I still entertain some doubt on the Lord Ordinary's finding with regard to repayment to the defender of the expenses already paid. We have not before us a proper minute of abandonment in terms of the statute; and in my view the question whether such a minute would infer repayment of those expenses is not competently raised. While concurring in the course proposed, I would not be held as committed to the defender's view on that question.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming note for the pursuer against the interlocutor of Lord Dundas, dated 19th January 1906, along with the note for the pursuer, Adhere to the said interlocutor: Refuse the reclaiming-note, also refuse the crave for a sist contained in said note, and decern; and remit to the Lord Ordinary to proceed as may be just: Find no expenses due to or by either party since 19th January 1906."

Counsel for the Pursuer and Reclaimer—Dean of Faculty (Campbell, K.C.)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defender and Respondent—Lord Advocate (Shaw, K.C.)—Clyde, K.C.—Orr, K.C.—Mitchell. Agents—Winchester & Nicolson, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LANARKSHIRE UPPER WARD DISTRICT COMMITTEE *v.* AIRDRIE, COATBRIDGE, AND DISTRICT WATER TRUSTEES AND OTHERS.

Limitation of Actions—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1—*Company Incorporated by Act of Parliament—Action to Recover Cost of Repairing Road Opened by Company under Statutory Power—Turnpike Roads Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C, sec.* 100.

In an action by a District Committee of a County Council against Water Trustees as the successors of a Water Company incorporated by Act of Parliament and the contractors, for the expense incurred in repairing and restoring a road which the Water Company had opened under powers in their Act, but which as alleged had not been properly restored, the defenders pleaded that the action was barred by the Public Authorities Protection Act 1893, sec. 1, as not being timeously brought.

Held that as the Water Company was in fact and in substance a commercial company, empowered for its own purposes and with a view to profit to carry on the undertaking, it was not a public authority in the sense of the Act, and so was not protected thereby.

Held, further, that as the action was laid on section 100 of the General Turnpike Act 1831 (incorporated in the Roads and Bridges Act 1878, by sec. 123 thereof), it was not a claim in respect of an act or default on the part of the Water Company, and therefore not an action or proceeding of the nature contemplated by the Public Authorities Protection Act.

Road—Public Road—Turnpike Roads Act 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 100—*—Roads and Bridges Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *and Sched. C. sec.* 100—*Recovery of Cost of Repairing Road*

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Damaged by the Laying of Water Pipes —Repair Recoverable that of a Repair to be Executed immediately and once for all.

Under section 100 of the Turnpike Roads Act 1831, which is incorporated into the Roads and Bridges Act 1878 by sec. 123 thereof, a road authority is empowered, where a road has been damaged by being opened up for the laying of pipes, *e.g.*, for water, and has not been sufficiently restored, to execute the necessary repair, and to recover the cost from the party having opened the road.

Held that the repair contemplated by the Act is "a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared."

Section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) enacts —"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof." . . .

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) by sec. 123 incorporates certain sections of the Turnpike Roads Act 1831 (1 and 2 Will. IV, cap. 43) including section 100, and narrates these sections in Schedule C.

The Turnpike Roads Act 1831 (1 and 2 Will. IV, cap. 43), sec. 100, *inter alia* enacts—"And be it enacted that if the causeways and footpaths of any turnpike road or any part thereof shall be opened up by any person or persons with leave of the said trustees or otherwise having authority so to do, for the laying of pipes for water . . . and the same shall not be immediately thereafter repaired, renewed, and rendered completely sufficient and good by the person or persons opening up the same, to the satisfaction of the said trustees or their surveyor, then the said trustees or their surveyor shall have full power, and they are hereby authorised to execute the necessary repairs on the part or parts of such road or footpath so opened up, and to restore the same completely, and to charge the expense thereof against the person or persons opening up the same, which shall be ascertained by an account under the hands of the said trustees, or a quorum of them, or their clerk or surveyor. . . ."

On 29th March 1904 the Upper Ward District Committee of the County Council of Lanarkshire brought this action against the Airdrie, Coatbridge, and District Water Trustees, incorporated under the Airdrie, Coatbridge, and District Water Trust Act 1900, and having their principal office at Water Trust Buildings, Broomknoll Street, Airdrie, and Messrs Thomas Pate & Son, public work contractors, Airdrie, in which they sought to recover, with interest and expenses, from the defenders jointly and severally or severally, the sum of £772, 18s. 2d. as the cost of repairs to a public road under the charge of the pursuers, necessitated by certain doings of the contractors in the execution of works for the Airdrie and Coatbridge Water Company, the trustees' predecessors.

The defenders, the Water Trustees, pleaded, *inter alia*—"(1) In respect this action was not raised within six months of the cause of action arising, the defenders ought to be assoilzied. (3) The provisions of the General Turnpike Act 1831 do not apply to operations authorised by the said Airdrie and Coatbridge Water Works Amendment Act 1892."

The defenders Pate & Son *inter alia* pleaded—"(3) These defenders having conducted the operations mentioned merely as the servants or agents of the Water Company, they ought to be assoilzied."

The facts, so far as necessary for this report, are given in the findings of the Lord Ordinary (KINCAIRNEY), who on 1st February 1905 pronounced this interlocutor: —"Repels the first and third pleas-in-law for the defenders the Airdrie, Coatbridge, and District Water Trustees: Finds (1) that the North and South Lanarkshire turnpike road is for the length referred to in this action under the charge of the pursuers; (2) that under the authority of the Airdrie and Coatbridge Waterworks Amendment Act 1892 the Airdrie and Coatbridge Water Company, in the course of the year 1898, opened up the said road and laid a pipe along the track opened for the conveyance of water for the use of the towns of Coatbridge and Airdrie and the adjoining country; (3) that the work was done by the defenders Pate & Son under contract with said Water Company; (4) that the said defenders failed to repair and renew the said road and render it completely sufficient and good to the satisfaction of the said pursuers; (5) that in or about December 1899 the said pursuers, after notice given to the said defenders, under the authority of section 100 of the Act 1 and 2 Will. IV, c. 43, and section 100 of Schedule C of the Act 41 and 42 Vict. c. 51, executed the necessary repairs on the said road and restored the same, and that in doing so they expended the sum of £550, which they are entitled to recover from the said defenders; (6) that under the Airdrie, Coatbridge, and District Water Trust Act 1900 the defenders have taken over and agreed to pay the liabilities of the said Airdrie and Coatbridge Water Company, and, *inter alia*, their obligation for the said sum of £550 to the pursuers: Finds the said defenders the Airdrie, Coatbridge, and Dis-

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trict Water Trustees and the defenders Thomas Pate & Son liable to the pursuers jointly and severally for the said sum of £550, and decerns therefor against them jointly and severally: Finds the said defenders liable in expenses," &c.

In his opinion his Lordship said—" . . . . The question whether the Airdrie and Coatbridge Company is or is not a public body, and in doing the work in question a public authority, seems a very difficult question, as to which the recent authorities do not seem uniform. But I do not require to determine these points, because I think the question falls to be determined for the pursuers on a somewhat different ground, though perhaps not materially different from the ground last stated, viz., that this is not an action for acts done by the Water Company at all. The acts which the Water Company did or failed to do may have given rise to the expenditure which the pursuers seek to recover. But this seems to me to be an action for repayment of money expended on statutory authority under a statutory right to recover it. I refer to the 100th section of the Roads and Bridges Act, the application of which does not seem disputed. The pursuers are thereby authorised, if the defenders, who have opened up the road, do not restore it immediately—the obligation to act immediately being laid on the defenders, not the pursuers—then the Road Trustees (in this case the pursuers) are authorised to restore the road and to recover the expense from the defenders. This is an action for repayment of money, not an action of damages at all. There is no limitation as to the time in which the Road Trustees may do their work, or recover the cost after doing it. Had the pursuers delayed for six months to restore a piece of road left in a bad condition, there is no reason for supposing that their right—or rather their duty—to restore it was brought to an end; and if they did restore the road, their action in doing so could not be a prosecution or proceeding in the sense of the Public Authorities Protection Act. Or suppose the pursuers repaired the road on the defenders' failure to do so, I see no reason to doubt that they might recover their outlay after the lapse of six months. In short, I do not think this is a case to which the Act applies at all. . . . ."

The defenders reclaimed, and argued—The defenders were a public authority in the sense of the Public Authorities Protection Act. They were constituted by statute. They were bound by statute to provide water. Their obligations were statutory, and therefore they were within the scope of the Act—*Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K.B. 1; *The Ydun*, [1899] P. 236; *Spittal* v. *Corporation of Glasgow*, June 17, 1904, 6 F. 828, 41 S.L.R. 629; *Wilson* v. *1st Edinburgh City R.G.A. Volunteers*, November 30, 1904, 7 F. 168, 42 S.L.R. 138. The contractor was merely the servant of the Water Trustees, and therefore he too was within the protection of the statute—*M'Ternan* v. *Bennett*, December 21, 1898, 1 F. 333, 36 S.L.R. 239; *Greenwell* v. *Howell and Another* [1900], 1 Q.B. 535. It would have been otherwise had Pate been an independent contractor—*Tilling, Limited* v. *Dick, Kerr, & Company, Limited*, [1905] 1 K.B. 562; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K.B. 620. Though in form the action was for the recovery of a debt it was in substance really laid upon delict. That was why the Lord Ordinary had found both defenders jointly and severally liable.

Argued for respondents—This was a question of contract and not of delict, and therefore the Act did not apply. The action was laid on section 100 of the Roads and Bridges Act. The Act of 1893 only applied to public authorities and not to profit sharing companies such as this—*Att.-Gen.* v. *Proprietors of Margate Pier and Harbour*, [1900] 1 Ch. 749; *Ambler & Sons, Limited* v. *Bradford Corporation*, [1902] 2 Ch. 585; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449.

At advising—

LORD M'LAREN—In this case the Upper Ward District Committee of the County Council of Lanarkshire sue the Airdrie and Coatbridge Water Trustees and their contractor for the expense which they have incurred in restoring over ten miles of the roadway of the North and South Lanarkshire Road in which the defenders had laid their water pipe, but which, as alleged, they had not properly restored. The pipe was laid by the Airdrie and Coatbridge Water Company, a company incorporated by Act of Parliament and empowered to lay the pipe. Their undertaking has been taken over by a public trust which has become responsible for the liability of the Water Company. The first question for consideration is the defenders' first plea-in-law, in which the defenders claim absolvitor on the ground that they are entitled to the benefit of the provision in the Public Authorities Protection Act, which provides—. . . [*quotes sec.* 1 (*a*) *supra*]. . . . Supposing this to be an action or proceeding such as is contemplated by the Public Authorities Protection Act, it is necessary to point out that the damage done to the North and South Lanarkshire Road was done by the Airdrie and Coatbridge Water Company, and not by the Water Trustees. The Trustees in this question are only responsible because they took over the liabilities of the Water Company, and are not in position to maintain any defence which would not have been competent to the Water Company.

I do not think that it is necessary for the purposes of this case to consider very carefully the line of demarcation between the Public Authorities, who are entitled to the protection of the statute, and the companies or persons who are incorporated by Act of Parliament and are empowered by statute to undertake the execution of work which cannot be undertaken without the authority of Parliament. But there is a broad distinction between the position of public bodies such as county and parish councils or parliamentary commissioners who are

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directed to perform public duties, the cost of which is to be defrayed by rates, and the position of incorporated companies who are empowered for their own purposes and with a view to profit to undertake work of the same description. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously and are neither entitled to make a profit nor are responsible for loss. In the other case the company is under no obligation to proceed with the undertaking, and is absolutely free to consider whether the speculation for which parliamentary powers have been obtained is worth prosecuting with a view to profit. If a railway company elects to make use of its parliamentary powers, it is in a certain sense executing an Act of Parliament, but it is not performing a public duty, and I think it would be foreign to the scope and purpose of the Public Authorities Protection Act to apply its provisions to the case of actions brought against a commercial company for acts or defaults in the execution of powers which they are under no obligation to put in force and which they only use for their own benefit. The Airdrie and Coatbridge Water Company being in fact and substance a commercial company, cannot in my opinion claim the benefit of the Public Authorities Protection Act, and on this ground I think the defenders' first plea must fail.

I also agree with the Lord Ordinary that this is not an action or proceeding of the nature contemplated by the Public Authorities Act. It is an action founded on the 100th section of the Act 1 and 2 Will. IV, cap. 43, which empowers the road authority to charge the expense of restoring a road against the persons opening it. It is therefore not a claim in respect of an act or default on the part of the Water Company, but is a claim arising from the statutory powers of the road authority to repair the road at the expense of the persons who open it, whoever these persons may be. The claim is given without limitation of time, and I think it is therefore unnecessary to consider at what particular time the damage done to the road by the Water Company may be held to have ceased, or whether the execution of the necessary repairs was brought to an end within the period of six months, which according to the defenders' argument limits the right of action. . . .

The question of the cost of repair is one of some difficulty. I think that the pursuers have proved the expenditure set forth in their account by such evidence as is reasonable and usual in executing contracts of this description. . . . On the other hand, it is sufficiently clear that the pursuers got a better road as the result of the labour which they have put upon it, and they cannot be allowed to charge the whole of their expenditure against the defenders.

The Lord Ordinary had on this ground cut down the claim from a sum of over £700 to £550. But then I think that the repairs authorised by the 100th section of the Road Act means a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared. I therefore think that a further abatement of the account sued for is necessary, and I propose we should assess the pursuer's claim at £400. This would lead to a decerniture against the Airdrie and Coatbridge Water Trustees for that amount. As regards the contractors I am unable to see that there is any legal ground for a decree against them. It appears from the minutes of the District Committee that they declined from the beginning to recognise the contractors, and insisted on holding the water authority directly responsible. I think they were right in so doing, and it follows that Messrs Pate are entitled to be assoilzied, with expenses. . . .

The LORD PRESIDENT and LORD PEARSON concurred.

LORD KINNEAR was not present.

The Court recalled the interlocutor of the Lord Ordinary, assoilzied the defenders Thomas Pate & Son, and of new decerned against the defenders the Airdrie, Coatbridge, and District Water Trustees for £400.

Counsel for the Pursuers and Respondents—Wilson, K.C.—Orr Deas. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—T. B. Morison. Agents—Drummond & Reid, W.S.

Tuesday, March 20.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Pearson, Ordinary.

H.M. ADVOCATE *v.* HEYWOOD-LONSDALE'S TRUSTEES.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Payment within Year of Death—Prepayment of Obligation in Daughter's Marriage-Contract Prestable on Payer's Death, thereby Extinguishing Annuity—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2, *sub-sec.* (1) (c)—"*Gift.*"

In 1899 A bound himself in the marriage-contract of a daughter to pay a present annuity of £300 to her and on his death a sum of £15,000 to the marriage contract trustees for her behoof, with power to prepay the said sum in whole or in part, but as soon as the said sum or £10,000 thereof should have been paid the annuity was to cease. In 1900 A paid to the trustees £10,000 and died within six weeks.

Estate duty and settlement estate duty on the £10,000 having been

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claimed under section 2 (1) (*c*) of the Finance Act 1894—*held* that these duties were payable.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Gift—Consideration in Money or Money's Worth—Discharge by Daughter in her Marriage-Contract of her Legal and Conventional Rights—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 3, *sub-secs.* 1 *and* 2.

A father, bound by marriage-contract and bond of corroboration to pay to his younger children after his death a sum of £12,000 with power of apportionment reserved, made certain provisions in favour of his daughter in her marriage-contract, which she accepted in discharge of her legal and conventional rights through his death. *Held* that for the purpose of calculating estate duty such discharge was not a consideration in money or money's worth which, in terms of the Finance Act 1894, sec. 3, sub-secs. 1 and 2, fell to be deducted from a payment by the father to the daughter's marriage-contract trustees made within a year of his death and forming property deemed to pass on his death.

The Finance Act 1894 (57 and 58 Vict. cap. 30), in Part I, which includes sections 1-24, deals with estate duty, and by section 1 imposes such duty upon the principal value of the property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act. Section 2 (1) provides—"Property passing on the death of the deceased shall be deemed to include the property following—that is to say . . . (*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom."

Section 38 (2) of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, and by the above-quoted section of the Finance Act 1894, reads as follows—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz., (*a*) Any property taken as a *donatio mortis causa* made by any person dying after the first day of August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. (*b*) . . . (*c*) . . ."

The Finance Act 1894, by section 3, enacts—"(1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee. (2) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

On 17th July 1905 the Lord Advocate, on behalf of the Inland Revenue, brought an action against John Pemberton Heywood-Lonsdale, of Bicester Hall, Oxfordshire, and others, trustees acting under the ante-nuptial contract of marriage, dated 28th July 1899, between Henry Heywood Heywood-Lonsdale, of Shavington and Coverley, Shropshire, and the Honourable Helena Mabel Hamilton, third daughter of John Glencairn Carter Hamilton, Baron Hamilton, of Dalzell. In it he sought, *inter alia*, that the defenders should be ordained to deliver an account of the amount paid to them as trustees by Lord Hamilton of Dalzell twelve months before his death, which occurred on 15th October 1900, in terms of the obligations undertaken by him in the said marriage-contract, in order that the estate duty payable thereon might be ascertained. The amount which had been so paid by Lord Hamilton was £10,000.

The defenders, *inter alia*, pleaded—"(2) On a sound construction of the Finance Act 1894 estate duty is not payable upon the sum of £10,000 in question, and the defenders should be assoilzied from the conclusion therefor. (3) The said sum not being liable to estate duty is not liable in settlement estate duty. (4) In any event the defenders are entitled to a deduction of £2000 from said sum of £10,000, in respect that Mrs Heywood-Lonsdale purchased the provision to that extent in money's worth as condescended on."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (PEARSON), who on 3rd January 1906 pronounced this interlocutor—"Repels the defences: Finds that estate duty and settlement estate duty are payable by the defenders in respect of the sum of £10,000 paid to them on 5th September 1900 by the late Lord Hamilton of Dalzell, as property passing on his death within the meaning of the Finance Act 1894, and decerns and ordains

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the defenders to deliver an account accordingly: Appoints the cause to be enrolled for further procedure; and grants leave to reclaim."

Opinion—"The defenders are the trustees under the antenuptial contract of marriage between Captain Heywood-Lonsdale and the Hon. Helena Mabel Hamilton, third daughter of the late Lord Hamilton of Dalzell. The question in dispute is, whether estate duty and settlement estate duty are due in respect of a sum of £10,000 which was paid to the defenders by Lord Hamilton on 5th September 1900, about six weeks before his death, which occurred on 15th October 1900.

"By his own marriage-contract dated in 1864, Lord Hamilton being heir of entail in possession of the estate of Dalzell, bound himself and the heirs of entail to pay a provision of £12,000 to his younger children, divisible among them as he (whom failing, his wife) should appoint, and failing appointment, equally. Upon a disentail and re-entail of the estate carried through in 1894-95, the security for this provision was continued by a bond of corroboration and disposition in security. The younger children of Lord Hamilton were six in number. The provision, equally divided, would yield £2000 to each, but this was subject to the parents' reserved power of apportionment.

"This was the position of matters when Captain and Mrs Heywood-Lonsdale were married. By their antenuptial contract of marriage, which is dated 28th July 1899, Lord Hamilton bound himself and his heirs, executors, and representatives to pay to his daughter as pin-money during his and her joint lives, or until payment of a capital sum as after mentioned, a free yearly annuity of £300 as an alimentary life provision, exclusive of all rights of her husband. Lord Hamilton further bound himself to pay to the trustees at the first term after his death a sum of £15,000, free of all death duties, with penalty and interest. He reserved, however, the right to prepay this sum in whole or in part during his life, in which event the payment of £300 should cease from the date of payment of the £15,000, or of not less than £10,000 thereof. The trustees were to hold the fund and pay the income to the wife, whom failing to the husband, and on the death of the survivor it was to be held for behoof of the children or issue of the marriage, subject to a power of apportionment. Failing children or issue, the whole was to be paid to the person for the time holding the peerage of Hamilton of Dalzell.

"These provisions were accepted by Mrs Heywood-Lonsdale as in full satisfaction to her of all legitim and others which she could claim through the death of her father, and also in lieu of all provisions by him in her favour in his own contract of marriage.

"The present question has arisen in consequence of Lord Hamilton having availed himself of his reserved power to make prepayment of the provision of £15,000 in whole or in part during his life. He prepaid £10,000 of it to the trustees on 5th September 1900, and thereby terminated his obligation to pay £300 a-year as pin-money; though, as he died within six weeks, this ceased to be of practical importance.

"The Crown claim that estate duty is payable in respect of the sum so paid as being property passing on the death of the deceased under and by virtue of section 2, sub-section (1) (*c*), of the Finance Act 1894. It is proper to note at the outset that section 2, sub-section (1), as now authoritatively construed, brings into charge certain classes of property which do not pass on the death of the deceased, but which, in terms of section 2, 'shall be deemed' to be property so passing; see *per* Lord Macnaghten in *Cowley*, 1899, App. Cas. 210-3. It is necessary to keep this in mind in construing the section, as it displaces the criterion of 'passing on the death' as the test of liability to duty, and substitutes for it the question whether the circumstances of the case in hand fall within the sub-section founded on. Now, the sub-section founded on is sub-section (1) (*c*), whereby 'property passing on the death' is to be deemed to include property which would be required to be included in an account under section 38 of the Inland Revenue Act 1881, as amended by section 11 of the Inland Revenue Act 1889, if those sections were re-enacted subject to certain important amendments which are set forth. The resulting enactment is to be found at page 110 of Hanson's Death Duties (5th edition), and it is under head A of that enactment that the question arises. This, so far as applicable here, includes (1) property taken under a disposition purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased; and (2) property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. It is plain that this clause is dealing not only with gifts pure and simple, but with a wider class of transactions. In the previous Acts referred to the gift must have been taken under a 'voluntary' disposition, and the word 'voluntary' is now deleted, which points to gifts made in pursuance of some antecedent obligation as being within the clause. Further, the last clause, as to possible benefit to the donor by contract or otherwise, shows that the gifts contemplated include such as may have an element of onerosity in them, and this (as has been held in England) not necessarily by way of reservation out of the corpus or income of the gift itself, but arising *aliunde*. Now, the clause so construed appears to me wide enough to include the payment of £10,000 made on 5th September 1900. And if so, if that is the date at which the gift is to be regarded as made, then it is taxable, because it was made within twelve months before the death of the deceased. It is said that

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this is merely a case of a debtor paying his debt before it was due and payable under the contract—which no one would think of describing as a gift; and, moreover, that even the anticipation of the period of payment was here of no advantage to the creditor, because the annuity of £300 (being three per cent. upon £10,000) ceased *ex contractu* as soon as the £10,000 was paid. But the repayment could not have been enforced, so that it was purely voluntary (though that is not required to bring it within the section); and operating as it did as a gift *inter vivos*, it was none the less so, within the meaning of the section as above explained, because it was not a pure and simple gift, but was attended with onerous considerations on the other part. I take it that one purpose of the section as it now stands is to distinguish transactions of gift (in the widest sense) from transactions of purchase and sale; and at all events the former, as defined by the words of the clause, do not exclude any given transaction merely because it may be (1) onerous, or (2) enforceable.

"But it is said that the only 'property' here was the original obligation by Lord Hamilton in his daughter's marriage-contract to pay the £15,000 at the first term after his death, subject to his reserved power to make prepayment to the effect of extinguishing her claim for pin-money. In this view, the 'disposition' is to be found in the marriage-contract which contained the obligation to pay, and which is dated 28th July 1899, more than twelve months before the death. But this brings into play the last clause of the enactment, namely, that relating to property taken under any gift whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. It is said that here the donee was put into immediate possession and enjoyment of the gift, first by the delivery of the marriage-contract to trustees, and secondly by the payment of the pin-money. But the payment of £300 a-year and the payment of the £10,000 are quite different things, though not unconnected with each other. And the immediate possession and enjoyment of the gift can only be said to have been assumed at the date of the marriage-contract if it is the obligation to pay which is regarded as the gift, as distinguished from the payment. If so, possibly the delivery of the marriage-contract might be regarded as putting the trustees into possession, but in no view can it be regarded as conferring the 'enjoyment' of the gift.

"In either view, therefore, I hold that the main defence to the action fails, and that the Crown is entitled to have an account for the ascertainment of estate duty and settlement estate duty. The authorities to which I was referred on this part of the case were *Roberts*, 20 D. 449; *Montefiore*, 21 Q.B.D. 461; *Worral*, 1895, 1 Q.B. 99; *Holden*, 1903, 1 K.B. 832.

"But the defenders maintain that even if estate duty is payable in respect of the £10,000 they are entitled to a deduction therefrom of £2000, being Mrs Heywood-Lonsdale's equal share of the younger children's provision of £12,000, which, as already mentioned, she renounced and discharged in her marriage-contract. It is urged that this discharge, and also her discharge of legitim, operated as a partial consideration for the £15,000 provision undertaken by her father in her marriage-contract; and that deduction of such partial consideration is expressly provided for in section 3, sub-section 2, of the Finance Act 1894. I do not think this view is sound. In the first place, it would be impossible to put any definite money value upon the two items said to have been surrendered in 1899—on the legitim, because it was not ascertainable until Lord Hamilton's death, and was till then at his discretion; on the £2000 provision, because, although that was her equal share, it was defeasible by her father under his reserved power of apportionment. But, further, I do not regard section 3 as having any application to this case. The part of it which is said to apply is that which deals with a *bona fide* purchase and sale—'estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes . . . where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.' Then sub-section 2 deals in the same terms with the case of a purchase for partial consideration, the value of which is to be allowed as a deduction from the value of the property for the purpose of estate duty. In my opinion there was here no purchase and sale; and there certainly was no consideration in money or money's worth paid to the vendor Lord Hamilton 'for his own use or benefit.' I hold, therefore, that the defenders are not entitled to any such deduction as they claim."

The defenders reclaimed, and argued—The present case did not come under section 2, sub-section (1) (*c*), of the Finance Act 1894, as the payment was made in pursuance of an antecedent obligation. The cases which were cited to the Lord Ordinary, and on which his decision proceeded, did not apply. *Att.-Gen.* v. *Holden*, [1903] 1 K.B. 832, was distinguishable, inasmuch as there was in it no antecedent obligation but a complete absence of onerosity. So, also, there was no antecedent obligation in *Att.-Gen.* v. *Worrall*, [1895] 1 Q.B. 99; *Earl Grey* v. *Att.-Gen.*, [1900] A.C. 124; *Att.-Gen.* v. *Johnson*, [1903] 1 K.B. 617. *Att.-Gen.* v. *Beech*, [1899] A.C. 53, was more nearly in point. This payment was no gift, since full consideration was given for it, and it was in effect the purchase of an annuity, so distinguishing the present case from that of *Att.-Gen.* v. *Viscount Cobham*, [1904] 90 L.T.R. 816. Nor did the second clause of the section of the statute as set forth in the Lord Ordinary's opinion render the payment liable to duty, since there was no

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interest left in the settlor. The annuity was enjoyed by the donee, and a beneficial title was given to the total exclusion of the donor, so distinguishing the present case from those of the *Lord Advocate* v. *Roberts' Trustees*, January 26, 1858, 20 D. 449; and the *Att.-Gen.* v. *Montefiore*, L.R. [1888], 21 Q.B.D. 461. Here, had the donee been an individual, he might have realised full value in the open market; in addition the donee was in possession of a bond of corroboration, and so had *bona fide* possession of the gift, taking it to be such. No duty was exigible, and the Lord Ordinary's interlocutor should be recalled. In any event, a deduction should be made in assessing the sum liable to duty in terms of section 3 of the Finance Act 1894, since Mrs Heywood Lonsdale had given consideration by renouncing her legal and conventional rights. The cases of *Lord Advocate* v. *Warrender's Trustees*, January 9, 1906, 43 S.L.R. 278; and *Att.-Gen.* v. *Ellis and Others*, L.R. [1895], 2 Q.B. 466, were also referred to.

Argued for the pursuer and respondent—The duties sued for were exigible; under the statute, section 7, sub-section 1, no deduction would have been made in consideration of the obligation to pay the £15,000. This payment was clearly a gift in the sense of the statute, and the case was ruled by that of *Att.-Gen.* v. *Cobham*, *ut supra*. Section 2, sub-section (1) (*c*), applied, since it aimed at bringing into the scope of the Finance Act 1894 such transactions as the present which were alleged to be onerous. The word "gift" was here used in its ordinary sense as distinct from donation, and such a gift with a reservation was liable in duty—*Att.-Gen.* v. *Worrall*, *ut supra*; *Att.-Gen.* v. *Johnson*, *ut supra*. The question was, was the payment or obligation to pay originally a gift, whatever it had now become? It was—*Att.-Gen.* v. *Holden*, *ut supra*, *per* Ridley (J.) As to consideration having been received for the payment, in Scotland it was well settled that payments in a marriage-contract were not for a consideration in money or money's worth in the sense of the statute, the true consideration being marriage—*Lord Advocate* v. *Sidgwick*, June 6, 1877, 4 R. 815, 14 S.L.R. 522; *Inland Revenue* v. *Alexander's Trustees*, January 10, 1905, 7 F. 367, 42 S.L.R. 307. The case which ruled the present was that of *Att.-Gen.* v. *Smyth*, L.R., Ir. [1905], vol. 2, K.B.D. 553, and the duties sued for were payable.

At advising—

LORD PRESIDENT—This is a case arising out of the Finance Act in respect of the following circumstances:—Lord Hamilton of Dalzell, under his marriage-contract, was bound to pay a certain provision to his younger children, but with the ordinary power of apportionment. One of his children, the Hon. Helena Mabel Hamilton, married Captain Heywood-Lonsdale. Lord Hamilton became a party to his daughter's marriage-contract, and under that marriage-contract he bound himself to pay an annuity of £300 a-year to her, and the first term after his death to pay a sum of £15,000. This was to be in full of any right she could have either under his marriage-contract or in any other way. But he also took a power, if he chose, to pay a sum of £10,000 or £15,000 during his lifetime. If he so paid it, two events were to happen. In the first place, the sum of £15,000 after his death was to be either wholly or *pro tanto* satisfied, and secondly, his obligation to pay the annuity of £300 a-year was to cease. He availed himself of that option and did pay £10,000 to the trustees of Captain and Mrs Heywood-Lonsdale, but he died within six weeks of doing so. Accordingly a claim is made by the Crown for estate duty and settlement estate duty upon that payment of £10,000. That depends upon section 2, sub-section 1 (*c*), of the Finance Act of 1894. The Lord Ordinary has found that the duty is due. I am entirely satisfied with the Lord Ordinary's reasoning. He points out that the word "voluntary" now being cut out, "gift" must have a wider scope than it had before, and I should really have been almost content to add nothing to what the Lord Ordinary has said, but I think it right to say that our attention was called at the debate to a case which has been decided in Ireland, and which was, I understand, not brought before the Lord Ordinary's notice—*The Attorney-General* v. *Smyth*, reported in Irish Law Reports, 2 K.B.D., 1905, p. 553, in which there is a most exhaustive and luminous judgment of Chief Baron Palles dealing with what I think is exactly the same question. If I may be allowed to say so respectfully, I entirely agree with everything that Chief Baron Palles there said, and I do not think it could be more felicitously expressed. I shall therefore add, in my own words, only really one sentence to what the Lord Ordinary and the Chief-Baron have said. The English word "give" may be represented in the language of the civilians either by "do" or "dono." Now, it is true that the substantive which comes from "give"—"gift"—in ordinary colloquial language has come to represent *res donata* and not *res data*, but none the less I think it is still capable of the other construction, and I think the result of cutting out the word "voluntary" which was used in the statute is that "gift" can no longer be taken in the strict sense of *res donata*. Accordingly, for these reasons, I agree with the judgment which the Lord Ordinary has pronounced.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"Adhere to the interlocutor [of Jan. 3, 1906], refuse the reclaiming note, and decern: Find the defenders liable in expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and report to the Lord Ordinary in Exchequer Causes, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

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Counsel for the Defenders and Reclaimers —Younger, K.C.—Hon. W. Watson. Agents —Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Pursuer and Respondent —The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

GLASGOW CORPORATION *v.* CALEDONIAN RAILWAY COMPANY.

Road—Railway—Burgh—Maintenance of Roadway—Bridge Carrying Street Over Railway—Railway's Obligation to Maintain Road—District Annexed to City from County—Special Powers of City Authority as to Streets—"Public Highway"—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39.

The Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, provides for "any turnpike road or public highway" crossed by a railway being bridged by the railway company, and enacts that such bridges with the approaches shall be maintained by the railway company.

A railway company, whose Special Act conferred power in certain cases to substitute for existing portions of road new portions which were to be subject to the same provisions as the existing portions, crossed with its lines certain roads which at the formation of the line were under a county local authority. The roads were bridged in terms of section 39 of the Railways Clauses Consolidation (Scotland) Act 1845, in places new portions of road being substituted for existing portions. Some years subsequently the district embracing these roads was annexed to a City whose Special Act vested the roads in the city authority and subjected them to its other Special Acts, which contained provisions as to streets after being put on the register of public streets being maintained thereafter by the local authority.

In an action by the City against the railway company to enforce the obligation of maintaining the roadway, *held* (1) that the Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, by its terms "turnpike road or public highway" applied to streets in a city as well as roads in a county district, and so still applied to the roads in question; (2) that the substituted portions were in the same position as the other portions of road; and (3) that the special powers of the transferees could not operate a release from its obligations to the railway company.

Road—Railway—Burgh—Maintenance of Roadway — Bridges Carrying Streets Across Line — City Authority Owning Tramway System Using Bridges—Liability for Maintenance—Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 28—*Railways Clauses Consolidation (Scotland) Act* 1845, *sec.* 39.

A railway company was bound in terms of the Railways Clauses Consolidation (Scotland) Act 1845, section 39, to maintain the roadway upon bridges and approaches thereto which carried streets across their line. These roadways were also utilised by a tramway system owned by the corporation of the city in which they lay, the Tramways Act of 1870 being incorporated in their Special Act. In an action by the corporation to enforce against the railway company the obligation of maintenance of the roadway, *held* that the company's obligation was not to maintain the whole roadway, with a right of relief against the tramway, but was merely to maintain the portion of the roadway not falling within section 28 of the Tramways Act as incorporated in the Special Act.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 39, enacts—"If the line of the railway crosses any turnpike road or public highway, then except where otherwise provided by the Special Act, either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the Special Act in that behalf provided, and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company, provided always that, with the consent of the Sheriff or two or more justices as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriageway, on the level."

Section 46—"If, in the exercise of the powers by this or the Special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tram road, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with or as nearly so as may be."

Section 49—"If the road so interfered with . . . cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow."

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The Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 28, *inter alia*, enacts—"The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authorities shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid, as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway."

The Glasgow Corporation (Tramways and General) Order Confirmation Act 1901 (1 Edw. VII, cap. clxxix), which incorporates certain sections of the Tramways Act 1870, by sec. 7, *inter alia*, enacts that for the purposes of that Act section 28 of the Tramways Act 1870 "shall have effect as if five feet were therein mentioned instead of four feet."

The Caledonian Railway (Garnkirk Station) Act 1847 (10 and 11 Vict. cap. lxxxii) by section 34, the Caledonian Railway (Additional Powers) Act 1872 (35 and 36 Vict. cap. cxiv) by section 53, the Caledonian Railway Company (Additional Powers) Act 1878 (41 and 42 Vict. cap. clxxiii) by section 51, and the Caledonian Railway (Further Powers) Act 1882 (45 Vict. cap. liii), by section 55, provide that nothing contained in them shall exempt from the provisions of any general Act relating to railways.

The Acts of 1872, 1878, and 1882 in their second section incorporate the Railways Clauses Act 1845 save where expressly varied.

The Act of 1872 in section 7 enacts—"The new lines of road authorised to be made by the two next preceding sections of this Act, and all other new portions of road authorised by the provisions of 'The Railways Clauses Consolidation (Scotland) Act 1845,' as incorporated with this Act, to be formed in lieu of roads altered or diverted, shall, as respects maintenance, management, and tolls (where tolls are leviable), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads altered or diverted as aforesaid respectively."

The Act of 1878 in section 7 enacts—"The said diversions of roads and new piece of road shall respectively, as respects management, maintenance, and tolls (where tolls are exigible), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads for which the same are respectively substituted as aforesaid; and all other new portions of road authorised by the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, as incorporated with this Act, to be formed in lieu of roads altered or diverted, shall, as respects management, maintenance, and tolls (where tolls are exigible) and in all other respects, be held as parts of and be subject to the same provisions as the existing roads so altered or diverted respectively."

The Act of 1882 in section 35 enacts—"The company may permanently stop up the portions of existing roads for which any new portions of road authorised by the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, as incorporated with this Act, to be formed in lieu thereof, are respectively substituted; . . . and all such new portions of roads shall, as respects management, maintenance, and tolls (where tolls are exigible), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads for which the same are respectively substituted. . . ."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) makes provision for having streets declared public streets on the application of the Master of Works or any proprietor, and enacts—"Section 289—Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the [Magistrates and Council]. . . . Section 310—Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, [the Magistrates and Council] shall make provision for maintaining and, so far as thought expedient, for causewaying the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway. . . . Section 315—The Master of Works may, by notice given in manner hereinafter provided, require any proprietor of a land or heritage adjoining any public street, to causeway one-half in breadth thereof opposite such land or heritage in a suitable manner to his entire satisfaction, unless previous to the passing of this Act such portion of street was assumed by the [Magistrates and Council] as in a sufficient state of repair. Section 316—On the completion of the said causeway, and its approval by the Master of Works, or by the magistrate or Dean of Guild, as hereinafter provided, the registrar shall make an entry thereof in the register of public streets, which shall *ipso facto* relieve the proprietor from liability for the future maintenance or renewal of the said causeway."

The City of Glasgow Act 1891 (54 and 55 Vict. cap. cxxx), section 27, enacts—"Subject to the provisions of this Act, and excepting as after mentioned, the lands, buildings, sewers, lamps, lamp-posts, pipes, mains, plant, and all other property, assets and powers of every description, vested in, held by, or due or belonging to any councils, commissioners, or authorities within the district added, shall from and after the commencement of this Act be by virtue of this Act transferred to and vested in, be held by, and be due and belong to the corporation, the police commissioners, or the parks and galleries trustees, or other transferees, as such property and assets would, if within the existing burgh, belong to or be comprised within the administration of any one of those authorities, and shall form part of the property and assets of the city for all the estate and interest therein of

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such councils, commissioners, or authorities, and shall be held, received, and enjoyed by the respective transferees accordingly, and the powers, duties, and liabilities of such councils, commissioners, or authorities shall be transferred and attach to the respective transferees, and shall form part of the powers, rights, debts, liabilities, and obligations of the city, and be enjoyed, exercised, paid, discharged, and performed by the respective transferees." Section 35 (1)—"All public roads, highways, streets, footpaths, lanes, and courts in the district added, where vested in the several county councils, district committees . . . within the district added, or any of them, shall be and are hereby transferred to and vested in the police commissioners, and the same shall be subject to the provisions of the Police Acts."

The Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, sec. 44, enacts—"The added areas shall, from and after the passing of this Act, be incorporated with and form part of the city and county of the city of Glasgow, and be disjoined from the county of Lanark, in the same manner and to the same effect, and for every purpose, as the area disjoined from the same county and incorporated with and annexed to the city by the City of Glasgow Act 1891."

On 8th November 1904 the Corporation of the City of Glasgow brought an action against the Caledonian Railway Company in which they sought declarator—"(*First*), that Broomfield Road, Cumbernauld Road, and Strathclyde Street, in the city of Glasgow, are public highways, and are respectively carried over the defenders' railway or railways by means of a bridge or bridges; and (*Second*), that the defenders are bound at all times to maintain at their own expense the portion or portions of the said Broomfield Road, Cumbernauld Road, and Strathclyde Street, carried over the defenders' railway or railways by means of a bridge or bridges, including in such maintenance in each case the immediate approaches of such bridge or bridges, reserving to the defenders any right of relief competent to them, if they any have, in respect of any obligation as to maintenance or repair imposed upon the owners of the tramway undertaking, or any others liable to them in relief in respect of such tramway undertaking, in so far as such tramway undertaking is constructed upon the bridge carrying the said Cumbernauld Road over the defenders' railway or railways, and the immediate approaches of such bridge."

The defenders pleaded, *inter alia*—"(3) The defenders not being bound to maintain the specified portions of said streets, all as condescended on, are entitled to absolvitor from the conclusions of the summons with expenses. (4) The said streets having been declared public streets within the meaning of the Glasgow Police Acts, the defenders are not under obligation to maintain any portion thereof. (5) Strathclyde Street not being a public highway when the defenders' railway was constructed, the provisions of the Railways Clauses Act 1845 do not apply to it. (8) In respect of the provisions of the defenders' Acts condescended on, the defenders are not bound to maintain the new portions of road substituted by them for the previously existing roads appropriated and used by them partly in the formation of the said substituted roads, and partly for the purposes of the said railway. (9) In respect of the obligation contained in section 28 of the Tramways Act 1870, the pursuers, as owners of the tramways in Cumbernauld Road, are directly responsible for the maintenance of the said road to the road authorities, who in this instance are the pursuers themselves."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (Low).

On 17th March 1905 the Lord Ordinary pronounced this interlocutor:—"Finds (1) that Broomfield Road and Cumbernauld Road in the city of Glasgow are public highways, and are respectively carried over the defenders' railway or railways by means of a bridge or bridges; and (2) that the defenders are bound at all time to maintain at their own expense the portion or portions of the said Broomfield Road and Cumbernauld Road carried over the railway or railways by means of a bridge or bridges, including in such maintenance in each case the immediate approaches of such bridge or bridges, except in so far as the owners of the tramway constructed in Cumbernauld Road are bound to maintain the foresaid portion or portions of said road, including as aforesaid: To the extent and effect of these findings, but to no greater extent and effect, finds, decerns, and declares in terms of the conclusions of the summons as regards Broomfield Road and Cumbernauld Road: Appoints the cause to be enrolled for further procedure: Reserves in the meantime all questions of expenses, and grants leave to reclaim."

Opinion—"The main question raised in this case is whether public streets in Glasgow are public highways within the meaning of the 39th section of the Railways Clauses Consolidation (Scotland) Act 1845.

"By that section it is provided that [. . . *quotes section supra*. . . .]

"It appears that three streets in Glasgow—namely, Broomfield Road, Cumbernauld Road, and Strathclyde Street—are carried over railways belonging to the defenders by means of bridges which were constructed by the defenders.

"The pursuers, the Corporation of Glasgow, accordingly seek declarator (1) that these streets are public highways which are carried over the defenders' railways by means of bridges; and (2) that the defenders are bound to maintain at their own expense the portions of the streets carried over the railways by means of bridges, including the immediate approaches to the bridges. In short, the pursuers seek to have it declared that the streets and bridges in question fall within the scope of the 39th section.

"The defenders argued in the first place that the section applied only to country

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roads, and not to the streets of a town. They founded upon the words in the section 'any turnpike road or public highway,' and contended that the expression 'public highway' must be construed as referring only to highways *ejusdem generis* with turnpike roads. No doubt, if the only expression used had been 'public highways,' turnpike roads would have been included, although they were not specially mentioned, and there must therefore have been some reason for their special mention. I think that the explanation probably is that the Act goes on to make regulations in regard to bridges erected for the purpose of carrying railways over roads, and the regulations which are made for turnpike roads are different from those which are made for what are described as 'public carriage roads.' The conclusion which I come to upon reading the group of sections which commences with the 39th, and which fall under the general heading 'Interference with Roads,' is that the expression 'public highway' includes, at all events, public carriage roads of whatever kind they may be or wherever situated. There is nothing that I can find in any of the sections which excludes from the operation of the 39th section a public carriage road because it happens to be situated in a town or burgh.

"It is to be remembered, however, that the provisions of the Railway Clauses Act only become effective by being incorporated in the Special Act, and if a general rule laid down in the General Act is one which could not with justice be applied in a particular case, the Legislature may in the Special Act make such special provisions as may be suitable to the circumstances.

"It is therefore necessary to see whether the Special Acts which authorised the construction of the railways intersecting the streets in question contained special provisions which altered or modified the general rule laid down in the 39th section of the General Act.

"As regards Broomfield Road and Cumbernauld Road, which were admittedly public streets or public carriage roads at the time when the bridges were built, the defenders were unable to point to any provisions in the Special Acts which superseded or modified the general rule of the 39th section of the Railways Clauses Act.

"The defenders indeed founded upon the fact that as regarded some of the bridges they had been obliged to alter the line of the street, stopping up an old portion of the street, and substituting for it a new portion which was carried over the railway by a bridge. They were authorised by their Special Acts to make these alterations upon the streets, and it was provided in each case that the new portion of the road should, as respected management, maintenance, and in all respects, be held as part of, and be subject to the same provisions as, the existing road for which it was substituted.

"I do not think that these provisions, or what was done under them, prevented the 39th section of the Railways Clauses Act from being applicable. The railways authorised by the Acts crossed public highways, and the defenders, as directed by the section, carried the highways over the railways by means of bridges, and it is in my opinion of no moment that what were carried over the railways were not the original highways but substituted highways, because the Special Acts declared that the substituted portions should in all respects come in place of, and be in the same position as, the original portions.

"I therefore do not think that what was authorised and done in the way of altering the line of the streets can relieve the defenders of the obligation to maintain the bridges and the immediate approaches thereto. These circumstances may be important in considering what are the 'immediate approaches' to the bridges, but that is a question which is not raised in this case.

"It further appears that until 1899 Broomfield Road and Cumbernauld Road were in the county of Lanark, and under the jurisdiction of the District Committee of the Lower Ward of that county, but in that year they were brought within the boundaries of the city of Glasgow, and the defenders refer to a variety of enactments by which the roads brought within the city are vested in the city authorities. I do not think that these enactments have any bearing upon the present question. I do not see how the mere transference of roads for administrative purposes from one local authority to another can, in the absence of express provision to that effect, relieve the defenders of the obligation laid upon them by the 39th section of the Railways Clauses Act.

"In regard to Strathclyde Street, which is also carried over a railway belonging to the defenders by means of a bridge, the position of matters is somewhat different. The defenders aver that when the railway was made and the bridge built, Strathclyde Street was a private street, and they plead that the street, not having been a 'public highway' when the railway was constructed, the provisions of the Railways Clauses Act do not apply to it. Now, I imagine that, although Strathclyde Street was a private street, it may nevertheless have been a public highway, and the defenders do not say that it was not so. On the other hand, the pursuers, while they admit that Strathclyde Street was a private street, do not aver that it was a public highway. I cannot tell by reading the Special Act under which the railway crossing Strathclyde Street was constructed how the matter really stood, and accordingly it seems to me that there must be inquiry.

"There is one other matter to which I must refer. The pursuers are the owners of tramways in Cumbernauld Road, and their statutory obligation is to maintain so much of the road upon which the tramways are laid as lies between the rails, and as extends eighteen inches beyond the rails upon each side. The defenders say that that obligation includes the bridges as well

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as the other parts of the street, and I do not understand the pursuers to deny that that is the case. The pursuers have accordingly qualified the conclusions of the summons by reserving to the defenders any right of relief competent to them against the owners of the tramway in regard to the maintenance and repair of the road.

"I doubt whether the relative position of the parties is properly described by saying that the defenders' obligation is to maintain the whole of the roadways upon the bridges, with a right of relief as regards part thereof against the pursuers. The 28th section of the Tramways Act 1870, which is quoted in the defences, rather seems to render the owners of the tramway directly responsible for the maintenance of the road upon which the tramway is laid to the extent there defined.

"It therefore seems to me that all that the pursuers can ask is that the defenders should be found liable to maintain the roadways of the bridges and the immediate approaches thereto, except in so far as the owners of the tramways are bound to do so."

The defenders reclaimed, and argued—Section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 did not here apply. The roads and streets in question were public streets of the city of Glasgow, to maintain which the corporation was liable. The Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, section 44, transferred Broomfield Road and Cumbernauld Roads from the county local authority to that of the city to the same effect as the area annexed to the city of Glasgow by the City of Glasgow Act 1891. That Act by its 35th section transferred all public roads, highways, streets, and footpaths in that area to the Police Commissioners, and declared them to be subject to the provisions of the Police Acts which the third section had defined as meaning, *inter alia*, the Glasgow Police Acts 1866 to 1891. Now, the Glasgow Police Act 1866 in its 316th section declared that after streets had been declared public streets, and enrolled in the register thereof, the proprietor was no longer liable for their maintenance, and by section 310 that the Magistrates and Council should make provision therefor. Moreover, the whole purposes of these streets had been changed by the transference. They had ceased to be highways in the sense of section 39, and their character was changed, *e.g.*, causeway had been substituted for macadamised road. There was no case of section 39 having been held to apply to a street in a burgh. The cases *Lancashire and Yorkshire Railway Campany* v. *Borough of Bury* (1889), L.R., 14 A.C. 417; *Great Eastern Railway Company* v. *Hackney District Board of Works* (1883), L.R., 8 A.C. 687; and *Cameron* v. *Caledonian Railway Company*, March 12, 1904, 6 F. 763, 41 S.L.R. 414, were all distinguishable either in respect to the subject, the Special Acts in question, or the parties. Also apart from the Acts relating to the city of Glasgow, section 7 of the Special Acts of 1872 and 1878, and section 35 of that of 1882, exempted the defenders from the burden of maintenance of the substituted roads—*Magistrates of Perth* v. *Earl of Kinnoul and the Caledonian Railway Company*, June 28, 1872, 10 Macph. 874, 9 S.L.R. 555. Further, if the supervening Tramways Act 1870 which was incorporated in the Glasgow Corporation (Tramways and General) Order Confirmation Act 1901 had by section 28 removed partially the burden of maintenance and transferred it to the tramway owners, then the total transference operated by the vesting of these roadways in the city of Glasgow under the provisions of the Glasgow Police Act 1866 had extinguished the entire obligation. As to Strathclyde Street, that was not a public highway when the Railway Company bridged it, nor was the contrary averred. It had only become a public highway in 1894 under the Glasgow Police Act 1866, which by sections 310 and 316 laid the burden of maintenance on the city authority. Previous to 1894 it had been a private street, and not subject to section 39 of the Railways Clauses Consolidation (Scotland) Act 1845. No matter for inquiry was averred, and no proof should be allowed as to Strathclyde Street. The Lord Ordinary's judgment should be recalled and the defenders assoilzied.

Argued for the pursuers and respondents—Section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 applied and obliged the Railway Company to maintain these bridges and roadways. The words used in that section were "any turnpike road or public highway," and had been interpreted to include carriageways though not footpaths—*The Queen* v. *Bexley Heath Railway Company*, [1896] 2 Q.B. 74. In the case of the *Lancashire and Yorkshire Railway Company* v. *Borough of Bury*, *cit. sup.*, the railway company had been held liable though no additional surface of roadway was added to the liability of the road authority by their operations. The argument as to liability having been discharged by the vesting of the roads in the city of Glasgow was unsound—*Great Eastern Railway Company* v. *Hackney Board of Works*, *cit. sup.*, *per* Lord Watson. In that case a statute vesting the roads in a local authority was held not to relieve adjoining landowners from liability; similarly in the present case the liability under section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 was not by transference extinguished. Nor was there anything in the urban character of these streets to displace the liability. The transference merely put the new authority in place of the old with all its rights of relief, and carried with it the Railway Company's obligation in respect of these roadways in terms of section 27 of the City of Glasgow Act 1891. Nor did the Special Acts of the Railway Company exempt them from liability under section 39. Sections 7 of the Special Acts of 1872 and 1878, and section 35 of the Special Act of 1882, plainly meant that the new roads should be dealt with as part of the old system, and should be as if no

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diversion or alteration had taken place. These sections besides were qualified by section 53 of the Act of 1872, section 51 of the Act of 1878, and section 55 of the Act of 1882 respectively, to the effect that the company was not to be exempt from the provisions of any general Act relating to railways, and consequently not from the provision of section 39 of the Railways Clauses Consolidation Clauses (Scotland) Act 1845. Nor could the exemption claimed have applied to any bridge erected under a Special Act in 1847, which was also liable to the provisions of the general Railway Acts by its own special enactment. Further, the decisions in the cases of the *Magistrates of Glasgow* v. *The Glasgow and South Western Railway Company*, May 13, 1895, 22 R. (H.L.) 29, 32 S.L.R. 733; and the *Caledonian Railway Company* v. *The Corporation of Glasgow*, February 20, 1901, 3 F. 526, 38 S.L.R. 376, had laid it down that the city could not interfere with such bridges and their roadways as those in question, and so they must be under and maintainable by the Railway Company. As to Strathclyde Street, the averments were distinct that it was a public highway. The case of *Neilson* v. *Borland, King, & Shaw*, February 28, 1902, 4 F. 599, 39 S.L.R. 417, showed that the public use of it as a highway had no bearing on the duty of maintenance. The case of *Christie* v. *The Corporation of Glasgow*, May 31, 1899, 36 S.L.R. 694, was also referred to.

At advising—

LORD KINNEAR—This is an action at the instance of the Corporation of the City of Glasgow against the Caledonian Railway for declarator that the defenders are bound to maintain certain portions of roads or streets in Glasgow which are carried over the railway by means of bridges. The roads in question are three in number, the Broomfield Road, the Cumbernauld Road, and Strathclyde Street; and the Lord Ordinary has sustained the action as far as regards the first two with a certain qualification, and as regards Strathclyde Street has expressed his opinion that certain facts must be ascertained before judgment can be given, and has therefore continued the cause for further procedure. I am of opinion that his Lordship's interlocutor is right, and that we ought to adhere to it.

The facts as regards Broomfield Road and Cumbernauld Road are simple, and are not in dispute. The defenders' railways cross the lines of these two roads at various points, and at each of these points the road is carried over the railway by a bridge. When the bridges were originally constructed the roads were under the jurisdiction of the District Committee of the Lower Ward of Lanarkshire, but on the passing of the Glasgow Corporation Act 1899 they were brought within the boundary of the city, and the main question between the parties is whether the operation of this statute did or did not discharge an obligation to maintain the bridges which had been previously incumbent on the Railway Company. The pursuers' case is founded on the 39th section of the Railways Clauses Consolidation Act 1845; and the first ground of defence, which was also the most strenuously maintained, assumes that that enactment effectually imposed the obligation in question while the roads were within the jurisdiction of the County Road Trustees. The 39th section provides that "if the line of railway cross any turnpike road or public highway, either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge . . . and such bridge with the immediate approaches and all other necessary works connected therewith shall be executed and at all times thereafter maintained at the expense of the company." It is not disputed that Broomfield and Cumbernauld Roads were public highways in the county of Lanark when they were crossed by the defenders' lines of railways, and it follows that the bridges by which they were carried over the railway had to be executed, and, if the Act remains operative, must still be maintained at the expense of the defenders. But it is said that this statutory liability was determined when the roads became public streets within the meaning of the Glasgow Police Acts. The first argument that was advanced in support of that proposition does not appear to me to have much force. It was said that the language of the enactment is not applicable to the streets of a burgh. If a bridge has been "executed" in terms of the statute, the bridge to be maintained is sufficiently identified as that so executed, whether a public street may properly be called a public highway or not. But I agree with the Lord Ordinary that the words are large enough to include all public carriage roads even when they pass through a burgh. I cannot see, therefore, that the application of the statute in terms is displaced because of the inclusion of the roads, of which the bridges in question form parts, within the municipal boundaries of the city. It is maintained, however, that the Acts of Parliament by which this inclusion was brought about have made so radical an alteration of the rights and liabilities involved in the maintenance of roads, as to make the 39th section of the Railway Clauses Act unworkable, and so to relieve the company of its obligations. As this argument was developed, it involved a distinction between the liability for maintaining the main structure of the bridge and for maintaining the surface of the roadway; for Mr Cooper conceded that notwithstanding the Glasgow statutes the defenders would still be liable to replace, for example, a defective girder, although they would not be liable for repairing the roadway. I find it extremely difficult to reconcile this view with the plain meaning of the Act. It was held in the *North Staffordshire Railway Company* v. *Dall*, approved by the House of Lords in the *Lancashire and Yorkshire Railway Company* v. *The Mayor of Bury*, that when a road is carried over the railway by a bridge the obligation to maintain the bridge includes the roadway,

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for a bridge without a roadway is not for practical purposes a bridge; and accordingly the learned Judges of the Queen's Bench held that the provision applied to all necessary works including the stoning and metalling without which the road would be useless. If the enactment is repealed altogether by implication, the construction adopted in this decision will of course create no difficulty, but if, as is conceded, it is not repealed but is still operative at least in part, it seems to me that an exemption as regards one particular part of the bridge from the liability which the statute imposes in terms as regards the whole is not easily to be inferred. But I am of opinion that the statutes on which the defenders rely create no exemption and make no change whatever in the liability imposed upon them by the Railways Clauses Act. The enactment mainly relied on is the 35th section of the City of Glasgow Act 1891, by which it is provided that all public roads, highways, and streets, formerly vested in county councils or district committees within the district added shall be transferred to and vested in the police commissioners and shall be subject to the provisions of the Police Acts. I agree with the Lord Ordinary that the transference of roads for administration purposes from one local authority to another cannot relieve the defenders of their obligation to bear the expense of maintaining bridges. It is said that the new administrators as police commissioners have a more extensive authority than road trustees. But their additional functions can make no difference in the legal relation between them as administrators of the roads and the defenders. They are still creditors, just as the old road trustees were, and the defenders are still debtors in a specific obligation imposed by statute, which is neither enlarged nor diminished by the transference of the duty of managing roads to a body which is also charged with the duty of police commissioners. If they require the roadway of the bridges to be maintained in a more expensive manner than has hitherto been found necessary, the defenders may or may not have a right to object to a burden which may be beyond what was contemplated by the statute. But no question of that kind is raised at present, and if it arises it must be determined on the same principle as if it had been raised, as it might have been, by an extravagant demand of the former trustees. The suggestion that the new managers may call for a larger expenditure than the statute intended is no reason for relieving the defenders from the obligation which the statute imposes.

As to the second ground of defence—that the defenders, as regards some of the bridges, had been obliged to alter the line of the road, stopping up an old portion and substituting for it a new portion which was carried over the railway by a bridge—I agree entirely with the opinion of the Lord Ordinary, and I have nothing to add to what he has said.

This disposes of the question raised by the reclaiming note, so far as regards the roads which were admittedly public carriage roads at the time the bridges were built. As regards Strathclyde Street, the Lord Ordinary was unable to decide, upon the mere construction of the Special Act, whether this was or was not in fact a public highway when the railway was made; and he has accordingly entered the case to be enrolled for further procedure. I think this was the right order and that we ought to adhere to his Lordship's interlocutor.

The LORD PRESIDENT, LORD M'LAREN, and LORD PEARSON concurred.

The Court adhered.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Cooper, K.C.—Orr Deas. Agents—Campbell & Smith, S.S.C.

Counsel for the Pursuers and Respondents—The Dean of Faculty (Campbell, K.C.)—The Lord Advocate (Shaw, K.C.)—M. P. Fraser. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CLIPPENS OIL COMPANY, LIMITED *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

(*See ante*, July 6, 1905, 42 S.L.R. 698, 7 F. 914; February 22, 1901, 38 S.L.R. 354, 3 F. 1113; November 27, 1900, 38 S.L.R. 121, 3 F. 156; June 7, 1899, 36 S.L.R. 710, 1 F. 899; February 3, 1898, 35 S.L.R. 425, 25 R. 504; December 17, 1897, 35 S.L.R. 304, 25 R. 370.)

Interdict—Interim Interdict—Subsistence of Interdict.

Held (*per* Court of Seven Judges) that interim interdict having been granted in the Bill Chamber and the Note passed, the interdict subsisted till the Note was finally disposed of either by a judgment of the Lord Ordinary not reclaimed against, or by a judgment of the Inner House on a reclaiming note.

Limitation of Action—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61)—*Public Authority Acting with a View to Cripple Opponents—Relevancy of Averment.*

In an action brought by a mineral company against water trustees to recover damages for wrongous interdict, *observed* (*per* Lord President)—"I do not think that to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available."

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Interdict—Interim Interdict—Mineral Company Interdicted by Water Trustees—Question of Interdict Wrongous—Preservation of Status Quo—Prevention of Respondents from doing what otherwise not Entitled to do.

At the instance of water trustees interim interdict was granted against a mineral company interdicting it from mining under or within forty yards of the trustees' water-pipes. This interdict was eventually upon the Note refused and the company brought an action of damages. Pending this action the trustees sought and obtained on a different ground an interdict, interdicting the company from mining so as to damage the pipes which had been found entitled to support.

In the action of damages *held* that the interim interdict was wrongous entitling to damages, inasmuch as (1) it was not one merely preserving the *status quo*, and (2) not being in exactly similar terms to the interdict finally obtained, its effect had not been only to prevent the pursuers doing what otherwise they were not entitled to do.

Observed per Lord President—"I do not think that to show the defenders were trying to cripple the pursuer of set purpose has anything to do with the interdict being wrongous."

Reparation—Damages—Wrongous Interdict—Mineral Company Interdicted from Working Main Seam—Measure of Damages.

Interim interdict was granted against a mineral company which stopped it from working its main seam. The interdict having been eventually upon the Note refused, the company brought an action of damages, and claimed as for a total loss of its business on averments that the loss of the mineral had necessitated the stoppage of its works, which entailed the rapid deterioration of its machinery, the loss of its workmen and of its business connection. It was proved mineral could have been obtained from inferior seams, but that that would probably have entailed a very considerable loss on working. *Held* that the damages were to be assessed on the basis of the company having kept its works and business going by using mineral obtained elsewhere than from the main seam.

Process—Diligence for Recovery of Documents—Confidentiality—Action of Damages for Wrongous Interdict—Interim Interdict by Water Trustees against Mineral Company—Report by Man of Skill to Water Trustees after Interdict Obtained.

In an action of damages for wrongous interdict brought by a mineral company against water trustees the pursuers sought to recover a report by a man of skill made on the mineral workings to the defenders shortly after the interim interdict complained of had been obtained. The Court *held* that the report should be produced to be examined by it, and if with a bearing to go into the case in whole or in part.

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1, enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance of or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of continuance of injury or damage, within six months next after the ceasing thereof. . . ."

On 6th May 1898 the Clippens Oil Company, Limited, brought an action against the Edinburgh and District Water Trustees incorporated under the Edinburgh and District Water-works Act 1869, in which they sought to recover £137,000 as damages for loss sustained in consequence of an interdict wrongously obtained against them by the defenders. The interdict complained of had been granted interim by the Lord Ordinary on the Bills (PEARSON) on March 16, 1897, and interdicted the pursuers ". . . (*Second*) from working and mining the seams of shale and other minerals, and of limestone and fireclay, in their lands of Straiton, and in the lands of Pentland leased to them, at any point within forty yards of the complainers' pipe-tracks or lines of pipes or bridge, as shown on the copy of the Ordnance Survey map produced herewith, or at least from working, mining, and awaytaking, or in any way interfering with the pillars or stoops of shale and limestone left by the respondents and their predecessors the Straiton Oil Company, Limited, in their workings on the said estates of Straiton and Pentland, so far as these pillars or stoops are under the complainers' pipe-track and line of pipes, or within forty yards thereof. . . ."

The pursuers pleaded, *inter alia*—"1 The pursuers having suffered loss and damage to the extent sued for in consequence of the interdict wrongously and illegally obtained at the defenders' instance against them, are entitled to decree in terms of the conclusions of the summons. 3. The defenders' pleas, in so far as founded on the Statute 56 and 57 Vict. cap. 61, should be repelled in respect that . . . (3) The defenders have not acted either in fact or in intention in pursuance or in execution of any authority or duty, whether statutory or otherwise, within the meaning of section 1 of the said statute. (4) The injury complained of was continuous up to the date of raising the present action, or at all events up to 3rd February 1898, and the present action was raised on 6th May 1898."

The defenders pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient in law to support the conclu-

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sions of the summons. (4) Any losses which the pursuers may have sustained, through having been caused through the pursuers' voluntary action, and not owing to the said interdicts, the defenders should be assoilzied. (5) The defenders should be assoilzied in respect that the pursuers are not entitled to work the minerals included in the said interdict of 16th March 1897 so as to injure the Crawley pipe, and the operations which were interdicted would, if they had continued, have resulted in injury to the said pipe. (7) In any event, the damages claimed are excessive. (8) The present action is excluded by section 1 of the Public Authorities Protection Act 1893, 56 and 57 Vict. cap. 61."—[*Plea* 8 *for the defenders was added by amendment in the Inner House, the pursuers' plea* 3 *being also added to meet it, and this branch of the case was heard before Seven Judges.*]

With regard to the damage alleged to have been suffered the pursuers averred—"(Cond. 8) By the obtaining of said interdict, wrongously and illegally as aforesaid, the defenders caused loss and damage to the pursuers. The whole available mining developments were closed either immediately or within a few months from and in consequence of the granting of the interim interdict. It was found impossible, in consequence of the interdict, to carry on the shale mining and oil manufacture except at a ruinous loss, and the pits and works had to be closed on 14th July 1897. By this time the bing of shale, containing about 25,000 tons, which constituted a valuable insurance against strikes and mining risks, had been exhausted. The retorts had to be allowed to cool down and the refinery to stand, and thereby, and by remaining unused, to deteriorate, and about 1000 workmen had to be dismissed. These men had to seek employment elsewhere, and the mining and working population which used to surround the pursuers' works and live in the pursuers' houses disappeared, to the great detriment of the said works. While heavy expense has been incurred in keeping the pits free of water, and maintaining the leading mines, the workings generally fell rapidly out of order, and large expenditure is necessary to bring them into the like working condition as they were in at the date of the interim interdict. The whole property and plant of the company, which was then in full productive order, suffered seriously by being brought to a standstill and thrown out of use. Not only has it in itself deteriorated, but extraordinary expense is now necessary to re-start it and bring it up to its former efficiency. Moreover, while the company had a large and increasingly profitable business, including a well-established and extensive business connection, not only has it been unable, owing to the interdict to carry on its business, but the said connection itself has been lost, and much loss and outlay must now be incurred before it can be recovered and the company's business again restored to its profitable condition. The pursuers estimate their loss and damage on these heads at £137,000. The defenders repudiate all liability to the pursuers, and the present action has thus been rendered necessary."

On the same matter the defenders in their statement of facts averred—"(Stat. 6) The interim interdict granted by the Lord Ordinary only prevented the pursuers from working and winning the seams of shale and limestone in their lands of Straiton and in the lands of Pentland leased to them at any point within 40 yards of the defenders' Moorfoot pipe. That interdict lasted from 16th March 1897 to the 18th September 1897. The interdict granted by the Lord Ordinary on 18th September 1897 only prevented the pursuers from working, winning, and away-taking the pillars or stoops of limestone left in the limestone workings on the estate of Straiton, as far as these pillars or stoops are under the defenders' pipe track or within 40 yards therefrom. That interdict was recalled on 3rd February 1898. At the date of the interim interdict, on 16th March 1897, there was abundance both of shale and limestone in the Clippens workings which the pursuers could have worked without breach of the interdict. The pursuers had abundance both of shale and limestone which they could have worked, and ought, in the ordinary course of the development of their field, to have worked between the 16th March 1897 and 3rd February 1898. There was no necessity whatever for the pursuers to stop their workings for any part of the said period in consequence of the said interdict. The development of their mineral field could have proceeded in the ordinary course, as it had done for years before, during the whole period when the said interdicts were in force against them. The pursuers closed their works voluntarily and not owing to the action of the defenders, or anything for which the defenders are responsible. The said interdicts caused them no loss whatever. The interdicts merely prevented the pursuers from working at one out of the many places where they could have worked with equal ease to themselves. It is believed and averred that the pursuers ceased working simply because the working of the said minerals had been and was at the time of stoppage unprofitable. The cost of production at the pursuers' works was greater than the prices realised by the pursuers for the articles produced, and this state of matters had prevailed almost without intermission since the date of the formation of the pursuers' company."

A proof was taken.

At the proof the Lord Ordinary (PEARSON), on the ground of confidentiality, refused to ordain the defenders to produce a report by a Mr Gemmell, mining engineer, to the defenders, made on an inspection shortly after the interdict of 16th March 1897 of the mineral workings, the inspection having been obtained in virtue of the power conferred on water undertakers by section 26 of the Water-works Clauses Act 1847 (10 Vict. cap. 17), "for better ascertaining whether any such mines are being worked or have been worked so as to

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damage the said works," to enter upon the lands being mined.

The whole facts of the case are given in the opinions of the Lord Ordinary and the Lord President (*infra*).

On 18th March 1905 the Lord Ordinary decerned in favour of the pursuers for £15,000.

Opinion.—"In this action the pursuers seek to recover damages from the defenders in respect of an alleged wrongful interdict obtained by the defenders against them in the Bill Chamber on 16th March 1897.

"The pursuers had the right, partly as owners and partly as lessees, to work shale and limestone in the lands of Pentland and Straiton, through which the defenders' main pipe track passes on its way to Edinburgh. The track contains two pipes —(1) the Crawley pipe, laid in 1825 to introduce the water from Crawley Springs, under power contained in the Act of 1819: and (2) the Moorfoot pipe, laid in or about the year 1876, in pursuance of the Moorfoot Water Scheme. At the time of the interdict complained of it was assumed that both pipes were subject to the provisions of the Water-works Clauses Act; but it was afterwards found in an action of declarator that the defenders had a right to have the Crawley pipe supported apart from that Act. The defenders further acted on the erroneous assumptions that no notices had been served upon them under the Water-works Clauses Act, and that the mineowner who has worked the minerals within the 'prohibited area,' without first giving notice to the undertakers under section 22 of the statute, has thereby disabled himself from giving an effectual notice under the statute, with the result that the statutory inhibition becomes absolute, and the minerals must be left as they stand without compensation.

"On these assumptions the defenders, for the safety of their pipe, presented a note of suspension and interdict in the Bill Chamber in March 1897 for the purpose (so far as need be here referred to) of restraining the pursuers '. . . [*quotes second crave of note, quoted supra*] . . .' They stated their willingness to find caution, and on 16th March 1897 the note was passed and interim interdict was granted in terms of the prayer on caution as offered. After proof decree was pronounced on 18th September 1897, granting interdict as regards the limestone pillars, but refusing the prayer of the note as to the shale stoops. On a reclaiming note presented by the Water Trustees the prayer of the note was refused also as regards the limestone pillars on 3rd February 1898.

"Briefly stated, the position of the pursuers' company at the time the interim interdict was granted was this—They had been in existence since 1903, when they had taken over the mineral rights of a previous company. They had had a bad time and had never paid a dividend, but, on the contrary, had incurred considerable losses. The oil trade had been passing through a trying period, and prices were about their lowest in 1897 and 1898. The company had been advised to erect new and improved retorts but had not the money to do it. Further, they had had one misfortune after another—first, a crush in the main shale, which ultimately closed the workings in that seam and compelled them to resort to an inferior seam known as the Broxburn shale. Then the mine had been flooded with water, and much trouble was experienced through this and the stoppage of the pumps. These difficulties, however, had been met so far as possible, and the company were in course of transferring their workings from the Broxburn to the more profitable main shale which had by this time been opened up again, when the interdict was obtained.

"The workings were in some parts so near the interdicted area that the first thing the company did was to stop working and call in skilled advisers as to what they ought to do. In the result they resumed working at certain faces, and went on with a small and rather uncertain output from the workings and the bing, until July, when they ceased work. The cessation of work in the mining department of course affected the crude oil department and the refinery, with the result, as they allege, that the whole works were stopped, the retorts and machinery rapidly deteriorated, and are now useless, and their business connection was broken up. They therefore claim as for total loss; and large as the amount concluded for is, Mr Armour, their secretary and manager, says it will cost two or three times as much as is concluded for to put the business back where it was.

"The defenders do not admit that they are liable at all; and it will be convenient to consider first their plea that they should be assoilzied, or otherwise that the damages should be merely nominal. They contend that it rests, in the first instance, on the company as pursuers to make out their case of wrongful interdict, and that the pursuers have failed to do so. I proceed to consider the arguments adduced on each side on this part of the case.

"The pursuers found, in the first place, on the fact that the interim interdict was recalled by the Lord Ordinary as regards the shale pillars (which are the things mainly in question here), and by the Inner House as regards the limestone also. They contend that if an interim interdict is recalled *causa cognita*, this necessarily infers that the interdict was wrongful, except in the case of an interim interdict obtained for the preservation of the *status quo*, without touching the merits of the dispute. I am disposed to agree in the argument that in the general case the fact that an interim interdict is recalled by the Court is *prima facie* evidence that it was wrongfully obtained. But the defenders contend that it was within the exception, and that the sole purpose of the interdict was to maintain the existing state of possession until the legal rights of parties were determined. This appears to me to be a rather inadequate way of describing the position. The Trustees, it is true, had been

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for many years in possession of the water mains, for a purpose which could only be served by their being left practically undisturbed. But it was equally open to the company to say that they and their predecessors had been in full possession of the minerals, in the only possible way, namely, by working and using them; and the very words of the interdict stopped them from further interfering with the stoops within a certain area. Interdict in such terms appears to me much more like an anticipation of the merits of the dispute than a preservation of the *status quo*.

"Then the pursuers point out that the interdict was applied for and obtained upon a quite erroneous statement both of the facts and the law, it being mainly founded on the assumptions already referred to as to the alleged failure of the company to serve notices under the Water-works Clauses Act, and as to the legal effect of their not having served such notices. The defenders can hardly challenge this statement of the original position; but they urge in reply that it has since turned out that they had a perfectly good ground in law for obtaining an interdict in substantially the same terms, although they were then ignorant of their rights. They point to the fact already mentioned that they have since obtained a judgment to the effect that one of the two water mains (the Crawley pipe) has of itself a right to be maintained and protected against injury from the pursuers' workings, apart altogether from the Water-works Clauses Act; and they urge that an interdict cannot be wrongful if it prevents what the party interdicted had no right to do, although it may proceed on wrong grounds. I cannot accept this reply of the defenders to the full effect contended for. It might, and probably would, be otherwise if the *Crawley* declarator case had rested upon the decision in the Outer House; for then the company would be under an interdict against working a block of minerals which substantially included the subject of the interdict now in question. But on a reclaiming-note, while the Trustees' right to have their pipe supported was affirmed, the responsibility for supporting it was laid on the company in general terms, without reference to any given area, and on the footing that any area defined beforehand might prove to be too much or too little for the purpose. Accordingly there is nothing in the terms of the ultimate decision in that case which enables the trustees to affirm that the interdict against injuring the Crawley pipe is co-extensive with the interdict now in question. It may turn out to be so; and it was pointed out that at the inception of these disputes the company and its officials expressed themselves pretty strongly as to the imminence of the risk, at a time when they were wishing the Trustees to buy a block of minerals and were holding them liable for a possible flooding of the mines. This may be taken into account in the assessment of damages; but I cannot hold that the *Crawley* declarator case has had the effect of justifying the interdict now challenged if that was otherwise wrongful when it was obtained.

"Further, the pursuers contend that, even failing these two grounds of liability, and on the assumption that it is to be determined on the whole circumstances of the case, they are still entitled to decree. In the view I take it is not necessary to pursue this further, but as both parties have founded on the antecedent circumstances as conclusive in their favour, perhaps I should express my opinion upon them. It is, that while the circumstances strengthen the view I have above indicated in favour of the pursuers, I should not be prepared to hold that they were of themselves enough to decide the case in favour of the pursuers apart from the considerations to which I have already adverted. It might have been otherwise if the pursuers' allegations of bad faith on the part of the Trustees had been well founded. It is suggested that the interdict was not obtained in good faith for the protection of the pipe, but for the oblique purpose of crippling the company to force them to come to terms. It is pointed out that none of the Trustees have come forward to justify what was done, or to explain on whom the responsibility for obtaining the interdict really rests. But I take it that the Trustees as a body perhaps naturally relied on their expert advisers in matters of law and mining, and that the result is simply that they are to be held as committed to all that was done in their name. No doubt what they did was done in pursuance of a plan; but the ultimate object of their plan was to secure the safety of the pipes. The fact is that both parties were pushing their supposed rights to an extreme point, with the view of doing their duty to their constituents; the Trustees holding to the position that they were entitled to have the minerals left unworked, owing to the failure to give notice under the Water-works Clauses Act; and the company maintaining that while their further working would in all probability result in serious subsidence, the Trustees would be liable not only for the breaking of the pipes but for the resulting inundation of the mine. On the one hand it is no good answer on the part of the Trustees to say that they were doing their duty by their constituents in obtaining their interdict; but on the other I think it hardly lies with the company to accuse the trustees of acting in bad faith in the matter. I credit each party with acting up to their lights at the time in the way of safeguarding the interests committed to them.

"The defenders might have had a complete answer to the pursuers' case if they had shown that the pursuers could have worked on in the mine and maintained their output without a breach of interdict, and that they failed to do so. If this could be shown, it would be difficult for the pursuers to recover any damages, as they would be themselves responsible for the stopping of their works, which was the proximate cause of the damage. Accord-

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ingly the defenders maintain that the interdict was only directed against working the shale in the ordinary sense, that is, so as to maintain the output, and did not prohibit the driving of levels through the interdicted area, either by way of opening them out in the old roads, or by driving new levels through the dip end of the stoops. Further, they say that even if the terms of the interdict should be held to extend to such workings, they could have at least opened out the levels in the old roads without interfering with the shale pillars. In my opinion, it is proved that the company would have incurred grave risk of breach of interdict if they had taken either of the courses suggested; and if the Trustees had intended that their interdict should not prevent the driving of levels through the interdicted area, they should have made this plain. It must be kept in view that it is by virtue of the Water-works Clauses Act that the stoppage of working after notice is subject to the reserved right of the mineowner to drive levels through the prohibited area, while the interdict now in question was obtained on the representation that the Water-works Clauses Act did not apply to the case owing to the company's failure to give notice.

"The next question is as to the point of time down to which the interdict thus wrongfully obtained was wrongfully insisted in. The determination of this is vital to the question of the amount of damages. The pursuers maintain that the date is to be fixed not earlier than 3rd February 1898, the date of the final judgment of the Inner House on the reclaiming note, and they say that by that time their business was ruined and their business connection gone past recall. The interdict had to do with both shale and limestone stoops, and as already mentioned the judgment on the merits in the Outer House granted interdict as to the limestone, while as regards the shale pillars the reasons of suspension were repelled and the prayer of the note refused. Now, it was the Trustees who reclaimed, and the pursuers contend that the effect of the reclaiming note was to suspend the whole interlocutor, including the implied recal of the interim interdict *quoad* the shale, and to set up again the original interim interdict. There is singularly little authority on this point of practice. In the ordinary case of an action of declarator and interdict where no order for interim regulation is in use to be granted at the outset, I have no doubt that on a reclaiming note the Inner House would have power on incidental motion to make such interim orders as might be necessary. They would not be bound to hold the reclaiming note as simply suspensive of the whole Outer House judgment, but would be entitled to impose interim regulations as to possession or use, which would enable them in the end to do complete justice between the parties. I am unable to see why a case should be differently treated in this respect at the same stage merely because it originated in the Bill Chamber. Reclaiming notes in the Bill Chamber itself stand on quite a different footing, and are subject to special regulations. But when a case originating in the Bill Chamber has been decided *causa cognita* upon the passed note, the Bill Chamber procedure as to interim interdict is exhausted, and upon a reclaiming note being lodged, the question of interim regulation ought to be regarded, not from the point of view of an interim interdict originally imposed, which was granted *periculo petentis* and on *ex parte* averments, but from the point of view of what the Lord Ordinary has decided on the merits. If a reclaiming note operates to suspend the whole interlocutor in the sense contended for, then a judgment as to interdict, pronounced *causa cognita* on the merits, would or would not be operative meanwhile, according as interim interdict had or had not been originally granted in the Bill Chamber. I think the true view is that the interim interdict was not revived by the reclaiming note, and that if the company had desired meanwhile to work the shale pillars, either as a whole or so far as was necessary in the driving of through levels, this was a matter to be judged of by themselves, or to be regulated by the Court on an incidental application under the reclaiming note if objection was taken by their opponents.

"It remains to assess the damages. The pursuers claim as for a total loss, their main contentions being that the interdict operated (1) to interfere with the working of shale to the extent (after July) of stopping the output, which of course affected and ultimately stopped all the departments of their business; (2) to interfere with the development of their plan for working the mines, which had to be fixed with a view to future developments; and (3) to interfere with the development and ultimately with the existence of their business connection, owing to the paralysing effect of the uncertainty as to how long the interdict would last. Now, it would be difficult, if a date so late as February 1898 were selected, to say that the company had not suffered a loss comparable with the large sum concluded for. I am not impressed by the suggestion that they abandoned the workings in Broxburn shale suddenly and without good reason, or that they did so in order to work nearer the pipes and so compel the trustees either to interdict them or to purchase a block of the minerals. It is, I think, made out that the main shale was more profitable to the company. Nor can I blame the company for pausing for a fortnight or three weeks after the interdict was served in order to take skilled advice as to their position, and also as to the propriety of keeping up their output by resorting to the bing of shale which had been saved up to provide for the event of strikes and similar risks. Bnt on the other hand it is in evidence that the deterioration goes on at a rapidly increasing rate, and that matters could with a moderate expenditure have been preserved almost entire till the middle of September without much detriment to the plant or even to the business.

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It seems clear that a claim for a total loss, if that date be taken, is quite out of the question, and that the pursuers must submit to a very large reduction in their claim. It is by no means certain on the evidence that they would have been in a position to avail themselves of the prosperous time which followed a few months later. The company had been impecunious from the very first; they had never paid a dividend; prices were at their lowest in the year 1897-1898; and in May 1896 they were obliged for want of money to forego the erection of new and improved retorts, which might have enabled them to tide over the bad times, and to be ready to take advantage of the returning prosperity. The evidence leaves in considerable doubt the question whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices, and to hold their own with other companies. In a case where such considerations affect the result it is obviously impossible to assess the damages with precision, or otherwise than as would be done by a jury. This is a case in which, unless the damages are to be merely nominal, one has to deal with pretty large figures, for the amount claimed as for a total loss is £137,000, and this is coupled with an intimation that a sum of £300,000 or £400,000 would not fully reinstate the pursuers. I have considered the question of the amount in the light of the evidence, and in view of the general considerations to which I have already alluded; and the conclusion at which I arrive is that I ought to award a sum of £15,000. I therefore give decree for that amount. And as the defenders treated the case not as raising a mere question of the amount of damages but as one in which they claimed absolvitor, I think the pursuers should have their expenses without modification."

The pursuers reclaimed.

The defenders also reclaimed.

Argued for the defenders and respondents—(1) *On the plea under the Public Authorities Protection Act* 1893, *sec.* 1—The statute from which flowed the defenders' rights, viz., The Edinburgh and District Waterworks Act 1869 (32 and 33 Vict. cap. 144), by its third section incorporated the Commissioners' Clauses Act 1847 (10 Vict. cap. 16), and section 64 thereof enabled the defenders to take proceedings; thus they were performing here a public duty under a statute and were entitled to the benefit of the Public Authorities Protection Act 1893—*Kennedy* v. *Police Commissioners of Fort William*, December 12, 1877, 5 R. 302, 15 S.L.R. 191, *per* Lord Ormidale; *Greenwell* v. *Howell and Another*, [1900] 1 Q.B. 535; *Spittal* v. *The Corporation of Glasgow*, June 17, 1904, 6 F. 828, 41 S.L.R. 629, *per* Lord Trayner, adopting the opinion of the President (Jeune) in the case of the *Ydun*, [1899] Prob. 236; *Christie* v. *Corporation of the City of Glasgow and Others*, 7 S.L.T. 41. The protection afforded by the Act received a very wide interpretation—*Chamberlain & Hookham, Limited* v. *Bradford Corporation*, 83 L.T.R. [1900] 518. The pursuers had failed to bring their action within the required six months of the continuing injury, which lasted from the 16th March till 18th September 1897, the date of the Lord Ordinary's interlocutor. Their duty was to bring the action even though the interdict had not been finally disposed of in the Court of Session, the process in that Court having no suspensory effect—*Earl of Mansfield* v. *Aitchison*, December 11, 1829, 8 S. 243; *Cochrane* v. *Hamilton*, March 3, 1847, 9 D. 794. The interim interdict was superseded when judgment was pronounced *causa cognita* on September 18, 1897. The test was, if the pursuers had worked the limestone after 18th September which interdict would they have breached? The *punctum temporis* to be looked to was the date of interlocutor not extract—*Roberts* v. *Earl of Rosebery*, December 7, 1825, 4 Murray 1; and after 18th September the defenders could not have worked the limestone but might have worked the shale. The cause of complaint therefore ceased on 18th September 1897. The opinion of Lord President Inglis in the case of the *Glasgow City and District Railway Company* v. *Glasgow Coal Exchange Company, Limited, cit. infra*, in which the case of *Torrance* v. *The Edinburgh and District Water Trustees* was mentioned, showed that the interdict granted *causa cognita* by the Lord Ordinary was not suspended by a reclaiming note to the Inner House. That it was competent and indeed the proper course when a judgment *causa cognita* had superseded interim interdict to have recourse a second time to the Bill Chamber was shown by the case of *Mackenzie* v. *Gilchrist*, July 2, 1830, 8 S. 1002. On appeal to the House of Lords also interdict might be again applied for; the case of *Innes* v. *Innes*, June 13, 1829, 7 S. 762, and the case of *Laird* v. *Miln*, November 16, 1883, 12 S. 54, showed that an interim interdict fell without special recal on an advising being delivered *causa cognita*. As to the competency of issuing extract before the expiry of the reclaiming days, *see* the case of *Young* v. *Bell*, May 22, 1850, 12 D. 939. The pursuers' action was barred by the plea under the Public Authorities Protection Act 1893, and the decree of the Lord Ordinary should be recalled and the defenders assoilzied. (2) *On the merits.*—The Water Trustees were in possession of the right of support, as had now been proved by the Crawley declarator—*Edinburgh and District Water Trustees* v. *Clippens Oil Company, Limited*, November 27, 1900, 3 F. 156, 38 S.L.R. 121, December 7, 1903, 6 F. (H.L.) 7, 41 S.L.R. 124, and the pursuers' operations threatened to disturb that possession. No damages could be given in respect of an interdict the purpose of which was to prevent inversion of a state of possession—*Glasgow City and District Railway Company* v. *The Glasgow Coal Exchange Company, Limited*, July 14, 1885, 12 R. 1287, 22 S.L.R. 903, *per* Lord President Inglis; *Moir* v. *Hunter*, November 16, 1832, 11 S. 32. The interdict was not wrongous, since it did not prevent the pursuers doing anything which was their right—*Mudie* v. *Miln*, June 12, 1828, 6 S. 907; *Jack* v. *Begg*,

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October 26, 1875, 13 S.L.R. 17—nor was it wider in its terms than the Crawley interdict—*Edinburgh and District Water Trustees* v. *Clippens Oil Company, Limited, ut supra*. The fact of the pursuers having wrongly construed the interdict as preventing them from driving levels through the "rooms" below the pipe track had caused them loss, but for that loss the defenders could not be held liable. In no case were the pursuers entitled to damages for total or constructive loss, as the works need not have been discontinued if judicious development and working of the mineral field had been exercised and the plant renewed as it should have been. Some extra expense would have served to save the business, which was however at the time far from profitable. The impecuniosity of the business caused the stoppage, and it was vain to claim damages for a business destroyed.

Argued for the pursuers—(1) *On the plea as to the Public Authorities Protection Act* 1893.—An interim interdict granted in the Bill Chamber and continued at passing of the note remained effectual, notwithstanding that the Lord Ordinary *causa cognita* recalled it and refused the note, until (*a*) the expiry of the reclaiming days if no reclaiming note was presented, or (*b*) the final decision of the Inner House if a reclaiming note was presented. The proceedings in an ordinary suspension or in an application for interdict *uti possidetis* might be referred to as analogies. If the defenders' view were sound a respondent in any of these proceedings would only need to reclaim to render nugatory the protection which the Court considered the complainer ought to have. The original interdict therefore continued till the final decision by the Inner House on 3rd February 1898. The argument that another application to the Bill Chamber was open to a complainer against whom a Lord Ordinary had given an adverse decision *causa cognita* was impossible. *Lis alibi pendens* would be pleaded. The same litigation would be in both Outer and Inner Houses. It was manifest from the form of the bond of caution that the interim interdict was intended to stand until discussion of the case by the Inner House. The Court of Session though divided with the Outer and Inner House was one Court; its judgment was not obtained until a Lord Ordinary's interlocutor became final, or until the Inner House decerned on a reclaiming note; a reclaiming note was not an appeal but a mode of obtaining re-hearing. As to what was covered by the Public Authorities Protection Act, it was not every act or default in the execution of a public duty which the statute protected—*Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449; *M'Phie* v. *Magistrates of Greenock*, December 10, 1904, 7 F. 246, 42 S.L.R. 190; *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K.B. 1, *per* Vaughan Williams (L.J.); *Cree* v. *St Pancras Vestry*, [1899] 1 Q.B. 693. A wrongful interdict obtained in defence of property belonging to a statutory body was not a default committed in the execution of a statutory duty any more than a breach of a contract entered into in the execution of its functions by a statutory body. If the defenders' argument was correct the pursuers should have raised their action within six months of the date of the interim interdict, and—it might be—before the note had been disposed of either by the Lord Ordinary or by the Inner House. In that case the pursuers would have required immediately on raising their action to have obtained a sist; to that it might effectually be pleaded that the action was premature and ought not to be persisted in. A wrong could not be sued on till the conditions from which it appeared that a wrong had been done had been established, and the pursuers were entitled to reckon from that date—in the present case the 3rd February 1898. (2) *On the merits.*—The interdict was wrongous, malicious, and cut at the output of the company, involving destruction to the crude oil works and refinery and so also to the company's business. The case of *Hay's Trustees* v. *Young*, January 31, 1877, 4 R. 398, 14 S.L.R. 282, showed the nature of the remedy by interdict, and that of *Wolthekker* v. *Northern Agricultural Company*, December 20, 1862, 1 Macph. 211, *per* Lord Justice-Clerk Inglis, showed the responsibility which lay on the applicant for that remedy. On a sound construction of the interdict presently in question the pursuers were absolutely cut off from doing anything within the forbidden area beneath the pipe track which might affect or interfere with the pillars of shale, and it was not in the mouth of those who obtained it to plead any ambiguity in it against those who were bound to avoid any breach of it. The pursuers would only be barred from recovering by bad faith or unreasonable conduct. The defenders pleaded that they were defending an existing state of possession, but this was not so; they had a right of support, but the minerals which gave the support were not theirs, nor would the argument of *status quo* avail them, since the pursuers were working the minerals while the pipe was in its former condition of instability. The interdict was obtained by misrepresentations as to the true state of matters. Had the defenders pleaded their right of support at common law the pursuers would have been at liberty to drive levels through the area from which the interdict excluded them entirely. Under the interdict as obtained, it was impossible for the pursuers to attempt to drive levels through the interdicted area either in the old "rooms" or through the old "stoops." The extent of the wrong was not to be measured by comparing the interdict granted with that which might have been granted. It was wrongous in its effects in view of the cases of *Robinson, &c.* v. *North British Railway Company* (*disting.* the case of *Moir* v. *Hunter, ut supra*), March 10, 1864, 2 Macph. 841; *Kennedy* v. *Police Commissioners of Fort-William, ut supra*; *Fife* v. *Orr*, October 16, 1895, 23 R. 8, 33 S.L.R. 1; and the case of *Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740, 1 S.L.R. 39,

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laid down the rule that an interdict reclaimed against and recalled is *ipso facto* wrongous. Moreover, the evidence showed that the defenders had obtained the interdict maliciously, and in face of advice by their expert advisers that a much narrower and less harmful interdict was all that was necessary to protect their pipes. The pursuers had a duty to take the advice of skilled persons as to the best method of carrying on operations in the circumstances arising from the interdict; that advice they had taken and acted on. Yet they had suffered loss owing to a diminished output and consequent stoppage of crude oil works and refinery, deterioration of plant, and loss of business. They should be put in the same position they would have been in had the interdict not been obtained—*Livingstone* v. *Rawyards Coal Company*, February 13, 1880, 7 R. (H.L) 1, 17 S.L.R. 387. Accordingly the pursuers were entitled to damages as concluded for—*Ballachulish Slate Quarries Company, Limited* v. *Grant*, July 10, 1903, 5 F. 1105, 40 S.L.R. 791, was also quoted.

At the debate in the Inner House counsel for the pursuers raised the question of *non-production on the alleged ground of confidentiality of Mr Gemmell's report*, and argued—In the circumstances of the case the pursuers were entitled to know what was before the defenders at the time they applied for interdict and during the period they insisted on keeping it up, so far as it had a bearing on their state of knowledge. The report was obtained in virtue of the Waterworks Clauses Act 1847, and a complete disclosure on the pursuers' part was entailed inasmuch as there was a right to inspect their workings. It was only equitable that a full disclosure should be made by the defenders. The report might have advised the defenders to suggest that the pursuers drive levels through the rooms and that that would not take away from the support which was necessary. If that were so and the advice were unheeded the defenders could not have been in good faith in their actings. The doctrine of confidentiality was not to be extended beyond documents relating to the claim actually the subject of litigation. Mr Gemmell's report should be produced.

On this question of *confidentiality* the defenders argued—The pursuers put too narrow a limitation on confidentiality. It applied to advice given on a question which may be litigated in future. The report was irrecoverable in the interdict action, and the present was a mere continuance thereof. Nor was there here any averment that facts had come to the defenders' knowledge which would have enabled them to withdraw the interdict and that they had not done so. The report in question was merely a piece of evidence and might well be incomplete without the presence of Mr Gemmell, the framer thereof. The report should not be produced.

LORD PRESIDENT—This is a motion for the production of a report which was made by Mr Gemmell to the defenders. The circumstances under which Mr Gemmell made the report were these:—Under the Water-works Act the defenders had the right of sending a person to inspect the works with the view to reporting on them. They did so, and this report was given in respect of the right of access thus obtained. The report was presented to the defenders a few days after the action had been begun, and the Lord Ordinary refused to allow the report to be produced upon the ground that it was obtained after the action had been begun, and consequently must be looked upon as one of the steps in the litigation, and therefore fell under the ordinary objection of confidentiality.

In an ordinary case I have no doubt that would be sound, but the present action is somewhat peculiar. I do not rest the matter on the somewhat technical ground that the action then being litigated was distinct from the present action and that therefore there was no confidentiality connected with this action.

The distinction to my mind is that in an ordinary action the person's state of knowledge or mind is neither here nor there. A man is entitled to stand on his right whatever the state of his mind may be. But in this action—being an action of damages for wrongous interdict—it is open to contend that the state of knowledge of the present defenders—the promoters of the interdict—has a great deal to do with the question whether they were wrong in keeping up the interdict. That may become of moment because of the peculiar position of the remedy of interim interdict. Interim interdict is a matter which in one sense is always before the Court. There is no incompetence in renewing motions on the subject from time to time. I do think therefore that the state of mind and knowledge of these parties a few days after interim interdict was granted and before the record had been made up in the note of suspension and interdict may have an important bearing on the question which we are trying.

Therefore I am of opinion that this report should be produced. But I do not think that it ought to be produced *de plano*, because, as I have put the matter on this question of the state of knowledge of the parties, it may be objected that the report contains other matters which are confidential. Therefore without deciding at the present moment whether any part of it is to go in, I think the Court should read the report and then decide the question how far it is to go in.

LORD M'LAREN—I agree, subject to your Lordship's last observation to the effect that there may be matters of a confidential character in this report which may have to be excluded. The purpose of sending Mr Gemmell to inspect was, as I understand, that he might report to the Water Trustees whether the interim interdict was being faithfully observed by the mine-owner. Such a report would in the ordinary case have no relevancy in an action of damages. In the present case I think it may have

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relevancy, and may indeed be decisive on one of the points of the case (I mean the possibility of a restricted working) if it contains elements bearing on that question. Whether it has such elements we do not know. It may also have a bearing on the question whether the Water Trustees were willing to use the interdict in a reasonable way and to endeavour to co-operate to minimise the inconvenience to the company and the consequent claim of damages that might arise against themselves. On both grounds I think the document admissible.

LORD KINNEAR concurred.

At advising—

LORD PRESIDENT—The pursuers in this action are proprietors and tenants of the minerals consisting of shale and limestone in the estates of Straiton and Pentland respectively. Through the lands and near the surface lie the pipes of the defenders, who are a statutory trust to supply Edinburgh with water. The pipes, which lie near the surface, are two in number, and laid side by side. The older of them, known as the Crawley pipe, was laid under the authority of Act of Parliament in the beginning of last century, long antecedent to the passing of the Water-works Clauses Act. The other, known as the Moorfoot pipe, was laid in 1874—that is, at a date subsequent to that statute.

The minerals in the field, both shale and limestone, had been worked for a considerable period by the pursuers and their predecessors, the workings in Straiton beginning about 1877 and those in Pentland about 1882. The workings at several places extended beneath the pipe line, and from an early time questions began to be raised between the pursuers' predecessors and the defenders. The early workings were by the method known as stoop-and-room. By this method of working, so long as the stoops remain standing, the subsidence near the surface caused by the removal of the mineral in the rooms is either nothing or small; but when the stoops come to be removed by the operation known as stooping, then considerable subsidence may be expected to follow. Such subsidence, if it had had the effect of suddenly breaking the pipes, would have been a serious matter to both parties. To the Water Trustees it would have meant the possibility of a water famine in Edinburgh—to the mineral workers a flooding of the mine with possible loss of life. Accordingly, negotiations were entered into for the purchase of the minerals for a sufficient strip to ensure the safety of the pipes. These proving abortive, the pursuers' predecessors—a company—raised an action in 1886 of declarator against the defenders to have them ordained to enter into arbitration to buy such a strip. From that action the defenders were assoilzied, the Court holding it to be irrelevant on the obvious ground that the Water-works Clauses Act did not impose any such obligation but only gave the Water Company an option to purchase, leaving the mineral owners, if such option were not exercised, to work the minerals in the ordinary way.

After that from time to time notices were given by the mineral workers whenever they proposed to work within the 40 yards limit, but no counter notices were given by the defenders. Certain small subsidences did occur, and the pursuers' pipes were injured at the joints although not actually broken. So matters remained till 1896. By this time the present pursuers were the mineral owners and lessees, and in the ordinary course of their workings they came to proceed to the removal of the stoops both in the limestone and the main seam of shale. Accordingly, in November 1896 and January 1897 they served fresh and appropriate notices.

Upon receipt of these notices the defenders gave no counter notice to take, but after an abortive attempt at arrangement they served on the pursuers a note of suspension and interdict to prevent them working the minerals below the pipe. Upon this note they after a hearing in the Bill Chamber asked and obtained interim interdict on 16th March 1897. The note being at the same time passed, a record was made up in ordinary form in the Court of Session. The theory of the Water Trustees was this. They alleged that the pursuers had been in the past partially working within the 40 yards' limit without notice given. In consequence they said the whole right of working minerals within the 40 yards' limit was gone, and the mineral owners had forfeited their rights thereto, although admittedly they had never been paid a penny of compensation. They also alternatively averred that the working of the respondents was unusual in character. A proof was allowed and taken in the month of August, and the Lord Ordinary took the case to avizandum. On 18th September 1899 the Lord Ordinary issued his interlocutor, and declared the interdict perpetual *quoad* the limestone, but as regards the main shale he repelled the reasons of suspension and refused the prayer of the note. The reason for so dealing with the limestone was that his Lordship came to the conclusion that the proposed workings were unusual. As regards the shale he considered the workings usual, and held that there was no substance in the plea for the complainers. Against this interlocutor a reclaiming-note was presented by the complainers on the first sederunt-day of the winter session. The case was heard in the Inner House, who on 3rd February 1905 recalled the interlocutor *quoad* the limestone, but adhered *quoad* the shale, *i.e.*, refused interdict *in toto*.

The pursuers proceeded to raise the present action of damages for wrongous interdict, the summons in which was signeted on 6th May 1898. Just before this, however, an entirely new idea had occurred to the defenders. All through the proceedings which I have just narrated, the defenders had never imagined but that their right was subject to the provisions of the Water-works Clauses Act, and in fact the whole pleadings were based on that assumption. It now occurred to them that a different

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position might be taken up in regard to the Crawley pipe, which was laid under Acts of Parliament antecedent to the Water-works Clauses Act, and accordingly on 27th April 1898—that is, after the whole litigations were at an end—they raised a declarator that the title to the Crawley pipe was equivalent to a grant of aqueduct, and that the pipe in consequence was bound to be supported. This case was carried through all the Courts to the House of Lords, who affirmed the judgment of this Court giving effect to this contention.

The judgment so affirmed by the House of Lords gave decree of declarator, and interdicted the defenders, the mineowners and lessees, from working the minerals so as to injure the pipe or interfere with the continuous flow of water therein. It did not, as will be seen, prescribe any particular limit within which minerals should not be worked, recalling in that matter the interlocutor of the Lord Ordinary, who had delimited an area of what he considered perfect safety.

During the progress of this action the present action remained dormant. It was then wakened and a proof allowed by the Lord Ordinary. A most voluminous proof was taken, and his Lordship decerned in favour of the pursuers for £15,000. Again, at that judgment the present reclaiming note was taken. On the case appearing in the Single Bills the defenders asked to be allowed to add a new plea. This amendment was in terms of the Act of 1868 allowed under reservation of expenses. The new plea was based on the Public Authorities Protection Act, and insisted that inasmuch as the present summons was not raised within six months of the Lord Ordinary's interlocutor of September 18th, 1897, in the interdict action, the whole action was excluded.

Just as in the case of the Crawley declarator, the defenders' wisdom came late in the day, for it is obvious that if this is a good plea no proof need have been taken, and all these costly proceedings might have been avoided. Nevertheless it is a plea which must now be decided. The pursuers make various replies to this plea, but as the action was admittedly raised within six months of the final judgment, February 1898, it is obvious that unless the interim interdict was no longer binding after the Lord Ordinary's judgment, the plea is not available. The question therefore is, when did the interim interdict granted in March 1897 cease to be operative—did it cease at the date of the Lord Ordinary's judgment in September, or was it still in force till that judgment was disposed of on the reclaiming note in February following.

In view of the importance of the question raised by this plea, as affecting a matter of practice, we thought it right to send this part of the case to be argued before Seven Judges.

The function performed by the Lord Ordinary on the Bills in granting interim interdict on a passed note is precisely the same now as it always was when the procedure was initiated by a proper bill. At that time the bill which craved letters of suspension prayed for an interdict in the meantime until the bill should be advised, and the letters of suspension which were granted upon the granting of the bill narrated and repeated the interdict given. It was possible to put in a date to which the interdict was to extend, or it might be till such time as the case was disposed of.

In 1838 procedure by bill in suspension and interdict was abolished and procedure by note took its place. The form of note became regulated by the schedule to the Act of Sederunt of 24th December 1838, which remains to this day. In that form no date is specified, but interdict is asked, leaving it to the interlocutor to specify what interdict, if any, shall be granted at the passing of the note. I have no doubt it would still be competent to ask the Lord Ordinary to limit the interdict to a certain date, but if that is not done the form of interlocutor, which has become stereotyped, is "Grants interim interdict." The word "interim" is nowhere defined, but the echo of the old form still remains in the form of the bond of caution, where the cautioner becomes bound to pay damages for wrongous interdicting in case it shall be found right so to do by the Lords of Council and Session after discussing the passed note of suspension and answers.

It is indeed common ground between both parties that the interim interdict subsists till the case on the passed note is disposed of; where they differ is as to what is the disposing of the case. It seems to me that disposed of must necessarily mean finally disposed of. That finality can only take place in one of two ways—either by interlocutor of the Lord Ordinary allowed to stand for the currency of the reclaiming days without reclaiming note taken, or by final judgment of the Inner House, and until one or other of these periods arrives the interim interdict must subsist.

There are several considerations which lead to this result.

The Bill Chamber performing through its own clerk the office of extractor, the interim interdict can be immediately certiorated by a certificate under his hand. But if the contention of the defender here is right and that interdict falls the moment the Lord Ordinary pronounces an interlocutor on the passed note, what is the suspender to do during the currency of the reclaiming days? He cannot extract if the respondent desires to prevent him, and thus he can get no proper certioration of the interdict he now holds. I have put this case on the assumption that the Lord Ordinary on the passed note makes the interdict perpetual. But if he refuses, the dilemma is just as bad. It is easy to see that the interest of the suspender to have interdict until final disposal may be just as imperative as when he got it in the Bill Chamber. The defender suggested that he might make another application to the Bill Chamber. In other words, that the Bill Chamber should be invoked, for the purpose of granting a second interim interdict, to pass another note identical in

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terms with the one already depending and lying under reclaiming note. If from the state of business this second passed note came to be disposed of by another Lord Ordinary before the advising of the reclaiming note, the absurdity of the position becomes apparent. But the best answer lies in the fact that not only could counsel point to no precedent in case or authority for his suggestion, but that none of your Lordships in your combined experience at the bench and bar had ever heard of such a proceeding.

The Lord Ordinary, who had to form an opinion on this matter for a different reason, felt the difficulty and attempted to solve it by suggesting that the Inner House on a reclaiming note could regulate interim possession. In the first place, this would in a case like the present, where the Lord Ordinary's judgment was given in vacation, leave the suspender remediless. But further, I am bound to say that the foundation on which the Lord Ordinary rests that opinion, viz., that in an action of declarator and interdict the Inner House can issue an interim order dealing with possession, is in my experience fallacious. I have never known such an order. An unsuccessful attempt to get one was made in the case of *Green* v. *Shepherd*, 4 Macph. 1028. The attempt was never, so far as I know, repeated, and I understand that your Lordships who have sat for many years in the Inner House agree with me. On the contrary, I have known many cases where, contemporaneously with an action of declarator, a note of suspension and interdict was raised, and interim interdict having been granted the passed note was thereafter sisted to await the issue of the declarator, simply and solely because, under what I have always understood was the universal view of the profession, such interim orders were not obtainable in an action of declarator.

I do not indeed think that this shows that interim possession might not be regulated in a suspension upon proper application. I think the Act of 1838 gives such a power. But after all that is not the question. Interim possession has been regulated by the interlocutor in the Bill Chamber, and the true question is as to its duration.

In truth, however, the matter I think becomes quite clear if we reflect historically on what a Lord Ordinary's judgment is. I had occasion in a recent case (*Purves* v. *Carswell*, December 21, 1905, 43 S.L.R. 266) to review the changes which settled the Outer House as we now have it, and I do not repeat what I then said. The Lord Ordinary originally only prepared cases, and even when he came to issue interlocutors on the merits, his decree is not his own decree but the decree of the Lords of Council and Session. A reclaiming note is not in a strict sense an appeal—it is a rehearing. In old days rehearings were always competent, and indeed only ceased when either a party got tired of losing or the Lords tired of his persistence interpelled him from presenting further reclaiming petitions. All this is now altered, and the form of rehearing is cut down to a judgment on the merits by a Lord Ordinary, followed by a reclaiming note. But if the reclaiming note is taken, then in truth the Lord Ordinary's judgment is just what it was in old days—namely, a first indication of opinion—and the true disposal of the case is only when the reclaiming note is heard.

I ought, perhaps, to add that the cases of *Law* and *Milne & Innes* are entirely beside the question. They were both cases in the Bill Chamber.

So far as *Law's* case is concerned no one doubts that the first interlocutor in the Bill Chamber may declare the interdict to run only for a certain time—indeed under the old bill it was the only form. The modern equivalent is "To see and answer, meantime grants interim interdict." But that is always followed by an interlocutor at the time the note is passed, and the question here is as to the effect of that interlocutor when the Bill Chamber Judge becomes *functus* by the passing of the note into the Court of Session. The case of *Innes* depended on the peculiarity of the service of a House of Lords petition of appeal stopping all effect of a Court of Session decree, and that does not touch the question here.

The result is that in this case the interim interdict subsisted till the final disposal of the case in February 1898, upon which view the action was timeously raised within the six months required by the Public Authorities Protection Act.

We now come to the pleas dealt with by the Lord Ordinary. I entirely agree with the views of his Lordship on these matters, and he has so well expressed his views that I have but little to add, but I shall say a few words as to each of them. The first is that the interdict having been granted to maintain a *status quo* it was not wrongous. Now, the law on the subject is, I think, well fixed by Lord President Inglis in the well-known case of *Wolthekker—prima facie*, an interim interdict is sought *periculo petentis*, and a recal shows it was wrongous. The subject was further considered in the *Glasgow City and District Railway Company* v. *Glasgow Coal Exchange*. Now, here I do not think it can truly be said the interdict was to maintain the *status quo*. For the *status quo* is not necessarily interfered with by any physical alteration—a proposition of which the *Glasgow City and District Railway* is a complete example. The condition of matters here was that the respondents were in possession of the mineral field underneath the pipe just as much as the complainers were in possession of the pipe, and the history of the past showed removal of minerals from underneath the pipe and interference with the pipe. Besides, what seems to me conclusive is that the interdict asked was—subject to what may be said on the next point—not an interdict against interfering with the pipe, but an interdict from entering into the forty yards territory, and therefore in so far as the respondents were already in the forty yards

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territory was a disturbance not a maintenance of the *status quo*.

The next point is that the pursuers here cannot get damages for being interdicted from what they had no right to do. In other words, that as damages are given not for the mere pronouncement of interdict but for the being stopped from doing the thing, the thing that they might do must be defined in the light of the true rights of parties as settled by the *Crawley* declarator. That is true, but then as the Lord Ordinary points out, whether that affords a conclusive answer or not depends on the two interdicts being the same. The defenders first argued that the interim interdict is in terms only against working the stoops, and is not against going into the territory. I am satisfied that is not so. I think the ordinary meaning of working the seams of shale means any proceeding connected with mining in the stratum known as the seam. Further, it is certain that that was what the defenders themselves thought at the time. The pursuers here have urged the Court to consider the conduct of the defenders for various reasons. Some of these reasons I think irrelevant. I do not think that (1) to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available, nor (2) that the same consideration has anything to do with the interdict being wrongous. It is possible, however, that elsewhere this view might not be concurred in, and at anyrate I think it is permissible to consider what view the defenders who framed the interim interdict took of what they were doing. Therefore I say that I have no doubt whatever the defenders did wish to cripple and stop the pursuers. There is an account given by Mr Armour of a meeting with the representatives of the Trust in February 1897, which was not attempted to be contradicted, which shows quite clearly that the defenders, relying on their unlimited means, meant if they could to force the pursuers into submission. It is not for me to judge —even if I could—as to whose unreasonableness had made the former attempts at settlement collapse. But the defenders had all along that matter in their own hands, for there then being no question of the Crawley rights, they had only to fix for themselves the limits of safety, and then the value of the minerals, if the pursuers asked too much, could be settled by arbitration. Instead of that they chose to resort to litigation on a bad plea, and if further evidence was wanted that they meant it to be a war *à outrance* it is found, I think, in (1) the terms of the report which was produced in the Inner House, and which convinces me that for practical purposes of the immediate safety of the pipe the interdict need never have applied to Pentland; and (2) the tactics displayed in regard to the dates at which the application was made and the reclaiming notes taken.

The defenders next argue that on the assumption that the terms of the interdict are different, yet nevertheless under the Crawley interdict no working was possible. I am satisfied that they have not made out this point. I believe the evidence of Mr Rankine, who, while candidly admitting that much removing of the stoops under the pipe would have been unwise, says there would have been no difficulty in driving through the levels so as to reach the virgin shale beyond. I am fortified in this view by the fact that in the workings that were stopped they were taking unusual precautions, necessitated by the fact that there had been a crush since the old working. I am perfectly satisfied that if the interdict had been merely against injuring the pipe there would have been no difficulty in getting at least some of the levels into the virgin shale, and that consequently the shale famine to which the pursuers were subjected would have been avoided.

There remains the question of damages. With the Lord Ordinary's general remarks I agree, but it is evident that the case is altered by the alteration of the date. It has been settled by the decision of the Seven Judges that the wrongous interdict continued till February 1896. The true view to take of the situation is I think this—The defenders are not to be prejudiced by the fact that the times were bad and that the company was not rich. Accordingly, a claim upon total loss is I think inadmissible. On the other hand it is equally clear that if the main shale supply had not been stopped, stoppage of the works would not have come when it did.

Now, the cost to the company of reverting in February 1898 to the position from which they were unlawfully excluded in March 1897 seems to me an additional expense to which they would have been put if they had kept going by getting shale elsewhere. To get shale elsewhere was, I think, physically possible by (1) reverting to Broxburn shale at a greater expense, and (2) keeping the main workings available by pumping. Unfortunately as this squares neither with the theory of damage by the pursuers nor the defenders the calculation is not easily made and must be more or less of a rough estimate. I do not think the pursuers can answer that their expert, Mr Rankine, advised them not to revert to Broxburn. It is true he did so, but he did not say as a mining engineer it was not possible, and I think a perusal of his reasons, as given in his report, shows that he was travelling beyond the province of a mining engineer in the advice he gave, even although he adds in a half hearted manner some considerations which are within his proper province. The pursuers are also entitled to a certain sum to represent the expenses of change in going back to the Broxburn seam and then to the main seam.

On the whole matter, I am of opinion that the damages should be assessed at the sum of £27,000.

LORD M'LAREN—I agree with your Lordship on all the legal points of the case, and only wish to add an observation on the subject of the estimation of damages. I

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agree with your Lordship in thinking that the damage to which the company is entitled may be best ascertained by supposing that they had proceeded to get shale in the most convenient way in order to carry on their oil works, though the result might be that they would make no profit but a very considerable loss. It seems, however, to be recognised that it would have been better for the company to go on with their work for a year or less, with such shale as could be obtained, rather than risk the injury of the machinery which would have resulted from blowing out the furnaces and stopping the works. Now, £27,000 seems a very large sum for a problematical loss during the period of ten months during which the company are supposed to make the best use they can of their existing shale and workings, and the best use they could make of their retorts. I am bound to say that, having gone into the figures, and after making allowance for the cost of keeping the main shale seam open by pumping, and for a certain amount of restoration that would have been necessary in reverting to the main shale, I have not been able to satisfy myself that a less sum would suffice. But I may add this, that in estimating problematical damages, one is entitled to take a rougher axe to the operation than in estimating damages which had accrued, and I cannot help thinking that if the work had been continued on the basis of our judgment the company would have found some way of lessening the expense — it might be by shortening the hours of work at the furnaces or in some other way. I should therefore personally be disposed to make a considerable abatement from the sum brought out by calculation, but as I understand that your Lordships are in agreement that we should fix the damages at the sum of £27,000, I do not think it necessary to suggest any other figure.

Lord Kinnear—I agree entirely with your Lordship both on the point of practice and the merits of the case; and I only add with reference to the question of damages and the basis on which the damages are to be ascertained, that I agree with the observation your Lordship made, that in the application of a principle in the special circumstances of this case we are compelled to make a somewhat rough estimate of the amount of damages which we hold to be sustained. I admit it is a rough estimate, but I am unable to suggest a different figure from your Lordship which would be more satisfactory to my own mind or anybody else's, and I therefore agree in the judgment at which your Lordships have arrived.

The Lord President intimated that Lords Kyllachy, Stormonth Darling, Low, and Pearson concurred in his opinion on that branch of the case which had been heard before Seven Judges.

The Court pronounced the following interlocutors:—

"The Lords of the First Division along with three Judges of the Second Division having heard counsel for the parties on the preliminary plea stated by the defenders in terms of their minute of amendment, viz., that the present action is excluded by section 1 of the Public Authorities Protection Act 1893, and on the pleas stated in answer thereto by pursuers in terms of their note and minute of amendment, in conformity with the opinions of the whole Judges, Repel the said plea stated by the defenders, and decern."

"The Lords having considered the reclaiming-note for the pursuers against Lord Pearson's interlocutor dated 18th March 1905, and also the reclaiming note for the defenders against said interlocutor, and having heard counsel for the parties, Recal said interlocutor except in so far as it finds the pursuers entitled to expenses: Decern against the defenders for payment to the pursuers of the sum of £27,000 sterling: Adhere to the Lord Ordinary's finding as to expenses: Find the pursuers entitled to additional expenses since the date of the interlocutor reclaimed against, including the expenses reserved in terms of interlocutors dated 6th and 13th July 1905; and remit the account," &c.

Counsel for the Pursuers—Clyde, K.C.—Morison—Pitman. Agents—Drummond & Reid, W.S.

Counsel for the Defenders—The Dean of Faculty (Campbell, K.C.)—Cooper, K.C.—Macphail. Agents — Millar, Robson, & M'Lean, W.S.

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REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

PRIVY COUNCIL.

Tuesday, May 16, 1905.

NATIONAL TRUSTEES, EXECUTORS, AND AGENCY COMPANY OF AUSTRALASIA *v.* GENERAL FINANCE AGENCY AND GUARANTEE COMPANY OF AUSTRALIA.

(On Appeal from the Supreme Court of Victoria.)

Trust—Liability of Trustees—Payment to Party not Entitled Made bona fide and on Advice of Solicitors.

Circumstances in which *held* that trustees who, acting in *bona fide* and on the advice of competent solicitors, paid away a part of the trust estate to persons who were not legally entitled to it, were liable to make good the amount to the assignees of the persons legally entitled, and were not protected by section 3 of the Victorian Trusts Acts 1901.

This was an appeal from a judgment of the Supreme Court of Victoria.

The facts appear from the judgment of their Lordships.

Section 3 of the Victorian Trusts Act 1901 corresponds with section 3 of the Judicial Trustees Act 1896 (59 and 60 Vict. c. 35), which is as follows:—"If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly for personal liability for the same."

Their Lordships' judgment was delivered by

Sir Ford North—This is an appeal from a judgment of the Full Court of the State of Victoria (Madden, C.J., Hodges and Hood, JJ.) affirming the judgment of à Beckett, J., in the Supreme Court, holding the appellants liable for breach of trust in not having paid to the respondents their share in a trust estate. The material facts are as follows:—Roderick McDonell (who died in 1858) bequeathed his personal estate to trustees upon trust to get in the same and pay one clear fourth part to his wife absolutely, and to invest the residue and pay the annual income to his daughter Ann Howe during her life, and after her death to hold the principal in trust for her children who should attain twenty-one, or if daughters marry, in equal shares. Six children of Ann Howe attained vested interests, and one of them, Mary Grace Howe, intermarried with John Fraser in July 1872. Mary Grace Fraser died in August 1876 intestate, and administration to her estate was granted to her husband John Fraser, who, by the law of the Colony as it then stood, was absolutely entitled to the whole of her personal estate. She left two children only. By an Act of the Colony, which came into operation on 13th December 1884 (48 Vict., No. 828, sec. 25)—the Married Women's Property Act 1884—it was provided that the estate, real and personal, as to which any married woman died intestate after the commencement of the Act, should, after payment of duties and funeral, administration, or testamentary expenses and debts, be distributable between her husband and her children or next-of-kin, in the like manner and proportion in which the estate, real and personal, as to which a married man died intestate was distributable between his widow and his children or next-of-kin. By an indenture dated the 6th February 1891 John Fraser assigned to the respondents all his share and interest in the personal estate of the testator McDonell, and in the estate of the said Mary Grace Fraser, whether as her husband, or administrator, or otherwise, by way of mortgage, for securing £650 with interest. John Fraser died intestate in June 1894 without having paid any of the principal or interest due on the mortgage. No administration was taken out to him. By an indenture dated the 8th July 1895 the appellant company (hereinafter called the Trustee Company), and their managing director Walter Madden, were, in exercise of a power contained in McDonell's will, appointed trustees of that will, and the investments representing the residue of his estate were transferred to the new trustees. On the 18th December 1897 Anne Howe,

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the tenant for life, died, and the trust estate became distributable. The trustee company employed a firm of high standing at Melbourne as their solicitors in connection with McDonell's trust; and they in March 1898 took out in the name of the Trustee Company letters of administration *de bonis non* to Mrs Fraser, with full knowledge of the actual date of her death. Notwithstanding this the solicitors by some extraordinary slip advised the Trustee Company and their officers that the two children of Mrs Fraser were entitled in equal shares to her share in McDonell's estate—as to two-thirds thereof in their own right, and as to one-third as beneficiaries under their father, assuming that he left no debts. On the 13th June 1898 Mr Joy, then acting as liquidator of the respondents, wrote to the manager of the Trustee Company reminding them of the mortgage, and warning them against distributing any part of McDonell's trust estate, as the respondents were entitled to John Fraser's proportion. On the 30th September 1898 Mr Macoboy, the secretary of the Trustee Company, who had charge of this estate under Mr Madden, the managing director, and was in personal communication with the solicitors on the subject, had an interview with Joy with respect to the assignment; and he states that he informed Joy that his company would get one-third and the Frasers two-thirds, and that Joy raised no question as to this. The respondents seem to have accepted this statement as to their rights without verification, though a reference to their mortgage would have shown the date of Mrs Fraser's death. Questions were raised by John Fraser's children as to the validity of his mortgage, and what, if anything, was due upon it; and in consequence one-third of Mrs Fraser's share was, under the Colonial Act for the relief of trustees, paid into Court by the Trustee Company in March and August 1899. The other two-thirds were, about August 1899, divided between her two children. It does not appear how the money paid into Court was ultimately dealt with. It is shown by the evidence of Mr Macoboy that the solicitors of the Trustee Company did at a subsequent date discover and inform that company that they had made a mistake in advising them that J. Fraser was entitled to one-third only; but no information as to this was given to the respondents. They seem, however, to have subsequently discovered the mistake for themselves, and on the 30th December 1902 their solicitors wrote to the Trust Company that the respondent company, as Fraser's assignee, was entitled to the whole of his late wife's share, or so much thereof as would satisfy their claim, and asked for a statement of Mrs Fraser's estate; to which, on the following day, Mr Madden made the disingenuous answer that the money was paid into Court by the Trust Company in 1899. The respondents' solicitors, however, insisted upon their claim to the whole of the share in the trust funds to which Mrs Fraser was entitled; and not having received any satisfactory reply, the respondents, on the 11th March 1903, issued the writ in this action to recover the amount improperly paid by the Trustee Company to her children, and obtained judgment in their favour for £673, 18s. 10d. and interest. This was affirmed on appeal, and the present is an appeal from those decisions. The appellants' counsel rested their case upon three grounds—(1) That the Trust Company had paid the moneys to Mrs Fraser's children upon the advice of competent legal advisers, and therefore there was no breach of trust, (2) that the respondents were estopped by their conduct from disputing the validity of the payment, and (3) that the Trust Company were protected by section 3 of the Trusts Act 1901. With respect to the first point, it is clear beyond all question that John Fraser was entitled to the whole of his wife's share in the trust estate, and not to one-third only; and that the payment of two-thirds to Mrs Fraser's children instead of to the respondents was a breach of trust. The fact that such payment was made through the bad advice of the solicitors of the Trust Company is no defence. In *Doyle* v. *Blake*, 2 Sch. & Lef. 231, Lord Redesdale said—"I have no doubt that they" (the executors) "meant to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If, under the best advice he could procure, he acts wrongly, it is his misfortune; but public policy requires that he should be the person to suffer." And there are many similar decisions in the books. The appellants relied on the case of *Speight* v. *Gaunt*, 50 L.T. Rep. 330, 9 App. Cas. 1, in which a trustee employed a broker to purchase certain securities for a trust. The broker said that he had done so, and produced a bought note and asked for the money to complete as next day was pay day, and the trustee gave him the necessary cheques, which the broker misapplied. In a suit to make the trustee liable, it was held that the payment to the broker was made in the usual and regular course of business, and that the trustee was not liable—in other words, there was not any breach of trust. The present is a very different case. The second point raised for the appellants was that the respondents' conduct induced them to believe that they admitted the title of Mrs Fraser's children to the two-thirds, and that they acquiesced in and assented to the payment to them. Unfortunately for the appellants there are no facts upon which such an argument can be based. There is not a shred of evidence to show that the respondents were consulted about, or approved of, or assented to, or even were aware of, such payment being made. It is the common case of all parties that at that time everyone believed that John Fraser, and the respondents through him, were interested in one-third only, and that the application of the rest of the fund was a matter in which the respondents had no concern. Any request to them to concur in the payment of the two-thirds to the children would probably have led to an

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investigation of the facts, and resulted in the institution of this action some years before 1903. It is true that the respondents did not ask for more than one-third; but they had been informed by the Trust Company that this was all to which they were entitled, and the Trust Company cannot complain that the respondents accepted and acted on that statement. They did not discover the error till long afterwards. There is no evidence that they in any way misled the Trust Company; on the contrary, the Trust Company misled them. The third point raised on the appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of section 3 of the Trusts Act 1901, which corresponds with section 3 of the English Act, 59 and 60 Vict. c. 35. That section is as follows:—"If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." The Courts in the Colony have found that the appellants acted honestly and reasonably, and their Lordships are prepared to deal with the case upon that footing. Mr Terrell contended that these two things being established, the right to relief followed as a matter of course; but that is clearly not the construction of the Act. Unless both are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach looking at all the circumstances. It is a very material circumstance that the appellants are a limited joint stock company formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorises them to retain out of trust funds administered by them in addition to their costs. What they now ask the Court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the Trust Company from a loss which they have incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants their Lordships think that it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents who have committed no fault, should lose their money to relieve the appellants who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their *cestui que* trusts. In the present case there seems to be some ground for thinking that other proceedings were open to the Trust Company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the Trust Company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss if the Trust Company should find they cannot obtain relief elsewhere. The Courts in the Colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their Lordships agree with them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—H. Terrell, K.C.—Vaughan Hawkins. Agent—George M. Light, Solicitor.

Counsel for the Respondents—Warmington, K.C.—A. H. Jessel. Agents—Hicks, Arnold, & Mozley, Solicitors.

HOUSE OF LORDS.

Monday, July 3.

(Before the Lord Chancellor (Halsbury), Lords Davey and Robertson.)

CORPORATION OF SHEFFIELD *v.* BARCLAY AND OTHERS.

(On Appeal from the Court of Appeal in England.)

Company — Indemnity — Forged Transfer of Stock—Innocent Presentment for Registration—Implied Contract to Indemnify.

Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another, and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making

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the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request.

A and B were the joint and registered owners of a certain corporation stock. A, in fraud of B, forged a transfer in favour of C & Co., a firm of bankers, who advanced him money on the security of the stock. C & Co. forwarded the transfer to the corporation with a request that the stock should be registered and a new certificate issued in C's name. This was done and C transferred the stock to D for value. C & Co. and D and the corporation, all of them, acted in good faith in ignorance of A's fraud, and without negligence. B, upon discovering the fraud, brought an action against the corporation and recovered from them the value of his interest in the stock.

Held, in an action by the corporation against C & Co., that the latter were bound to indemnify the former. Judgment of the Court of Appeal *reversed*.

This was an appeal from a judgment of the Court of Appeal (WILLIAMS, ROMER, and STIRLING, L.JJ.) reversing a judgment of LORD ALVERSTONE, C.J.

The facts of the case are sufficiently indicated in their Lordships' opinions.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—In this case two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation and demanded, as they were entitled to do if the transfer was a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill after the death of Timbrell discovered the forgery that had been committed and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained. Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest that there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries if they like. If they find that an intending borrower has a co-trustee, they ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as if genuine transfers are brought they are entitled to do, that the stock shall be registered in their name or that of their nominees, and they are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by action on this "demand" have incurred a considerable loss. As I have said, I think that if it were *res integra* I should think that the bank were liable; but I do not think that it is *res integra*, but it is covered by authority. In *Dugdale* v. *Lovering* (32 L.T. Rep. 155, L. Rep. 10 C.P. 196) Mr Cave, arguing for the plaintiff, put the proposition thus—"It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This, though only the argument of counsel, was adopted and acted upon by the Court, and I believe that it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr Cave in his argument

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quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think that the principle as enunciated is well established. With respect to the case of the sheriff quoted in the Court of Appeal (*Collins* v. *Evans*, 5 Q.B. 820) I think that it has been overlooked that the sheriff was executing a genuine writ, and the information he received was given to him to aid him in the execution of the office, which by law he was bound to execute, and the information (for it was no more) was given to him in good faith; but can anyone suppose that if anyone brought a forged writ and called upon the sheriff to execute it, such person would not be liable to indemnify the sheriff? I cannot think that there would be any doubt on that subject, but the genuineness or otherwise of the document to which the corporation were called upon to give effect made the whole difference, and I think that both upon principle and authority the corporation are entitled to recover, and I move your Lordships accordingly.

LORD DAVEY — The appellants are suing the respondents upon an implied contract to indemnify them against the liability which has been incurred by them in these circumstances. On the 11th April 1893 the respondents, Barclay & Company, Limited, forwarded to the appellants a transfer of Sheffield Corporation stock purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favour of the respondent Barclay, with a request to the appellants to register the name of the last named respondent, and forward new certificates in due course. The appellants acted upon this request, and granted a new certificate to the respondent Barclay, who afterwards transferred the stock for value to third parties. The names of Barclay's transferees were registered in due course, and it is admitted that they obtained a good title against the appellants. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but in fact Honnywill's signature had been forged by Timbrell. It was not, however, until 1899, after Timbrell's death, that Honnywill discovered the fraud, and he thereupon brought an action against the present appellants for rectification of the register and other relief, and recovered judgment against the appellants, under which they have incurred a large liability. On these facts the Lord Chief-Justice, who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability which they have incurred, but his judgment has been reversed by the Court of Appeal. Before referring to the numerous authorities which have been cited, I will first state the grounds upon which I have come to the conclusion that the Lord Chief-Justice was right and that his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But of course it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request. I think that this is the broad principle to be deduced from such cases as *Humphrys* v. *Pratt*, 5 Bli. N.S. 154; *Betts* v. *Gibbins*, 2 Ad. & E. 57; *Toplis* v. *Grane*, 5 Bing. N.C. 636, and the other cases which have been cited. In *Humphrys* v. *Pratt* the reasons for the judgment in this House are unfortunately not stated in the report, but in commenting on that case in *Collins* v. *Evans*, 5 Q.B. 820, Tindal, C.J., says:—"The declaration states that the judgment creditor pointed out the goods, and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any other individual in that position, whether sheriff or not, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions." In *Toplis* v. *Grane* the same Judge, after referring to the evidence in the case, says—"We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins*, that where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences

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thereof." In *Collins* v. *Evans*, on the other hand, the sheriff was entrusted with the execution of a writ of *ca. sa.* against one John Wright, and the defendant pointed out to him a person of the same name as the person liable, and the sheriff acted on the representation and incurred liability. It was held that the defendant was not liable to indemnify the sheriff, because he had merely made an innocent representation to the sheriff, but had not required the sheriff to act upon such representation, and had left him to his own discretion whether he would act upon it or not. It has been said that the principle of these decisions only applies to cases between principal and agent and employer and employee, and the language of Tindal, C.J., in his comment on *Humphrys* v. *Pratt*, gives some colour to that suggestion. I am not, however, of that opinion, and the contrary was decided in *Dugdale* v. *Lovering* (*ubi sup.*). It may be that the language of Tindal, C.J., was not so felicitous as it usually was; but his meaning is plain that the liability to indemnify the sheriff arose from his having acted in supposed execution of his duty at the request and by the direction of the creditor. In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity, but in cases like the one now before your Lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied. It matters not to the corporation whether A or B is the holder of stock, but to the purchaser who has paid his purchase-money, or the banker who has lent money on the security of the stock, it is of vital interest. The Court of Appeal distinguished the sheriff's cases on the ground that the request was to execute his duty in a particular manner. In the cases in question that was so. But I think that the argument *hæret in cortice*, and is neither logical nor maintainable. It is difficult to imagine a case where a person should innocently request the sheriff to execute a writ which though apparently regular is in fact fictitious or invalid. If such a case be possible, it would come within the exact words of Tindal, C.J., and I entertain no doubt that the person presenting the writ would be held liable to indemnify the sheriff. It does not seem to matter at what stage of the transaction the request to do an act which turns out to be outside the officer's duty is made. In the present case, as pointed out by Mr Bankes, the appellants ran no real risk until they issued the new certificate on the demand of the respondents. The judgment of the learned Judges in the Court of Appeal seems to be based mainly on three grounds —(1) the decision of Lindley, J., in *Anglo-American Telegraph Company* v. *Spurling* (5 Q. B. Div. 188); (2) that there was no consideration for the alleged contract of indemnity; (3) that the contract, if any, to be implied from the circumstances was a warranty of their title by the transferees and not a contract of indemnity. The cases of *Sim* v. *Anglo-American Telegraph Company* (*ubi sup.*) and *Anglo-American Telegraph Company* v. *Spurling* (*ubi sup.*) were an action and cross-action which arose out of a forged transfer of some of the company's stock, and were heard together. The first action was by the persons claiming under the forged transfer against the company for damages for wrongful removal of their names from the register on discovery of the fraud, and the cross-action was by the company against the persons who had brought in the forged transfer for registration for an indemnity. The learned Judge decided the first action in favour of the plaintiffs. He also decided the cross-action against the company. With regard to the transferor, he said—"Supposing that he knows nothing wrong about it, are the company entitled to say to him, 'We assume from the fact that you bring this transfer to us that it is a genuine document'? I apprehend that they are not entitled to say so to him. They are only entitled to say to him, 'We assume that you come honestly to us and that you do not know that anything is amiss with regard to the transaction.'" The learned Judge then stated his views as to the duties of the company as follows:—"It appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after transfers of stock or shares standing in the names of persons on the register, and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think that the true view is this, that there being no negligence on the score of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall on the company." There was an appeal in both cases and the decision in the first action was reversed, but counsel for the Telegraph Company did not proceed with the appeal in the cross-action, because if they succeeded in the first appeal the Telegraph Company had not suffered any damage. I am of opinion that the case of *Anglo-American Telegraph Company* v. *Spurling* was also wrongly decided by Lindley, J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms that it is genuine but warrants that it is so. I think that this is the result of the decision in *Oliver* v. *Bank of England* (86 L.T. Rep. 248 (1902) 1 Ch. 610), affirmed in this House under the name of *Starkey* v. *Bank of England* (88 L.T. Rep. 244, (1903) A.C. 114). It may be argued with some

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force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of consols is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But however this may be, it is enough for decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such. I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct, which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned Judges who took part in the decision of the first case of *Sim* v. *Anglo-American Telegraph Company* (*ubi sup.*). I will content myself with quoting the language of Cotton, L.J.—"The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer they may be liable to the real stockholder." True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shows, however, that it is a very poor protection. Stirling, L.J., held in this case that the mere performance of a duty imposed by law upon anyone holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. But, with great respect to that very careful Judge, he overlooked that this very point was involved in the decision in the case of *Oliver* v. *Bank of England*. Vaughan Williams, L.J., quoted and commented upon the passage from the judgment of Willes, J., in *Collins* v. *Evans* (*ubi sup.*) where he says—"The fact of entering into the transaction with the professed agent as such is good consideration for the promise." And it did not occur either to the learned counsel who argued the case with great pertinacity or to any of the learned Judges in the Court of Appeal or the noble Lords in this House to question that the acting by the Bank of England on the demand of the supposed attorney was not a good consideration for the promise by him to warrant the genuineness of the power which they held to be established. Lastly, it was said by Romer, L.J., that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the statute of limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires that we should so hold. I agree with the Lord Chief-Justice that as between these two innocent parties the loss should be borne by the respondents, who caused the appellants to act upon an instrument which turned out to be invalid. I am therefore of opinion that the appeal should be allowed and the judgment of the Lord Chief-Justice restored with costs here and below.

LORD ROBERTSON concurred.

Judgment appealed from reversed.

Counsel for the Appellants—Danckwerts, K.C.—Eldon Bankes, K.C.—Waddy. Agents—R. F. & C. L. Smith, Solicitors.

Counsel for the Respondents—Haldane, K.C. — Radcliffe, K.C. Agents — Maples, Teesdale & Co., Solicitors.

HOUSE OF LORDS.

Monday, July 24.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, James of Hereford, and Lindley.)

MAYOR AND CORPORATION OF WESTMINSTER *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Local Government—Public Health—Sanitary Authority—Statutory Power—Ultra Vires—Bona Fides—Power to Make Subterranean Lavatory — Lavatory Constructed Incidentally Forming a Subway —Rules which should Govern Public Bodies in their Exercise of Statutory Powers.

An Act of Parliament conferred upon a sanitary authority power to construct lavatories under its streets, but conferred no power to make subways.

Held that in constructing an underground lavatory with access from both sides of a street, which constituted and was in fact used as a subway, the sanitary authority had not acted *ultra*

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vires, its primary intention having been *bona fide* to construct a lavatory and not a subway.

Observed by the Lord Chancellor—"That where the Legislature has conferred a statutory power to a particular body, with a discretion as to how it is to be used, it is beyond the power of any court to contest that discretion, assuming the thing done is the thing which the Legislature has authorised."

"By Lord Lindley—I am not aware of any authority to show that the High Court can properly grant an injunction to restrain a public body, authorised to make a particular work for some public purpose, from exercising its authority on the ground that in the opinion of the Court the work being made is larger or handsomer and more costly than it need have been . . . unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorised work."

By Lord Macnaghten—"A public body invested with statutory powers . . . must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably . . . and have some regard to the interest of those who may suffer for the good of the community."

This was an appeal from a judgment of the Court of Appeal (WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.), who had reversed a decision of JOYCE, J.

The facts of the case are fully set forth in their Lordships' judgments.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—It seems to me that the power of the local authority to erect certain public conveniences cannot be disputed. The shape, site, and extent of them are left to the discretion of the authority in question, and as to the things themselves, which under this discretion have been erected, I do not understand that any objection can be made. The objections, so far as they assume the force of legal objections, refer to the access to them, and to the supposed motives of the local authority in the selection of the site. Assuming the thing done to be within the discretion of the local authority, no court has power to interfere with the mode in which it has exercised it. Where the Legislature has confided the power to a particular body, with a discretion as to how it is to be used, it is beyond the power of any court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised—(see *London, Brighton, and South Coast Railway Company* v. *Truman*, 54 L.T.Rep. 250, 11 App. Cas. 45). It appears to me impossible to contend that these conveniences are not the things authorised by the Legislature. It seems to me that the provision of the statute itself contemplates that such conveniences should be made beneath public roads, and if beneath public roads some access underneath the road level must be provided, and if some access must be provided it must be a measure simply of greater and less convenience, when the street is a wide one, whether an access should be provided at only one or at both sides of the street. That if the access is provided at both sides of the street it is possible that people who have no desire or necessity to use the convenience will nevertheless pass through it to avoid the dangers of crossing the carriageway seems to me to form no objection to the provision itself, and I decline altogether to sit in judgment upon the discretion of the local authorities upon such materials as are before us. I quite agree that, if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another, but I have endeavoured to show that the Legislature did contemplate making subterranean works under the roadway and also access to them. Under these circumstances I think that it is a question of degree, and if there be the express provision, as I think there is, to make a tunnel under the street for the purpose of these conveniences, then I think that the question of its extent or cost is a matter with which neither a court of law nor of equity has any concern, since the thing contemplated by the statute has been done, and done in the way in which the statute contemplated that it might be done. That the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose. I think that the judgment of Joyce, J., should be restored. With respect to the costs of this litigation, I cannot overlook the fact that the local authority made a blunder and interfered with the footway. That has now been put right, but in the first instance led to the litigation. Then I think that the negotiation and correspondence was not as candid as it should have been, and I think, therefore, that neither side in this controversy should have any costs.

LORD MACNAGHTEN—At the southern or lower end of Parliament Street, just before you come to Bridge Street, where in consequence of recent improvements there is a distance of about 100 ft. between the opposite buildings, the appellants as the sanitary authority of the city of Westminster have constructed public lavatories and other conveniences for the use of persons of both sexes. These conveniences are placed under the ground in the middle of the street as far removed as possible from the buildings on either side. The plan of the construction is this—On each side of the roadway there is an entrance 5 ft. 9 in. wide protected by railings and leading by a staircase of the same width to a passage or subway 10 ft. wide and 8 ft. high which runs the whole way across on a level with the underground conveniences. Out of this subway there are openings—two for men and one for women—into spacious chambers, where the usual accommodation (politely described as lavatories and cloakrooms) is provided on a

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large and liberal scale. All the arrangements seem to have been designed and carried out with due regard to decency and with every possible consideration for the comfort of wayfarers in need of such accommodation. The London and North-Western Railway Company are the owners of a large and valuable block of buildings on the east side of Parliament Street, having a frontage to Parliament Street and a frontage to Bridge Street, with vaults under the pavement in Parliament Street, and a claim, for what it is worth, to the soil beneath the roadway up to the midline of the street. They took objection to the sanitary works constructed by the Corporation and sought to have them removed. They put their case alternatively as a case of trespass or of obstruction to the highway causing special damage. The Corporation relied on their statutory powers under the Public Health (London) Act 1891, which authorises them to construct such public sanitary conveniences, and vests in them for the purpose the subsoil of the road, exclusive of the footway. When the parties came to trial it was found that owing to some mistake or inadvertence the works of the Corporation had encroached on the footway. Joyce, J., before whom the case was tried, ordered the Corporation to remove the encroachment, but made no order as to costs. On appeal by the plaintiffs the Court ordered the Corporation to "pull down and remove the whole of the staircase, railings, and other works placed by the defendants upon the lands of the plaintiffs other than the conveniences in the pleadings mentioned, and such further portion of the construction as the Court" might, "upon application, sanction as a proper approach to the said conveniences." The order was to be suspended pending an appeal to this House, and the Corporation were to pay the costs of the action and of the appeal. The Corporation have acquiesced in the order of Joyce, J. Their only contention now is that the order of the Court of Appeal is wrong. There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case I think that it will be convenient to take it separately. Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorised by the Act of 1891. The conveniences themselves, extensive as the accommodation is, have not been condemned by the Court of Appeal or even attacked in the evidence. Then the entrance from the roadway is only 5 ft. 9 in. wide; so is the staircase. It is in evidence that a width of 4 ft. 6 in. is "necessary" in order to enable two persons to pass on the staircase. The witness who gave that evidence was pressed to say that "under ordinary circumstances 4 ft. 6 in. to 5 ft. would be a wide entrance for a thing of this sort." "No," he replied, "not ample. You want to give a minimum of 5 ft. if you can, and more than that. You would give 6 ft. if you had got plenty of space." So the entrance actually provided which has been condemned by the Court of Appeal, and, as I think, without evidence, is just 9 in. wider than the minimum width which the only witness examined on the point says ought to be provided, and 3 in. narrower than what he thinks should be allowed if space permits. It seems rather a strong measure to invoke the powers of the Court in so trifling a matter, especially considering that the excess, if excess there be, cannot make the slightest practical difference to the respondents. Then I come to the subway, which has not been opened to the public as yet. Now, there is not a scrap of evidence tending to show that there is anything improper or suspicious about the subway, One witness was asked if he had "ever known an approach to a convenience which was 10 ft. wide except this." He said he had not, and there the matter dropped. But then no instance could be given—at any rate, no instance was given—of a convenience so large placed in the centre of a street so wide and approached from either side. If it is permissible to construct a convenience approachable from either side of a wide street, you cannot prevent the public from using the subway as a thoroughfare. I should think it most unlikely that it would be largely used, if used at all, by persons not desirous of availing themselves of the convenience. But it is possible; Vaughan Williams, L.J., thinks it more than possible. He has "no doubt, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians." There seems to be no experience to guide one on the point. And so the Corporation were, I think, not to be blamed for making provision in order to obviate crushing and jostling in a place where crowding is (to say the least) not convenient. I have not forgotten that there are two passages in the evidence which one of the learned Lords Justices quotes at length, and all the members of the Court appear to rely on them. It seems that the chairman of the Works Committee admitted that this tunnel (as it has been called), 10 ft. wide and 8 ft. high, was "both an approach and a subway." That seems to have been thought a very damaging admission. Of course it was a subway. It was a subway capable of being used as a thoroughfare. It would have been a subway if there had been no thoroughfare. For my part I do not quite understand all this play upon words. Then there was another passage in the evidence supposed to be more damaging still, in which a witness said that he did "not see any necessity for 10 ft." It would, he admitted, be "a waste of space and a waste of money." But if you look at the context it is perfectly clear that the learned

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Lord Justice was under a misapprehension. The witness was not referring to the subway which was 10 ft. wide. He was not thinking of the subway. The questions put to him both by the learned counsel and by the Judge were addressed to the entrance and staircase, to which very different considerations apply. It was not suggested that there was any notice, or any intention of putting up a notice, directing the public to this subway as a means of crossing. The entrance, which was of the usual limited dimensions, did not of itself offer any invitation to the public to enter for the purpose of crossing the roadway. Then I come to the question of want of good faith. That is a very serious charge. It is not enough to show that the Corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side, and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith it must be shown that the Corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Vaughan Williams, L.J., "it is not true to say that the Corporation have taken this land which they have taken with the object of using it for the purposes authorised by the Legislature. You are acting *mala fide*," he added, "if you are seeking to acquire and acquiring lands for a purpose not authorised by the Act of Parliament." So you are—there can be no doubt of that. The other learned Lords Justices seem to take the same view of the conduct of the Corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad. The learned Judge who tried the case had before him the chairman of the Works Committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament Street. He asserted on oath that "the primary object of the committee was to provide these conveniences." Why is this gentleman not to be believed? The learned Judge who saw and heard him believed his statement. The learned Judges of the Court of Appeal have discredited his testimony mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St Margaret's and St John's under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think that there is anything in the minutes tending to disprove his testimony. I agree with Joyce, J., that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom. I have felt more difficulty with regard to the question whether the Corporation have acted altogether reasonably—"with judgment and discretion," as Turner, L.J., puts it in a well-known case. It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it right—I am sure that it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that if the engineer of the Corporation and the engineer of the Railway Company had been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic and not unworthy of his position as an officer of a great public body to try to throw dust in the eyes of his correspondent. I do not suppose that the officials of the Railway Company were put off their guard by the answer which he sent. I have no doubt that they knew perfectly well what the Corporation proposed to do. But still the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage. The result of these considerations to my mind is, that if at the trial the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately the respondents chose to stand aloof, and have given no assistance to the Court. Under these circumstances I think there is no alternative but to allow the appeal and to restore the judgment of Joyce, J. But I think there ought to be no costs either here or in the Court of Appeal.

LORD JAMES OF HEREFORD—In this case the London and North-Western Railway Company seeks by injunction to restrain the defendants, the present appellants, from maintaining a certain tunnel, staircase, and railings, and other works upon land in Parliament Street, Westminster. The facts upon which the questions in issue depend may, I think, be summarised as follows:—[*His Lordship went through the*

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facts and evidence as set out above.] Now upon these facts it seems to me to be clear that the intention of the local authority was to construct two distinct objects, a convenience with an approach and a subway. It is true that a portion of the subway would be used as the approach to the convenience, but the subway would also be used by those who did not intend to visit the convenience, but only desired to cross free of danger from one side of Parliament Street to the other. It is also clear that in consequence of this double user the subway was made of 4 feet greater breadth than would have been necessary if only an approach to the convenience had been constructed. Such being a summary of the facts before your Lordships, it is necessary to consider with what legal powers the appellants and their predecessors were invested so as to authorise the construction of the works in question. Inasmuch as the soil of the respondents has been taken without their sanction for the purposes of the works, the appellants must show legal authority for such an act. By section 44 of the Public Health Act (London) 1891, power was conferred upon sanitary authorities to provide and maintain public conveniences, and in order to carry out the exercise of the power the subsoil of any road (required for the purpose) was vested in the sanitary authority. This is the only legislative authority under which a justification for the act done is alleged. It will be noted that there is no legislative power given to local authorities to construct subways. Now, I agree in the view that has been taken that the powers to construct a convenience under the Act of 1891 of necessity include a power to construct an approach thereto. And so the question to be solved seems to be thus formulated. Was the so-called tunnel an approach to the convenience only, or was it something more? (1) Was it a subway distinct from the approach, or (2) was it a subway in combination with the approach used for two distinct purposes? In my judgment the construction in question comes within one or other of the two latter alternatives. Possibly within the first, certainly within the second. If this finding on the facts be correct, the works, so far as they constitute the subway, are constructed without legal authority. The Legislature has not thought it right to confer on local bodies the power to compulsorily take land or impose rates for the purpose of constructing subways. In this case some land has been taken which would not have been required if the approach had not been enlarged into a subway, and an unauthorised burden has been imposed upon the ratepayers in consequence of this enlargement. Thus it is, in my opinion, that the appellants have acted beyond their powers and without justification. I have only to add that the reasons for their judgment given by the Lords Justices in the Court of Appeal appear to me to be unanswerable, and I therefore think that those judgments ought to be affirmed and this appeal dismissed.

LORD LINDLEY—By the Public Health of London Act 1891, section 44, the appellants were authorised to provide and make and maintain public lavatories and sanitary conveniences in situations where they might deem the same to be required, and they were authorised to defray the expense of providing the same, and of any damage occasioned to any person by the erection and construction thereof, as if such an expense was an expense of sewerage. Further, for the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building, was vested in the appellants. I cannot doubt that under this authority they could lawfully construct lavatories and sanitary conveniences in, on, or under any road in their district, provided that they did not interfere with any footway adjoining any building or with the soil under any such footway. No particular size or form of convenience, or mode of access to an underground convenience, is prescribed, and I see no reason why a convenience should not be made under a road, with an underground access to it on each side of the road. The size and position of the convenience and of the access are left to the discretion of the appellants, and in the exercise of that discretion the locality, the amount of traffic, and the class of people likely to use the conveniences would naturally have to be considered. The cost is left to the good sense of the appellants, and I am not aware of any authority to show that the High Court can properly grant an injunction to restrain a public body authorised to make a particular work for some public purpose from exercising its authority on the ground that in the opinion of the Court the work being made is larger or handsomer and more costly than it need have been. Still less can a mandatory injunction be properly granted in such a case. Matters of detail, of taste, and of expense in executing works authorised by statute are left to the constructing authority, and their decision on such matters is not open to review in an action for an injunction unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorised work. The case before your Lordships is not of that description. Whether an expense unnecessarily incurred in constructing authorised work could be disallowed by an auditor, or be thrown in some other way on the person who incurred it, is a matter which your Lordships have not to consider on the present occasion, and I say no more about it. But the foregoing observations, favourable as they are to the appellants, do not exhaust the case. Other matters have also to be considered. Where a person is authorised by a statute or by the common law to do what, apart from such authority would be unlawful, *e.g.*, to commit a trespass, and the authority is conferred for some distinct and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrongdoer from the beginning, and not only as a wrongdoer in respect of what can be proved to have been in excess

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of his authority. It is presumed against him that the abuse of his authority shows an intention from the first to commit an unlawful act under colour of a lawful authority. This general principle was established in the well-known case known as the *Six Carpenters'* case (8 Co. Rep. 146 *a*), on which there is an instructive comment in the first volume of Smith's Leading Cases. Counsel for the respondents urged that this principle was applicable to the present case, and deprived the Corporation of any defence which they might have had if they had not exceeded their authority. In one respect the appellants did clearly exceed their authority, for they interfered with the foot-pavement and the land under it—a thing which they had no right to do. This, however, was put right by the injunction granted by Joyce, J. The argument had the charm of novelty, but no authority was cited for applying the principle of the *Six Carpenters'* case to such a case as this. I never heard of, and I cannot find any instance of, an injunction being granted to restrain the completion of works authorised by statute simply because the authority which authorised them had been exceeded if the excess was abandoned, and satisfaction for the injury caused by it had been made either by payment of money or by restoration in fact. In the absence of any such authority I cannot accede to the argument of the learned counsel. The consequences would be most unjust, and contrary to settled principles of equity. Still less would it, in my opinion, be in accordance with the principles on which mandatory injunctions are granted to compel the Corporation to undo work done which, apart from the excess, can be shown to be within their statutory authority. The respondents naturally rely very strongly on the minutes of the proceedings of the constructing authority, and on the letters written by their officials, and on the evidence given by Mr Weaver at the close of his cross-examination. They contended that the sanitary conveniences were constructed in order to make a subway, which without them could not lawfully be made. But I do not think that the minutes and letters are sufficient to prove that the subway as constructed was in fact unauthorised by statute. On this part of the case I do not think it necessary to say more than that I concur in the observations of Lord Macnaghten. Having regard to those minutes and letters, I also am of opinion that the costs should be dealt with as proposed by him. Although the appellants succeed in their appeal they have only themselves to thank for the litigation which they provoked.

Their Lordships sustained the appeal.

Counsel for the Appellants—Haldane, K.C. — Hughes, K.C. — Dighton Pollock. Agents—Allen & Son, Solicitors.

Counsel for the Respondents—Younger, K.C. — Shearman, K.C. — Eustace Hills. Agent—C. De J. Andrewes, Solicitor.

HOUSE OF LORDS.

Tuesday, November 14.

(Before the Lord Chancellor (Halsbury), Lords Robertson, and Lindley.)

MAYOR AND BOROUGH COUNCIL OF PADDINGTON AND ANOTHER *v.* ATTORNEY-GENERAL AND ANOTHER.

(On Appeal from the Court of Appeal in England.)

"Building" — Meaning of — Prohibition against "Buildings" in Act of Parliament for Preservation of Open Spaces—Screen—What Constitutes a "Building" Depends upon Context.

Certain Acts of Parliament whose object was, *inter alia*, to preserve open spaces for purposes of recreation prohibited the erection of "buildings" upon such open spaces.

Held that a screen erected with the object of preventing an adjoining owner from acquiring a prescriptive right to the access of light over such an open space was not a "building."

Per the Lord Chancellor (Halsbury)—"A screen or some erection of that nature might be considered a 'building' with reference to some covenants, and might not be considered a 'building' with reference to others. The subject-matter to be dealt with and the subject to which the covenant is supposed to be applied are all to be looked at to see what the word 'building' means in relation to that particular subject-matter."

Judgment of the Court of Appeal *reversed*.

A series of statutes, the Metropolitan Open Spaces Acts 1877 (40 and 41 Vict. cap. 35), and 1881 (44 and 45 Vict. cap. 34), the Open Spaces Act 1887 (50 and 51 Vict. cap. 32), and the Disused Burial Grounds Act 1884 (47 and 48 Vict. cap. 72), have for their object, *inter alia*, the preservation of open spaces including disused burial grounds as places of exercise, ventilation, and recreation, and the last of the Acts above mentioned provides by section 3 that it shall not be lawful except for special purposes which have no bearing on the present case to erect any "buildings" upon any disused burial grounds.

The owner of a leasehold piece of land abutting on a disused burial ground built upon it a tenement of houses with windows overlooking the burial ground. The persons in right of the burial ground gave orders for the erection of a screen on the edge of their ground with the object of preventing him from acquiring a prescriptive right to the access of light over the open space, and he thereupon brought the present action in which he sought to restrain them from proceeding with the erection of the proposed screen on the ground that it was a "building," and therefore prohibited by section 3 of the Disused Burial Grounds Act 1884.

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BUCKLEY, J., dismissed the action, but his judgment was reversed by the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY), which pronounced an order prohibiting the erection of the screen.

On appeal to the House of Lords their Lordships at the conclusion of the arguments gave judgment as follows—

LORD CHANCELLOR (HALSBURY)—I confess that I should have been better satisfied if the parties had thought fit to come to some agreement in this case, but of course they have a right to have the judgment of the House; and while on the one hand certainly there are public rights involved, on the other the question, as it is raised here, is a question between a private speculator who wants to make the best of his buildings, and a public body whose only interest is to preserve that which is committed to their charge in as unencumbered a position as that in which they received it. Now, in the first place, I think it necessary to consider what is the meaning of the prohibition contained in the Act referred to. I am of opinion that it meant what it said that the space was to remain unbuilt upon. It is no longer to be used as a burial ground, but it is not to be used as building ground. That is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition. I entirely agree with Buckley, J., that in the books there may be found a great variety of cases where, with reference to the subject-matter of the covenant and the meaning of what was in question between the parties, a screen, or some erection of that nature, might be considered a "building" with reference to some covenants, and might not be considered a "building" with reference to others. The subject-matter to be dealt with and the subject to which the covenant is supposed to be applied are all to be looked at in order to see what the word "building" means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases. Anything which is in the nature of a building might be within one covenant, and the same erection might not be a building with reference to another covenant. I think that the observation of Buckley, J., was very well founded. But now I have to look at the word "building" here with reference to this subject-matter and with reference to what this Act of Parliament was doing. It is very obvious, I think, that what it was intended to do was to keep this disused burial ground from being used as building ground, to keep it as a place of exercise, ventilation, and recreation, and what not; to prevent anything from being done in the nature of building which would interfere with or restrict the free and open use of these spaces as constituted under the statute. But when I look at the question here I am bound to say that I look at it under more difficulty, because I have not only to consider whether a screen is a building, but I have to consider whether an undescribed screen, of which neither the size nor the nature has been specified, would be a building within the meaning of the Act of Parliament. All I can say at present is that if the proposition is put in the abstract in that way without any reference to any concrete facts, it must be put thus, that any screen is a "building" within the meaning of the Act of Parliament. I am not prepared to affirm that proposition, and I think that Buckley, J., was perfectly right. I think that it is not a building; and that decision, that it is not a building, appears to go to a great part of the argument, because the only mode in which it has been suggested that this injunction should be maintained, namely, that the ground should not be used for any other purpose than that which the Act of Parliament provides, seems to me to add nothing whatever. Any other purpose than what? Any other purpose than open ground, than as a place for recreation, enjoyment, or what not. I find nothing in the letters which have been referred to which indicates the slightest restriction of any one of these purposes in the use of this ground. If we look at what is the real substance of the matter, it is obviously this, that this public body was doing what every private proprietor would do under the circumstances, because every private proprietor would prevent certain rights from being acquired over this space which would both prejudice the value and prevent the full use of it in the future. If this particular space can be built round, and rights acquired, whatever use might be made of it hereafter, you might have it so completely surrounded by houses of such height that the light and even the ventilation itself might be very seriously interfered with by the rights acquired by twenty years' use. Under these circumstances it appears to me that this public body was perfectly entitled to prevent this from being done in order to protect that which is under their guardianship. They may, perhaps, be commended for not having actually erected the screen, but having raised the question on a mere threat, because, of course, where the object is simply to prevent the acquisition of a right, it is convenient first of all to test the question of law; and although, as I have pointed out, it is rather inconvenient to have to pronounce judgment upon a hypothetical screen, as to which the learned counsel has indulged his imagination and has pictured a screen going completely round a space of about a quarter of a mile, yet I think, perhaps, that it was the most convenient form, not to put the screen itself into operation, but to try the question of law whether any screen of any sort or kind would be admissible for the purpose of preventing prejudicial rights from being acquired. Now, I must say that I am sorry that the parties should not have arrived at an agreement between themselves about this matter; but, looking at the whole question, looking at what the meaning of the statute is and at the condi-

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tion of things that now exists between the parties, I am of opinion that the judgment of the Court of Appeal is unsound. The learned Lords Justices appear to me to assume a state of things which I do not find to be established here. I think that the judgment of Buckley, J., is perfectly right, and under the circumstances I move your Lordships that the judgment appealed from be reversed.

LORD ROBERTSON—I agree with the Lord Chancellor that the case was rightly decided by Buckley, J. I think that there is great force in his initial observation that it would be an extraordinary proposition that because an open space has been made available to the public for enjoyment in an open condition free from building, the result should be to give immediately, or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as a matter of right, an easement of light which theretofore they had not enjoyed. When the sections are examined I find it impossible to trace the bringing about of that extraordinary result. In the first place, I think that the vicar has never been ousted of his proprietorial rights, and when I turn to the administration of the body which is charged with preserving the place as an open space, it seems to me that, so far from being extraneous to the scope of that administration, what it is proposed to do is completely within it. I think that the erection of a screen is, or may be, entirely consistent with the purpose of maintaining this place as an open space for public enjoyment, and in furtherance of that purpose. No one can say that a recreation ground surrounded by flats seven storeys high and looked into by all the windows of those buildings is necessarily as good a recreation ground as one more open to the sun and less overlooked. Accordingly, just as Cozens-Hardy, L.J., says that these administrators could erect a toolhouse, that being in furtherance of the primary purpose of the administration, so I think that this erection is within that purpose. Of course I do not imply that it is the duty of all administrators of open spaces to surround their open spaces with screens; all that I say is that it is within the rights which have never been taken away from the proprietors and administrators of these grounds, and it may be a step to be taken in furtherance of the purposes with which they are charged. I need hardly say that what I have said bears relation directly to the argument of Cozens-Hardy, L.J., which indeed was adopted at your Lordships' Bar. On the other question, as to whether any screen is necessarily a building, which, as has been pointed out, is the condition of the argument, I can only say that proposition seems to me to be entirely inconsistent with the most obvious physical facts. On these grounds I think that the judgment of the Court of Appeal was wrong, and the judgment of Buckley, J., right.

LORD LINDLEY—I am entirely of the same opinion. The injunction granted by the Court of Appeal, to my mind, goes a great deal too far. There is not the slightest evidence to warrant the notion that the defendants or any of them intended to erect a building on this land, and accordingly the Court of Appeal have put in words which would cover building or screen. Screens are of all sorts and kinds, and I can imagine screens which obviously are not buildings, and would obviously be justified by the statutory powers conferred upon these public bodies. This open space may be preserved, and primarily ought to be preserved, as a place of recreation, and more or less as a garden. Now, just fancy an injunction to restrain these defendants from planting good sized trees in front of these windows which would interfere with already acquired rights of light. How could it be possible to maintain an injunction to restrain them from such planting? That shows that the Court of Appeal has gone too far. I entirely adopt the view taken by Buckley, J. I think that he has put the true construction on the Acts, and I agree that the appeal ought to be allowed with costs here and below.

Order appealed from reversed.

Counsel for the Appellants — Haldane, K.C. — Terrell, K.C. — Nash — Montague Barlow. Agent—John H. Horton, Solicitor.

Counsel for the Respondents—Astbury, K.C. — M. Romer. Agents — Cheston & Sons, Solicitors.

HOUSE OF LORDS.

Tuesday, November 21.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

ASHTON GAS COMPANY *v* ATTORNEY GENERAL AND OTHERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue—Income Tax—Gas Company—Maximum Rate of Dividend Provided by Statute—Payment of Dividend Free of Income Tax.

The Special Act of a gas company provided that the profits of the company to be divided among the ordinary shareholders in any year should not exceed a specified rate.

Held that in calculating the rate of dividend income tax ought to be included.

This was an appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.), who had affirmed a judgment of BUCKLEY, J.

The Act of Parliament under which the Ashton Gas Company was incorporated provided as follows:—"Except as in this Act provided, the profits of the company to be divided among the shareholders

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in any year shall not exceed the rate of ten pounds per centum per annum (which rate is in this Act referred to as 'the standard rate of dividend') on the ordinary share capital or stock of the company authorised by Parliament and paid up."

For many years the company had paid to its shareholders the maximum dividends free of income tax.

The Corporation of Ashton and the Attorney-General in the present action sought a declaration that according to the true construction of the Act of Parliament the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable for that year in respect of income tax on the profits to be divided and for an injunction to restrain the company from distributing profits otherwise than on the footing of such declaration.

BUCKLEY, J., and the Court of Appeal granted the declaration and the injunction craved.

The Gas Company appealed.

At the debate the appellants referred to the Income Tax Act 1842 (5 and 6 Vict. c. 35), secs. 40, 54, and 60.

It is enacted by sec. 60—"The duties hereby granted and contained in the said schedule marked A shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of the Act and to refer to the said duties as if the same had been inserted under a special enactment. Schedule A.—No. III. The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times therein limited. Third—Of ironworks, gasworks . . . on the profits of the year preceding."

Their Lordships gave judgment as follows—

LORD CHANCELLOR (HALSBURY)—But for the somewhat complex character of the dividend arrangements of this company, I should say that this was a clear case. There are two things which give rise to confusion. In the first place this action only raises indirectly the question of what is to be deducted in respect of income tax. The Legislature has laid down that the shareholders of this company shall not get more than a ten per cent. dividend on their shares. That seems to me to be a very clear proposition, and when we analyse the facts in this case I should have thought that the whole thing would have been settled in five minutes. In the second place, there is a somewhat difficult and complex machinery which makes the officers of the company officers of the financial department of the Government for the purpose of collecting the tax. Now, first of all, let us suppose that each shareholder is to get ten per cent. upon his shares. That is a very plain matter, and what the ten per cent. is can easily be ascertained. But then the particular Act of Parliament which is before us provides that ten per cent. being the utmost that the shareholders shall receive, they are in their turn the persons who are to collect the income tax for the Government. Let us suppose that we get rid of the machinery altogether and that the company are relieved from the necessity of collecting the tax for the Government. Let us suppose that instead of that machinery the shareholder is left face to face with the Government collectors, and that instead of acting as the Government receivers the company simply pays the ten per cent. to the shareholders, and allows the shareholder to make his bargain or rather to give accounts to the proper Government officer. The company having paid ten per cent., and it having been ascertained what the proper quota of the shareholder would be in respect of the income tax, suppose the company to give to the shareholder, besides the ten per cent. which they have already given to him, the quota for the income tax also, will they or will they not have given to the shareholder more than ten per cent. for his dividend? It is obvious that they will have given him the amount, we will call it x, which is due in respect of dividend, plus y, which is the amount of income tax due from him. So presented the case appears to me to be perfectly clear. The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters that which is the real nature of the profit. Now, the profit upon which the income tax is charged is what is left after you have paid all the expenses necessary to earn that profit; indeed profit is a very plain English word, that is what is charged with income tax. But if you confused the expenditure which is necessary to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel to point out at such very considerable length that this is not a charge upon the profits at all. The answer to that is this—the income tax is a charge upon the profits, the thing which is taxed is the profit which is made, and you must ascertain what is the profit that is made before you deduct the tax. You have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure, which expenditure earns itself. That appears to me to put in a clear form what this is. I share very much the difficulty of Buckley, J., in understanding how so plain a matter has been discussed in all the courts at such extravagant length, because it appears to me that when once you put the two propositions, "What is it that you are taxing?" "Profits." And then, "How can you ascertain profits without deducting the income tax itself, which you clearly can and must do?" I think that these two propositions render the matter absolutely clear from any doubts at all. In the case of *Last* v. *London Assurance Corporation*, 53 L.T. Rep. 634, 10 App. Cas. 438, which was

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decided a good many years ago, in 1885, one can understand the argument which was there suggested, which was that when you are dealing with the bonuses of an insurance company you pay a bonus to induce people to become shareholders in your undertaking, therefore it is part of the necessary expenditure to induce people to come in. But the Court of Appeal, and this House afterwards, refused to acquiesce in that argument. They said "That is not true; you must ascertain first the income; you must ascertain what the income tax is levied upon—that is to say, the profit of the undertaking is to be ascertained first; and when you have found out what the profit of the undertaking is you have then to tax it as profit." Really the whole question comes back to the definition of the word "profits." When once you have defined what the word "profits" means it is perfectly clear what the result of this case must be. I am of opinion, for the reasons which I have given, that the judgment of the Court of Appeal is absolutely right, and I move your Lordships that the appeal be dismissed with costs.

Lord Robertson—The whole argument of the appellants is rested upon the words of Schedule A read out of all relation to the subject-matter of the enactments. What has got to be remembered, and not to be ignored, is that Schedule A merely provides a formula for ascertaining the income arising from the ownership of lands. It is an artificial and rather elaborate method of estimating income, but what it yields is, on the theory of the Acts, income none the less than if the question was raised under any other of the schedules. Now if this be so there is no room for argument. The view of the appellants really implies that the tax under Schedule A is not income tax at all, and I am not sure that the reasoning would not tend to the shareholders' own part of the proceeds being taxed over again, this time as income tax. I entirely agree in the judgment of Buckley, J.

Lord Lindley—I am entirely of the same opinion. The reasoning of the judgment of Buckley, J., appears to me to be absolutely unanswerable, and although I have listened with great respect to what is an intellectual conjuring trick, I am satisfied that there is nothing at all in the appellants' argument.

Judgment appealed from affirmed.

Counsel for the Appellants—H. Terrell, K.C.—W. M. Cann. Agents—Burgess, Cozens & Co., Solicitors.

Counsel for the Respondents—Danckwerts, K.C.—R. J. Parker. Agents—Sharpe, Parker, Pritchards, Barham, & Lawford, Solicitors.

HOUSE OF LORDS.

Wednesday, November 22.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

CHARLESWORTH AND ANOTHER *v.* WATSON AND ANOTHER.

(On Appeal from the Court of Appeal in England.)

Mines and Minerals — Mining Lease — Construction — Undertaking to Win, Work, and Get Fairly, Duly, and Honestly the Whole of the Coal.

A lease for a term of twenty-one years of a seam of coal provided that the lessees should, as soon as they commenced working the coal, pay a yearly rent of £100 per acre of coal, and until then a yearly rent of £5. They undertook that they would "at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine . . . or seam . . . in a proper and workmanlike manner." It ultimately turned out to be impossible to work the coal except at a loss, and the lessees declined to do so.

Held that on a true construction of the lease they were bound to work the coal (the words "fairly, duly, and honestly" adding to rather than detracting from their obligation), and that accordingly they were liable to the lessors in damages for breach of contract.

The respondents on 18th December 1885 leased to the appellants for the term of twenty-one years a certain seam of coal, the lessees "yielding and paying therefor, as soon as the said lessees shall commence working the said coal, yearly and every year during the said term . . . the clear annual rent of £100 for an acre of the said coal by two half-yearly payments . . . the first payment thereof to begin and be made on the half-yearly day next after the said lessees shall have commenced working the said coal, and yielding and paying yearly and every year during the continuance of this demise the further sum of £100 for every acre of the said coal . . . and also yielding and paying yearly and every year during the said term until the said lessees shall begin to work and get coal from and out of the said mine . . . the annual rent of £5 to be paid and payable at the time and in the manner aforesaid." The lessees covenanted, *inter alia*, that they and "their several agents, servants, colliers, and workmen shall and will at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine, bed, vein, or seam of coal hereby demised in a proper and workmanlike manner, and also that they, the said lessees, shall not or will not desist from working and using any of

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the workings until all the coal which can or may with ordinary safety to the workmen, or according to the ordinary method of working, be first got thereout, and shall and will well and effectually preserve . . . the several water levels, &c., . . . and further that they . . . shall not in working or getting the said mine . . . open any pit . . . nor injure the surface of the lands." . . .

The lessees never worked the coal, having come to the conclusion that to do so would be unprofitable, and paid rent at the rate of £5 per annum from the date of the lease until August 1901.

The lessors claimed damages for breach of contract, contending that the lessees were bound to work the coal; the latter maintained that the lease left it optional with them whether they would do so.

The question was referred to arbitration, and subsequently appealed to CHANNELL, J., who gave judgment for the lessees. The Court of Appeal reversed his judgment and the lessees appealed to the House of Lords.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—

LORD CHANCELLOR (HALSBURY)—It appears to me that the judgment of the Court of Appeal is absolutely right, and I do not think it necessary to expand the views which they have expressed. The question comes very shortly to this, whether, when there is an undoubted obligation to work coals, that obligation can be qualified and cut down by words which, as it has been more than once admitted by the learned counsel who have addressed us, are intended to qualify not the obligation to work but the obligation to do what work is done in a proper manner. The adverbs which are used in the lease in connection with the words winning and working seem to me wholly inappropriate to qualify and cut down the original obligation. I hesitate very much to think that the words being such as they are, one could qualify and cut down the initial obligation by looking at what the nature of the transaction is; still, if one does look at it, it appears to me to point in the other direction. Both parties supposed that there was coal here; and if there was coal, is it to be supposed that for £5 a year the attempt to get profit out of this, which both parties assumed was a field of coal, was to be suspended for twenty-one years at the option of the person who took the lease? One could well understand that where the dead rent is of such magnitude that it would of itself be the heaviest burden upon the lessee if he does not work—in that case having regard to the nature of the obligation entered into, you may not require an absolute covenant to work; but where the dead rent is of so comparatively trifling a character as this—£5 a year for twenty-one years—to say that it is to be at the option of the lessee whether he will work or not seems to me a very unreasonable and unbusinesslike arrangement. To my mind, if one were once at liberty to consider the question whether it is a likely covenant to be entered into or not, I should come to a conclusion the other way; but I do not depend upon that. To my mind the sole question is whether there is or is not an absolutely clear obligation to work. I think that there is; and under those circumstances I move your Lordships that the appeal be dismissed with costs.

LORD ROBERTSON—The broad facts of this case are exceedingly simple. There is a lease of this field of coal for twenty-one years from 1885. In 1898 or the beginning of 1899 the colliery people intimate that they have dismantled and abandoned the working by which alone they proposed to work this coal seam. Accordingly, *prima facie*, it would appear that there is the clearest possible claim for damages for a breach of the contract which was knowingly entered into by those parties. The answer to that is, curiously enough, found in the specific obligation which relates to the working which they have abandoned. It is said both as regards the winning and the working that they are to win and work honestly, and a variety of laudatory epithets are applied. How those words limiting their operations to operations of a legitimate kind can take away their obligation to go on working I cannot see. If there had been a very long time taken in reaching the mine I can quite understand that questions might have been raised as to whether that period had not been unduly prolonged; but in this case the avowed abandonment of the working lifts us out of that region altogether. We have therefore simply to construe the clause to which I have referred. I read that clause as containing first of all the obligation both to win and to work, and then a qualification of that by saying that it must be well done. But why you should say that because you are obliged to do a thing well you are absolved from doing it at all passes my conception. The argument was presented in a very sharp and clear form by both the learned counsel. Therefore we understand the question as it is raised in this case. Upon that question I must say that I think the argument too clear to require more than a reference to the context for its refutation. I cannot accede to the view that by the particularity and care in defining the mode of the operations there is absolution given from entering upon those operations at all.

LORD LINDLEY—I have come to the same opinion. I was rather struck by the observations made by the learned counsel for the appellant and by a passage which was read from the judgment of Jessel, M.R., in *Abinger* v. *Ashton*, L.R., 17 Eq. 358. I have since looked at that case, and I think I see what was meant by it. Jessel, M.R., there had to construe a covenant which was badly drawn and open to more interpretations than one. One of the interpretations which he suggested that it might bear was that which was urged upon us as the true interpretation to be put upon this lease. But really and in substance it comes to this—that under a lease like this the lessee has an option whether he will work or not.

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That is a very startling proposition. I have looked into all the authorities that I could find upon the subject, and I can find no warrant whatever for it. I am bound to say that upon the true construction of this covenant I agree entirely with the Court of Appeal.

Judgment appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—C. A. Russell, K.C.—Ashworth James. Agents—Clements, Williams, & Co., Solicitors.

Counsel for the Respondents—Neville, K.C.—M'Swinney. Agents—T. B. & W. Nelson, Solicitors.

HOUSE OF LORDS.

Thursday, November 23.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

CORY & SON, LIMITED *v.* HARRISON AND OTHERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract—Construction—Sale of Business—Contract not to "Directly or Indirectly Carry on, or be Engaged, or Concerned, or Interested in" the Business.

A coal merchant, engaged both in the home and foreign trade, sold his home business to a company, entering at the same time into an agreement with the company not to "directly or indirectly carry on, or be engaged, or concerned, or interested in the coal trade in any part of Great Britain or the Isle of Man." He subsequently sold his foreign business to another company on credit, looking for payment to the company's future profits. The company subsequently started a home business in Great Britain.

Held that the mere fact of his being a creditor of the company did not make him "concerned or interested in" the coal trade in the meaning of the agreement.

This was an appeal from a judgment of the Court of Appeal (WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.), who had affirmed a judgment of JOYCE, J.

The facts were as follows:—The respondent Harrison carried on business as a coal merchant, being engaged both in the home trade and also in an export trade. He sold his home trade to the appellants, who were also coal merchants, retaining the export trade, and entered into a covenant not to "directly or indirectly carry on, or be engaged, or concerned, or interested in the coal trade in any part of Great Britain or the Isle of Man." He afterwards sold his export trade to a company. The sale was not for cash, and he looked to the profits of the company's trade for payment of the purchase money. The company afterwards began to carry on a home trade, and the appellants brought this action for breach of covenant, asserting that the respondent Harrison was "concerned or interested in" the company's coal trade in Great Britain.

Joyce, J., and the Court of Appeal gave judgment for the defenders. The pursuers appealed to the House of Lords.

At the conclusion of the argument for the appellants their Lordships gave judgment.

LORD CHANCELLOR (HALSBURY)—I think that we are all of opinion that what is complained of here is not within the covenant. It would be absolutely impossible, I think, to lay down with precision what is or is not comprehended in such words as "interested or concerned in." All that I can say about it is that you must look at the facts of the particular case, and look at the business meaning of the words. I agree that the question to be determined is, What was the business meaning of these words dealing with such a subject-matter as is dealt with by these agreements? And to my mind it is impossible to say that the words of the covenant make this gentleman "concerned or interested in" this particular business. Of course, the ambiguity is created when words so very wide in their extension are applied to a business of this character. The words "concerned or interested in" would in popular signification undoubtedly include a great deal more than would have been intended by the business meaning of this covenant. When it is put that you are "interested" if you lend money to a person, if you supply him with capital, if you do this, that, and the other which enables a business to be carried on, in a certain wide sense it cannot be denied that you are "interested"; and being "interested" may also include terms of affection, because, speaking in one sense, they may give a person an interest in something. But when you are dealing with the subject-matter which is here dealt with—namely, the carrying on of a business, and endeavouring to prevent the carrying on of that business directly or indirectly, or having any part or concern in that business—I think that every business man would quite comprehend that the mere fact of being a creditor of the firm is not being "concerned or interested in" it. Although in a certain sense every creditor is "interested in" the solvency of his debtor, and in that sense there is an interest, that is not the sort of interest which is contemplated by this covenant It appears to me that this is really the short point which we have to decide, and as far as I am concerned I think there is no doubt about it—that it is not within the covenant. For these reasons I am of opinion that this appeal should be dismissed with costs.

LORD ROBERTSON—I am of the same opinion. I think that the case of the appellants is much too far fetched. When J. & C. Harrison entered into the agreement for the sale to John Harrison and

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Tidswell, they were carrying on their foreign business quite legitimately, and it is that foreign business which they sold to John Harrison and Tidswell. Now, if John Harrison and Tidswell had simply taken over the foreign business, and the clauses which have been referred to had been inserted in the agreement, there could not have been a word to say in support of the appeal. Does the mere fact that the new firm, who themselves are quite free from the obligations of the covenant, intend not to limit their business to the foreign trade, but to carry on the home trade, involve the present respondents in a breach of this contract? It seems to me that the position is really not substantially different from that of a moneylender, or, at all events, that the reasoning must apply to the one case as well as to the other; because the basis upon which the appellants have ultimately rested their case is a very narrow one, that inasmuch as you have these clauses applicable not merely to the export business, but to the other operations of the new firm, therefore the respondents are liable in this action. I think that untenable, and I am quite content to face the challenge which was made by the learned connsel for the appellants to treat this in a business aspect. It appears to me that to apply the word "interested" in this sense would be to give it an extension which would prove most embarrassing, and indeed impracticable, in the ordinary conduct of business.

LORD LINDLEY—I am of the same opinion, and I cannot usefully add anything to the reasons which have been given.

Order appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants — Warmington, K.C. — Haldane, K.C. — Austen-Cartmell. Agents — Deacon, Gibson, Medcalf, & Marriott, Solicitors.

Counsel for Respondents—Neville, K.C.—Hughes, K.C.—Sheldon. Agents—Keene, Marsland, Bryden, & Besant, Solicitors.

HOUSE OF LORDS.

Tuesday, November 28.

(Before Lords Macnaghten, Robertson, and Lindley.)

ALIANZA COMPANY, LIMITED *v.* BELL (SURVEYOR OF TAXES).

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue — Income Tax — Profits — Nitrate Grounds — Exhaustion of Material — Deductions—Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, 1st Case, Rule III, sec.* 159.

An English company owned lands, buildings, and plant in Chili, digging out of the land a substance called "caliche" and extracting from it soda, potash, and iodine, from the sale of which they made their profits. The lands, &c., when all the "caliche" has been extracted would be of almost no value.

Held that in computing their profits for income tax under Schedule D they were not entitled to deduct any yearly sum to meet the exhaustion of the "caliche."

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., STIRLING and MATHEW, L.JJ.), who had affirmed a judgment of CHANNELL, J., upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The Income Tax Act 1842 provides, sec. 100, Schedule D, 1st Case, Rule I—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years."

Rule III—"In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements . . . nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises." . . .

Section 159—"In the computation of duty to be made under this Act in any of the cases before mentioned . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act . . . nor to make any deduction from the profits or gains from any property herein described . . . on account of diminution of capital employed, or loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation."

The appellants were an English company incorporated under the Companies Act, with a registered office in London. They owned land, buildings, and machinery in Chili, the land being a large tract of nitrate grounds. The upper stratum of these grounds consisted of a substance called "caliche," and it was the presence of this substance which gave value to the land. The caliche was dug up and taken to the company's works, where there was extracted from it nitrates of soda, potash, and iodine, from the sale of which the company's profits were derived. When ultimately the caliche in the company's property becomes exhausted their land and plant will have little or no value.

An assessment having been made upon

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the appellants under Schedule D of the Income Tax Act 1842, based on their printed accounts and statements of profits for the proceeding three years, they appealed to the Commissioners of Income Tax claiming to be entitled, for the purpose of computing their profits, to deduct a yearly sum to meet the exhaustion of the nitrate grounds.

The Commissioners of Income Tax, Channell, J., on a stated case, and the Court of Appeal, having all decided against them, they appealed to the House of Lords.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

LORD MACNAGHTEN—I do not think it necessary to say more than a very few words. I think that your Lordships are satisfied with the judgment of the Court of Appeal, and with the reasons by which that judgment is enforced. It seems to me that this claim comes within the third rule, and that it is money wholly and exclusively laid out and expended as capital. For these reasons I move your Lordships that this appeal should be dismissed, and that the appellants should pay the costs.

LORD ROBERTSON—I think it undesirable that any doubt should be thrown upon a settled course of decisions on the income tax law, and it seems to me that although the case has been argued with a vigour which did full justice to it, the arguments advanced are of a most familar character. The propositions required to be established in order to bring it within the provisions and decisions are these—I begin by stating, of course, that it is under Schedule D that the case is to be judged. First of all, is this capital for which it is proposed to obtain a deduction? Now, that seems to me to be entirely concluded by the findings in the case. There is no doubt whatever that the scheme of the enterprise of this company was to invest their capital in the acquisition of this property, and then to proceed to work it as a mining concern. That being so, Collins, M.R., seems to me to be abundantly justified in saying that this is merely another case where capital has been embarked in a wasting subject-matter. The whole of the argument for the appellants is really founded on what I suppose that no one would doubt, that as the output takes place there is a consumption of a certain proportionate amount of the capital. But that is concluded, as Lord Macnaghten has said, by rule 3. I agree with Stirling, L.J., further, that section 159 is never to be laid out of account in these instances, because in its express prohibition of an allowance being made for capital it, on the face of it, refers to all the various cases under the various schedules. Accordingly the argument that there is something peculiar to Schedule A in the principle which has been applied in *Addie's* case (February 16, 1875, 2 R. 431), and in the other cases which have been mentioned, fails before the universal *conspectus* which in express terms is given by section 159 to this very principle.

LORD LINDLEY—I am entirely of the same opinion. It appears to me that it is quite impossible to get out of rule 3. I cannot see my way to do it at all.

Order appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Danckwerts, K.C.—Bremner. Agents—Ashurst, Morris, Crisp, & Company, Solicitors.

Counsel for the Respondent—The Attorney-General (Sir R. B. Finlay, K.C.)—The Solicitor-General (Sir E. Carson, K.C.)—Rowlatt. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Friday, December 15.

(Before Lords Macnaghten, Robertson, and Lindley.)

MANCHESTER CARRIAGE AND TRAMWAYS COMPANY *v.* SWINTON AND PENDLEBURY URBAN DISTRICT COUNCIL.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Statute — Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78) *sec.* 43 — *Interpretation— Purchase of Tramway within its District by Local Authority under Compulsory Powers— Whether bound also to Pay for Depot out of District "Suitable and used . . . for Purposes of Undertaking."*

Section 43 of the Tramways Act 1870 provides:—"Where the promoters of a tramway in any district are not the local authority, the local authority . . . may . . . by notice . . . require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district . . ."

Held that the words "within such district" qualified the word "undertaking" and not the words "lands . . . promoters," and that accordingly a local authority acquiring a tramway undertaking under the above section was bound to pay the promoters the value of a depot suitable to and used by them in the undertaking, although not situated within the district of the local authority.

Judgment of Court of Appeal *reversed.*

This was an appeal from a judgment of the Court of Appeal (COLLINS, M.R., STIRLING

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and MATHEW, L.JJ.) who had reversed a decision of CHANNELL, J.

The facts are set forth in Lord Macnaughten's opinion *infra*.

Their Lordships having taken time to consider their judgments gave judgment as follows:—

LORD MACNAGHTEN — Notwithstanding the decision of the Court of Appeal and a certain hesitation on the part of the learned judge of first instance which led the Court of Appeal to think that they were about to "give effect to his real opinion" by overruling the judgment which he had pronounced, it does not appear to me that this case is one of any great difficulty. The question is raised on an award stated in the form of a special case. The arbitrator, who was appointed by the Board of Trade, was the late Sir Frederick Bramwell, a gentleman admittedly of extreme ability and of great experience in arbitrations of this sort. The parties to the controversy were, on the one hand the Swinton and Pendlebury Urban District Council, and on the other the Manchester Carriage and Tramways Company, Limited, who were (within the meaning of the Tramways Act 1870) promoters of a tramway in the district of the Swinton Council. The tramway under statutory powers and obligations was worked by the tramway company in connection with tramways constructed by the Salford Corporation, and by them leased to the company. In this way the tramway in question formed part of a continuous or through line to Manchester. Adjoining the Salford main line about a mile or three-quarters of a mile from the limits of the district of the Swinton Council, the tramway company had two depots, known as the Ford Lane depot and Church Street depot. On the 22nd January 1901 the Swinton Council duly gave notice to the tramway company that they were required to sell to the council under the conditions and in the manner provided by section 43 of the Tramways Act, so much of their undertaking as was within the district of the Swinton Council. On receiving the prescribed notice, the promoters are bound to sell to the local authority "their undertaking or so much of the same as is within" the "district," and the purchasing authority is bound to pay "the then value"—that is, I think, the value at the date of notice (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatever) of the tramway and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district. The value is to be determined, in case of difference, by arbitration. What the arbitrator has to find is the value to the promoters, not the value to the purchasing authority. Nor are the promoters under any obligation, as the Court of Appeal seems to have thought, to make a good title to the adjuncts and accessories for which the purchasing authority has to pay. If their title be infirm, if their tenure be insecure, or their possession precarious, the arbitrator no doubt would take that into consideration in determining value, but the purchasers must pay the value of their adjuncts and accessories to the promoters whatever it was at the date of the notice, even although they may be of little or no value to the purchasing authority. The notice of January 1901 was given at the instance of the Salford Corporation. Their lease to the tramway company was then about to expire. On its expiration they proposed to work a combined system of tramways through Swinton and Salford as one undertaking, and to work it by electricity instead of using horse-power. As the persons really interested in the purchase under an arrangement sanctioned by Parliament, they represented the Swinton Council in all the negotiations and proceedings consequent upon their notice to the tramway company. After a protracted hearing of much evidence, the arbitrator made his award on the 28th May 1903. The award sets out with minute and perhaps unnecessary detail the relative Acts of Parliament and orders, and the result of the evidence as to the two depots. And then there is a passage which seems to me to be not immaterial, having regard to the view taken by the Court of Appeal—"and pay for the actual tramways within their districts." But they contended that under section 43 they were not compellable to purchase either the Ford Lane or the Church Street depot, on the ground that even if such depots or either of them were suitable to and used by the tramway company for the purposes of their tramways, they were both of them situated geographically without the district of the council, and that the said section only made it obligatory upon the local authority to purchase that which was within their district. Counsel for the tramway company contended that if such depots were in fact suitable to and used with their undertaking within the council's district, the council were under the said section compellable to purchase them, although the depots themselves were outside the district. "I was asked," the arbitrator adds, "by counsel for the Council to state my award in the form of a special case for the opinion of the Court on this point." Now, stopping there, it seems to me that nothing can be plainer than this—that one question, and one question only, was intended to be raised by the special case. It is quite true that the arbitrator does not follow throughout this introductory statement the exact language of the section. In the earlier part he follows it literally. In the latter part he substitutes the expression "used with" for the words "used for the purpose of." In my opinion that is a mere slip—a very natural slip—a slip which the arbitrator, if his attention had been called to it, would have been entitled to correct. Nor can I see that in this particular case there can be any difference in meaning between the two expressions. If a thing is suitable to and used with a tramway I am unable to imagine how the person or company so

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using it can avoid using it for the purposes of the tramway. By what perverse ingenuity could it be used otherwise? Then we come to the award. The arbitrator awards and finds "as a fact that the Ford Lane depot, although in a limited sense used with the undertaking of the tramway company within the district of the council, is not suitable to such undertaking." Then he adds—"I further award and find as a fact that the Church Street depot was used with and is suitable to the said undertaking." Then, following accurately the words of the section, he finds the value of the tramways and "of all lands, buildings, works, materials, and plant of the Manchester Carriage and Tramway Company suitable to and used by them for the purposes of the undertaking." He finds separately (*a*) the value of the tramways lines; (*b*) the value of the land and buildings constituting the Church Street depot and the tramway lines therein and the tramway line in Church Street leading into the depot; and (*c*) the value of the fixtures and fittings in and upon the Church Street depot as per the valuation therein before referred to. The total was £49,006. But the arbitrator adds that should the Court be of opinion that the Council were not compellable to purchase or pay for the Church Street depot, then the last two items, which amounted together to £24,317, were to be deducted, and the value was to be reduced to £24,689. The learned judge of first instance answered the question in favour of the tramway company. The answer of the Court of Appeal was in favour of the Swinton Council. The learned Lords Justices of the Court of Appeal inferred from the variation in language to which I have referred that there was some ambiguity in the award, and that the arbitrator had it in his mind to submit to the Court some question of law which he certainly did not formulate, and which the learned counsel for the Swinton Council candidly admitted that he did not ask him specifically to state. What that question could possibly have been I am unable to imagine. The question of user was a mere question of fact. The question of suitability was a mere question of fact. Both those questions had been answered by the arbitrator, and answered, your Lordships will observe, as questions of fact in favour of the Swinton Council. The only question which the arbitrator reserved —the question depending on geographical position—was not argued seriously at your Lordships' Bar. It was determined in favour of the appellants by the learned judge of first instance. The Court of Appeal apparently did not think it worth discussing. And, speaking for myself, I do not think that it is open to argument. The learned Lords Justices in the Court of Appeal seem to have been much impressed with the consideration that the arbitrator was a gentleman of much experience and ability. They thought it most unlikely that he should have made a slip or a blunder, as they termed it, and therefore they came to the conclusion that he must have meant something by the change in his language. Well, persons of the greatest experience and ability do make slips sometimes, and I must say that I should have thought it much more likely that a man of experience and ability should make a slip than that anybody of common sense in a serious document, and after much consideration, should present to the Court a conundrum in the form of a cryptogram. It is not, perhaps, uninstructive to find that both the learned and experienced counsel in their address to the arbitrator made just the same slip, if it be a slip, and that the learned counsel for the Swinton Council was, if I may venture to say so, the first offender. I therefore move your Lordships that the order appealed from be reversed, and that the order of Channell, J., be restored, with costs both here and below.

Lord Robertson—It is certain that in this special case the arbitrator directly, expressly, and formally states one point for the opinion of the Court. It is certain that no other point is directly, expressly, or formally stated by him, or indeed stated at all. The most that can be said, or has been said, is that it is to be inferred from his having mentioned certain things which would be relevant to the consideration of another question, that he really intended to submit that other question. To this there seem to me to be several answers, and the first is that the arbitrator has shown by the structure of his special case that his way of stating a point for decision was to state it directly or expressly, and I must say that I think this conclusive. But secondly, even if it were permissible to infer that the arbitrator really intended to submit a further point from his having mentioned things relevant for its discussion, it must be remembered (and has been forgotten) that this is not merely a special case but an award, and many things are relevant to the award, and of a kind usually inserted in an award, which may not bear on the point submitted for decision. This special case is presented not under sec. 19 of the Arbitration Act, which provides for special cases pure and simple, but under sec. 7 (*b*), which provides for awards being stated in the form of a special case. Now it cannot be affirmed of all that is set out in this special case that it is relevant either to the question admittedly stated or to the question which it is now sought to evolve out of it, and the reason is that the document serves the double purpose of award and special case. Even if all the passages in the award which are founded on by the respondents could be pressed into their service they are ultimately confronted with the difficulty that the arbitrator has decided that the depot was suitable to the use of the undertaking. Now it is against this conclusion that the respondents invoke the consideration of distance and inaccessibility, and this conclusion is determined against them in the exact terms of the statute. I am unable to think that there is any veiled importance or significance in the use of the word "with" in the award. There is no limit or sug-

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gestion in the award of any intention in this abbreviation, and in the proceedings the word "with" was treated by both parties as convertible with the more ample expression of the statute. I have only to add that in my opinion the words "within such district" qualify the word "undertaking," and not the words "lands, buildings, works, materials, and plant of the promoters." The reading which I adopt is the natural reading, and the reason of the thing is adverse to the opposite view, for it cannot be suggested that stables, which might be close to the district although outside it, should be excluded from the clause, while the opposite construction breaks down entirely over the words "materials and plant." I am for reversing the judgment appealed against.

LORD LINDLEY—I am also unable to agree with the Court of Appeal in this case. The arbitrator here was not stating a case for his guidance before making his award; he made an award and set out the facts which he considered material in order to make it intelligible and satisfactory. But he made it, as he had power to do, subject to a question of law, which he was asked to state, and did state in very clear terms, in order that it might be decided by the Court. He was not requested to state, and did not in fact state, more than one question for such decision, and that question was whether the Church Street depot, which was outside the Swinton district, had to be paid for. The question submitted by the arbitrator to the Court for decision has been properly decided, and this is now scarcely disputed. But your Lordships are asked to say that the Swinton District Council desired to raise another point of law, and that the arbitrator has stated the facts in such a way as to show that he intended to raise another question, namely, whether the Church Street depot could in point of law be said to have been "suitable for and used by the company for the purpose of the company's undertaking." Counsel frankly admitted that the arbitrator was never asked to refer any such question to the Court, and I cannot myself see that he has in fact done so. The question of suitability is one of fact, and the arbitrator has found that question in favour of the selling company. It requires no little ingenuity to discover that such a question can be regarded as a question of law; but assuming that it can be so regarded, it is in my opinion manifest that no such question was intended by the arbitrator to be referred to the Court, and that he has not in fact stated any such question for its decision. I am convinced that the words "used with" in the award are only an abbreviation for "used for the purposes of," and that the arbitrator used the two expressions not intentionally by way of contrast, but inadvertently as synonymous. The appeal ought to be allowed with costs in the usual way.

Order appealed from reversed. Order of Channell, J., restored.

Counsel for the Appellants—Moulton, K.C.—Astbury, K.C.—Eldridge—Sandars. Agents—Ayrton, Biscoe, & Barclay, Solicitors.

Counsel for the Respondents—Balfour Browne, K.C.—Pickford, K.C.—Rhodes. Agents—Trass & Taylor, Solicitors.

HOUSE OF LORDS.

Friday, December 15.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

UNDERGROUND ELECTRIC RAILWAY COMPANY OF LONDON *v.* COMMISSIONERS OF INLAND REVENUE.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue — Stamp Duty — Conveyance on Sale—Ad valorem Duty—Periodical Payment—Payment Contingent on Profits—Stamp Act 1891 (54 *and* 55 *Vict. c.* 39), *secs.* 56 *and* 57.

Sec. 56 (2) of the Stamp Act 1891 provides as follows:—"Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

By an agreement by which a company's business was sold it was provided that part of the consideration payable to the sellers was to be the annual payment out of profits of a sum equal to a dividend of 3 per cent. on the amount for the time being paid up on such of the original ordinary share capital in the new company as should for the time being have been issued; such payment was however postponed to the payment of a cumulative annual dividend of 5 per cent. to the ordinary shareholders. At the date of the agreement the whole ordinary share capital had been issued, but only about a quarter of it paid up.

Held that under sec. 56 *ad valorem* duty fell to be paid on a sum representing 3 per cent. on the amount of ordinary share capital paid up at the time of the agreement (that being "money payable periodically . . . in perpetuity, or for an indefinite period . . .") multiplied by twenty, and that it was immaterial that the amount payable periodically was subject to the contingency of there being sufficient funds to pay the 5 per cent. dividend.

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Per Lord Lindley—"There is nothing in sec. 57 which either cuts down or excludes sec. 56."

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., STIRLING and MATHEWS, L.JJ.), who had reversed a judgment of CHANNELL, J., upon a case stated by the Commissioners of Inland Revenue.

Sec. 56 (2) of the Stamp Act 1891 is quoted in the rubric.

Sec. 57 provides—"Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part as the case may be of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

The Underground Electric Railway Company of London acquired by purchase the undertaking of the Metropolitan District Electric Traction Company, Limited, and the bargain between them as to the price to be paid was concluded in an agreement which contained, *inter alia*, the following provision—"Article 3—The profits of the new company (the appellants) available for dividend in respect of each year shall be applied in the following order and manner—that is to say. First, in payment of a cumulative dividend at the rate of 5 per cent. per annum up to the end of such year on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly, in paying to the Traction Company or its assigns as a further part of the consideration for the said sale such a sum as shall be equal to a dividend of 3 per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital of £5,000,000 in the new company as shall for the time being have been issued by the new company."

Under sec. 59 (1) of the Stamp Act 1891 the above agreement was equivalent *quoad ad valorem* duty to an actual conveyance on sale.

At the date of the agreement the whole of the ordinary share capital of £5,000,000 had been issued, and £1,300,000 had been paid thereon. Upon this sum a dividend of 3 per cent. for the year would be £39,000.

The Commissioners of Inland Revenue being of opinion that the contingent annual dividend payable under article 3 was part of the consideration for the sale, and that it was payable either in perpetuity or for an indefinite period within the meaning of sec. 56 (2) of the Stamp Act of 1891, assessed the *ad valorem* duty at 10s. per cent. (sec. 56 (4)) on £39,000 multiplied by 20, bringing out the figure of £3900.

The Underground Electric Railway Company argued that the sum in question being payable on a contingency fell within section 57 of the Stamp Act 1891, and not within section 56.

CHANNELL, J., held that no duty could be assessed in respect of any part of the annual sum payable under sub-clause 2 of article 3 of the agreement, on the ground that the amount payable was unascertainable.

The Court of Appeal reversed this decision.

The Electric Railway Company appealed to the House of Lords.

Their Lordships having considered their opinions gave judgment as follows:—

LORD CHANCELLOR (HALSBURY)—I have had an opportunity of reading the opinion upon this case which Lord Lindley has written. I quite concur in it, and have nothing to add.

LORD ROBERTSON—I think that the judgments given in the Court of Appeal were perfectly right.

LORD LINDLEY—When the stamp duty payable on the conveyance in this case had to be ascertained, part of the consideration for the sale was 3 per cent. of the then paid-up capital of the purchasing company. This sum was a minimum sum, and it was payable periodically for an indefinite time. The amount payable in future was liable to be increased, but not to be diminished, except in certain events to which I will now refer. One of these events, and the only one in my opinion which creates any difficulty, was the possible insufficiency of the profits of the company to pay the amount referred to after paying a dividend of 5 per cent. on the paid-up capital of the company. That dividend of 5 per cent. had to be paid out of the profits of the new company to its shareholders before any further payment became payable to the selling company. The minimum sum payable periodically was so payable subject to a contingency, viz., the existence of a sufficiency of profits to pay, first, a dividend of 5 per cent., and then a further dividend of 3 per cent. We have, therefore, an ascertained minimum amount payable periodically as part of the consideration of the sale, but payable on a contingency. Is such a sum within sec. 56, clause 2, of the Stamp Act 1891? I need not read it again. Its language is very wide. It is contended that the words "money payable periodically" in that section do not apply to money payable on a contingency, because contingent payments are dealt with by sec. 57. I do not myself see how sec. 57 assists the appellants. Its effect seems to be that where the consideration for a sale consists of money payable on a contingency, such money is to be taken into account in ascertaining the stamp duty to be paid on the conveyance of the property sold. I see nothing in sec. 57 which either cuts down or excludes sec. 56. It is also contended that the words "money payable" in sec. 56 do not include money payable upon a contingency, because the contingency may never happen, and no money may be payable. But the words of sec. 56 appear to me to be wide enough to cover all moneys which may become payable, and the latter

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part of clause 2 certainly favours this construction. Moreover, sec. 57 says that money payable on a contingency is to be taken into account, and that to my mind removes any doubt which might otherwise arise as to the inclusion of contingent payments in sec. 56. Then it is said that the purchasing company may be wound up, or may at some future time reduce its capital, and so reduce in future the minimum sum payable periodically to the selling company. No doubt these are possible events, but at most they are merely other contingencies on which the payment of the minimum sum depends. Unless the contingency of winding up or reducing the capital happens, the minimum sum continues to be payable. The fact that the minimum sum is payable on more contingencies than one is in my opinion quite immaterial. They only affect the ability of the purchasing company to pay, which is the only contingency of any importance. For these reasons I am of opinion that the decision of the Court of Appeal was correct, and that this appeal should be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Roskill, K.C. —Austen-Cartmell. Agents—Bircham & Company, Solicitors.

Counsel for the Respondents—The Attorney-General (Sir R. Finlay, K.C.) and Rowlatt, Sir E. Carson, K.C., with them. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Friday, December 15.

(Before Lords Macnaghten, Robertson, and Lindley.)

BRITISH EQUITABLE ASSURANCE COMPANY *v.* BAILY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Company — Life Assurance Company — Assurance Policy—Construction—Effect of Prospectus on Terms of Policy—Participation in Profits—Change of Regulations.

The deed of settlement of an insurance company founded in 1854 provided that its profits were to be divided as directed by its bye-laws, and that its bye-laws could be altered by other bye-laws. In 1886 the bye-laws provided that the whole profits made in the mutual branch were to be divided among the policy-holders in that branch. In that year the company issued to the respondent a policy entitling him to £400 on death, and "all such other sums, if any, as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise according to their practice for the time." There was nothing further in the policy or the proposal which could be construed into a contract by the assurance company to pay anything beyond the £400, and the respondent's proposal for insurance was made on a form in which he expressly agreed to "conform to and abide by the deed of settlement and bye-laws, rules, and regulations of the company in all respects." The respondent, however, had taken his policy relying upon a prospectus issued by the company, which stated:—"The entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund."

In 1902 the assurance company proposed under the Companies Act 1890 to alter its constitution by becoming registered as a company with limited liability, with a memorandum and articles of association which provided that 5 per cent. of the profits of the mutual department were to be carried to a reserve fund. The proposed change was perfectly competent, looking to the constitution of the company as set forth in the original deed of settlement.

Held that the company had not contracted with the respondent that the whole of the profits of the mutual department should be divided among the policy-holders in that department. Judgment of Court of Appeal *reversed*.

Appeal from a judgment of the Court of Appeal (WILLIAMS, STIRLING, and COZENS HARDY, L.JJ.), who had affirmed a decision of KEKEWICH, J.

The facts of the case appear sufficiently from the rubric and the judgments of their Lordships.

At the conclusion of the arguments their Lordships took time to consider their judgment.

LORD MACNAGHTEN—This case raises a question between an insurance company and the holders of participating policies in the company's office. At the suit of a plaintiff suing in a representative character, Kekewich, J., declared that the company ought to continue to distribute the entire profits coming from the participating branch of its business, after making certain deductions which it is not necessary to specify, among the holders of participating policies. The Court of Appeal has affirmed that order. The judgment of the Court was delivered by Cozens Hardy, L.J. The ground of the decision is expressed in a single sentence—"A company cannot by altering its articles justify a breach of contract." No one, I should think, would be inclined to dispute the proposition. But, with all deference, that is not the question. The simple question is, what was the contract between the parties? The distribution of profits in this company is governed by a bye-law duly passed in accordance with the provisions of its deed of settlement made in 1854, when the company was competently registered under the Acts then in

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force. The deed of settlement contains a clear and distinct provision empowering an extraordinary general meeting to make bye-laws for the government of the company, subject to a proviso that such bye-laws shall not be valid until confirmed by a subsequent extraordinary meeting. It was under this article that the bye-law relating to the allocation of profits in favour of participating policy-holders was made. There is a subsequent article declaring that "the provisions of the deed of settlement and any bye-law of the company may be altered, repealed, or suspended by a bye-law or bye-laws, but not otherwise." The plaintiff's proposal for insurance was made on a printed form in which the proposer expressly agreed to "conform to and abide by the deed of settlement and bye-laws, rules, and regulations of the company in all respects." The proposal was accepted. A policy which refers to the proposal was executed. It provides for the payment of the sum assured, and "all such other sums, if any, as the company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The conditions indorsed on the policy provide that the corporate funds, property, and effects of the company as mentioned in the policy, after satisfying all prior claims and charges "according to the provisions of the deed of settlement and the bye-laws of the company for the time being," shall alone be liable for the payment of the moneys payable under the policy. If there were nothing more it would be absurd to suggest a doubt as to the right of the company to alter its bye-laws in accordance with the provisions of the deed of settlement, however long the practice of the company as to the application of profits might have continued undisturbed. It appears, however, that this company, like all other insurance companies, has been in the habit of publishing a series of tables applicable to participating policies and other policies issued by the office. As usual those tables are prefaced by an attractive prospectus enlarging on the peculiar and extraordinary advantages offered to those who are willing to insure in the office. Now, the prospectus, under the head of "Mutual Life Assurance Department," points out the objections to ordinary mutual societies—objections, as it seems to me, mainly, if not entirely, applicable to such societies at starting. It then states that in the British Equitable Assurance Company, which is not a mutual office any more than any other proprietary office which grants participating policies, these defects are avoided. Then follows the statement—"The current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department"—that is the participating department—"and the general premiums and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders." It was stated on behalf of the plaintiff, and admitted by the company, that the plaintiff insured in the company in reliance upon the statement contained in the prospectus, and was induced thereby to apply to the company for the grant of the policy in question, and "accepted such policy on the faith thereof, and would not have done so in the absence of such statement." It is not clear to my mind what is meant by this allegation and admission. Probably it means no more than this—that the plaintiff was attracted to this particular office by its prospectus. Now the statement in the prospectus was an accurate statement of the position of affairs at the time when the prospectus was brought to the notice of the plaintiff. It will be observed that the prospectus does not purport to give an assurance of any sort that the allocating of profits would never be altered, or to indicate that the system then in use and the practice existing at the time were essential features or fundamental conditions of the constitution of the company. Nobody, I should imagine, would effect an insurance in the belief that the laws and regulations of the office which he selects are immutable. What an insurer relies upon is the character and reputation of the company, and the certainty that no office which hopes to keep its business would think of altering the distribution of its profits to the prejudice of its policy-holders. Such a step would ruin the most flourishing company. It would be suicide. I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract, or are to be treated as incorporated in the contract of insurance and so limiting the powers of the company in the full and free exercise of which the plaintiff bound himself to acquiesce. I have not troubled your Lordships by referring to changes in the constitution of the company consequent upon the Act of 1862, or to the proposal now on foot to substitute a memorandum and articles of association for the deed of settlement and bye-laws of the company. The question would, I think, be precisely the same if the proposal were to alter the bye-laws under the provisions of the deed of settlement. I move your Lordships that the appeal be allowed and the action dismissed with costs both here and below.

LORD ROBERTSON—The appellants are an assurance company carrying on the business of assurance in its various departments. Among other branches of their business they issue life policies, the holders of which participate in the profits of the business. The respondent holds one of these policies. He is not a member of the company, and holds no relation to it other than that of a policy-holder. At the time when the respondent's policy was issued—namely, in 1886—the whole of the profits made in this branch, which is called the Mutual and Participating Branch, were divided among the policy-holders in that branch. In 1903 a change was made by altering one bye-law under a power given by another bye-law, and now there is first taken out of the profits provision for a reserve fund, and

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what is distributed among the policy-holders is the balance, instead of as formerly the whole of those profits. That this change was made in the interests of the company as an institution, and was a matter of sound finance, is not in dispute. That it was competent to the company in terms of its institution, and regularly done, is also not in dispute; and it is therefore unnecessary to go through the various provisions in the deed of settlement and bye-laws. The case of the respondent is that, standing as he does outside the company, his contractual rights as a policy-holder have been violated by the change. The order which he has sought and obtained is a declaration that the appellants ought to continue to distribute the entire profits coming from the Mutual and Participating Branch. Now the whole question in the case is, Did the appellant company contract with the respondent to the effect of depriving themselves of the right which they had under their constitution of making this change? It seems to me not merely that they did not, but that, as part of the contract, the respondent bound himself to take only such profits as should be declared according to the rules of the company as they existed at each declaration of profits. The policy itself, to which one naturally first looks for the contract, gives no countenance to the respondent's claim, and, on the contrary, limits his rights to the amount assured and "all such other sums, if any, as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." When we turn to the proposal we find that the respondent signed a declaration that "I agree to conform to and abide by the deed of settlement, and bye-laws, rules, and regulations of the company in all respects." The only express reference to profits contained in the proposal is in the eleventh question, "If in the Mutual Department are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" The answer was, "By way of addition." The third question is, "Sum to be assured and for what term?" and the answer is, "£400 payable under table A." Now, table A is all figures except the following words at the top:—"Annual premiums to assure a sum of money at death, with profits in addition;" and at the bottom, "The entire profits divided triennially." I have now stated everything bearing on the subject that is to be found in the policy, the proposal, and the only document referred to in these instruments, namely, table A. These seem to me to constitute the contract, and they negative the respondent's case and establish that of the appellants. But the Court of Appeal and the learned Judge whose judgment they affirmed have felt themselves entitled to decide the case not on those documents but on the prospectus which was shown to the respondent before he made his proposal. The theory of Kekewich, J., was that there was a "collateral contract," while the learned Lords Justices justify the introduction of the prospectus on the somewhat singular ground that inasmuch as table A, which is referred to in the proposal, is to be found in the prospectus, therefore you are entitled to read the rest of the prospectus relating to mutual policies as incorporated in the contract. I am unable to agree in this. We are not here in an action for damages, or for rescission of the contract, and I do not feel entitled when the respondent in his proposal refers to table A to hold him as incorporating all the rest, or part of the rest, of the print in which that table is to be found. The passages in the prospectus on which the Court of Appeal proceed contain a description of the system as *de facto* existing at the time. But it seems to me that the respondent, so far from binding the appellant company to perpetuate that system, has placed himself in the hands of the company to the extent of binding himself to "abide by"—those are the words of the proposal—their rules. There is nothing repugnant or unreasonable in his thus following the fortunes of the company, and this is what he has done. For these reasons I think that the judgments appealed against ought to be reversed.

LORD LINDLEY—This appeal turns entirely on the contracts entered into between the insurance company and its participating policy-holders represented by Mr Baily. The contracts are contained in the policies issued to them. It is contended that the applications for these policies were based on the faith of prospectuses containing statements and holding out inducements which preclude the company from making alterations in the mode of applying their profits without the consent of the policy-holders. If these gentlemen were seeking to rescind or rectify their contracts on the ground of fraud or mistake, or were suing for damages occasioned by fraudulent misrepresentations, it would be legitimate to refer to the statements in the prospectuses on the faith of which they became policy-holders. But the complaining policy-holders are not doing anything of this sort, and the prospectuses not being referred to in the policies cannot in my opinion be legitimately referred to in order to construe the contracts into which the policy-holders have been induced to enter. These contracts are to be found in the policies themselves. By each policy the company agree to pay to the executors of the assured a fixed sum out of the funds of the company, "and all such other sums, if any, as this company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being: Provided always that this policy is made subject to the conditions and regulations hereon indorsed." That is the contract between the parties, but the indorsed conditions and regulations are part of it, and the fifth is important. The company was formed as long ago as 1854, and

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the object of the fifth regulation is to limit the liability of the members of the company. But the regulation throws light on the position of the policy-holders and on what they can claim under their policies. The fifth indorsed condition or regulation in effect provides that the funds of the company, "after satisfying prior claims and charges according to the provisions of the deed of settlement and bye-laws of the company for the time being, shall alone be liable for the payment of the moneys payable under the policy, and that no shareholder, member, director, or other officer of the company shall be liable to any demand in respect of the policy beyond or otherwise than out of the payment in the manner and at the times provided for by the deed of settlement and the then bye-laws of the company of the amount thus remaining unpaid of the shares held by him." The reference to the deed of settlement and bye-laws for the time being is all important, for the bye-laws determine how the profits of the company are to be disposed of, and those bye-laws are subject to alteration from time to time by an extraordinary meeting of the shareholders of the company (see clauses 9, 24, 56 of the deed of settlement). The policy-holders are not shareholders, and have no voice in making or altering bye-laws; but the sum payable under any policy, in addition to the fixed sum mentioned in it, is made by the policy itself to depend upon what the directors may have ordered to be added to such sum, and that depends upon their practice for the time being. The practice of the directors in its turn depends on how the profits are to be ascertained and divided in accordance with the bye-laws, which may be altered from time to time as above pointed out. I am quite unable to adopt the view taken by the Courts below as to the inability of the company to alter their bye-laws as they have done, and, *inter alia*, to make a sinking fund without the consent of the policy-holders. I can find no contract to that effect. A collateral contract so wholly opposed to the contracts contained in the policies is not, in my opinion, established by the evidence in the case. Of course the powers of altering bye-laws, like other powers, must be exercised *bona fide*, and having regard to the purposes for which they are created and to the rights of persons affected by them. A bye-law to the effect that no creditor or policy-holder should be paid what was due to him would in my opinion be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated and sought to be restrained is fair, honest, and businesslike, and will, in the opinion of the directors and shareholders of the company, be beneficial as well to the policy-holders as to the shareholders. The sole question is whether such an alteration infringes the rights of the policy-holders. In my opinion it clearly does not. I am of opinion that the appeal should be allowed, and that the action should be dismissed, and that the respondents should pay the costs of the action and of the appeals both here and below.

Judgment appealed from reversed.

Counsel for the Appellants—Levett, K.C. —Whinney.

Counsel for the Respondent—P. O. Lawrence, K.C.—Gatey. Agents—H. Gover & Son, Solicitors for all Parties.

HOUSE OF LORDS.

Friday, December 15.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

CALTHORPE *v.* TRECHMANN.

MACLEAY *v.* TAIT.

(On Appeal from the Court of Appeal in England.)

Company — Liability of Directors — Prospectus — Non-Disclosure of Contracts — Fraudulent Prospectus — Action for Damages — Necessary Proof — "Knowingly Issuing" — Mistake — Clause of Waiver — Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *section* 38.

Section 38 of the Companies Act 1867 provides that every prospectus of a company shall specify certain particulars of any contract entered into by the company before the issue of the prospectus, and that any prospectus which does not do so "shall be deemed fraudulent" on the part of the directors "knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

In an action for damages for fraud brought against the directors of a company who had issued a fraudulent certificate within the meaning of the above section, by a person who had taken shares on the faith of the certificate, *held* (1) that to succeed he must prove (*a*) that had he known of the omitted contract he would not have become a shareholder; (*b*) that he had suffered damage; (2) that the omission having been due to an innocent mistake of the directors they were in any case protected by a clause of waiver waiving any fuller compliance with sec. 38 than that contained in the prospectus.

Per Lord Lindley—"The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus but never knew of the existence of a contract which ought

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to have been disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section but forgot all about it when he issued a prospectus not referring to it."

These were appeals from two decisions of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.), who had affirmed decisions of JOYCE, J., in favour of the plaintiffs.

The plaintiffs in each case were shareholders in, and the defendants were directors of, the Standard Exploration Company, Limited. The plaintiffs' case was that they had taken shares in the company on the faith of a certain prospectus issued by the directors in which the latter had failed to disclose a certain contract entered into by the company prior to the date of the prospectus. They contended that under section 38 of the Companies Act 1867 the prospectus was fraudulent and that they were entitled to damages. (Section 38 of the Act of 1867 has been repealed by the Companies Act 1900, and its place taken with certain modifications by sec. 9 *k* of that Act).

The facts of the case and the arguments of parties are sufficiently set forth in the opinions of their Lordships, and in particular in that of Lord Lindley.

At the conclusion of the arguments their Lordships took time to consider their judgment.

LORD CHANCELLOR (HALSBURY)—Both these actions are actions for damages brought by the respective plaintiffs, who complain that they have been injured by the fraud of the defendants, and claim damages for the loss which they have sustained by the fraud of which they complain. As the actions are identical in their merits I will in what I have to say hereafter treat the matter as if their were one plaintiff and one defendant. But for the 38th section of the Companies Act 1867 it is certain that neither of these actions would have been brought; and the real question to be debated is whether that section does, or rather did, more than enact where a contract which ought to have been inserted in a prospectus is omitted that such omission shall be held to be fraudulent. That is what the section in terms enacts, and I think that it decides no more. Now in order to entitle the plaintiff to recover damages where he sues for damage suffered by reason of a fraud upon himself, he must prove that he sustained them, and as one step towards that proof he must show that he acted on the faith of that fraudulent statement. It is an old judicial observation that fraud without damage or damage without fraud will found no action. Now, in this class of case, where misstatements are made in a prospectus and people have been led to take shares the taking of which has led to loss, I have often said that it is quite a fair inference to draw—if the prospectus is calculated to induce people to take shares and they do take shares—that the prospectus, tainted with falsehood as it is, is to be acted on as a whole—that people cannot be expected to analyse their own mental sensations so minutely as to be able to explain what particular statement has induced them to become subscribers; but the question under this section is a very different one, and I think to enable a plaintiff to recover damages that he must convince the tribunal before whom the question comes that if he had known of the omitted contract he would not have become a shareholder. That is what he must prove. Now in this case I do not believe for a moment, for the reasons to be given by Lord Lindley, that there would have been the smallest difference in the plaintiff's conduct if the contract in question had been disclosed as it ought to have been. I have had the opportunity of reading what Lord Lindley has written on that part of the subject, and I entirely concur with him. I also agree with him as to the waiver clause. Where a clause of that sort has been inserted as part of the machinery for fraud, it will, of course, afford no protection to its contrivers, but where, as in this case, it is a perfectly honest slip, why should it not be a protection? I know no reason. I move therefore that both appeals be allowed, and that both actions be dismissed with costs both here and below.

LORD ROBERTSON—It is in my opinion quite clear that the statute, by declaring a prospectus to be fraudulent does not dispense the person founding on the fraud from proving that damage has resulted from the fraud. That is plain on principle, and if it were needed there is good authority for it. On the other hand, the vice of the prospectus being an omission, the question whether if that omission had not taken place the result would not have been the same—that is to say, the shares would have been taken—is one requiring cautious and delicate handling. I do not think it an insoluble question, as has been suggested. But even for the person whose election to take or not to take is in debate, and supposing him to speak with absolute candour, it requires a mind of singular clearness to decide how he would have acted if the omitted contract had been named, and it has to be borne in mind that it is not how he ought in reason to have decided, but how he, the particular individual, would have decided, that has got to be ascertained. Accordingly, one has to make full allowance for all sorts of considerations and prejudices—that the contract made one too many, and the thing too complicated, or that he did not like the names of the people, and so on. Now, applying this view to the present case, I cannot join in any emphatic assertions about the conclusiveness of the evidence. But I take into account the nature of the omitted contract, and the account given by this gentleman of his views of the enterprise, and I think it safe to infer that the omission of this contract did not affect

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his decision to apply for shares, and that he would not have acted otherwise if it had been mentioned. On this ground I agree in the reversal proposed.

LORD LINDLEY—Both these appeals turn on the true construction of section 38 of the Companies Act 1867, and of the application of that section to the facts of the cases which have to be considered. Before attempting to apply the section to those facts it will be convenient to examine the section itself, and the construction which has been judicially put upon it. The section consists of two parts. The first states that a company's prospectus must contain certain particulars, the second declares that a prospectus which does not contain those particulars "shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares on the faith of such prospectus, unless he shall have had notice of such contracts." The particulars which are required to be stated "are the dates and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of such prospectus." The section says no more. When the section has to be applied to any particular case, *i.e.*, when a plaintiff sues a defendant for damages for a breach of duty imposed by this section, the following questions necessarily arise, viz., (1) Is the document to which the plaintiff says no reference is made in the prospectus such a contract as is described in the first part of the section? If it is not such a contract, there is an end of the case. If it is, and if it is not disclosed, then it is necessary to inquire (2) whether the defendant was a promoter, director, or officer of the company; (3) whether he knowingly issued the prospectus; (4) whether the plaintiff took shares on the faith of the prospectus; (5) whether he had notice of the undisclosed contract before he applied for his shares? Assuming that all these questions are answered in the plaintiff's favour, there are still other questions as to which the section is wholly silent, viz., what is the plaintiff's remedy, and what more must he prove to entitle himself to damages? These matters are left to be dealt with by the judicial tribunals of the country, and they have nothing to guide them except the established principles applicable to actions for fraudulent misrepresentations — *Twycross* v. *Grant*, 2 C.P. Div. 469, decided that section 38 of the Companies Act 1867 could hardly apply to all contracts which fell within its words, but certainly included all contracts by the persons named in the section which might be material to be known by applicants for shares. Bramwell, L.J., and Kelly, C.B., thought that the words "any contract" ought to be still further restricted, but this opinion did not prevail. In *Twycross* v. *Grant* the jury found as facts that the plaintiff took his shares on the faith of the statements of the prospectus, and that if the contracts there in question had been disclosed or referred to in the prospectus the plaintiff would not have taken the shares. They also found that the defendant *bona fide* believed that the contracts need not have been set forth. The jury found a verdict for the plaintiff, and gave him as damages the full amount which he had paid for his shares, although he might have sold them at a premium before he brought his action. The case came before the Common Pleas Division and the Court of Appeal, and the verdict was upheld. The construction put on section 38 in *Twycross* v. *Grant* by the Common Pleas Division has, I believe, been accepted as sound ever since it was decided, viz., 1877; and on the question of damages, and also on the immateriality of the defendants' belief that section 38 did not apply, the decision in *Twycross* v. *Grant* was approved, and followed by this House in *Shepherd* v. *Broome* (1904), A.C. 342. *Twycross* v. *Grant* did not raise, and therefore did not settle, the very important question whether section 38 does more than make non-disclosure equivalent to actual fraud in the cases to which the section applies. On proof of the non-disclosure of a contract required to be disclosed, the section declares that the prospectus is to be deemed fraudulent on the part of the persons named in the section. No evidence, therefore, of evil intention on their part is required to be given by the plaintiff, and, on the other hand, the section renders proof by them that they had no evil intention immaterial. But an action for damages based on fraud, or on what is to be deemed fraudulent, can only be maintained by a person who can prove that the fraud, or what is to be deemed fraud of which he complains, has caused him damage, and the question is raised how is this principle to be worked out when applied to actions based on section 38? The section in terms gives no remedy or cause of action, but it is a remedial section for the protection of applicants for shares against the wiles of promoters and others. It is noteworthy that what is deemed to be fraudulent is the prospectus, and not merely non-disclosure of a contract required to be referred to. The language of the section is consistent with the view that anyone who is induced to take shares by a prospectus which, although honest and true in all its statements is to be deemed fraudulent, and has lost his money by so doing, can maintain an action for damages even although he was not in fact misled in any way whatever. He may have relied only on statements which were true, and the non-disclosed documents may be such that he would have attached no importance to them if he had known of them. The language of the statute is open to such a construction; but if so construed it leads to a result which is so unjust and so inconsistent with the principles which govern actions for damages occasioned by fraud that some other interpretation consistent with the language of the section and with established principles ought to be sought for, and if found ought to be adopted. The difficulty has been observed and commented upon in several cases. In *Sullivan* v. *Mitcalfe*, 5 C.P. Div. 455,

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which arose on demurrer, Thesiger, L.J., after approving the decision in *Twycross* v. *Grant* on sec. 38, said that "no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." Bramwell, L.J., adhered to the opinion which he had expressed in *Twycross* v. *Grant*, and on the construction of the first part of sec. 38 did not agree with Thesiger, L.J. But on principle I think that Thesiger, L.J., was right. Lord Blackburn, in his well-known judgment in *Smith* v. *Chadwick*, 9 A.C. 187, pointed out that a plaintiff who sues for damages by reason of having been induced by a fraudulent prospectus to take shares in a company must prove both fraud and damage to himself occasioned by such fraud. *Smith* v. *Chadwick* did not turn on sec. 38, but that section says no more than that a prospectus shall be deemed fraudulent against certain persons if it does not disclose certain documents. But proof that a document is fraudulent is not all that a plaintiff must prove in order to recover damages. He must further prove damage occasioned to himself by the fraud of which he complains. Proof that he applied for shares on the faith of a prospectus which is to be treated as fraudulent by sec. 38, and that he obtained them and paid for them and lost his money, is *prima facie* evidence, but only *prima facie* evidence, of damage by fraud on himself. *McConnel* v. *Wright* (1903), 1 Ch. 546, goes no further than this. But if the plaintiff is challenged on this point he must go a step further and prove that he was misled by what makes the prospectus fraudulent, *i.e.*, the omission to disclose some document which ought to have been disclosed. This was the view taken in *Nash* v. *Calthorpe* (1905), 2 Ch. 237, which in my opinion was correct. And it is noteworthy that Romer, L.J., agreed with the decisions of the Court of Appeal in *McConnel* v. *Wright*, and also in the later case of *Nash* v. *Calthorpe*, which was not decided until after the cases before your Lordships came on for trial. Another question which has been much discussed is the meaning of "knowingly issued" in the second part of sec. 38. It is necessary to prove that the defendant knowingly issued the prospectus; and this has been held to mean issued the prospectus knowing of a contract such as is described in the section, and knowing that the prospectus did not disclose it. The fact that a defendant honestly but erroneously believed that the section did not apply to a particular contract of which he knew will not protect him from liability. This was decided in *Twycross* v. *Grant*, and by this House in *Shepheard* v. *Broome*. The language of the statute in terms applies to directors and others who knowingly issue a prospectus which does not disclose such a contract as is mentioned in the first part of the section, whether they knew of its existence or not. But it can hardly be supposed that the Legislature meant to brand with fraud a director who knowingly issued a prospectus but never knew of the existence of a contract which ought to have been disclosed. I cannot, however, think that the section can be properly restricted so as not to apply to a director who knew of a contract such as is described in the first part of the section but forgot all about it when he issued a prospectus not referring to it. Whether such a director could be properly convicted on an indictment for fraud, or for something short of it, is quite another question which your Lordships have not to consider. I have already pointed out that no intent to deceive is necessary to support a civil action for damages based on section 38. I will merely observe that in common parlance persons talk of knowing perfectly well what for the moment is not present to their mind, and even what they cannot at the moment recal to their memory. With these observations on the construction and legal effect of section 38, I pass to its application to the cases before your Lordships. The Standard Company was promoted by the Globe Company, and the prospectus of the Standard Company stated that in the formation and issue of that company there were no promoters' profits in any shape or form whatever. This statement has been proved to be true. But there was a contract dated the 27th October 1898 and made between the Globe Company and the Standard Company, by which the Globe Company agreed to transfer to the Standard Company 5000 fully paid-up deferred shares of £1 each in the Austin Friars Syndicate; and in consideration of this transfer the Standard Company was to allot and issue to the Globe Company 40,000 fully paid-up shares of £1 each of the Standard Company. This agreement was unfortunately not disclosed in the prospectus of the Standard Company. But I cannot doubt for a moment that it fell within the first part of section 38 of the Companies Act 1867, and ought to have been referred to in the prospectus. It was a contract which any prudent applicant for shares in the Standard Company would have desired to understand before he took shares in the Standard Company, and was in that sense to that extent material, as explained in *Twycross* v. *Grant*. Every judge who has had to consider this question has come to the same conclusion, and to my mind this part of the case is so clear that it is unnecessary to say more about it. The prospectus was not issued until May 1899, and the defendants were directors when it was issued and when shares were allotted to persons who were induced by it to apply for shares in the Standard Company. All the plaintiffs in these actions did so apply. How it came about that the contract of the 27th October 1898 was not disclosed is by no means clear; but whatever the real explanation may be it was certainly not intentionally omitted by any of the defendants to these actions. It is clearly proved, and is now admitted, that whether legally liable or not, they are all innocent

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of any fraudulent misstatement or concealment. Nevertheless section 38 entitles the plaintiffs to have the prospectus treated as fraudulent, and the next question is, have the plaintiffs or any of them proved that they have sustained any damage by reason of the non-disclosure of the contract on the 27th October 1898? The plaintiffs took shares on the faith of the prospectus, and they have lost their money. This is their case; but it is at most only a *prima facie* case, and when the facts of the case are more closely investigated it is difficult to believe that a knowledge of the deed of the 27th October 1898 would have induced any of them to abstain from applying for shares. In the first place, the examination and cross-examination of the plaintiffs shows conclusively that the plaintiffs paid no attention whatever to the documents which were disclosed, and if another had been added to their number the result would have been the same. But, further, the contract of the 27th October 1898, when understood, turns out to be an ingenious but perfectly honest transaction, entered into in order to facilitate the acquisition by the Standard Company of the preferred shares of the Finance Syndicate, all the shares of which the Standard Company was formed to acquire. The contract conferred no profit whatever on the Globe Company, and, so far from disproving the statement in the prospectus that there was no promoters' profits, the contract shows that none were or could be made out of the transaction to which the contract related. In short, it is, in my opinion, plain that the non-disclosure of this contract has not caused any damage whatever to the plaintiffs or any of them. But even if I am wrong in coming to this conclusion, I am of opinion that the defendants are entitled to be protected by the plaintiffs' agreements to waive any fuller compliance with section 38 than is contained in the prospectus. This is a case in which all the defendants are honest men. If they are liable, they are so by reason of an unfortunate mistake on their part. None of them had the slightest intention of keeping back anything. Whether the same can be said of all the other directors I do not know. In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied upon as a protection against trickery; but in the first of these, *Greenwood* v. *Leather Shod Wheel Company*, 81 L.T. Rep. 595, (1900) 1 Ch. 421, it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands. These actions are instances in which the defendants can justly claim the protection of the waiver clauses contained in the prospectus and application for shares. For these reasons I have come to the conclusion that both appeals should be allowed and the actions be dismissed, with costs both here and below.

Judgments appealed from reversed. Actions dismissed.

Counsel for the Appellant Calthorpe—Haldane, K.C.—Gore Brown, K.C.—Cozens-Hardy. Agents—Burn & Berridge, Solicitors.

Counsel for the Appellant Macleay—Younger, K.C.—Ashton Cross. Agent—Gilbert Robins, Solicitor.

Counsel for the Respondents—Hughes, K.C.—Higgins. Agents—Richardson & Company, Solicitors.

PRIVY COUNCIL.

Wednesday, February 7.

(Present—The Right Hons. Lords Macnaghten and Davey, Sir Ford North, and Sir Arthur Wilson.)

MONTREAL AND ST LAWRENCE LIGHT AND POWER COMPANY *v.* ROBERT.

Company—Ultra Vires—Invalid Resolution—Third Party bona fide Acting upon it—Company Barred from Pleading Invalidity in Question with Him.

Relying upon what purported to be a valid resolution of a company duly communicated by its officials, a third party in *bona fide* and with nothing to put him on his inquiry sold certain property to the company. The resolution was invalid inasmuch as the quorum prescribed by the bye-laws had not been present when it was passed.

Held that in a question with the third party the company could not plead that the resolution was invalid.

Appeal from a judgment of the Court of King's Bench for the Province of Quebec, Canada, consisting of LACOSTE, C.J., BOSSE, BLANCHET, OUIMET, and TRENHOLME, JJ., who had affirmed a judgment of the Superior Court (TASCHEREAU, MATHIEU, and LORANGER, JJ.), reversing the judgment of DAVIDSON, J., at the trial.

The facts are fully set out in the judgment of their Lordships.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Their judgment was delivered by

LORD MACNAGHTEN—By deed dated the 18th July 1901, and made between the respondent Edmund Arthur Robert and the appellants the Montreal and St Lawrence Light and Power Company, Robert conveyed to the company a lot of land known as Buisson Point, situated at the Cascade Rapids on the river St Lawrence, in the county of Beauharnois and Province of Quebec, with the right of fishing in the river opposite and attached thereto. The consideration for the purchse, as stated on the face of the deed, was "one dollar, and other good and valuable consideration." The deed was prepared by and executed in the presence of Maître Perodeau, Notary Public, who was the company's notary. It

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bore the company's seal. It was signed by Mr Porteous, the president, and Mr Kitto, the secretary of the company. Attached to it was a verified copy of a resolution purporting to have been passed at a meeting of the directors on the 17th inst., and purporting to authorise the president and secretary "to complete the transaction and sign the necessary documents." By another deed dated the same day, and made between the same parties, it was declared that the real consideration for the sale was the sum of 15,000 dollars paid in cash, and an agreement to pay the further sum of 260,000 dollars on the 30th November then next. It was, however, declared that the purchaser should have the right at any time before the 30th November to abandon the purchase by forfeiting the said sum of 15,000 dollars and by reconveying the property to the vendor, in which case the sale was to be dissolved to all legal intents and purposes. On the 4th January 1902 the company brought an action against Robert praying for a declaration that the two deeds of the 18th July 1901 were null and void, and asking that the registrar of the county of Beauharnois might be ordered to cancel all entries of the same in the registration books of the county, and that the vendor might be ordered and adjudged to repay the said sum of 15,000 dollars to the company. On the 7th January 1902 Robert brought an action against the company seeking to recover 260,000 dollars as the balance of the purchase money alleged to be overdue. The two actions were consolidated and came on to be heard on the 30th June 1903 before Davidson, J. The learned Judge maintained the action of the company except so far as it asked for repayment of the 15,000 dollars, and dismissed the action of the respondent Robert. The Superior Court sitting in review reversed the judgment of the trial Judge and dismissed the company's action. Their decision was affirmed by the Court of King's Bench for the Province of Quebec. From the judgment of that court the present appeal has been brought. The argument on the appeal before this board resolved itself into two questions:—(1) Had the company power to buy Buisson Point? (2) Did the company in fact buy it? The company was incorporated in 1888 by a Quebec statute (51 and 52 Vict. c. 73), under the name of the Chambly Manufacturing Company, for the purpose of creating water power on the river Richelieu, near Chambly, and carrying on business there as an electrical lighting and power company. That Act, and a subsequent Act passed in 1895, were replaced by a Quebec statute passed in 1898 (61 Vict. c. 65). By it the company was reincorporated under its original name, and its powers were increased. In 1901 by another Quebec statute (1 Edw. VII, c. 67), assented to on the 28th March 1901, the corporate name of the company was changed to the name of the Montreal and St Lawrence Light and Power Company and its powers were again increased. The provisions of the Act of 1898 were discussed at considerable length. On the one hand, it was argued that by that Act the company was empowered to set up works on any river in the Province of Quebec except that part of the province which forms the judicial district of Quebec. On the other hand, it was contended that, notwithstanding the generality of the language of the Act, the company was still restricted to the use of the river Richelieu and its tributaries, and that its operations must be confined within certain prescribed limits which do not include or extend to Buisson Point. In the opinion of their Lordships it is not necessary to pronounce a decision on the construction of the Act of 1898. In view of the provisions of the Act of 1901, under which the company seems to have been absorbed (or acquired, as its president prefers to say) by another company known as the Montreal Light, Heat, and Power Company, it would serve no useful purpose to do so. Whatever may be the sphere of the company's operations as described in the Act of 1898, it is clear that the company was empowered to acquire and hold for the purpose of its business real or immovable estate not exceeding a specified sum in yearly value in any part of the province outside the prohibited district. The company acting *bona fide* must be the sole judge of what is required for the purpose of its business. It appears, therefore, to their Lordships that the transaction in itself was not *ultra vires*, and consequently the first question must be answered in the affirmative. As regards the second question—the question whether the company did in fact buy, or bind itself to buy, the property—the real difficulty is to ascertain the gist and substance of the company's complaint. There is no suspicion of fraud or circumvention or surprise or collusion. It is not suggested that Robert took advantage of the innocence or inexperience of those with whom he was dealing. They were "all," as James Ross, the vice-president of the Montreal Light, Heat, and Power Company, said, "first-class business men, and associated with him in many enterprises." It is not suggested that Porteous, the president of the appellant company, or the secretary, or the notary, betrayed the interests of the company confided to them. There is no entry in the minutes disavowing the action of the president, or censuring him for exceeding his instructions. The case presented by the learned counsel for the company in his opening address was that the notion of buying was not in the mind of the directors at all. They wanted—or James Ross, who, though not a director, had a controlling interest in the company and in other companies of the same class, and was the prime mover in the matter, wanted an option—an option pure and simple, that would lapse of itself if nothing was done. That was the real meaning, it was said, of the resolution of the 17th July 1901. But somehow, without any fault on the part of anybody in particular, the company found itself committed to a purchase. Now, the facts of the case when examined tell a very different story. It is quite true that at first the negotiation was for an

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option. It seems that a tender for the lighting of the city of Montreal was then in the market, and Ross and his associates thought that the water power at Buisson Point was at any rate worth securing. They had obtained the offer of an option from Robert, the owner of Buisson Point. Robert saw his opportunity, and after a week's delay on the part of Ross, pressed for an immediate reply. On the 11th July he wrote—"I shall consider myself free unless I hear from you to-day." There was no reply, or no satisfactory reply, to this communication. Then he made a definite offer in writing to sell the property to Ross or his nominee on certain terms which gave an option to the purchaser of abandoning the purchase within a fixed time on forfeiting the deposit. On the same day, the 11th July 1901, in the absence of Ross, Porteous, who held a power of attorney from Ross, and was, as Ross said, his "trusted ally," accepted the offer in Ross's name, and declared his nominee to be "The Montreal and St Lawrence Light and Power Company." Then came the directors' meeting of the 17th July. The minutes of that meeting were entered by Porteous himself. The preamble to the resolution certainly contains the word "option." "The purchase," it says, "was to be in the shape of an option up to the 30th November 1901 for the sum of 275,000 dollars, of which 15,000 dollars is to be paid in cash on the passing of the deed to the company." The resolution is, "That the president and secretary be authorised to complete the transaction and sign the necessary documents." If the minutes are read with any attention, it becomes quite plain that what was meant was not a mere option but an actual conveyance with the option of reconveyance within a specified time. So the company's notary must have understood it. In order to prepare the conveyance he must have had before him Robert's offer of the 11th July, and Porteous' acceptance of it, as well as the resolution of the 17th July. It was his duty "to complete the transaction" so far as the legal part of the business was concerned, and prepare "the necessary documents," and no fault can be found with what he did. The deed was passed, and the deposit of 15,000 dollars duly paid by the company. There is no satisfactory explanation why the directors allowed the 30th November to slip by without making any move. The directors may have thought that Ross had assumed the management of their affairs. Ross may have supposed that the directors were then looking after their own business. Porteous may have forgotten the terms of the bargain, or he may have judged it inexpedient to throw the bargain up at that particular moment. Whatever the cause was, Robert was not to blame. His conduct seems to have been quite straightforward and above board. It was no fault of his if the directors of the company were careless or supine. Another point was made on behalf of the company. It seems to have been a mere afterthought, for there is no hint of it before the action was launched. It is said that the meeting of the 17th July was irregular; there was not a quorum present; therefore the resolution passed on that occasion was invalid and goes for nothing. It is quite true that the bye-laws require the presence of three directors to make a quorum—and only two attended on the 17th. But after all the bye-laws of a company constituted as the Montreal and St Lawrence Light and Power Company was constituted are not public property. They concern matters of internal management. Those who deal with the company have no means of access to them; no right to pry into the company's archives, or interrogate its officials. There was nothing to put Robert on inquiry. The officials of the company, the president, the secretary, and the notary, furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor, "You should not have given credit to what our people told you." If such a plea were listened to no one would be safe in dealing with a company having private regulations of its own inaccessible to the outside world, to which appeal could be made in case of need to relieve it from solemn obligations or save it from a bad bargain. Such being their Lordships' view, it would seem to be a work of supererogation to inquire whether the resolution of the 17th July, if invalid, has been validated by subsequent resolutions or by the subsequent conduct of the company. On the whole their Lordships agree with the Superior Court sitting in review and the Court of King's Bench, and they will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Judgment affirmed.

Counsel for the Appellants—Sir R. Reid, K.C.—R. C. Smith, K.C. (of the Colonial Bar). Agents—Blake & Redden, Solicitors.

Counsel for the Respondent—Macmaster, K.C.—Lafleur, K.C.—G. Foster—J. Martin (all of the Colonial Bar). Agents—Lawrence, Jones, & Company, Solicitors.

PRIVY COUNCIL.

Tuesday, February 27.

(Before Lords Macnaghten, Robertson, and Lindley, and Sir Arthur Wilson.)

BAUDAINS AND OTHERS *v.* RICHARDSON AND ANOTHER.

Succession—Will—Reduction—Undue Influence—What Constitutes.

For the reduction of a testamentary writing upon the ground of "undue influence" it must be proved that the will of the testator was in the particular

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matter in question coerced into doing what he or she did not desire to do. To prove that the testator was induced to do as he or she did by degrading or pernicious influences, or that, generally, a certain person had the power unduly to overbear the testator's will, is insufficient.

Observations of Sir J. Hannen in *Wingrove* v. *Wingrove*, 11 P.D. 81, *approved.*

This was an appeal from three judgments of the Royal Court of the Island of Jersey (Superior Number), which had cancelled and annulled the will and codicil of Miss Julia Westaway on the ground of undue influence.

The particular facts of the case are of no importance for the present report.

Their Lordships took time to consider their judgment, which was delivered by

LORD MACNAGHTEN — . . . . It only remains to consider whether Julia Westaway possessed testamentary capacity, and whether the two instruments impeached in this case were the expression of her own will. [*His Lordship went through the evidence at considerable length and continued*]—The result of the voluminous evidence in this case satisfies their Lordships that at the date of the will of April 1895 and at the date of the codicil of August 1898 Miss Julia Westaway was of sound mind, memory, and understanding. As regards undue influence, all that can be said is that undue influence is conspicuous by absence. Influence may be degrading and pernicious and yet not undue influence in the eye of the law. The leading authority on the subject is the judgment of Cranworth, L.C., in *Boyse* v. *Rossborough* (6 H.L.C. 2). It was the experience of Sir James Hannen that "there is no subject upon which there is a greater misapprehension." The misapprehension "arises," he says, "from the particular form of the expression." In his charge to a special jury in the case of *Wingrove* v. *Wingrove*, 11 P. Div. 81, where those remarks occur, the learned President explains, very much as Lord Cranworth had explained, what is and what is not undue influence. He speaks of "influence" in its popular signification. He gives the instance of a young man caught in the toils of a designing woman or led astray by a profligate companion, with the result that under the influence by which he is surrounded he persuades himself to leave his property to his mistress or the man who has been his evil genius. However shocking the case may be, however cruel to his nearest relatives, that is not undue influence. "To be undue influence in the eye of the law," says the learned President, "there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence." Then his Lordship points out that there are different kinds of coercion, and concludes by saying that if the act is shown to be the result of the wish and will of the testator at the time, then, however it is brought about—putting aside a case of fraud—still it is not undue influence. "There remains," his Lordship adds, "another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced." In the present case it is enough to say that there is not a scrap of trustworthy evidence to prove that Elizabeth Curwood or Charles Curwood exercised undue influence in the legal sense of the term over Miss Westaway, or coerced her into making either the will or the codicil.

. . . .

Judgment appealed from reversed.

Counsel for the Appellants—Sir E. Clarke, K.C.—C. E. E. Jenkins, K.C.—Barnard, K.C.—Hawksford. Agents—Bennett & Ferris, Solicitors.

Counsel for the Respondent—Haldane, K.C.—Solicitor-General for Jersey (Durell)—H. Durley-Grazebrook. Agents—Williamson, Hill & Co., Solicitors.

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SUMMER SESSION, 1906.

COURT OF SESSION.

Friday, March 9, 1906.

OUTER HOUSE.

INLAND REVENUE *v.* HEYWOOD-LONSDALE'S TRUSTEES.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*c*), 5 (1)—*Bond Granted by Heir of Entail within Year of Death to Daughter's Marriage-Contract Trustees.*

An heir of entail in possession, who had debarred himself from disentailing save on voluntary consents, arranged for power to charge the entailed estates to a certain amount in favour of certain persons. In virtue of this power he granted a bond and disposition in security for a certain sum in favour of the marriage-contract trustees of a daughter whose portion he wished to increase, the sum to be held by them in terms of the marriage-contract, and within a year of so doing he died. *Held* (1) that the sum in the bond and disposition in security was property deemed to pass on the death of the heir of entail within the meaning of the Finance Act 1894, section 2 (1) (*c*), and was liable for estate duty and (2), being so deemed to pass, inasmuch as it passed under the marriage-contract it was also liable for settlement estate duty.

The Finance Act 1894 (57 and 58 Vict. cap. 30) in Part I, which includes section 1-24, deals with estate duty, and by section 1 imposes such duty upon all the property, real or personal, settled or not settled, which passes on the death of any person dying after 1st August 1894.

Section 2 (1) enacts—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*c*) property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881 as amended by section 11 of the Customs and Inland Revenue Act 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily,' and a reference to a volunteer were omitted therefrom."

Section 38 (2) of the Customs and Inland Revenue Act 1881 (44 Vict. cap. 12) as so amended reads—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz.—(*a*) Any property taken as a *donatio mortis causa* made by any person dying after 1st August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift, *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise, (*b*) . . . (*c*). . . ."

On 17th July 1905 the Lord Advocate on behalf of the Inland Revenue raised an action against John Pemberton Heywood-Lonsdale of Bicester Hall, Oxfordshire, and others, the trustees acting under the antenuptial contract of marriage dated and recorded in 1899 between Captain Henry Heywood-Lonsdale of Shavington, Shropshire, and the Hon. Helena Mabel Hamilton, third daughter of the Right Hon. John Glencairn Carter Hamilton, Baron Hamilton of Dalzell. In it he sought an account of, and to recover estate duty and settlement estate duty on the principal sum in a bond and disposition in security granted in favour of the defenders by the factors and commissioners of Lord Hamilton, dated 4th and 6th and recorded 23rd July 1900. Lord Hamilton died on 15th October 1900. The amount in the bond and disposition in security was £5000.

The pursuer, *inter alia*, pleaded—"(1) By virtue of section 2 (1) (*c*) of the Finance Act 1894, the principal sum in the bond granted by the factors and commissioners of Lord Hamilton in favour of the defenders being property passing on the death of Lord Hamilton, is chargeable with estate duty. (2) Settlement estate duty is also due in

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respect of the said principal sum, as it is property settled in terms of the marriage-contract under which the defenders are acting as trustees."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON).

On 9th March 1906 the Lord Ordinary pronounced an interlocutor repelling the defences, finding that estate duty and settlement estate duty were due on the £5000 as property passing on the death of Lord Hamilton within the meaning of the Finance Act 1894, and ordaining the defenders to lodge an account.

Opinion.—"The late Lord Hamilton of Dalzell having, with consent of the next heirs, obtained powers from the Court to charge his entailed estates of Dalzell and Jerviston with a sum of money, granted through his commissioners a bond over the estates in favour of the marriage-contract trustees of his daughter the Hon. Mrs Heywood-Lonsdale for £5000. As this charge was put upon the estate within twelve months of Lord Hamilton's death, and besides is made subject to the provisions of Mrs Heywood-Lonsdale's marriage-contract, the Crown have made claim for both estate duty and settlement estate duty. This claim is resisted by Mrs Heywood-Lonsdale and her marriage-contract trustees.

"The circumstances in which the question arises are these—Lord Hamilton of Dalzell was married in 1864, and by his antenuptial marriage-contract, by virtue of the provisions of the Aberdeen Act, he bound himself and the heirs of entail succeeding to him to make payment to the younger children of the marriage of the sum of £12,000, and he further bound himself, and his heirs and successors whatsoever, but that *subsidiarie* only, to make good any part of said provision which might not be properly chargeable on the estates in terms of the said Act of Parliament. This provision was declared to be in full of all claims of legitim, &c.

"Lord Hamilton disentailed the estates in 1894, and in connection with the disentail proceedings he granted a bond of corroboration and disposition of the estates in security in favour of his younger children, who were six in number, including Mrs Heywood-Lonsdale, for the said sum of £12,000. This bond was recorded on 28th February 1894.

"Lord Hamilton re-entailed the estates in 1895 in favour of himself, whom failing, his eldest son the Hon. Gavin George Hamilton, and the other heirs-substitute specified in the disposition and deed of entail.

"Mrs Heywood-Lonsdale was married in 1899, and under her antenuptial marriage contract Lord Hamilton of Dalzell bound himself to pay to the marriage-contract trustees at the first term which should happen after his death the sum of £15,000, but reserving to himself right to prepay this sum at any time during his life. This sum, of which I understand £10,000 was prepaid out of the general estate of Lord Hamilton before his death, and £5000 remained to be paid, was settled for the liferent alimentary use of Mrs Heywood-Lonsdale, and of her husband in succession should he survive her, and for the children of the marriage in fee.

"Should there be no children taking a vested interest at the death of the survivor of the spouses, Lord Hamilton of Dalzell's provision was destined over to the person for the time being holding the peerage of Hamilton of Dalzell.

"Circumstances having occurred which rendered Lord Hamilton of Dalzell desirous of increasing his provision for his younger children, and at the same time of conferring a present benefit upon his eldest son, he arranged, with consent of his three sons and next heirs under the entail, to charge the fee of the entailed estates with a sum of £122,000, for the purpose, *inter alia*, of adding £5000 to the marriage-contract provision of each of his daughters, including Mrs Heywood-Lonsdale, so as to make up their respective provisions to £20,000 each. There were also considerable additional provisions made for the younger sons, and a large sum was paid over to or for behoof of the next heir. The necessary proceedings were taken in January, and the power was granted on 21st February 1900. So far as concerns the present question warrant was granted to Lord Hamilton of Dalzell to charge the entailed estates with a sum not exceeding £122,000 sterling, and that by granting and executing at the sight of the Court, *inter alia*, a bond and disposition in security in ordinary form in favour of the trustees under Mrs Heywood-Lonsdale's marriage-contract for the sum of £5000 sterling 'for the purposes therein specified.' But the obligation in the bond was subject to a resolutive condition in the event of Mrs Heywood-Lonsdale or her issue succeeding under another and independent trust, in which case the sum in the bond was destined over to the person for the time holding the peerage of Hamilton of Dalzell as if Mrs Heywood-Lonsdale had died without issue. The order of Court also provided that in exchange for their bonds and dispositions in security, 'the petitioner's younger children should be bound to discharge the bond and provision in their favour for the maximum sum of £12,000 already existing on record, and to accept the provisions to be made by the said bonds and dispositions in security to be granted as aforesaid in full of all they can ask or claim by the decease of the petitioner or otherwise.'

"By virtue of this power a bond and disposition in security for £5,000 was granted by the commissioners of Lord Hamilton of Dalzell in favour of the marriage-contract trustees of Captain and the Hon. Mrs Heywood-Lonsdale, dated 4th and 6th and recorded 23rd July 1900. This bond was in the usual form applicable to such charges, and bound only Lord Hamilton of Dalzell and the heirs of entail succeeding to him in the entailed estate to pay to the marriage-contract trustees for the purposes of the marriage-contract the sum of £5,000 sterling,

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and that at the term of Martinmas next 1900, with interest from the 21st February 1900, the day after that on which the power was granted.

"The power having been granted on the 20th February 1900, and the bond granted in July 1900, Lord Hamilton of Dalzell died on 15th October 1900, not only within twelve months of the granting of the bond, but before the date of payment specified in the bond.

"I am of opinion that the claim of the Crown for estate duty is well founded. The £5000 contained in the bond, whether it be regarded as cash or as an interest to that extent carved out of the entailed estate, did not pass on the death of Lord Hamilton of Dalzell, and therefore the Finance Act 1894, section 1, did not apply. But then section 2 of the Act provides that certain classes of property not passing on the death of the deceased shall be deemed to be included in such property, or, in other words, shall be deemed to pass on the death of the deceased, and the section provides, *inter alia*, sub-section (1) (*c*) that property which would be required to be included in an account under the 38th section of the Customs and Inland Revenue Act 1881, as amended by the 11th section of the Customs and Inland Revenue Act 1889, if these sections were herein enacted and extended to real property as well as personal property (and omitting from the section the words 'voluntary, &c.'), should be so deemed to be included.

"Turning to the Customs and Inland Revenue Act 1881, section 38 (2), as modified and incorporated in the above sub-section, it will be found that, read short, so far as applicable to the present question it provides as follows:—That the property to be included in an account, and therefore to be deemed to pass at the death of a deceased, shall be property of the following descriptions, viz., *inter alia*, any property taken under a disposition made by any person dying after 1st August 1894 purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased. Now, it appears to me to be incontestable that the £5000 contained in the bond in question is property taken under a disposition by Lord Hamilton of Dalzell, who died after 1st August 1894, and that said bond being without consideration purported to operate as an immediate gift *inter vivos* by transfer and that said gift was not made twelve months before Lord Hamilton's death. If so, it is property which is to be deemed to be included in the property passing on his death, and is therefore liable in estate duty.

"I say taken under a disposition by Lord Hamilton, because I must reject the contention, and I think it was the only substantial consideration urged to the contrary, that Lord Hamilton having no independent control of the estate, the 'disposition' was not truly his in fact but only in form. I also accept it, as stated, that Lord Hamilton had debarred himself from disentailing on valued or compulsory consents and could only do so on voluntary consents, but I do not think that this affects the result. As heir of entail in possession he was proprietor subject only to the fetters of the entail. He truly purchased the right to charge by the provisions which he made out of the charge for the next heirs, though it would not have mattered if the right had been conferred on him gratuitously. His right was limited to charging in favour of certain specified parties. But it was in his option whether he would exercise the right. He did exercise the right and thereby conferred a gratuitous benefit or gift upon the grantees. And no one but he could have granted the disposition. The case is, I think, ruled by the decision in the *Earl of Glasgow's* case (January 15, 1875, 2 R. 317, 12 S.L.R. 215), the reasoning in which, though it arose under the Succession Duty Act, and in the reverse order, applies directly and is conclusive.

"I say also 'being without consideration,' for the contention that there was at least part consideration in the discharge and the provisions under Lord Hamilton's own marriage-contract and bond of provision is without foundation. The provision had already been discharged, and the reason for formally repeating the discharge was merely as a means to clear the record.

"Settlement estate duty is, I think, in no different position. Section 5 (1) of the Finance Act 1874 provides that where property in respect of which estate duty is leviable—and I hold that the property in question is in that position—(*a*) 'is settled by the will of the deceased,' or (*b*) 'having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of' it, a further estate duty called settlement estate duty is to be levied. I do not think that it can be questioned that the property in the sum contained in the bond has been settled in the sense of the Act. It has not indeed (*a*) been settled by the will of the deceased, for the bond was in no sense a testamentary instrument—section 22 (1) (*b*). But it was settled by another disposition, and though it did not pass under that disposition on the death of the deceased so as to come directly under section 1 of the Act, it was property which by section 2 is to be deemed to be included in such property. I admit that there is awkwardness in the expression 'passes under that disposition' which is even more elliptical than most of the difficult 'passes' in the Act. But I think that the meaning is sufficiently clear when the terms of section 2 are kept in mind. And I am impressed by the consideration that any other interpretation would impose a hardship upon the ultimate beneficiaries under the settlement by depriving them of the advantage which payment of settlement estate duty confers.

"On the amount being adjusted I shall therefore grant decree accordingly as concluded for, with expenses to the Crown."

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Counsel for the Pursuer—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton-Grierson).

Counsel for the Defenders — Younger, K.C.—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, May 12.

SECOND DIVISION.

[Sheriff Court of Perthshire at Dunblane.

M'ALLAN *v.* PERTHSHIRE COUNTY COUNCIL, WESTERN DISTRICT, DUNBLANE.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident Arising Out of and in Course of Employment—Workman Doing Work outwith Scope and Time of his Ordinary Duties under Voluntary Arrangement with Fellow-Workman—Cases of Emergency.*

A county council were repairing a road by means of a steam roller, the hour for the daily commencement of operations being 7 a.m. The engineman, who otherwise would have had to come on duty before that hour, for his private convenience arranged with a surfaceman, one of his fellow-workmen, that the latter should do the work of breaking up the engine's fire and getting up steam. The work for which the surfaceman was employed by the county council, and which did not begin until 7 a.m., was to sweep and put "blinding" on the road while it was being rolled. He was accidentally injured while getting down from the engine before 7 a.m. *Held* that the accident did not arise out of and in the course of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897.

Lord M'Laren's statement, in *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, of the law applicable to the case where a workman is injured while doing something outwith the strict scope of his employment in a case of emergency, *approved*.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1) enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

In an arbitration upon a claim by John M'Allan (respondent) against The Perthshire County Council, Western District, Dunblane (appellants), under the Workmen's Compensation Act 1897, the Sheriff-Substitute at Perth (SYM) awarded compensation. At the request of the defenders he stated the following case:—"The appellants are the authority having control of the roads in the Western District of Perthshire, and the respondent, who is sixty-five years of age, was employed by them in road mending from 24th July till the beginning of September 1905, at a wage of 3s. 6d. per day. On 21st August 1905 the respondent when stepping down from a steam roller belonging to the appellants received an injury to his left leg below the knee, which ultimately resulted in periostitis of the leg. He thereafter presented an application for compensation under the Workmen's Compensation Act. At the date of and for some time prior to the accident the appellants' steam roller was being used in repairing the road between Kippen Station and Thornhill, which crosses the river Forth at the Bridge of Frew. The roller was under the charge of an engineman named M'Callum, assisted by a man named M'Arthur, who acted as fireman and flagman. It was exclusively the duty of M'Callum and M'Arthur to work, clean, oil, and fire the engine. The work of repairing the road was under the charge of M'Diarmid, a foreman surfaceman, who acted under the directions of the road surveyor, and the duty of the respondent was to sweep and to put 'blinding' on the part of the road on which the roller was working. The respondent was subject to the orders of M'Diarmid, but also occasionally required to take the directions of M'Callum, the engineman, as to the particular piece of road which was to be prepared for the roller. For the sole use of the engineman and fireman the appellants provided a moveable wooden hut, which at the date in question was stationed at the Bridge of Frew. Instead, however, of occupying the hut at night, the engineman and fireman, who were living in Doune, cycled backwards and forwards to their work, and allowed the respondent to sleep in the hut. The respondent, who had been lodging at Thornhill, was glad to get leave from the engineman to stay all night in the hut. The hour for commencing work was 7 a.m. It took a short time, however, to get up steam, and therefore the fire of the engine needed to be attended to before 7 a.m. In order to save him from returning before that hour in the morning, the engineman arranged with the respondent to break up the engine fire in the mornings before he arrived. The said arrangement was a mutual convenience to the engineman and the respondent. In accordance with this arrangement between him and the engineman the respondent, about 6·30 a.m. on the morning of the 21st August, went on to the engine which was drawn up near the side of the road for the purpose of attending to the fire. It was when he was stepping down from the engine a few minutes later, and before seven o'clock, that he sustained the injury to his leg. It was not part of the duty for which the respondent was employed or paid to attend to the engine or to work before 7 a.m. Having regard to the manner in which the

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Supreme Court has interpreted the words 'arising out of and in the course of the employment,' I am of opinion that the accidental injury to the respondent's leg must be held to be within these words. . . . I have therefore found the respondent entitled to compensation, and awarded a certain compensation."

The following question of law was submitted for the opinion of the Court—"(1) Whether the respondent's accident arose out of and in the course of his employment by the appellants within the meaning of section 1 (1) of the Workmen's Compensation Act?"

Appellants argued—The accident did not arise "out of and in the course of" respondent's employment. "Out of and in the course of" involved two considerations—(1) the time of the accident; (2) the scope of the duties for which the workman was employed. As to "time," he was injured before the hour at which his employment began; as to "scope of duties," the work upon which he was engaged at time of accident was entirely beyond and outwith that for which he was employed. It was not a case of helping in an emergency or danger, or of doing something to further master's interest, but was a voluntary arrangement to do another's work. The following cases were in appellants' favour—*Callaghan* v. *Maxwell*, January 23, 1900, 2 F. 420, 37 S.L.R. 313; *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381; *Gibson* v. *Wilson*, March 12, 1901, 3 F. 661, 38 S.L.R. 450; *Benson* v. *Lancashire and Yorkshire Railway Company*, [1904] 1 K.B. 242. The case of *Sharp* v. *Johnson & Company, Limited*, [1905] 2 K.B. 139, was distinguishable.

Argued for the respondent—The accident arose "out of and in the course of the employment," because but for that employment it could not have occurred. "In the course of" referred, it was true, primarily to time, but the Courts had construed questions of time liberally and had not debarred a workman from compensation because the accident had happened a little before or after strict working hours—*Sharp* v. *Johnson & Company, Limited, cit. sup.* Similarly, too, the fact that he was not actually engaged upon the work for which he was hired was immaterial, if he was acting in a reasonable manner and in his master's interest, or that of a fellow-workman. *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, was a favourable authority, and showed that this latitude was extended to cases other than those of danger and emergency.

LORD JUSTICE-CLERK—I confess I am somewhat surprised at the judgment of the Sheriff-Substitute, which in my opinion is clearly erroneous. The case is really a very clear one, and the facts very simple.

The engineman, who was in charge of the steam roller, required to be at his work some little time before the hour, viz., 7 a.m., at which the general work of road repairing began, in order that steam might be up and the engine ready to begin work at that hour. Accordingly he and his mate were provided with a moveable wooden hut in which they might sleep, and which accompanied the engine. The engineman and his mate, however, preferred to go home at night, and the former arranged with the respondent that he should see to the lighting of the fires in the morning and the getting up of steam. The respondent's ordinary duties were in no way connected with the engine or its working, he being one of the surfacemen who swept and put "blinding" on the part of the road on which the engine was working, and the arrangement under which he undertook the lighting of the engine's fires was a private one between him and the engineman, and entirely outwith the knowledge of their employers. The respondent was injured while stepping down from the engine, and claims compensation on the ground that he was injured in an accident "arising out of and in the course of" his employment by the appellants.

I am clearly of opinion that the accident did not arise out of or in the course of such employment. Admittedly the injured man's ordinary or normal duties were not connected with the working of the engine. It was not a case of emergency, or one in which the injured man was furthering the interests of his employers. The circumstances disclose simply an arrangement for helping the engineman, and enabling him to come on duty somewhat later in the morning. The case is entirely different from those in which a workman, acting in an emergency and with his master's interests in view, does something beyond the strict scope of his ordinary duties. In such cases he will probably be held entitled to compensation. The law is on this point well stated by Lord M'Laren in *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, who says at page 736—"Any accident occurring to a workman while engaged in promoting his master's interests is *prima facie* within the category of cases considered by the statute as constituting a claim. . . . We are familiar with the principle of common employment as used in the limitation of claims, and this principle may also be invoked to aid the interpretation of the statute, because impliedly each workman, besides having to perform the special work for which he is hired, owes something to the community of fellow-workers, and must be helpful according to his experience where necessity arises." That means where any emergency arises, and where it is the duty of all workmen where danger threatens to do their best to prevent an accident. An excellent illustration is the case of a runaway horse in a yard or a dock which is stopped by some workman who has nothing to do with its management, but who rushes forward and does his best to prevent an accident. The present case, however, presents no such features. There was no emergency; no necessity for the respondent's intervention; no interest of his employers to be served. I am accordingly

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of opinion that the question must be answered in the negative.

LORD KYLLACHY—I am of the same opinion. The Sheriff-Substitute seems to have felt himself constrained by the decisions to hold that the accident in the present case was one arising out of and in the course of the respondent's employment. And it is certainly true that the tendency of recent decisions has been to give a very wide construction to that statutory expression, but it is necessary to draw the line somewhere; and it appears to me to be quite impossible to hold that an accident happening to a workman in such circumstances as occurred here was one which in any reasonable view arose out of and was in the course of this workman's employment.

LORD LOW concurred.

LORD STORMONTH DARLING was not present.

The Court answered the question in the negative.

Counsel for the Appellants—Hunter, K.C. —Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent—C. D. Murray. Agents—Wishart & Sanderson, W.S.

Wednesday, May 16.

FIRST DIVISION.

AYR COUNTY COUNCIL *v.* PATERSON AND OTHERS.

Local Government—County Council—Burgh Represented on County Council—Appointment of County Assessor—Right of Representatives of Burgh not Assessed for Payment of County Assessor's Salary to Vote in his Selection—"Matter Involving Expenditure"—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 73 (8).

Held that the selection of a county assessor, whose salary had been already fixed, was not a matter involving expenditure in the literal sense of section 73, sub-section 8, of the Local Government (Scotland) Act 1889, and that therefore the representatives of a burgh which did not contribute to the assessment levied by the County Council to pay the salary of and outlays incurred by the assessor, were entitled to vote thereon.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 8, enacts—"Every burgh which contains a population of less than seven thousand shall, for the purposes hereinafter mentioned, and subject to the provisions of this Act, be represented on the county council of the county within which it is situated . . . in manner following, that is to say, (1) . . . (2) . . . (3) The provisions of this section shall apply to a royal burgh which contains a population of more than seven thousand, but does not return or contribute to return a member to Parliament, and to any burgh which contains a population of more than seven thousand but does not maintain a separate police force. (4). . . ."

Section 11 transfers to the County Council, *inter alia*, the whole powers and duties of the commissioners of supply save as in the Act after mentioned. These powers and duties include, under the Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), the duty of having the valuation roll of the county made up (section 1), the power of appointing an assessor or assessors for this purpose (section 3), and power to levy an assessment to meet the expense thereof (section 18). The assessor has also the duty of preparing the register of parliamentary voters in terms of the County Voters Registration (Scotland) Act 1861 (24 and 25 Vict. cap. 83), the expense of which is authorised (section 41) to be defrayed by assessment on the lands within the county exclusive of the lands within a parliamentary burgh.

Section 73 (8) enacts—"The councillors or members of district committees appointed to represent a burgh or an electoral division consisting of a police burgh or part of a police burgh shall not act or vote in respect of any matters involving expenditure to which such burgh does not contribute or for which the lands and heritages in such burgh or police burgh are not assessed."

Section 83 (3) confers power on the county council to appoint from time to time, *inter alios*, assessors, and (6) provides that it "shall pay to the . . . assessors . . . such reasonable salaries, wages, or allowances" as it may think proper.

A special case was presented on behalf of (1) the County Council of the county of Ayr, of the first part; (2) Peter Paterson, solicitor, Maybole, a candidate for the office of assessor for the Carrick Division of the county of Ayr, of the second part; (3) Anthony C. White, solicitor, Ayr, also a candidate for the said office, of the third part; and (4) James Borland, Provost, and Ebenezer Bannatyne, Bailie, of the royal burgh of Irvine, the two representatives from the burgh of Irvine on the County Council of Ayr, and the Provost, Magistrates, and Councillors of the burgh of Irvine, as representing the burgh and community thereof, of the fourth part.

The case stated—"(5) Irvine is a parliamentary as well as a royal burgh within the county of Ayr. It returns two members to the County Council of the county of Ayr, in terms of the said eighth section of the Act of 1889. It has a population of more than 7000. It does not maintain a separate police force. (8) The assessors of the various divisions of the county of Ayr are paid by salaries fixed by the first party, and these are included in the estimates for each year. The salary at present payable to the assessor for the Carrick Division of the County Council is as follows, viz., (*a*) £85, 10s. per annum under the Lands Valuation Acts, including outlays, and (*b*) under the

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Voters Registration Acts £90 per annum, exclusive of outlays, and an additional £25 for every third year in connection with the duties imposed on the assessor in making up the roll of the County Council voters under the Local Government (Scotland) Act 1889, section 28. These salaries and any outlays incurred by the assessors are entirely payable out of the Lands Valuation Assessment imposed under section 18 of the said Lands Valuation (Scotland) Act 1854 and the Voters Registration Assessment imposed under section 41 of the County Voters (Scotland) Act 1861. To these assessments the royal burgh of Irvine does not contribute, and its lands and heritages are not assessed therefor. The burgh is, however, the proprietor of certain subjects situated in the county outside the burgh boundaries, and in respect of that property it pays the usual county assessments. The County Council of Ayr has no power to levy any rate whatever within the royal burgh of Irvine. (9) The only contributions other than the assessment for the afore-mentioned subjects made by the royal burgh of Irvine to the County Council of Ayr are for the use of the County Police and for the Sheriff Court-Houses. The contribution in respect of the police service is made under a special agreement, which is terminable at any time on giving the stipulated notice of six months. The proprietors of lands and heritages in the burgh of Irvine are assessed by the burgh on the requisition of the County Council of Ayr for the Sheriff Court-Houses under the Sheriff Court-Houses Act 1860. The sum required from the burgh for these purposes is calculated on the basis of the valuations of the assessors for the county and burgh respectively. In the event of the valuations for the landward districts of the county of Ayr being reduced, the assessments upon the burgh of Irvine for these purposes would fall to be increased. The same result in that event would follow in the case of the burgh having to contribute for the use of the county police force by way of assessment in place of by agreement. The burgh of Irvine appoints its own assessor to make up the valuation roll and voters rolls of that burgh. (10) On 6th February 1906 a special meeting of the county of Ayr was held. One of the items of business at said meeting was the appointment of an assessor for the Carrick Division of the county on a report of the Valuation Committee, the present assessor having intimated his resignation as from 15th May 1906. His resignation was accepted at a statutory meeting of the County Council held on 19th December 1905, and at this meeting the first party resolved that the appointment of his successor should be made at the said meeting on 6th February 1906, upon the footing that his salary, &c., should be the same as his predecessor. The royal burgh of Irvine is not within the said Carrick Division of the county. Three names were submitted to the meeting for the appointment of assessor for said division of the county, viz., (1) Mr A. F. Mathie Morton, solicitor, Ayr; (2) Mr Paterson, the party of the second part; and (3) Mr White, the party of the third part. The motion to appoint Mr Morton was not seconded and his nomination therefore fell. Mr Paterson and Mr White having both been duly nominated and seconded, a vote between them was taken by show of hands, which disclosed that 23 members voted for the appointment of Mr White and 22 for the appointment of Mr Paterson. A division was thereafter demanded and the roll called. There voted for the third party 23 members, and for the second party 22. Among the votes recorded for the third party were those of the two individual parties of the fourth part as the representatives of the royal burgh of Irvine. Objection was taken to the votes recorded by the said fourth parties, but these representatives maintained their right to vote in the matter. The third party was declared duly elected, subject to the validity of the votes objected to being judicially established. In the event of its being held that the said votes are invalid, the parties are agreed that the second party was duly elected. (12) The second party maintains that the appointment in question was a matter involving expenditure to which the royal burgh of Irvine does not contribute, or for which the lands and heritages in such burgh are not assessed, that under section 73 (8) of the Local Government Act 1889 the representatives of that burgh were not entitled to act or vote with regard thereto, and that therefore he is entitled to the office. The third party maintains that the appointment of the assessor is that of the appointment of a county official; that it is not a matter involving expenditure in the sense of the said section 73 (8); that the burgh of Irvine has a material interest in the valuations made by the county assessors from time to time; that the representatives of the royal burgh of Irvine were not debarred from taking part at the said special meeting in the matter of the appointment of such assessor and voting therein; and that the third party was and is lawfully elected to the office. The fourth parties concur in the contention of the third party."

The question stated in the case was—"Were the two representatives of the royal burgh of Irvine entitled to vote for the appointment of the said assessor at the meeting of the County Council on 6th February 1906?"

Argued for the second party—The question depended on a construction of section 73 of the Local Government Act 1889. That section meant that members representing a burgh could only vote as to matters involving expenditure to which their burgh contributed. The burgh of Irvine did not contribute towards the payment of the assessor. The matter therefore was one involving expenditure to which this burgh did not contribute. The burgh had a separate assessor for whose salary an assessment was levied within the burgh. Matters affecting the Carrick Division of the county were outwith those affecting the burgh. The representatives of the burgh could not vote on the selection of

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an assessor any more than they could on his salary. There was nothing in section 73, sub-section 8, to allow of a distinction being drawn between these acts. Reference was made to the case of *MacArthur* v. *County Council of Argyll*, March 18, 1898, 25 R. 829, 35 S.L.R. 612.

Argued for the third and fourth parties—The appointment of an assessor was part of the general administration of the county. The Local Government Act did not intend that representatives of a burgh should be on the County Council for police purposes and yet have no say in the selection of the county clerk or assessor. The Act (section 83) conferred on the Council, as a whole, the power of appointing officials, and was imperative in its terms as to the payment of their salaries. The County Council were bound to pay their assessor a salary, so that the mere selection of the assessor was not a matter involving expenditure in the sense of section 73 (8). That being so the representatives of the burgh of Irvine was entitled to vote. They had a right of voting as to matters of police and as to questions under the Contagious Diseases (Animals) Acts. The fact that the County Council had no power to assess lands within the burgh of Irvine did not affect the question.

At advising—

LORD PRESIDENT—The question raised in this special case is one not without difficulty, and depends upon the terms of the Local Government Act of 1889. By that Act the machinery of county councils was established, and there are various provisions with which I need not trouble your Lordships as to the way county councils are to be elected, but the 8th section of the Act provides that . . . [*quotes section supra*] . . . Under sub-section 3 of section 8 it is further provided . . . [*quotes sub-section 3 of section 8 supra*]. . . Now, Irvine is a burgh which has a population of more than seven thousand, and does not maintain a separate police force, and accordingly, under those provisions which I have read the representatives of the burgh of Irvine sit on the County Council of Ayr. The county councillors representing a burgh in this way are therefore members of the County Council, as it is expressed "for the purposes hereinafter mentioned, and subject to the provisions of this Act;" but their powers are curtailed by the 8th sub-section of the 73rd section of the Act, which says this . . . [*quotes sub-section 8 of section 73 supra*] . . . Now, among other things that the County Council has to do, there is, in terms of the Lands Valuation Act of 1854, the powers in this respect being transferred to them, the duty of appointing an assessor for the purpose of making up the valuation roll. The assessor has not only to make up the valuation roll, but he has also to make up the roll under the Voters Registration Act. The salaries and outlays incurred by such assessors are entirely payable out of the Lands Valuation Assessment and the Voters Registration Assessment, under the Lands Valuation Act of 1854 and the County Voters Act of 1861 respectively, and both these assessments are assessments which the county entirely pays and to which the burgh does not contribute. Therefore it is really common ground between the parties to this case that if it was any question of fixing the emoluments of the assessor, that would be a thing involving expenditure to which the burgh did not contribute, and the burgh representatives would not be entitled to vote upon the question. But the question that has arisen is this. The salary having been fixed, the Council came to consider what particular person should be chosen to fill up the appointment, and there being a division of opinion between two candidates, a vote was taken, and candidate A or candidate B goes in upon that vote according as you do or do not take in the votes of the burgh representatives. Accordingly, this special case has been presented to determine whether the burgh representatives had or had not the right to vote upon that question. Now, speaking for myself, I can only say that I have found the question to my mind one of considerable difficulty, because it seems to me that the distinction, whichever way it is drawn, is really very thin. In one sense it is true that when you have fixed upon an official's salary, whether you appoint A or whether you appoint B to the office does not involve a question of expenditure, because it costs precisely the same amount of money whether A draws it or whether B draws it. But, on the other hand, it is a very thin distinction to say that a person who may not vote upon whether money is to be provided for the maintenance of an office, nevertheless may vote upon a question of who is to fill the office; and therefore I cannot say that for myself I have formed the opinion I have formed with any great confidence. But still I am bound to come to a determination upon it; and it seems to me that it is impossible to lay down any general canon as to what involves expenditure and what does not, that each case as it arises must be decided upon its own facts, and that when you take this particular case the only safe guide is simply to follow the words of the Act of Parliament. It has to be observed that it is not a case of giving the members only the right to vote upon certain matters; it is rather that you make them members of the County Council and then disqualify them from voting upon certain matters; so that it seems to me that they are there with a *prima facie* right to take part in the proceedings, which may be cut down by the words that I have quoted. Accordingly, as I find that this vote did not literally "involve expenditure," I come to the conclusion that these gentlemen were entitled to vote. And on the whole matter I do not think this an inequitable conclusion to come to, because, as was pointed out to us in the argument, although the burgh of Irvine have not in one sense a direct interest in the making up of the valuation roll they have an indirect interest, because there are certain assessments to which they are bound to contribute. They are not assessed directly

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because they are in the burgh and not in the county; but the burgh has to make a contribution, and the amount of the contribution, as in a question with the contribution of the county, is got at by taking the proportion of the valuation of the burgh and the valuation of the county. It is therefore clear that in an indirect way the burgh have an interest in what the valuation of the county is, and that being so they have an interest in having whom they consider to be the best man appointed to settle what that valuation is. Accordingly, although I make these latter observations as showing that I am comforted by thinking it is not an inequitable conclusion that I have come to, I still put my judgment, in the nice position in which I find the matter, on a simple adherence to the Act of Parliament, and I am of opinion that we should answer the question put to us in the affirmative.

LORD M'LAREN—I concur for the reasons given by your Lordship. I am not satisfied that the appointment of an assessor to a salaried office is a question involving expenditure in the sense of the Local Government Act. It may be said that expenditure is a necessary result of the appointment of an assessor, but here the expenditure is the result of the performance of a statutory duty which is independent of the choice of the individual official.

LORD KINNEAR—I also think that this is a question of considerable difficulty upon the construction of the statute, but I have come to the same conclusion as your Lordships, and for the same reasons.

LORD PEARSON was absent.

The Court answered the question in the affirmative.

Counsel for the First Party—Leadbetter. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Party—Hunter, K.C. — T. B. Morison. Agent — James Ayton, S.S.C.

Counsel for the Third and Fourth Parties — Clyde, K.C. — Wilton. Agent — Alexander Bowie, S.S.C.

Thursday, May 17.

SECOND DIVISION.

PHEYSEY, PETITIONER.

Public Records—Nobile Officium—Transmission of Public Records for Production in English Court—Register of Marriages—Marriage Schedules.

The Court *granted* the prayer of a petition presented by an Englishman, who was suing an action of divorce in the High Court of Justice in England, for the purpose of having the Registrar-General authorised to exhibit in the suit certain volumes in his custody.

This was a petition presented on 16th May 1906 by Frederick Cecil Pheysey, distiller's clerk, residing at 3 Elms Road, Clapham, in the county of London.

The petitioner stated—"That the petitioner was, on 21st June 1901, married in Glasgow to Marguerite Horton Rutherford, then residing at 2 Ailsa Terrace, Hillhead, Glasgow. The petitioner was then a minor, being twenty years of age, and his said wife was two years his senior. The marriage took place by declaration before the Sheriff of Lanarkshire at Glasgow, upon a petition presented to him on behalf of and signed by both the contracting parties, who on same date also signed the register of marriages for the district of Blythswood, Glasgow. At the date of said marriage the petitioner was and has continued to be a domiciled Englishman. That on or about 11th January 1904 the petitioner's said wife, in the name and under the description of Marguerite Horton Rutherford, spinster, contracted a bigamous marriage with Henry Edward Cosgreave at St Mary's Church, Wednesbury, in the district of West Bromwich, and the petitioner's said wife and the said Henry Edward Cosgreave have since lived and cohabited as man and wife at 19 Egerton Gardens, West Ealing, in the county of Middlesex. That on or about 21st December 1905 the petitioner brought an action in the Probate, Divorce, and Admiralty Division of the High Court of Justice in England for a dissolution of his marriage with the said Marguerite Horton Rutherford, founding upon her adultery with the said Henry Edward Cosgreave. To said action the petitioner's said wife (calling herself Marguerite Horton Cosgreave) has filed an answer in which she, *inter alia*, stated she never was the wife of the petitioner. The said action is set down for trial, and it is anticipated will be reached in the course of the present month. That the said petition and relative declaration and warrant by the Sheriff, and the said principal marriage certificate or schedule, are in the custody at Edinburgh of the Registrar-General for Scotland, and being required to establish the petitioner's marriage, the present application is therefore made to your Lordships for authority to have the volumes containing the same, viz. (1) register of marriages for the district of Blythswood, Glasgow, for the year 1901, and (2) marriage schedules for the district of Blythswood, Glasgow, for the year 1901, exhibited before the said Division of the High Court of Justice in England, under the custody of an officer to be selected by the Registrar-General, and by whom the said volumes shall be restored to the custody of the Registrar-General. A copy of this petition has been duly intimated to the Registrar-General."

The petitioner prayed the Court "to grant warrant to and authorise the said Registrar-General, or any officer duly authorised by him, to convey the said volumes containing the said petition and relative declaration and warrant by the Sheriff, and the said marriage certificate or schedule, to London, and there to exhibit

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the same in the said High Court of Justice—Probate, Divorce, and Admiralty Division—at the said trial," &c.

No appearance was made for the Registrar-General.

Counsel in moving that the prayer of the petition be granted referred to *Mackenzie, Petitioner*, February 8, 1902, 4 F. 559, 39 S.L.R. 390; *Earl of Euston, Petitioner*, December 5, 1883, 11 R. 235, 21 S.L.R. 170. [LORD LOW—Are there not in this case the same safeguards as in an application at the instance of the Crown?—(A) Yes.]

The Court (the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low, absent Lord Kyllachy) granted the prayer of the petition.

Counsel for the Petitioner — Horne. Agents — Webster, Will, & Company, S.S.C.

Tuesday, May 22.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

MUIR & SON, LIMITED *v.* EDINBURGH AND LEITH CORPORATIONS GAS COMMISSIONERS.

Process—Proof in Outer House—Reclaiming Note — Further Proof Allowed by Inner House—Remit to Lord Ordinary—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 62.

Section 62 of the Court of Session Act 1868 is as follows:—"The third section of the Act 29 and 30 Vict. cap. 112 [Evidence (Scotland) Act 1866] is hereby amended to the effect of providing that, notwithstanding the terms of said section, 'where proof shall be ordered by one of the Divisions of Court,' it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion."

During the debate on a reclaiming note presented by the defenders against an interlocutor of the Lord Ordinary in favour of the pursuers pronounced after proof, the pursuers obtained leave to amend their record and the defenders to answer the amendment. Thereafter, the defenders having moved to be allowed to lead additional proof, the pursuers contended that under the section set forth above it could only be taken by one of the Judges of the Division, a remit to the Lord Ordinary being incompetent.

The Court *remitted* to the Lord Ordinary to take further proof and to report.

Muir & Son, Limited, having brought an action of damages against the Edinburgh and Leith Gas Commissioners, the Lord Ordinary (ARDWALL) after proof gave judgment in their favour.

The defenders reclaimed.

In the course of the hearing the pursuers obtained leave to amend their record and the defenders to answer the amendments. The defenders then moved the Court to allow them to lead additional proof. The Court indicated their opinion that the proof should be allowed, and proposed to remit the case to the Lord Ordinary.

Pursuer's counsel drew their Lordships' attention to section 62 of the Court of Session Act 1868, and to the case of *Rowatt, &c.* v. *Brown*, February 18, 1886, 13 R. 576, 23 S.L.R. 397, and contended that the additional proof could only be competently taken by a Judge of the Division, a remit to the Lord Ordinary being made expressly incompetent by section 62 of the Court of Session Act 1868, and being further inconvenient, as it might lead to a multiplication of processes, for if the Lord Ordinary revised his judgment after hearing further proof a new reclaiming note would be necessary.

The Court pronounced this interlocutor—

"The Lords allow the answers for the defenders to be received: Open up the record: Allow the minute of amendment and the answers to be added to the record and of new close it: On the motion of the defenders remit to the Lord Ordinary to allow them a further proof in respect of the said minute and answers, and the pursuers a conjunct probation, and to report—the proof to be taken by the said Lord Ordinary not earlier than 16th October next."

Counsel for the Pursuers—Guthrie, K.C. —Constable. Agents—Finlay & Wilson, S.S.C.

Counsel for the Defenders—Lord Advocate (Shaw, K.C.)—J. D. Millar. Agent—James M'G. Jack, S.S.C.

Tuesday, May 22.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

M'GROARTY *v.* JOHN BROWN & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1, *sub-sec.* (2) (*c*)—*Serious and Wilful Misconduct—Drunk and Unfit to Work.*

"Being drunk and unfit to work" is serious and wilful misconduct within the meaning of section 1 (2) (*c*) of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (*c*), enacts—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

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In an appeal from the Sheriff Court at Dumbarton in an arbitration under the Workmen's Compensation Act 1897 between James M'Groarty, holder-on, 3 Burnbank Place, Yoker, appellant, and John Brown & Company, Limited, engineers and shipbuilders, Clydebank, respondents, the stated case gave the following facts as proved:—

"1. That the appellant entered the employment of respondents on Monday, 18th September 1905, and wrought on the night-shift till Friday, 22nd September 1905.

"2. That the appellant is a holder-on, and during that time was engaged on the ss. 'Carmania,' then in course of construction.

"3. That on the night of 22nd September 1905 the appellant worked on the night-shift from 6 o'clock till 9·30 p.m., when he left the yard. He returned to the yard shortly before 10 p.m. the worse of drink.

"4. That his condition was observed as he passed through the check office by the respondents' foreman Shields, part of whose duty it was to watch the men coming in.

"5. That Shields immediately reported appellant's condition to his under foreman Davis, and directed him to follow the appellant.

"6. That the foreman Davis immediately followed the appellant and came up with him on board the ss. 'Carmania' at the place where he had been working, and just as he was about to resume work.

"7. That the foreman Davis thereupon ordered the appellant to leave his work, and told him to go home in consequence of his drunken condition.

"8. That the appellant was drunk and unfit to work.

"9. That the foreman Davis acted rightly in ordering the appellant to leave.

"10. That the appellant thereupon left the place where he had been working previously, and proceeded to go home.

"11. That a few minutes later the appellant was found injured at the bottom of a ladder on board the ss. 'Carmania.'

"12. That such injury took place after the appellant had been ordered to discontinue his work.

"13. That the ladder in question was quite safe and suitable for the ordinary use of sober workmen.

"14. That the accident to appellant happened solely through appellant being drunk and unfit to work, and was not attributable to the negligence of the respondents."

The Sheriff-Substitute (BLAIR) held on these facts that the appellant having been injured in consequence of his being drunk and unfit to work, that was serious and wilful misconduct on his part within the meaning of the Act, and assoilzied the respondents with expenses.

The following question in law was submitted for the opinion of the Court:—"Whether the fact of the appellant being drunk and unfit to work, and the accident having happened in consequence thereof, constitutes serious and wilful misconduct within the meaning of the Act."

Argued for the appellant—The appellant had worked from 6 p.m. to 9·30 p.m., and during that time he was perfectly sober. The arbiter had made no findings as to what had happened to the appellant during his absence. Facts might have been proved which would have excused him. There were various degrees of intoxication, and such facts might have shown that the appellant's conduct was excusable and did not constitute serious and wilful misconduct in the sense of the Act.

Counsel for respondents were not called on.

LORD PRESIDENT—I have no doubt in this case. It has been found by the Sheriff-Substitute that the appellant came to his work the worse of drink, and that the accident happened solely from his being drunk and unfit for work. It was argued that the Sheriff ought to have inquired as to what happened between the time the appellant left his work at 9·30 and his return at 10 o'clock. But I think the Sheriff was right in not doing so. The main fact that the man was drunk and unfit for work and that the accident happened solely owing to his condition, was enough to disentitle him to compensation under the Act.

LORD M'LAREN—I am of the same opinion. It is only necessary in this case to consider whether drunkenness is "serious and wilful misconduct." Of course there are degrees of intoxication, but in this case the appellant was dismissed for being drunk and unfit for work. I cannot doubt that drunkenness to the extent of unfitting a man for his work is "serious and wilful misconduct," and disentitles the applicant to compensation under the Act of Parliament.

LORD KINNEAR and LORD PEARSON concurred.

The Court answered the question in the affirmative.

Counsel for the Appellant—Hunter, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondents—M'Clure, K.C.—Macmillan. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, May 23.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

ALLAN *v.* THOMAS SPOWART & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sec.* 12—*Application for Review—Power of Arbiter to Declare that the Compensation Payable to the Workman shall Cease at a Future Date.*

In an application to have the compensation payable to an injured miner ended or diminished, the arbiter, on a

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report by a medical referee to the effect that the miner's wage-earning capacity would be completely restored after three months' work on the surface, directed that the compensation should cease after a certain future date, giving effect to the report.

Held that the arbiter had exceeded his power, inasmuch as his function in assessing compensation was to have regard to the workman's present state, and not to pronounce a judgment, the validity of which would depend on his condition at a future date.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule 1, section 12, enacts—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased. . . ."

In an arbitration under the Workmen's Compensation Act 1897, raised in the Sheriff Court at Dunfermline by John Allan, miner, Wellwood, who had received injuries to his back, against Thomas Spowart & Company, Limited, Lassodie Colliery, Dunfermline, in which the claimant had obtained compensation at the rate of 18s. 6d., subsequently reduced to 15s. 6d. per week, the respondents on 15th November 1905 lodged a minute in process craving the Court to end or diminish the compensation "in respect that the circumstances of defender are now changed, and that he is fit for work."

Answers were lodged in which continuing partial incapacity was pleaded. On 8th December 1905, of consent, the Sheriff-Substitute (HAY SHENNAN) remitted to the medical referee, Dr Sturrock, who on 12th December reported—"That John Allan has sufficiently recovered from the effects of the accident and is fit for work, there being no ankylosis of (fixed union between) the vertebræ, no symptoms of any injury of the spinal cord, nor any wasting of the muscles of the back, nor any degeneration in them. As John Allan has not worked since July 1901, in my opinion he should have work above ground for the first three months." On a further remit by the Sheriff-Substitute, who was in doubt whether the medical referee meant that after three months' work on the surface Allan's wage-earning capacity would be completely restored, or merely that he would then be able to work underground without his recovery being complete, the medical referee stated his meaning was "that three months on the surface was all that was needed to restore completely Allan's wage-earning capacity."

Thereafter on 27th February 1906 the Sheriff-Substitute pronounced an interlocutor in which he directed "that the weekly compensation to the respondent be reduced as from 31st December 1905 to the sum of nine shillings and eightpence, and that the said compensation be ended from and after 31st March ensuing."

Allan appealed.

The stated case, *inter alia*, set forth the above-mentioned facts and submitted the following question of law for the opinion of the Court—"(2) Whether the Sheriff-Substitute had power, under the Workmen's Compensation Act 1897, to direct that the compensation payable to the appellant should be ended as at 31st March 1906, the date of the Sheriff-Substitute's judgment being 27th February 1906?"

Argued for appellant—The arbiter had no power to declare that the compensation should end at some future time. His only ground for doing so was a medical forecast that by that time the appellant would have completely recovered. A medical certificate to that effect was no evidence as to the state of his earning capacity at that date. There must be as at that date either a proof or, at all events, a remit as to his then earning capacity—*Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Johnstone* v. *Cochran & Company, Annan, Limited*, June 30, 1904, 6 F. 854, 41 S.L.R. 644.

Argued for respondents—The medical referee had reported that the appellant had completely recovered. The fact that his muscles were stiff and needed to be relaxed was not inconsistent with his having completely recovered. That being so the arbiter had power to declare the compensation ended as from 31st March 1906.

LORD PRESIDENT—The appellant in this case was injured at a time when his average weekly earnings were 37s. 4d. After a period during which he was paid fifty per cent. of his wages, on 30th January 1904 the respondents, his employers, presented an application in the Sheriff Court at Dunfermline craving that the compensation should be ended or diminished in terms of section 12 of the Workmen's Compensation Act.

At that time a proof was led and the Sheriff-Substitute found that the appellant was still suffering from the effects of the injury, and awarded him compensation at the reduced rate of 15s. 6d. per week. On 15th November 1905 the respondents lodged a minute craving that the compensation should be ended or diminished. Proof was ordered, but, of consent, the parties agreed to a remit being made to a medical referee, Dr Sturrock. The medical referee reported that the appellant had sufficiently recovered from the effects of the accident and was fit for work, but that as he had not worked since July 1901 he should have work above ground for the first three months.

At the hearing on the report the appellant's agent moved to be allowed to lead evidence as to the appellant's wage-earning capacity. The Sheriff-Substitute refused the motion for proof and remitted to Dr Sturrock to supplement his report as to the appellant's recovery. In answer the medical referee reported that three months on the surface was all that was needed to restore completely the appellant's wage-earning capacity. On that report an interlocutor was pronounced reducing the compensation as from 31st December 1905 and ending it from and after 31st March 1906. That interlocutor was pronounced on 27th February 1906.

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[*The Lord President after dealing with the first question, on which the case is not reported, continued*]—The second question is whether the Sheriff-Substitute had power to end the compensation as from 31st March 1906, the date of the judgment being 27th February 1906.

In pronouncing this interlocutor the Sheriff-Substitute seems to have introduced a new practice which I think ought not to be encouraged. The meaning of the medical referee's report seems to have been that the appellant had recovered in this sense, that the injured parts were healed, but that he had not recovered from that weakness which is inseparable from long disuse of the muscles. The Sheriff-Substitute allowed modified compensation for three months, after which it was to be ended. I am not surprised that the Sheriff-Substitute did so, for Dr Sturrock had said that after three months' work on the surface the appellant's muscles would have regained their former vigour, and so, as there was no longer any physical injury, the appellant would then be just as good a man as he had been before the accident. But the Sheriff-Substitute has, to a certain extent, pronounced judgment beforehand on a future event. The function of the Sheriff in assessing compensation is to have regard to the man's present state, and he is not entitled to pronounce a judgment beforehand, the validity of which depends on his condition at a future date. I think, therefore, the case must be remitted to the Sheriff-Substitute to satisfy himself either by remit or by proof as to the appellant's condition on 31st March 1906, whether he had completely recovered at that date or not, and as to his condition up to the present time. The Sheriff will then be in a position to declare that the compensation was, or was not, rightly ended as at 31st March, and also to dispose of the case.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the second question in the negative and remitted to the Sheriff as arbitrator to ascertain the appellant's condition on 31st March 1906, and since then, and to proceed in the arbitration.

Counsel for Appellant — Watt, K.C. — Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents — Solicitor-General (Ure, K.C.)—Horne. Agents—W. & J. Burness, W.S.

Thursday, May 24.

SECOND DIVISION.

[Sheriff Court of Ayrshire at Ayr.

RUSSEL *v.* M'CLYMONT.

Master and Servant — Wages — Implied Contract—Services Rendered by Niece to Aunt—Presumption.

A niece in impoverished circumstances came to live with an elderly aunt, occupying the position of an adopted daughter. During her aunt's last illness, extending over several years, she performed all the duties of a sick-nurse. She, along with other relatives, obtained certain benefits under her aunt's will, which had been made prior to her illness. *Held* that she was not entitled, in the absence of a contract to that effect, to remuneration or wages for the services she had rendered.

This was an action for the sum of £300, brought in the Sheriff Court at Ayr by Miss Sarah Catherine Russel against James Templeton, Mrs Isabella Davidson or Dick's testamentary trustee, to which Mrs Elizabeth Murdoch Davidson or M'Clymont, who along with the pursuer was Mrs Dick's residuary legatee, had been sisted as a defender. The sum sued for represented, according to the pursuer's contention, reasonable remuneration for services rendered to Mrs Dick over a period of several years.

The facts of the case are sufficiently apparent from the interlocutor and note of the Sheriff-Substitute (CAMPBELL SHAIRP), and the excerpts from the correspondence and evidence *infra*.

On 28th October 1902 the Sheriff-Substitute pronounced this interlocutor:—". . . Finds in fact — 1. That the late Mrs Isabella Davidson or Dick, mentioned in the petition, died at Waterloo Villa, Ayr, on 29th November 1899, and that for three years prior to her death she had been in such a state of bodily and mental weakness as necessitated constant attendance and nursing; 2. That during said period of three years she was most efficiently attended to and nursed by her niece the pursuer; 3. That such nursing and attendance was given by the pursuer out of family affection for her aunt the said Mrs Isabella Davidson or Dick, and that in return for it she received her clothes and a home in her aunt's house; that there was no express contract that any wages should be paid to the pursuer, and that she was content at the time such services were rendered to look for no further remuneration for such services except such as she might receive in the shape of bequests under the said Mrs Isabella Davidson or Dick's will at her good pleasure: Finds in law that in the above circumstances any presumption that wages are due to the pursuer for her attendance on Mrs Dick has been rebutted: Accordingly assoilzies the defenders from the conclusions of the action. . . ."

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Note.—"I have not found this case free from difficulty. There is not much difference between parties as to the true state of the facts. The difficulty lies in applying the law to the same.

"In October 1888 the pursuer returned from America to find a home with her aunt Mrs Dick, and her uncle the Rev. Mr Davidson, her passage money being paid by Mrs Dick. At that time the pursuer's financial position was such that it was necessary for her either to find such a home with relatives or to work for her living. Prior to the pursuer's arrival from America certain correspondence passed between the pursuer and her uncle and aunt, but neither at that time nor at any subsequent date was it arranged that wages should be paid to the pursuer. On this point I refer to the pursuer's own evidence.

"On her arrival in October 1888 the pursuer stayed with Mrs Dick for about a month, and then by her aunt's desire she went to her uncle the Rev. Mr Davidson, who, being very frail, required her more than Mrs Dick. From that date she looked after and nursed her uncle till his death in 1893. On his death Mr Davidson left the pursuer all that he had, and the total value of this bequest was about £660. I think it is fair, looking to the whole circumstances of the case, that this bequest should be remembered. On Mr Davidson's death the pursuer returned to live with her aunt Mrs Dick, and remained with her till she died.

"As to the state of Mrs Dick's health during the last three years of her life, and the devoted and efficient nursing which she received at the hands of the pursuer, I refer to the evidence of Dr M'Kerrow. On that evidence I am prepared to hold that the pursuer's services were unremitting and most efficient, and that but for these services it might have been necessary to employ two trained nurses during the last three years of Mrs Dick's life. Had the pursuer been a stranger, I think that the sum of £200 which she claims for these three years would have been reasonable remuneration for the services she rendered; but then she was no stranger.

"I think that her true position is frankly set forth by herself in the passages of her evidence to which I have already referred. When Mrs Dick's will was read the pursuer suffered considerable disappointment. She found the *pro indiviso* half of the house in Prestwick which she had expected to receive was not to be hers. The sum of money which the pursuer may receive under Mrs Dick's will is probably over £600. This is made up of the one-half of the residue of Mrs Dick's estate, and of one-sixth of a legacy of £1000 left to pursuer's mother. The pursuer's position is accordingly this, that being disappointed under the will, and seeing that other relatives not nearer than herself, who rendered no such arduous services as she did, are receiving as large or a larger share of Mrs Dick's estate, she is now entitled to put forward her claim for wages. The strongest argument to my mind in favour of the pursuer's claim is that Mrs Dick's will was executed long prior to her three years' illness, and that during that illness her mental power was so impaired that she was unable duly to estimate the services rendered by the pursuer, or to arrange to remunerate them adequately, and that consequently the pursuer's claim for wages may legitimately be made against Mrs Dick's estate like any other claim for deathbed expenses.

"After giving this argument full value I am not prepared to hold that it can prevail. I think that the pursuer must abide by her position as a relative of Mrs Dick, who got her clothes and a good home, and was content to accept the chances which always prevail in testamentary affairs.

"No case has been quoted to me as showing that a relative has been allowed both to accept a legacy and to claim remuneration for services rendered. To sanction this would in my opinion be a new departure, not lightly to be entered upon in the Sheriff Court without an example in the Court of Session. I fully appreciate the hardship of the pursuer's position, but I think that to uphold her contention would be in effect for this Court to remake Mrs Dick's will, and that would in my judgment be a very hazardous experiment."

The following passages are excerpted from the correspondence referred to by the Sheriff-Substitute, the two first being from letters written by the pursuer to her aunt, from America, at a time when she was training for the nursing profession in a New York Hospital, and the last from one written by her to her uncle about the same time:—(1) "May 1888 . . . You mention that Uncle Robert (the Rev. Mr Davidson) sent you a reading of my letter. I hope it was not a very blue one, but he wrote in such a kind way asking me if I would not like to go back to the manse, that I had to tell him just exactly how I was situated, and what I was doing, for I could not say I would go until I told him all about it, and leave it for himself to judge whether he would care to have poor me; and even you say I might be of use to you too. Now, my dear Aunt Dick, if I thought I could be of any benefit to you, Uncle Robert, or Aunt Railton, I would consider myself very fortunate and happy in having such a good home, and would only be too glad to do all I could for you. . . . My lectures have not begun yet. . . . I believe they will begin soon now, but it seems a perfect lifetime to have to spend—two whole years—here, but when one knows they have to provide for themselves and all their wants it is best not to think too much of the drudgery, but to think of the independence at the end. . . . There is one thing sure it is a very fatiguing life in the meantime." (2) "1st August 1888 . . . It is absolutely necessary for me to do something. . . . You see why I am forced to strike out for myself. Mother had a letter from Aunt Railton a fortnight ago, and she said when she was going to the Manse. She just wrote to say she was going, and if it was not for the expense of crossing the Atlantic I should just do the same; but it is not the expense of crossing the Atlantic that is the lion in my way, for

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I could do that much, but if I thought I might be a sort of third wheel afterwards, I think I would run away, and I would like to try and earn just a little to lay past for by-and-bye, and would do all I could to make you feel I was worthy of your kindness. Mother would be more contented for me to be with you than in New York. There is no doubt of that, and I would like being with you myself, but you know me sufficiently to know whether I would be all you could desire or not." (3) " . . . When I answered your kind letter of last March, in which you gave me such a cordial welcome back to Scotland, I felt that I would like to be with you, but as I had never told you how dependent I am I thought I had better wait till you knew, and then if you still wished me I would go with all my heart."

The following is excerpted from the evidence given by the pursuer:—"(Q) You arrived in Scotland in October 1888?—(A) Yes. (Q) Mrs Dick had sent out your passage money to you?—(A) She did. (Q) And you came and took up residence with Mrs Dick at Waterloo Villa?—(A) Yes, about the end of October 1888. (Q) You remained with Mrs Dick for about one month, when she sent you to look after her brother, the Rev. Mr Davidson?—(A) Yes. . . . (Q) After Mr Davidson's death you returned to Mrs Dick's?—(A) Yes. She insisted upon my coming back to her. She said, 'Now that your uncle is dead, you must come back to me and look after me, for I am black needing you.' (Q) Mrs Dick was then 74 years of age?—(A) Yes. She was getting very frail and losing her memory. (Q) And she required someone to look after her?—(A) Yes, very decidedly. (Q) Who was then looking after her?—(A) An old servant she had for many years, old Jess, as she was called. (Q) A woman considerably over sixty at that time?—(A) She was an old woman, and died in August 1895. (Q) At that time old Jess was the only one looking after your aunt?—(A) Yes. (Q) For three years before her death your aunt required nursing and attention day and night?—(A) Yes. She had a fall in 1894, which gave her such a shake that she seemed to fail more and more after that. (Q) You alone nursed and watched her?—(A) Yes. There was a great deal of heavy disagreeable work to do, and I got my hand poisoned in connection with my duties. . . . (Q) You got your board?—(A) I got my board and clothing. . . . (Q) You never asked her for wages?—(A) No. (Q) Would she have given you wages if you had asked?—(A) She would. (Q) You never tried to ascertain what was in her will?—(A) Never. (Q) You did not know what was in her will?—(A) No. I had a great deal in my power. (Q) If there had been more left for you in her will you would not have made any claim?—(A) I do not think I would. (Q) Were the services you gave her not natural towards a kind relative in a sense?—(A) It was in the sense that she had asked me to come and take care of her, and I had performed my duty towards her. (Q) Was it not in a sense of kindness and affection towards her?—(A) Certainly not altogether. (Q) Did you consider that she had been very kind towards you?—(A) She was. . . . (Q) You did not contemplate the question of wages till after you found out that you were not left well off under the will as you expected?—(A) I was always led to believe that my aunt would remunerate me. (Q) You did not contemplate the question of wages until after the will was read?—(A) I always thought she would leave me something for staying by her. (Q) Did you contemplate asking for wages?—(A) No, because I knew she knew my circumstances, and I was fully persuaded that she would remunerate me in her will, or something like that. (Q) When you found that you were getting less under the will than you expected, did you then consider that you were entitled then to bring in a claim for wages?—(A) I thought I was clearly entitled."

The pursuer appealed to the Sheriff (BRAND), who on 4th August 1905 pronounced an interlocutor recalling the interlocutor of the Sheriff-Substitute and awarding the pursuer £200.

Mrs M'Clymont appealed to the Court of Session, and argued—No claim for remuneration was competent, for the reasons set forth in the note of the Sheriff-Substitute. The pursuer lived with her aunt in the position of a member of the family and not of a servant, which *per se* raised a presumption against wages which could only be overcome by proof of special contract entirely awanting here. The pursuer's position in the family distinguished the case from *Anderson* v. *Halley*, June 11, 1847, 9 D. 1222, and *Thomson* v. *Thomson's Trustee*, January 12, 1889, 16 R. 333, 26 S.L.R. 217, on which the Sheriff had relied. Lord President Boyle's dictum in the former case at p. 1227 was not of general applicability. *Ritchie* v. *Ferguson*, November 16, 1849, 12 D. 119; *Miller* v. *Miller*, June 10, 1898, 25 R. 995, 35 S.L.R. 769; *Urquhart* v. *Fairweather*, October 28, 1905, 43 S.L.R. 7; and *Rig* v. *Rig*, June 6, 1676, M. 11,426, were all favourable authorities. As a matter of fact the pursuer never thought about wages but relied upon being remembered in her aunt's will, as she in fact was, and her only possible ground of complaint was that she had not got quite as much money as she expected and possibly deserved.

Argued for the pursuer and respondent—She was entitled to wages. The correspondence showed that she came, not upon the footing of obtaining a temporary home, but of earning a livelihood. There was thus virtually a contract for wages. Further, it was admitted that she had rendered services for which hired servants might justifiably have been employed, and the presumption of law, even between parent and child, was in such circumstances in favour of remuneration—*Anderson* v. *Halley*; *Thomson* v. *Thomson's Trustee*; *Miller* v. *Miller*, *supra*. She was accordingly entitled to a *quantum meruit*. Her claim was in no way satisfied by the benefit she took under her aunt's will, along with others who had rendered no services—*Spadin* v. *Spadin's Trustees*,

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January 14, 1819, F.C. M'Laren on Wills, i, 750, was referred to.

LORD JUSTICE-CLERK—This is a painful case. It is always a sad thing to see relations quarelling about money. From all I have seen in the proof Miss Russel seems to have done her duty in an exemplary manner. She would have been justified in bringing in skilled nurses to attend upon her aunt. But she did not do so, and undertook that duty herself. It was no doubt very trying work, and she deserves great credit for it. But unfortunately we must deal with this claim as a question of legal right. The residuary legatee has not seen fit to recognise the pursuer's services. She might very well have done so but she has not. With that we have nothing to do. We can only consider whether the pursuer has any legal claim.

On the proof I hold that when the pursuer came home from America she came as a niece to live with her aunt, very much in the position of an adopted daughter. There is no case where in such circumstances a niece who has come to live with an aunt has been held to have any claim for remuneration as for services unless there was a bargain for such remuneration. When the pursuer came home she was rather depressed. The family money had been lost. She had begun to go through a period of hard probation with a view to becoming a nurse. She came to this country to find a home with her aunt instead of going out to work for herself, and to render to her aunt the duties of a daughter, not of a servant—not expecting to receive wages, but no doubt expecting to be remembered in her aunt's will. Her aunt did remember her in her will. The pursuer's case is really put on this, that after a time there was a change of circumstances. The aunt came to be in such a state of health that she required much more attention. Miss Russel had to render arduous and painful services. At the same time the aunt's mental condition became such that she could not do anything additional for the pursuer by will. I am unable to see that these circumstances affect the question which we have to decide.

Summing up the case it stands thus—The pursuer came to her aunt as an adopted daughter. She lived on with her when her health became worse. She might have employed nurses but she did not do so. She nursed her aunt herself as a daughter might have done. She cannot enforce a claim in law to wages for doing so. I think the Sheriff was wrong. I am perfectly satisfied with the Sheriff-Substitute's interlocutor and his careful note, to which I give my entire concurrence.

LORD KYLLACHY—I agree with your Lordship and with the Sheriff-Substitute. I am entirely satisfied with the Sheriff-Substitute's interlocutor and note, and am prepared to adopt all he has said.

LORD STORMONTH DARLING—I concur. The position of matters is this, that the pursuer when she came to her aunt in 1888, and again when she returned to her in 1893, was content to do so on the understanding that she was to get a home and board and clothing; as to anything beyond that she trusted to being remembered in her aunt's will. She has in fact been remembered, but not with such substantial results as she expected and thought appropriate. That may have been due to the fact that her aunt's last codicil was made in 1893, while the special services rendered to her by the pursuer were after that date, by which time the old lady's weakness, mental and bodily, had greatly increased. I concur with your Lordships in thinking that the residuary legatee on that account might well have recognised the claim which the pursuer had in equity. It is, however, impossible for us to do anything to help her, as she has failed to prove that there was any contract, express or implied, that she should receive additional remuneration for the duties she performed. I am of opinion that we should revert to the judgment of the Sheriff-Substitute, with which I agree in every respect.

LORD LOW—I am of the same opinion. Like all your Lordships, as I understand, I should have been very well pleased if it had been possible to give the pursuer some remuneration for the onerous services she has rendered to Mrs Dick during the last three years of her life. But it is only too plain that she has no claim which the law can recognise.

The Court recalled the interlocutor of the Sheriff and assoilzied the defenders.

Counsel for the Appellant—Cooper, K.C.—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Thursday, May 24.

FIRST DIVISION.

[Single Bills.

CANAVAN *v.* JOHN GREEN & COMPANY.

(*Ante* December 16, 1905, *supra* p. 200.)

Expenses—Jury Trial—Two Trials in both of which Pursuer Successful—Verdict in First Trial Set Aside on Ground of Misdirection—Expenses of First Trial.

In an action of damages for personal injury the pursuer obtained a verdict which was afterwards set aside on the ground of misdirection. At the second trial the pursuer again obtained a verdict. The pursuer moved for the expenses of both trials.

Held that as the verdict in the first trial had been set aside on the ground of misdirection the pursuer was entitled to the expenses of the first trial as well as those of the second.

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Opinions reserved as to the right of a pursuer who has been successful in both trials to the expenses of the first where the verdict in it has been set aside as contrary to the evidence.

M'Quilkin v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; and *Grant* v. *William Baird & Company, Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365, commented on.

This case is reported *ante ut supra*.

John Patrick Canavan, labourer, 14 South Shamrock Street, Glasgow, raised an action of damages at common law, or alternatively under the Employers' Liability Act 1880, against John Green & Company, masons, 600 Eglinton Street, Glasgow. The case went to a jury and he obtained a verdict. The Court having set aside the verdict of the jury on the ground of misdirection on the part of the Judge, the case was tried a second time, when a jury under the Lord President again returned a verdict for the pursuer, assessing the damages at £220. A rule was refused.

The pursuer on 24th May moved in the Single Bills for the expenses of both trials.

The defenders opposed the motion *quoad* the expenses of the first trial and argued—The pursuer was not, as of right, entitled to the expenses of the first trial and should not in this case be allowed them. The two most recent decisions on the point were conflicting, *i.e.*, *M'Quilkin* v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; and *Grant* v. *William Baird & Company, Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365.

Counsel for the pursuer were not called on.

Lord President—The facts in this case are familiar to your Lordships. There was a jury trial in which the pursuer claimed damages alternatively at common law and under the Employers' Liability Act. The jury after a direction by the learned Judge returned a verdict for the pursuer under the statute, ignoring the common law liability and without saying yea or nay to the common law issue, but assessing the damages at a figure which was within the statutory limits.

The verdict was afterwards set aside on the ground of a misdirection by the learned Judge as to the statutory provision on which the question turned. A new trial then took place at which I presided. I purposely directed the jury to give special findings as to the common law and statutory liability. The jury found for the pursuer on both issues and assessed the damages at a sum which was not within the statutory limits. On a motion for a new trial your Lordships refused to disturb the verdict on the ground that the jury had given a verdict on the common law issue, and that there was a certain amount of evidence to support their finding. The pursuer now asks for the expenses of both trials.

It seems to me that when the miscarriage of the first trial is due to the misdirection of the Judge, there is no question of the pursuer's right to the expenses of the first trial as well as those of the second. I therefore think the motion now made should be granted. Our attention was called to two cases which I agree are not very easy to reconcile, and when an appropriate case arises it may well be that they ought to be reconsidered. Such a case, however, is not now before us, and I desire to reserve my opinion till the appropriate case occurs.

Lord M'Laren— I agree entirely in what your Lordship has said as to cases in which a new trial has been granted on the ground of misdirection on the part of the Judge; but I desire to reserve my opinion as to the expenses of a first trial where the verdict has been set aside on the ground that the evidence was insufficient to justify the verdict, because even if the pursuer recovers damages as the result of the second trial, it is his fault or error that he did not bring forward such evidence at the first trial as should satisfy the Court as well as the jury.

Lord Kinnear—I am rather inclined to think that the two cases cited, although at first sight they may appear to be conflicting, are yet distinguishable. My own view is that the question of expenses ought always to be decided with special reference to the circumstances of the particular case. But I agree with your Lordship that it is not necessary to distinguish between the two cases quoted to us for the purpose of disposing of the present application. The pursuer here got a verdict in the first trial, which was set aside because the Court thought that the law had not been satisfactorily explained by the learned Judge who presided at the trial. If the error could have been corrected without a new trial, and the consequent judgment had been an absolvitor, the pursuer must have borne the expense caused by his obtaining a wrong verdict. But because the verdict was set aside it did not follow that the pursuer was wrong and the defender right on the question of fact. The consequence of setting the verdict aside was a new trial; and the result of the second trial, when the law was fully explained, was the same as that of the first. On the question for a jury, therefore, the pursuer was found to be in the right all along, and if the expense of the first trial has been thrown away it is because the defenders insisted, as they were entitled to do, on a second trial, which has not altered the result. The pursuer therefore cannot be said to have caused the expense of a double trial. I think, therefore, that as the successful party he is entitled to the expenses of the litigation in the usual way.

Lord Pearson—I agree in the judgment proposed. In this case a second trial was granted on the ground that there had been a misdirection by the Judge who presided at the first trial. I think the result might be different if the verdict had been set aside not only on the ground of misdirection but on the further ground that the verdict was contrary to evidence. That would

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have been a different case, and I do not express any opinion on it.

The Court found the pursuer entitled to the expenses of both trials.

Counsel for Pursuer—J. C. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Friday, May 25.

FIRST DIVISION.

[Sheriff Court at Falkirk.

CALDWELL *v.* DYKES.

Process—Appeal—Appeal merely on Question of Expenses—When only to be Given Effect to.

Per Lord President—"I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits."

On 18th December 1904 James Thomson Caldwell, flesher, Vicar Street, Falkirk, brought an action in the Sheriff Court at Falkirk against James Dykes, flesher, High Street, Falkirk, to recover £97, 15s. 4d. alleged to be due him on an accounting; and on the 24th April 1905 the Sheriff-Substitute (MOFFAT) after a proof gave him decree for £73, 4s. 4½d. but found neither party entitled to expenses. Parties acquiesced in the Sheriff-Substitute's judgment on the merits, but the pursuer took an appeal to the Sheriff on the question merely of expenses. The Sheriff (LEES) on 21st July 1905 recalled the finding as to expenses of his Substitute and allowed the pursuer one-half of his expenses. The defender appealed to the Court of Session.

The nature of the cause appears from the following findings of the Sheriff-Substitute in his interlocutor of 24th April:—"Finds in fact—(1) That in the beginning of July 1904 the defender was engaged to act as salesman and manager to the pursuer of a flesher's business at Vicar Street, Falkirk, at a salary of £1, 10s. per week, payable weekly, with a commission of ten per cent. on profits; (2) That there was no arrangement between the pursuer and defender that the defender should take over the business as soon as he was able to pay £300, or on any other terms; (3) That it was the duty of the defender to account regularly to the pursuer for the drawings of the business; (4) That in accordance with his duty the defender up to 8th October 1904 placed the drawings of the business to the credit of the pursuer's account in bank; (5) That the pursuer was in the habit of remitting money regularly for the payment of wages; (6) That on or about 8th October 1904 the defender entered into negotiations with the pursuer to purchase the said business; (7) That these negotiations did not come to a successful termination; (8) That from the 8th October 1904 the defender failed to account to the pursuer for his intromissions; (9) That the defender was dismissed from his employment as manager for the pursuer on 19th October 1904; (10) That the defender did not leave the employment but continued to carry on business until the evening of the 24th October 1904; (11) That on the evening of the 24th October the defender handed over the key of the shop to the pursuer and left the premises: Finds in law that the defender is bound to account to the pursuer for his intromissions in the management of the business up to 24th October 1904: Finds in fact (12) That on an accounting the defender is due the pursuer the sum of £73, 4s. 4½d. sterling; (13) That the defender has already paid to the pursuer, in obedience to the interlocutor of 19th December 1904, the sum of £51, 2s. sterling." The defender had on record admitted his indebtedness to the extent of £51, 2s., and had made a tender of £85, not appearing on the record, to avoid the litigation.

Argued for the defender (appellant)—An appeal merely on the question of expenses was competent—*Fleming* v. *North of Scotland Banking Company*, October 20, 1881, 9 R. 11, 19 S.L.R. 4; *Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 557—and the finding of the Sheriff-Substitute was the right one in the circumstances of the case—*Critchley* v. *Campbell*, February 1, 1884, 11 R. 475, 21 S.L.R. 326; *Mayor and Coulson* v. *Grierson*, June 16, 1892, 19 R. 868, 29 S.L.R. 766. This was not a case where the pursuer was entitled as of right to expenses. The action was one of accounting, and in such a case a pursuer though successful was not entitled as of right to full expenses. The pursuer had taken the first step in appealing to the Sheriff, and therefore could not complain of this appeal.

Argued for the pursuer (respondent)—The Court would not look favourably on an appeal from the Sheriff Court merely on the question of expenses, and in this case ought not to reverse the Sheriff's judgment. The conduct of the defender had been unreasonable all through. He was under a duty to account to the pursuer, failed at first to do so, and when he did his statement of his intromissions was so unsatisfactory that the pursuer had to employ professional accountants to go into the matter. The Sheriff on these facts was justified in his interlocutor, which was indeed the only equitable one possible.

LORD PRESIDENT—I confess that this is a case to which I address myself with great regret, because I think it is deplorable that, in a case where the original claim was for

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£97, where £51 was judicially admitted, and where—without going into the question of whether there was an extra-judicial offer of even more—the pursuer has been held entitled to £73, there should be an appeal first of all to the Sheriff and then to this Court, with a print of 61 pages and two appendices, and no attempt to disturb the merits of the original judgment.

I think it has been quite settled—and, I have no doubt, rightly settled—that there is no actual defect in competency either in appealing from the Sheriff-Substitute to the Sheriff or from the Sheriff to this Court upon the ground of expenses alone; because, after all, competency in this matter of appeal would have to depend upon the provisions of the various statutes which regulate appeals, or, if it was something which was not actually touched by statute, then it would have to depend upon a well-settled common law practice, and admittedly there is no statutory provision and no rule of practice that would prevent an appeal in the circumstances. But, while that is so, I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged, both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits. But, as I say, when a person sues for £97, is offered £51 and gets £73, and the judge who decides the case and decides it in that way, gives neither party their expenses, I think the case is about as far removed from the two categories that I have indicated as any case can well be.

I therefore think that the Sheriff ought not to have gone into this matter at all, as soon as he found, as his interlocutor shows, that neither party quarrelled with the merits of the judgment before him. Of course, I have the same opinion with regard to the duty of this Court, and it was not without difficulty, therefore, that I considered it right to examine the Sheriff's judgment at all upon this matter. But, after all, I think I am bound to do so, because I think the Sheriff has, as I say, contravened the rule which I have ventured to lay down; and, secondly, I find this, that the Sheriff, in dealing with the expenses in which he has altered the judgment of the Sheriff-Substitute, goes upon what I have no hesitation in saying is a radically wrong principle—that is to say, he commences with a proposition which is radically unsound. . . . [*His Lordship then gave his reasons for preferring the judgment of the Sheriff-Substitute.*] . . . In these circumstances I think the justice of the case is best met, and the view is best enforced of the great repugnance that we have to entertaining appeals like this upon mere expenses, by recalling the interlocutor of the Sheriff-Principal, reverting to the interlocutor of the Sheriff-Substitute, and finding neither party entitled to expenses since the date of the Sheriff-Substitute's interlocutor.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced an interlocutor recalling the interlocutor of the Sheriff, and reverting to and affirming the interlocutor of the Sheriff-Substitute, with no expenses to either party since its date.

Counsel for Pursuer and Respondent—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Defender and Appellant—J. R. Christie—Fenton. Agents—R. & R. Denholm & Kerr, S.S.C.

Friday, May 25.

FIRST DIVISION.

[Justice of the Peace Court for the County of the City of Glasgow.

ALEXANDER *v.* LITTLE & COMPANY.

Process — Appeal — Competency — Finality Clause—Compensation Claimed by Seaman under sec. 166, *sub-sec.* (2), *of the Merchant Shipping Act* 1894—*Penalty or Civil Compensation—Merchant Shipping Act* 1894 (56 *and* 57 *Vict. c.* 60), *secs.* 166, *sub-sec.* (2), *and* 709—*Summary Procedure* (*Scotland*) *Act* 1864 (27 *and* 28 *Vict. c.* 53), *secs.* 3 *and* 28—*Summary Prosecutions Appeals* (*Scotland*) *Act* 1875 (38 *and* 39 *Vict. c.* 62), *secs.* 2 *and* 3.

Section 709 of the Merchant Shipping Act 1894 provides that all orders, decrees, and sentences, pronounced by any sheriff or justice of the peace in Scotland under the authority of the Act shall be final and not subject to review.

The Summary Prosecutions Appeals (Scotland) Act 1875 provides that either party to a cause, *i.e.*, a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty before an inferior judge, may appeal notwithstanding any provision contained in the Act under which the cause shall have been brought excluding review.

A seaman brought a complaint against his employers in a Justice of the Peace Court for recovery of compensation alleged to be due to him under sec. 166 (2) of the Merchant Shipping Act 1894. The complaint bore to be under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. The Justices having dismissed the complaint, the seaman appealed on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875. *Held* that as the complaint was not a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty or a sum of money in the nature of a penalty in the sense of the Summary Procedure Act 1864, the Prosecutions Appeals Act 1875 did not apply, and that therefore the appeal was incompetent.

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The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60) enacts, section 166—"(1) Where a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages unless he is discharged with such sanction as is required by this Act, and with the written consent of the master . . . (2) If a seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which but for this section would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation, not exceeding twenty pounds, as the court hearing the case thinks reasonable." Section 703—"In Scotland, all prosecutions, complaints, actions or proceedings under this Act, other than prosecutions for felonies or misdemeanours, may be brought in a summary form before the Sheriff of the county or before any two justices of the peace of the county or burgh where the cause of such prosecution or action arises, or where the offender or defender may be for the time, and when of a criminal nature or for fines or penalties, at the instance of the procurator-fiscal of court, or at the instance of any party aggrieved, with concurrence of the procurator-fiscal of court . . ." Section 707—"Where on any summary proceedings in Scotland there is a decree for payment of any sum of money against a defender, the decree shall contain a warrant for arrestment, poinding, and imprisonment in default of payment." Section 709—"No order, decree, or sentence pronounced by any sheriff or justice of the peace in Scotland under the authority of this Act shall be quashed or vacated for any misnomer, informality, or defect of form; and all orders, decrees, and sentences so pronounced shall be final and conclusive, and not subject to suspension, reduction, or to any form of review or stay of execution, except on the ground of corruption or malice on the part of the sheriff or justices . . ."

The Summary Procedure Act 1864 (27 and 28 Vict. c. 53) enacts, section 3—"*Application of Act*—The provisions of this Act may be applied to . . . (3) All proceedings for the recovery of any penalty or sum of money in the nature of a penalty, which under the provisions of any Act of Parliament may be recovered by summary complaint or information, or by poinding or distress and sale, or other summary process or diligence of the like nature, before any sheriff, justices or justice, or magistrate." Section 28—"*Limits of civil and criminal jurisdiction defined in respect to proceedings by way of summary complaint.* . . . In all proceedings by way of complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses . . . to grant warrant for the imprisonment of the respondent, . . . and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil. . . ."

The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62) enacts—section 2—"*Interpretation of Terms*—In this Act the following terms have the meanings herein assigned to them —. . . 'Cause' means and includes every proceeding which may be brought under the Summary Procedure Act 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior judge." Section 3—"*Inferior judge on application of party aggrieved to state a case for opinion of superior court*—On an inferior judge hearing and determining any cause, either party to the cause may, if dissatisfied with the judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction or complaint under such Act, by himself or his agent applying in writing . . . to the inferior judge to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of a superior court of law as hereinafter provided. . . ."

On 20th September 1905 James Little & Company, steamship owners and brokers, 69 Buchanan Street, Glasgow, were charged in the Justice of the Peace Court for the county of the city of Glasgow on a summary complaint at the instance of Joseph Alexander, Miners Arms, Blyth, Northumberland

The complaint was as follows:—"Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. Unto the Honourable His Majesty's Justices of the Peace for the county of the city of Glasgow, under the Summary Jurisdiction conferred on them by the Merchant Shipping Act 1894, the complaint of Joseph Alexander, Miners Arms, Blyth, Northumberland, a British subject, *Humbly sheweth*—That James Little & Company, steamship owners and brokers, 69 Buchanan Street, Glasgow, have been guilty of conduct or default within the meaning of sec. 166 (2) of the Merchant Shipping Act 1894, whereby the said Joseph Alexander is entitled to compensation, in so far as on or about 8th July 1904 the said Joseph Alexander having signed articles at North Shields to serve as donkeyman on board the said James Little & Company's s.s. 'Riverdale,' on a voyage of not exceeding two years' duration, to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at the Tyne, proceeding thence to New York, thereafter trading to ports in any rotation, and to end at such

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port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master, they did on or about 13th April 1905 at Bombay, while a state of war existed between Japan and Russia, with both of which nations Great Britain and Ireland was at peace, and raw cotton had been notified by Russia as contraband of war, charter or order said ship on a voyage to Kobe, a port in Japan, near Kare, where gun-cotton is manufactured for the Japanese Government, with a cargo of raw cotton, and on the said Joseph Alexander justifiably refusing to proceed on said voyage as in breach of said articles and the proclamation issued on 11th February 1904 by His Majesty King Edward Seventh, enjoining strict neutrality on the part of his subjects, falsely charge the said Joseph Alexander before a magistrate with wilful disobedience to lawful orders, and leave him at said port, in consequence of which the said Joseph Alexander had his agreement prematurely terminated, was compelled to return to the United Kingdom as a distressed seaman, and suffered much hardship and discomfort thereby, being compelled to sleep on deck during the greater part of the voyage, and put up with insufficient and inferior food, whereby he suffered in his health. May it therefore please your Honours to grant warrant to cite the said James Little & Company to appear before you to answer to this complaint, and thereafter to find them guilty of said conduct or default, and to adjudge them to pay to the said Joseph Alexander such compensation, not exceeding £20, as to your Honours seems reasonable, with expenses. According to Justice,

"JOSEPH ALEXANDER."

At the hearing before the Justices the respondents objected to the relevancy of the complaint on the ground, *inter alia*, that a release in terms of section 136 of the Merchant Shipping Act had been signed by the complainer and attested. The Justices sustained this objection and dismissed the complaint.

The complainer appealed to the Court of Session on a case stated. The case bore to be under the Summary Prosecutions Appeals (Scotland) Act 1875, and contained a statement of the facts and certain questions in law for the opinion of the Court.

The respondents objected to the competency of the appeal, and argued—The decision of the Justices was final—Merchant Shipping Act 1894, section 709. The procedure contemplated by section 703 of that Act was the ordinary common law procedure of the Justice of the Peace Court and not that of the Summary Jurisdiction Acts of 1864 and 1881. If the latter had been meant the Act of 1894 would have said so. The fact that the proceedings contemplated were to be summary did not mean that the ordinary common law jurisdiction of the Justice of the Peace Court was to be excluded. This was not a prosecution for a penalty but for a civil debt (*i.e.*, compensation) recoverable by civil procedure. The concurrence of the procurator-fiscal would have been necessary had the proceeding been for recovery of a penalty (section 703). The fact that under section 707 the decree might contain warrant for imprisonment did not make the complaint a proceeding for the recovery of a penalty in the sense of the Summary Procedure Act of 1864, but merely abrogated the effect of the Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), which abolished imprisonment for civil debt. Under the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104), section 538, imprisonment was also competent. The Summary Prosecutions Appeals Act 1875 dealt merely with summary proceedings in the sense of the 1864 Act and prosecutions for offences or recovery of penalties (section 2). This proceeding fell within neither category, and therefore it was not entitled to the benefit of the appeal provided for by section 3 of the 1875 Act—*Lee* v. *Lasswade Local Authority*, November 2, 1883, 11 R. (J.C.) 1, 21 S.L.R. 51. The common law jurisdiction of the Justices (6 Geo. IV, c. 48, section 2) had not been exceeded, and therefore the finality clause in the Merchant Shipping Act was conclusive—*Bone* v. *School Board of Sorn*, March 16, 1886, 13 R. 768, 23 S.L.R. 537.

Argued for appellant—The appeal was competent. The objection now taken that this was not a proceeding under the Summary Jurisdiction Acts had not been taken in the Court below. [Counsel for the respondents stated that it had, and that his plea of "no jurisdiction" covered that objection.] The fact that under section 707 of the Act imprisonment was competent brought this proceeding within the scope of the Act of 1864. Section 28 of that Act provided that the jurisdiction was to be regarded as criminal if a sentence of imprisonment could be pronounced in default of payment. That was so here. This proceeding was therefore competently brought under the Act of 1864, and that being so this appeal was competent. The finality clause in the Merchant Shipping Act (viz., section 709) was met by section 3 of the Summary Prosecutions Appeals Act 1875. It was sufficient if the compensation could be assimilated to a penalty. The fact that it was limited to £20 did so assimilate it.

At advising—

LORD PRESIDENT — By the Merchant Shipping Act of 1894, and section 166 thereof, provision is made by which a seaman engaged in a voyage which is to terminate in the United Kingdom, shall not be entitled to sue in any Court abroad for wages unless under certain exceptions therein specified. By the second sub-section of that section it is provided that if a seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which but for this section would have entitled the seaman to sue in a Court abroad, he shall be entitled to recover in addition to his wages such compensation, not exceeding £20, as the Court hearing the case thinks reasonable.

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Now the present appellant Joseph Alexander was a seaman, and he was engaged in the employment of James Little & Company, the respondents, on a vessel which was about to make a voyage from Bombay to Japan. The ship was ordered by the owners to take a cargo of cotton to Japan. At that time cotton had been declared by the Russian Government to be contraband of war, and accordingly this appellant refused to go further on the voyage.

Under this section he was not able to sue for his wages in Bombay; but a case was taken in Bombay in which it was held—and I shall assume rightly without giving any opinion upon the matter—that he was entitled to refuse as he did to serve. On his return home he now brings an action. He has been paid his wages under circumstances I do not think it necessary to go into; and this action which we have before us is admittedly rested on the second sub-section alone. It is, of course, quite clear in reading the second sub-section that the idea of the sub-section is that the extra payment is to be recovered at the same time as the wages are recovered. All the same I do not think that that prevents him suing for it itself, if the wages have been recovered by voluntary payment. There is nothing in the section which makes it absolutely necessary, although in most cases it might be desirable, to recover the two sums at one time. Accordingly, I think the case was competently brought in the Justice of Peace Court, because section 708 of the Merchant Shipping Act allows for summary proceedings, *inter alios*, before the Justices. It accordingly was so brought, and the Justices pronounced a decree assoilzieing the defenders in respect that it was proved that a discharge had been given for this claim. Against that pronouncement of the Justices an appeal has been taken upon a case stated under the Summary Procedure Act of 1864 and the Summary Prosecutions Appeals Act of 1875, and on the case arriving here the objection of incompetency has been taken, and that is the matter which your Lordships have now to determine.

Now I have already referred to the section upon which the claim depends, and I have referred to the section which allows summary proceedings, but there is another section in the Merchant Shipping Act which is very much to the point, and that is section 709—[*His Lordship read the section*]. No one says that the present case is within the exception there defined, and therefore, *prima facie*, that is a finality clause which would prevent any appeal; and so it would but for one thing, and that is that by the provisions of the two Acts which I have already cited—viz., the Summary Procedure Act and the Summary Prosecutions Appeals Act—it is familiar to your Lordships that these Acts read into every other Act of Parliament a provision for appeal according to the provisions enacted in them—that is, notwithstanding there may be a finality clause in a General Act of Parliament which allows of prosecution, yet if that prosecution is brought under the forms of the Summary Procedure Act and the Summary Prosecutions Appeals Act, then *ipso facto* there is an appeal given there by way of a case stated.

Therefore, that being so, the question necessarily comes to be narrowed to this—the finality clause will obviously apply to summary proceedings in general, but it will be overridden by the provisions of the two Acts I have cited, if the prosecution is a prosecution which can be brought under the Summary Procedure Act and the Summary Prosecutions Appeals Act. No doubt this complaint, on the face of it, bears to be so. When I look at the complaint I see it is headed—"Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881." But of course it is clear that you cannot make a thing rightly fall under a certain Act of Parliament by simply putting the title of the Act at the top, and therefore the question comes to be whether this is truly a proceeding under these Acts or not. Now that depends on the terms of these Acts, and the provisions of these Acts applicable to this matter are, first of all, the third section of the Act of 1864, which by sub-section 3 says that the provisions of the Act are to apply to "All proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which under the provisions of any Act of Parliament may be recovered by summary complaint . . . before any sheriff, justices or justice, or magistrate." And then that definition, such as it is, is perhaps extended—for I do not think the extension practically comes to much—by the second section of the Summary Prosecutions Appeals Act of 1875, which says—"Cause means and includes every proceeding which may be brought under the Summary Procedure Act 1864, and every other summary proceeding for the prosecution of an offence, or recovery of a penalty, competent to be taken before an inferior judge." Therefore the question comes to be simply this—Is the prosecution for this sum of money, due under sub-section 2 of section 166 of the Merchant Shipping Act, either a proceeding for the recovery of a penalty, or a sum of money in the nature of a penalty, or is it a summary proceeding for the prosecution of an offence, or the recovery of a penalty? I am quite unable to see that it is; because I think it is not, in the ordinary sense of the word, a penalty at all. It is not a penalty in the sense in which the word penalty is used in the Summary Procedure Acts. It is referred to as compensation, and the scheme of the section, I think, is not far to seek. By the first part of the section the seaman is prohibited from exercising what would otherwise be his right of suing the owner abroad for breach of contract—the obvious reason being that it is very inexpedient that ships should possibly be delayed by the existence of legal proceedings at ports of call where they would be reduced to this dilemma, either that they would be delayed, or, if they were not delayed, that the proceedings would have to go on in the absence of material witnesses. But then,

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as a *quid pro quo* for that taking away of the common law right of the sailor, subsection 2 comes in and says that if the sailor shows that he would have had a perfectly good cause of action, the right to sue which the first part of this section deprived him of, then he is to be entitled, in addition to his contract wages, to such compensation, not exceeding £20, as the Court thinks reasonable. The compensation is not measured by the offence of the owner, for the owner has committed no offence. All that the owner has done is that he has availed himself of the Act of Parliament, which says that he is not to be sued in a foreign court. It is measured by the extra expense and trouble that the seaman has been put to in not being allowed to recover what, *ex hypothesi*, is his just debt at the time, but, instead of that, having to come home and sue, months or almost a year after. All that seems to me to be of the essence of civil compensation, and not penalty, and therefore I do not think it falls in any sense within the definition of either the one statute or the other. If that is so, then the matter is ended, because we are bound to give effect to the finality clause, which is a plain provision of the Merchant Shipping Act. I think, accordingly, that the objection to the competency is well taken, and that your Lordships cannot entertain this appeal.

Lord M'Laren—I should have been glad if we could have given a decision on the questions submitted to us in this case, because the questions are well suited to the determination of a superior court, and are not such as can be satisfactorily solved by two justices of the peace on their own knowledge of the law. But after listening to your Lordship's exposition of the case, I am not satisfied that these questions can be brought within the scope of the Summary Prosecutions Appeals Act 1875. Appeal under that Act is limited to representations against penalties and sentences of imprisonment for offences, and awards in the nature of penalties. It is impossible to read that Act and the correlative provisions from other Acts without seeing that the penalties there dealt with are fines imposed by the Court for something done which the party is not entitled to do, with the effect of causing injury to others. Now it has been pointed out that the provisions for compensation under the Merchant Shipping Act of 1894 are not of the nature of a punishment or penalty for a wrong, because the shipowner is within his statutory right in delaying payment until the ship comes home and the case can be tried in the courts of his own country. The shipowner is absolved from the obligation of submitting to the jurisdiction of a Small Debt Court in the place where the debt first becomes due, but in consideration of this privilege the Merchant Shipping Act awards the seaman compensation limited to £20, to compensate him for the inconvenience to which he is put in not getting his wages until the termination of the voyage. It has been argued that this limitation to £20 brings the award within the nature of a penalty. If it were a question between liquidate damages and penalty, no doubt this would be a penalty because it is restrictable. But this does not solve the question before us, and I am not satisfied that it is a penalty in the sense of the Summary Prosecutions Appeals Act which deals with penalties which are either within the region of criminal jurisdiction or are of the nature of penal awards imposed on offenders in consequence of a wrong. I think that indemnity rather than penalty is the motive of this provision of the Merchant Shipping Act.

Lord Kinnear—I concur.

Lord Pearson—I agree in holding that the appeal is incompetent for the reasons assigned by your Lordship. The strength of the appellant's case lies in the expression "guilty of any conduct or default" occurring in section 166 of the statute, and in the provision of section 707 that the decree shall contain a warrant for arrestment, poinding, and imprisonment, in default of payment. The question must be solved by considering the precise nature of the seaman's claim in this case and of the remedy given him by the statute. It is clearly a civil claim for money compensation in respect of a wrongful act, and in imposing the liability to imprisonment in default of payment the statute means imprisonment until payment. The imprisonment takes its place, along with the poinding and the arrestment with which it is joined, as a mode of recovering the money, and is not imposed *in modum pœnæ*. The punishment of the master would do no good to the dismissed seaman. What he wants and what the statute provides for him is the prompt payment of the money due to him. Having regard both to the nature of the pecuniary claim itself and to the general policy of the statute, which is really a code standing by itself, I hold the Summary Procedure Acts do not apply. I think it clear that the case falls within section 709 of the Merchant Shipping Act, which enacts that the order shall be final and conclusive and not subject to review except on the ground of corruption or malice on the part of the Justices, which is not alleged.

The Court dismissed the appeal.

Counsel for the Complainer and Appellant—Macmillan. Agent—D. Hill Murray, S.S.C.

Counsel for the Respondents—Younger, K.C.—Paton. Agent—Campbell Faill, S.S.C.

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Friday, May 25.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

M'LEANS *v.* JOHNSTONE AND OTHERS.

Process — Proof — Proof or Jury Trial — Appeal for Jury Trial—Collision at Sea —Action of Damages—Interpretation of Regulations—Nautical Assessor—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73.

An action of damages for collision at sea raised in the Sheriff Court and appealed to the Court of Session for trial by jury under section 73 of the Court of Session Act 1868 and section 40 of the Judicature Act 1825, *held* unsuitable for jury trial, and *remitted* to a Lord Ordinary for proof, on the ground that it involved not a pure question of fact but the construction of the regulations for preventing collisions at sea, and called for the presence of a nautical assessor.

Opinions per the Lord Justice-Clerk and Lord Kyllachy — That collision cases involving merely questions of fact may be suitable for jury trial.

Per the Lord Justice-Clerk—"I know of no case where the judge trying a case with a jury has had a nautical assessor."

Per Lord Stormonth Darling—"I am quite clear you cannot have both a nautical assessor and a jury . . . When these two demands are both made I think the demand for a jury must give way."

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73, enacts—"It shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above £40 at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV, c. 120, and such causes may be remitted to the Outer House."

6 Geo. IV, c. 120 (The Judicature Act 1825), section 40, contains this proviso—"But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis* or granting diligence for the recovery and production of papers) it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation . . ."

The pursuers John and Helen M'Lean, owners of the "Bonnie Lass," sued the defenders Peter Johnstone and others, the owners of the "Sunshine," in the Sheriff Court at Aberdeen for the sum of £1588 in name of damages caused by a collision which took place between the two vessels. The Sheriff-Substitute on 4th May pronounced an interlocutor allowing parties a proof of their averments.

The pursuers appealed to the Second Division of the Court of Session and proposed issues for the trial of the cause by jury.

On the case being called in the Single Bills the defenders asked for proof, and intimated their intention of asking for a nautical assessor.

The following were the averments of parties on record so far as material:—"(Cond 2) On 14th February 1906 the 'Bonnie Lass' left Sunderland, under the charge of the pursuer John M'Lean, on a voyage to Cromarty, with a crew of five hands, including the said John M'Lean, and with a cargo of coals. All went well until the vessel was about four miles off Scotstown Head on the following day. The weather was then fine and clear, the regulation lights of the vessel were burning brightly, the wind was in the south-south-west blowing a moderate breeze, and there was a very little sea from the same direction. The 'Bonnie Lass' was sailing before the wind, under all sails except her flying jib, and her course was being steered north-by-east for Rattray head. While on this course, those on board the 'Bonnie Lass' saw a steam trawler on their port side, between them and the shore, showing a green light, and going in the same direction as themselves. The defenders' averments are denied. (Ans. 2) . . . Explained that the weather was fine, but that the night was dark, that the schooner did not show the regulation lights, that in particular she did not show a port light nor a stern light. (Cond. 3) Shortly after sighting the said trawler, and about a quarter past seven o'clock in the evening, William Lochrin, one of the crew of the 'Bonnie Lass,' was sent by the mate of that vessel to the bowsprit to make fast the flying jib, and while he was engaged in this duty the trawler suddenly and with extreme recklessness changed her course, ported, and at full speed attempted to cross the bows of the 'Bonnie Lass.' In doing so the trawler collided with that vessel, striking the bowsprit, carrying it away and knocking overboard the said William Lochrin. Those on board the 'Bonnie Lass' did all they could to avert the collision. Both before and after the trawler struck their vessel they hailed her and endeavoured by shouting to get her to keep clear of them, but without effect. The trawler, after striking the 'Bonnie Lass,' failed to stand by, held on her course, and shortly afterwards disappeared from view. . . . If those on board the defenders' vessel did not see the 'Bonnie Lass,' that was due entirely to their having no sufficient lookout and by their failure to stand by after the collision. (Ans. 3) Denied. On 15th February about seven o'clock in the evening while the trawler 'Sunshine' was about eight miles to the east-south-east of Rattray Head, and while she was proceeding on a course north-east a half

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east, the jib-boom of the schooner caught the mizzen boom topping lift of the trawler and carried it away. No other parts of the two ships were in collision. William Lochrin, one of the crew of the schooner, was at the time of the collision on the bowsprit making fast the flying jib, and was projected on to the deck of the trawler. The defenders believe and aver that the immediate cause of the collision was that just as the trawler had got abreast of the schooner the latter (in breach of article 21 of the regulations) shifted her course to clear Rattray Head and Kinnaird Head, and so pass into the Moray Firth. In doing so she did not give the trawler, which was keeping on her course, sufficient time to get out of the way, and before the trawler had passed her the jib-boom of the schooner caught the mizzen boom topping lift of the trawler and carried it away. In any event the schooner was in fault in respect that while she saw there was risk of collision she kept on and took no steps to avert it by going to starboard or by using such other precautions as the circumstances required in order to avoid a collision. The schooner (in breach of articles 10 and 5 of the regulations) did not show her stern or port lights, and those on board the trawler were in consequence unaware until the collision had taken place that there was a vessel in the vicinity, and so were unable to take any steps to prevent a collision had such been practicable. The schooner, after striking the trawler, failed to stand by but held on her course to the Moray Firth, and disappeared from view. . . . (Cond. 10) The said collision, and the consequent loss and damage which the pursuers have sustained, was caused entirely through the fault and negligence of those in charge of the said trawler 'Sunshine,' for whom the defenders, the owners of that vessel, are responsible. The 'Sunshine' ran into and collided with the 'Bonnie Lass' entirely through the gross recklessness and carelessness of those in charge of the former vessel. In particular, it is averred that those on board the 'Sunshine' were in fault in failing to keep clear of the 'Bonnie Lass,' in endeavouring to cross her bows as aforesaid, and in failing to stay by her and render her and her crew assistance after the collision. The defenders or those in charge of their said vessel, for whom they are responsible, were thus in breach of the regulations for preventing collisions at sea (1897), and in particular were in breach of articles 20, 22, 23, and 24 of said regulations, and they also contravened the provisions of section 422 of the Act 57 and 58 Vict. cap. 60. It is also believed and averred that no proper or sufficient lookout was kept by those on board the 'Sunshine,' and that that vessel was being navigated in reckless disregard of other vessels. The defenders' averments in answer are denied. At the time of the collision the pursuer John M'Lean was at the wheel of his vessel; all his crew except Lochrin, who was on the bowsprit, were on deck. A sufficient lookout was kept on the 'Bonnie Lass.' After the collision the said John M'Leanshowed signals of distress, and did all he could to attract the attention of those on board the 'Sunshine,' and to save his vessel, but without success. (Ans. 10) Denied. The cause of the collision was that the schooner changed her course from about north-east to about north-west while the vessels were running on the same course and almost abreast of each other. The schooner was also in fault in respect she did not show the regulation lights. It is believed and averred that at the time the collison took place a proper watch was not kept on board the schooner. In any case the loss of the vessel was caused through the fault and want of ordinary care of the pursuer John M'Lean, in respect (1) he failed to stand by, or even to come to anchor, and thereby secure the assistance of the trawler; (2) he failed to give signals indicating his whereabouts and that he wanted assistance; (3) he failed to make for Fraserburgh and to ascertain the extent of his damage before proceeding to Cromarty. It was the duty of the pursuer John M'Lean to adopt one or other of these expedients, and if he had so acted the schooner would not have been lost. By failing to stand by, the schooner acted in contravention of section 422 of the Merchant Shipping Act 1894, and in failing to give signals of distress she acted in breach of article 31 of the Regulations."

Argued for the pursuers and appellants—The action fell under the class specially appropriated by statute to jury trial, and must go to a jury unless the defender could show "special cause" why it should not —*Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538. The mere fact of its being a collision case was not a "special cause," many such cases having been tried by jury, *e.g.*, *Livermore* v. *Duncan*, January 21, 1865, 3 Macph. 410; *Morison and Milne* v. *Bartolomeo & Massa*, June 8, 1867, 5 Macph. 848, 3 S.L.R. 366; *Dent and Others* v. *North British Railway Company*, February 4, 1880, 17 S.L.R. 368; the case of "*The Hogarth*" and "*The Pomegranate*," heard by Lord Salvesen and a jury, March 1906, *unreported*. Further, it was not a collision case involving any special difficulty, the point being whether certain of the Regulations had or had not been infringed. There was no good reason why a nautical assessor, if one was required, should not sit with the judge at the jury trial, and such a possibility was evidently before the framers of the Act of Sederunt of 8th December 1894 for carrying into effect the purposes of the Nautical Assessors (Scotland) Act 1894 (57 and 58 Vict. cap. 40), *vide* section 3 of the Act of Sederunt, last three lines, where the words "*trial*, proof, or hearing" were used.

Argued for the defenders and respondents—The case was one for proof, not jury trial. The fact of its being a collision case involving the interpretation of the Regulations and necessitating the presence of a nautical assessor was sufficient special cause. The defender was entitled to demand a nautical assessor—Nautical Asses-

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sors (Scotland) Act 1894, section 2, and no case had ever occurred in which a jury and a nautical assessor had both taken part.

LORD JUSTICE-CLERK—It is in the discretion of the Court when they think that a case is unsuitable for jury trial to send it to proof before a judge. In the present instance I cannot imagine any case less suitable for trial by jury. A collision case suitable for jury trial would be one involving a pure question of fact, such as the question whether or not a certain course had been followed. But where, as here, we have an elaborate question whether certain Regulations have been observed in the spirit or in the letter, and where the Regulations themselves are difficult to interpret and apply, I think the case should be tried by a judge assisted by a nautical assessor. I know of no case where the judge trying a case with a jury has had a nautical assessor. There are two things which a nautical assessor must do. He must advise the Court as to questions of seamanship and the meaning of Regulations, and he must also advise whether the course actually taken was one which would have been taken by a skilful seaman. Looking to the nature of his functions, it is difficult to see how it would be possible to combine trial before a jury with the employment of a nautical assessor.

LORD KYLLACHY—I agree. I can quite conceive cases of collision which would be suited for jury trial. I remember, for instance, a case where the sole question was whether a red light had been in fact exhibited by one of the ships. That case, although in fact tried by a proof, was no doubt quite suitable for jury trial. But in cases involving questions as to the construction of the Regulations, and nautical opinion as to the application of particular Regulations, the presumption is very strong against the suitability of jury trial. I think this case should be sent to proof.

LORD STORMONTH DARLING—I agree. I am quite clear that you cannot have both a nautical assessor and a jury. Whether that result is arrived at on considerations of competency or judicial discretion does not much matter. The provisions of the Judicature Act must now be read in the light of the Nautical Assessors (Scotland) Act 1894. Here we have one of the parties demanding a jury subject to the Court's approval, and the other a nautical assessor as of right. When these two demands are both made, I think the demand for a jury must give way.

LORD LOW—I agree. I think this case is not suitable for jury trial.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the issues for the appellants, Disallow the same: Appoint the cause to be tried by a proof before Lord Salvesen, and remit to him to proceed in the cause, reserving all questions of expenses."

Counsel for Appellants—Scott Dickson, K.C.—Macmillan. Agents—Henry & Scott, W.S.

Counsel for Respondents—Lippe. Agents—Beveridge, Sutherland, & Smith, S.S.C.

TEIND COURT.

Tuesday, March 13.

(Before the Lord President, Lord Kinnear, Lord M'Laren, and Lord Adam.)

[Lord Pearson, Ordinary.

BAIRD *v.* EARL OF WEMYSS.

Teinds — Locality — Teind Rental — Grazings and Plantations Forming a Park and Policies—Principle of Valuation.

Certain lands, the teinds of which fell to be valued because of an augmentation of stipend, consisted of grazings and plantations forming the park and policies attached to a mansion-house. *Held* (*rev.* Lord Pearson, Ordinary) that the teinds should be valued at one-fifth of the rent which could have been got for the subjects in their actual condition as at the date of the augmentation. *Burt* v. *Home*, January 12, 1878, 5 R. 445, 15 S.L.R. 472, *commented upon.*

Teinds — Locality — Objection — Title to Object.

Objection was raised by one of two titulars to an interim scheme of locality and rectified state of teinds on the ground that a third titularity existed in the parish which had not been recognised by the common agent. *Held* (*per* Lord Pearson, Ordinary) that the objector's title to insist on the objection depended on his interest to do so, and there being no interest the objection *disallowed.*

Teinds—Locality—Glebe Lands—Lands Excambed for Old Glebe and Designed as New Glebe—Liability for Stipend.

A new glebe was designed in 1776 out of part of the lands of A given in excambion for the lands formerly constituting the glebe. In connection with this excambion it was stipulated that the remainder of the lands of A should be burdened, *inter alia*, with the teinds affecting the whole of the lands of A, including the new glebe. *Held* (*per* Lord Pearson, Ordinary) that the new glebe lands not being teind free lands the teind thereof should not be deducted in a process of locality so as to affect the interests of the heritors *inter se.*

Teinds — Valuation — Valuation by Sub-Commissioners at instance of Tacksman without Mention of Titular—Order by High Commissioners to Desist from Valuing the Lands—Validity of Sub-Valuation.

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Objection was taken to an interim scheme of locality and rectified state of teinds on the ground that effect had been given therein to a valuation by the Sub-Commissioners obtained at the instance of the tacksman and dated 1630, which the objector alleged to be invalid in respect that (1) it did not appear *ex facie* of the report that the titular had been called; (2) an order of the High Commissioners dispensing with the valuation, and alleged to refer to the lands in question, was produced to the Sub-Commissioners in 1632 bidding them desist from the valuation. *Held* (*rev.* Lord Pearson, Ordinary) that the sub-valuation was valid and could be approved.

Under a process of augmentation, modification, and locality, raised in 1883, the first and second ministers of the parish of Haddington obtained an augmentation of stipend. Lord Blantyre, the proprietor of certain lands in the parish, lodged objections to the interim schemes of locality and rectified state of teinds. On the death of Lord Blantyre these objections were insisted in by his successor in the lands, Mr W. A. Baird of Blantyre and Lennoxlove. The Earl of Wemyss, a heritor in the parish, appeared as respondent and lodged answers in support of the interim locality and state of teinds.

The principal objections were to the following effect:—*Art.* 2.—The state of teinds and interim scheme of locality had proceeded upon the footing that there were only two rights of titularity in the parish—that of the objector and that of the Marquess of Linlithgow. The objector averred that a third right of titularity existed in the Marquess of Lothian, and that certain teinds had been included in the titularity of Lord Linlithgow which were in fact in that of Lord Lothian. *Art.* 3.—The common agent had, in preparing the state of respondent's teinds, deducted therefrom the teind of 5 burgage acres, part of the lands of Hermanflat, forming the glebe of the second minister of Haddington. The old glebe of the second minister of Haddington had been acquired by a predecessor of the respondent in 1776 in exchange for the 5 burgage acres, part of the lands of Hermanflat, which now formed the glebe. In connection with this excambion it was stipulated that the remainder of the lands of Hermanflat should be burdened, *inter alia*, with the teinds of the whole lands of Hermanflat, including the new glebe, and the town and the second minister were infeft in the said remaining lands upon a disposition in security to the above effect. The objector maintained that the whole teind of Hermanflat without deduction should be in the locality, and averred that by the deduction an undue amount of stipend was being localled upon his teinds. *Art.* 4.—In fixing the rent of certain lands of the respondent, extending to 18½ acres (Scots), the rent taken had been that which was obtained or could be obtained for the lands in their actual condition at the date of the augmentation. The objector claimed that the rent should have been taken at the full agricultural rent obtainable for the subjects were they under crop, on which expert evidence was afterwards led. *Art.* 5.—The common agent had given effect to an alleged valuation, dated 26th July 1630, by the Sub-Commissioners for the Presbytery of Haddington, of the teinds of 30 acres (Scots) of the tenendry of Newmills now belonging to the respondent. The report of the Sub-Commissioners was in the following terms:—"Apud Haddingtoun vigesimo secundo mensis Julii anno dni Jajvic trigesimo. The samen day anent the p'ces of valuaoun. intent & p'sewit befor ye saids sub c'comissioneris by Pat Cokburne of Clerkentoun and Dame Margret Cokburne his mother, takisman and takiswoman of ye teinds of ye lands underwrittin agains . . . heretable pprietoris of ye samen lands efter mentionat for proveing of ye trew worth & cstant rent in teind separatim of ye lands pticularlie efterspeit Qrof ye saids pat Cokburne of Clerkentoun & his said mother hes & collectis ye teind, They ar to say . . . Ite of xxx aikeris of ye saids lands of Newmylles p'teining herelie to ye saids airis of ye said umqll George hepburne and to Janet Scheillis in lyfret . . . The saids sub commissioneris ffinds & declare ye said c'stant rents in teind p'sonage or great teind of ye saidis lands to be worth yeirlie in all tyme cuming as followis To witt . . . Ite twa firlottis twa pecks victuall halff quheitt halff beir for ilke aker of xiii akeris of ye saids lands of Newmylles and ane firlott twa pecks victuall halff quheitt halff beir for ilke aker of iiii akers halff aker yrof and for ilke aker of ye remanent yrof extending to xii akeris of land and halff aker twa firlottis victuall halff quheitt halff beir . . . and yt ye saids lands hes no vicarage teind Becaus ye said c'stant rent of ye said teinds of ye saids lands separatim being admittit to ye said pat cockburne of Clerkentoun and Dame Margret Cokburne his moyer yr p-baonis They provit ye samen to be in c'stant rent in all tyme cuming as is above written as was cleirlie understood to ye saids iudgis Thairfor they fand and declarit as said is desup act." The objector challenged the validity of this valuation, on the ground that it was obtained in a process at the instance of the tacksman pursued without the consent of the titular, Lord Maitland; and also on the ground that, as shown by an excerpt from the Sub-Commissioners' report (quoted *infra* by the Lord President), on 26th March 1630 there appeared to have been presented to the Sub-Commissioners on behalf of Lord Lauderdale, Lord Maitland's father, an order of the High Commissioners purporting to debar them from interfering with the valuation of the teinds. It was also averred that the sub-valuation had been departed from, and that it had never been acted upon by the tacksman or his successors whose right of tack had since expired. *Art.* 6.—In the state of teinds complained against the above sub-valuation had been interpreted as applying to the whole lands of Newmills which extended in all to over 100 acres (Scots). The

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objector contended that its application should be confined to 30 acres Scots, and the remainder of the lands should, in any case, be treated as unvalued, and should be valued, as stated in article 4, at the full agricultural rental as corn land. The lands in fact formed part of the park and policies of Amisfield Mansion-House.

On 17th February 1905 the Lord Ordinary (PEARSON) pronounced the following interlocutor (*the portions to which the reclaimer objected are printed in italics*):—"Repels the objection stated in the second article of the objections for Lord Blantyre, and now insisted in by the said William Arthur Baird, as amended, reserving to Mr Baird to raise the question in any other competent process: Sustains the objection stated in the third article of said objections with reference to the glebe of the second minister; *further sustains the objection stated in article fifth of said objections in reference to the alleged valuation of* 1630 *by the Sub-Commissioners of the Presbytery of Haddington;* quoad ultra *sustains the objections in so far as the same relate to the unvalued lands belonging to Lord Wemyss as the extent thereof is restricted by the joint minute of admissions:* Finds for the purposes of this locality that as regards said unvalued lands, including the 18½ acres referred to in article fourth of the objections, the actual rent for the year in which the augmentation was granted, as regards the lands let, be taken as the rent of said lands irrespective of any subsequent abatements, and *as regards the land unlet, the rent or value put thereon by the expert witnesses for the objector be taken as the rent thereof, and remits to the clerk to rectify the locality accordingly:* Finds that the objection stated in article seventh is departed from: Finds the objector entitled to expenses, subject to a deduction of one-fourth from the taxed amount as a modification, and remits," &c.

Opinion.—"I have now to dispose of the objections insisted in by Mr Baird to the interim schemes of locality and the rectified state of teinds, and of the answers lodged by the Earl of Wemyss.

"The first objection relates to the teinds of the lands of Bearford and others. These lands belong to Lord Wemyss and the representatives of James Lawrie, and the teinds thereof have been treated by the common agent as falling within the titularity of the Marquis of Linlithgow. The question on the merits is, whether they are rightly so treated, or whether they ought to be held as falling within a separate titularity in the person of the Marquis of Lothian. Until the present locality only one titularity was recognised in the parish, namely, that of Lord Linlithgow. Another has been brought in and recognised by the common agent in the person of the present objector; and this necessitated the division of the teind of the parish between these two titularities before the liability for stipend under each titularity could be ascertained. The objector now seeks to introduce for the first time a third titularity in the person of Lord Lothian, embracing the teinds of the lands I have mentioned. This would necessitate a recasting of the rectified scheme. The respondent challenges the title and interest of the objector to raise this question, even on the assumption that such a titularity exists in the person of Lord Lothian. This appears to me to be a case where a person's title to state the objection depends upon his interest to do so; and it is not disputed that the objector has no interest to do so in this process of locality, and that, on the contrary, if his objection were sustained, he would be worse off than he is at present. I am clearly of opinion that the objection must be disallowed on the ground of want of interest, reserving to Mr Baird to raise the objection in any other competent process.

"The second objection relates to the teind of five burgh acres which form the present glebe of the second minister of Haddington. In his statement of the respondent's teind the common agent has allowed deduction of the teind of this glebe, on the ground, I presume, that no teind is payable from glebe land. The glebe was designed in 1776 out of land belonging to the respondent's predecessor, Mr Charteris, to whom the presbytery conveyed the old glebe in exchange for the five burgh acres now in question, which they designed and appropriated as the new glebe. In place of transferring the liability for teind from the new glebe to the old, the transaction took the form of an agreement between Mr Charteris and the town, in which the town stipulated that all cess and teind payable to them or to others in their name from the whole lands of Hermanflatt (of which the new glebe was part) should be a burden on Mr Charteris' remaining lands of Hermanflatt. Then the presbytery, in designing the new glebe, and declaring the old glebe to belong to Mr Charteris, took an obligation from him to pay the cess and public burdens, including teind, to the town, and to relieve the second minister and his successors from payment of all such burdens, including teind; and in security of this obligation of relief it appears from the presbytery minutes that the minister and the town were infeft in the remaining lands of Hermanflatt. This seems to have been the method adopted for virtually declaring the new glebe to be teind free, and so far as the second minister is concerned, he (I understand) gets the full benefit of the transaction. But the very form of the transaction implies that so long as the benefice was protected the new glebe lands were not to be teind free in the absolute sense; for it took the shape of an obligation of relief. Therefore, while the question is a somewhat narrow one, I do not see the necessity or the appropriateness of making the proposed deduction in a process of locality, so as to affect the interests of the heritors *inter se;* and this, I understand, would be the result of sustaining what the common agent has done. I therefore allow the objection.

"The remaining objections have to do with questions of valuation. The first in

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order is as to the value at which certain unvalued lands amounting to 18½ Scots acres are to be entered in the state of teinds. But it will be convenient if I express my opinion first upon the more general questions argued, and in particular as to the position and effect of the valuation in 1630 by the Sub-Commissioners. Now it is certain that this valuation was obtained by the tacksman of the teinds in the absence of the titular. There have been cases in which, on the construction of old sub-valuations, it has been held either that the titular must be presumed to have had notice and to have acquiesced, or that the relations between him and the tacksman were such as to make the valuation binding upon him. But the present case is exceptional in this respect, that it clearly appears that the titular disapproved of the tacksman's proceedings, and took the ordinary steps to have them stopped by obtaining an order of the High Commission to that effect which was duly intimated to and observed by the Sub-Commissioners. It is entirely in accordance with this view that in 1714, in an action of valuation and sale of the teinds of certain lands included in the sub-valuation of 1630, there was produced and founded on, not the sub-valuation, but a valuation of the High Commission in 1632.

"It is replied for the respondent that in later proceedings, and particularly in the locality of 1796, the sub-valuation was produced and founded on, and that it has received effect ever since as regards the teinds of the lands of Newmills, being the lands now particularly in question. If this amounted to *res judicata* it would be conclusive in the respondent's favour. No such plea is stated on this record; but even if it were, I cannot find that the questions now raised were raised and decided by the Court in that process. The respondent's case is rather that the sub-valuation was there accepted by the common agent and acted on by the Court in the locality. No doubt this makes all that has happened since unchallengeable, but it does not appear to me, on the authorities, to have the effect of guarding against challenge in a subsequent process a valuation to which the titular was no party, and against which he practically obtained interdict. I hold that it is now open to those interested to demand that the lands contained in it shall, so far as that valuation is concerned, be treated as unvalued.

"This renders it unnecessary to consider the subordinate question raised, namely, whether if the sub-valuation were held good, it covers the whole lands of Newmills or only thirty acres of them.

"As to the principle of valuation to be applied both to the last-mentioned lands and to the 18½ Scots acres previously referred to, I hold with the objector that in this process it must proceed not upon the 'constant rent' but upon the actual return for the year when the augmentation was granted, as regards the lands let, irrespective of abatements which may have been arranged for subsequently; and that as regards the lands not then producing an industrial rent, it must be stated at the value for that year as proved in evidence without regard to the actual occupation of the subjects, and without any allowance for the expense necessary to bring them into a state of cultivation. Substantially I am prepared to adopt the views of the witnesses adduced by the objector on that matter."

The Earl of Wemyss reclaimed, but confined his opposition to the findings of the Lord Ordinary as regards the validity of the sub-valuation, the extent of lands covered thereby, and the principle to be adopted in valuing the rental of the plantation and grazing land. He also raised an action of valuation and approbation of the sub-valuation, and moved the Court to sist the present process until that matter was determined.

Argued for the reclaimer—The objector *qua* heritor had no title to attack the valuation unless it appeared *ex facie* to be a nullity—*Kinloch* v. *Bell*, February 12, 1867, 5 Macph. 360, 3 S.L.R. 215. Even assuming the objector's title to attack the valuation, his objection was ill-founded, in respect that it was based upon the alleged absence of the titular from the proceedings before the Sub-Commissioners. There was no evidence *ex facie* of the report that the titular had not been called, although his name did not appear thereon. Further, the parties narrated as appearing were the heritor and the tacksman, and their representation was sufficient. The presence of the minister was not essential—*Ministers of Old Machar* v. *The Heritors*, February 28, 1868, 6 Macph. 504, 8 Macph. (H.L.) 168; *Ministers of Campbeltown* v. *Macneill*, June 3, 1801, 12 F.C. 527, Mor. App. Teinds, No. 12, *aff.* February 20, 1809—nor that of the titular—*Deans of Chapel Royal* v. *Johnstone*, February 20, 1867, 5 Macph. 414, 3 S.L.R. 234, March 18, 1869, 7 Macph. (H.L.) 19; *Thomson* v. *Officers of State*, July 20, 1763, M. 10,687, 15,754; *Duke of Roxburgh* v. *Scott*, December 12, 1744, M. 15,741. The passage in Erskine (ii. 10, 35) generally cited to the contrary applied only to actions in the Court of Session at the instance of a heritor. The Sub-Commissioners reported on 22nd June 1630. The order from the High Commissioners was not reported to the Sub-Commissioners until 26th March 1832, and could therefore have no effect. Further, the order was obtained at the instance of Lord Lauderdale, whilst the titularity in question was held by his son Lord Maitland. As to the alleged dereliction there was no proof. On the contrary, the sub-valuation had been acted upon in any case since 1797. There was no evidence that the decree of 1714 applied to the lands of Newmills. As to the extent of the lands covered by the valuation, the expression "30 acres" was not taxative. The tacksman was claiming a valuation of his whole interest in the lands of Newmills, and the sub-valuation had been acted upon as covering the whole lands. As to the principle of valuation, the case of *Burt* v. *Home*, January 12, 1878, 5 R. 445, 15 S.L.R. 472, did not

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apply. This was not a case of land withdrawn from its agricultural use—*Glenlyon* v. *Clark*, November 15, 1842, 5 D. 69; *Learmonth* v. *City of Edinburgh*, December 3, 1857, 20 D. 190, June 1, 1859, 21 D. 890.

Argued for respondent—The sub-valuation was invalid. The presence of the titular was essential, and not only had he not been called but he had offered active opposition to the sub-valuation, and never acquiesced in it—*Speir* v. *D'Eresby*, January 16, 1891, 18 R. 407, 28 S.L.R. 277; *Mansfield* v. *Stewart*, January 30, 1880, 7 R. 552, 17 S.L.R. 359. Especially the decree of the High Commissioners of 1632 and the valuation of 1714 showed the abandonment of the sub-valuation—Connell on Teinds, i. 276, 285; Forbes on Tithes, 401. The tack covered only part of the lands of Newmills; other parts of the land were not in the tack, and the tacksman had no interest to procure a valuation of these. The valuation expressly limited the lands valued to "30 acres." The remainder of the lands were unvalued. As to the principle of valuation, the rule laid down in *Burt* v. *Home*, *supra*, must be held to apply. The ground had been diverted from agricultural uses. The rent of the woodlands must be taken as that which those lands would bear if under crop. The valuation of the common agent should be held to apply to the lands other than woodlands—*Scott* v. *Kerr*, July 15, 1837, 2 Sh. and M'L. 968.

At advising—

Lord President—In the locality of Haddington various questions have arisen between the Earl of Wemyss, who is proprietor of several portions of land lying within the parish, and Mr Baird of Lennoxlove, who has the double position of being a co-heritor with Lord Wemyss and also of being titular of certain of the teinds of the lands of the parish—I say certain of the teinds, as it is the fact that there are two if not three titularities in the parish. These questions were brought to a precise issue by means of objections stated by Mr Baird to the interim locality as drawn up by the common agent. The Lord Ordinary has disposed of these objections. In several of his findings the parties have acquiesced. But a reclaiming note has been brought and insisted in with regard to certain of the findings.

The points raised are three in number, and may be stated as follows:—Lord Wemyss is admittedly proprietor of lands designated in his titles as the Tenandry of Newmilns, and comprising various parcels of land, all of which at present form part of the park and policies of the mansion-house of Amisfield. The estate known at present as Amisfield was formed in 1720 by the agglomeration of several properties, but the nucleus of it consisted of the estate of Newmilns, and since its formation the park has been used as parks attached to a mansion-house ordinarily are, *i.e.*, kept in permanent pasture and interspersed with plantations. The Earl of Wemyss produces a report made by the Sub-Commissioners of the Presbytery of Haddington, dated 26th July 1630, which values the teinds of the lands of Newmilns, which it describes as extending to 30 acres, at a certain quantity of victual, and he contends that no more teind can be demanded from him than that amount of victual. The common agent gave effect to this contention, following in this respect what had been done in the state of teinds in all the localities since 1799. Mr Baird objects—(1) that the sub-valuation cannot be approved, and consequently can have no effect given to it, and (2) that it only applies to 30 acres, whereas Lord Wemyss's lands are much larger in extent; and this raises the two first questions in the case. The Lord Ordinary sustained the first objection, and held that the sub-valuation must be disregarded. This made it unnecessary for him to determine the second question, but at once opened the way for the third, which was—how should the teind of the lands be stated? Mr Baird contends that, being unvalued, it must, on the authority of the case of *Burt*, be stated as the fifth of an assumed rental if the whole land were under corn. Lord Wemyss, on the other hand, contends that the land must be taken as practically occupied for the purpose of growing grass, and that therefore the rental must be taken as at what actually is got, or would be got, for the grazings as they exist. The Lord Ordinary has sustained Mr Baird's contention.

It is familiar practice that in localities effect is given to reports of sub-valuation to whose approval no objection could be stated. At the same time, in strictness this ought not to be so, for until approved a report of a sub-valuation is of no avail whatever. Accordingly, in order to put himself in a correct position, Lord Wemyss has raised before your Lordships, as Commissioners of Teinds, a process of valuation and approbation of the sub-valuation, and a motion was made to sist the present process until that matter was determined. However as, on the one hand, the Lord Ordinary has given judgment on the merits, and the objector by his minute intimated that he waived any technical right to object to the sub-valuation as unapproved, and as, on the other, it was clear that the objector being titular would have a clear title and interest to appear and oppose the approbation, it seemed unnecessary to your Lordships to take that step. Our judgment in the present case will practically determine that in the approbation.

Adverting now to the first standing question the Lord Ordinary has pronounced against the sub-valuation, and the grounds of his Lordship's judgment are shortly stated by him thus:—"It is certain that this valuation was obtained by the tacksman of the teinds in the absence of the titular. There have been cases in which, on the construction of old sub-valuations, it has been held either that the titular must be presumed to have had notice and to have acquiesced, or that the relations between him and the tacksman were such as to make the valuation binding upon

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him. But the present case is exceptional in this respect, that it clearly appears that the titular disapproved of the tacksman's proceedings and took the ordinary steps to have them stopped by obtaining an order of the High Commission to that effect, which was duly intimated to and observed by the Sub-Commissioners. It is entirely in accordance with this view that in 1714, in an action of valuation and sale of the teinds of certain lands included in the sub-valuation of 1630, there was produced and founded on, not the sub-valuation, but a valuation of the High Commission in 1632."

I am unable to agree with the Lord Ordinary in this matter. His Lordship does not actually say that the absence of the titular would be fatal to the sub-valuation. The counsel for the objector, however, so argued. I am clearly of opinion that this is not so. The point was expressly decided so long ago as 1763 in the case of *Thomson* v. *Officers of State*. That judgment was approved of by Lord President Inglis in *Ministers of Old Machar* v. *Heritors* (6 Macph. 504, at 521), and though that case was reversed in the House of Lords, the grounds of reversal in no way affect that portion of the Lord President Inglis' opinion. But further and on principle the contention of the objector would seem to have nothing to support it. I need not go over again the oft told history of the true position of the Sub-Commissioners. It will all be found in the judgments in the *Old Machar* case in the House of Lords. Suffice it to say that the Sub-Commission was put in motion by the King and could at any time sit of their own desire; that the proceedings before them were in no proper sense of the word a judicial process; and that—provided that the tacksman is as here present—there is not even the possible suggestion that the titular's interests were not properly attended to, the interest of his own tacksman being truly identical with his. The true ground of the Lord Ordinary's judgment here consists in the conclusion he comes to that the proceedings before the Sub-Commissioners were "stopped" by the titular "taking the ordinary steps" of obtaining an order from the High Commission to make them desist. So far as "ordinary steps" are concerned, I cannot say that I think a proceeding of the kind was at all ordinary; and that an order was obtained from the High Commission at all must I think be ascribed to what we know historically of the somewhat dominant position of the Earl of Lauderdale. But how does the matter stand? The sole evidence is derived from a portion of the report of the said Sub-Commissioners, which is as follows:—"The qlke day c'perit p'solie in pns of the saids Sub-Commissioneris Wm. Cairnes of Pilmure quha in name and behalf of ane Noble Erle John erle of Lauderdaill pducit an act of ye Commissioneris nomt be his Matie for surrenderis and teinds grantit in favor of the said Erle beiring in effect that he for ye better tryell of the trew worth of ye teinds yt he hes of uyris menis lands wes c'tent to refer ye availe & quantitue of ye saids teinds to ye aiths of veritie of ye heritors of lands yrof he hes ryt to ye teinds qlk declaratioun maid & cours taken be ye said erle ye saids c'missioneris allowed and yrfor ordainit him to have lris to charge ye saids heritors to c'peir befor thame to give yr aithis of veritie upoun ye just and trew availl of ye lands yrof he has ye teinds wt certificatioun and they failzie ye samen sall be referrit to his aith of veritie as ye samen act of ye dait at Edr ye xxviii day of Jar. 1629 zeiris at mair lenth p'portis desyring thairfor they wald desist fra taking tryell of ye worth of ye teinds of ony menis lands yrof he hes ye teinds wt in ye said presbyterie c'forme to qlke desyre and for obedience to ye said Act of ye saids c'misrs discharges yr offr & yr fiscall to sumond or cause be sumonit and warnit or chargit agen ye said Erle as having ryt to ye teinds of uyreis menis lands wt in ye said presbyterie nor yat ye heritors of ye said lands for trying of ye availl of the said teinds desup Act."

Now it is certain that in 1630 the titular of the lands was formally not Lord Lauderdale but his son Lord Maitland. It may have been—and it is said by the objector to have been the case—that this was just an arrangement which Lord Lauderdale had for some unknown reason made for his own convenience. Be that as it may the formal title is as I have said, and it is consequently not clear that the direction of the Act applies to these lands at all.

But further, your Lordships will observe that though the date of the High Commission's Act is given as 28th January 1629, it is not produced to the Sub-Commissioners till 26th March 1632. So far, therefore, as these lands were concerned the Sub-Commissioners had not been stopped but had valued them in 1630. And having valued them in 1630 there was nothing more for the Sub-Commissioners to do except to report, which they did. And if confirmation of the view that the sub-valuation *quoad* the lands had not been effected by the action of the Earl of Lauderdale, it is conclusively given by the fact that we have here an official extract of the sub-valuation (the heading "decree" as printed by the parties seems to me incorrect) given out by the clerk of the Commission, who was appointed in 1633, *i.e.*, a year after the handing in of the Act of 1632.

If we proceed to speculate, it might well be the case that if, say in 1633 or 1634, the heritor had proceeded to ask the High Commission to approbate the sub-valuation of 1630, the Earl of Lauderdale if he thought it to his interest might have had influence enough to stop that particular sub-valuation being approbated. But what is there in that? There are many objections—for example, *inter alia*, a pure objection on the value itself—which the High Commission at that time might have entertained. But all that is impossible now. The truth is that as soon as it was decided that the present Court of Teinds could, after the lapse of hundreds of years, approve the valuation of the Sub-Commissions, many of the objections to approbation

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which were available at the time became practically non-existent. And accordingly it has now been decided for upwards of 150 years that the Court must approve, provided that no intrinsic objection can be shown to the sub-report, that it can be shown that the identity of the lands can be made out, and that dereliction of the sub-report cannot be shewn against the party seeking to approve.

Dereliction is indeed alleged in this case by the objector, and the evidence he adduces of it is that in some valuation proceedings in 1714 there is mention made of certain persons producing a decreet of valuation of the High Commission in 1633 of the lands of Nungate. Now, doubtless a valuation by the High Commission infers dereliction of a sub-valuation. But the onus of showing dereliction lies on the objector. I do not think that onus is discharged when he cannot produce the decree of valuation, but only a reference to it, and when that reference does not in terms refer to the same lands. It may very well be that the lands of Newmylns lay in the territory of Nungait, but whether a valuation of the teinds of the Nungait was or was not a valuation of the teinds of each separate parcel of lands which could be described as within the territory of the Nungait is quite another affair, and one which cannot possibly be cleared up without the text of the decree itself.

Accordingly, on this branch of the case I disagree with the Lord Ordinary. I think no good objection has been shown to the sub-valuation, and that it falls to be approved.

This makes it necessary to consider the question which the Lord Ordinary by his judgment was absolved from considering, viz., to what extent of lands does the sub-valuation apply. On this point I shall be very brief. The sub-valuation explicitly states that it values Newmills extending to 30 acres. I do not say that it might not be possible to show that other lands than Newmills proper fell within it. But *prima facie* it must be construed according to its tenor, and I do not think that the condescendence has in any way given us materials for extending the natural meaning of the words. I hold therefore that the valuation covers 30 acres of Newmills only.

The third question therefore remains with regard to the remanent lands which the Lord Ordinary decided as to the whole, viz., what is the principle of valuation? On this part of the case the Lord Ordinary thought himself bound by the decision of the majority of the whole Court in the *Calton* case—*Burt* v. *Home*—and decided that the teind must be valued as at a fifth of the rent which the land would bring if it were let for corn crops.

I wish to say emphatically that I have never been able to reconcile my own opinion to that of the majority of the Court in the case of *Calton*. I entirely agree with Lord Adam in that case, and I humbly think that the judgment of Lord Craighill, which may be taken as a type of the judgments of the majority, confuses the question of the exemption from teindability—for which no one, as I understand it, contended—with the question of what kind of rent is the rent and constant rent named by the two statutes of 1633. At the same time that judgment is a judgment of the Whole Court, and is binding on me unless it is annulled by the House of Lords. I am, however, only bound to follow it so far as it is a decision. I am not bound by what may be the logical conclusion to be drawn from the dicta of the majority with whom I do not agree.

Now the decision in that case covers two points, and two only. It decided (1) that the lands of a heritor which had in times past borne fruits were still liable to teind, although being covered with houses they were not *de facto* yielding fruits, and (2) that the rent of such lands was to be calculated as if they were at present under corn.

It is by turning the second branch of the decision into an absolutely general proposition that the Lord Ordinary has reached the present result. The facts here are quite different. In that case the lands were admittedly bearing no fruits. Here they admittedly are, for they are growing grass, *i.e.*, the lands are in exactly the position of the lands in the *Glenlyon* case. Now no one has ever supposed that the sequel of the *Glenlyon* case was that part of the old forest of Athol was calculated as to what it would bring as corn land. And further, the practice of every locality in the country is the other way. When land is occupied as country land ordinarily is, *i.e.*, partly in corn land, partly in pasture, partly in plantations, it is the actual rental that is taken. No one so far as I know ever heard of a new and fictitious rental being evolved from a valuation made upon the assumption that the whole land was put under corn crop. Such a result might be attained, I can well see, from a logical extension of the dicta of the majority in the *Calton* case. That such a logical extension would upset the practice of every locality in the country, and render nugatory the pages of decisions in Morison and the comments of Erskine which are occupied with what do and what do not form good deductions from teindable rental, fortifies me in my opinion that the judgment was wrong, but does not, I think, force me to accept more than the actual decision.

I am therefore of opinion that on these matters the interlocutor of the Lord Ordinary should be altered, and that the teinds should be valued as at a fifth of the rent which would be got for the subjects so far as they consist of grazings and plantations in their actual condition.

Lord M'Laren—I agree with your Lordship on all the points in this case. I wish only to make an observation on the last point. The law of teinds, like every other branch of law, must take account of the industrial and social arrangements of the country. In considering how teinds are to be levied we must take into account the industrial development of the country. In

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some countries there are forest lands owned by the Government, but in our country forests and plantations in general are private property, and in the case of estates of any considerable extent there is a residence or mansion-house with a tract of land kept under wood and grass immediately surrounding the mansion-house, which in Scotland is called the policy. These policies have never been treated as teindable subjects except in so far as they may consist of a home farm.

That being the character of the land in question in this case, it is said that, on the authority of the *Calton* case, it should now for the first time be treated as a teind-producing subject. I share with your Lordship the doubts you have expressed as to the validity of the reasoning of the majority of the Court in that case, and it does not appear to me that in any fair sense the decision in that case can rule a question like the present. What was decided there was that where you have a process of conversion going on before your eyes by which arable land yielding tithe is being converted into streets of houses, the parson or the titular is not to lose his tithe because of this conversion. But it is a different thing to say that you are to institute a historical inquiry into the use of the land for the purpose of establishing that at some remote period the land was in a condition that would make it subject to tithe. How far back is this inquiry to be carried? I suppose, if necessary, to the beginning of the Christian era. I really see no possible limits to the extension of such an inquiry, and I agree that the principle of the *Calton* case does not compel us to hold that the land in dispute was originally arable land and is therefore to be treated as a teindable subject.

LORD KINNEAR—I agree with all that your Lordship has said, and I think it quite unnecessary to go over again in detail grounds of judgment which have been fully explained. But there are two leading points of general importance as to which I desire to express my own opinion.

In the first place, I think it clear that the objection founded on the supposed absence of the titular cannot be sustained without disregarding the doctrine laid down by the House of Lords in the cases of the *Deans of the Chapel Royal* and of the *Ministers of Old Machar*. The principle which must govern the decision of all such questions in future is that the validity of valuations either by the Sub-Commissioners, or by the High Commission before 1707, is not to be tried by the same rules as are applicable to judicial proceedings. It is not, therefore, a conclusive objection to the validity of a valuation that the titular does not appear on the face of the proceedings to have been summoned, because that, if it were necessary, may be assumed to have been done although it has not been recorded, and also because a perfectly good valuation may have been made even although the titular was in fact no party to the proceedings. The reasons for both propositions are to be found in the learned exposition of the history and constitution of these Commissions which was given by Lord Curriehill in the cases cited. As regards the Sub-Commissioners, Lord President Inglis points out that these were not persons to whom the exercise of any precise judicial functions could have been very well committed. They were not lawyers. They were either country gentlemen or members of the presbytery of the bounds. They were not persons acquainted with the forms of process, and could not be expected to conform themselves thereto in all respects, and the duty which was committed to them was not to pronounce any judgment but to inquire and report to the High Commission. These observations are directly applicable, because the document we are to construe is the report of a Sub-Commission. But there is another reason which rests perhaps upon more fundamental considerations, and is equally applicable to the High Commission; and that is that these bodies were not judicial tribunals engaged in trying private law-suits between litigating parties, but Royal or Statutory Commissions conducting a public inquest, and required to collect information by their own methods on a matter of public interest. It is true that the High Commission had executive powers as well as powers of inquiry. But they were not therefore tied down to the procedure of the courts of law. In an ordinary litigation the parties are solely responsible for the conduct of their own causes, and persons who were not parties before the Court are not to be prejudiced by the decision. But the Commissions were required to ascertain and determine the value of teinds, whether the parties immediately interested came before them or not. This appears from the express terms of the Commission of 2nd February 1629, by which the Sub-Commissioners, whose report we are now considering, are charged "to inform themselves by all the lawful wayes and means they can of the just and constant worth of the teinds both great and small," and "with power to call all parties having interest in the valuations 'and if both parties be present to proceed to their trial without citation,' . . . and if the parties be not present, with power to direct their own precepts and cause charge the saids persons personally if they can be apprehended, and failing thereof by open proclamation to hear and see the said valuation tried and declared; . . . and if neither titular nor heritor will compear," the Sub-Commissioners are empowered to choose a procurator-fiscal and to authorise him with their warrant "to pursue and follow out the probation and valuation of the teinds concerning those" who delay or refuse to insist. To prevent injustice, therefore, the persons interested were to have due notice of the proceedings, but if they did not appear and look after their interests for themselves, the valuation was not to be hindered, but the Sub-Commissioners were to proceed with the assistance, if necessary, of a procurator-fiscal of their own appointment. The legal consequence of all this, as

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it is expounded in the cases cited, is that a sub-valuation cannot be set aside as invalid because it does not appear on the face of the record that the titular was cited or that he took part in the proceedings. In the first place, it must be assumed that the proper steps were taken for giving him due notice that his teinds were to be valued; and in the second place, if he did not appear, it was for the Sub-Commissioners to consider whether the interest of the teind holders was sufficiently protected by the presence of the tacksman, and if not, whether they should appoint a procurator "to pursue and follow out the valuation." Accordingly, it was held in the case of *Thomson*, to which your Lordship referred, and again in *Pringle* v. *The Officers of State*, that it was not essential to the validity of valuations that the titulars should be made parties to them; and in both cases the defence sustained was that the Sub-Commissioners were not to be considered as Courts of Judicature, but "had been appointed to carry into execution a general and public measure according to their discretion and the best information they could procure." These cases are directly in point, and the principle on which they proceeded is sanctioned by the judgments of the House of Lords.

But it is said, and the Lord Ordinary has held, that the present case is distinguishable, because the titular disapproved of the tacksman's proceedings and took the ordinary steps to have them stopped by obtaining an order of the High Commission to that effect, which was duly intimated to and observed by the Sub-Commission. I must confess that I do not know on what authority the proceeding of the titular is supposed to have been an "ordinary step." But I agree with what your Lordship has said about that procedure, and I only add that the report of it is too vague and general to justify any certain conclusion as to its intention or effect. It does not appear to what Commission Lord Lauderdale appealed. The Act of the Commissioners in his favour is said to have been dated on the 28th of January 1629. The Commission under which the valuation in question was made was not until the 2nd of February 1629; and we know that before that date a variety of valuations had been made under previous Commissions which had neither the authority of Parliament nor the authority of the General Submissions on which the King's decreet-arbitral was pronounced, and were therefore of no force or effect against any one. This is explained in the judgment of Lord Justice-Clerk Inglis in *Dunlop and Allan* v. *The Commissioners of Woods and Forests*. But it is more material that at the date when the Sub-Commission was moved to stay the proceedings for valuing Lord Lauderdale's teinds in general, *i.e.*, the 26th of March 1632, they had already completed the valuation of the particular teinds in question. A stay of procedure in 1632 with reference to teinds described generally as Lord Lauderdale's teinds of other men's lands, could in my opinion have no effect upon a valuation of specific teinds completed in 1630.

I agree with your Lordship also as to the proper method of estimating the value of the teinds which are not included in the report of the Sub-Commissioners. The difficulty as to this point—and it is not inconsiderable—is created by the judgment in *Burt* v. *Home*. That case is binding on this Court so far as regards the actual decision. But I agree that, considering the difference of opinion among the learned Judges who decided it, we are not bound to follow out to their logical consequences the opinions of the majority when we are not ourselves able to agree with them. I must say that, for my own part, I agree with the opinions of Lord Moncreiff, Lord Shand, and Lord Adam. The general rule of our law is that the teind is a proportion of the fruits, and therefore *debitum fructuum* and not *fundi;* and I cannot think that Mr Erskine's doctrine is open to question when he says that even after valuation teinds continue to be *debita fructuum:* for the valuation does no more than ascertain the value of the tithe without altering its nature. Even in *Burt* v. *Home* the learned Judges hardly dispute the doctrine, although the decision is not easily to be reconciled with it. But its application to the process of valuation is illustrated by various decisions cited by Mr Erskine, which I think afford sufficient authority for the decision of the present question. Thus he observes that all rent paid to the landlord is not necessarily subject to tithe so as to be accounted rent in the valuation of tithes, for as orchards produce no fruits that are the subject either of parsonage or vicarage tithe, the rent due by the tenant for an orchard is not to be computed in the valuation. So he says that a moor is deemed to be *pars fundi*, and of course is not a tithable subject; and again "as tithes are due only from the fruits of the earth and not from the rent of houses, which are not tithable subjects, the rent paid for supernumerary houses over and above what is necessary for the farm is to be deducted from the rent roll in the valuation." In like manner, Lord Adam says in *Burt* v. *Home*—"In many cases there are woodlands, more or less extensive, on the lands, which are excluded from the lease; but it is not the practice to put a value or rent upon these woodlands with the view of adding the value to the rent before striking the teind"; and he adds that "to ascertain what rent the ground on which a wood grows would bring if let for agricultural purposes, on the assumption that the wood was removed, and to add it to the agricultural rent, would be an entire novelty in teind practice." These are authorities for the course which is proposed by your Lordship, and I agree with the reasons already given in support of it.

LORD ADAM had retired from the Bench before the advising.

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The Court pronounced this interlocutor:—

"Recal said interlocutor in so far as it sustains the objections stated in article fifth of the objections for Lord Blantyre, and now insisted in by the said William Arthur Baird as amended, and the finding as to the manner the rent or value of the lands referred to in articles fifth and sixth of said objections was to be ascertained: Find that the lands of Newmills, to the extent of 30 acres, were, by the report of the Sub-Commissioners of the Presbytery of Haddington dated 26th July 1630, valued for teind, and when said report is approved of, effect must be given to the valuation accordingly: Find that in ascertaining the rent or value of the unvalued lands belonging to Lord Wemyss, referred to in article sixth of the said objections, the same must be ascertained by taking one-fifth of the rent or annual value at which they were or could have been let in their actual condition, and with these findings remit to the Lord Ordinary to proceed with the cause: Recal said interlocutor in so far as it finds the objector William Arthur Baird entitled to expenses, subject to a deduction of one-fourth as a modification: *Quoad ultra* in respect the reclaiming note is not insisted in against said interlocutor, adhere to said interlocutor: Find no expenses due to or by either party, and decern."

Counsel for the Objector and Respondent — Chree — Hon. W. Watson. Agents — Dundas & Wilson, C.S.

Counsel for the Respondent and Reclaimer —Fleming, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Saturday, May 26.

SECOND DIVISION.

SHIELL'S TRUSTEES *v.* SHIELL'S TRUSTEES.

Succession—Vesting—Liferent—Fee—Liferent Interest—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17—*Construction.*

The Entail Amendment Act 1868, section 17, provides that it shall be competent to constitute by trust or otherwise a liferent interest in moveable estate in favour only of a party in life at the date of the deed (in the case of a testamentary deed the death of the granter), and where any moveable estate shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable estate shall belong absolutely to such party.

A testator, who died in 1875, by his trust disposition and settlement directed that the income of his estate should be divided equally among his four children, the issue of any who might predecease the period of the payment of the capital to receive their parent's share of income, under burden of an annuity to the widow or widower of such predeceasing child. On the death of all his children his whole means were to be divided among his grandchildren then alive, and the issue of such as might have predeceased, payment being made on their respectively attaining twenty-one years. In the event of any of his sons or daughters dying without issue, their portion of the income was to be divided among their surviving brothers and sisters, and the capital of such portions was to be equally divided among his grandchildren and their issue, as before provided, at the period of division.

The testator was survived by four sons, one of whom, A, died in 1895, survived by a widow and four sons, one of whom, B, born in 1878, died in 1905, after attaining majority. The income was paid by the trustees to the testator's four sons while alive, and after A's death his share of income, less an annuity to his widow, was divided among his four sons until the death of B.

In a special case brought to determine B's rights at the date of his death in his grandfather's estate, *held* that his interest under the trust disposition and settlement was not a liferent interest but a contingent right of fee, and that accordingly he had not acquired by virtue of section 17 of the Entail Amendment Act of 1868 an absolute right of property in any portion of his grandfather's estate when he attained majority.

Section 17 of the Entail Amendment (Scotland) Act 1868 enacts—"From and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such party: Provided always that where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the trans-

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ference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made."

This was a special case brought to determine certain questions which arose out of the trust-disposition and settlement of the late John Shiell of Smithfield, solicitor, Dundee, dated 25th July 1871, who died on 6th July 1875.

The *fourteenth* purpose of the trust-disposition was in the following terms:—"I direct my said trustees or trustee on my death to manage my said means and estate as a whole, and to apportion the free proceeds thereof, after deducting all needful costs and charges, and the annuities and others foresaid as follows, *videlicit*, the interest or revenue derived from a sum of £15,000 to be set apart and paid to each of my sons (subject to the foregoing deduction as to the Bank Street property if acquired by my son John) and my daughters, the issue of any of my children who may predecease receiving their parent's share, and that half-yearly, at the terms of Whitsunday and Martinmas during the lifetime of my sons and daughters, and to the issue of those who predecease, until their share of the capital of my said means and estate shall become payable to them as after mentioned, and the residue or remainder of the interest or revenue of my said means and estate shall be paid in equal portions to my said sons, Anthony George Shiell and John Shiell, during their lives, the issue of either or both of them who may predecease the term of division of my means and estate as after mentioned receiving the share of interest or income of their parents, and that at the said terms of Whitsunday and Martinmas, beginning the first term's payments of the said interest or income at the first term of Whitsunday or Martinmas occurring six months after my death, my said trustees or trustee making payments to my children or the said issue as interim allowances out of my said general means and estate until their right to the said interest or income shall become due, my intention being that my sons and daughters shall share equally in the said income or interest on the sum of £15,000 each, my sons during their lives, and their issue until the period of division after mentioned, getting in addition the interest on the remainder or residue of my said means and estate. On the death of all my children, then my said whole means shall be ascertained and apportioned amongst my grandchildren then alive and the issue of such as may have predeceased leaving issue *per stirpes* and not *per capita*, and their respective portions of my said means and estate shall be paid to such grandchildren and their issue on their respectively attaining twenty-one years of age, the interest of their respective portions being applied for the benefit of such minor grandchildren and their issue. In case any of my sons or daughters shall die without issue then their portion of the said interest and income shall become payable to and among their surviving brothers and sisters, and the capital of such portions shall be held to form a part of my means and estate at the period of division, and be equally divided amongst my grandchildren and their issue as before provided: Declaring that in case my sons or daughters shall die leaving issue, the share of the interest or income payable to such issue (less the annuity after mentioned) may be paid to their surviving parent to be applied for their behoof, or may be applied therefor by my said trustees or trustee themselves or himself: Declaring farther in case of my sons leaving widows or my daughters widowers, my trustees or trustee are hereby directed to pay to them as an alimentary provision an annuity during their widowhood out of the share of the interest and income of the means and estate which was enjoyed by their deceased spouse of two hundred pounds per annum, whether there be issue of the marriage or not; in case of issue such annuities shall form a burden on the share both of the income and capital falling to them under these presents: Declaring that the portions of the said interest and income of my said means and estate falling and payable to my children, and the interest or income and capital payable to my grandchildren, shall be, and the same are hereby declared to be, strictly alimentary provisions, and shall not in any way or under any circumstances be liable or attachable for the debts or deeds of my said children, or of any husband of my daughters or my granddaughters, their *jus mariti*, courtesy of Scotland, and all other legal rights competent to husbands being hereby expressly excluded and debarred; and the said provisions in favour of my said children and their issue shall not be assignable in any manner of way, and the receipts of my daughters and granddaughters without the consent of their husbands shall be a sufficient discharge to my said trustees or trustee: Declaring that the foregoing provisions to my children are in full, and shall be so accepted for all claims and demands they might otherwise have through my death or the death of their mother."

By codicil dated 23rd June 1874 the truster made the following alteration on the above purpose:—"With regard to article fourteenth of said deed I direct that the interest of my whole estate shall be life-rented equally by my sons and daughters without distinction or limitation, and declare the provisions under said head to be carried out in all other particulars, the widows and widowers of my sons and daughters having four hundred pounds per annum in place of two hundred pounds during their viduity, as a strictly alimentary provision for themselves and my grandchildren, which shall not be arrestable or assignable for debts or deeds."

Mr Shiell was survived by four children, two sons and two daughters, all of whom were alive at the date of the special case with the exception of his son John Shiell junior, who died in 1895 survived by a widow and four sons. Of the latter all were alive

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at the date of the special case except one son, John Anthony Shiell, who was born in 1878, and died unmarried on 2nd March 1905, leaving a trust-disposition and settlement, dated 13th February 1905, by which he conveyed to certain trustees his whole estate including any interest which had vested in him under his grandfather's settlement. The estate of Mr John Shiell had never been divided. Until the death of his son John in 1895 the income thereof was divided equally among his four children, and after John's death one-fourth of the income was paid to the latter's widow and family, the widow receiving £400 in satisfaction of her annuity and the balance being divided among the children. The income received by the deceased John Anthony Shiell the year previous to his death amounted to £155, representing the income of one-fourth of one-fourth share of the capital of the whole residue, less £100 per annum, being his one-fourth share of the annuity payable to his mother the widow of Mr John Shiell junior.

In consequence of the death of John Anthony Shiell in March 1905, a question arose as to his rights under his grandfather's settlement, and this special case was presented for the opinion of the Court, the trustees acting under the trust-disposition and settlement of the late John Shiell being the *first parties*, and the trustees acting under the trust-disposition and settlement of John Anthony Shiell being the *second parties*.

The second parties maintained (1) that apart from the operation of the Entail Amendment Act as after mentioned, the late John Anthony Shiell had at the date of his death a vested interest in one-fourth part of the fourth share of the capital of the whole estate of his grandfather, of which his father had drawn the income during life — that the first parties were bound to hold and administer the capital representing the said vested interest until the arrival of the period of division fixed by the testator, viz., the death of the last survivor of the testator's children, and that in the meantime, pending the arrival of said period of division, the second parties were entitled to receive from the first parties the interest accruing on the said share of capital vested in the said John Anthony Shiell; (2) alternatively, (*a*) that at the date of the death of the said John Anthony Shiell the first parties held for his behoof in liferent a moveable estate in Scotland by virtue of a deed dated after the passing of the Entail Amendment Act 1868, the said John Anthony Shiell having been born after the date of said deed and being at the date of his death of full age, and accordingly that in terms of section 17 of said Act said moveable estate belonged absolutely to the said John Anthony Shiell; (*b*) that the said moveable estate which so belonged to the said John Anthony Shiell consisted of a fourth part of one-fourth share of the whole moveable estate left by the testator, the said John Shiell of Smithfield, said fourth part being burdened with one-fourth part of the capital sum required to provide an annuity of £400 to his mother Mrs Katherine Guthrie or Shiell; (*c*) that accordingly the first parties were bound forthwith to pay over to the second parties the said estate which belonged absolutely to the said John Anthony Shiell, due security being found by the second parties for the said one-fourth part of the capital sum required to provide said annuity; or (*d*) that alternatively, and in any event, they were bound to hold and administer said moveable estate until the period of division fixed by the testator, and until the arrival of that period to pay the income accruing thereon to the second parties.

The first parties on the other hand maintained (1) that apart from the operation of the Entail Act of 1868 Mr John Shiell's estate, in terms of his testamentary deeds, had not vested in any of his grandchildren, and would not do so until the death of his last surviving child; (2) that the Entail Act of 1868 was not applicable to the interest enjoyed by the late John Anthony Shiell in his grandfather's estate, in respect (*a*) that the interest so enjoyed by him was not applicable to any definite part of the estate, and (*b*) that the said interest, not being for life, but being terminable upon the contingency of the death of third parties, was not a liferent within the meaning of the statute; (3) in any case, and whether or not the statute applied to the effect of vesting any right in the deceased John Anthony Shiell, that neither he nor his representatives were entitled to demand payment of any part of the estate before the period fixed by the testator, namely, the death of the last surviving child.

The following questions were, *inter alia*, submitted for the opinion and judgment of the Court:—"(1) Apart from the operation of the Entail Amendment Act 1868, had the late John Anthony Shiell a vested interest, and if so, to what extent, in the estate of his grandfather, the late John Shiell of Smithfield? (3) If the first and second questions are answered in the negative (*a*) Did the first parties, at the date of death of the said John Anthony Shiell, hold in liferent for his behoof, within the meaning of section 17 of the Entail Amendment Act 1868, any moveable or personal estate, which, in virtue of said section, belonged absolutely to him; (*b*) if so, of what did the said estate consist?"

Argued for the Second Parties—(1) John at the date of his death had, apart from the Entail Amendment Act 1868, section 17, a vested interest in a share of his grandfather's estate (this argument was stated *pro forma* but admittedly could not be maintained). (2) When John attained the age of 21 years he obtained an absolute right of fee in the share of his grandfather's estate held in liferent for him by the trustees by virtue of section 17 of the Entail Amendment Act 1868. It was said against him that his interest was not a "liferent interest" within the meaning of the Act, because (*a*) "liferent" applied only to the enjoyment of a subject for life and not for

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a shorter period terminable upon some contingency; (*b*) his interest was not applicable to any definite part of the estate. As to objection (*a*) "liferent" merely meant usufruct or right to the fruits of a subject, the essential idea being that the right could not extend beyond life, but there being no reason why it should not apply to a shorter period—Dig. vii, 1 and 2; Institutes, ii, iv, 1; Cod. iii, 33, 5; Ersk. Inst. 2, 9, 39; Bell's Prin. 1037; Rankine on Landownership, 3rd ed. p. 630; *Chaplin's Trustees* v. *Hoile*, October 30, 1890, 18 R. 27, Lord Young at p. 31, 28 S.L.R. 51. As to objection (*b*) the mere fact that the exact amount of his interest was not ascertainable did not prevent vesting under section 17, as that section evidently expressly contemplated the case "where more persons than one are interested in the moveable or personal estate." The present case fell under the class of case struck at by the Act—M'Laren, Wills and Succession, sec. 564; *Suttie* v. *Suttie's Trustees*, June 12, 1846, 18 Jur. 442. The case of *Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79, 36 S.L.R. 973, was also alluded to in the course of the argument.

Argued for the First Parties—(1) Apart from the operation of the Entail Act 1868, nothing had vested in John. (2) The Entail Act 1868, section 17 (which applied to moveables the provisions of the Entail Amendment Act 1848, secs. 47 and 48, relating to heritage), was not applicable to and therefore could not affect John's case, which was not within the mischief struck at by the Act, viz., the limitation of the right of a person unborn at the date of the deed to a liferent. He had not a "liferent interest" in the sense of section 17, or indeed in any ordinary sense of the word, the only liferenters being the testator's sons and daughters and not his grandchildren. John's right was one of contingent fee. The passages already cited from Erskine's Institutes and Bell's Prin, together with Bell's Com. (M'Laren's edition) vol. i., p. 52, Bell's Dict. *voce* Liferent, showed that the idea of "liferent" postulated the enjoyment of the fruits of a subject for the period of a life, either that of the person enjoying or of another. Compare too the distinction in England between a tenant for life and a tenant for years—Settled Land Act 1882, secs. 2 and 58; *In re Atkinson*, 31 Ch. D. 577. Further, the statute evidently contemplated an interest in a definite sum of money, but here the interest of John could not be ascertained until the death of the last liferenter—*cf. M'Culloch's Trustees* v. *M'Culloch*, March 14, 1900, 2 F. 749, 37 S.L.R. 535, 6 F. (H.L.) 3, 41 S.L.R. 88; *Haldane's Trustees* v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206.

LORD STORMONTH DARLING—The late Mr John Shiell, solicitor, Dundee, died in 1875, leaving a large estate, heritable and moveable, and survived by four children, two sons, and two daughters. One of the sons (John) died in 1895, survived by a widow and four sons. The other children of the testator survive, and so do the widow and three sons of John. But the other son of John, born in 1878, died in 1905 unmarried, but leaving a will by which he conveyed to trustees his whole estate, including any interest which had vested in him under his grandfather's settlement. It is between his trustees and the trustees of the testator that the present question has arisen.

The scheme of the testator's settlement was a comparatively simple one. Apart from certain legacies and annuities he directed that the income of his estate should be divided equally among his four children, and on the death of any of them before the term of division leaving issue, that the share of income which he or she had enjoyed should be continued to such issue, under burden of an annuity of £400 a-year to the widow or widower of such predeceasing child. On the death of all his children his whole means were to be "ascertained and apportioned among his grandchildren then alive and the issue of such as might have predeceased leaving issue *per stirpes* and not *per capita*," payment being made on their respectively attaining twenty-one years of age. But in the event of any of his sons or daughters dying without issue, then their portion of the income was to become payable among their surviving brothers and sisters, and the capital of such portions was to form a part of his means and estate at the period of division, and be equally divided among his grandchildren and their issue as before provided.

Under these provisions the fourth share of the income formerly received by his son John was, after his death in 1895, annually paid to his widow and family, the widow receiving £400 in satisfaction of her annuity, and the balance being divided among her children. The effect as regards the deceased John Anthony Sheill, in the year previous to his death, was to give him £155, representing the income of one-fourth of one-fourth share of the whole capital, less £100, being his one-fourth share of the annuity payable to his mother.

His trustees, by the first and second questions of law, raise the question whether and to what extent he had before his death taken a vested interest under the will of his grandfather. But no argument was addressed to us upon that head, for the obvious reason that there was a proper clause of survivorship among the grandchildren referable to the period of division which was fixed at the death of the testator's last surviving child, and therefore there could be no vesting before the period arrived. Accordingly the sole question which we have to consider is as to the effect of sec. 17 of the Entail Amendment Act of 1868 in producing an arbitrary period of vesting of the fee contrary to the plain provisions of the will, so soon as the supposed "liferent interest" came to be held by the testator's trustees for behoof of John Anthony Shiell, he being then of full age.

This section practically adopts, as regards personal estate, the declaration enacted, as regards land, by sec. 48 of the Rutherfurd Act of 1848, that "it shall be competent to grant an estate in Scotland limited to a

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liferent interest in favour only of a party in life at the date of such grant." It sets out by providing that "from and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour *only* of a party in life at the date of the deed constituting or reserving such liferent;" and then the section goes on to enact that, where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, and convey such estate to such party. The only variation in expression between the two Acts is that the older Act speaks of an estate in Scotland "limited to a liferent interest," while the later Act speaks of "a liferent interest in moveable and personal estate in Scotland." But it can hardly be supposed that the rather looser language of the Act of 1868, as applied to personal estate, meant anything different or less exacting than the more precise language of the Act of 1848 as applied to land; and therefore I take them both to mean the same thing.

What, then, is the true signification of a liferent interest, or an interest limited to a liferent, in moveable and personal estate in Scotland which cannot be constituted in favour of an unborn child, and must in certain circumstances be treated as a fee? Is it confined to the case of an interest limited to a liferent, in the sense that the beneficiary can never take more than a liferent whatever happens, and must his interest apply to a definite and severable estate in money? Or does it extend to the case of an interest which, by conception of the deed conferring it, is capable of being converted into a fee, and which cannot be so converted at an earlier period without interfering with the lawful interests of other parties? This alternative view applies to the case in hand, and without attempting to lay down any general rule for the construction of the section I think it must be answered in the negative. John Anthony Shiell's interest under his grandfather's will was in truth not a liferent but a contingent fee, and it would be impossible for the first parties to make over the estate, which the Act describes as "held in liferent," without anticipating the period of "ascertainment and apportionment" of the whole residue directed by the will, and so materially affecting the interests of the other beneficiaries. It is true that the section can never receive effect without depriving somebody of a fee which he would otherwise have got. But that does not justify interference with the rights of other parties interested in an undivided estate, and I cannot assent to Mr Cullen's ingenious argument that the first parties would satisfy their statutory obligation to "deliver, make over, or convey" the estate, which, he says, is the subject of a liferent, by simply continuing to hold it as they are doing at present.

There is so little authority on the construction of the Act (which is remarkable after the lapse of thirty-eight years from its date) that one is glad to find any judicial indication of the kind of case to which it applies. Such an indication is afforded by the case of *M'Culloch's Trustees* v. *M'Culloch*, 2 F. 749, *aff.* L.R. (1904), App. Cas. 55. That was a case with provisions in favour of grandchildren, very similar to the present except that the fee had admittedly vested in one of the grandchildren before the question arose. The decision on the main question was that this grandchild was not entitled under the will to immediate payment of the share which had vested in him, because the value of the share could not be ascertained till the period appointed by the testator for distribution. But the grandchild propounded an argument also on section 17 of the Act of 1868, founding on the fact that he was unborn at the date of the testator's death, that he attained majority in 1898, and that he had been in the enjoyment since his father's death in 1880 of the income of one-third of the undivided estate of his grandfather. The Lord Chancellor contented himself with saying—"This is not one of the cases to which the statute applies." But Lord Davey said a little more, and after referring to the statute as apparently "converting a person with a limited interest into one holding a larger interest," and as directing the trustees "notwithstanding any direction to the contrary in the will to transfer his share to him," ends by observing—"nor is there anything in the statute which in the least degree overrides any apt and competent provisions in a will for the purpose of fixing the period" (*i.e.*, of ascertainment and distribution). Now, if that could be said of a will which gave an immediate vested interest in the fee, much more, as it seems to me, does it apply to a will which postponed vesting to the period of distribution. There is nothing inept or incompetent in such a provision, and the view taken by the House of Lords seems to imply that the kind of "liferent interest" contemplated by the section is not to be extended beyond the simple case where, coming to be held by trustees for behoof of a person of full age, it is capable of being converted into a fee without interfering with the legitimate interest of others.

LORD KYLLACHY—I concur, and do so on this ground. I am of opinion and think it clear that the so-called liferent possessed by the late J. A. Shiell was not in the sense of the statute or in any reasonable sense a liferent at all. On the contrary, it was, I think, really a right of a somewhat complex and quite innominate character, embracing as it did (1) a contingent fee in a certain share of the trust estate, and (2) a right, subject to certain burdens, to enjoy the income of the share in question until the right to the fee became absolute upon the

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death of the last survivor of the truster's immediate children, J. A. Shiell's uncles and aunts. That was really the substance of the right, and being so, it appears to me that however it may be described, it cannot be described as a right of liferent. In one view it was more than a liferent, for it embraced as an essential element a right of fee—a contingent fee no doubt, but still a fee—while in another view it was less than a liferent. For it might terminate during the granter's life by the death which might have occurred at any time of the survivor of J. A. Shiell's uncles and aunts.

I cannot in such circumstances accept the ingenious and able, but I think somewhat strained, argument of the second parties, which would in my opinion extend the operation of the 17th section of the Entail Act of 1868 to a kind of case which it does not cover, and which certainly it did not contemplate.

LORD LOW—I am of the same opinion. The object of the 17th section of the Entail Act of 1868 was, I apprehend, to prevent the tying up of moveable estate by the creation of liferents, and it was accordingly enacted that it should be competent to constitute or reserve a liferent "in favour only of a party in life at the date of the deed." What was struck at therefore was the limitation of the right of a person unborn at the date of the deed to a liferent. There was, however, no limitation of the right of John Anthony Shiell to a liferent. On the contrary, he was given a fee of a portion of the trust estate in the event of his surviving the period of payment. It is true that in addition to the contingent right of fee the testamentary trustees were directed in a certain event which happened to apply for his behoof the income of the proportion of the trust estate which he would take in fee if he survived the period of payment. But it seems to me to be impossible to regard that direction as limiting the right given to John Anthony Shiell to a liferent. As matter of fact his right was not limited to a liferent, and the circumstance that he enjoyed the income for a time but died before the fee vested in him, was a mere accident which cannot qualify the nature of the right conferred upon him. I may add that it seems to me to be doubted whether the right to the income given to him can properly be described as one of liferent at all, but however that may be, I am satisfied that it was not a liferent within the meaning of the enactment in question.

That short view appears to me to be sufficient for the decision of the case, but I also concur in what your Lordships have said.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the first branch of the first question and the first branch of the third question in the negative, and found it unnecessary to answer the other questions of law.

Counsel for the First Parties—Dean of Faculty (Campbell, K.C.)—Constable—A. M. Stuart. Agent—Thomas Henderson, W.S.

Counsel for the Second Parties—Cullen, K.C.—A. R. Brown. Agents—Cowan & Stewart, W.S.

Tuesday, August 15, 1905.

OUTER HOUSE.

[Lord Pearson.

THOMSON & GILLESPIE *v.* THE VICTORIA EIGHTY CLUB.

Club—Social Club—Liability of Members and of Committee-men—Goods Purchased on Credit by Clubmaster on Instructions of Committee—Liability Jointly and Severally of Committee.

Held per Lord Pearson (1) that the ordinary members of a social club, in the absence of special circumstances, are not liable for goods supplied to the club on the orders of the clubmaster; but (2) that the members of the committee, which passed the accounts for payment in ordinary course, and whose members had general knowledge that the supplies necessary for the club's existence were being given by the particular tradesman, were liable; and (3) that such liability was not *pro rata* but joint and several.

On 26th February 1904 Thomson & Gillespie, wine merchants, Edinburgh, and Alexander Scott Cairns, sole partner of that firm, raised an action against (1) the Victoria Eighty Club, 25 Dundas Street, Edinburgh, (2) Robert G. Armstrong and others, the members of the committee of the Club, and (3) the said Robert G. Armstrong and others, the known members of the Club, in which they sought to recover £165 (subsequently restricted owing to a payment to £120), the balance due to them on account of liquor supplied to the Club. Seventeen of the members called appeared to defend, including R. W. Millar, who was a member of committee. No appearance was entered or defences lodged for the Club or the Committee of Management. The conclusion of the summons against the Club was not insisted in, as it had apparently no funds.

The pursuers pleaded—"(1) The account sued for having been incurred for behoof of the members of the Victoria Eighty Club, and being due and resting-owing to the pursuers, and the second defenders being at present the committee having the management of the affairs of the said Club, the pursuers are entitled to decree in terms of the first conclusion of the summons with interest and expenses. (2) Such of the third defenders, the members of said Club, as were members of committee during the currency of said account, are conjunctly and severally, or severally, or in any view *pro rata*, liable as individuals in payment of

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said account in respect that (*a*) they ordered and contracted to pay for the goods, (*b*) they procured the said goods on credit in knowledge of the insufficiency of the Club funds. (3) The third defenders, the members of said Club, having authorised and delegated to the committee the ordering of the goods in question, and *separatim* having acquiesced in said goods being got on credit notwithstanding the insufficiency of the Club funds, are conjunctly and severally, or severally, or in any view in equal shares and proportions, liable for payment of the price of said goods."

The facts of the case and the arguments of parties sufficiently appear from the Lord Ordinary's opinion.

LORD PEARSON—"The pursuer Mr Cairns is the sole partner of Thomson & Gillespie, wine merchants in Edinburgh. He sues for payment of £165, 0s. 6d. (now restricted to £120, 0s. 6d. in respect of a payment to account) as the price of liquor supplied by him between 6th September 1902 and 8th August 1903 to a social club in Edinburgh known as the Victoria Eighty Club.

"He calls three sets of defenders, namely, (1) the Club itself; (2) the office-bearers and other members of the committee of the Club as at the date of raising the action, as such committee, and as representing the Club; and (3) the whole members of the Club (some 98 in number including the pursuer himself), so far as known to the pursuer, as such members and as individuals.

"There are two alternative conclusions for payment. The first is directed against the first and second sets of defenders, and is for payment of the account out of the funds of the Club. The second alternative is directed against the third set of defenders as members of the Club, and as individuals, and decree is asked against them 'conjunctly and severally, or severally, or otherwise *pro rata* and in equal shares.' The Club having admittedly no funds, the pursuer chooses the second alternative, and moves for decree accordingly, and this jointly and severally, which he maintains is the true character of their liability. Further, it is to be noted that while the defenders called in the third place are called expressly 'as members of the said Club and as individuals,' the pursuer's pleas-in-law draw a distinction between the members of the Club generally and such of them as were committee-men during the currency of the account sued on. This distinction is not expressed in the summons, but as the conclusion is for payment by them not only as members of the Club, but also as individuals, I think it may be held competent to treat it as including a conclusion for individual liability against the members of committee. I understand that of the 98 defenders called in the third place, eighteen were members of committee, and the rest were ordinary members, and that of the seventeen compearing defenders one (R. W. Millar) was a committee-man and the rest ordinary members.

"Stated briefly, the material facts as to the Club and the pursuer's connection with it are as follows. It was formed on 31st May 1899, the entry-money being 5s. (afterwards raised to 10s.), and the annual subscription 5s. At the close of the first year there were one hundred and seventy members. In pursuance of the rules, there was a committee of twenty-one, consisting of the three office-bearers and eighteen members, one-third retiring annually. The committee had the management of the whole affairs of the Club, with full power to provide and alter the furnishings, to provide periodicals, and to purchase liquors. They had power to appoint sub-committees. The pursuer supplied liquors to the Club from about March 1900. As he had friends in the Club and was getting orders from it, he became a member of it sometime in 1902, and so continued for about six months, when he sent in his resignation, which does not appear to have been formally accepted. He did not use the Club; but he got the printed report and balance-sheet of May 1902, from which he says he saw that the Club was going back and was practically insolvent.

"The account now sued on is for liquor supplied between 6th September 1902 and 8th August 1903, under deduction of certain payments to account. About two years previously, when he began supplying the Club, he gave one month's credit, and was for a short time punctually paid. But the period was gradually extended, and he kept on sending supplies, believing (as he was assured by the clubmaster Angus M'Leod) that all the members were liable, or (as the pursuer puts it) that the committee gave M'Leod orders and that the Club were responsible. All the orders were given through the clubmaster personally, and were upon a printed form and signed by him. It does not appear what the precise form of order was. In so ordering supplies the clubmaster acted upon the instructions of the committee to this extent, that they told him what tradesmen to employ, and instructed him to order supplies as necessary; and the invoices from the tradesmen were laid before the committee, who passed them for payment, the cheques being signed by two of the office-bearers. When the account fell into arrear, the pursuer, though not pressing, wrote several times for payment, and succeeded in getting certain payments to account, which are now credited.

"I consider first the claim made against the ordinary members. This is an action on contract for the price of goods sold and delivered by the pursuer, and the question is, who the other contracting party was. The question who is in law liable to pay for supplies furnished to a club has not been much canvassed in Scotland. The course of the English decisions, of which there are now a good many, shows the necessity of having careful regard to the circumstances of each case, including the rules of the particular club. But subject to this (which I shall consider presently) they have also resulted in establishing what I may call the *prima facie* legal view of such contracts as are here in question, as determined by

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the known practice of social clubs. To begin with, it is impossible to affirm the liability of the Club as such, for that is not a legal entity, capable of contracting or of being sued. The liability must rest either with the members as such, or the committee-men, or some of them, or the clubmaster. Circumstances might be figured in which it was the clubmaster alone; but in the normal case this view has never been received with favour, any more than has the argument, submitted in some cases, that there was really no contract at all, and that the tradesman must be deemed to have relied merely on an honourable understanding that he would be paid. In the ordinary case the clubmaster is regarded as having acted as an agent, and not as principal, in such a contract. But unless there is something special in the circumstances he is not regarded as having acted as agent for the ordinary members as such. The matter is thus put by Lord Lindley in one of the latest decisions (*Wise*, 1903, L.R. App. Cas. 139)—'Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding-up proceedings—see *Fleming* v. *Hector*, 1836, 2 M. & W. 172; *St James's Club*, 2 D. M. & G. 383.' It will be observed that this is expressed quite generally, and not as applicable merely to the case in hand, which was a case arising within the club itself, upon a claim by the trustees against the members for relief of an obligation. Of course there may be exceptional cases either way. There may be cases where certain ordinary members have intervened and pledged their own credit for the goods. There may be cases on the other hand where the rules of the club emphasise and strengthen the view that ordinary members were not to be liable, as happened in both the cases cited by Lord Lindley, in each of which there was an express rule (as also occurs in the present case) that all members should pay ready money for what they were served with in the club. But the distinction referred to by Lord Lindley has been affirmed in other cases where there was no such rule.

"But it is said that the special circumstances of the present case as disclosed in the proof are sufficient to fix the Club members as such with responsibility. The pursuer has devoted a large part of the proof to an attempt to show that they are liable as having authorised and approved of the committee ordering liquors from the pursuer on credit, when it was well known to all the members that the revenue of the Club was insufficient to pay for the supplies, and that there were not Club funds available for paying the account. In my opinion the pursuer has entirely failed to make good this ground of action. An attempt is made in the first place to show that the members generally must have known, and that some of them did in fact know, that the club could not subsist except on credit, inasmuch as the profits on the drink, which were necessary for carrying it on, could not be realised until some time after the drink was delivered, and even then were speculative, depending on the amount of the drawings. There is, however, no direct evidence of any ordinary member, as such, having either antecedently authorised or subsequently approved the dealing on credit, and even if they had, it would not follow that they stood committed to the pledging of their own credit. The evidence taken as a whole really amounts to no more than this, that the witnesses had an impression that the members in general recognised a responsibility, either legal or moral, to make good the payments. Nor can I hold that the pursuer's argument upon the yearly reports and balance-sheets of the club is well founded. It is said that the ordinary members knew or ought to have known from these that the Club was truly insolvent. I cannot hold that they had any duty to inquire; and therefore the question is whether they in fact knew. But it is not proved that they knew it in fact; and even those who are fixed with the knowledge of the balance sheets say, and say (as I believe) truly, that they drew no such inference. If that was what the balance sheet was intended by the committee to represent, it was most misleading. The auditors' docquet *prima facie* represented the very reverse; and if, as the account seems to represent, the Club could clear its liabilities even upon the depreciated or break-up value of the furnishings, much more would it be able to do so if it were to carry on successfully, as everyone concerned assumed it would be able to do. It may be observed that the pursuer, himself a member, says he regarded the balance sheet as an indication of insolvency. Perhaps not very much can be made of the circumstance that he was a member of the Club; but this at least follows from it, that he ought to have made himself acquainted with the rules, and that if he thought insolvency impending he ought to have made the more sure as to who his debtor was, and have resorted to the obvious course of calling a halt, and moving for an investigation into the propriety of continuing the Club. The view I take on the merits renders it unnecessary either to discuss the still more favourable position in which some of the ordinary members are placed by reason of special circumstances, or to dispose of the preliminary pleas taken by these defenders. They say that all those who were members of the Club during the period covered by the account have not been called as defenders; and that it results from this either that the

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pursuer should now call those whom he has omitted, or that (if he contends for joint and several liability) his action is incompetent on the authority of the case of *Neilson* v. *Wilson*, March 12, 1890, 17 R. 608, 27 S.L.R. 505. I need say no more than that I am not satisfied that either of these pleas is applicable to such a case as the present.

"The pursuer pleads alternatively that in any event those who were members of the managing committee during the currency of the account cannot escape liability. As I have said, eighteen of the defenders called are alleged to be in that position; and of these, seventeen have not appeared to defend the action. The remaining one, the defender Robert W. Millar, is, of course, quite entitled to raise the question of his liability as a committee-man. The material facts as disclosed in the proof are these. Mr Millar was a member of the Club from nearly the beginning. He was elected a member of the Committee at the annual general meeting of the Club on 26th June 1900, at which he was present; and in the normal course he would be one of the committee-men retiring in July 1903. It appears that he gave attendance more or less regularly at the committee meetings until November 1902. According to his evidence he desired to have done with the Club and ceased to use it about February 1903. By non-payment of his annual subscription in May 1903 he assumed that he ceased to be a member in July of that year, it having been (as is alleged) the practice of the committee to score out the names of members after two months' default in subscription. But according to the rules there is in that state of things no *ipso facto* demission of membership, but merely a power to the committee to strike the names of defaulters off the roll, which so far as appears was not done in the case of Mr Millar. He received circulars after May 1903 to attend committee meetings. The general meeting summoned in July 1903, when his membership of committee should have run out subject to re-election, proved abortive for want of a quorum, and the Club went on (as I take it) with the existing state of things, summoning a special general meeting in December 1903, which likewise failed for want of a quorum. He says it was then he first heard of the pursuer's account, and he was one of those who subscribed to the levy then made of 30s. per member to raise money to pay that account. He did not send in his resignation as member of the Club until March 1904, after this action was raised. As to the financial position of the Club, he says that he had no reason to doubt its solvency, and that from the balance sheet of May 1902 he thought it was in a very fair way. As to the practice of the committee, his evidence is that the Club was worked on one month's credit. There was a refreshment sub-committee of which he was not a member; but the accounts due by the Club were laid before the committee and passed for payment every month; and usually the committee had submitted to them a comparative statement of the Club drawings from liquors for the month or quarter just ended compared with the corresponding period of the preceding year. These in the autumn of 1902 showed a great falling off as compared with the previous year. This of itself showed a serious position of matters; for obviously it was to the profit on the sale of liquors that those in the management of the Club had to look for payment of the tradesmen. Mr Millar now says that if he had realised the situation he would have called a general meeting of the members to consider the position, and that he did not do so only because he did not consider it at the time. All this time the weekly supplies were being obtained from the pursuer; and although Mr Millar says he was not aware of the particular orders or of their amount, he was aware generally that fresh orders were being given and that the Club could not be kept open unless fresh supplies of liquor were got. I cannot doubt that all this implies liability on the part of the members of committee to see the account paid, and that on the facts the clubmaster gave the orders as their agent. It is no sufficient answer to point to the pursuer's evidence as showing that he thought the Club and all its members were liable to him, and that it was on their credit that he relied. It is, of course, of some importance to ascertain who it was to whom the pursuer thought he was giving credit. But the mistake made by the pursuer was in a sense a mistake in law and does not alter the facts. The true principal can be sued when he is discovered, notwithstanding that credit was erroneously given to another—see the opinions of Lord Esher and Lord Justice Lopes on this point in *Steele* v. *Gourlay* (1887, 3 T.L.R. 772). No doubt there are cases in which certain selected committee-men have been found liable on grounds special to themselves, *e.g.*, the personal giving of orders or the signing of cheques for payment of specific accounts to the same merchant. But it does not follow that where no such specialty exists the members of committee are not liable as such. That depends upon the course of dealing and the practice of the committee of which they are members. If the system of orders and payments adopted by the committee is such as to fix the members of committee with the general knowledge that supplies necessary to the existence of the Club were being obtained from a particular tradesman, and his accounts were passed by the committee for payment as part of their ordinary business, then I hold that the committee-men are liable, with such relief as they can obtain from the Club funds, or from the members by way of contribution. Nor do I think that there is room (in such a case of continuous weekly supplies) for distinguishing between those committee-men who were present and those who were absent from any particular meeting, as if only those who attended a meeting were liable for the accounts passed at that meeting. Then it is suggested that Mr Millar's membership of the Club or of the

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committee ceased in July 1903, and that at that time the account sued for was not completed. But I cannot accept the view that his membership ceased. The committee did not in his case exercise their option to strike him off the roll as a defaulter, and the consequence was that he had to send in his formal resignation in March 1904. Nor can I hold that his office as committee-man really ceased in July 1903. There being no quorum at the general meeting nothing could be done; and in these circumstances I hold that the continuity of administration remained unbroken and that the committee remained in office *de facto* from the necessity of the case, not perhaps having all the powers, but having all the duties, of the normal committee until they or rather the outgoing third should be lawfully replaced. Further, I think it clear that the liability is not merely *pro rata*, and that the proper course is to decern against the compearing defender Mr Millar for payment, reserving any right of relief competent to him."

This interlocutor was pronounced:—"The Lord Ordinary having considered the cause, in respect the pursuers do not insist for decree in terms of the first alternative conclusion of the summons, dismisses the same, and decerns; and as regards the second alternative conclusion, decerns against the defender Robert W. Millar for payment to the pursuers of the sum of one hundred and twenty pounds and sixpence sterling with interest at the rate of 5 per cent. per annum from the date of citation, reserving to the said defender any right of relief which may be competent to him: Assoilzies the other compearing defenders from the said last-mentioned conclusion (other than the defender William Hill who has already been assoilzied), and decerns," &c.

Counsel for the Pursuers — M'Lennan, K.C.—Armit. Agent—George Matthewson, S.S.C.

Counsel for the Defenders (James Anderson and Others)—A. M. Anderson. Agent—W. P. Crow, Solicitor.

Counsel for the Defenders (A. M. Cruikshank, R. W. Millar, and Others)—Munro. Agents—Reid & Crow, Solicitors.

Counsel for the Defenders (William Hill and Harry Rawson)—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defender (J. G. Reid)—Munro. Agents—Reid & Crow, Solicitors.

Tuesday, May 22, 1906.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANARKSHIRE COUNTY COUNCIL v. BURGH OF AIRDRIE.

LANARKSHIRE COUNTY COUNCIL v. BURGH OF COATBRIDGE.

River—Process—Pollution—Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), sec. 11—Appeal to Court of Session in Common Form—Competency—Statute.

The Rivers Pollution Prevention Act 1876, sec. 11, provides for review by one of the Divisions of the Court of Session by way of special case of any proceedings under that Act in the Sheriff Court, and it also provides for a petition or complaint presented in the Sheriff Court being removed to be tried by the Superior Courts in the first instance if thought desirable.

In a petition presented in a Sheriff Court to have the defenders ordained to cease polluting certain streams, the defenders, after the Sheriff had found that they had admitted polluting and were therefore guilty of a breach of the Act, brought an appeal to the Court of Session in common form. *Held* that section 11 of the Rivers Pollution Prevention Act 1876 was exhaustive as to the method of review and exclusive of the common law right of appeal, that the appeal was therefore incompetent and fell to be dismissed, and that it was not and could not at this stage be an application to have the case tried in the first instance in the Superior Court.

Guthrie, Craig, Peter, & Company v. *Brechin Magistrates*, January 9, 1885, 12 R. 469, 22 S.L.R. 343, *commented on.*

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), section 11, enacts—"If either party in any proceedings before the County Court under this Act feels aggrieved by the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice. The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the Judge of the County Court upon the application of the parties or their attorneys. The Court of Appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses. Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, and to enforcing judgments in County Courts and appeals from decisions of the County Court Judges, and to the conditions of such appeals, and to the power of the Superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action, in the same manner as if such action

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and appeal related to a matter within the ordinary jurisdiction of the Court. Any plaint entered in a County Court under this Act may be removed into the High Court of Justice by leave of any Judge of the said High Court, if it appears to such Judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a County Court, and on such terms as to security for and payment of costs and such other terms (if any) as such Judge may think fit."

Section 21 provides for the application of the Act to Scotland and *inter alia*—"(5) The expression 'the County Court' shall mean the Sheriff of the county, and shall include Sheriff-Substitute, and the expression 'plaint entered in a County Court' shall mean petition or complaint presented in a Sheriff Court. (6) The expression 'the High Court of Justice' shall mean the Court of Session in either Division of the Inner House thereof."

On 28th August 1905 the County Council of the County of Lanark presented a petition in the Sheriff Court at Airdrie against the Provost, Magistrates, and Councillors of the Burgh of Airdrie, in which the pursuers sought to have the defenders ordained to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the North Calder Water, the Luggie Burn, the Gartsherrie Burn, the North Burn, the South Burn, and the Brown Burn, all streams flowing through parishes within the pursuers' district, any solid or liquid sewage matter. A similar petition was also presented against the Provost, Magistrates, and Councillors of the Burgh of Coatbridge. The pursuers founded on the Rivers Pollution Prevention Act 1876, and pleaded—"(1) The defenders having committed an offence against the statute founded on, and polluted the said streams in manner libelled, the pursuers are entitled to have them ordained to abstain from doing so."

The Sheriff-Substitute (GLEGG) found that the action related to a question of heritable right or title in which the value of the subject involved exceeded £1000, appointed the cause to be enrolled for further procedure, and granted leave to appeal. The Sheriff (GUTHRIE) recalled his Substitute's interlocutor, and subsequently, after hearing parties' procurators, found that the defenders admitted permitting sewage matter to fall into the streams, and that they were thus committing an offence, and repelled all their pleas save, in the case of Airdrie, No. 8, which was to this effect—"There being no means practicable and available by which the defenders can render the sewage less harmful, the defenders should be assoilzied," and a similar plea in the case of Coatbridge. The defenders brought an appeal to the First Division of the Court of Session. The appeal was in ordinary form.

On the case appearing in the Single Bills the pursuers (respondents) took exception to the competency of the appeal and argued—The Rivers Pollution Prevention Act 1876 conferred new powers on local authorities and laid down regulations for their exercise. Section 11 prescribed the method of obtaining review of the proceedings in the Inferior Court. That was exhaustive and excluded the common law right of appeal. This appeal was therefore incompetent and could not be treated as an application to have the cause tried in the first instance in the Superior Court as it had already gone too far in the Sheriff Court. [They also advanced an alternative argument, on the supposition that the common law right of appeal subsisted, that the appeal was incompetent as being premature, the Sheriff not having exhausted the case].

Argued for appellants—The appeal was competent. There was a common law right of appeal from the Sheriff Court and it was not taken away; it therefore subsisted—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130. Had it been intended to take it away the Rivers Pollution Prevention Act 1876 would have said so expressly. A similar appeal had been entertained by the Court—*Guthrie, Craig, Peter, & Company* v. *Magistrates of Brechin*, January 9, 1885, 12 R. 469, 22 S.L.R. 343. A special case was not appropriate here, for it proceeded on facts proved or admitted. Here the Sheriff had found the defenders in the wrong without proof or admission. The Act made provision for the cause being tried in the Superior Court if it were thought desirable. It was desirable here. [On the alternative argument they quoted Sheriff Courts Act 1853 (16 and 17 Vict. cap. 80), section 24; Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 53; *Duke of Roxburghe*, May 26, 1875, 2 R. 715, 12 S.L.R. 472; *Turner's Trustees* v. *Steel*, January 9, 1900, 2 F. 363, 37 S.L.R. 250, *per* Lord M'Laren.]

LORD PRESIDENT—These two cases are actions at the instance of the County Council of Lanark against the burgh of Airdrie and against the burgh of Coatbridge respectively, relating to substantially the same circumstances. Both are complaints at the instance of the County Council against the Magistrates of the respective burghs, for polluting, by outflow of their sewers, certain tributary streams of the river Clyde, and both were originated by petitions presented in the Sheriff Court under the provisions of the Rivers Pollution Prevention Act 1876, of which contravention was alleged to have been committed. In both cases the defenders joined issue, but although the defenders were not quite the same in each case it is unnecessary to advert to the distinctions between them as far as the disposal of the present appeal is concerned. Although the defenders did not in terms admit pollution—did not at least admit an infringement of the Rivers Pollution Act—yet it is quite clear from the defences lodged that the sewers did discharge into these streams. The defenders, however, have stated many pleas in defence, including pleas of incompetency, no title to sue, and irrelevancy. Now the

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Sheriff-Substitute at first disposed of the action on the first plea of incompetency, on the ground that it related to a question of heritable right or title in which the value of the subject in dispute exceeded £1000, and allowed an appeal; and the Sheriff recalled his Substitute's interlocutor, and then took up and proceeded to deal with the other pleas in the action. I am now referring specially to the Airdrie case, and in that case what he did was to repel all the pleas except the 8th, which he reserved, but he made a finding that it was admitted that sewage was being permitted to fall into the streams, and a finding that the respondents were thus committing an offence against the Rivers Pollution Prevention Act. He then made a remit, under the 10th section of that Act, to a man of skill, and from the terms of the interlocutor one is led to infer that the manner in which he eventually may dispose of the 8th plea will probably depend on the nature of the report of the man of skill.

But however that may be, that is the interlocutor which is appealed against here, and the question that arises for decision is as to the competency of the appeal. Now, the Rivers Pollution Prevention Act, after providing that the initial proceedings shall take place before the County Court, which, by the interpretation clause, is in Scotland the Sheriff Court, proceeds to make this further provision in section 11—"If either party in any proceedings before the County Court under this Act feels aggrieved by the decision of the Court in point of law, or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice," the High Court of Justice being in Scotland the Court of Session. The section goes on to provide that the appeal shall be in the form of a special case, but it also contains this provision—"Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, . . . and appeals from decisions of the County Court Judges, and to the conditions of such appeals, and to the powers of the Superior Court on such appeals, shall apply to all proceedings under this Act." But the same section further provides as follows:—"Any plaint entered in a County Court under this Act may be removed into the High Court of Justice by leave of any Judge of the said High Court if it appears to such Judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a County Court."

I am of opinion that the provisions under the Act are exhaustive. The Act gives a purely statutory remedy and not a common law remedy. It is true that the common law remedies are not interfered with but remain as before, yet the remedies here provided are statutory and in some ways peculiar. I do not propose to go into an exposition of the co-existence of these two systems of remedies, which matter was before us in a recent case. It is enough to accentuate the fact that the remedies here are statutory and entirely different from those at common law. The statute here provides that the aggrieved party shall have his choice of the method of procedure. If he thinks that the case should be tried *ab initio* in the High Court, *i.e.*, the Court of Session, he must come and persuade a Judge of that Court to remove the case there, and if he does that, then his preliminary pleas will be disposed of by him. But if he does not do that, and joins issue in the Sheriff Court and has some of his pleas disposed of there, his opportunity of removal to the Court of Session is gone. If proceedings have taken place in the Sheriff Court, the remedy then available to him, as provided by the Act, is an appeal in the form of a special case. On that appeal all the pleas dealt with will come up for review, though of course only on the facts as stated by the Sheriff. It is to be noted, however, that under the terms of the section I have quoted, an appeal is competent in this form both on the law and on the merits.

Therefore I come to the conclusion without difficulty that this appeal is incompetent, and I do not think that that decision will do any injustice to the respondents, for if they choose to appeal by way of special case all their *fasciculi* of pleas will come up for review and form questions in the special case, though they must take care in adjusting the terms of the special case that it is made evident that these pleas have been dealt with in the lower Court.

As I have said, I have come to this conclusion without difficulty, and I should not have said anything further had it not been argued to us that the decision in the case of *Guthrie* v. *Magistrates of Brechin* is to the opposite effect. I do not doubt that that case did involve a determination of this point in a manner opposed to the view that I have just laid down, but clearly the question was never argued in that case. The case is complicated because there the question of competency, was not raised under the Rivers Pollution Act but under the Public Health Act. The defender in his defences founded on the 7th section of the Rivers Pollution Act, but the case was considered on competency, and the plea of incompetency was laid not on the Rivers Pollution Act but on the Public Health Act, and that contention was repelled. It is quite true that as the case went on it must have done so under the Rivers Pollution Act, for it was admitted by the Lord President and Lord Mure that it was truly an appeal under that Act and not under the Public Health Act; but still the point, as I say, was never argued, and so, what would otherwise have been a binding decision, cannot weigh with us in deciding this case.

I therefore think that this appeal is incompetent and must be dismissed. After the pleas have been exhausted in the Sheriff Court it will be open to any party aggrieved to appeal to us by way of special case.

LORD M'LAREN—I agree as to the construction of The Rivers Pollution Act and

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the conditions under which appeals in such cases must be taken to this Court. It is impossible to read section 11 without coming to the conclusion that it is exhaustive and that it excludes the common law right of appeal. But even were the common law right of appeal not excluded it would not avail the appellant, for he has not brought this appeal at that stage of the proceedings where a common law right of appeal would be available to him.

One important question that has been raised in this discussion is as to the stage at which such proceedings as this can be removed to the High Court. I think it is clear that it is only at an early stage that this step is competent, because the Act says that a plaint may be removed if it appears to the Judge to be desirable that it should be tried "in the first instance" in the High Court. Now, it cannot be doubted that removal would have been competent immediately after the closing of the record, or possibly even after the Sheriff's interlocutor of the 16th of November, which only disposes of two pleas of the defenders, and appoints the case to be enrolled for further procedure. Although I think that, as the Act has not provided a fixed time for removal of the cause, the power should be construed in a sense favourable to the right of removal, I have come to the same conclusion as your Lordship, that the removal is asked for at too late a stage—after the Sheriff has pronounced an interlocutor finding that an offence under the Act has been committed.

As to the other method of bringing the case to this Court, viz., by appeal, the provisions of the statute are wide, for appeal is competent to anyone who is aggrieved by the decision in the Inferior Court either in point of law or on the merits, or with regard to the admission or rejection of evidence. I think it follows that the Act does not limit the remedy to one appeal only, for on a question of the rejection of evidence, if the appeal were successful, the case would have to go back to the Sheriff for the evidence to be completed. But here the Sheriff has disposed of a point of law; and if I were entitled to advise the respondents I should advise that their remedy under the circumstances was by means of an appeal in the form of a special case. That question, however, is not before us, and I agree that the appeal in its present form is incompetent.

LORD KINNEAR—I agree, and I venture to think that the Act not only introduces new remedies but it creates new wrongs, for it allows a public body to treat as statutory offences operations of a riparian owner in cases where no other riparian owner and local authority could have interfered before the passing of the Act. Now, in creating this new offence the statute provides two distinct processes by which the matter may be brought under the cognisance of the High Court, or in Scotland the Court of Session. In the first instance it provides for removal to this Court, but if that procedure is not made use of, and the County Court or Sheriff Court proceeds to dispose of the matter in the first instance, then the statute allows of an appeal by way of a special case. The two methods are quite distinct, and that this is an appeal and not a removal is perfectly clear, for we are here asked to review the decision of the Sheriff finding that an offence under the Act has been committed. It is manifest that that is not a removal for trial "in the first instance," but an appeal against a decision of the Inferior Court.

Now, the statute provides that a party may appeal if aggrieved by the decision of the Inferior Court in point of law or on the merits, and the statute goes on to provide that the appeal shall be in the form of a special case, but it further provides that all the enactments, rules, and orders relating to such proceedings in County Courts and appeals therefrom shall apply to all proceedings and appeals under this Act. But that is all to be "subject to the provisions of this section;" that means that a party is to have the benefit of all the existing enactments provided he takes his appeal in the form provided by this section and not otherwise. I therefore think that in this form the appeal is incompetent, but the appellants' remedy is not thereby taken away, for he can raise all his points on appeal by way of special case on a proper application to the Sheriff for that purpose.

LORD PEARSON was not present.

The Court dismissed the appeal as incompetent, and remitted the cause to the Sheriff to proceed.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Burgh of Airdrie, Defenders and Appellants — Wilson, K.C. — Murray. Agents — Drummond & Reid, W.S.

Counsel for the Burgh of Coatbridge, Defenders and Appellants—Hunter, K.C.—Horne. Agents — Laing & Motherwell, W.S.

Wednesday, May 23.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ROBERTSON *v.* BRANDES, SCHÖNWALD, & COMPANY.

Contract—Construction—Foreign—Arbitration Clause—Reference to Arbitration in a Country not that of the Parties nor of Fulfilment—Law Governing Validity and Effectiveness of Clause.

A contract between a merchant in Scotland and a mercantile firm in Antwerp, to be implemented in Scotland, contained this clause—"*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way." *Held* that

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the question whether the clause was valid and effective fell to be determined by the law of England.

Hamlyn & Company v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, *followed.*

Process—Contract—Foreign—Arbitration Clause—Validity according to Foreign Law of Arbitration Clause—Mode of Ascertainment.

The validity of an arbitration clause fell to be determined by English law. The Lord Ordinary allowed a proof. *Held* that as proceedings would have to be taken in England under the Arbitration Act in order to start the arbitration, the proof allowed was unnecessary as the validity of the clause would be determined in the course of such proceedings, and *action sisted, hoc statu*, in order that parties might carry through arbitration proceedings in England if the clause was valid and covered the dispute in question.

On 22nd January 1906 John Robertson, grain merchant, Perth, raised an action against Brandes, Schönwald, & Company, 87 Place de Meir, Antwerp (against whom arrestments had been used *jurisdictionis fundandæ causa*), for payment of £250 as damages for breach of contract. The contracts in question, which were to be implemented in Scotland, contained this clause—"*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way."

In defence the defenders, *inter alia*, pleaded—"(3) The action ought to be dismissed, or at all events sisted in respect that the validity of the arbitration clause falls to be determined by the law of England, according to which law the reference is valid and binding."

The circumstances of the case are given in the opinion *infra* of the Lord Ordinary (SALVESEN).

On 27th March 1906 the Lord Ordinary pronounced the following interlocutor:—"Finds that the validity of the arbitration clause in the contracts libelled falls to be determined by the law of England: Allows the defenders a proof of their averments to the effect that according to said law the said clause constitutes a valid and binding reference of the dispute out of which this action has arisen; and reserves all questions of expenses."

Opinion.—"On 8th May 1905 the defenders sold to the pursuer two parcels of ground basic slag, of different qualities and prices, which included the freight and insurance to Perth. The goods were loaded on board a sailing vessel called the 'Emma,' the master of which granted bills of lading dated 30th November 1905 in which he acknowledged that the slag had been shipped in good order and condition. The defenders sent copies of the bills of lading to the pursuer along with an invoice and a draft for £330, 6s. as the price of the goods, less an advance on freight. This draft the pursuer accepted, and in exchange received from the defenders' bankers the endorsed bill of lading with two covering insurance notes. Before the portion of the 'Emma's' cargo which belonged to the pursuer was discharged, the bill for £330, 6s. had fallen due and been paid. Shortly thereafter the pursuer discovered that the cargo was in bad condition, and he has now brought this action in order to recover from the defenders the difference in value between the goods contracted for and the goods delivered. The claim also includes a sum in name of damages in respect of the slag delivered having a smaller percentage of phosphate of lime than the minimum guaranteed in the contracts.

"Both contracts are embodied in written sale-notes which contain the following clause:—'*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way;' and the defenders plead that the action should be sisted until the matters in dispute have been determined by arbitration in terms of this clause. The pursuer, on the other hand, argued that according to the fair construction of the reference clause nothing was referred except questions as to the meaning or intent of the contract, and alternatively that as the pursuer's claim was one of damages, and no power had been conferred on the arbiters to assess damages, the dispute which had arisen was not one which fell under the arbitration clause. This argument proceeded on the assumption that the validity of the clause fell to be ascertained according to the law of Scotland.

"In the course of the debate the defenders' counsel maintained that the clause of reference fell to be interpreted and governed by the law of England, in accordance with which it was valid and binding on the parties, and barred either from raising or insisting in an action at law. On the record, as it originally stood, the pleadings did not properly raise this question, but they have been amended, and I have now to decide whether the third plea-in-law for the defenders, which states the legal proposition which they maintain, is well founded.

"In my opinion the case cannot be distinguished from that of *Hamlyn & Company*, 21 R. (H.L.) 21. That also was an action of damages for breach of a contract which contained an arbitration clause in general terms, the only difference being that while here the words used are 'by arbitration in London in the usual way,' the clause in that case was 'by arbitration by two members of the London Corn Exchange or their umpire in the usual way.' That, however, is not material to the decision of the only point which I feel at liberty to decide at this stage, namely, whether the validity of the clause itself falls to be determined by English law. Now, in *Hamlyn's* case the House of Lords decided that although the contract was for most purposes a Scotch contract, there was nothing to prevent parties agreeing that their rights under the arbitration clause should be determined according to the law of England, and it was held that

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the clause of reference was expressed in terms which clearly indicated that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. I think the same can be said with equal force here. The arbitration was to be in London in the usual way—that is to say, it was to be an English arbitration and not a Scotch one.

"If parties had been agreed that this clause of reference is valid according to English law, I would have been in a position at once to have sisted the action until the matters in dispute had been ascertained by arbitration in London. But as there is no agreement on the subject, and as every question of foreign law is a question of fact which falls to be ascertained by evidence, I have no alternative but to allow a proof, however pedantic the proceeding may appear to be in the present case. . . ."

The pursuer reclaimed, and argued—The validity of the arbitration clause fell to be determined by the law of Scotland. London was merely the *locus* of the arbitration. The contract as a whole was governed by the law of Scotland. One of the parties to it was Scotch. Performance was to be made in Scotland. By the law of Scotland the arbitration clause was bad as no arbiters were named. The present case differed from that of *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642. In that case the arbitration clause contained the names of English arbiters, *e.g.*, "two members of the London Corn Exchange." Assuming that the clause was governed by the law of England, by that law the clause was ineffectual. The present dispute was not a dispute in the sense of the contract. The clause did not cover disputes as to alleged defects in quality. In any event the pursuer was entitled to a *conjunct probation*.

Counsel for the respondents were not called upon.

LORD PRESIDENT—In this case a gentleman who is resident in Perth sues a firm in Antwerp, against whom arrestments have been used to found jurisdiction, and the ground of action is for damages for breach of contract in respect of the alleged inferior quality of a certain consignment of basic slag which he had ordered from them. The contract under which the slag was sold contained this clause—"Any dispute on this contract to be settled by friendly arbitration in London in the usual way." The foreign firm denies that there has been any breach of contract upon the merits, but pleads that the question of whether there has been breach or not must be decided by arbitration in respect of the clause cited. The Lord Ordinary pronounced the following interlocutor:—[*Quotes interlocutor*] . . . The pursuer objects to going to arbitration, and upon two grounds. He first of all says that the arbitration clause must be construed according to Scotch law, and that, so construed, it must be bad in two respects—(*first*), in respect that there is no arbiter named at all, and (*secondly*), in respect that the question of breach of contract for defective quality is not in the sense of the clause in dispute. He also says that, even assuming that the arbitration clause is to be construed by English law, the same result happens, namely, that this is not a dispute on the contract. With the general ground of the Lord Ordinary's judgment I entirely agree, and I do not think it necessary to add much to what he has said. I agree that the case is really indistinguishable from the case of *Hamlyn & Company* (21 R. (H.L. 21) recently decided in the House of Lords. The only distinction between the two cases is that in *Hamlyn's* case the arbitration was to certain members of an associated body in London instead of arbitration "in the usual way," but in my opinion that makes no practical difference, and I think the reasoning of the learned and noble Lords in that case, particularly in the judgment of Lord Watson, is absolutely applicable to the case that we have here. I have therefore no doubt that the Lord Ordinary has come to a just conclusion upon the principal question argued before him. But I do not think that the Lord Ordinary—although I am far from thinking that he is wrong—has taken the most convenient way for the furtherance of the case. If this arbitration clause had contained a nomination of arbiters so that the parties, so to speak, could at once start the arbitration of their own motion without asking anyone else, it would probably have been convenient, inasmuch as the pursuer here says that even according to the law of England it is a bad arbitration clause, that we should have decided that matter in the usual way by examining English counsel or referring it to an English Court. But it is quite clear that what requires to be done here is to take proceedings in England under the Arbitration Act in order to start an arbitration which the other party will not concur in starting, and in those proceedings it is evident that this point could at once be raised, viz., whether this clause is an effectual clause or not. If that is determined by the English Court in favour of the clause then the arbitration will go on, but if the English Court decide that it is a bad clause then the pursuer will be in a position to come back to us and say that the arbitration cannot proceed. Accordingly, I think the convenient plan would be to recal the Lord Ordinary's interlocutor so far as he allows the defenders a proof of their averments, and to sist the action in order that the parties may proceed to start an arbitration in England.

LORD M'LAREN—I concur in thinking that the present case is governed by that of *Hamlyn & Company*. It is to be observed that while the Lord Ordinary has allowed a proof he has not done so with much goodwill towards that form of inquiry for this case. His Lordship evidently considered himself bound by decisions, for he says—"I have no alternative but to allow a proof however pedantic the proceeding may appear to be in the present case." Now, I

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think it is consistent with sound principle that where in a case involving a question of foreign law an occasion necessarily arises of obtaining the opinion of the foreign court on the question, it is unnecessary to have a preliminary inquiry in our own courts as to the effect of that law. For example, where a Scotch case goes to the House of Lords, who have cognisance both of English and Scotch law, they may decide that an arbitration clause is effectual according to English law, and send the case direct to arbitration as was done in the case of *Hamlyn & Company*. It is clear that the parties in this case cannot proceed to arbitration without seeking the intervention of a Judge in England to appoint an arbiter, and I see no advantage in any preliminary inquiry here seeing that the matter will have to be decided by the English Court. If the English Court holds that the arbitration clause is ineffectual, the case will remain in this Court, and parties may then move for proof. I therefore concur in the variation of the interlocutor which your Lordship has suggested.

LORD KINNEAR—I quite agree with your Lordship. I rather think that in the course of the argument there was some confusion between two questions which are perfectly different and must be kept distinct—the question of the construction of the contract and of the question of its legal effect once its meaning has been ascertained. The first question argued was really one of construction, because it was maintained that the only question in dispute in this action does not fall within the terms of the arbitration clause. Assuming it to be so decided, the next question is whether the arbitration clause is effective or not; and that would be a question of construction also. But we have a perfectly sufficient and ruling guide for the determination of that question of construction in the case of *Hamlyn* v. *Talisker Distillery*, and I have no doubt that the clause of reference means that the questions which it governs are to be determined in an arbitration the seat of which is to be in England according to the usual methods in which arbitrations are there conducted. Then, however, Mr Morison brought forward a variety of reasons why it should not be given effect to assuming the contract to be binding. He said it is not an effective contract of reference because the English Court, when it is appealed to in order to set the arbitration in motion, will not for one reason or another give effect to this clause. But that raises a question of the law and practice of the Courts of England which we cannot decide of our own knowledge, but can only decide on evidence of the law and practice of that country. The Lord Ordinary has allowed a proof of this, and although it is a perfectly logical course it would not in this case be a practical or convenient course. It is quite clear that any judgment which we might pronounce upon these questions upon the evidence of experts—who, however learned, may not be infallible—would not prevent the English Court to which the application must be made deciding the same questions for itself upon its own authority; and whatever our judgment upon the evidence as to the law of England might be, it would be futile, because when an application is made to the English Court it will be disposed of according to the law administered by that Court, for a knowledge of which it is not dependent upon the kind of evidence on which we should have to proceed, or upon our view of the effect of such evidence. I think the parties should go to the High Court at once, where the question may be determined authoritatively.

The result of this may be that the defenders may have a process of arbitration instituted in which the questions at issue may be decided and the pursuer may come back to this Court for an effective decree. If their application fails because the clause is found to be incapable of being put into effect in England, the parties may have to come back to have the case tried on the merits here. In either alternative the course proposed by your Lordship is more convenient and more in accordance with our practice than to allow a proof of the law and practice of England, or to invite an English Court to give an opinion on that matter to us instead of allowing the parties to go directly to that Court for themselves.

LORD PEARSON—This is a question, not of Scots law, but of private international law as applied in Scotland. I agree the question, as argued to us, is ruled by the case of *Hamlyn & Company*. I am the more disposed to take this view because, as I understand the pursuer's position, he does not merely maintain that on a sound construction this reference clause does not cover the particular questions in dispute. Before he argues that, it must be assumed that the validity of the reference clause as such is to be determined according to the law of Scotland. But under our law there is a question prior to all questions as to the scope or construction of the clause. There is the prior question of whether this clause can be enforced at all seeing that it does not name an arbiter. It is true he does not plead his objection so high, but that is involved in the argument submitted. If that be so, then, applying it to this contract of sale, it comes to this, that where the parties contracting live in two different countries, and agree that their disputes shall be referred to arbitration in a third country, the validity as well as the scope of the reference clause is to be determined by the law of the country where the action is raised; and if that law pronounces the reference clause to be bad there is to be no arbitration. We were not informed what the law of Belgium would say on the subject, but if it be the same as our own law, that would furnish a strong additional argument in favour of defenders.

LORD M'LAREN—May I add that I agree with all that Lord Kinnear has said as to the general construction of arbitration clauses not being a question depending

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on principles peculiar to the laws of England or Scotland. The construction of an arbitration clause is a matter to be determined by the phraseology of the clause and by the rules of grammar and logic, and is not a question of the municipal law of England or of any other country. It is otherwise of course when the question is whether the agreement to refer to arbiters to be chosen is effective.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Find that the arbitration clause falls to be construed by the law of England, and before further answer sist procedure *hoc statu* in order that the parties may carry through arbitration proceedings in England if on a true construction of said clause it is valid and covers the dispute in question: Find the reclaimer liable in expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for Pursuer and Reclaimer — Younger, K.C.—T. B. Morison. Agents—J. & J. Galletly, S.S.C.

Counsel for Defenders and Respondents—Hunter, K.C. — Boyd. Agents — Boyd, Jameson, & Young, W.S.

HOUSE OF LORDS.

Tuesday, May 29.

(Before the Lord Chancellor (Loreburn), and Lords Macnaghten, Davey, James of Hereford, Robertson, and Atkinson.)

PARISH COUNCIL OF GLASGOW *v.* PARISH COUNCIL OF KILMALCOLM.

(In the Court of Session, March 1, 1904, reported 41 S.L.R. 347, and 6 F. 457.)

Poor — Settlement — Capacity to Acquire Residential Settlement — Bodily and Mental Weakness Rendering Self-Maintenance Impossible — Maintenance in a Charitable Institution.

A person whom "mental weakness and chronic physical disease" renders incapable of maintaining himself, may, by the necessary residence for the requisite period in a charitable institution, without begging or applying for parochial relief, acquire a residential settlement in the parish where the institution is situated.

Question whether an insane person could so acquire a residential settlement.

The case is reported *ante ut supra.*

The Parish Council of Kilmalcolm (defenders and reclaimers) appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—I am of opinion that the order appealed from is right and that this appeal should be dismissed. I do not propose to enter upon any discussion of the law involved in this case, because, having had the advantage of considering the opinion which has been prepared by my noble and learned friend Lord Robertson, I find myself in complete agreement with it and have nothing to add to what he says.

Lord Macnaghten—I agree.

Lord Davey—The learned counsel for the appellants have failed to convince me that the judgments delivered by the learned Judges of the Second Division are wrong, and I have nothing to add. All the facts and the law also seem to be dealt with by those Judges in a manner which appears to me to render it unnecessary to add anything. Therefore I concur.

Lord James of Hereford—This case appears to me to be governed by authority which cannot now be disputed.

The pauper Mary Gillespie, an illegitimate child, was born in the parish of Houston on 18th February 1881. She was admitted to a charitable institution called Quarrier's Homes, situated in the parish of Kilmalcolm, in October 1887, and remained there until March 1901, when on account of disobedience she was removed to the City of Glasgow Poor-house and has remained there ever since. It will be seen that the pauper attained puberty in February 1893. It is sought to render the parish of Kilmalcolm liable by virtue of the residence of the pauper at Quarrier's Homes within that parish.

The mental condition of the pauper is thus described—it is said that during the whole period of her residence in Kilmalcolm "she suffered from mental weakness and chronic physical disease which made her incapable of maintaining herself." Now, upon those facts it must be taken that the pauper did not in one sense maintain herself—that is, she did not earn any money, and had, of course, no private means of her own. She also, from mental deficiency, was incapable of earning her living. But now the authorities apparently clearly decide that the non-earning of the means of support, even when coupled with incapacity through mental weakness short of lunacy or idiotcy, does not prevent the acquiring of a residential settlement so long as the pauper does not resort to common begging and does not apply for parochial relief.

It is sufficient if the pauper is maintained by someone. So long as there is no disqualification through begging or application for parochial relief it is immaterial from whom the means of maintenance are derived.

A series of decisions, the principal of which is the *Kirkintilloch* case, have so determined, and this view of the law has been acted on for many years. It seems too late to attempt to alter rules so well established.

Doubtless this view may, as mentioned by Lord Moncreiff, cast a heavy burden upon a parish in which a charitable institution is situated, but the parish may

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derive benefit from the existence of the institution within its boundaries; but even if this be not so, this argument of hardship cannot alter the law.

I therefore concur in the judgments of the Lord Ordinary and of the Judges of the Second Division of the Court of Session, both upon the main point and on the special averments mentioned in those judgments.

LORD ROBERTSON—The clear argument presented by the learned counsel brought the question before us to a very narrow point. This woman resided three years continuously in the appellants' parish, and during that period had not recourse to common begging and did not receive or apply for parochial relief. Her subsistence was derived from the funds of the charitable institution in whose home she resided; but it was not argued that this circumstance of itself excluded the application of the disputed section. The question proposed by the appellants was the much narrower one, whether the fact (for this is to be assumed) that the woman suffered from "mental weakness and chronic physical disease which made her incapable of maintaining herself" takes her out of the enactment. The words in the section relied on by the appellants are "shall have maintained himself"; but the (disappointingly) limited contention is that while a person may be within the section who *de facto* does not (*e.g.*, through laziness) maintain himself while able to do so, another person whose failure to maintain himself is due to mental and bodily weakness is outside the provision.

Now, if the words in question had to be construed for the first time, there is, to say the least, much plausibility in the broader view that to come within the enactment at all a person must during the three years have derived his maintenance from his own property or labour. This view goes of course a great deal further than the appellants do now, and would render the fact of maintenance not being found by the person himself but by others the crucial fact, while the cause of that fact, *e.g.*, bodily or mental unfitness for self-maintenance, would be irrelevant to the question.

The construction of the statute, however, which as matter of history was put on this section by the very able Judges who developed the law on this subject from 1845 to 1898, was entirely different. They held that from the point of view of the poor law all persons fell into two categories, according as they did or did not live off or try to live off the public by rates or begging; and that if people did not live off or try to live off the public in those ways it was immaterial whether they lived on their own resources or on the resources of their friends, or people who acted as their friends. Accordingly if a man did not ask parochial relief or beg, it was of no consequence whether he lived on his own means or wages or on other people's; and equally little did it matter whether the charity on which he subsisted was administered to him by individuals or by organisations. Obviously this is an entirely tenable theory, although it is open to the objection that it reduces the emphatic and energetic words "support himself" to a synonym of "live," and finds the effective enactment in the qualification introduced by the word "without." But it seems to me unnecessary to be anxious over the intrinsic merits of this construction, because the Legislature adopted it in 1898. By that time repeated judicial decisions in Scotland had completely established this construction; and in that year Parliament, while (for a different purpose) repealing the section containing the words "maintain himself," re-enacted those words as part of the new formula of residential settlement. In my opinion it must be held that in so doing the Legislature deliberately and of choice re-enacted them in the sense which they had been authoritatively held to possess, and that they must therefore be read in that sense.

This being so, there is nothing in the present case except the comparatively easy question whether the result is affected by the fact that the pauper was disabled from maintaining herself by bodily and mental weakness not involving insanity. For the reason given by the Lord Ordinary I think the averment insufficient and irrelevant. Whether the authorised construction of the words "maintain himself" will stand the strain of a condition of insanity is a question which has not arisen and does not arise to-day. It is a question generically different from that before the House.

LORD ATKINSON—I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend and I entirely concur.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Clyde, K.C. —Macmillan. Agents—Lade & Hood, Solicitors, Port-Glasgow—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—Bramall & White, London.

Counsel for the Pursuers and Respondents—The Solicitor-General for Scotland (Ure, K.C.)—W. Thomson. Agents—Mackenzie, Innes, & Logan, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Parish Council of Houston, Defenders and Respondents—Scott-Dickson, K.C. — MacRobert. Agents — Holmes, Mactavish, & Company, Johnstone—Constable & Sym, W.S., Edinburgh —John Kennedy, W.S., Westminster.

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COURT OF SESSION.

Saturday, May 26.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'CONNELL & REID *v.* W. & G. MUIR.

Compensation—Liquid and Illiquid Claims—Constitution—Sist.

In an action to recover the price of 400 bags of flour sold and delivered, the defenders sought to set off the price paid by them for 250 bags sold to them about the same time for which a delivery-order had been granted and acknowledged by the storekeeper, but of which they had not obtained delivery owing to a dispute as to the ownership of the flour. The question of the ownership was the subject of two multiplepoindings, one in the Sheriff Court which had been sisted to await a decision in the other, which was in the Court of Session but to which the defenders were not parties. The Lord Ordinary had pronounced judgment in the Court of Session multiplepoinding action, which the defenders maintained would rule the Sheriff Court action, with the effect that the pursuers never were owners of the 250 bags. *Held* that the counter claim was neither liquid nor *quod statim liquidari potest*, and so could not be set off against the liquid claim of the pursuers, and that there were no special circumstances averred to lead the Court to depart from the general rule and to grant a sist.

On 26th April 1906 M'Connell & Reid, flour importers, Glasgow, brought an action in the Sheriff Court there against W. & G. Muir, bakers, Calton, Glasgow, in which they sought to recover £262, 10s., the price of 400 bags of flour sold to the defenders and delivered on 8th March to them.

In defence the defenders pleaded—"(1) The defenders not being indebted to the pursuers in the sum sued for, and being willing to pay any balance that may be due by them to the pursuers, the present action should be dismissed with expenses," and sought to set off against the sum claimed, the sum of £172, 16s. 3d., the price paid by the defenders for 250 bags of flour which they averred had never been delivered. They made a statement of facts, which with the answers thereto for the pursuers was as follows:—"(Stat. 1) The defenders have often bought flour from the pursuers. Prior to 21st December 1904 they had purchased from the pursuers, but had not received delivery of the 400 bags of flour, and also 250 bags of flour, the price of which, less discount, was £172, 16s. 3d. Notwithstanding the delivery-order mentioned by the pursuers, the defenders have not yet received delivery of the said 250 bags of flour. (Ans. 1) Admitted that defenders have frequently purchased flour from pursuers, and that on 21st December 1904 defenders had not received delivery of the 400 bags of 'Unity' flour—same having been sold for forward delivery. Admitted that defenders had prior to 21st December 1904 also purchased from pursuers other 250 bags of flour, but denied that delivery had not been given. Explained that said 250 bags of flour were of 'Semper Idem' flour, which were held by Thomas Hayman & Son, carting contractors and storekeepers, 26 Robertson Street, Glasgow, as custodiers, in their Commerce Street Store on behalf of and subject to the order of pursuers, and were purchased by defenders from pursuers on 7th December 1904, 'ex store,' at the price of 28s. per bag, with 1¼ per cent. discount for cash in fourteen days, and delivery of same was given by pursuers to defenders on said 7th December by delivery-order addressed to the said Thomas Hayman & Son, granted by pursuers in favour of defenders for said 250 bags of 'Semper Idem.' The defenders paid the price of said 'Semper Idem' on 21st December 1904, and took the discount of 1¼ per cent. (Stat. 2) On said 21st December 1904 the defenders paid to the pursuers the said sum of £172, 16s. 3d., but they have not yet received delivery of the said 250 bags of flour—Thomson M'Lintock, chartered accountant, Glasgow, as trustee on the sequestrated estates of John M'Nairn & Company, produce merchants and importers, 104 Brunswick Street, Glasgow, having claimed that the same belonged to the said John M'Nairn & Company, and not to the pursuers, and that the pursuers had no title to sell the same to the defenders. (Ans. 2) Admitted that on said 21st December 1904 defenders paid to the pursuers the said sum of £172, 16s. 3d. *Quoad ultra* not known and not admitted. Explained that upon said 21st December 1904 defenders received from the said Thomas Hayman & Son, to whom the said delivery-order had been addressed, a warrant or certificate of transfer to the following effect:—'We have this day transferred to your account 250 bags of flour "Semper Idem" in Commerce Street Store, by order of Messrs M'Connell & Reid, which we now hold subject to your instructions only, you paying the store charges on same.' (Stat. 3) The question of the ownership of the said 250 bags of flour has been raised in an action of multiplepoinding which is at present pending in this Court, and to which the pursuers and defenders have been called as parties. The record in said action has not yet been closed. The defenders' claim in said action was lodged in order that their rights and the rights of the pursuers might not be prejudiced, and they intend either to withdraw or amend it. (Ans. 3) Admitted that the said action of multiplepoinding is presently pending in this Court, and reference is made to defenders' claim in said action, a copy of which is herewith produced. . . . . ."

The action of multiplepoinding in the Sheriff Court referred to had been sisted pending a decision in a multiplepoinding raised in the Court of Session before Lord Ardwall dealing with the same matter—

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Hayman & Son v. *M'Lintock*, 1906, 13 S.L.T. 863. Both multiplepoindings were raised by Hayman & Son as nominal raisers, Thomson M'Lintock being real raiser. W. & G. Muir were not parties to the Court of Session action. M'Connell & Reid had lodged claims in it, but not in the Sheriff Court action though called as defenders.

On 13th December the Sheriff-Substitute (BALFOUR) repelled the defences and decerned against the defenders in terms of the petition, holding that they could not set off the price of the 250 bags of which the ownership was in dispute against the price of the 400 bags.

On appeal the Sheriff (GUTHRIE) on 16th February 1906 recalled his Substitute's interlocutor, decerned *ad interim* for £89, 13s. 9d., and *quoad ultra* sisted the action.

Note.—"There is a sum of money belonging to the defenders in the pursuers' hands, for which it may turn out that the pursuers have not given value. It is not a liquid debt by the pursuers to the defenders, but it is in course of being made liquid or the reverse. This is, I think, an exceptional case in which the principle of retention may be extended on grounds of equity apart from usage or mutual contract, for the pursuers, founding on a liquid debt, are shown on probable grounds to be under an obligation to account to their debtor for a large sum arising out of a similar and almost simultaneous transaction. The cases of *Munro* v. *Macdonald's Executors*, 4 Macph. 687, and *Ross* v. *Ross*, 22 R. 461, cited to me appear to warrant the sist which I have granted in order that the true position of the parties *inter se* may be fixed."

The pursuers appealed to the Court of Session, and argued—The Sheriff-Substitute was right. It was owing to defenders' own fault and delay that they did not obtain actual delivery. If the defenders had any claim, it was for damages for failure to implement a contract of sale. The claim was neither liquid nor, as the Sheriff stated, "in course of being made liquid or the reverse." For the multiplepoinding in the Sheriff Court had been sisted, and, moreover, the defenders now stated regarding their claim therein that they intended "either to withdraw or amend it," while to the Court of Session multiplepoinding the defenders were not parties. The pursuers' claim on the other hand was admitted, and the ordinary rule that an illiquid claim cannot be set off against a liquid claim applied—*Mackie* v. *Riddell*, November 20, 1874, 2 R. 115, 12 S.L.R. 115; *Scottish North-Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700; *Mackie* v. *Mackie*, June 15, 1897, 5 S.L.T. 42. The cases of *Munro* v. *Macdonald's Executors*, March 30, 1866, 4 Macph. 687, and *Ross* v. *Ross*, March 9, 1895, 22 R. 461, 32 S.L.R. 337, referred to by the Sheriff, were exceptional and special cases. The defenders' present position was inconsistent with their claim in the Sheriff Court multiplepoinding, where they stated that 250 bags of the flour "belonged to the said M'Connell & Reid."

Argued for the defenders (respondents)—1. The defenders' claim was really liquid; it was for repetition of the price paid. They could not have got delivery, for according to Lord Ardwall's judgment in *Hayman & Son* v. *M'Lintock*, February 22, 1906, 13 S.L.T. 863 (the judgment in which would necessarily rule the Sheriff Court multiplepoinding) the property had never passed from M'Nairn & Company, and therefore, *prima facie* at any rate, the pursuers had no title to sell. In any case a delay from 21st December (the acknowledgment of intimation of the delivery-order) till after 9th February was not unreasonable. 2. But even assuming the claim was illiquid, it was in process of being made liquid by the multiplepoindings in the Court of Session and in the Sheriff Court, and the action should be sisted to await the result—*Munro* v. *Macdonald's Executors*; *Ross* v. *Ross* (*cit. supra*). In *Mackie* v. *Mackie* decree had been given before the counter claim was raised. *Mackie* v. *Riddell* was quite different from the present case; it would have been similar if the horse there in question had never been delivered.

LORD JUSTICE-CLERK—I have no doubt that if this case is to be disposed of in the way the Sheriff has done, it can only be on the ground of very special circumstances to take it out of the ordinary rule that an illiquid claim cannot be set off against one that is liquid. The Sheriff has treated it as an exceptional case. After giving it full consideration I cannot see any such special circumstances as would entitle us to treat it otherwise than according to the usual rule. The purpose of the defenders' plea is to save themselves the risk of loss in respect of another transaction. I cannot see why that should affect the matter. We are told that there is an action of multiplepoinding pending in the Court of Session, that it will shortly be decided, and that the decision in that case will set up the defenders' claim. We do not know as to that. We do not know what the decision will be, and we do not know, whatever the decision is, that it will necessarily decide the question between the parties in this case. I am sorry to differ from the Sheriff, who has had a large experience in this class of cases, but I must say that I think the Sheriff-Substitute is right, and that there are not sufficient grounds of an exceptional nature for sisting the case as the Sheriff has done.

LORD KYLLACHY—I regret to be obliged to agree. I think the Sheriff-Substitute's judgment must be returned to. If on the record in the present case facts were averred and admitted which even *prima facie* instructed a good claim on the part of the defenders against the pursuers arising out of the previous transaction mentioned, I should have been quite disposed to stretch a point so as to try in the present action the merits of the defenders' claim, and if it turned out to be just, to give the defenders the benefit of a set off. But on examining this record I find that there is not only no admission of such facts but no averment of them. There is nothing to show and

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nothing averred relevant to infer that even *prima facie* the defenders have a good claim for failure to deliver under the previous contract. In these circumstances I am constrained to agree with your Lordship that the Sheriff's interlocutor must be recalled and the interlocutor of the Sheriff-Substitute restored.

LORD STORMONTH DARLING — I agree. The argument for the defenders is that they have paid away money to the pursuers which they are entitled to get back in an action of repetition or of damages. It is said that we should sist the present action until that question is decided. It is not said that there is any case in Court which will necessarily settle it. No doubt it is said (Stat. 5) that the issue in this action "depends in great measure on the judgment to be pronounced in the action of multiplepoinding referred to in art. 3 hereof." But when we turn to article 3 we find that the record in that action is not closed and that the defenders intend either to withdraw or amend their claim. Then as to the multiplepoinding in this Court, Lord Ardwall's judgment, although it might be valuable as a precedent, would not settle the question as between these particular parties. The Sheriff is therefore hardly accurate in saying that the defenders' counter claim "is in course of being made liquid or the reverse." It is not in the position of being "*quod statim liquidari potest.*" Accordingly the ordinary rule that an illiquid claim cannot be set off against a liquid claim applies and I agree that the interlocutor of the Sheriff should be recalled and that of the Sheriff-Substitute restored.

LORD LOW—I am of the same opinion. It is plain that there are no special circumstances here which would justify the Court in treating this case as an exception to the well-established general rule that an illiquid claim cannot be set off against a liquid claim.

The Court pronounced this interlocutor—

"Sustain the appeal, recal the said interlocutor, and affirm the interlocutor of the Sheriff-Substitute dated 13th December 1905: Repel the defences and decern against the defenders in terms of the prayer of the petition: Find the defenders liable in expenses in this and in the Inferior Court since the said 13th December 1905," &c.

Counsel for the Pursuers (Appellants)—Crabb Watt, K.C.—MacRobert. Agents—Cadell, Wilson, & Morton, W.S.

Counsel for the Defenders (Respondents)—Horne. Agent—W. B. Rankin, W.S.

Saturday, June 2.

SECOND DIVISION.

[Sheriff Court at Glasgow.

QUINN *v.* JOHN BROWN & COMPANY, LIMITED.

Process—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 4—*Assessment of Compensation in Action Brought Independently of the Act—"Court in which the Action is Tried."*

In an action of damages for personal injuries at common law and alternatively under the Employers' Liability Act 1880, a Sheriff after a proof assoilzied the defenders, and inasmuch as the pursuer intimated he did not wish to proceed under the Workmen's Compensation Act 1897, found it unnecessary to pronounce further. The pursuer appealed, and, on the Court proceeding on new findings in fact to dismiss the action, moved for compensation to be assessed under the Workmen's Compensation Act. The defenders argued that that should be done in the Sheriff Court. The Court *remitted* to the Sheriff.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4), enacts—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ."

In October 1903 John Quinn, rigger, Glasgow, raised an action in the Sheriff Court at Glasgow against John Brown & Company, Limited, Clydebank Engineering and Shipbuilding Works, Dumbartonshire, for the sum of £500, or otherwise for the sum of £218, 8s. as damages at common law and under the Employers' Liability Act 1880 respectively, on account of personal injuries sustained by him on 31st March 1903 when working in the defenders' employment.

On 31st July 1905 the Sheriff-Substitute (DAVIDSON), after a proof, pronounced an interlocutor finding in fact, *inter alia*, "that no fault has been proved against the defenders or anyone in the position of superintendent in their employment within the meaning of the Employers' Liability Act 1880," assoilzieing the defenders, and "in respect it was stated at the bar that pursuer does not desire to proceed in terms of

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the Workmen's Compensation Act 1897" finding it unnecessary to pronounce further.

The pursuer appealed to the Court of Session.

On 16th May 1906 the Court was proceeding to dismiss the action on new findings in fact other than that no fault had been proved against the defenders or anyone in the position of superintendent, when the pursuer moved the Court to determine the amount of compensation due under the Workmen's Compensation Act, and referred to section 1, sub-section 4, of that Act. The defenders asked that the case should be continued, and the Court granted a continuation of a week.

At the continued hearing on 2nd June it was argued for the defenders—The Court which was to assess the compensation payable under the Workmen's Compensation Act was the Court in which the action was tried, *i.e.*, in which proof is taken. The case should be remitted to the Sheriff to assess the compensation—*Little* v. *P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287.

Argued for the pursuer—In *Little* (*supra*) there were no materials upon which the Court could have proceeded to assess compensation, there having been no proof on the merits. Here there were the necessary materials, and this was the Court which tried the case because it finally ascertained the facts on which the judgment was to proceed.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact . . . (5) that no fault has been proved against the defenders or anyone in the position of superintendent in their employment within the meaning of the Employers' Liability Act 1880: Therefore dismiss the action, remit to the Sheriff to determine the amount due to the pursuer under the Workmen's Compensation Act 1897, and decern . . . ."

Counsel for Pursuer (Appellant)—R. L. Orr, K.C.—J. H. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders (Respondents)—George Watt, K.C.—Macmillan. Agents—Cuthbert & Marchbank, S.S.C.

Tuesday, June 5.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

WATSON *v.* WORDIE & COMPANY.

Reparation — Damages — Accident — Street — Horse - Vice — "Reesting" — Stopping Suddenly when in Front of Another Vehicle—Relevancy.

The pursuer in an action for damages averred that when driving a lorry along a street, seated with his legs over the near side, and when about to overtake a two-horse lorry of the defenders proceeding in the same direction at a walking pace, he looked back over his shoulder on hearing the bell of a tramcar; that while in the act of doing so he was injured by his legs coming against the defenders' lorry, which had suddenly stopped owing to one of its horses having come to a standstill in accordance with a vicious habit of "reesting" known to the defenders. He further averred that the defenders were in fault in using such a horse in their business.

Held that the pursuer had not stated a relevant case of fault against the defenders.

Thomas Watson, lorryman, in the employment of Messrs J. & A. Hutton, Edinburgh, brought an action against Wordie & Company, general carriers, in which he sued them for £500 damages for injuries.

He averred, *inter alia*—"(Cond. 2) On or about 23rd March 1905, between 8 a.m. and 9 a.m., the pursuer was driving a lorry containing a load of timber from Leith Docks to the timber yards of his employers at Newington. He was, as is customary when driving a lorry, seated on the left-hand corner thereof, with his right leg hanging over the end nearest the horse, and his left leg over the side. While proceeding up the North Bridge the pursuer overtook a two-horsed lorry (afterwards ascertained to belong to defenders) proceeding slowly in the same direction. The North Bridge is very wide, and between the eastmost car line and the footway there is ample room for two lorries to pass each other. (Cond. 3) As the pursuer was anxious to reach East Newington Place as soon as possible, and defenders' lorry was proceeding slowly, it was necessary for pursuer to pass defenders' lorry on the right-hand side. To accomplish this pursuer pulled his horse to the right. As he was doing so he heard a car bell ring, and in order to satisfy himself that he was not the cause of any obstruction he turned his head for a moment in the direction of the car. At that moment one of the horses in the defenders' lorry 'reested,' or suddenly halted, with the result that defenders' lorry suddenly and unexpectedly stood still, and before pursuer was able to pull up, the defenders' lorry came into contact with pursuer's left leg and crushed it between the two lorries. Had said horse not 'reested' pursuer could easily have passed the defenders' lorry. (Cond. 5) The said accident was due to the fault and negligence of defenders. They were well aware that one of the horses yoked in said lorry was a 'reester,' or one which has the vicious habit of suddenly halting in the street, without any cause or without any previous warning, and obstinately refusing to proceed. This kind of horse is well known to all horse-dealers and users of horses, who in consequence do not use them in the public streets, as their employment there is attended with danger to the public using said streets. The defenders well knew that

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the use of the horse in question in their said lorry was attended with danger to the public, as the said horse which 'reested' had on previous occasions (as the defenders well knew) behaved in the same manner in the public streets. It was not safe for defenders to employ said 'reester' in the public thoroughfares, and in so employing it they were guilty of gross and culpable negligence. The pursuer had no knowledge of said horse."

He pleaded, *inter alia*—"(1) The pursuer having been injured through the fault of defenders in negligently and culpably employing said vicious horse on a public street, as above condescended on, is entitled to reparation from defenders as concluded for in the summons."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) The said accident having been entirely due, or at least materially contributed to, by the negligence of the pursuer, the defenders ought to be assoilzied from the conclusions of the summons."

On 3rd February 1906 the Lord Ordinary (SALVESEN) pronounced an interlocutor approving of an issue in ordinary form.

Opinion.—"The circumstances out of which this action of damages has arisen are of a somewhat unusual and perhaps novel character. The pursuer avers that he was driving a lorry along North Bridge, and that he was on the point of passing another lorry belonging to the defenders, which was proceeding somewhat more slowly, when one of the horses of the latter lorry suddenly halted, with the result that his left leg, which was hanging over the side, was jammed between the two lorries and seriously injured. The fault alleged against the defenders is that the horse which suddenly halted was a 'reester'—that is to say, an animal which has the vicious habit of stopping suddenly of its own accord when it is being driven in the ordinary way. The pursuer says that such horses are well known to all users of horses, and that their habits make them a source of danger to public traffic. He accordingly maintains that the defenders were to blame in employing such an animal in one of their lorries.

"The defenders urged that the action was irrelevant on the ground that the driver of a lorry is entitled at any moment to bring his vehicle to a stand without regard to the traffic behind him, and that no liability can rest upon them for the lorry being suddenly brought to a stop, whether that was done by the action of the lorryman or occurred in consequence of the vicious nature of the horse. In my opinion, the contention thus broadly stated is not well founded. It is, of course, plain that there may be many occasions where the driver of a vehicle is not merely entitled but bound to bring it to a sudden stop, *e.g.*, in order to avoid collision with other vehicles or with foot-passengers, but I cannot affirm that no liability will ever rest on a lorryman or his employers if a lorry is unnecessarily brought to a standstill so as to endanger vehicles which are immediately behind or in the course of passing. While the primary duty of the driver of a vehicle is to look ahead, I think that there may sometimes be a duty upon him if he wishes to bring his vehicle to a sudden stop to ascertain whether that can be safely done with reference to the traffic immediately behind, and if necessary to warn such traffic of his intention. If so, it would seem to follow that the employment of a horse whose character is such that it may at any time bring the vehicle to a sudden stop without the knowledge of the driver and without any action on his part, may, I think, constitute negligence. At all events I am not prepared, in the state of the averments, to hold that the pursuer has not stated a relevant case for inquiry.

"The defenders further pleaded that it was plain from the pursuer's averments that his own want of caution or failure to fulfil the duties of a driver had contributed to the accident. The pursuer admits that at the moment when the accident happened he had turned his head at the sound of a bell from an approaching tramcar. Whether that very natural action on his part constituted contributory negligence in the particular circumstances in which it occurred seems to me a question which cannot safely be decided on relevancy, but ought to be submitted to the determination of the jury. I shall accordingly approve of the issue which the pursuer has lodged for the trial of the cause."

The defender reclaimed, and argued—There were no relevant averments of fault. The averment that the horse suddenly halted was not a relevant averment of fault, because a lorry horse proceeding at a walk might stop or be stopped for many innocent purposes, and such a stoppage was one of the ordinary incidents of the streets which should have been kept in view by anyone following behind. The fact that in this particular case a stoppage, in itself innocent and normal, was caused by a bad habit of the horse was obviously immaterial, as the bad habit had not produced any result which might not have followed from the ordinary proceedings of the most exemplary of horses and drivers. The case of *Auld* v. *M'Bey, &c.*, February 17, 1881, 8 R. 495, 18 S.L.R. 312, was distinguishable, the vehicles in that case having been progressing at a rapid pace. In any case the pursuer's averments showed that he had been guilty of contributory negligence.

Argued for the pursuer and respondent—If the horse had not been vicious he would not have stopped at that particular moment, and no accident would have happened. Accordingly it was a vicious habit known to the defenders which had caused the accident. This was not a case of a driver voluntarily stopping for a justifiable cause. There had been no contributory negligence, but in any event that was a question for the jury.

LORD JUSTICE-CLERK—The averments of the pursuer are substantially that on the occasion in question he was driving a

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vehicle sitting on the near side with his legs over the side; that he was overtaking the defenders' vehicle, which was moving at a walking speed; that hearing the bell of a tramcar he looked over his shoulder for a moment, and while in the act of doing so his legs came against the defenders' vehicle, and he was thus severely injured. He avers that this happened in consequence of the horse in the defenders' vehicle stopping, and thus not leaving room for him to go clear upon the off-side, and that the horse had a habit of stopping without cause, and was thus vicious; and that the defenders were in fault in using such a horse in their business.

The Lord Ordinary has found the pursuer's averments to be relevant to entitle him to an issue to go to a jury. I am unable to agree with the Lord Ordinary. I cannot hold that the averments of the pursuer disclose a case of fault or negligence. The things which he avers do not, to my mind, present any case which would make it a wrong to keep and use the horse in question in doing work at a walking pace. That a horse when walking should stop, without receiving indication by rein or voice to do so, does not, as I think, point to danger to anyone. A horse on the street may stop at any time, and cart-horses which are kept long hours in the shafts are expected to do so when stopping is necessary, and it is new to me to hear it suggested that such a stoppage could cause any danger to anyone who was attending to his own safety, whether on foot or on horseback or driving. Could it be held that a driver of a horse moving at a walk would be guilty of fault if he stopped his horse to adjust harness, or to pick up something dropped on the road, or himself to go to the side of the road for a necessary purpose? I do not suppose, until this case was raised, that any such idea ever occurred to anyone that a driver was bound to anticipate that someone might be coming up behind, so near, with his legs dangling over the side, and looking away from the direction in which he was going, as to cause danger. If this is so, then the thing itself was not a danger reasonably to be anticipated in the case of a horse which sometimes stopped without apparent cause, so that a person owning such a horse was doing a wrong in using it.

It would be a very different case, and one calling for inquiry, if it was averred that a horse was given to shying or bolting or jibbing. All such things are productive of active movement of an unexpected kind which may be highly dangerous. But what the pursuer avers has no resemblance to such actions, and I am unable to see that what is averred here is relevant to infer fault. I am therefore in favour of dismissing the action.

LORDS KYLLACHY, LOW, and STORMONTH DARLING concurred.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for Pursuer and Respondent—Orr, K.C.—Laing. Agent—R. W. Cockburn, W.S.

Counsel for Defenders and Reclaimers—Watt, K.C.—Horne. Agents—Connell & Campbell, S.S.C.

Tuesday, June 5.

FIRST DIVISION.

MORRISON *v.* WATERS & COMPANY AND ANOTHER.

Expenses—Several Defenders—Liability of Unsuccessful Defender for Expenses of Successful Defender.

In an action against two defenders "conjunctly or severally or severally" for damages in respect of the death of the pursuer's son, one of the defenders was found liable and the other assoilzied.

Held, in the circumstances of the case, that as the successful defender had been brought into Court owing to the conduct of the unsuccessful defender in repudiating liability, in the knowledge of facts peculiarly within his own province and which no inquiry on the part of the pursuer might have been able to discover, the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer.

Mackintosh v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; and *Thomson* v. *Edinburgh and District Tramways Company, Limited*, January 15, 1901, 3 F. 355, 38 S.L.R. 263, *commented on*.

On 15th July 1905 Robert Morrison, boiler maker, 23 Orchard Street, Renfrew, raised an action of damages against Waters & Company, contractors, 37 New Sneddon Street, Paisley, and William Martin Murphy, tramway contractor, 13 St James Place, Paisley, in which he sought decree "conjunctly and severally or severally" against the defenders for £500 in respect of the death of his son, who had been run over and killed by a tower-waggon belonging to Murphy but drawn by horses supplied by Waters & Company. The pursuer before raising his action had been unable to find out whose servant, Russell, the driver of the tower-waggon, was, and each defender had written saying his claim was against the other. The case was heard by Lord Ardwall and a jury on 6th December 1905, when a verdict was returned finding that Morrison's son had been killed through the fault of the driver Russell, and that Russell was at the time of the accident under the control of Waters & Company, and damages were assessed against them at the sum of £120. On a rule the Court refused a new trial, and on 5th June 1906 it applied the verdict, decerned against Waters & Company for £120, and found them liable to the pursuer in expenses. The defender Murphy there-

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upon moved for his expenses against the other defenders Waters & Company, who opposed the motion.

Argued for defender Murphy—The rule as to expenses in such cases depended on the question who was responsible for bringing the successful defender into Court. Here it was the unsuccessful defender who had repudiated liability for an accident for which he was aware he was responsible—*Caledonian Railway Company* v. *Greenock Sacking Company and Others*, May 13, 1875, 2 R. 671, 12 S.L.R. 443; *Mackintosh* v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; *Thomson* v. *Edinburgh & District Tramways Company, Limited*, and *Thomson* v. *Kerr*, January 15, 1901, 3 F. 355, 38 S.L.R. 263.

Argued for defenders Waters & Company—The general rule was that stated by Lord Moncreiff in *Mackintosh* v. *Galbraith and Arthur* (*ut supra*), viz., that "if a pursuer convenes two defenders and one is assoilzied, the pursuer, and not the unsuccessful defender, pays the expenses of the successful defender." The pursuer was bound to make inquiry and to take the risk. In the tramway case (*ut supra*) the fault admittedly lay between the two defenders. Here neither of the defenders admitted liability, and neither might have been found responsible.

LORD PRESIDENT—In this case the father of a child who was killed by being run over by a waggon, intimated a claim of damages against the carting contractor who owned the horses and employed the driver. The contractor maintained that he was not liable, on the ground that the waggon, which was one of peculiar construction, belonged to another party, who had full control over the driver.

The father applied to that other party, who denied liability, alleging that he had no control over the driver. The father called both parties as defenders, but in the conclusions of the action asked decree against them conjunctly and severally, or severally. Both parties denied that there had been any negligence in fact. A trial ensued, in which a jury found that there had been negligence in fact on the part of the driver, and that he was in fact the servant of the carting contractor.

An application was made for a new trial. Counsel for both the defenders admitted that there had been negligence in fact, but they contended as between each other as to whose servant the driver actually was. Your Lordships thought the jury had come to a right conclusion, and refused to disturb their verdict. The effect of the verdict was to find the carting contractor liable and to assoilzie the other defender. The pursuer is clearly entitled to his expenses against the unsuccessful defender, and the question therefore is, whether the successful defender is to get his expenses from the pursuer or from the unsuccessful defender.

The question on which the rule in such cases depends is this—Whose fault was it that the additional defender was brought into Court? Of course, a pursuer who has a right of action is not entitled to bring all the world into Court, but there may be cases in which a pursuer is forced to call more than one party, owing to the action of another defender. The cases of *Mackintosh* v. *Galbraith & Arthur*, 3 F. 66, and *Thomson* v. *Kerr*, 3 F. 355, which were quoted to us, afford illustrations of that. For my own part I rather agree with the minority in the case of *Mackintosh*, but such cases must be determined on their own facts, and this seems very clearly a case in which the successful defender would not have been called into Court but for the action of the other defender, who maintained that the accident was due to the successful defender's fault, and who said so on a question of fact peculiarly within his own province and not within that of the pursuer—a question which no amount of inquiry on the pursuer's part might have been able to solve. This seems clearly a case for finding the successful defender entitled to expenses as against the other defender and not against the pursuer.

LORD M'LAREN—*Prima facie* it is for a pursuer to find out who is responsible to him for a wrong which he considers he has sustained, and in general if he calls as a defender a party who is innocent of the alleged wrong he will be liable in expenses. But this rule is subject to exceptions, especially where the claim is made in the first instance against the party who is truly responsible, and it is at his request and instance that another party is called into the field. Here the question is who is responsible for bringing the successful defender into Court. In this case I have no doubt that it was the unsuccessful defender, who, as we see, from the beginning sought to shift the burden from his own shoulders and put it on the tramway contractor. I therefore concur with your Lordship that the unsuccessful defender must pay the costs of the successful defender.

LORD KINNEAR—I agree. It is clear that the unsuccessful defenders were responsible for bringing the successful defender into Court. Mr Guthrie has argued that it lies with the pursuer to make inquiries and find out who is liable, and there can be no question that as a general rule that is the pursuer's duty before he brings anybody into Court. But the question is not whether the pursuer would be liable in expenses to the successful defenders with or without relief against the defenders who have failed, but whether the latter, against whom the claim is actually made, can throw upon the pursuer the consequences of their own action. They caused proceedings to be taken against a person who had no responsibility in the matter, by their allegation that he was in fact the responsible employer of a man who was really their own servant. That depended upon facts which were within their own knowledge, and of which the pursuer knew nothing, and they can hardly be heard now to complain that he did not find out before the trial that their statement was without foundation.

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LORD PEARSON—I agree. I think this a clear case for awarding the expenses as your Lordship proposes.

The Court pronounced this interlocutor—

"The Lords . . . assoilzie the said defender William Martin Murphy from the conclusions of the action, and decern: Find the said defenders Waters & Company liable to the said defender William Martin Murphy in the expenses incurred by him in the cause, and remit the account thereof," &c.

Counsel for Pursuer — T. B. Morison — Gillon. Agents — Kirk Mackie & Elliot, S.S.C.

Counsel for Defenders Waters & Company—Guthrie, K.C. — Hunter — Mitchell. Agents—Lister Shand & Lindsay, S.S.C.

Counsel for Defender Murphy—Cooper, K.C—Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Monday, August 28, 1905.

OUTER HOUSE.

[Lord Ardwall, Ordinary on the Bills.

YOUNGS, PETITIONERS.

Judicial Factor—Special Powers—Power to Sell Heritable Subject — Report by Accountant of Court against Power Craved —Power Granted by Court.

Circumstances in which a petition for the appointment of a judicial factor on an intestate estate, with special power to sell a heritable property included in the said estate, having been presented, the Court *granted* the special power craved, although the Accountant of Court, to whom a remit had been made, had reported against the special power being granted.

This was a petition presented by Mrs Jeanie Cunninghame M'Bride or Young, residing at Garail, Dunoon, and Alexander Young, residing at Cessford, Troon, for the appointment of a judicial factor on the estate of the deceased John Reid Young, who had died intestate. The petitioners were the widow and the eldest son and heir-at-law of the deceased.

The petition, *inter alia*, sought power for the factor to complete a title to and to sell a villa known as Garail, situated at Dunoon.

It was stated in the petition that the widow was desirous of leaving Dunoon in order to provide suitable education for her children, that it would probably be difficult, and certainly not remunerative, to let Garail for a term of years unfurnished, that the property was only suitable for residential purposes during the summer months, and that it would be impossible to let for a summer tenancy unless the furniture were to remain in the house, and that even if a satisfactory rent were received for the summer months a considerable amount would be involved in the upkeep. It was also stated that it was the intention of the deceased prior to his death to sell Garail during 1905.

The Lord Ordinary having remitted to the Accountant of Court to consider and report with reference to the power of sale craved, the Accountant *inter alia* reported as follows—"The gross annual income of the estate may be stated at from £750 to £850, divisible one-third to the widow, and two-thirds to children. That as stated the present assessed rent of Garail is £85, but the valued rent is £110, from which deduct a liberal estimate to meet feu-duty, taxes, and repairs, &c., £59, leaving £51, which is 4½ per cent. on £1200, the proposed upset price, a higher rate than can be obtained from investment in trust securities. In these circumstances the Accountant cannot report in favour of a sale as craved, there being neither necessity nor high expediency. See case of *Gilligan*, May 14, 1898, 25 R. 876, 35 S.L.R. 690."

LORD ARDWALL—"It is with hesitation that I consider myself bound in this case in the interests of the estate to take a different view from the Accountant of Court. The case of *Gilligan's Factor*, 25 R. 876, is an authority for my doing so. On the merits that case differs most materially from the present. There the value of the property consisted in the site, which was in an improving and central locality in Glasgow, and the site was practically certain to rise largely in value and it would have been folly to sell it. Further, the petition was opposed by the pupil's grandmother. In the present case the subjects belong to a class of property which it is notorious has enormously decreased and will probably decrease still more in value. This is owing to the opinion that has gained ground amongst the well-to-do inhabitants of Glasgow that a more beneficial change of air can be got by going to the central and eastern portions of Scotland than by going "down the water" as it is called. There are also greater railway facilities than formerly, and persons from Glasgow can reach such places as Stirling, Dunblane, Callender, Crieff, Comrie, St Fillans, Crawford, Biggar, and other places in the upper ward of Lanarkshire, and even watering-places on the Fife Coast, with comparative ease. Building of villas and cottages has greatly increased recently in all those localities, and the new erections are greatly taken advantage of by people from Glasgow. There is therefore no future in such a property as that in question. Further, it is a most undesirable class of property to keep as a letting subject. There is always the initial difficulty of getting a tenant, rendering the obtaining of any income uncertain. If in any year a tenant is not obtained the garden and greenhouses must be kept up at an expense probably of not less than £60 to £100 a-year without a return. There is, further, the difficulty about wear and tear of furniture if it is let furnished. I have had experience myself both personally and among my friends of

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the letting of country houses, and there cannot be a more unsatisfactory kind of business, nor could an investment more troublesome in its character or more uncertain and unreliable in its returns be imagined. The Accountant in his report proceeds solely on the assumption that a steady return of £110 a-year will be got from the property. This assumption is, in my opinion, wholly unwarranted, and almost certain to turn out fallacious. I am of opinion that in the interests of the estate the property should be sold as soon as possible. I proceed both on the report of Messrs Binnie, who are very skilled valuators, and on my own knowledge and experience. In my opinion it is highly expedient that leave to sell the subjects in question should be granted."

The following interlocutor was accordingly pronounced:—"The Lord Ordinary officiating on the Bills having resumed consideration of the petition and proceedings with the report by the Accountant of Court and heard counsel for the petitioner thereon, authorises and empowers the judicial factor, James Watson Stewart, to sell the property of Garail, Dunoon, described in the first place in the prayer of the petition, by public roup, after due advertisement, at the upset price of £1200, and if not sold at or above said upset price to re-expose the same at such reduced upset price as may be fixed by the Accountant, and on a sale and payment of the price to grant a disposition thereof, containing the usual and necessary clauses, and to grant all other deeds requisite and necessary for rendering such sale effectual, and decerns: Finds the petitioners entitled to the expenses of this application and all procedure following thereon; allows an account of said expenses to be given into process."

Counsel for the Petitioners—J. G. Jameson. Agent—T. J. Martin, W.S.

Tuesday, December 5.

OUTER HOUSE.

[EXCHEQUER CAUSE.]

[Lord Pearson, Ordinary.

INLAND REVENUE *v.* IRVINE AND DISTRICT WATER BOARD.

Revenue—Stamp Duty—"Conveyance or Transfer on Sale"—Water Undertaking—Compulsory Statutory Transfer of Undertaking—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *secs.* 1, 57, *and First Sched.—Finance Act* 1895 (58 *Vict. cap.* 16), *sec.* 12.

The Corporation of a burgh constructed water-works for the supply of their own area, and also entered into agreements with neighbouring outlying districts by which they undertook to supply them with water for a money payment fixed on the basis of the assessable rental of the different districts. It was not entitled to make a profit. Subsequently the Corporation promoted a Provisional Order for powers to bring in additional water. This was opposed by the outlying districts, and eventually a new Provisional Order was promoted and passed providing for the transference of the water undertaking from the Corporation to a new joint Board representing both burgh and districts on certain terms, which included (1) a cash payment to the burgh; (2) relief from all expenses incurred by the burgh in connection with the Parliamentary proceedings; and (3) a transference of the whole debts and liabilities of the undertaking. The Inland Revenue claimed payment of conveyance on sale duty in respect of this transference to the Board. *Held* (1) that the transaction was a conveyance on sale upon which duty was payable, and (2) that the cash payment, the relief from Parliamentary expenses, and the amount of the debts and liabilities taken over were parts of the consideration for the transfer and together formed the *cumulo* sum upon which the duty fell to be calculated, withdout any deduction being made on the ground of the interest which the Corporation had in the Board.

The Stamp Act 1891 (54 and 55 Vict. cap. 39) enacts—section 1—"From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the first schedule to this Act shall be the several duties in said schedule specified, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by this Act, and shall be subject to the exceptions contained in this Act and in any other Act for the time being in force."

Under the heading "Conveyance or Transfer on Sale" in the first schedule, duty is imposed according to the amount or value of the consideration for the sale.

Section 57—"Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

The Finance Act 1895 (58 Vict. cap. 16), sec. 12, enacts—"Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, . (*a*) any property is vested by way of sale in any person, . . . such person shall, within three months after the passing of the Act, or the date of vesting, whichever is later . . . produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to

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the vesting . . . duly stamped with an *ad valorem* duty payable upon a conveyance on sale of the property; and in default of such production, the duty with interest thereon at the rate of five per cent. per annum from the passing of the Act, date of vesting . . . as the case may be, shall be a debt to Her Majesty from such person."

This was an action at the instance of the Lord Advocate on behalf of the Commissioners of Inland Revenue against the Irvine and District Water Board, which concluded for payment of a sum of £595, 15s. as *ad valorem* conveyance on sale duty on the transfer of the water undertaking to the Board from the Corporation of Irvine, which had been effected by the Irvine and District Order Confirmation Act 1903 (3 Edw. VII, cap. cxlvii).

In defence the defenders, *inter alia*, pleaded—"(2) The defenders are not liable for conveyance on sale duty in respect (*a*) that the transfer operated by the Provisional Order of 1903 was simply to give effect to an administrative change in a public trust; and (*b*) that in any case the said transfer was not a vesting by way of sale within the meaning of the statute libelled. (3) *Esto* that the said transfer was a vesting by way of sale, the defenders are not liable to pay stamp duty on (1) the proportion of the liabilities of the undertaking which falls to be met by the Corporation of Irvine; and (2) the proportion of liabilities consisting of expenses connected with the Provisional Orders of 1901, 1902, and 1903, in respect that these were not part of the consideration for the sale."

The facts of the case are given in the opinion of the Lord Ordinary (PEARSON), which was as follows:—"In this action the Commissioners of Inland Revenue claim payment of conveyance on sale duty in respect of the transference of the water undertaking of the Corporation of Irvine to a new corporate body known as the Irvine and District Water Board. The transfer was effected by Act of Parliament (Irvine and District Water Board Order Confirmation Act 1903), whereby the Irvine Corporation Water Undertaking was transferred to and vested in the new board, subject to certain pecuniary arrangements. These include the taking over of the debts and liabilities affecting the undertaking, the payment of certain parliamentary costs, and payment to the Corporation of Irvine of £2500 as full compensation to them for and in respect of the transfer.

"The main question raised in the case is whether by virtue of this statutory transfer the undertaking was vested in the defenders 'by way of sale.'

"It appears that under a series of local statutes the Corporation of Irvine constructed water-works and supplied water to their own area. They also entered into agreements with three water supply districts formed in adjoining parishes to furnish these districts with a supply of water for a money payment. That money payment was in fact fixed on the basis of the assessable value of the respective districts including Irvine. But Irvine had no assessing power beyond its own area, and this payment was truly a price paid as for the purchase of the water, just as much as if it had been fixed on any other basis, such as a price per gallon.

"In recent years the population and rental of the surrounding districts had greatly increased relatively to those of Irvine, and two police burghs (Saltcoats and Kilwinning) had been erected within the outlying special water supply districts. In these circumstances the Corporation of Irvine in 1902 promoted a Provisional Order to bring in an additional water supply from a new source. This Order was opposed by the outside authorities on the ground that the water undertaking, regarded as a whole, should be vested in a board representative of all interests. This could not be effected under the Order as proposed, but in order to give an opportunity for its consideration in the next session the Commissioners only passed the preamble subject to certain parts of the Order being suspended for a year. Accordingly in 1903 a Provisional Order was promoted for the constitution of a joint board, and notwithstanding opposition by the Corporation of Irvine, the Order was passed, and became the statute of 1903 to which I have already referred. The new board, which was created a body corporate under the name and style of The Irvine and District Water Board, is composed of seventeen members, seven being elected by the Corporation of Irvine, and the remaining ten being representative of the outlying districts. The whole undertaking is now transferred from the Corporation of Irvine and vested in this board on certain pecuniary terms. Shortly stated, these terms were—(1) that the new corporation should take over the debts and liabilities of the undertaking, amounting to £110,958; (2) that they should pay the parliamentary costs of all parties in promoting and opposing the Provisional Orders of 1901-3, amounting (as stated by the pursuer) to £5656; and (3) that they should pay to the Corporation of Irvine the sum of £2500 as full compensation to them for and in respect of the transfer as aforesaid. With regard to the second head there seems to be some uncertainty on the record, but I take it that the defenders who ought to know are right in saying that the sum of £5656 represents not the whole costs mentioned in section 21 of the Order, but only so much of them as was incurred by the Corporation of Irvine.

"In these circumstances the defenders maintain that there was here no conveyance on sale, but that the transaction was really a transfer of trust property from one set of trustees to another and larger body of trustees, the beneficiaries remaining the same. This was a public statutory undertaking out of which the Corporation of Irvine were expressly debarred by statute from making any profit; and the statutory transfer it is said amounted to no more than the vesting of the legal title in a larger and more representative body of trustees for purposes of management. It

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is urged that the Provisional Order of 1902 recognised the outlying communities as having for all time an equal right to the supply, and an equal share in the liabilities; that while previous to that time the matter may have rested on terminable agreements, the basis of the relation between Irvine and the surrounding districts was shifted by the statute from mutual agreement to statutory right; and that all that was really done in 1903 was to acknowledge the right of these districts to some representation in the management, and to transfer the control to the larger and more representative body.

"I do not think this view squares with the facts. The desires of the outlying districts might possibly have been satisfied with a mere change in the control of the undertaking. But that is not what was done. It was not a mere change of one body of trustees and managers for another and larger body. It was a radical and complete change in the ownership of the *corpus* of the undertaking, which was transferred for pecuniary consideration from one corporation to another and independent corporation, whose interests were by no means identical with those of the original owners. It is not accurate in fact to say that the Corporation of Irvine was trustee for the outlying districts. On the contrary, they worked together under specific agreements for the purchase and sale of water, just as much as if there had been individual consumers outside Irvine who were supplied by meter from the main pipe on its way to Irvine. It is true that Irvine was not entitled to make any profit from the supply; and in that sense the undertaking was not strictly commercial; but I see no reason why that circumstance should make any difference in the question whether a given transaction was a conveyance on sale. Nor do I think that the defenders are well founded in their argument that the Provisional Order of 1902 having recognised the outlying inhabitants as truly beneficial owners of the works, all that the order of 1903 effected was a formal change in the nominal administrators. I think it impossible to sever the two statutes in that way seeing that the one was in large part expressly suspended in its operation in order that the other might be passed. And, taking them together, I hold that there was a real transfer of property from one legal *persona* to another for pecuniary consideration—a transaction for which I find it difficult to suggest any other name than a conveyance on sale. The interests of the two corporations concerned in the matter were in some points clearly adverse; so much so, indeed, that the Corporation of Irvine strenuously resisted the proposal of 1903 for a transfer, but maintained that if the undertaking was to be transferred, it should be on ordinary arbitration terms. That seems to me just what was done; with this difference, that instead of having the expense and delay of an arbitration, the pecuniary consideration was fixed by agreement, and was embodied in section 21 of the Act.

"The defenders claim that in any view they are not liable in the whole amount sought to be recovered. (1) They say they are not liable in stamp duty on such portion of the debts and liabilities of the undertaking as falls to be met by the Corporation of Irvine, which they state at 35 per cent. of the whole. This argument could only be successful if it were legitimate for the defenders to represent the Corporation of Irvine as being *pro tanto* purchasers as well as sellers. But the Corporation of Irvine, although it is a constituent authority within the definition of the Act, is not a constituent member of the new corporation. It has merely the right to be represented upon it by seven members elected from among their own number. And in any case the new corporation is a legal person, one and indivisible. (2) The defenders further dispute the claim for duty on such portion of the liabilities as consists of the expenses connected with the Provisional Orders, in respect these were no part of the consideration for the sale. There might have been some force in this objection if the figure of £5656 included the expenses other than those incurred by the Corporation of Irvine, as the consideration for a sale ought directly or indirectly to represent value as between the seller and the purchaser. Even then it might have been replied that the 21st and 41st sections of the statute treat the whole costs incurred by all the constituent authorities as payable by the new corporation. But the sum of £5656 is stated by the defenders to include only those charges which were incurred by the Irvine Corporation; and as to these I see no reason to doubt that the payment forms part of the consideration for the transfer."

An interlocutor was pronounced repelling the defences and finding the pursuer entitled to the sum sued for with interest at 5 per cent. per annum from 1st January 1904.

Counsel for the Pursuer—The Solicitor-General (Clyde, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton Grierson).

Counsel for the Defenders—Wilson, K.C.—Constable. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

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HIGH COURT OF JUSTICIARY.

(GLASGOW CIRCUIT COURT.)

[Lord Pearson.

Wednesday, February 28.

TAYLOR *v.* ORMOND & COMPANY.

Justiciary Cases — Small Debt Appeal — Deviation in Point of Form from the Statutory Enactments—Leading without Notice Evidence of Previous Over-Payments in Defence of Claim for Wages—Counter Claim — Small Debt (Scotland) Act 1837 (7 *Will. IV and* 1 *Vict. cap.* 41), *secs.* 11 *and* 31.

In a small debt action for wages, the defenders, without having given any notice of counter claim, led evidence of previous over payments to the pursuer to an amount exceeding the sum sued for, and the Sheriff giving effect to such evidence assoilzied them. *Held* (*per* Lord Pearson) on appeal that this defence was truly a counter claim of which notice should have been given in terms of the Small Debt (Scotland) Act 1837, section 11, and that its admission without notice was such a deviation in point of form from the statutory enactments as had prevented substantial justice from being done within the meaning of section 31 of the said Act, and appeal *sustained.*

The Small Debt (Scotland) Act 1837 (7 Will. IV and 1 Vict. cap. 41), section 11, enacts—"And be it enacted, that where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer . . . at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded except with the pursuer's consent, but action shall be reserved for the same." Section 31—"And be it enacted, that it shall be competent to any person conceiving himself aggrieved by any decree given by any sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary. . . . Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff. . . ."

Taylor, a seamstress, raised an action in the Small Debt Court at Glasgow against Ormond & Company, by whom she was employed on piecework, for the sum of £1, 15s. 7½d. as wages due for work done by her for them between 17th August and 1st September 1905. It was proved that the pursuer had worked for the defenders and earned the sum sued for during that period. The defenders then proceeded to lead evidence and produced a written statement showing that at various dates between December 1904 and the period in question the pursuer had been erroneously paid by them various sums in excess of the wages due to her at the respective times of payment, and that the total of these sums exceeded the sum sued for. Objection was taken to such evidence being received, *inter alia*, on the ground that no notice of counter claim or statement of the dates and amounts of the alleged over-payments had been served.

The Sheriff-Substitute (BOYD) repelled this objection, admitted the evidence tendered for the defenders, and in respect of it granted them decree of absolvitor.

The pursuer appealed to the Circuit Court at Glasgow on the following grounds:—"(1) Because the Sheriff-Substitute in admitting said evidence for the respondents without any counter account or claim having been served on the pursuer deviated in point of form from section 11 of the Small Debt (Scotland) Act 1837, wilfully, or so as to prevent substantial justice from being done, and (2) because the Sheriff-Substitute, in so admitting said evidence, acted with malice and oppression in the sense of section 31 of said Small Debt (Scotland) Act 1837."

Argued for appellant — The defence amounted to a counter claim, notice of which should have been given in terms of the Small Debt (Scotland) Act 1837, section 11 — *Cowie* v. *Rush*, September 28, 1866, 5 Irv. 320, 2 S.L.R. 279; *Renfrew* v. *Hall*, November 26, 1901, 4 F. (J.) 27, 39 S.L.R. 280.

Argued for respondents—The action was properly one of accounting; the defence was an adjustment of the account and not a counter claim to which the statute would apply. This was the view taken by the Sheriff-Substitute and, whether right or wrong, his decision upon this point was final and not open to review—*Buchanan* v. *Glasgow Corporation Water-Works Commissioners*, September 19, 1862, 4 Irv. 225; *Mosson v. Brash*, September 27, 1872, 2 Coup. 325.

LORD PEARSON—I think this case is narrow enough, but I must say I have a very clear opinion upon it. The 11th section of the Small Debt Act says—"Where any defender intends to plead any counter account or claim against any debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer." Now, in my opinion, a defence of over-payments made during a selected period anterior to the fortnight's wages sued for, involved a set-off; and it is admitted that no copy of the claim was served. I can hardly imagine a case where the service of such a copy was more necessary to justice, because otherwise the pursuer would be called upon to defend herself against a claim arising out of a previous part of her contract of service without any notice that it was to be raised. The whole reason of the section seems to me to apply with exceptional force in the circumstances.

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On the argument for the respondents I am asked to assume that the Sheriff entered into an accounting, and held that the work of the fortnight for which wages are sued was really covered by the alleged previous over-payments. That would be a startling result; it makes one look at the case more closely. When attention is paid to the claim in the Sheriff Court I see that the appellant lays her claim of £1, 15s. 7½d. as for wages from 17th August to 1st September 1905, for piece-work services rendered by her to the defenders during that period. Now, I have heard nothing to suggest that the Sheriff negatived that in assoilzieing the defenders. It rather appears to me that he did not negative it, and that he assumed that the fortnight's wages were earned, but held that they were compensated by some over-payments made in respect of previous work. I am prepared to hold that the defence was really and truly a counter claim, and that there should have been notice of it by service, in order that the pursuer might have an opportunity of meeting it. That being so, I think I must proceed under section 31 and hold that there was such deviation from the statutory enactments as has prevented substantial justice from being done. I therefore sustain the appeal, recal the decree of the Sheriff-Substitute, and remit to him to decern in terms of the summons.

The Court sustained the appeal.

Counsel for Appellant—Mercer. Agent—Archibald Hamilton, Solicitor, Glasgow.

Counsel for Respondents—J. R. Christie. Agents — Middleton & Brown, Writers, Glasgow.

COURT OF SESSION.

Tuesday, June 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

CATHCART PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL.

Poor — Settlement — Capacity to Acquire Residential Settlement—Insanity—Certification—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1.

The fact that a pauper is insane during the necessary period of residence is *per se* sufficient to prevent him from acquiring a settlement in a parish. It is not essential that his insanity should have been formally certified.

Facts upon which the Court *held* that a pauper was insane and incapable of acquiring a settlement.

The Poor Law (Scotland) Act 1898, sec. 1, enacts—"Section seventy-six of the principal Act (viz. 8 and 9 Vict. c. 83, sec. 76) is hereby repealed, and in lieu thereof it is enacted as follows:—'From and after the commencement of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after, the commencement of this Act, have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any such parish shall be held to have retained such settlement if during any subsequent period of four years he shall not have resided in such parish continuously for at least one year and a day: Provided always that nothing herein contained shall, until the expiration of four years from the commencement of this Act, be held to affect any persons who at the commencement of this Act are chargeable to any parish in Scotland.'"

The Parish Council of the Parish of Cathcart brought an action against the Parish Council of the Parish of Glasgow in which they sought declarator "that the Parish of Glasgow was on 29th July 1903, and still is, the parish of the legal settlement of John Nairn Baillie, presently an inmate of Riccartsbar Asylum, Paisley, and that on the said 29th day of July 1903 the said John Nairn Baillie became, and has ever since continued to be, a proper object of and entitled to parochial relief. And further, it ought and should be found and declared by decree foresaid that the defenders are liable to relieve the pursuers of the whole sums of money already advanced or incurred by pursuers on account of the said John Nairn Baillie on and since the said 29th day of July 1903, amounting, as at 15th November 1904, to the sum after specified, as well as of all further sums of money advanced or to be advanced by pursuers on account of the said John Nairn Baillie since the last-mentioned date, together with interest due and to become due thereon at the rate of 5 per centum per annum. And the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to make payment to the pursuers of (*First*) the sum of £45, 11s. 7d., being the amount disbursed by the pursuers in relieving the said John Nairn Baillie from the said 29th day of July 1903 till the said 15th day of November 1904, conform to account which will be produced at the calling hereof, with the interest of the several advances of which said amount is composed at the rate of 5 per centum per annum from the respective dates of payment thereof till payment; and (*Second*) all other advances or disbursements that have since been, or may hereafter require to be, made by the pursuers on account of the said John Nairn Baillie during the time he continues a proper object of parochial relief, with interest thereon at the foresaid rate from the date of the respective payments of the same by the pursuers till payment."

The facts of the case are fully set forth in the opinion of the Lord Ordinary (ARDWALL), *infra.*

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The pursuers pleaded, *inter alia*—"1. The legal settlement of the said John Nairn Baillie being in the parish of Glasgow, and he having been since 29th July 1903 a proper object of parochial relief, the pursuers are entitled to decree of declarator as concluded for. 2. The parish of Glasgow is liable as concluded for in respect that (1) It is the parish of the pauper's birth; (2) He has lost by absence any residential settlement he may have acquired in the parish of Govan or elsewhere; (3) During his residence in the parish of Cathcart he has all along been mentally incapable of losing his said settlement in the parish of Glasgow and of acquiring a settlement by residence in the parish of Cathcart. 3. The defenders, as representing the parish of the settlement of John Nairn Baillie, are liable for the maintenance of the said pauper, and are bound to relieve the pursuers of the advances made, or which may hereafter be made, by them on his behalf."

The defenders pleaded, *inter alia*—"2. The legal settlement of the said John Nairn Baillie not being in the parish of Glasgow, the defenders should be assoilzied."

On 12th July 1905 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that during the period from Whitsunday 1895 to July 1903 John Nairn Baillie was resident in the parish of Cathcart, but that during that time he was disqualified by insanity from acquiring a settlement by residence in that parish; (2) that he has not a residential settlement in any other parish; and (3) that he was born in the parish of Glasgow, and that that parish is the legal settlement of the said John Nairn Baillie, and liable for his maintenance: Therefore finds, declares, and decerns in terms of the whole conclusions of the summons," &c.

Opinion.—"In this case the parish of Cathcart seek to have the parish of Glasgow declared liable for the support since 29th July 1903 of a pauper lunatic, John Nairn Baillie, presently an inmate of Riccartsbar Asylum, Paisley.

"It is not denied that the parish of Glasgow is the parish of the pauper's birth, and if he has not acquired a residential settlement in the parish of Cathcart it is admitted that the parish of his birth is liable, as he has lost by absence any residential settlement he may have acquired in the parish of Govan or elsewhere. There is no doubt that he has been resident in the parish of Cathcart for a length of time necessary to acquire a residential settlement there, and the only question on which the decision of the present case depends is, whether during his residence in the parish of Cathcart the pauper has all along been mentally incapable of losing his birth or other settlement and of acquiring a settlement by residence in the parish of Cathcart.

"The facts of the case are as follows:—John Nairn Baillie, the pauper, was born in the parish of Glasgow on 19th December 1871. Some few years after his birth his father died of consumption, and it may be here added that he lost a brother and two sisters from that complaint. He himself had consumption, which began at fifteen years of age and lasted some years, and one lung still bears traces of former disease. At eighteen months old John Baillie had measles, and at the same time inflammation of the brain. At the age of fifteen years he had bleeding of the lungs and was off work eighteen months. After being engaged in various employments he finally became a druggist's assistant and served as such in various places till Christmas 1894. At that time he came home to study for a dispenser's certificate. His mother at this time was living in Govanhill where she resided for about three or four years from 1891 to Whitsunday 1895. That was in the parish of Govan. After that she removed to No. 10 Gray Street, Langside, which is in the parish of Cathcart, where she lived for nine years down to Whitsunday 1904. John Baillie resided with his mother from about Christmas 1894 till July 1903, and from Whitsunday 1895 till July 1903 he was accordingly resident in the parish of Cathcart. This then is the period during which his mental condition is important, with a view of determining the liability of the parties to this action.

"Three weeks after Christmas 1894 his mother Mrs Baillie says that a change came over him. He got excited one morning and rushed from the kitchen into his room. Then he went back into another room where his sister was lying in bed ill, and told her that the foundations were falling. His mother saw something was wrong, and said, 'Oh John, what's this?' He burst out crying. She thought that something had gone wrong with his mind, and after trying to set the toilet cover on fire with some matches, he ran out of the house only partially dressed and his brother ran after him and got him back. Two days after Mrs Baillie sent for Dr Alexander Nairne, who is now dead, but she says that he wanted to send John Baillie to an asylum. Dr Stuart Nairne was consulted by his brother Dr Alexander Nairne, and both of them continued to visit John Baillie for some time. Dr Stuart Nairne was examined on commission, and says he visited John Baillie frequently, but he speaks specially to a visit in March 1895, at which time, he says, he was of opinion that he was insane, and he repeats this distinctly upon cross-examination, and in re-examination he says that the symptoms that he observed at that time were his noise, mutterings, and violence, and also hallucinations. It may be observed that Dr Stuart Nairne is an uncle of John Baillie.

"On 27th February 1895 Dr J. V. Wallace, who is district medical officer for the parish of Govan Combination, was called in to see John Baillie on the instructions of the Parish Council. He called and examined him and says that he found him to be suffering from insanity. He was excitable and nervous in all his movements, and erratic in his behaviour. He then says—'I considered that he was in a fit state then to be certified as insane, and I would

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have been prepared if necessary to certify him as insane at that time.' I consider this to be most important evidence, as Dr Wallace is a person of very large experience, having examined, as he tells us, fully two thousand cases of persons considered insane. He did not certify John Baillie to be insane at that time, because his mother was averse to his being sent to an asylum, and accordingly the application for his admission to an asylum which had been drawn out was never returned by his mother. The only other doctor who examined John Baillie at this time was Dr Barrie, but he is now dead. After this attack, however, and between April and July 1895, John Baillie had a lucid interval, and during that time he applied for and got a situation in a chemist's shop in Maryhill, Glasgow, where he remained for a short time, apparently about a fortnight, but he had to leave it, and his mother describes how one morning he got up to go to his work, tried to take his breakfast, and could not do so, and when his mother inquired what was the matter, he said, 'It's my head,' and he has not been back to work of any kind since, nor has he been fit for it, and from that time onwards, apparently, he has constantly shown symptoms of insanity, though at times he has had lucid intervals. He suspected that his food was being poisoned; he got into excited states; thought there was blood in the room; he sat and muttered to himself; he once or twice attempted violence to his mother, and once or twice to himself by gripping his throat. His excitable turns came on for three or four weeks at a time between 1895 down to 1903, till at last his mother was obliged to have him removed to an asylum. During this time, and especially during his lucid intervals, he could write well, could spell well, could speak distinctly when he did speak, although he was usually silent and melancholy. He took long walks by himself, and was inoffensive for periods of a fortnight or three weeks at a time, till another excited attack came on, and his mother's view is that the effect of the second attack he had in July 1895 continued during the succeeding years till he was taken to the asylum. Besides the evidence of his mother, it seems to me that there is some important evidence given by Dr Russell, whose house is within a hundred yards of where John Baillie lived with his mother. He noticed John Baillie as soon as he came to reside at Langside, and from the very first thought that he was a man of unsound mind, and continued of that opinion down to the time that he was sent to the asylum, although he observed a marked deterioration during that period dating more particularly from June 1900, when he became untidy and slovenly in his habits and dress. On these facts there seems a wonderful unanimity among the skilled witnesses examined to the effect that, probably from the date of the first, and certainly from the date of the second attack in 1895, John Baillie was never of sound mind, and was suffering from what has been called 'adolescent insanity,' a recognised form of brain disease. There are, of course, slight divergences of opinion about the details, but I think the weight of the evidence is to the effect that from 1895 onwards John Baillie must be considered to have been insane, and he certainly is so at present. In answer to the question, 'Would it have been possible to certify him as insane at any time during that period of eight years (*i.e.*, 1895-1903)? Dr Clouston answered, 'I would have had no difficulty in regard to that;' and he says further on, 'His ability to work for a week or so at a time is quite consistent with his being a fit patient for a lunatic asylum during the whole of the period since July 1895;' and Dr Yellowlees, who is called as a witness for the defenders, says, 'I would probably have certified him at the very first and sent him to the asylum. I agree with Dr Wallace that he was certifiable in 1895. There is no doubt about it.' Then he is asked, 'Do you agree with Dr Russell that he was certifiable in 1900?' and he answers, 'It is quite possible; he might or might not have been;' and in answer to questions put by myself he says that he could not say that from 1895 till now John Baillie has ever been perfectly free from brain disease, although he may have been so well during the best intervals that he could not have certified him at these particular times.

"On the whole evidence I have come to be of opinion that from July 1895 to July 1903 John Baillie was a lunatic or insane person, and although not certified as a fit inmate for an asylum yet he was a proper person to be so certified during the whole of that period with the exception of his lucid intervals. Further, I think that he ought to have been certified as a lunatic and sent to an asylum in 1895, and that it is proved that he would have been so sent but for his mother's strong aversion to asylums. It is further clear that, except for about a fortnight at the beginning of his residence in Cathcart, he has done nothing for his own support.

"On these facts the question now is, was John Baillie during his residence in the parish of Cathcart capable or incapable in law of acquiring a residential settlement. On the one hand it seems that no amount of imbecility short of idiocy will render a pauper incapable of acquiring a settlement for himself. See *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, 5 F. 274; and *Parish Council of Glasgow* v. *Parish Council of Kilmalcolm*, 6 F. 457, following on the cases of *Cassells* v. *Somerville & Scott*, 12 R. 1155, and *Nixon* v. *Rowand*, 15 R. 191. On the other hand, it seems settled that if a person is insane he cannot during his or her residence in an asylum or in the house of a relative acquire a residential settlement in the parish where he has been residing in a state of insanity. (*Melville* v. *Flockhart*, 20 D. 341, and *Watt* v. *Hannah*, 20 D. 342.)

"I am conscious that it is not easy to see as a mere question of fact why the pauper in this case should be deemed incapable of

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acquiring a settlement for himself, and the paupers in the cases of *Kirkintilloch* and *Glasgow* (above quoted) should have been deemed capable of acquiring such settlement. But it has been recognised by the Court that some general rules should be laid down in such matters for the guidance of parishes, even though the application of these rules to particular cases may sometimes appear to produce anomalies. The rule to be gathered from the decisions on this matter seems to be that imbecility will not disable a person from acquiring a residential settlement, but that idiocy or insanity will do so, and, holding as I do that John Baillie was insane from July 1895 till July 1903, I am of opinion that during his residence in the parish of Cathcart he was incapable of acquiring a settlement by residence in that parish, and that, not possessing any other residential settlement, the parish of Glasgow, as the parish of his birth, is liable for his maintenance. I shall therefore decern against the defenders in terms of the conclusions of the summons, with expenses."

The defenders reclaimed, and argued—The pauper had acquired a residential settlement in Cathcart, having in fact resided in the parish for a period of three years. The physical fact of residence was *per se* sufficient to give a settlement, and was the only element requisite (apart from conditions as to begging, &c.) under the regulating statute, viz., the Poor Law (Scotland) Act 1898, section 1. The fact of residence had nothing to do with *animus*—*Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357, L. J.-C. Inglis at 367; the Lunacy (Scotland) Act 1857, section 75. The question therefore came to be this, had any exception to that statutory rule been established by decision? At most that a certified lunatic in confinement cannot acquire a settlement in the parish of his confinement — *Cassels* v. *Somerville and Scott*, June 24, 1885, 12 R. 1155, at 1159, 22 S.L.R. 772; *Watt* v. *Hannah*, December 19, 1857, 20 D. 342; *Melville* v. *Flockhart*, December 19, 1857, 20 D. 341; *Rutherglen Parish Council* v. *Glenbucket Parish Council*, October 24, 1895, 33 S.L.R. 366; *Edinburgh Parish Council* v. *Cramond and Whithorn Parish Council*, March 26, 1903, 11 S.L.T. 12. There was also, perhaps, the apparent exception of the congenital idiot, explained by his being incapable of forisfamiliation and retaining his father's settlement until death. But even on the assumption that mental capacity or *animus* came into the question, the pauper here had far more of both than others who had been held capable of acquiring settlements—*Nixon* v. *Rowand*, December 20, 1887, 15 R. 191, 25 S.L.R. 175; *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, December 5, 1902, 5 F. 274, 40 S.L.R. 179; *Parish Council of Glasgow* v. *Parish Council of Kilmalcolm*, March 1, 1904, 6 F. 457, 41 S.L.R. 347, *aff.* H.L., May 29, 1906, 43 S.L.R. 639; *Parish of Haddington* v. *Parish of Dunbar*, December 19, 1837, 16 S. 268. The pauper here too was only intermittently insane—See *Greig* v. *Chisholm*, December 19, 1857, 20 D. 339.

Argued for pursuers and respondents—(1) The pauper here was in fact insane. (2) An insane person being without any legal capacity could not acquire a settlement, and no amount of residence without that capacity was of any effect. If capacity had nothing to do with the matter, it was surely strange that it was the special point on which all the reported decisions turned — See as authorities favourable to the respondents the cases cited *supra* and *Greig* v. *Ross*, February 10, 1877, 4 R. 465, L.J.-C. at 467, 14 S.L.R. 346. There was no authority for the doctrine that confinement or a medical certificate were necessary to prevent acquisition of settlement.

LORD JUSTICE-CLERK — There are two questions which must be answered before a decision can be given in this case—(1) Was the pauper in fact insane? and (2) Is it the legal effect of ascertained insanity that the sufferer cannot acquire a settlement? As regards the first question I have no difficulty. The evidence satisfies me that the pauper was in fact a lunatic, and practically, though not officially, certified as such, the certification not being followed out by restraint in an asylum. The Lord Ordinary has gone very fully into the facts, and I entirely concur with his reading of them as expressed in his note.

Upon the second question I also agree with him. It was strongly maintained in argument that it was not sufficient to prevent the acquiring of a settlement that the pauper should be proved to be insane, and that it was necessary that he should be formally certified, otherwise however insane he might be in fact, he might still acquire a settlement for himself. It was maintained that this was fixed by decisions already pronounced. I am unable to agree that any such rule has been laid down in previous judgments. Were I satisfied that such a rule was established I should bow to it, although I confess it would be difficult for me to understand the principle upon which it could be based. The fact as it appears to me to be inquired into is not whether certain proceedings have taken place, but what was the mental state of the pauper. If he was mindless in the sense either of amentia or dementia, then it cannot be said of him that he could acquire a settlement. The want of all legal capacity is the matter which in my opinion is decisive. And holding as I do that the proof is conclusive on that question, I feel bound to hold in law that the pauper could not acquire a settlement by residence. The recent decision in the House of Lords in the case of *Kilmalcolm* is quite consistent with this view. I am therefore in favour of adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY—I am of the same opinion.

LORD STORMONTH DARLING—We were asked at the close of the discussion here to delay giving judgment till the House of

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Lords had decided the appeal in the case of *Kilmalcolm*, lest their Lordships might express opinions having a bearing on this case. Judgment has now been given in that appeal, which raised the question whether residence in a charitable institution by a pauper unable from mental and bodily weakness to earn her living was enough to constitute a residential "settlement" in the parish containing the charitable institution. Plainly the question of most importance there to the parishes interested turned on the charitable character of the institution as rendering the parish which contained it possibly liable for a number of imported paupers. Accordingly I find that the noble and learned Lords dealt chiefly with this aspect of the case, and decided that the statutory condition of the pauper having "maintained himself without recourse to common begging either by himself or his family, and without having received or applied for parochial relief," in order to the acquisition of a residential settlement, was a condition entirely independent of where the means came from, so long as they did not come from common begging or the poor fund of the parish. But I also find that both Lord James of Hereford and Lord Robertson (with whom the Lord Chancellor and Lord Atkinson concurred) expressly said that the incapacity through mental weakness to earn the means of support must be short of "lunacy or idiocy," or to put the same thing in other words, must be of a kind "not involving insanity." In none of the cases has it ever been laid down that a medical certificate of lunacy was indispensable, or that insanity might not be proved as a fact in the case. On the contrary, Lord President Inglis in the case of *Cassels* v. *Somerville & Scott*, 12 R. at p. 1159, after stating it as settled by the case of *Melville* v. *Flockhart*, 20 D. 341, that a person who was boarded in an asylum could not acquire a settlement in the parish in which the asylum was situated, and by the case of *Watt* v. *Hannah*, 20 D. 342, that the same result followed if the person was sent to be boarded under a keeper in respect he was a lunatic, went on to say—"The pauper here was not sent to be boarded in Lesmahagow because he was insane, but because, his mind being weak, he was not capable of earning a livelihood like other men in his position. He was not in any sense a lunatic." And his Lordship added—"It might have been shown that though he had not been certified a lunatic he was nevertheless one in fact."

Now that is an averment which is made here, the reason which Cathcart assigns for his not being sooner confined as a lunatic being his mother's great disinclination to sanction such a step. Agreeing as I do with your Lordship and the Lord Ordinary that these averments are amply proved, I do not find it necessary to resume the passages in the evidence on which that opinion is founded. It is only because as Lord Ordinary I had something to do with both the *Kilmalcolm* case and the *Kirkintilloch* case (5 F. 274) that I have thought it right to make these few observations. I notice that in the latter of these two cases Lord Adam intimated (at p. 282) that he had come to the same conclusion as I had done as Lord Ordinary, viz., that the pauper's mind was weak but not disordered, and that he was not by any means an idiot. Here I do not think that the pauper was an absolute idiot, but I do think that his mind was so disordered as to make him a lunatic during the whole period of his residence in the parish of Cathcart outside the asylum, and that he was thereby disqualified from acquiring a residential settlement.

LORD LOW—I concur.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor reclaimed against, and decern."

Counsel for Reclaimers—Younger, K.C.—Orr Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Saturday, June 2.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LEE *v.* POLLOCK'S TRUSTEES.

Process — Abandonment — Withdrawal of Minute of Abandonment—Right to Withdraw—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10—*Act of Sederunt* 11*th July* 1828, *sec.* 115.

The pursuer in an action, who has lodged a minute of abandonment, has an absolute right to withdraw such minute, the defender's remedy being to move for absolvitor in the action on the ground of delay, which motion the Lord Ordinary may grant if consistent with the justice of the case, or may refuse allowing the pursuer to proceed subject to conditions as to expenses.

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10, after providing for the making up of a record which shall foreclose the parties in point of fact, *inter alia* enacts—"the pursuer having it in his power notwithstanding to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." The Act of Sederunt of July 11, 1828, passed in pursuance of the Judicature Act 1825, by sec. 115 enacts—"And whereas it is enacted by section 10 of the Act that the pursuer shall have it in his power to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent, it is declared that this applies only to the case of the pursuer abandoning his cause before an interlocutor has been pronounced assoilzieing the defen-

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der in whole or in part, or leading by necessary inference to such absolvitor, after which it shall not be competent for him to do so in regard to that part of the cause decided by said interlocutor either expressly or by necessary inference; reserving, however, to him any remedy by a new action which may be competent to him under subsisting regulations."

On 9th June 1905 John Bethune Walker Lee, Solicitor in the Supreme Courts, Edinburgh, brought an action of declarator and for payment of a casualty in respect of certain heritable subjects in the town of Mauchline, Ayrshire, against Mrs Martha Jamieson or Pollock and others, trustees under the trust-disposition and settlement, dated 30th October 1903 and recorded 6th October 1904, of the late Andrew Pollock, agricultural engineer, Mauchline. In the course of the proceedings Lee lodged a minute of abandonment and subsequently moved for leave to withdraw it.

The circumstances of the case are given in the opinion of the Lord Ordinary (JOHNSTON), who on 15th March 1906 pronounced this interlocutor:—"Refuses the pursuer's motion to withdraw the minute of abandonment lodged by him in respect the pursuer has failed to pay the defenders' taxed expenses: Assoilzies the defenders from the conclusions of the summons, and decerns: Approves of the Auditor's report on the defenders' account of expenses, and decerns against the pursuer for payment to the defenders of the sum of £130, 13s. 9d. sterling, being the taxed amount of said account."

Opinion.—"Mr Lee raised this action, which is the statutory action for recovery of a casualty, in June 1905. The record was closed on 18th July 1905 and the case heard in the procedure roll. It turned out that the summons was out of shape, and I allowed an amendment on condition of payment of a modified sum of expenses, and the condition having been fulfilled allowed a proof to be taken on 1st February 1906. The identity of the defenders' lands is not in dispute. But there is a difficult question of fact at issue regarding the limits of the pursuer's superiority, and whether it covers the defenders' lands.

"In the course of procedure between the closing of the record and the diet of proof Mr Lee gave great trouble by non-production of the titles on which his condescendence founds, and he received great and unusual indulgence not only from me but from his opponents. On 22nd December 1905 a diligence for recovery of documents was granted to the defenders. But on 17th January 1906 I had peremptorily to order Mr Lee to lodge in process the documents enumerated in a list. It came to be informally understood that Mr Lee would not be able to proceed with his proof on 1st February 1906, but it was only late on the previous day that he lodged the minute of abandonment 'in terms of the statute.' Whereupon on the morning appointed for the proof (1st February) I wrote the usual interlocutor—'In respect of the minute of abandonment for the pursuer, Discharges the diet of proof fixed for this date: Appoints the defenders to lodge an account of their expenses, and remits, &c.' The defenders' account of expenses was lodged on 15th February and taxed on 23rd February. As taxed it amounts to the sum, large for the point which the procedure had reached, of £130, 13s. 9d. The amount has, however, been a good deal increased by Mr Lee's conduct of the case.

"On 21st February, *i.e.*, before taxation of the account, Mr Lee verbally moved for leave to withdraw his minute of abandonment, and referred me to the two precedents of *Tod*, 16 S.L.R. 718, and *Dalgleish*, 23 S.L.R. 552. I intimated verbally that assuming it to be a matter of discretion I was not disposed to grant leave to abandon, and explained that I should like to look at the account of expenses after taxation.

"On 28th February I was moved to approve of the Auditor's report on the taxation of the account of expenses, and Mr Lee renewed his motion for leave to withdraw his minute of abandonment, and asked me to pronounce such interlocutor as he might take to review.

"On looking more particularly into the matter of procedure, I have come to the conclusion that notwithstanding the above precedents I have no discretion in the matter. If I thought otherwise, as I have already said, I am not disposed to exercise that discretion in Mr Lee's favour. I desire to say, however, that I do not think Mr Lee's action either vexatious or frivolous. I think that there was a fair question to be litigated, and requiring with a view to decision to be cleared up by proof. My reason for refusing the appeal to my discretion would be that I think Mr Lee has had already more than the indulgence due to a litigant.

"But as in my judgment I have no discretion, I have still to determine what is the result of Mr Lee having lodged a minute of abandonment and failed to pay the taxed amount of the expenses.

"Is Mr Lee entitled to withdraw his minute of abandonment as matter of right and to ask for a new diet of proof, and if so, on what conditions? or,

"Are the defenders entitled to hold him to his abandonment, and in respect of his failure to implement the condition of abandonment, to require me to pronounce decree of absolvitor with expenses.

"The abandonment is under the Judicature Act 1825 (6 Geo. IV, cap. 120), section 10, and the relative Act of Sederunt, 11th July 1828, section 115, the terms of which I need not quote.

"In *Ross* v. *Mackenzie*, 16 R. 871, the Lord President (Inglis) said—'It seems to me that the failure to pay expenses after the minute of abandonment was lodged merely deprived the pursuer of the privilege of abandonment.' That language is not inconsistent with the view that he may still proceed, though I am far from saying that that was his Lordship's meaning.

"The other cases which I have found bearing on the subject are—*Lawson* v. *Low*, 7 D. 960, which makes it clear that after the

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minute of abandonment, until expenses are paid, and the Court sustains the minute and in respect thereof and of the payment of expenses dismisses the action, the action remains in dependence. At the same time the Court held in that case that notwithstanding such dependence the pursuer was not prevented convening his opponent in a new action, provided he went no further than merely convening him until the abandonment of the first action was sustained and the first action taken out of the way. But Lord Mackenzie gives expression to an important dictum. 'I do not think,' he says, 'that the statute gives a party power of abandoning an action until the expenses are paid or consigned. He may say he abandons it, but that is only abandoning his own pleas, for the opposite party may still take judgment against him.' This would in my opinion entitle the defender to crave, on the pursuer's failure to fulfil the condition of abandonment, judgment of absolvitor.

"*Cormack* v. *Waters*, 8 D. 889, merely confirms the view that the case is still in dependence notwithstanding a minute of abandonment, until the minute is sustained, which it cannot be until the expenses are paid.

"*Muir* v. *Barr*, 11 D. 487, is merely though most emphatically to the same effect.

"I may also refer to *White* v. *Duke of Buccleuch*, L.R., 1 Scotch and Divorce Appeals, 70.

"Upon a consideration of the point, and in view of these authorities, the opinion to which I have come is—(1) that I have no discretion in the matter; (2) that if I have, the pursuer's motion should be refused; and (3) that the pursuer is not now entitled to proceed, even on condition of paying the expenses rendered useless by his abortive abandonment, but that the defenders are entitled as matter of right to be assoilzied with expenses, and I shall grant decree accordingly.

"I have explained the reasons fully, so that the pursuer may have my judgment reviewed if so advised by the Inner House."

The pursuer reclaimed, and argued—It was competent to withdraw the minute of abandonment on payment of the expenses thereof, the Lord Ordinary having no discretion in the matter—*Todd & Higginbotham* v. *Corporation of Glasgow*, July 4, 1879, 16 S.L.R. 718; *Dalgleish* v. *Mitchell*, March 19, 1886, 23 S.L.R. 552; *Ross* v. *Mackenzie*, June 26, 1889, 16 R. 871, 26 S.L.R. 600. There was nothing in the Judicature Act 1825 or the Act of Sederunt of July 11, 1828, relative thereto, to constitute a minute of abandonment a judicial contract. The Lord Ordinary's interlocutor should be recalled.

Argued for the defenders and respondents—The whole matter was in the discretion of the Lord Ordinary—*Todd & Higginbotham* v. *Corporation of Glasgow*, and *Dalgleish* v. *Mitchell*, *ut supra*. His interlocutor was correct according to the established practice—Coldstream's Court of Session Procedure (4th ed.) p. 110 note A—and should be sustained.

Lord President—The question here is as to the effect of a minute of abandonment. I am not able to agree with the conclusion to which the Lord Ordinary has come, which seems to me, if I may say so, founded on a misapprehension of what a minute of abandonment is. A minute of abandonment is a privilege given by statute to a pursuer to abandon his action upon certain conditions. It is not a judicial contract between the pursuer and the defender. When a minute of abandonment is lodged by a pursuer and received, the ordinary and proper interlocutor is to remit the defender's account of expenses to the Auditor to tax and report; but the meaning of that is simply to reduce to a certain fixed sum the condition which the pursuer has to fulfil in order to get his minute of abandonment given effect to. The Auditor's report as to expenses is conclusive, and when the case comes back from the Auditor, the pursuer, on paying the expenses so fixed, is entitled, in respect of his minute and the payment of the expenses, to have the action dismissed, and so be in a position to bring another action. A very good test is this, that no one ever heard of an interlocutor decerning for these expenses as upon a minute of abandonment, and in consequence allowing extract thereof.

The whole misundertanding has probably arisen from the form of interlocutor which is set out in a well-known text-book which is generally right. Of course, if the pursuer after lodging his minute and getting the expenses taxed, does nothing, the defender must have his remedy. That remedy is not in respect of a judicial contract under the minute—because there is no such contract—but is the ordinary remedy of asking the judge to give judgment in his favour, because the pursuer will not move. In such a case—there having been ordinarily nothing more done, and no more expenses incurred—the Auditor's report can be approved as it stands. Accordingly, I can understand that interlocutors may have been written in the form given in the text-book referred to. In truth, however, the form of interlocutor there given—though it may have been pronounced in such an ordinary case as I have mentioned—is not actually right, because it looks as if it were an interlocutor pronounced on the minute of abandonment, whereas, in order to be complete, it should run—"In respect that the pursuer is no longer proceeding with the case, therefore approves of the Auditor's report and decerns and assoilzies the defender." I can imagine cases where there would require to be an eke to the Auditor's report, if, after the minute had been lodged and the account taxed, there had been some further proper step taken by the defender. He would be entitled to the expenses of that appearance over and above the expenses that had been taxed.

When we look at what a minute of abandonment is—as correctly stated by Lord President Inglis in *Ross* v. *Mackenzie*, 16 R.

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871—it seems to me that the pursuer has an absolute right to withdraw it if he likes. But what is the result? The result is that the case is in the position it was in before the minute of abandonment was lodged, with this difference that the pursuer has put himself in the position of having caused delay in the proceedings. The defender may enrol and ask for absolvitor, and that motion would be granted unless the pursuer is able to show that his proceedings have been *in bona fide*. In that event the pursuer would be entitled to go on with the case subject to such conditions as to expenses as the Lord Ordinary chose to lay down. It seems to me, then, that the proper interlocutor for your Lordships to pronounce is to recal the Lord Ordinary's interlocutor, sustain the pursuer's motion to withdraw the minute of abandonment, and to remit to his Lordship to proceed with the case as to him may seem just. I do not wish to take it out of the power of the Lord Ordinary to do what he might have done at the time the motion was made to withdraw the minute of abandonment. He will take up the case—the minute of abandonment being gone—and will either allow a proof subject to such conditions as to expenses as he thinks proper, or if he thinks that course consistent with the justice of the case he will assoilzie the defender.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's reclaiming note against Lord Johnston's interlocutor dated March 15, 1906, Recal the said interlocutor; sustain pursuer's motion to withdraw his minute; allow him to withdraw said minute accordingly; remit the cause to the Lord Ordinary to proceed therein as to him may seem just: Find the pursuer entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount of said expenses."

Counsel for the Pursuer and Reclaimer—Spens. Agent—Party.

Counsel for the Defenders and Respondents—Lippe. Agents—Boyd, Jamieson, & Young, W.S.

Tuesday, June 5.

SECOND DIVISION.

BATE'S TRUSTEES *v.* BATE.

Succession—Vesting—Trust—Assignation in Trust—Liferent by Implication—Accessory—Repugnancy—Gift of Fee on a Party's Death.

A in contemplation of her marriage to B assigned to trustees her whole estate; "(*Second*) After my death, in the event of my marrying and predeceasing the said" B "and of there being no children or issue of children of said intended marriage, for behoof of the said" B "in liferent . . . so long as he shall remain unmarried . . .; (*Third*) for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally, or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen . . . after the decease or second marriage of the said" B "if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee: But declaring always . . . that in the event of the said" B "entering into a second marriage, the foresaid liferent provision created in his favour, in the event before mentioned, shall as on the date of such second marriage *ipso facto* cease and determine." A was married to B, and died intestate survived by B and two sons. B claimed a liferent by implication under the third purpose, or alternatively that the income of the estate till his death or second marriage was undisposed of and fell into intestacy.

Held that B was not entitled to a liferent of the trust estate, that it vested as at A's death in her sons, and that they were entitled to immediate payment both of the capital and the accrued interest, it following as an accessory.

Ralph v. *Carrick*, 1879, 11 Ch. Div. 873, *commented on and distinguished.*

By assignation in trust, dated 16th, 17th, and 20th July 1878, and registered in the Books of Council and Session 15th January 1883, Miss Mary Whitehill, with consents therein set forth, in contemplation of the marriage contracted and about to be entered into between her and Thomas Elwood Lindesay Bate, surgeon in the Bengal Medical Service, conveyed in trust to certain persons therein named, and the acceptors and survivors of them, and to such other person or persons as might be assumed into the trust, her whole estate then belonging to her, or which she might succeed to or become vested in during the marriage. The purposes for which the said trust assignation was granted were as follows:—

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"(*First*) For behoof of me, the said Mary Whitehill, in liferent for my liferent use allenarly, exclusive always of the *jus mariti* of my said intended husband; (*Second*) After my death, in the event of my marrying and predeceasing the said Thomas Elwood Lindesay Bate, and of there being no children or issue of children of said intended marriage, for behoof of the said Thomas Elwood Lindesay Bate in liferent for his liferent use allenarly so long as he shall remain unmarried, but not assignable by me or him nor attachable for my or his debts or deeds; (*Third*) For behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen after the decease of the longer liver of myself and my said intended husband if I shall be the longer liver, but after the decease or second marriage of the said Thomas Elwood Lindesay Bate if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee; but declaring always, as it is hereby specially provided and declared, that in the event of the said Thomas Elwood Lindesay Bate entering into a second marriage, the foresaid liferent provision created in his favour in the event before mentioned, shall, as on the date of such second marriage, *ipso facto* cease and determine: And further declaring that in the event of my being married to and predeceased by the said Thomas Elwood Lindesay Bate without leaving lawful issue of the said intended marriage, the said trustees shall denude themselves of the trust hereby created and retrocess and repone me in and to the whole estate and effects hereby conveyed in the same manner as if these presents had never been granted."

Miss Mary Whitehill was married to Thomas Elwood Lindesay Bate on 27th July 1878, and died intestate on 16th September 1904. She was survived by her husband and by two sons, the only issue of the marriage, Ronald Elwood Bate and Claud Lindesay Bate, who at the date of this case were both of full age. The funds falling under the trust assignation amounted as at the date of the truster's death to £6300, and the yearly income arising therefrom was about £200.

Questions having arisen with regard to the construction and effect of the trust assignation, this special case was presented to the Court. The parties to the case were —(1) Sir Matthew Arthur, Bart., and others, the trustees acting under the trust assignation; (2) Thomas Elwood Lindesay Bate, the husband; (3) Ronald Elwood Bate and Claud Lindesay Bate, the only issue of the marriage.

The second party contended that the truster failed to dispose of the income of the trust funds applicable to the period of his survivance unmarried, in the event, which occurred, of her predeceasing the second party and being survived by issue of the marriage, and that she died intestate *quoad* the said income. Alternatively, the second party contended that under the said trust assignation there was an implied gift to him of the said income of the trust funds, and that he was consequently entitled to payment thereof from the first parties so long as he remained unmarried.

The third parties contended (1) that under the trust assignation the only gift of income to the second party in the event of his surviving the truster was that contained in the second purpose, which did not apply in the event which happened, and was accordingly ineffectual; (2) that on a sound construction of the trust assignation the third parties had now a vested right to the whole trust funds, including the income accruing since the death of Mrs Bate, equally between them; and (3) that in respect of their having a vested right of fee in the trust funds, and of there being no other trust purpose to be served by the retention of the funds in the hands of the first parties until the death or re-marriage of the second party, they were now entitled to have the same paid and made over to them.

The first parties contended that they were bound to hold the trust funds until the death of the second party in terms of the trust assignation; and that, in the event of the contentions of the second party being held to be ill-founded, they were bound to accumulate the income since Mrs Bate's death so long as they could lawfully do so.

The following questions of law were, *inter alia*, submitted to the Court—"(1) Does the income of the trust funds accruing since the death of Mrs Bate, and until the death or second marriage of the second party, form intestate succession of Mrs Bate? or (2) Is the second party entitled, under the trust assignation, to payment from the first parties of the said income so long as he remains unmarried? or (3) In the event of the first two questions being answered in the negative, are the third parties entitled, as at the death of Mrs Bate, to have the whole trust funds paid over to them? or Are the first parties bound to hold the said trust funds until the death or second marriage of the second party?"

Argued for the second party—There was an implied gift of the liferent of the trust funds to the second party so long as he did not marry again. In *Aberdein's Trustees* v. *Aberdein and Others*, March 19, 1870, 7 S.L.R. 433, 8 Macph. 750, Lord Moncreiff at p. 752 said—"A bequest to B on the death of A implies a liferent to A;" and this expressed the rule of *Humphreys* v. *Humphreys*, 1867, L.R. 4 Eq. 475, referred to in M'Laren on Wills, vol. i, p. 322. True, this rule had been qualified in *Ralph* v. *Carrick*, 1879, L.R. 11 Ch. D. 873 (esp. opinions of Cotton, L.J., and James, L.J.), to the effect that a gift to the testator's heir-at-law (but not to a stranger) after the death of A implied a life estate to A. This rule had been followed also as regards next-of-kin—*In re Springfield — Chamberlin* v. *Springfield*, [1894] 3 Ch. 603, and *In re Willats—Willats* v.

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Artley, [1905] 1 Ch. 378. Vesting was here postponed, but even assuming vesting the rule applied. Though there was apparently no reported case in which the rule had been applied in Scotland, it was an equitable rule and should be applied. (2) Alternatively, vesting was postponed to the date of distribution—*Young* v. *Robertson*, 1862, 4 Macq. 314—and the truster having failed to dispose of the income of the estate from her death till the date of distribution there was intestacy *quoad* this income. Vesting being postponed there was no room for applying the doctrine of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236.

Argued for the third parties—(1) There was no room for the implication of a liferent; that would neglect the conditions of clause two, again referred to in clause four. This distinguished the case from those cited. (2) The children "then surviving," *i.e.*, at Mrs Bate's death, at that date took a vested interest, and vesting having taken place the income followed the capital, and there being no purpose in keeping up the trust the third parties were entitled to immediate payment—*Miller's Trustees* (*cit. supra*).

LORD LOW—If it were not for the postponement of the term of payment in the third purpose, the construction of the trust-assignation in question would present no difficulty. Apart from that clause the provisions of the assignation are these—In contemplation of her marriage with the second party the deceased Mrs Bate assigned certain funds to trustees to be held by them, (1) for behoof of herself in liferent; (2) after her death and "in the event of there being no children or issue of children of said intended marriage" for behoof of the second party "so long as he shall remain unmarried;" (3) "for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue equally or share and share alike, payable at the majority or marriage of such issue;" and (4) failing such issue, then for behoof of her own heirs or assignees in fee. It was then declared that in the event of the second party entering into a second marriage "the foresaid liferent provision created in his favour in the event before mentioned shall, as on the date of such second marriage, *ipso facto* cease and determine." Now, if there had been nothing else in the assignation no difficulty could, in the event which has happened, have arisen. Mrs Bate was survived by two sons (the third parties), who have both attained majority, and therefore the second party would have had no claim to a liferent of the trust estate, while the third parties would have been entitled to immediate payment of the capital.

There is, however, in the third purpose a further postponement of the term of payment of the capital which creates considerable difficulty. After the words which I have quoted—"payable at the majority or marriage of such issue"—the following words occur—"whichever of these events shall first happen after the decease of the longer liver of myself and my said intended husband if I shall be the longer liver, but after the decease or second marriage of the said" second party "if he shall be the longer liver."

The second party maintains that payment was postponed in order that he might enjoy a liferent of the trust funds during his life or until he married again, and that that object has been effectually carried out by postponing the term of payment until his death or second marriage, the fee being given to the very persons who would have been Mrs Bate's heirs *in mobilibus ab intestato*.

That contention is founded upon a rule which seems to be well settled in the law of England and which may be stated thus—If a testator destines his estate to his heir-at-law *after the death of A* there is an implied gift of a life estate to A, but if the person to whom the estate is destined after the death of A is not the heir-at-law, the implication does not arise—*Ralph* v. *Carrick*, 11 Ch. Div. 873. The rule is equally applicable to the case of the next-of-kin.

That rule has never been actually applied in Scotland, but apparently the question has never arisen, and I am inclined to think that in circumstances appropriate for the application of the rule it would be adopted by this Court.

Now, if the third purpose here stood alone I think that the rule would have been applicable, but of course that purpose must be read along with and in the light of the other clauses of the assignation, and the question is, whether when so read it discloses an intention on the part of the truster to give a liferent to the second party, in the event, which has occurred, of there being surviving children of the marriage, with sufficient certainty to justify the Court in giving effect to it?

I am of opinion that that question must be answered in the negative. The second purpose of the trust confers a liferent on the second party in the event of there being no children. That seems to me to raise a strong presumption that the intention was that if there were children there should be no liferent, because if the intention was to give a liferent in any event, the obvious course would have been to say so, and one can hardly imagine a conveyancer not merely providing separately for the two cases, but doing so by giving an express liferent if there should be no children, and leaving it to be inferred that there should also be a liferent if there were children, by a mere declaration that payment of the capital should be postponed until the second party's death.

There is further the declaration which I have already quoted and which follows the enumeration of all the trust purposes, to the effect that "the foresaid liferent provision created" in favour of the second party "in the event before mentioned" should cease upon his second marriage. It is plain that that declaration refers only to the liferent given by the second purpose, and further the natural inference from the language of the declaration is that in the

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previous part of the assignation only one provision for a liferent to the second party had been made.

In the face of these clauses I think that it is impossible to hold that a liferent, in the event of there being children, was given by implication in the third purpose. It may be that, as matter of fact, the clause in that purpose postponing payment was inserted with the intention of giving a liferent to the second party. But that is mere conjecture, and I apprehend that the Court would not be justified in holding that a liferent was given by implication, unless the implication was so plain as to be practically equivalent to an express provision. It seems to me to be impossible to say that that is the case here.

I am therefore of opinion that the second party is not entitled to a liferent of the trust estate, and I shall now consider the alternative contention urged by the second party, namely, that the income of the trust estate from the death of Mrs Bate until the period of payment is undisposed of and falls into intestacy.

That also is a contention to which I am unable to assent. I think that by virtue of the third purpose the fee of the trust estate vested in the third parties at Mrs Bate's death, and that the income accruing after that date, not having been otherwise disposed of, followed the capital sum as an accessory, and that the third parties have right thereto.

The only other point requiring to be determined is what effect, if any, is to be given to the direction postponing the payment of the capital until the death or second marriage of the second party?

It seems to me to be impossible to gather from the assignation any definite trust purpose which the postponement of the term of payment was intended to serve, and that being so, and an absolute gift of the fee, vesting as at Mrs Bate's death, having been given to the third parties, there is no sufficient reason for keeping up the trust. I am therefore of opinion that the third parties are entitled to immediate payment of the trust estate with the interest which has accrued since Mrs Bate's death.

The result is that, in my judgment, the first alternative of the third question should be answered in the affirmative and all the others in the negative.

Lord Stormonth Darling—The puzzle of this trust-assignation (which was executed by the late Mrs Bate a few days before her marriage and in contemplation of that event) lies in the difficulty of reconciling the second trust purpose with the third and with the declaration in the fourth. If she intended that her husband should have a liferent of her estate in any case, whether there were children or not, why did she make it an express condition of the liferent conferred upon him by the second purpose, not only that she should predecease him, but also that there should be no children or issue of children of the marriage? On the other hand, if she intended that he should have no liferent in the event of there being children, why did she make the fee payable to the children only at his death or second marriage if he survived her? The second party, who is the husband, founds on this clause as implying a liferent; and he cites certain English cases which seem to support the proposition that a life estate in A B will be implied from a gift on the death of A B to the testator's heir-at-law or next-of-kin (although not to strangers) on the principle that the postponement of the heir's or personal representative's enjoyment of the subject (real or personal, as the case may be) till the death of A B is intelligible only on the supposition that A B is to take the intermediate income. Certainly no one has been able to suggest any other reason for postponing payment of the capital till after the death or second marriage of the husband.

But while there is much force in this reasoning, I read these English cases as applicable only to the pure case where a life estate may be implied because there is no express provision against it. Here there is an express provision, viz., that the liferent is to arise "in the event of there being no children or issue of children of said intended marriage." It is the only part of the deed in which a liferent is expressly given. And it seems to me that you would have to read these words out of the deed before you could give effect to the second party's argument. It may be permissible to conjecture that these words were not intended as an absolute condition of the liferent; but there they stand, in a deed, moreover, by which the lady was under no contractual obligation to grant a liferent at all, and it would be carrying conjecture too far to treat the words *pro non scriptis*.

I therefore agree with Lord Low on the main question; and I further agree that, the trust estate having vested as at Mrs Bate's death unburdened with any liferent, the third parties are entitled to immediate payment of it.

Lord Justice-Clerk—I have had an opportunity of perusing the opinions which have just been delivered, and I entirely concur in them.

Lord Kyllachy was absent.

The Court pronounced this interlocutor—

"Answer the first and second questions and also the second alternative of the third question in the negative, and the first alternative of the third question in the affirmative."

Counsel for the First Parties—Paton. J. W. & J. Mackenzie, W.S.

Counsel for the Second Party—M'Clure, K.C.—J. H. Millar. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Third Parties—Macfarlane, K.C.—Macmillan. Agents—Roxburgh & Henderson, W.S.

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Thursday, June 7.

SECOND DIVISION.

[Sheriff Court at Paisley.

CONN *v.* BURGH OF RENFREW.

Burgh—Common Good—Administration—Proposal by Town Council to Pay Out of Common Good Expenses of Opposing Parliamentary Bill—Title of Burgess to Object—Burgh Police (Scotland) Act 1903 (3 *Ed. VII, c.* 33); *Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. c.* 49); *Local Government (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 50); *Municipal Corporations (Borough Funds) Act* 1872 (35 *and* 36 *Vict. c.* 91).

The common good of a royal burgh being corporate property falls as such to be administered by the town council as the executive of the corporation, and having been originally derived from the Crown, the title to complain of any misapplication of it is vested exclusively in the Crown, and no action at law directed against the council's administration is competent at the instance of any individual burgess or burgesses (unless he or they can allege a patrimonial interest distinct from his or their interest as members of the community) except in so far as certain limited rights of intervention have been conferred by various statutes now consolidated in the Town Councils (Scotland) Act 1900. In particular, the Burgh Police (Scotland) Act 1903, the Local Government (Scotland) Act 1889, the Municipal Corporations (Borough Funds) Act 1872, do not affect the law which regulates the right of burghs to deal with the common good, or the manner of their doing so.

An individual burgess *held* not entitled to object to a town council defraying the expense of opposing a bill in Parliament out of the "common good." *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C., *followed.*

Burgh—Municipal Corporations (Borough Funds) Act 1872 (35 *and* 36 *Vict. cap.* 91).

The question of the applicability of the above Act to Scotland *raised* but *not decided.*

The Burgh Police (Scotland) Act 1903 (3 Ed. VII, cap. 33), section 55, provides—"Without prejudice to any powers possessed by them under the existing law, the town council of a burgh shall, subject to the like conditions, have the like powers of opposing bills or provisional orders as are conferred upon county councils by section 56 of the Local Government (Scotland) Act 1889 as read with the Private Legislation Procedure (Scotland) Act 1899, and any expenses incurred by them in any year in the exercise of the last-mentioned powers may be defrayed in whole or in part from any assessment or from any two or more separate assessments levied by them in such year or in the following year, all as the town council may determine. Provided that any ratepayer who is entitled to an exemption from any assessment leviable by the town council may appeal to the Secretary for Scotland against any such determination, and his decision shall be final. . . ."

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 56, provides—"The council of a county shall have the same powers of opposing bills in Parliament, and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the county, as are conferred by the Act of the thirty-fifth and thirty-sixth years of Her present Majesty, chapter ninety-one; and, subject as hereinafter provided, the provisions of that Act shall extend to a county council as if such council were included in the expression 'governing body' and the county were the district in the said Act mentioned: Provided that (*a*) no consent of owners and ratepayers shall be required for any proceedings under this section; (*b*) this section shall not empower a county council to promote any bill in Parliament or to incur or charge any expense in relation thereto, save only a bill for confirming a provisional order made under or in pursuance of the provisions of any Act of Parliament; (*c*) the consent of the Secretary for Scotland shall be substituted for the consent of the Secretary of State or Local Government Board."

The Municipal Corporations (Borough Funds) Act 1872 (35 and 36 Vict. cap. 91), sec. 2, provides—"When in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund, borough rate, or other the public funds or rates under the control of such governing body, to the payment of the costs and expenses attending the same, and when there are several funds or rates under the control of the governing body, such governing body shall determine out of which fund or funds, rate or rates, such expense shall be payable and in what proportions. . . ."

Section 4—"No expense in relation to promoting or opposing any Bill or Bills in Parliament shall be charged as aforesaid, unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body at a meeting of the governing body, after ten clear days' notice by public advertisement of such meeting and of the purpose thereof in some local newspaper published or circulating in the district, such notice to be in addition to the ordinary notices required for summoning such meeting, nor unless such resolution shall have been published twice in some newspaper or newspapers circulating in the district, and shall have received, in respect of matters within the

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jurisdiction of the Local Government Board the approval of such Board, and in respect of other matters the approval of one of Her Majesty's Secretaries of State; and in case of the promotion of a Bill in Parliament, no further expense shall be incurred or charged as aforesaid after the deposit of the Bill, unless the propriety of such promotion shall be confirmed by such absolute majority at a further special meeting to be held in pursuance of a similar notice not less than fourteen days after the deposit of the Bill in Parliament. Provided further, that no expense in promoting or opposing any Bill in Parliament shall be charged as aforesaid unless such promotion or opposition shall have had the consent of the owners and ratepayers of that district to be expressed by resolution in the manner provided in the Local Government Act (1858) for the adoption of that Act."

Section 5—"The approval of the Local Government Board or one of her Majesty's Principal Secretaries of State, as the case may be, shall not be given to any such resolution as aforesaid until the expiration of seven days after the second publication thereof as provided by this Act, and in the meantime any ratepayer within the district of the governing body may give notice in writing to the Local Government Board or Secretary of State objecting to such approval."

The Renfrew Police and Improvement Act 1855 provides, section 17—"That if and when the general assessments, other than private and district assessments, authorised to be levied under the said recited Act and this Act, shall exceed in any year the sum of sixpence in the pound, but not otherwise, and if the burgh shall be at the same time possessed of any free income arising from the common good thereof, after deduction of the interest of any debt which the burgh may owe, and also the necessary annual outgoings of the burgh, there shall be annually contributed, in the events aforesaid, from the said free income, such a reasonable proportion towards the purposes of this and the said recited Act as the Town Council of the burgh, having due regard to the extinction of the capital of such debt, shall think just . . ."

The Town Council of Renfrew took steps to oppose a Bill introduced into the House of Commons, under the title of 'An Act to Amend the Constitution of the Trustees of the Clyde Navigation and for Other Purposes.' The Town Council of Renfrew were trustees of Renfrew Harbour, and their opposition to the Bill was based upon the fact that under it the Burgh of Renfrew had no representative upon the Clyde Navigation Trust, and the object of their action was to obtain, if possible, some suitable representation.

The Town Council proposed to defray the expenses of the opposition of the Bill out of the common good of the burgh.

John M. Conn, 72 Fulbar Street, Renfrew, an inhabitant and ratepayer in the burgh, thereupon brought a petition in the Sheriff Court of Renfrew at Paisley against the Provost, Magistrates, and Councillors of the Royal Burgh of Renfrew, praying the Court "to interdict the defenders from paying out of or charging to, or proceeding to pay out of or charging to, the common good account of the Burgh of Renfrew, or from paying out of or charging to, or proceeding to pay out of or charging to, any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, in pursuance of resolutions alleged to have been passed at special private meetings of the Town Council of the Burgh of Renfrew, held within the Council Chambers on 6th and 12th April 1905, or one or other of them, to the effect that the Bill after mentioned should be opposed by them in Parliament unless due representation be granted to them on the public body known as the Trustees of the Clyde Navigation, any sum or sums for the purpose of being applied towards the costs and expenses attending the opposing by defenders in Parliament a Bill introduced therein entituled 'An Act to Amend the Constitution of the Trustees of the Clyde Navigation, and for Other Purposes,' until the defenders shall have complied with the terms and provisions of (1) the Municipal Corporations (Borough Funds) Act 1872; (2) the Local Government (Scotland) Act 1889; and (3) the Burgh Police (Scotland) Act 1903, or obtained the approval of the Secretary for Scotland to said resolutions in terms of said Acts, and to grant interim interdict and to find the defenders liable in expenses."

[The defenders had never proposed and did not propose to pay any part of the expenses out of rates or assessments. The only question, therefore, dealt with in the case came to be that connected with the "common good."]

The pursuer averred *inter alia*—"(Cond. 10) It is a condition-precedent to the defenders charging any burgh funds under their control with the costs and expenses attending the opposition to any bill in Parliament, or to the prosecution of any proceedings necessary for the protection of the interests of the inhabitants of Renfrew, and in particular the Bill which the defenders are opposing as above condescended on, that they should comply with the Municipal Corporations (Burgh Funds) Act 1872, the Local Government (Scotland) Act 1889, and the Burgh Police (Scotland) Act 1903. This the defenders have failed to do, and it is illegal and *ultra vires* of the defenders to pay out of or charge, or proceed to pay out of or proceed to charge, as they intend to do, any burgh funds under their control with such costs and expenses until they have so complied with the provisions of said Acts, and in consequence of the defenders' illegal proceedings the pursuer is prevented from exercising his statutory rights, and will suffer material loss in consequence of increased taxation consequent on defenders' action, the general assessments being already 1s. 1½d. per £. (Cond. 11) The defenders are not entitled under these statutes or any other statute, nor at common law, to pay out of or charge to, or proceed to pay

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out of or proceed to charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, with the costs and expenses attending the opposition in Parliament to said Bill, except subject to the regulations contained in the statutes referred to in the immediately preceding article, and with the consent foresaid. No rights, powers, or privileges of the defenders are attacked or threatened by the promotion of the said Bill for reconstitution of the Clyde Trust, nor will any alteration in the constitution thereof affect Renfrew. . . ."

In their answers the defenders stated, *inter alia*—"(Ans. 9) Admitted that the defenders . . . have resolved to oppose said Bill in the House of Commons, and to pay expenses incurred by them out of the common good of the burgh. . . . Explained that the defenders have adopted in connection with said resolution the same procedure which has been adopted by them and all other burghs administering a common good from time immemorial. In particular, in 1879, 1892, 1899, and 1902, the defenders or their predecessors in office have spent money out of the common good in connection with the promotion of Bills relating to the harbour of Renfrew, and that after adoption of the same procedure as has been adopted in the present case. The defenders are satisfied after the most careful consideration of the question that it is material to the general interests of the Burgh of Renfrew that they should be represented upon the Clyde Navigation Trust, and it is believed that this is the general opinion of the vast majority of the ratepayers. Such representation will, it is thought, most likely be secured by following the course resolved upon. The pursuer has no interests whatever to object to the action of the defenders."

The pursuer stated, *inter alia*, the following pleas—"(1) The defenders not being entitled in terms of either the Municipal Corporations (Borough Funds) Act 1872, the Local Government (Scotland) Act 1889, the Burgh Police (Scotland) Act 1903, or any other Act, to pay out of or charge to or proceed to pay out of or charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, the costs and expenses or any part thereof of opposing the said Bill, except subject to the regulations contained in said statutes, and after having the approval of the Secretary for Scotland to any resolutions passed by them, and not having complied with or observed said regulations or obtained said approval, the pursuer is entitled to interdict as craved with expenses. (2) The defenders not being entitled to pay out of or charge to or proceed to pay out of or charge to the common good account of said burgh, or any of the assessments and rates imposed and collected by them, or other the public funds or rates under their control, the costs and expenses or any part thereof of opposing the said Bill, the pursuer is entitled to interdict as craved."

The defender stated, *inter alia*, the following plea—"(3) The action ought to be dismissed in respect that the pursuer has no title, *separatim* no interest, to challenge the defenders' administration of the common good."

On 23rd May 1905 the Sheriff-Substitute (LYELL) pronounced the following interlocutor:—". . . Finds that the pursuer has set forth no title or interest to sue the present action: Therefore dismisses the same. . . ."

Note.—"In this action the pursuer asks that the Provost, Magistrates, and Town Councillors of Renfrew should be interdicted from charging to the common good of the burgh or from charging to the assessments to be levied by them within the burgh the expenses to be incurred by the defenders in opposing before Parliament a Bill entitled 'An Act to amend the Constitution of the Trustees of the Clyde Navigation, and for Other Purposes,' until the defenders shall have complied with the provisions of certain Acts of Parliament enumerated in the prayer of the petition. The only title that the pursuer sets forth on record is that he is an inhabitant of the Burgh of Renfrew, and that he will be 'injuriously affected' by the actings of the defenders. The injury which he says he will suffer comes, shortly stated, to this, that the burgh rates will be raised, or if the payment is made out of the common good there will be less money capable of being applied from that fund to the reduction of the rates. In other words the pursuer appears as champion of the community, asking nothing for himself that he does not demand for the whole body of ratepayers in Renfrew. It is hardly matter for argument at this time of day that such an interest as that gives no title to a pursuer to bring this kind of action. I have had occasion to express my views at length upon this very subject in the case of *Mackenzie* v. *The School Board of Renfrew*, being No. 183 of the ordinary cases in this Court, to which views I still adhere, and I cannot do better than quote from the note of the Sheriff his opinion on the matter, with which opinion I entirely agree—'The cases of *Ewing* and *Morrison*, both decided in the House of Lords in 1839, are direct and, as I think, standing authorities for the proposition that at common law a ratepayer as such has no title to maintain an action against a public body for alleged illegal application of funds, but in order to qualify a title must distinctly allege personal patrimonial injury, and ask a judgment which will have the effect of redressing the injury done him. And one can readily see the propriety of such a rule for I can imagine nothing more calculated to paralyse the action of a public body, to which large powers of administration and management have been delegated, than to know that they are liable to be brought into Court at the instance of any ratepayer who takes it into his head that a particular resolution or act of management, though it in no way affects him patrimonially, is not strictly legal.'

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"*Ewing's* case (15 S. 389, and 1 M'L. & R. 847) seems to me to be absolutely in point here. In that case the Glasgow Police Commissioners had spent police funds in opposing a water company's Bill, and the prayer there was to have them ordained 'to repeat and pay back' the money 'into the funds of the said police establishment;' and Lord Medwyn's opinion in 15 S., at p. 397, is instructive. He says—'Parties may object to an illegal tax so far as regards their own portion of it. They cannot appear for the community or other ratepayers.'

"At common law, then, the pursuer has no title, having set forth no interest but that of a ratepayer, and cases such as *Cowan*, 10 Macph. 578, and *Wakefield*, 6 R. 259, have no application to a case such as this where the defenders are not a body of trustees entrusted with funds to be used for a particular specified purpose, but the Town Council of a Burgh clothed with large discretionary powers of management and administration. But it was argued that the effect of the provisions of sections 91 to 96 of the Town Council's Act of 1900 is to abrogate the law of *Ewing* and kindred cases. On the contrary, however, I think these provisions have nothing whatever to do with the point I am here considering. They simply provide for accounts being properly kept and audited, and allow a dissatisfied ratepayer a certain appeal to the Sheriff. That appeal was held by the Court in *Heddle's* case, 25 R. 801, to be competent to a ratepayer though he could aver no patrimonial interest. But it was so held merely because the statute founded on specially authorises such a course. No one suggested that an individual ratepayer has such a right at common law; and no such provision allowing an appeal in certain circumstances and under certain conditions can possibly be founded on as an authority for the bringing of an action for interdict or repayment by a person who, according to well-established law, has no title or interest to bring such an action. I need only further say that, even had the pursuer's title been good, I very much doubt the relevancy of his averments, and the competency, or at least the convenience, of trying such questions as he endeavours to raise in a summary process of interdict in the Sheriff Court."

The pursuer appealed to the Sheriff. On 26th June 1905 the interim Sheriff (LEES) pronounced an interlocutor adhering to the interlocutor of the Sheriff-Substitute.

Note.—"In dealing with a petition for interdict it is necessary to notice precisely what is asked and on what grounds. Here the petitioner asks the Court to interdict the Town Council of Renfrew from paying their expenses of opposing a recent Clyde Trust Bill out of any of the burgh assessments, or out of the burgh public funds, or out of the common good, till they comply with three specified statutes or obtain the approval of the Secretary of Scotland. From the terms of the condescendence and of the pleas-in-law it is plain that the pursuer means that the approval of the Scotch Secretary must be got in addition and not as an alternative to compliance with the requirements of the three statutes.

"The need to bring the action is based on the averment that the defenders at a certain meeting resolved to pay the abovementioned expenses out of the common good or the burgh rates. The defenders say they never proposed to pay these expenses out of the rates, and as the copy of their minutes, produced by the pursuer, confirms what the defenders state, interdict on that ground cannot be given, for a court does not interdict people from doing what has never been threatened to be done.

"Now, the three statutes I have mentioned are of importance to the pursuer's case in this way, that the latest of them—the Burgh Police Act of 1903—allows a town council to pay the expenses of opposing a Parliamentary Bill out of the rates, after complying with certain provisions which are a safeguard to the ratepayers against improper application of the rates, and which give any dissatisfied ratepayer an opportunity of being heard before approval so to apply the rates is given.

"If, therefore, the Town Council had been proposing to pay these expenses out of the rates, the pursuer would have been in a position to complain that the defenders were evading the opportunity given of protecting himself by the Act of 1903, taken in conjunction with the two earlier statutes embodied in it. But then the complete reply is that, as has been pointed out, the defenders are not proposing to pay the expenses out of the rates, and the combination of the three statutes does not deal with the common good. In taking their expenses out of the common good the defenders cannot be called on to comply with the provisions of three statutes, two of which at least have nothing to do with it.

"But the pursuer contends that at common law he has a right to challenge this interference with the common good, while on the other hand the defenders say that at common law they were acting within their rights. Perhaps the defenders are right, but I think it would be improper of me to express any opinion.

"The pursuer's contention has been discussed by the learned Sheriff-Substitute with considerable fulness, and as I entirely concur with the views he has expressed, little remains to be said. At common law the pursuer of an interdict must set forth both a title and an interest to sue. Now the title and interest that the pursuer here avers are that he is a ratepayer, and that unless the defenders are stopped he will be 'injuriously affected, . . . and will suffer material loss in consequence of increased taxation.' This is somewhat vague; but it was explained in argument that under the 17th section of the Renfrew Police Act of 1855 it is provided that whenever the police rates exceed sixpence in the pound a reasonable contribution may be made to them from the income of the common good. In this way the pursuer says that if the capital of the common good is lessened, the chance of a contribution towards the police rates

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is diminished, and thus the rates in some future year may, and probably will, be higher than they would otherwise have been.

"But this is a contention that has again and again been held as only supplying a ground of loss which is too remote and indirect to be able to be taken into consideration. The loss founded on must be direct patrimonial loss, which will appreciably affect the complainer. I do not think that the case of *Russell* v. *Magistrates of Hamilton*, 25 R. 350, is in conflict with these views. There the pursuers of the interdict had a *locus standi* to complain, as they were already objectors to the granting of the Provisional Order, as a step to which the inquiry of which they complained was about to be held.

"On the whole case I therefore think that the Sheriff-Substitute did right to refuse the interdict asked.

"I should perhaps allude to the plea of no jurisdiction which the defenders mentioned but did not venture to press. Considering the frequent occasions in which recent statutes direct the local courts to give protection to aggrieved ratepayers, it would seem anachronous to hold they were powerless in such a matter as this."

The pursuer appealed to the Court of Session, and argued—The defenders' proposal to pay expenses out of the common good was illegal, they not having complied with the necessary statutory provisions contained in the Municipal Corporations (Borough Funds) Act 1872, and also the Local Government (Scotland) Act 1889 and the Burgh Police (Scotland) Act 1903. The Act of 1872 applied to Scotland—*see* section 11 (special provision that it shall not apply to Ireland or London)—*Perth Water Commissioners* v. *M'Donald*, June 17, 1879, 6 R. 1050, at 1055 and 1059, 16 S.L.R. 619; *Leith Dock Commissioners* v. *Magistrates of Leith*, November 30, 1897, 25 R. 126, at 132 and 139, 35 S.L.R. 132. But even on the assumption that the defenders' proposals transgressed no general statutory rules, they at anyrate violated the Special Act applicable to the burgh of Renfrew, viz., the Renfrew Police Act 1855, sec. 17. Further and lastly, they were objectionable at common law inasmuch as the defenders, being trustees of the common good, could only legally apply it to trust purposes, which the present was not—*Queen* v. *Mayor of Sheffield*, L.R., 6 Q.B. 652. As to the pursuer's title to sue, an express title was conferred on him by the Act of 1872, sec. 5, and at common law his title was at least as good as those of the pursuers in *Wakefield* v. *Commissioners of Supply of Renfrew*, November 29, 1878, 6 R. 259, 16 S.L.R. 183, and *Cowan & Mackenzie* v. *Law*, March 8, 1872, 10 Macph. 578, 9 S.L.R. 341.

Argued for the defenders—The pursuer's case on record was founded on three statutes. Of these the Acts of 1903 and 1889 applied only to rates and had no bearing on the "common good," and the Act of 1872 did not apply to Scotland—*vide* the terminology &c. of the Act and the opinions delivered in the House of Lords in *Magistrates of Leith* v. *Leith Dock Commissioners*, July 25, 1899, 1 F. (H.L.) 65, 36 S.L.R. 956, but reported on this point only in Constable's Provisional Orders, p. 107; *vide* also *Fordyce* v. *Bridges*, February 23, 1847, 6 Bell's Appeals, p. 1. Assuming, however, that the Act did apply to Scotland, it was an Act whose object was to enlarge and not to curtail the powers of magistrates, and could not therefore apply to the "common good," which was not a "borough fund," with which alone it dealt. At common law the pursuer had no title to sue—Erskine, i, 4, 23; *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C.; *Ewing* v. *Glasgow Commissioners of Police*, January 19, 1837, 15 S. 389, *aff.* August 16, 1839, M'L. and Rob. 847; *Paterson, &c.* v. *Magistrates of St Andrews, &c.*, July 12, 1881, 8 R. (H.L.) 117, at 122, 18 S.L.R. 728; *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9. R. (H.L.) 91, at 95, 19 S.L.R. 893; *vide* also Acts 1491, c. 36; 1593, c. 185. If he had a grievance a remedy was provided by the Town Councils (Scotland) Act 1900, secs. 91 to 99, especially 96.

LORD KYLLACHY—In this case I agree with the Sheriffs, and, speaking generally, with their reasons. As they rightly point out, the question is not as to the respondents' power to assess for the expenses in controversy, but as to their common law power to pay the same out of their common good. It appears to me that this being conceded, it is in itself conclusive against the appellant's action as laid. For, as expressed both in the petition and in the pleadings, the complainer's case is rested entirely upon certain provisions of the Burgh Police Act of 1903, or at least upon that statute read in connection with two previous statutes to which it makes reference for certain purposes. And it appears when examined that the statute in question (that of 1903) has nothing whatever to do with the administration of the common good of royal burghs. In point of fact it refers to all burghs, royal, parliamentary, or police; and the particular provisions founded on relate simply to a special power of assessment conferred with respect to a certain kind of expenditure—a power which the Act confers under certain conditions as to procedure, but which is expressly declared to be without prejudice to all powers already existing, including of course all powers possessed by royal burghs with respect to the application of their common good.

It may, however, be undesirable to dispose of the case upon the ground merely of defects in the pleadings — defects which might possibly be obviated by amendment. And, accordingly, it may be as well to consider generally, as the Sheriffs have done, the merits of the pursuer's complaint as applied to the proposed expenditure from the common good, and in particular the appellant's title to interdict that expenditure.

Now, apart from statute (and apart of course also from special conditions attaching by charter or usage), the legal position

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of the common good of a royal burgh does not seem to be doubtful.

In the first place, the common good is corporate property, and falls as such to be administered by the Town Council as the executive of the corporation, and applied by them for the benefit of the community, in such manner as, using a reasonable judgment, they think proper.

In the next place, however, the corporate property having been derived from the Crown, and the Crown possessing over it a right of oversight and control, it has always been recognised that the Crown may at any time intervene to prevent or redress any abuse or malversation on the part of the Town Council.

Lastly, the Crown having this right, and perhaps duty, it has always been held by consequence that the Crown's title to intervene is exclusive. In other words, no action at law directed against the Council's administration is competent at the instance of any individual burgess or body of burgesses. This last proposition is laid down very distinctly by Erskine (i, iv. 23), where he explains, *inter alia*, that the "maladministration of borough revenues is to be considered rather as a matter of public government than the subject of a popular action in a court of law; and therefore no private burgess or number of burgesses seem entitled to such action against their magistrates." And the same doctrine has more than once received judicial recognition, particularly in the case of *Mollison* v. *Magistrates of Inverury*, December 14, 1820, F.C., a case referred to in Lord Ivory's note to the passage I have just quoted. The case of *Ewing* v. *Glasgow Commissioners of Police*, 1837, 15 S. 389, *aff.* (H.L.) 1839, M'L. & R. 847, referred to by the Sheriff, went perhaps a step further, for it seems to have extended the principle to the case of police funds which, although the produce of an assessment, were in the administration of the Town Council as police commissioners. How far that extension was justifiable has sometimes been doubted. But it has never been doubted (speaking always apart from statute) that the title to complain of misapplication of the common good of a Royal Burgh is vested exclusively in the Crown.

By statute, however, checks upon the Town Council's powers have from time to time been introduced, and incidentally to those checks certain limited rights of intervention have been conferred on individual burgesses or classes of burgesses. The series of statutes is as follows:—1491, cap. 36; 1535, cap. 26; 1593, cap. 185; 1693, cap. 28; 3 Geo. IV, cap. 91 (1822); 63 and 64 Vict. c. 49 (1900).

For the present purpose, however, it is enough to note (1) that as early as the Act 1535, cap. 26, Royal Burghs were required to bring annually into Exchequer an account of the revenues of their Burghs "that the 'Lords Auditours' may judge whether they have been properly expended;" and the Act further contains a provision that fourteen days' notice shall be given in order that "all concerned may come and impugn the same if that is desired;" (2) that this enactment was continued in an expanded form by the Act 3 Geo. IV, cap. 91, which regulated the whole matter until the recent Act of 1900, and which provided (sec. 3) that after production of the annual account as therein mentioned, it should be competent to any *three* or more burgesses of a burgh to make complaint in writing to the Barons of Exchequer in Scotland, who should proceed to determine the same in a summary manner; (3) that the whole matter is now regulated by the said Act of 1900 (63 and 64 Vict. ch. 49), which repealing the Act last mentioned, makes careful provisions for the publication and audit of all burgh accounts, including those of Royal Burghs, and also for the intervention of any ratepayer or elector who may be dissatisfied with any account or any item in it, such intervention being by application to the Sheriff, as therein provided, with a right of appeal as in ordinary actions in the Sheriff Court.

It can hardly, therefore, be said that the administration of the common good in Royal Burghs is not now effectually supervised, or that individual burgesses are without remedy if they desire to raise a question as to the lawfulness of any particular expenditure. This, of course, however, only tends to emphasise the incompetency of the action which is now before us.

I have only to add that I have not overlooked the appellant's separate argument upon the Burgh Funds Act of 1872 (35 and 36 Vict. cap. 91). Apart from the question whether that Act applies to Scotland, which is by no means clear, it seems to me a sufficient answer that, like the Act of 1903, the Act of 1872 is an enabling, and not a restricting Act, and that it contains, like the former Act, an express provision that its powers shall be without prejudice to any powers already possessed by any public authority. As to the Renfrew Police Act of 1855, on which the appellant's counsel also founded a separate argument, I can only say that I agree with the Sheriffs that it has no bearing on the present case.

On the whole, therefore, I am of opinion that we should adhere to the judgment of the Sheriff.

LORD STORMONTH DARLING—I am quite satisfied with the Sheriff's mode of disposing of this case. In particular the interim Sheriff (Lees) is quite right in pointing out that, as shown by their minutes, the Town Council never proposed to pay the expenses of opposing the Clyde Trust Bill out of the rates, and therefore that the only interdict that could be asked is an interdict against their paying these expenses out of the common good of the burgh. That is qualified in the petition by this, that they shall not do so until they shall have complied with the provisions of three specified statutes regulating procedure. Now, waiving for the moment the question whether the first of these statutes, the Municipal Corporations (Borough Funds) Act 1872, applies to Scotland at all, and conceding for the sake of argument that it does, the ques-

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tion comes to be, do these three statutes taken together alter the law regulating the right of Scottish royal burghs to deal with their common good or their manner of doing so?

I do not suppose that anybody will question the law upon this matter as stated by Lord Watson in the case of *Grahame* v. *Magistrates of Kirkcaldy*, 9 R. (H.L.) 95—"As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes, but no member of the community has a title to call the respondents to account generally for their maladministration of the common good of the burgh. The respondents are not answerable for their administration of the burgh property, as if they were trustees for the community. Except in so far as its actings may interfere with the personal uses which an inhabitant is entitled to make of the burgh property, the corporation is only accountable to the Crown for its administration of that property. The law is so stated by Mr Erskine (book i, tit. 4, sec. 23), and was affirmed by the Court in the case of *Mollison* v. *Magistrates of Inverury*." Lord Watson used this language in 1882, ten years after the passing of the Municipal Corporations Act. There is not a hint in his Lordship's judgment that the law as he stated it was altered or in any way affected by the passing of that Act, and that is not to be wondered at when you find that the Act itself is an enabling one and contains a clause (section 8) providing that "nothing in this Act shall extend or be construed . . . to take away or diminish any rights or powers now possessed or enjoyed by any governing body." I therefore arrive at the conclusion that the rights of the town council of a Scots royal burgh to deal with their common good for proper burgh purposes has all along stood as it did in Erskine's day, and that it cannot be challenged at the suit of an individual inhabitant unless he can allege a patrimonial interest of his own distinct from his interest as a member of the community.

It is true and is admitted by the defenders that their ministerial duty as regards all corporate property (common good included) was prescribed in 1900 by the Town Councils (Scotland) Act of that year, which enacted (secs. 91-9) that yearly accounts should be made out and audited, and that any "ratepayer or elector" who is dissatisfied with the account or any item therein may complain against the same by petition to the Sheriff within a specified time. But this, of course, is not a proceeding of that kind. Neither does it seem to me that the local Act of 1855 helps the pursuer's case. Section 17 provides, in the event of the general assessments for any year exceeding sixpence in the £ but not otherwise, for a contribution from the free income of the common good towards the expenditure of the burgh, and for the decision by the Sheriff of any question as to the amount of the contribution. But that procedure can only take place when a question is raised by six or more inhabitants rated for assessment of premises above a certain value, and they require the decision of the Sheriff by notice in writing. No such procedure has here been taken.

Lord Low—It seems to me that there are several grounds, any one of which would be sufficient for the decision of this case.

In the first place, I think that the Sheriff was justified in throwing the action out upon the question of title. It is not, perhaps, very easy to reconcile all the cases relating to the right of a ratepayer to challenge the administration of public funds, but there is one authoritative decision which is precisely applicable to the present case. I refer to the case of the *Burgesses of Inverury* v. *The Magistrates*, 14th December 1820, F.C.

In that case several burgesses of Inverury brought an action against the magistrates, charging them with gross mismanagement of the burgh property, and specifying particular instances where the burgh funds had been "either shamefully misapplied, or not at all accounted for." The summons concluded for decree against the magistrates ordaining them to restore certain specified sums to the credit of the burgh, and also for a general accounting.

The Court held, in the first place, that the burgesses had no title to sue, seeing that "they asked no judgment available to themselves, but complained merely of acts done to the prejudice of the burgh." The Court further held that the action was incompetent, the Court of Session having no general jurisdiction in relation to burgh accounts or the management of burgh revenues, and the distinction which had been drawn in an earlier case between a general accounting and an action based upon specific acts of alleged malversation, was held not to be well founded.

The case of *Inverury* has always been regarded as an authoritative judgment, and it has been referred to with approval in the House of Lords first by the Lord Chancellor in the case of *Ewing* (1 M'L. & R. 847), and afterwards by Lord Watson in *Grahame*, 1882, 9 R. (H.L.) 91, at p. 95.

I am therefore of opinion that the plea that the pursuer has no title or interest to sue was properly sustained by the Sheriffs.

Even, however, if it should be held that the pursuer has a title to sue, I think that he must fail upon the merits of the case.

It seems to me that the only question which is properly raised in the petition is whether the defenders were entitled to apply funds administered by them in payment of the expenses of opposing a Bill in Parliament without adopting the procedure provided by the 55th section of the Burgh Police Act 1903. The pursuer founds both in the prayer of the petition and in the condescendence upon three statutes taken together, these statutes being the Municipal Corporations Act 1872, the Local Government Act 1889, and the Burgh Police Act 1903. By the 55th section of the last named Act it is provided that the

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Town Council of a burgh shall have the like powers of opposing bills or provisional orders as are conferred upon County Councils by the Local Government Act, and the latter Act in turn incorporates by reference certain provisions of the Municipal Corporations Act 1872.

By the 55th section of the Act of 1903, therefore, the three Acts are combined, and in order to ascertain the procedure to be followed they must be read together; and it seems to me that that is plainly what is referred to in the prayer of the petition. When the petition was brought it appears that the pursuer understood that the defenders proposed to defray the expenses of opposing the bill both out of the assessments and out of the common good. If that had been the case the pursuer would have been right in founding upon the 55th section of the Act of 1903 in so far as the assessments were concerned. It turns out, however, that the defenders do not propose, and never have proposed, to defray the expenses out of the assessments but out of the common good, and seeing that the Act of 1903 refers to assessments only and does not in any way affect the right of a Town Council to deal with the common good, it is clear that the provisions of the 55th section have no application to the case as it now stands.

That also is sufficient for the disposal of the case as laid, but there was another ground upon which the pursuer anxiously contended that he was entitled to decree, and upon which (although it is not raised upon record) it may be desirable that we should express our opinion.

It was contended that, at all events, the defenders were bound to adopt the procedure directed by the Municipal Corporations Act of 1872. Now it may be that the language of the 2nd section of that Act is wide enough to include the common good of a burgh; but in the first place, the Act is an enabling Act conferring upon what is called the "governing body" powers which it did not previously possess; and in the second place, the 8th section expressly saves "any rights or powers now possessed or enjoyed by any governing body." If, therefore, the Town Council of a royal burgh have otherwise power to apply the common good to such a purpose as that in question, they do not require to take advantage of the powers conferred by the statute. Now, no authority was cited, nor indeed was any serious argument submitted to us, to the effect that it is incompetent for a Town Council acting in good faith to defray out of the common good the expenses of opposing a Bill in Parliament, which in their judgment is prejudicial to the interests of the burgh. In my opinion it is competent for the Town Council so to apply the common good, and I have nothing to add to the exposition of the law which has been given by Lord Kyllachy.

I therefore concur in the view that the action should be dismissed.

Lord Kyllachy — I should perhaps explain that I entirely concur with the concluding sentences of Lord Low's opinion.

Lord Justice-Clerk—I have no hesitation in concurring with your Lordships in throwing out the action on the ground of want of title. I cannot see any reasonable ground upon which the title of the pursuer could be maintained on principle, and in view of the decisions already pronounced, I consider that that question is foreclosed.

I am glad, however, that your Lordships have dealt with the case on the merits on the assumption of a title to sue. I entirely concur in what has been said by your Lordships on that matter.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for Appellant—Hunter, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents—Blackburn—Hon. Wm. Watson. Agents—Dundas & Wilson, C.S.

HOUSE OF LORDS.

Friday, March 30.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Macnaghten and Robertson.)

BROWN *v.* JOHN HASTIE & COMPANY, LIMITED.

(In the Court of Session, November 8, 1904, reported 42 S.L.R. 52, and 7 F. 97.)

Patent—Patents for Inventions—Master Patent or merely Patent for Mechanical Arrangement—Claim—Infringement.

A patent, the object of which was "the prevention of leakage of steam in steering and the like engines by the introduction into the steam feed-pipe of a casing which contains a cut-off valve, operated from and acting in unison with the controlling valve of the steering or like engine," claimed—"In connection with the valves of steering and like engines, fitting in a passage or casing through which the steam enters the controlling valve casing, a double beat or equivalent valve having opposite inclines acted on by counterpart inclines moving with the controlling valve, the parts being arranged and operating substantially as and for the purposes hereinbefore described."

The owner of the patent maintained that it was a master or pioneer patent, no means up to its date having been invented for preventing the leakage of steam in steering engines, and sought to have declared as infringements later patents having the same object and using a cut-off valve, which valve, however, was operated by a different mechanical device.

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Held that the claim must be construed as being merely for a mechanical arrangement, and consequently that the later patents, the mechanical device in which did not infringe the mechanical arrangement in the earlier patent, were not infringements.

The case is reported *ante ut supra.*

Hastie & Company, Limited (defenders and reclaimers) appealed to the House of Lords.

The claim in Brown's specification is quoted *supra* in rubric.

At delivering judgment—

LORD CHANCELLOR—This was an action for an infringement of a patent, and the question of the novelty of the invention was not raised upon the record, because that would have been derogating from a submission in a previous proceeding between the same parties. I do not desire to say anything whatever upon the subject of the novelty of the invention.

But, assuming that the invention was as novel as it appears to have been meritorious, I look at the claim in the appendix in order to ascertain whether or not there has been an infringement of this patent. It is superfluous to describe the mechanism of the patent, and of that which is alleged to be the infringement, for that has been done with the utmost clearness in the judgments of the Inner House, and also by the Lord Ordinary. In the result it appears to me that whether this is to be treated as an infringement or not depends upon the true construction of the claim at the end of the completed specification.

I have come to the conclusion that this claim cannot be enlarged in the manner proposed by Mr Cripps' argument. I think that the words in it, "having opposite inclines acted on by counter-part inclines," are the material parts of the claim as stated. I do not know whether the claim could have been stated otherwise—at all events it seems to me that we must treat this claim for the present purpose as being a claim for a mechanical arrangement, and once that is ascertained I do not think that it can be said that the mechanical device applied by the appellants is an infringement of the mechanical arrangement which has been described in the claim of the respondents.

Under these circumstances, with the greatest possible respect for the learned Judges in the Court of Session, I am of opinion that this appeal ought to be allowed, and I move your Lordships accordingly.

EARL OF HALSBURY—I am of the same opinion, and I have nothing to add.

LORD MACNAGHTEN—I agree.

LORD ROBERTSON—I entirely agree. The only point on which I shall add one word is as to what Mr Cripps has described in English phraseology, although this is a Scotch case, as an "estoppel." Now it seems to me to be perfectly clear that the whole effect of the consent decree pronounced in the previous action was that it tied the hands of this appellant from ever disputing the validity of the patent in question, or disputing that they had in the previous case infringed the patent. To me it seems impossible to rear out of that consent to the decree a logical process which shall convict the present appellant of inconsistency in now arguing about a different machine altogether that he has in fact not infringed. His undertaking was not to infringe, and he seeks now to shew that he has fulfilled that, and I think he has succeeded.

Their Lordships reversed the judgments appealed with expenses.

Counsel for the Pursuer and Respondent—Cripps, K.C.—Sandeman. Agents—Steedman, Ramage, & Bruce, W.S., Edinburgh—Fowler & Company, London.

Counsel for the Defenders and Appellants—Solicitor-General for Scotland (Ure, K.C.)—H. Fletcher Moulton. Agents—R. H. Millar & Company, S.S.C., Leith—John Kennedy, Westminster.

Monday, June 25.

(Before the Lord Chancellor (Loreburn), and Lords Macnaghten, James of Hereford, Robertson, and Atkinson.)

WINDRAM AND OTHERS (OWNERS OF "BUCCLEUCH") *v.* ROBERTSON (OWNER OF "KYANITE.")

(In the Court of Session May 23, 1905, reported 42 S.L.R. 602, and 7 F. 665.)

Appeal—Appeal on Questions of Fact—Review by House of Lords.

Observations per Lord Chancellor (Loreburn) in a case depending on review of a finding in fact, found by both the Lord Ordinary and the Inner House.

The case is reported *ante ut supra.*

Windram and Others, the owners of the sailing ship "Buccleuch," appealed to the House of Lords.

At the conclusion of the appellants' argument, the respondents not being called upon—

LORD CHANCELLOR—The only point that was raised in this appeal was whether the lights of the sailing ship "Buccleuch" were what they ought to have been, or whether they were so dim and imperfect for one reason or another that the vessel must be held to blame on that account.

The question is wholly one of fact, and there is a great deal of contradiction of evidence. There is a finding against the "Buccleuch" on this point not only of the Lord Ordinary but also of all the Lords of Session in the Inner House, and it would be a strong thing for this House to differ upon a point which is exclusively a point of fact with the findings of both Courts below. Were the matter entirely *res integra*, I

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should agree with the learned Judges in the Court of Session that it was a difficult case, but I think myself I should still have come to the same conclusion that they have done, namely, that the insufficiency of the lights was established. I attach particular importance to the evidence as to the condition of the lights after the collision, although it was after the collision, and for my own part I attach some importance to the fact that the Dutch pilot who was on board the "Buccleuch" was not called as a witness, and his absence was not accounted for.

Viewing the matter from the point of view of the third Court that has had to consider the facts, I feel it would be improper for us to dissent from the judgments which resulted in the order appealed from, and I think therefore the appeal should be dismissed.

LORD MACNAGHTEN—I also feel that it is impossible to differ from the conclusion at which the learned Judges in Scotland have arrived.

LORD JAMES OF HEREFORD, LORD ROBERTSON, and LORD ATKINSON concurred.

Their Lordships dismissed the appeal with expenses.

Counsel for Appellants—Butler Aspinall, K.C.—Horne. Agents—Webster, Will, & Company, S.S.C., Edinburgh—Rawle, Johnstone, & Company, London.

Counsel for Respondents—Sir R. Finlay, K.C.—Pickford, K.C.—Spens. Agents—J. & J. Ross, W.S., Edinburgh — Thomas Cooper & Company, London.

Thursday, June 28.

(Before the Lord Chancellor (Loreburn), Lord James of Hereford, and Lord Robertson.)

INVERARITY *v.* FORFARSHIRE COUNTY COUNCIL.

(In the Court of Session, March 10, 1904, reported 41 S.L.R. 434, and 6 F. 553.)

Public Health—Special Drainage District — Assessment — Expenses of Forming Special Drainage District—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 133.

When a special drainage district is formed in a county, the local authority is entitled under section 133 of the Public Health (Scotland) Act 1897, to levy within the special district, an assessment to raise a fund to meet the expenses, including legal expenses, properly incurred in the formation of the special district but prior to its formation.

The case is reported *ante ut supra.*

Inverarity, pursuer and reclaimer, appealed to the House of Lords.

The Public Health (Scotland) Act 1897 enacts—" . . . where any special drainage district has been formed under this Act or any of the Acts hereby repealed, the expense incurred by the local authority for sewerage or drainage within the same or for the purposes thereof, and the sums necessary for payment of any money borrowed therefor either before or after the passing of this Act, together with the interest thereof, shall be paid out of a special sewer assessment which the local authority shall raise and levy on and within such . . . special district, in the same manner and with the same remedies and modes of recovery as are hereinafter provided for the public health general assessment. . . . . ."

At delivering judgment—

LORD CHANCELLOR—In my opinion this appeal fails because the expenses in question can fairly be described as expenses incurred for the purposes of the special drainage district. I think the true construction of section 133 of the Public Health Act 1897 is that the words "purposes thereof" mean purposes of the special drainage district. I have nothing further to add to the exhaustive opinions expressed by the learned Judges in the Court of Session.

LORD JAMES OF HEREFORD—The main point involved in this case is when explained simple and clear.

The appellant, the pursuer in the Court below, held estates in the Brechin District of the county of Forfar. The Brechin District Committee of the County Council determined to form a special drainage district called Hillside, which would, for the purposes of drainage, be carved out of the Brechin District, and such Hillside District was duly formed. Certain legal expenses were incurred incidentally to and before the formation of the Hillside District. The amount of such expenses was by a resolution dated 5th October 1901 assessed and imposed upon this district.

The main question involved in the case is whether the assessment so made ought to have fallen on the whole Brechin District or upon the Hillside District formed out of it, and the solution of such question depends upon the construction to be put upon the 133rd section of the Act of 1897, and especially upon the provision that where any special drainage district has been formed the expense incurred by the local authority for sewerage or drainage within the same or for the purposes therof, &c., shall be paid out of a general sewer assessment to be levied within such district.

Now, the Lord Ordinary found that the resolution of the respondents to impose the said assessment was *intra vires*, and that the Hillside District was liable to discharge the expenses in question. The learned Judges of the Court of Session concur in this view, holding that the words "where any special drainage district has been formed" do not limit liability for expenses to those incurred after the formation of the district, and also that the words "or for

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the purposes thereof" may include legal and preliminary expenses. This reading and application of the Act seems to me to be reasonable and correct, and therefore my opinion is that the judgment should be affirmed.

There were some minor points raised in the argument in the Court below which seem also to have been correctly dealt with.

The appeal should be dismissed.

LORD ROBERTSON—I am entirely satisfied of the soundness of this decision. The empowering section (section 133), in virtue of which this assessment has been made, allows the County Council to assess the Hillside District for certain purposes. It seems to me that the opinions of Lord M'Laren and Lord Kinnear supply, in very few words, a complete answer to the only plausible argument of the appellant, and I intend to imitate their Lordships' brevity. The initial words beginning "where any" are satisfied by reference to the time of making the assessment and have no relation to the time when the expense assessed for has been incurred. The expense now in dispute is within the words, and I think it is also in accordance with the system of setting-up districts that it should be borne by the new district which has by those means obtained independence.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—The Lord Advocate (Shaw, K.C.)—B. A. Cohen. Agents—St Clair Swanson & Manson, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Counsel for the Respondents—Horace Avery, K.C.—Adamson. Agents—J. & J. Galletly, S.S.C., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Thursday, June 7.

FIRST DIVISION.

[Lord Johnston, Ordinary in Exchequer Causes.

INLAND REVENUE *v.* GIBB.

Revenue—Income Tax (Schedule D)—Moneys Held by Person in Representative Capacity—List to be Furnished by Person not Himself Directly Chargeable—Whether Statement of Profits Necessary or merely Name and Address—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *secs.* 42 *and* 51.

The Income Tax Act 1842 provides, sec. 42, that in the case of a trustee or agent who is in receipt of profit, &c., belonging to another, and who is not himself directly chargeable with duty, it shall be sufficient if he delivers a list "in the manner hereinafter required of the name and residence" of the persons entitled thereto.

Section 51 provides that every person who shall be in receipt of any money belonging to another for which such other person is chargeable shall "deliver in manner before directed a list in writing, in such form as this Act requires, signed by him, containing a true and correct statement of all such money, value, profits, or gains, and the name and place of abode of every person to whom the same shall belong. . . ."

A firm of underwriters on being asked to furnish a list in terms of section 51 of the Income Tax Act 1842 containing the profits due to their constituents, declined to do so, holding that under section 42 of the Act they were not bound to do more than furnish a list containing their names and addresses.

Held that the underwriters were bound to furnish the list called for containing the profits, section 42 being merely a proviso on preceding sections, and referring shortly to the list required by section 51 and not restricting the scope of such list.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) [after providing (section 41) for trustees and guardians of incapacitated persons being charged] enacts, section 42—"Provided always that no trustee who shall have authorised the receipt of the profits arising from trust property by the person entitled thereunto, or by the agent of such last-mentioned person, and which person shall actually receive the same under such authority, nor any agent or receiver of any person being of full age and resident in Great Britain, . . . who shall return a list in the manner hereinafter required of the name and residence of such person, shall be required to do any other act for the purpose of assessing such person. . . ."

Section 51 enacts—"Every person who shall be in receipt of money or value, or the profits or gains arising from any of the sources mentioned in this Act, of or belonging to any other person, in whatever character the same shall be received, for which such other person is chargeable under the regulations of this Act, or would be so chargeable if he were resident in Great Britain, shall within the like period prepare and deliver, in manner before directed, a list in writing in such form as this Act requires, signed by him, containing a true and correct statement of all such money, value, profits, or gains, and the name and place of abode of every person to whom the same shall belong, together with a declaration whether such person is of full age, . . . in order that such person, according to a statement to be delivered as herein mentioned, may be charged either in the name of the person delivering such list, if the same shall be so chargeable, or in the name of the person to whom such property shall belong, if of full age, and resident in Great Britain, and the same be so chargeable by this Act. . . ."

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On 5th July 1905 Hugh Gibb, 109 Hope Street, Glasgow, acting or representative partner of the firm of Cayzer, Irvine, & Company, underwriters, Glasgow, was cited to appear to answer to an information by the Lord Advocate on behalf of His Majesty, under the Income Tax Acts, 5 and 6 Vict. cap. 35, 16 and 17 Vict. cap. 34, and 4 Edw. VII, cap. 7.

The information bore—"That Hugh Gibb, No. 109 Hope Street, Glasgow, acting or representative partner of the firm of Cayzer, Irvine, & Company, underwriters, Glasgow, the said firm being persons in receipt of money, value, profits, or gains of or belonging to other persons, and chargeable under Schedule (D) of the Income Tax Act, 16 and 17 Vict. cap. 34, for the year ending the 5th day of April in the year 1905, in terms of 4 Edw. VII, cap. 7, and being bound in terms of the Income Tax Acts, and in particular of section 51 of the Income Tax Act (5 and 6 Vict. cap. 35), to prepare and deliver to the proper person appointed to receive the same, at his office, a list in writing containing a true and correct statement of all such money, value, profits, or gains, and the name and place of abode or residence of every person to whom the same belonged, with relative declarations, has refused or neglected to deliver to . . . a list in writing containing a true and correct statement of all money, value, profits, or gains of or belonging to any other person and chargeable under Schedule (D) of the Income Tax Act 16 and 17 Vict. cap. 34, for the year ending the 5th day of April in the year 1905, in terms of 4 Edw. VII, cap. 7, and received by the said firm, and the name or place of abode or residence of every person to whom the same belonged, with relative declarations, contrary to the provisions of the Income Tax Act (5 and 6 Vict. cap. 35), and particularly of sections 51 and 55 thereof; whereby the said Hugh Gibb has forfeited the sum of £50."

Gibb pleaded not guilty and lodged defences.

In his defences he stated—"Cayzer, Irvine, & Company are steamship owners in Glasgow, but they also act as insurance brokers and underwriting agents under mandates authorising them to underwrite risks for a number of underwriters all resident in Great Britain. . . . Each of the said underwriters is engaged in other trades, businesses, or concerns falling within Schedule D of the Income Tax Act 1842, and several of them are also engaged in other underwriting transactions through other agencies. The profits of said underwriters, which are chargeable for income tax, can be ascertained therefore only after there has been deducted or set off against the profits acquired in the said concerns, the excess of the loss sustained in any other of the said concerns over and above the profits thereof. . . . No form is prescribed by the Income Tax Acts appropriate for making the return called for, and the sections of the statute founded on in the information are not intended to and do not apply to the case of the respondent. The business carried on by the said Cayzer, Irvine, & Company is similar to that carried on in all cases of brokerage of every kind, where one person employs another to do business for him, on the understanding that the person employed accounts to the client for the profit, if any, arising from the client's own business. In such cases of brokerage section 51 of the Act has not been applied, and is not applicable."

The Lord Advocate lodged answers, in which he stated, *inter alia*—"On behalf of the underwriters for whom they act and take payment of premiums and to whom they are bound to account, Messrs Cayzer, Irvine, & Company are each year, and were in the year libelled, in receipt of money or value or profits or gains belonging to the said underwriters, and chargeable with income tax. . . . The notice which was duly given on 17th March 1905 by . . . was in a form prescribed and approved of by the Board of Inland Revenue. As provided by the Taxes Management Act 1880, notices of demand or other documents required to be used in assessing, charging, levying, and collecting duties are to be made out, drawn, and prepared according to forms prescribed and supplied or approved by the Board from time to time."

The defender pleaded—"On a sound construction of the sections of the statute founded on in the information, and in the circumstances condescended on, the respondent is not bound to furnish the list required."

The nature of the list which the defender was called upon to fill up appears from the following excerpt:—

"Description of every person for whom the said firm act as Trustee, Agent, Receiver, Guardian, Tutor, Curator, or Committee in relation to profits arising from Trade, Profession, Foreign Possessions, and Securities, or other profits chargeable under Schedule D, viz.—

"*First.* Persons of full age and resident in the United Kingdom, or married women living with their husbands, in receipt of the profits:—

Names.	Place of Abode or Residence.	Amount of Profits.
		£

"I declare the profits of the above persons are chargeable on them respectively."

On 17th March 1906 the Lord Ordinary in Exchequer Causes (JOHNSTON) pronounced this interlocutor:—"Finds that the defender, as representing Messrs Cayzer, Irvine, & Company, is bound to deliver the lists demanded of the names of the persons for whom his firm conduct the business of underwriting in the manner described on record, with their addresses, but is not bound to include in such lists the amount of profit effeiring to each: Accordingly dismisses the information as laid: Finds neither party liable in expenses, and decerns."

Opinion.—"Messrs Cayzer, Irvine, & Company, who are primarily shipowners,

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but who also act as marine insurance brokers and underwriting agents in Glasgow, conduct a business in underwriting, the particulars of which are as follows:—A number of constituents grant them letters of authority under which each respectively authorises the firm 'to underwrite as my agent, in my name and for my account,' a sum not exceeding £ on each risk, and 'to sign for me and in my name the stamped policies of insurance,' and 'to adjust, compromise, and settle all losses, averages, returns, or claims arising thereon, and to defend at law or refer to arbitration disputed claims.' The letter of authority then concludes—'You are to render me in the month of January in each year the usual statements of your underwriting transactions on my behalf, retaining such a sum in your hands as you consider necessary to provide for possible losses upon all risks, say an amount equal to three total losses, and crediting my account with the bank interest allowed for same.'

"Messrs Cayzer, Irvine, & Company were to receive a commission of 10 per cent. on any profit accruing from the account. And the authority was to remain in force till cancelled in writing, but Messrs Cayzer, Irvine, & Company might close the account at discretion.

"It is clear, therefore, that were a constituent of Messrs Cayzer, Irvine, & Company carrying on this business himself without their intervention, he would be liable to income tax under Schedule D, and there would be no difficulty arising from the peculiar character of the business in assessing him under the rule of *The Scottish Union and National Insurance Company* v. *Inland Revenue*, 16 R. 461.

"Further, I think that there can be no doubt that Messrs Cayzer, Irvine, & Company are the agents, in the sense of the Income Tax Acts, of each constituent for whom they act under the authority of the mandate above quoted.

"Now, the Inland Revenue, dealing with Mr Hugh Gibb as the representative partner of the firm of Cayzer, Irvine, & Company, on the assumption that the said firm are persons in receipt of profits or gains of or belonging to other persons, and chargeable under Schedule D of the Income Tax Act 1853 for the year ending 5th April 1905, and as such are bound in terms of the Income Tax Acts, and particularly of section 51 of the Income Tax Act 1842, to deliver to the assessor a list in writing containing a true and corrrect statement of all such profits or gains, and the name and place of abode of every person to whom the same belong, with relative declarations, have demanded from Mr Gibb such list, and he having refused to deliver the same they sue him for penalties under section 55 of the Income Tax Act 1842. On a consideration of the various sections of this statute I have come to be of opinion that Mr Gibb is bound to deliver a list of the persons, with their places of abode, on behalf of whom his firm acts in the manner above mentioned, but is not bound to include a statement of the profits or gains for which his firm are accountable to each such person.

"There are a number of sections of the Act of 1842 commencing with section 40 which bear upon the duties incumbent upon agents under the statute, and I do not think that there would be much difficulty in solving the question submitted to the Court but for a discrepancy between the 42nd and 51st sections.

"Agents under the statute may be in two positions. Either they may be themselves chargeable to duty in place of the principal, or their principal may be himself directly chargeable. In the former case they must give the Inland Revenue such return of profits as the individual constituent would require to do, with a view to being assessed on his behalf. But in the latter case I think that their duty is limited to apprising the Inland Revenue of the fact of their constituent's chargeability in order that the Inland Revenue may see that their constituent makes the proper return with a view to his being himself assessed.

"Section 41 of the Income Tax Act 1842 provides for the case of persons under disability whose trustees or guardians, and of non-residents whose agents, are directly chargeable, and such trustees or guardians and agents must do everything required by the Act in order to the assessing of such persons to the duties granted by the Act.

"But section 42 provides that no agent of any person of full age, resident in the United Kingdom, and not under disability, 'who shall return a list in the manner hereinafter required of the name and residence of such person, shall be required to do any other act for the purpose of assessing such person,' unless the Commissioners shall require his testimony in pursuance of the powers and authorities given by the Act.

"I pass over the intervening sections, and come to section 51, which provides that every person who shall be in receipt of profits or gains 'arising from any of the sources mentioned in the Act, of or belonging to any other person, in whatever character the same shall be received, for which such other person is chargeable under the regulations of this Act,' shall deliver a list in writing, in such form as the Act requires, signed by him, containing a true and correct statement of all such profits or gains, and the name and place of abode of every person to whom the same shall belong, together with a declaration whether such person is of full age, or a married woman, or resident in the United Kingdom, or under disability, 'in order that such person, according to a statement to be delivered as herein mentioned, may be charged, either in the name of the person delivering such list if the same shall be so chargeable, or in the name of the person to whom such property shall belong if of full age and resident in the United Kingdom, and the same be so chargeable by this Act.'

"Now, if this section had stood alone there would have been no doubt that Messrs Cayzer, Irvine, & Company are in receipt of profits or gains arising from one of the

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sources mentioned in the Act, of or belonging to other persons their constituents, and must deliver the lists demanded, not only of the names and addresses of such constituents, but of the profits or gains to which they are entitled, and that whether such constituents are *sui juris* and resident or not.

"But I cannot ignore the distinct statement of section 42, which, in the case of the *sui juris* and resident principal, limits the duty of the agent to giving the name and address of his principal.

"I think that the full measure of section 51 was really only intended for the case where the agent is directly assessable, and that it is limited by section 42, where the principal himself and not the agent is directly assessable. But whether this be so or not, the rule in interpreting a taxing statute in all its details is in favour of freedom from obligation unless it is expressly and clearly imposed, and I cannot say that that is expressly and clearly imposed as a duty which, though within the terms of one section, is within the exception of another section of the same Act.

"And though section 190, Schedule (G) XVI, is quoted in support of the Crown's contention, I think that it really supports my conclusion. For, after providing for the cases in which lists containing names and addresses only are required, it winds up with these words, as if providing for a special class of case within the general category, 'and where any person before described is accountable for the duty to be charged in respect of the property or profits of others, such lists as aforesaid shall be delivered, together with the required statement of such profits.'

"I shall therefore find that Mr Gibb, as representing Messrs Cayzer, Irvine, & Company, is bound to deliver the lists demanded of the persons for whom his firm conduct the business of underwriting in the manner described, with their addresses, but is not bound to include in such lists the amount of profit effeiring to each; and I shall accordingly dismiss the information as laid, finding neither party liable in expenses."

The Lord Advocate reclaimed, and argued —Section 51 of the Income Tax Act 1842 declared that the list must contain a statement of profits as well as the name and residence of the person to whom the same belonged — Dowell's Income Tax Laws (5th ed.), pp. 50 and 51 (Note b, p. 51). Section 42 was a proviso to section 41, and merely absolved an agent who had given in a list "in the manner hereinafter required" from doing any other act. The words "from doing any other act" did not mean that they were not to fill in the profits as required by section 51. Section 41 referred to the case of an agent (1) for an incapacitated person, and (2) for a non-resident person. Such an agent had to stand in his principal's place, while section 42 referred to the case of an agent for persons *sui juris* and resident in Great Britain. Such agents were to be dealt with as agents and not as principals. Such agents were required by section 51 to insert in the lists to be delivered a statement of the "money, value, profits, or gains" due to their principals as well as their names and addresses, but they were not required to do more, *e.g.*, to give testimony, unless called on to do so. *Vide* also section 190, Schedule G, rule 16 (3), (5); Dowell, *op. cit.*, p. 250. The form of Schedule G appended to the 1842 Act was taken from Schedule G annexed to the Act of 1806 (43 Geo. III, c. 65). The form used was that directed by the Taxes Management Act 1880 (43 and 44 Vict. c. 19), section 15 (2); *vide* Dowell, *op. cit.*, p. 325.

Argued for respondent—Profits in the hands of Cayzer, Irvine, & Company were in the same position as profits in the hands of a stockbroker. Cayzer, Irvine, & Company were really insurance brokers, and an insurance broker was not bound to give in a list of the profit due to his client. Section 100 of the Income Tax Act 1842 provided for the computation of the duty on profits; the duty was to be on the profit, not on the gross return. That being so, Cayzer, Irvine, & Company could not make the return required, as their clients alone knew whether their ventures had been profitable or not, and what was the average amount of their profit in view of their other transactions.

LORD PRESIDENT—Messrs Cayzer, Irvine, & Company, in addition to other business, act as underwriters, and they underwrite not only in their own name but also for certain other people under a form of contract between them, by which Messrs Cayzer, Irvine, & Company are constituted agents for those other people to the extent of binding them to any risk which to Messrs Cayzer, Irvine, & Company seems good, provided always that the sum of each individual risk is not to exceed a certain amount, and with certain other provisions as to the division of profits which may be made out of the business. Messrs Cayzer settle with these people for whom they underwrite, and at the end of the year they draw out a statement of the balance of profit and loss, and if there is a balance of profit they after retaining in their own hands for security a sum of money equivalent to what would have to be paid under three total losses, hand over the remaining surplus to the person for whom they underwrite under deduction of the commission which they stipulate for.

Now the Inland Revenue has asked Messrs Cayzer to give a list in terms of section 51 of the Income Tax Act of 1842. That section says that every person who shall be in receipt of any money or value, or other profits or gains arising from any of the sources mentioned in the Act, of or belonging to any other person, in whatever character the same shall be received, for which such other person is chargeable, shall within a certain period prepare and deliver a list in writing, in such a form as the Act requires, signed by him, containing a true and correct statement of all such profits or gains, and the name and place of abode of every person to whom the

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same shall belong, together with a declaration whether such person is of full age and so on. Messrs Cayzer refused to give the list referred to in that section, conceiving that they were not bound to do so, and the Lord Ordinary has refused the demand of the Inland Revenue upon this ground. He holds that a list must be given, but that it is sufficient if that list contains the name and address without giving the profits. I cannot agree with the result which the Lord Ordinary has come to. It seems to me that the words of the statute are plain beyond all expression. There is no doubt that in this case Messrs Cayzer are in receipt of profits or gains arising from the sources mentioned in this Act, because it is the profits of a business or trade or vocation, namely, insurance underwriting, and they belong to some other person who may be chargeable under the Act, and accordingly the words of the section seem to apply directly. The only reason why the Lord Ordinary has refused the application to them is because of another section altogether, namely, section 42. Section 42 is a proviso upon the earlier sections before it. It provides for the case of a person who is not in the position in which other trustees who have been dealt with in the preceding sections have been put, namely, being himself directly chargeable with the duty; but if he has allowed the beneficiary to get the money, the statute says it shall be sufficient if he delivers a list in the manner hereinafter required, with the name and residence of such person. "In the manner hereinafter required" of course refers to the 51st section which I have just read. I think the mistake that the Lord Ordinary has fallen into is that he has taken the expression "of the name and residence of such person" as if it were a taxative expression instead of a merely descriptive expression. It seems to me that the policy of the statute is extremely simple. The furnishing of this list does not conclude the question whether the parties who get these profits will be assessed on their full value or not. They are assessed upon the value of their profits or gains. If the gentlemen who get the profits of the underwriting business are carrying on other business, the eventual return to the Inland Revenue will be on the result of these businesses taken together. This section gives the Revenue authorities a very valuable check upon such returns. The point was urged, that when you go to Schedule G, there is no actual column for profits, and therefore you could not be asked to make a return in that form. I think the Solicitor-General quite satisfied us that the historical reason for the schedule being in that form was that there had been a slip, that it had not been noticed that section 51 was a departure from the earlier section with which it corresponds, and that the proper alteration has not been made in the schedule.

I am for recalling the interlocutor of the Lord Ordinary and decerning in favour of the Crown.

LORD M'LAREN—I agree with your Lordship. It seems to me that section 51, which is the section founded on by the Inland Revenue Department, is broad enough to apply to cases of mercantile agency. It contemplates the case of an agent who is not himself chargeable for duty, but who has money in his hands, or passing through his hands, which is of the nature of profit due to the person for whom he acts. Under that section it is perfectly clear that the return which the agent delivers is a return which contains not only the names and addresses of the persons for whom he acts, but also the amount of profits which, according to his books, stands at the credit of that person or those persons. No Government or Parliament, probably, would ever think of asking for any other return from an agent than what he is able to furnish from his own books. Whether there be any deductions which the recipient of the profit is entitled to credit for, or whether on a balance of his whole transactions he has or has not made a profit for the year is a matter entirely outside the knowledge of the agent and with which he has no concern. All that is required of him is to give a return of the amount of profits or money in his hands. The Lord Ordinary, I think, is in agreement with the view which we take as to the construction of these clauses. But then he has come to the conclusion that it must be controlled by section 42. I may observe in passing that it is a very unusual thing to find clauses in an Act of Parliament controlled by a previous clause. That is not the general mode of construction of Acts of Parliament. Then there is this other general observation, that the return would be a very useless return to the Inland Revenue if it did not state what, if any, were the amounts of money belonging to the persons in question. When you come to look at section 42 it would seem to me, agreeing with your Lordship, that it is essentially a proviso upon a previous section—section 41. Section 41 deals with the case of persons who are chargeable with duty on profits which do not belong to themselves, but are only held by them for others in their representative capacity. Section 42, in contradistinction to section 41, provides for the case of persons who hold such profits, but who are not chargeable for those profits. There is a reference to subsequent clauses in the words "in the manner hereinafter mentioned." I should not think it in the least necessary to set out at full length all the particulars of how the profit was acquired. It is enough to clearly identify the amount, and no other provision can be found except in section 51. I think on a sound construction it means just the list prescribed in section 51 with its particulars, neither more nor less. As regards the argument founded on Schedule G, there is ample reference in all those clauses to Schedule G. What the statute sets out is sufficiently comprehensive to compel the attention of the person making the return to the particulars required to be filled

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up according to his own conscience and judgment.

I agree with your Lordship that we ought in this case to sustain the contention for the Crown, and to hold that there has been a failure to make the necessary return.

LORD KINNEAR and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Find for the pursuer on the information No 2 of process, and that the defender as representing Messrs Cayzer, Irvine, & Company is bound to deliver the lists demanded of the persons for whom his firm conduct the business of underwriting, in the manner described, with the names and addresses of such persons, and to include in such lists the amount of profit effeiring to each: Adjudge the defender to forfeit and pay to the pursuer the sum of £50, and decern: Find the pursuer entitled to expenses," &c.

Counsel for Pursuer and Reclaimer—Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for Defender and Respondent—Dean of Faculty (Campbell, K.C.)—R. S. Horne. Agents—Webster, Will, & Co., S.S.C.

Wednesday, June 13.

FIRST DIVISION.

[Lord Low, Ordinary.

HOPE *v.* THE LASSWADE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF MIDLOTHIAN AND OTHERS.

Local Government—Title to Sue—Parish Council—County Council—District Committee—Action to Determine Position of an Admitted Right-of-Way—Right of Parish Council to Take up Defence of Action—Local Government (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 29 *and* 42.

A proprietor of lands brought an action against a District Committee of a County Council in order to have the position of an admitted public right-of-way determined. The District Committee did not defend, but the Landward Committee of the Parish Council of the parish in which the right-of-way lay sisted themselves as defenders. *Held* that the Landward Committee had no title, and that the right to litigate on such matters lay with the County Council and its District Committee.

Expenses—Parish Council Sisted Defenders—Liability for Expenses from Lodging of Minute Craving Sist only—Action to Determine Position of Right-of-Way.

The Landward Committee of a Parish Council sisted themselves as defenders to an action to determine the position of an admitted right-of-way within the parish, brought against the District Committee of the County Council who did not defend. *Held* that the Landward Committee, who were found to have no title, were only liable in expenses from the date of lodging the minute of sist.

The Local Government (Scotland) Act 1894, section 29, *inter alia*, enacts—"A parish council may repair and maintain all or any of the public ways (not being highways or footpaths at the side of a highway within the meaning of the Roads and Bridges (Scotland) Act 1878) within the parish, and the expense of such repair and maintenance shall be defrayed out of the special parish rate. . . . ."

Section 42, sub-section 1, provides—"It shall be the duty . . . of a district committee . . . to assert, protect, and keep open and free from obstruction and encroachment, any right-of-way . . . which it may appear to them . . . that the public have acquired by grant, prescriptive use, or otherwise, and they may . . . for the purpose of carrying this section into effect, institute and defend legal proceedings and generally take such steps as they may deem expedient."

Sub-section 2—"Where a parish council or any six parish electors of a parish have represented to the district committee, or where there is no district committee to the county council, that any public right-of-way within the district . . . has been or is likely to be shut or obstructed or encroached upon, it shall be the duty of the district committee, or, where there is no district committee, of the county council, if they are satisfied that the representation is well founded, to take such proceedings as may be requisite for the vindication of the right-of-way, and if the district committee refuse or fail to take proceedings in consequence of such representation, the parish council or the electors who made the representation, may petition the county council, and if the county council so resolve, the powers and duties of the district committee under this section, in relation to such right-of-way, shall be transferred to the county council."

Sub-section 3 enacts—"Any expenditure incurred by a county council or a district committee thereof in connection with any legal or other proceedings, under the two preceding sub-sections or either of them, shall be defrayed out of the road rate for the district, or where a county is not divided into districts, out of the road rate for the county. . . . ."

On May 5, 1905, Sir Alexander Hope of Craighall, Baronet, proprietor of the lands of Pinkie and others in the parishes of Inveresk and Newton and county of Midlothian, raised an action against the Lasswade District Committee of the County Council of Midlothian, as such District Committee and as representing the public interest, and also against the County Council

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of Midlothian for any interest they might have, for declarator that he was proprietor of certain portions of the Haugh of Inveresk bounded by a space for a public walk 20 feet wide along the side of the river Esk, that the boundary between this space and his lands was certain lines, and that the public were entitled between certain points to go by the public walk but were not entitled to enter upon or traverse his lands without his consent. No defences were lodged by the defenders, but the Landward Committee of Inveresk Parish Council had themselves sisted defenders and lodged defences. The pursuer objected to their title and *inter alia* pleaded—"(4) The defenders the Landward Committee of the Parish Council of Inveresk have no title or interest to defend the present action."

The following narrative of the facts of the case are taken from the opinion of the Lord Ordinary (Low):—"The pursuer is proprietor of certain lands situated upon the river Esk which originally formed part of the commonty known as the Haugh of Inveresk. That commonty was, early last century, the subject of a process of division of commonty, and the lands in question formed the portion which was allotted to the pursuer's predecessor. It was stated in the decreet of division that the heritors had agreed to certain roads and walks being made upon the Haugh, and that, *inter alia*, there had been laid off a space of 20 feet broad along the water side *ex adverso* of the lands allotted to the pursuer's predecessor, which were described as bounded on the west by 'the public road along the river Esk.'

"It appears that prior to the decreet of division an embankment had been made by agreement among the heritors some distance from the river. For many years the public have walked along the top of the embankment, and the pursuer did not object until early in the present year, when the Landward Committee of the Parish Council of Inveresk proposed to undertake, and indeed actually commenced, certain operations upon what they claimed as the road mentioned in the decreet of division. The pursuer then maintained that that road was restricted to a space of 20 feet in breadth from the water's edge, while the contention of the Landward Committee was that it ran along the embankment, or at all events close to the embankment.

"In these circumstances the pursuer brought the present action, in which he seeks to have it declared that a line 20 feet from the water's edge is the boundary between his lands and the public road, and that the public are entitled to pass along the east bank of the river by means of the said space of 20 feet, and not otherwise.

"The defenders called were the Lasswade District Committee of the County Council of Midlothian, as such District Committee and as representing the public interest, and the County Council for any interest they might have.

"Neither of these bodies lodged defences, but the Landward Committee of the Parish Council of Inveresk lodged a minute asking to be sisted as defenders. The matter came before me in the Bill Chamber, and as I thought that the Landward Committee had *prima facie* an interest in the question, I sisted them as defenders, and they lodged defences."

On 16th October 1905 the Lord Ordinary (Low) pronounced the following interlocutor: — "Sustains the fourth plea-in-law for the pursuer: Finds, decerns, and declares in terms of the conclusions of the summons: Finds the defenders, the Landward Committee of the Parish Council of Inveresk, liable in expenses; allows an account of said expenses. . . ."

Opinion.—[*After narrating the facts of the case ut supra*]. . . . "The question which was argued before me in the procedure roll, and which I must now determine, is whether the defenders the Landward Committee have any right or title to defend the action, and to resist decree being pronounced in terms of the conclusions of the summons.

"That question seems to me to depend entirely upon the provisions of the Local Government (Scotland) Act 1894.

"What the defenders rely upon (and I think that it is the only part of the Act to which they can appeal) is the 29th section, which provides that 'a parish council may repair and maintain all or any of the public ways (not being highways or footpaths at the side of a highway within the meaning of the Roads and Bridges (Scotland) Act 1878) within the parish, and the expenses of such repairs and maintenance shall be defrayed out of the special parish rate.'

"It is not disputed that the road in question is a 'public way' of the kind there referred to, and the defenders argued that the right to repair and maintain the road involved the right to resist encroachments.

"That view might have had considerable force if it had not been that the Act makes special provision for the protection of rights-of-way. The 42nd section provides (sub-section 1) that 'it shall be the duty of a district committee . . . to assert, protect and keep open and free from obstruction or encroachment any right-of-way . . . which it may appear to them that the public have acquired by grant, prescriptive use, or otherwise, and they may for the purpose of carrying this section into effect institute and defend legal proceedings, and generally take such steps as they may deem expedient.'

"By the second sub-section the duty is laid upon the district committee of making inquiry, and if necessary of taking proceedings, if it is represented to them by a parish council, or any six parish electors, that a public right-of-way has been or is likely to be shut or obstructed or encroached upon. Finally by the third sub-section provision is made for any expenditure incurred by the district committee under the two preceding sub-sections.

"Now, I think that the road in question is plainly a right-of-way within the meaning of the 42nd section, and the ground upon which the Landward Committee of the Inveresk Parish Council are defending this action is that the pursuer is seeking to

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obstruct or encroach upon that right-of-way. I do not think that the Landward Committee have any right to litigate that question. By the Act the duty of protecting rights-of-way is laid upon the District Committee alone, and full provision is made for the carrying out of that duty. That being so, I think that action by any other local body is excluded. That view seems to me to be strengthened by the consideration that a parish council, or the landward committee of a parish council, have no funds which they are entitled to use for the purpose of defraying the expenses of such a litigation.

"I am accordingly of opinion that the fourth plea-in-law for the pursuer falls to be sustained, and decree pronounced in terms of the conclusions of the summons."

The defenders reclaimed, and argued—The roadway in question fell within the class of roads dealt with by the Local Government (Scotland) Act 1894, section 29, and the reclaimers' obligation to maintain it in the public interest gave them a title to defend any suit which might increase the burden of maintenance. This had been recognised in England—*Bright* v. *North* [1847], 2 Ph. 216; *The Queen* v. *White and Others* [1884], 14 Q.B.D. 358. These cases were decided on the ground that authority to litigate was incidental to the statutory duties, and that rule applied in this case. Interest or title to defend existed in the reclaimers only, not in the District Committee or the County Council, for the question was not of the class dealt with by section 42. Here the question was merely of determining the boundaries of an admitted right-of-way, there was no obstruction or encroachment, and what was at stake was the cost of maintenance. The District Committee or the County Council had no interest or right to defend inasmuch as they did not bear the cost of maintaining the roadway. The Landward Committee had the powers granted to the Parish Council under sections 23 to 29, and alone had the right to defend such actions—section 23, sub-section 2 (*b*). The Landward Committee could obtain the money required from the Parish Council —section 27, sub-section 3—which had no power to revise the estimates, section 37. The right of making representations to the District Committee or the County Council under section 42, sub-section 2, did not negative the reclaimers' title, for that right was not given to a landward committee. There was no express exclusion of the reclaimers' title, and in circumstances like the present there was no other remedy provided. In real actions all parties having an interest had a title to defend—*Glasgow Shipowners' Association* v. *The Clyde Navigation Trustees*, February 25, 1885, 12 R. 695, 22 S.L.R. 374—and as the defenders were acting here in the interest of the public, seeing that the cost of maintaining the road would be much increased if the pursuer's contention were upheld, a liberal construction should be put upon the reclaimers' powers—*Milne* v. *Landward Committee of Parish Council of Inveresk*, December 12, 1899, 2 F. 283, 37 S.L.R. 210. The interlocutor of the Lord Ordinary should be recalled.

Counsel for the pursuer and respondent were not called upon.

LORD PRESIDENT—The point in this case is whether the Landward District Committee of the Parish Council of Inveresk has a right to step in and insist in being heard as a defender in an action brought by the proprietor of certain lands in the parish of Inveresk, which has for its object the determination of the boundaries of a certain public road. The genesis of this public road was a division of commonty which took place early in last century, when the public road was reserved from the lands allotted to the pursuer's predecessor. Questions having arisen as to the precise course of the road, the proprietor has raised this action to have the course of the road defined as occupying a certain space laid down on a plan produced with the summons. He has called as defenders the Lasswade District Committee of the County Council, and the County Council for any interest they may have. The District Committee of the County Council resolved not to defend the action, and thereupon the Landward Committee of the Parish Council made application to be sisted as defenders, and having been provisionally sisted have lodged defences, and the question now before us is whether they have a title to defend this action. I say "provisionally sisted," for I think the Lord Ordinary's first interlocutor should have been in other terms, and should merely have allowed defences to be put in in order to see whether the Landward Committee should be sisted as defenders or not. But that is really of no moment now, for the interlocutor allowing the sist is covered by this reclaiming note, which brings up all the previous interlocutors for review, and therefore no prejudice has been occasioned to the parties.

Now, it must be borne in mind that originally the title, in all questions of public right, is in the individual members of the public. The title to pursue actions for asserting such rights is in *quivis ex populo*, as was instanced in the *Glentilt* case, and I have as little doubt that *quivis ex populo* could come in and ask to be sisted to defend such an action, and consequently also an action of casting about. Within modern times public bodies have been created which have had certain rights with regard to these matters conferred upon them, though it is to be noted that these rights do not extend beyond what the statute has, either directly or by the clearest implication, conferred upon them. I do not think we have any legislative enactment directly affecting the matter now before us until the Local Government Act of 1894. It is true that by the Act of 1889 the Road Committee of the County Council were made the authority for highways, but then I do not think this is a highway in the sense of the Roads and Bridges Act 1878. But sec. 42 of the Local Government Act 1894 deals particularly

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with the protection of rights-of-way, and it gives protection of rights-of-way to the District Committee of the County Council. It also gives a secondary right to the Parish Council, namely, a right of making representations to the District Committee, and of appealing to the County Council against the decision of the District Committee, if the District Committee refuses to take up a question which the Parish Council thinks it ought to take up. I have no doubt that the right which was explicitly given to the District Committee to maintain and make good a right-of-way does, as a necessary corollary, include the right to defend an action of casting about of a right-of-way, and therefore I think that the District Committee of the County Council, in virtue of the statutory powers conferred upon them, could have taken up the defence to this action. But where you find that full authority to take action has been conferred on the District Committee, and the limited authority of quickening them up has been conferred on the Parish Council, I think it is impossible to hold that a concurrent title with the District Committee to prosecute such action has been conferred on the Parish Council. The only direct authority given to the Parish Council is that conferred by sec. 29 of the Act of 1894, enabling them to repair and maintain public ways other than highways within the parish, and to defray the cost out of a special rate. It seems to me that ample scope is given to that provision if the interpretation of it is confined within its terms, *i.e.*, that the Parish Council may expend public money on maintaining such public ways as it finds *de facto* existing in the parish, but not on entering into litigation for the purpose of determining where public ways are and where they are not, that duty having been given to the District Committee of the County Council. I think, therefore, that the Lord Ordinary was right and that the reclaiming note should be refused, though the form of the first interlocutor is subject to the criticism I have already passed on it.

Lord M'Laren—In the excellent argument that was presented to us the hypothesis of the reclaimers' case was that section 42 did not apply to the present circumstances—that this was a *casus improvisus*, and that, consequently, the Landward Committee of the Parish Council, being vested with all powers necessary for maintaining the public ways within its district, was entitled to come forward and maintain the public interest in this right-of-way by sisting itself as defender in this action. I should have great difficulty in holding that apart from express legislative enactment a local authority, such as a county council or a parish council, would be entitled to take up the question of a public right-of-way and litigate it in the interests of the public. But it is clear that when the Act of 1894 was under consideration it was considered by the Legislature that public bodies interested in the locality should be entrusted with the duty of protecting public rights-of-way, and that the matter should not be left altogether to the individual action of private citizens. Provision is made for this in section 42, which appears to me to be a carefully constructed section, and to define precisely the extent to which this right was conferred on local authorities. Now, that section makes careful provision that the lesser local authorities, such as parish councils and committees of parish councils, should not be allowed to expend the ratepayers' money in litigating, under the influence, as would often be the case, of local feeling, questions relating to public rights-of-way. At the same time the Legislature, recognising that these bodies have a very real interest in such matters, has conferred upon parish councils the right of making representations to the county authority, and if a District Committee of a County Council refuses to accede to such representations, there is an appeal to the County Council in its entirety against such refusal. But I think it is clear that these larger and perhaps more dispassionate public bodies, who have statutory authority to apply the rates for such a purpose, are the only local authority on whom a title is conferred to litigate actions of rights-of-way in the interests of the public.

So here I think that the District Committee of the County Council could have intervened to defend this action. But the proposition that, failing their intervention, it is open to the Parish Council, or the Landward Committee of the Parish Council, to step in and take up the defence seems to me to be open to very grave objection. That proposition amounts to this, that the Parish Council can assume the position of a court of appeal from the County Council or its District Committee, and, where the County Council has decided that public money shall not be expended on such a matter, to overrule that decision by themselves taking up the case at the public expense. As I have said, I do not think that the provisions of the Act confer any authority on the parish councils to litigate questions of rights-of-way; and it seems clear that the Legislature did not consider that they had any implied authority to do so because certain powers with regard to such matters are expressly given to them, and given to them only to a limited extent and in carefully guarded terms. The conclusion that I arrive at is this that the express authority given in these carefully qualified terms excludes the notion of any implied authority to be deduced from the creation of these bodies for public purposes, and, consequently, that the power given to the county councils to litigate these matters, and the powers given to the parish councils to make representations, when taken together, make it clear that the powers of parish councils in these matters are strictly limited, and do not extend to the right that is contended for by the reclaimers.

Lord Kinnear—I agree. The interest of the public in the matter of actions to main-

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tain rights-of-way is entrusted by the Local Government Act of 1894 to District Committees of County Councils. This action puts it on the District Committee to consider whether it was their duty to defend the action. They did consider the question, and decided that as there was nothing in the action which would prejudice the interests of the public, it was not their duty to defend it. There is nothing in the statute which in such circumstances entitles a subordinate body such as a Landward Committee to take on itself a duty entrusted to another public body.

LORD PEARSON—I am of the same opinion. The question in this case is under section 42 of the Local Government Act of 1894, which lays on the District Committee the duty of protecting public rights-of-way. Section 29 is the only section that gives the Parish Council any spending power in the matter of public ways. But that section is limited to repair and maintenance, and I do not think it gives the Parish Council any power to use public money in the vindication of rights-of-way. The only standing which the Parish Council has in the matter of rights-of-way is the limited right conferred on it by section 42, sub-sec. 2, of making representations to the District Committee.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 16th October 1905] in so far as it finds the said defenders the Landward Committee of the Parish Council of Inveresk liable in expenses, and in lieu thereof find the said Committee liable in expenses since the date of the lodging of the minute, No. 8 of process: *Quoad ultra* adhere to the said interlocutor and decern: Find the said Committee liable in expenses since the date of the interlocutor reclaimed against, and remit the account thereof and of the expenses above found due since the date of the lodging of the said minute to the Auditor to tax and to report."

Counsel for the Defenders and Reclaimers —Munro—W. T. Watson. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Pursuers and Respondents — Scott Dickson, K.C. — C. D. Murray. Agents—Melville & Lindesay, W.S.

Thursday, June 14.

FIRST DIVISION.

[Sheriff Court at Peebles.

THE IMPROVED EDINBURGH PROPERTY INVESTMENT BUILDING SOCIETY *v.* WHITES.

Process — Pursuer — Designation — Address of Pursuer (a Society)— "Building Society Incorporated under the Building Societies Act 1874" — Sheriff Courts Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 6.

In a petition in the ordinary Sheriff Court the pursuer was designed as "The Improved Edinburgh Property Investment Building Society, Incorporated under The Building Societies Act 1874," no address being given. *Held* that this description satisfied the requirements of the Sheriff Courts Act 1876, sec. 6.

The Sheriff Courts Act 1876, sec. 6, *inter alia*, enacts—"Every action in the ordinary Sheriff Court shall be commenced by a petition in one of the forms, as nearly as may be, contained in Schedule (A) annexed to this Act, in which the pursuer shall set forth the court in which the action is brought, his own name and designation, and the name and designation of the defender. . . ."

On 18th April 1905 "The Improved Edinburgh Property Investment Building Society, Incorporated under The Building Societies Act 1874," presented a petition in the ordinary Sheriff Court at Peebles against Anthony White, contractor, and Christina White, spinster, residing at White Bank, Peebles, with conclusions for declarator and removing in respect of certain heritable subjects situated in Peebles. No address or further designation of the pursuer was given.

On 21st July 1905 the Sheriff-Substitute (ORPHOOT) pronounced an interlocutor in terms of the conclusions of the petition, and on 23rd October 1905 the Sheriff (MACONOCHIE) adhered.

The defenders appealed to the First Division of the Court of Session, and there raised the point that the designation of the pursuer was insufficient.

Argued for the appellants—The action was incompetent, as the requirements of The Sheriff Courts Act 1876, section 6, had not been complied with, no proper designation or address of the pursuers being given on which an operative decree could follow—*Joel* v. *Gill*, November 23, 1859, 22 D. 6, *per* L.J.-C. Inglis, p. 12.

Counsel for the respondents was not called on.

LORD PRESIDENT—The point has been raised by counsel in this case that inasmuch as this is a petition under section 6 of the Sheriff Court Act of 1876, it ought to set forth the name and designation of the pursuer, and that the name as set forth here does not include a designation. We were re-

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ferred to a remark of the Lord Justice-Clerk in *Joel* v. *Gill*—"I would state it as a general rule that the proper designation of any person is a statement of his present occupation and residence." No doubt that is the general rule, but I cannot say that residence must necessarily form part of the designation, which is given for the purpose of identification. In many cases no designation at all is needed. The instance of the *Bank of Scotland* was suggested in argument, and it has all along sued without an address or designation, and I have no doubt that a person like the Duke of Buccleuch could sue without an address being given. If an incorporated company gives its title under the Act there can be no room for doubt as to its identification. I am far from suggesting that a convenient practice should be departed from, but I do not think that as a matter of strict law the present petition ought to be dismissed. The objection therefore fails.

LORD M'LAREN—I agree with all that your Lordship has said. We were not referred to the clause in the Sheriff Court Act, but it requires the name and designation to be set forth. That explains why the address is given as a general rule, because the identification of an individual is imperfect without it. In the case of societies incorporated by Special Acts there was never any doubt that they could sue and be sued without the addition of a designation. The case of the *Bank of Scotland* is peculiar, because it is the oldest trading corporation in Scotland, but we often have actions before us by corporations such as railway companies which are never designed otherwise than by their names. Where a company is incorporated under a general Act you must look to its nature. I think that in the case of companies under the Building Societies Act 1874 the corporate name includes both name and designation.

LORD KINNEAR—I agree. The objection is founded on section 6 of the Sheriff Court Act 1876, which provides that actions in the ordinary Sheriff Court shall be commenced by petition setting forth the name and designation of the parties. The question here is whether the pursuers have complied with this provision of the Act. I have no doubt that they have. The description of the pursuers is quite sufficient, because it identifies the particular society that is sueing, and distinguishes it from everybody else.

LORD PEARSON concurred.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff and Sheriff-Substitute, and of new found, declared, decerned, and ordained in terms of the conclusions of the petition, with expenses.

Counsel for the Defenders and Appellants—A. A. Fraser. Agent—Stirling Craig, S.S.C.

Counsel for the Pursuers and Respondents—C. D. Murray. Agents—A. & A. S. Gordon, S.S.C.

Thursday, June 14.

FIRST DIVISION.

[Lord Dundas, Ordinary.

GLEN'S TRUSTEES *v.* THE LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY, LIMITED.

Contract—Insurance Policy—Construction—Grammatical Error—A Negative in Proviso to a Condition Nullifying Whole Intention of Condition—Reading Proviso as if there were No Negative therein.

A policy of insurance against accident stipulated that the right to recover under it should be forfeited on the expiry of . . . from the date of the accident "unless within these periods a settlement with the insured or his representatives has been agreed upon, or his claim referred to arbitration, or in the absence of notice from the company requiring the matters in difference to be referred to arbitration, legal proceedings have *not* been taken by the insured against the company. . . ."

Held that as the whole intention of the condition was to impose a limit of time on claims, and as the presence of the word "not" in the proviso was to nullify this intention, the clause must be read omitting the "not."

On July 10, 1905, Francis Walter Allan, shipowner in Glasgow, and others, trustees and executors of the late Thomas Glen, calico printer, Glasgow, raised an action against the Lancashire and Yorkshire Accident Insurance Company, Limited, 5 West Regent Street, Glasgow, to recover, with interest from April 24, 1897, the sum of £500, contained in a policy of insurance against accident, dated October 8, 1895, which had been effected with the defenders by the deceased William James Glen, civil engineer, Main Street, Donegal, Ireland. The insured was drowned on April 24, 1897, and by his holograph settlement, dated March 2, 1890, he bequeathed to his father Thomas Glen his whole means and estate. Thomas Glen applied to the defenders for payment of the sum due under the policy immediately after the death of the insured, without effect, and died in 1898 without having raised an action against them.

The policy contained, *inter alia*, the following condition:—"(10) The right to recover payment of any capital sum insured under this policy shall be forfeited and extinguished on the expiry of six months from the date of the accident, and the right to recover payment of the weekly compensations shall be forfeited and extinguished on the expiry of nine months from the date of the accident, on the completion of which periods the liability of the company in respect of such accident shall cease and determine, unless within these periods a settlement with the insured or his representatives has been agreed upon, or his claim referred to arbitration, or, in the

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absence of notice from the company requiring the matters in difference to be referred to arbitration as within provided, legal proceedings have not been taken by the insured against the company in respect of such claim."

The defenders, *inter alia*, pleaded—"(1) The right to recover under the policy founded on having lapsed, and being barred by the terms of the policy, the action ought to be dismissed."

On November 4, 1905, the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Sustains the first plea-in-law for defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses against pursuers," &c.

"*Opinion.*—Mr William James Glen, who was insured with the defenders, conform to policy dated 8th October 1895, was drowned on 24th April 1897. It seems that he left a holograph settlement conveying his whole means and estate, which would doubtless include his claim, if any, against the defenders, to his father Thomas Glen, whom he also appointed to be his sole executor. Mr Thomas Glen is also now deceased, and the pursuers, who are the trustees and executors under his trust-disposition and settlement, now sue the defenders upon the policy above mentioned. The only question which I have to consider at this stage is whether or not the pursuers' claim is barred by the terms of article 10 of the conditions annexed to and forming part of the policy. The substantive purpose of article 10 is clearly to establish in favour of the company a six (or a nine) months' limit, after the expiry of which the right to recover under the policy is to be forfeited. But three exceptions to this limitation follow, presumably in favour of the insured, which are thus expressed . . . 'unless within these periods a settlement with the insured or his representatives has been agreed upon, or his claim referred to arbitration, or . . . legal proceedings have not been taken by the insured against the company in respect of such claim.' The first and second of these exceptions are intelligible enough, but they do not apply to this case. The question is as to the meaning of the third exception, and whether it can be held so to apply. The pursuers' counsel maintained that the words used were in themselves unambiguous and intelligible, however difficult it might be to account for their presence, looking to the scope of the article as a whole, and that the Court must therefore construe this exception as meaning that, by the simple expedient of refraining from legal proceedings against the company for six months from the date of accident, an insured might safely delay making any demand upon the policy short, I suppose, only of the period of the long negative prescription. I do not think that I am bound to adopt this reading of the policy, and I decline to do so, because the construction suggested seems to me to be absolutely irrational, and would result in the defeat, by this third exception, of the substantive purpose and effect of the entire article. If it were legitimate to conjecture, one might well suppose that the words of the third exception may have originally been prefaced by an 'if,' and that the draughtsman observing that the word 'unless,' stood before the preceding exceptions, deleted the 'if,' and failed, *per incuriam*, to strike out the 'not' which follows shortly after. But taking, as I think that I am bound to take, the words as they stand, I confess that I am unable to put any intelligible or effective meaning upon them, and it appears to me that the exception must be simply held *pro non scripto*. The pursuers' counsel contended that if this view was adopted the whole of article 10 of the conditions must be read out of the policy and totally disregarded. I cannot agree with this contention. In my opinion, if the language of the third exception is, as I think it is, unintelligible, and must be held as of no effect, the substantive portions of article 10 still stand good, with the result that the sum insured under the policy is forfeited and extinguished, and the liability of the company has ceased and determined on the expiry of six months from the date of the accident, unless (which has not here happened) a settlement had been agreed upon, or the claim referred to arbitration. In my opinion, therefore, the first plea-in-law for the defenders falls to be sustained, and the action dismissed with expenses."

The pursuers reclaimed, and argued—Looking to the terms of the policy the main purpose of this contract of insurance was to bind the company to pay within a certain time a sum of £500 to the legal representatives of the person insured in the event of his death. This obligation was qualified by a time limit expressed in article 10. This time limit was again subject to three qualifications or exceptions. The third of these, which was here in question, read literally, took the pursuers outside the bar imposed by the time limit. Taken by itself the qualification could only have one meaning, the language being quite unambiguous. If on the other hand the clause in question were held to be meaningless, then the whole of article 10 must be read out of the policy, since the company intended to impose a qualified time limit, and it was impossible to discover what one of the qualifications was. Such stipulations in a contract of insurance should be absolutely clear, failing which they fell to be read against the company.

Counsel for the defenders were not called upon.

LORD PRESIDENT—In this case the holder of a policy in the defenders' company was drowned in 1897 leaving a settlement conveying his whole means and estate to his father. His father applied to the defenders for payment of the sum due under the policy, which was refused, and died in 1898 without raising an action on the policy. The present action is at the instance of the father's trustees. The defenders stated a preliminary plea that the action was barred by the stipulations of article 10 of the policy. The whole question is as to the

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meaning of that article. It is clear that as it stands, if taken literally, it is meaningless, but reading it as a whole, as I think we are entitled to do, it is also clear that the confusion is due to a grammatical error. In my opinion the Court is entitled to correct such an error. The word "not" was evidently inserted in the third stipulation of the article by failing to notice that the conjunction preceding was "unless" and not "if." I think we should read the stipulation as if the word "not" was deleted. If we do so it is clear that the action is barred by the stipulations of this article, and I prefer to base my judgment on this ground rather than that of the Lord Ordinary.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Scott Dickson, K.C.—W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Respondents—Hunter, K.C.—Hon. W. Watson. Agents—Gill & Pringle, W.S.

Saturday, June 23.

FIRST DIVISION.

MURRAY, PETITIONER.

Bankruptcy—Sequestration—Gazette Notice —Clerical Error—Date—Nobile Officium —Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 48, *and Schedule* (*B*).

A notice of sequestration in the form of Schedule B of the Bankruptcy (Scotland) Act 1856 was inserted in the *Edinburgh Gazette* of 5th June 1906, but owing to a clerical error the date of the deliverance was stated to be 5th June instead of 9th May. The corresponding notice in the *London Gazette* was correct. The Sheriff having difficulty in confirming the election of the trustee, a petition was presented on 23rd June 1906 by the agent in the sequestration craving the Court to authorise the insertion of a correct notice.

The Court *authorised* the petitioner to insert a notice setting forth the error and correct date, and authorised the Sheriff upon proof of such notice having been duly inserted to confirm the election of trustee and commissioner as if the date of the first deliverance had been correctly notified.

The Bankruptcy (Scotland) Act 1856, sec. 48, *inter alia*, enacts—". . . the party applying for sequestration shall, within four days from the date of the deliverance awarding sequestration if awarded in the Court of Session, or if it is awarded by the Sheriff, within four days after a copy of the said deliverance could be received in course of post in Edinburgh, insert a notice in the form of Schedule (B) hereunto annexed in the *Gazette*, and also one notice in the same terms within six days from the said date in the *London Gazette*."

Schedule (B) is as follows:—

"*Notice to the Gazettes.*

"The estates of A B (*name and designation*) were sequestrated on (*date, month, and year*) by the (*Court of Session or Sheriff of*).

"The first deliverance is dated the (*date*).

"The meeting to elect the trustee and commissioners is to be held at (*hour*) o'clock on the (*day of the week*) the (*date, month, and year*) within (*specify particular place*) in (*town*). . . . ."

On May 9th, 1906, the Lord Ordinary officiating on the Bills pronounced the first deliverance in a petition at the instance of Alfred Alexander Murray, W.S., Edinburgh, for sequestration of the estates of Charles Oscar Northwood, residing at Rosslyn, Holmfield Road, Blackpool. As required by section 48 of the Bankruptcy (Scotland) Act 1856 an abbreviate was duly presented to the Keeper of the Register of Inhibitions at Edinburgh, and recorded. Notices in the form of Schedule B, were also inserted in the *London Gazette* of 8th June 1906, and in the *Edinburgh Gazette* of 5th June 1906, intimating the award of sequestration and the date of the first deliverance, and calling the meeting to elect the trustee and commissioners, and mentioning the last date for lodging claims. The meeting was duly held and a trustee and commissioner elected. The process was thereupon transmitted to the sheriff-clerk by the presses, with a view to the Sheriff confirming the election of the trustee in terms of section 70 of the Act. The Sheriff, however, had difficulty in confirming the trustee's election, or proceeding further with the sequestration owing to the date of the first deliverance having been erroneously stated by a clerical error in the notice in the *Edinburgh Gazette* as 5th June 1906 in place of 9th May 1906.

On 23rd June 1906 Murray presented a petition appealing to the *nobile officium* of the Court, in which he narrated these facts and made the following crave:—"May it therefore please your Lordships to authorise the petitioner to insert in the *Edinburgh Gazette* within four days from the date of your Lordship's deliverance, a notice in the following terms:—

'*Charles Oscar Northwood's Sequestration.*

'Notice is hereby given by authority of the First Division of the Court of Session in Scotland that the estates of Charles Oscar Northwood . . . were sequestrated on 5th June 1906 by the Court of Session.

'The first deliverance is dated the 9th May 1906.

'The meeting to elect the trustee and commissioners is to be held at three o'clock on Wednesday the 13th day of June 1906 within Dowell's Rooms, 18 George Street, Edinburgh. A composition may be offered at this meeting, and to entitle creditors to the first dividend their oaths and grounds of debt must be lodged on or before the 5th October 1906.

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'The sequestration has been remitted to the Sheriff of the Lothians and Peebles at Edinburgh.

'All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone.

'ALFRED A. MURRAY, *W.S.*, *Agent*,
'23 St James Square, Edinburgh.'

And to substitute said notice for that published in the *Edinburgh Gazette* on 5th June 1906, and to hold the same as equivalent thereto, and to authorise the Sheriff of the Lothians and Peebles, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in said *Edinburgh Gazette;* or to do further or otherwise in the premises as to your Lordships shall seem fit."

Counsel for the petitioner in the Single Bills stated that the error was purely clerical; that the advertisement had been correctly inserted in the *London Gazette;* that the date of the first deliverance was not an essential fact (being inserted merely to give creditors notice of the proceedings), and had no effect in fixing the date of notour bankruptcy or in determining preferences. He referred to *Lipman & Co.'s Trustee*, June 14, 1898, 20 R. 818, 30 S.L.R. 729.

The LORD PRESIDENT having intimated that the Court was disposed to aid the petitioner, but that the prayer of the petition could not be granted as it stood, the petitioner was allowed to amend the prayer, which then read as follows:—"May it therefore please your Lordships to authorise the petitioner to insert in the *Edinburgh Gazette*, within four days from the date of your Lordships' deliverance, a notice in the following terms:—

"'*Charles Oscar Northwood's Sequestration.*

"'Whereas on 5th June 1906 the following intimation was inserted in the *Edinburgh Gazette*:— . . . [*here followed the notice originally inserted.*] . . . Notice is hereby given by authority of the First Division of the Court of Session in Scotland that the date of the first deliverance was by a clerical error stated in said intimation to be 5th June 1906 instead of 9th May 1906, and this intimation is now inserted to give notice to all concerned that the correct date of the first deliverance was 9th May 1906.'

And to authorise the Sheriff of the Lothians and Peebles, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in said *Edinburgh Gazette*, or to do further or otherwise in the premises as to your Lordships shall seem fit."

The Court (the LORD PRESIDENT, LORD KINNEAR and LORD PEARSON) pronounced the following interlocutor:—

"The Lords having considered the petition as amended at the bar, and heard counsel for the petitioner, Authorise the petitioner to insert in the *Edinburgh Gazette*, within four days from this date, a notice in the terms set forth in the prayer of the petition, and authorise the Sheriff of the Lothians and Peebles at Edinburgh, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner on the sequestrated estate of Charles Oscar Northwood mentioned in the petition, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in the *Edinburgh Gazette*, and decern."

Counsel for Petitioner—Burt. Agents—J. & A. Murray, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Sheriff Court at Dundee.

KENNEDY *v.* CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(*Ante*, March 13, 1906, *supra*, p. 430.)

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3)—*Arbitration—Application for Arbitration before Master has had Time to Consider Claim, and before Date of First Weekly Payment has Arrived—Competency.*

A workman met with an accident entitling him to compensation under the Workmen's Compensation Act. On 31st October he wrote intimating a claim against his master under the Employers' Liability Act or alternatively under the Workmen's Compensation Act. The first weekly payment under the latter statute fell due on 4th November. On 2nd November the workman lodged a petition for arbitration. The master pleaded that the application was incompetent and premature inasmuch as there was no question between the parties when it was presented and no time had been given him to consider the claim as made. The Sheriff-Substitute found the defences irrelevant, and awarded compensation.

Held on appeal that as there was no dispute between the parties when the petition was lodged as to the liability to pay compensation or its amount or duration, the compensation payable not being at the time of the application in arrear, no question had arisen within the meaning of section 1, sub-sec. (3), of the Act, and consequently that the condition-precedent to an arbitration was wanting, and the Sheriff-Substitute ought to have dismissed the petition.

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Field v. *Longden & Sons*, [1902] 1 K.B. 47, *approved*.

Expenses—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 6—*Incompetent Application for Arbitration—Discretion of Arbiter.*

The Workmen's Compensation Act 1897, Schedule II, section 6, provides:—"The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. . . ."

Held that this enactment did not cover the expenses of an application for arbitration found to be incompetent and premature.

[This case is reported *ante ut supra* and was now heard along with the immediately following case of *Sweeney* v. *Gourlay Brothers & Company (Dundee), Limited*.]

The Workmen's Compensation Act 1897, sec. 1, sub-sec. (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to the Act."

Section 6 of the Second Schedule provides that the expenses of the arbitration shall be in the discretion of the arbiter (*v. supra in second rubric*).

On 13th March 1906 the First Division of the Court ordained the Sheriff-Substitute at Dundee (CAMPBELL SMITH) to state a case in an arbitration under the Workmen's Compensation Act 1897 between Robert Kennedy, apprentice shipwright, 59 Dock Street, Dundee, now respondent, and the Caledon Shipbuilding and Engineering Company, Limited, Lilybank Works, Dundee, now appellants (*v. supra, page* 430). The Sheriff-Substitute had pronounced this interlocutor, dated 10th November 1905:—"Finds the defences as stated to be irrelevant: Finds the pursuer entitled to compensation from the defenders under the Workmen's Compensation Act 1897 at the rate of four shillings and sixpence weekly, as and from 28th October 1905, until the further orders of the Court: Further finds the pursuer entitled to expenses from the defenders, modified to two guineas, and decerns."

The stated case set forth—"On 2nd November 1905 the respondent presented an application in the Sheriff Court at Dundee, praying the Court to find him entitled to compensation from the appellants under the said Act in respect of personal injuries caused to the respondent on 14th October 1905 by accident arising out of and in the course of the respondent's employment with the appellants; to ascertain and fix such weekly payments as might be found to be due and payable to the respondent by the appellants under and in terms of the said Act; and to grant an award in favour of the respondent against the appellants therefor, with expenses. Notice of the accident had been duly given in terms of the statute. On the presentation of the application the usual warrant was granted for citation of the appellants, and appointing parties to be heard on 10th November 1905. On that day (10th November 1905) the Sheriff-Substitute heard parties' procurators. At the hearing, or after it, on the same day, the appellants' procurator lodged in process a written note of defences containing the pleas—(1) That the application was incompetent. (2) That the application should be dismissed with expenses to the appellants in respect that—(*a*) No question had arisen between the parties within the meaning of the Workmen's Compensation Act when the application for arbitration was presented. (*b*) Reasonable opportunity was not given to the appellants to admit their liability to pay the compensation claimed before the application was presented. The only part of these pleas argued at the bar, as understood by the Sheriff-Substitute, was that the action had been prematurely brought, and that therefore no expenses should be allowed to the respondent. The following facts were admitted at the bar—That on 14th October 1905 the respondent, while in the employment of the appellants, met with an accident entitling him to compensation under the Workmen's Compensation Act. That on 28th October 1905 the compensation to which he was entitled began to run. That on 31st October 1905 written notice of the accident was duly given to the appellants in terms of the Act. That on 2nd November 1905 the application was presented to the Court. That citation was effected on 3rd November 1905. That down to 10th November 1905, when the application was called before the Sheriff-Substitute as aforesaid, no payment of compensation had been made or tendered to the respondent, although the compensation had begun to run on 28th October 1905, and thirteen days' compensation was thus due. That down to 10th November 1905, when the application was called as aforesaid, no memorandum of agreement under the said Act had been sent to the sheriff-clerk either by the appellants or the respondent, although twenty-seven days had then elapsed since the accident. . . . The appellants did not aver that in fact any agreement had been made, but asserted merely that they were willing to pay. . . . The Sheriff-Substitute . . . was of opinion that, prior to the hearing on 10th November 1905, no 'agreement' within the meaning of section 1, sub-section 3, of the Act had been arrived at. He was, however, fully satisfied that an agreement, entitled to the sanction of the Court, had been arrived at by the agents, and, relying on their statements at the bar, he gave effect to it, and further that, without decree, the respondent could not enforce payment of any sum whatever. The Sheriff-Substitute was further of opinion—(*a*) that no agreement having been arrived at prior to the hearing on 10th November 1905, and

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the respondent having presented an application for arbitration, a 'question' had arisen within the meaning of section 1, sub-section 3, of the Act; and (*b*) that, in any event, in respect that prior to the hearing on 10th November 1905 the parties were admittedly at one only as to the liability to pay compensation, and not as to the amount or duration of compensation, and in respect that notwithstanding the general admission of liability to pay compensation no payment of compensation had been made, and the compensation was thus in arrear, a 'question' had arisen within the meaning of said section. . . . ."

The written notice of claim dated 31st October was alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897.

Various questions of law were stated, but the Court found it unnecessary to answer them.

Argued for the appellants—The Sheriff-Substitute was in error in thinking that a "question" in the sense of section 1, sub-section 3, of the Act had arisen here. There was no such question, and that being so the application should have been dismissed. A workman was not entitled to institute a claim in all cases at the expense of the employer, and irrespective of the fact whether his claim was admitted or not. Nor was he entitled to rush into Court with an arbitration before his employer had had time to accede to his claim or to pay the compensation admitted. The crucial date here was the date of the application, viz., 2nd November. Compensation was not payable till 4th November; the application was therefore incompetent. It should have been dismissed and expenses should then have been awarded to the appellants instead of to the respondent. Reference was made to *Field* v. *Longden & Sons*, [1902] 1 K.B. 47, and to the previous report of *Caledon Shipbuilding and Engineering Company, Limited* v. *Kennedy*, March 13, 1906, *supra*, p. 430.

Argued for the respondent—The claim here was not really made till 10th November. The application of 2nd November was merely the notice of the claim (*vide* section 2 of the Act). By 10th November the compensation was in arrear and no agreement had been registered. The question of expenses was a matter solely in the discretion of the arbiter (*vide* Schedule II, section 6).

At advising—

LORD PEARSON—This appeal comes before us on a case stated by the Sheriff-Substitute at Dundee in obedience to your Lordships' order, under the Workmen's Compensation Act.

The appellants are a shipbuilding and engineering company in Dundee. On 14th October 1905 the respondent met with an accident in the course of his employment at their works which entitled him to compensation under the Act. The first weekly sum of compensation became payable on 4th November, but before that date arrived the respondent had on 2nd November presented a petition for arbitration in the Dundee Sheriff Court, which was served on the appellants on 3rd November. I note in passing that the notice of claim given to the appellants on 31st October bore to be in terms of the Employers' Liability Act 1880, and it further stated that alternatively he claimed compensation under the Workmen's Compensation Act. The election to claim under the latter Act was made, as I understand it, by the lodging of the petition for arbitration on 2nd November.

At the hearing before the Sheriff-Substitute on 10th November the appellant objected to the petition on the ground that it was premature and unnecessary, as the appellants had never been unwilling to pay the half wages to the full statutory amount. I take this as being the Sheriff's recollection of what passed. A short written note of defences was also handed in by the appellants and lodged in process, which says the same thing in legal language, namely, that the application was incompetent and should be dismissed in respect (1) that no question had arisen between the parties within the meaning of the Act when the petition was presented, and (2) that no reasonable opportunity was given to the appellants to admit their liability. But the Sheriff's own account of it is quite sufficient to show that the point was definitely raised and argued.

Now, what the Sheriff did was this. He found the defences as stated to be irrelevant and he found the pursuer entitled to compensation at the rate of 4s. 6d. weekly as from 28th October. He further found the pursuer entitled to £2, 2s. of modified expenses, which he says he did in virtue of the discretionary power conferred on him by section 6 of Schedule II.

In my opinion the Sheriff has proceeded on an erroneous view of the statutory requirements, and the result at which he has arrived is inconsistent with the scope and intention of the Act. The Act does not regard arbitration with any degree of favour. It is to be the last resort of persons who find themselves unable to agree. It is assumed that there is to be a *bona fide* attempt to settle the matter without it. But the first requirement of all is, that there shall be a question arising in any proceedings under the Act as to the liability to pay compensation or as to the amount or duration of it. The expression "any question" obviously means any dispute. Then the statute prescribes that the question, if not settled by agreement, shall be settled by arbitration; which plainly imports that each party is entitled to an opportunity of settling by agreement, before arbitration can be forced upon him by the other. If either party attempts to rush an arbitration before any such question has arisen, or (if a question has arisen) before the other party has an opportunity of settling it by agreement, then the conditions precedent to the statutory arbitration are wanting and the petition for arbitration is incompetent *ab initio*.

These considerations are, I think, clear on the face of the statute, and I am confirmed in the view I have expressed by the

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decision of the English Court of Appeal in the case of *Field* v. *Longden & Sons* (1902, 1 K.B. 47), to which we were referred, and in which I may be allowed to express my entire concurrence.

Coming now to the grounds in law of the Sheriff-Substitute's decision, I find that the first ground which he assigns for it is this—that no agreement having been arrived at prior to the hearing on 10th November 1905, and the respondent having presented an application for arbitration, a "question" had arisen within the meaning of section 1, sub-section 3, of the Act. The underlying assumption here is, that the presentation of the petition for arbitration of itself created a question within the meaning of sub-section 3. But that is an impossible assumption, because, as was pointed out in the case of *Field*, the section in terms provides that a question must have arisen as to compensation before the provisions as to arbitration come into play. The Sheriff's second ground of decision is this—that in any event a "question" had arisen within the meaning of the Act, in respect that prior to the hearing on 10th November the parties were at one only as to the liability to pay compensation, and not as to its amount or duration, and in respect that notwithstanding the general admission of liability to pay, no payment had been made and the compensation was thus in arrear. But the compensation was not in arrear at the date when the petition was presented, which is the date at which its competency must be judged of; while as to the extent to which the parties were at one, there was certainly no question between them, when the petition was lodged, either as to the amount of the compensation or the duration of it.

The Sheriff-Substitute suggests that there was a waiver on the part of the appellants of their plea to the competency. I cannot draw this conclusion from the facts which he states; and it is inconsistent with the opening words of his interlocutor, where he finds the defences stated to be irrelevant, thus giving judgment on the plea which he says was waived.

Again, it was argued that this appeal is truly against the finding of expenses, and that as to these the Sheriff is final under section 6 of the Second Schedule. But that section applies only to the expenses of and incident to an arbitration and the proceedings connected therewith; and in my view there was here no arbitration properly so called. The sum in dispute is indeed very small, for the appeal is mainly directed against the award of expenses; but it raises a question of principle, of considerable importance to the proper administration of the statute.

In my view the Sheriff-Substitute ought to have sustained the preliminary defences and dismissed the petition, and it follows that his finding of expenses in favour of the petitioner cannot stand. But as there is no objection to the finding settling the compensation, it would seem unnecessary to recal that finding merely in order that the same result should be reached by registration of an agreement, and therefore I should propose that we should recal the first and last findings of the interlocutor and *quoad ultra* dismiss the appeal.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court pronounced this interlocutor—

"Recal the first and last findings in the interlocutor of the Sheriff-Substitute as arbitrator, dated 10th November 1905: *Quoad ultra* dismiss the appeal, and find it unnecessary to answer the questions of law stated: Find no expenses due to or by either party in connection with the stated case."

Counsel for Appellants—C. D. Murray—Hossell Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondent — MacRobert. Agent—D. G. Mackenzie, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Sheriff Court at Dundee.

SWEENEY *v.* GOURLAY BROTHERS & COMPANY (DUNDEE), LIMITED.

[This case was heard and decided along with the immediately preceding case of *Kennedy* v. *The Caledon Shipbuilding and Engineering Company (Limited)*.]

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3)—*Arbitration—Application for Arbitration while Master is Paying Full Compensation — Competency.*

His employers, without arbitration or a specific agreement, were paying an injured workman the full weekly compensation which he could claim under the Workmen's Compensation Act 1897, but had on several occasions when making payment intimated to him that they thought he had recovered and that the payments might soon be stopped. The workman after a time presented a petition for arbitration.

Held, on appeal, that the petition was incompetent and should have been dismissed, inasmuch as (1) when it was lodged no question had arisen between the parties as required by section 1 (3) of the Act prior to arbitration, and (2) the workman had no right to have his right to compensation constituted and controlled by a court of law irrespective of the Act.

The Workmen's Compensation Act 1897, section 1, sub-section (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any

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question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to the Act."

Thomas Sweeney, rivetholder, 64 Lilybank Road, Dundee, made application on 30th January 1906 in the Sheriff Court there, in an arbitration under the Workmen's Compensation Act 1897, for a decree ordaining Gourlay Brothers & Company (Dundee), Limited, to pay him nine shillings and ninepence sterling weekly as compensation under the Act as and from the 22nd January 1906. On 23rd February the Sheriff-Substitute (CAMPBELL SMITH) awarded the compensation claimed until the further orders of the Court with modified expenses. Gourlay Brothers & Company holding the application to have been incompetent appealed.

The stated case narrated—". . . The Sheriff-Substitute heard parties' procurators on 9th February 1906, when the appellants put in a written note of defences with the following pleas:—'(1) The petition is incompetent. (2) The petition should be dismissed with expenses to the defenders, in respect that—(*a*) There was no question between the parties within the meaning of the Workmen's Compensation Act when the petition was presented. (*b*) The respondent had entered into an agreement with the appellants under the Workmen's Compensation Act 1897, accepted compensation in terms thereof at the rate specified in the petition, and has received, and is still in receipt of, said compensation.'

"The Sheriff-Substitute allowed a proof, which was taken on 23rd February 1906.

"The following are the facts which the Sheriff-Substitute held as proved:—That the respondent on 5th September 1905, while working as a rivetholder in the employment of the appellants in Camperdown Shipyard, in the county of Forfar, was severely burned on his left hand and left leg through a lighted naphtha lamp falling upon him. That the appellants, in accordance with their liability under the Workmen's Compensation Act, from a fortnight after the accident till 23rd January 1906, paid the respondent 9s. 9d. per week as half his average weekly earnings. That the appellants had paid the respondent nothing since said 23rd January 1906. That when making the payment to the respondent of his weekly compensation the appellants intimated to him that in the opinion of the appellants and some unnamed medical adviser he had recovered and ought to be seeking for work, and that the payment of 9s. 9d. would in a very short time be stopped. That after having heard this warning several times repeated the respondent consulted an agent, who on 25th January 1906 gave the notice of the accident required by the statute, and on 30th January 1906 presented the petition to the Court. That no memorandum of agreement had been recorded with the Sheriff-Clerk by either party. That at the time when the petition was presented there was a dispute between the parties as to the respondent's ability to work—the respondent affirming his incapacity, while the appellants denied it, and threatened at any moment to stop payment of the compensation, and that no agreement had been made as to that dispute.

"The Sheriff-Substitute therefore held (1) that there had arisen a 'question' as to the duration of compensation within the meaning of section 1, sub-section 3, of the Act, and that the application was competently brought; and (2) that the respondent was entitled to compensation under the Act, and that complete recovery of his wage-earning powers had not been proved, as also that the appellants had not proved any probable cause for alleging it. . . ."

The following questions of law were submitted:—"(1) Whether a 'question' as to the duration of compensation within the meaning of section 1, sub-section 3, of the Workmen's Compensation Act 1897, had arisen between the parties and had not been settled by agreement. (2) Whether it being proved that the respondent has no agreement for compensation with the appellants capable of registration under the Workmen's Compensation Act, he is entitled to have his right to compensation constituted and controlled by a court of law as a guarantee against injustice being done to him or by him."

Counsel for the appellant stated that his argument in the preceding case (*Kennedy* v. *The Caledon Shipbuilding and Engineering Company, Limited*) covered the question raised in the present case.

There was no appearance for the respondent.

At advising—

LORD PEARSON—This is an appeal on a case stated by the Sheriff-Substitute of Forfarshire at Dundee under the Workmen's Compensation Act.

The appellants are shipbuilders in Dundee, and on 5th September 1905 the respondent received injuries in the course of his employment in their shipyard, which entitled him to compensation under the statute. The maximum amount due to him, on the footing of total incapacity for work, was 9s. 9d. a-week, being one-half of his average weekly earnings. This sum was duly paid to him by the appellants from a fortnight after the accident until 23rd January inclusive, that is to say, for four months and a-half. By the time the next weekly sum was payable, which was on 30th January, the respondent, through a solicitor, had given notice of the accident, and had presented a petition to the Sheriff for arbitration.

At the hearing before the Sheriff-Substitute on 9th February the appellants objected to the petition as incompetent, on the ground (1) that when it was presented there was no question between the parties within the meaning of section 1, sub-section 3, of the Act, and (2) that there was a subsisting agreement between the parties for

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compensation at the full statutory rate which had been regularly paid and accepted.

The Sheriff-Substitute allowed a proof, and found compensation due at the rate already mentioned, from the date of the last payment until the further orders of Court; and he awarded modified expenses to the respondent.

The Sheriff-Substitute thus virtually repelled the employers' objections to the petition; and so far as the stated case shows, the ground on which he did so was, that in making payment of the weekly compensation to the respondent the appellants had intimated to him, apparently on more than one occasion, that in their opinion and in that of their medical adviser "he had recovered and ought to be seeking for work, and that the payment of 9s. 9d. would in a very short time be stopped." In the view of the Sheriff-Substitute there had thus arisen a question as to the duration of compensation within the meaning of section 1, sub-section 3. In my opinion, no such question had arisen at the date when the petition was lodged, which is the material date. By the terms of the Act itself every payment of compensation is subject to review *de futuro;* and I regard the words used by the appellants when they made the payments as being no more than an expression of what the statute implies, namely, that the payments might have to be reviewed in the future, and even in the near future. In that sense the duration of compensation is always uncertain; but that does not mean that there is always a question as to its duration within the meaning of section 1, sub-section 3. There might be a case of payments being stopped on an allegation of complete recovery. But that is not this case. Here full payment had been regularly made down to date in accordance with the appellants' liability under the statute. It lay with the employer to make the next move, namely, to require the workman to submit himself for examination under section 11 of Schedule 1; and I see no reason at all for the assumption that in this case the employers would have taken the matter into their own hands. Indeed, I draw the contrary inference from the facts set forth by the Sheriff-Substitute as proved.

It follows that the petition should have been dismissed, unless it can be supported on the ground indicated in the second question of law stated by the Sheriff-Substitute. That question is, whether, where a workman has no agreement capable of registration under the Act, "he is entitled to have his right to compensation constituted and controlled by a court of law as a guarantee against injustice being done to him or by him?" The only possible answer is, that neither party has any right under the statute except what the statute confers; and that the question ignores the statutory conditions upon which alone an arbitration is admissible under section 1, sub-section 3. It is not until the parties are at arm's length that the statute contemplates a resort to arbitration, and then only when some definite question has arisen between them, which they have had at least an opportunity of settling by agreement and which they have failed so to settle. The mere fact that there exists no agreement capable of registration does not show that the parties are at arm's length. On the contrary, that is the normal state of matters, where, as here, the parties are *de facto* in agreement from the very first, and where compensation has been paid over a period of many weeks on the maximum scale.

In these circumstances I am of opinion that the Sheriff-Substitute ought to have dismissed the petition; and that his award of expenses was incompetent and must be recalled.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court pronounced this interlocutor—

"Find that the petition by the applicant is incompetent: Therefore find it unnecessary to answer the two questions of law stated: Recal the award of the arbitrator: Remit to him to dismiss the claim, and decern: Find no expenses due to or by either party in connection with the stated case."

Counsel for the Appellants—C. D. Murray—Hossell Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, June 7.

FIRST DIVISION.

[Lord Johnston, Ordinary in Exchequer Causes.

PATERSON *v.* INLAND REVENUE.

Revenue—Public-House—Licence Duty—Billiard Saloon in Flat above—Whether Part of Licensed Premises—"Offices"—Inland Revenue Act 1880 (43 *and* 44 *Vict. c.* 20), *sec.* 43.

The tenant of a public-house was tenant under a separate lease of a billiard saloon situated in the flat immediately above the public-house. There was no internal communication between the saloon and the public-house, access to the saloon being obtained by an outside staircase.

Held that the billiard saloon was neither part of the dwelling-house in which the retailer resided or retailed spirits, nor within the description "offices, courts, yards, and gardens therewith occupied," and consequently that licence duty was not exigible in respect thereof.

The Inland Revenue Act 1880 (43 and 44 Vict. c. 20), section 43, enacts—"(1) On and after the first day of July 1880, in lieu of the duties of excise now payable on licences

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to be taken out by retailers of spirits in the United Kingdom, there shall be charged and paid the duties following (that is to say)—If the annual value of the dwelling-house in which the retailer shall reside or retail spirits, together with the offices, courts, yards, and gardens therewith occupied, is under £10 . . ." [*Here follows a sliding scale of the duty payable.*]

On 28th October 1905 William Cleghorn Paterson, wine and spirit merchant, Harbour Bar, Girvan, brought an action against the Lord Advocate as representing the Commissioners of Inland Revenue, in which he sought declarator that he was not bound to pay excise licence duty in respect of a billiard saloon occupied by him as tenant, and situated in the flat immediately above his licensed premises. He also sought repayment of excess licence duty which he had paid under protest in respect of the said saloon.

The premises for which the pursuer held a public-house certificate consisted of a single room (the bar) with a dwelling-house of one room and kitchen attached, and were occupied by him under a lease, dated 17th November 1902, at an annual rent of £14. Under this lease he also occupied the stable, cellars, and outhouses behind the "Harbour Bar," at an annual rent of £11. Under another lease dated 25th May and 6th June 1905 he occupied as a billiard saloon at a rent of £20 the flat above the bar, room and kitchen. It belonged to the same proprietrix but had no internal communication with the lower flat, access to the saloon being obtained from the street through a pend leading to the yard behind and by an outside stone staircase going up from the yard to the flat above. There was also a private exit behind the bar into the entrance lobby of the dwelling-house, and thence through a back door into the court behind, from which the saloon might be reached by ascending the outside stone staircase above described, thus avoiding the necessity of going out into the public street.

The pursuer pleaded—"(1) The pursuer is entitled to decree of declarator as concluded for in respect that (*a*) the said flat occupied by him as a billiard saloon is not certificated by the licensing authority for the sale therein by retail of exciseable liquors; (*b*) the said flat is a separate tenement from the certificated premises; and (*c*) the said flat is not occupied by the pursuer along with certificated premises as offices, courts, yards, or gardens."

The defenders pleaded—"(1) In the circumstances and on a sound construction of the statutory provisions relating to licence duty, the rent of the billiard room is rightly included in the annual value according to which the duty has been charged."

The facts connected with the case are given in the opinions of the Lord Ordinary and the Lord President.

On 7th March 1906 the Lord Ordinary in Exchequer Causes (JOHNSTON) assoilzied the defender from the conclusions of the summons.

Opinion—"The pursuer is tenant under a lease, No. 6 of process, of a public-house for six and one-half years, commencing at Martinmas 1902. The premises when they were first let to him consisted of the bar in Knockushion Street known as the Harbour Bar, with the stable, cellars, and outhouses behind the same, all as presently occupied by Hugh Kirkwood, publican there, under exception (from and after the term of Whitsunday 1904) of the flat above the said public-house, which flat was to be taken over by the landlady at Whitsunday 1904. Accordingly, the upper flat was in the hands of Mr Kirkwood, the publican who preceded Mr Paterson. It is not indicated whether it was used by him as a billiard saloon or not, and for the purposes of the case I shall assume that it was not. The landlady did take the upper floor back into her own hands after a short period, but by the lease No. 7 of process she re-let it to Mr Paterson at Whitsunday 1905 for a period of seven years, and the terms of this lease, I think, require to be noted. The subject is described as that flat above the said Harbour Bar, situated at the corner of Henrietta Street and Knockushion Street, Girvan, to be used by him as a billiard saloon, and that for a period of seven years from and after the term of Whitsunday 1905. Now, Mr Young is quite right in drawing attention to this, that not only is the use of the upper flat defined, but that there is a break in favour of the landlady just at the term at which the lease of the public-house runs out, showing, therefore, that in her mind the billiard saloon was a valuable adjunct—I use that word in preference to offices—a valuable adjunct of the public-house business. I think that the same thing is shown by the previous passage, which declares that in the event of Paterson, the publican, selling the business, the landlady shall be bound to accept the purchaser as tenant of the billiard saloon after let. Now, I cannot read that otherwise than as indicating that in the first place the landlady thought the billiard saloon an important adjunct of her public-house premises, and, in the second place, that Mr Paterson thought that it would be of no use to him if he had not got the public-house, and that at the same time its possession would enhance the value of the public-house as a marketable subject. Now, these considerations do not necessarily lead to the decision of the case, but they are, I think, pertinent to the question which I have got to consider, and that is whether the terms of this statute, badly worded as they are, support the demand of the Crown. What I have got to interpret are the words, 'if the annual value of the dwelling-house in which the retailer shall reside or retail spirits, together with the offices, courts, yards, and gardens therewith occupied,' is as defined, the duty should be as specified. Now, there is no question that the first case which was referred to, the case of *Lawrence* and its sequels, the cases of *Kirk* v. *The Lord Advocate*, and *Paterson* v. *The Lord Advocate*, are all cases dealing

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with the question of 'the dwelling-house.' They are all cases in which a dwelling-house, practically separate, was sought to be brought under the definition of 'the dwelling-house in which the retailer shall reside or retail spirits,' and I do not think they really throw any light upon the question which we have here. At the same time, I agree with Lord Stormonth Darling when, in a subsequent case bearing more nearly upon the question, he says that his statement in the case of *Kirk* to the effect that 'the test of liability is the annual value of the certificated premises and no other,' was not an accurate statement if it be taken as a general statement, but that he intended it only with reference to the particular circumstances with which he was dealing.

"The question which I have to determine is rather upon the latter half of the clause quoted above, than the former, viz., whether this billiard saloon can be brought within the term 'offices, courts, yards, and gardens therewith occupied.' I think that the case of *Phillips* v. *The Lord Advocate*, 1 Fr. 828, is much nearer an authority than these above referred to, and supports me in the conclusion at which I have arrived, that such premises as this billiard saloon must be held to be covered by the terms of the statute. I set aside 'courts, yards, and gardens' and look at the word 'offices' only, but I must take the word 'offices' in conjunction with the words 'therewith occupied.' Now, the word 'offices' is a word of very wide meaning. I think you may search the dictionary through and you will hardly get a word to which such various grades of meaning have been gradually attached. Even when used in the plural, and taken in the special significance in which presumably it is used here, it is an extremely general word. I don't think I can do better than refer to two quotations in Murray's Dictionary. The *Times* of 1798 has this passage, 'To be sold, a freehold house with numerous attached and detached offices of every description.' Now, it seems to me that that indicates that one hundred years ago at any rate the word 'offices' carried an extremely wide meaning. Again, he gives this passage from an author Russell writing in 1881—'The usual outbuildings and offices which such fortified places contained.' It seems to me that these indicate a wide range of meaning, and of meaning fluctuating with the principal subject. The term 'offices' describes something which is pertinent, but it describes something which corresponds as a pertinent with the principal subject. That is appropriate as a pertinent to one thing which is not necessarily appropriate to another. For instance, to go back to Murray, a pantry, scullery, laundry, etc., are not appropriate offices of a farm, neither are byres and dairies appropriate offices of a dwelling-house, but they are each respectively offices of this particular principal subject. Now, if one considers what the principal subject is here, viz., a public-house, that may fairly come under the term offices in connection with a public-house, which would not necessarily come under the same term with reference to another building. Therefore, as I said at the beginning, one must regard not merely the word 'offices,' but the words 'occupied therewith,' as marking the relation between the 'offices' and their principal subject. Now, I cannot dispossess my mind of the consideration that a billiard saloon is an adjunct of a public-house which every publican would be delighted to have. There can be no question that—to refer to the case of *Phillips* (*supra cit.*)—the stable is not necessary to the public-house, but it is a very convenient adjunct of the public-house. It gives the customers of the public-house an opportunity of stabling. They get no drink in the stables, but in consequence of the use of the stable they are attracted to the public-house. I think that the billiard saloon is in very much the same position. A man who goes to the billiard saloon gets no drink there, because I cannot accept the suggestion of Mr Young that the licensed premises cover the billiard saloon. He can get no drink there, but the attraction of the billiard saloon is also an attraction to the public-house; and, apart from the terms of the lease, I cannot hold that the billiard saloon is not really 'therewith occupied.' The billiard saloon is truly an adjunct of the public-house in the sense of the statute and therefore an office in the sense of the statute. I say 'apart from the lease,' because if I go to the lease I find that conclusion confirmed by the terms of the lease to which I have already referred. Accordingly I am prepared to hold that this billiard saloon must be included in the annual value of the licensed premises just as much as the stable, courts, washing-house, and whatever else there may be in the back yard, and I therefore assoilzie the Crown from the conclusions of the summons with expenses. . . . .

"I think I should add that the situation of the premises weighs with me also. I cannot say that these have that separateness which the pursuer contends for. The court is not in any way a public court. One other set of premises has a right-of-way through it; otherwise it is truly a private court belonging to the public-house, and the passage to the billiard saloon is part of it."

The pursuer reclaimed, and argued—The question turned on sub-sec. 1 of sec. 43 of the Inland Revenue Act 1880 (43 and 44 Vict. c. 20). The licence was for the "Harbour Bar," together with "the offices, courts, yards, and gardens therewith occupied." The saloon clearly did not fall under any of the last three. A billiard saloon was not one of the "offices" of a public-house in the sense of the Act—*Lawrence* v. *The Lord Advocate*, January 24, 1889, 53 Justice of the Peace Reports, 167; *Kirk* v. *Lord Advocate*, October 22, 1897, 5 S.L.T. 143; *Phillips* v. *Lord Advocate*, December 28, 1898, 1 F. 828, 36 S.L.R. 636; *Grant* v. *Langston*, May 28, 1900, 2 F. (H.L.) 49, 37 S.L.R. 691; Webster's Dictionary, *voce* "offices." The saloon could not be called a pertinent, for it was held on a separate lease. The subjects were separate and the rents were separate. One of the leases too excluded assignees

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and the other did not. The rent of the saloon, £20, was more than the rent of the licensed premises. The Lord Ordinary was wrong in thinking that the saloon fell within the word "offices." The word "offices" must be construed with relation to the principal subject, *e.g.*, "offices" of a farm-house. The saloon was not necessary for the purposes of the other, and the "offices" of a house meant such buildings as were necessary for the purposes of the house.

Argued for respondent—In *Grant* v. *Langston* (*ut supra*) the subject in question was really a shop, not a dwelling-house. The case of *Phillips* v. *Lord Advocate* (*ut supra*) was in the respondent's favour. The billiard saloon was occupied as an appanage of the public-house. The upper flat was referred to in the lease of 17th November 1902 as within the "offices," *e.g.*, "the said public-house and offices, including the flat above the same." The lease of 1905 provided that the billiard saloon was to be so conducted as not to endanger the licence of the public-house. That showed the subjects were meant to go together. Moreover, the lease provided that if the public-house were sold the proprietrix should be bound to accept the purchaser as tenant of the saloon. "Offices" need not be such buildings as were "necessary" for the use of the principal subject—it was enough if they were used for and as part of the subject. A "store" and a "billiard saloon" were both offices of a public-house if they were used as part of the premises.

Lord President—The reclaimer here, Mr Paterson, occupies a public-house known by the name of the Harbour Bar at Girvan, which consists of a single room in which spirits are sold, with a dwelling-house of one room and kitchen attached. There are also in connection with the premises certain outhouses and stables. Above the public-house proper, and in the same building, there is another flat. That flat has not got internal communication with the premises below, but separate access is obtained thereto by means of an outside stair. The conditions of occupation of that flat at this time are that it is occupied by Mr Paterson as a billiard room, and the whole question in the present case is whether the Crown in charging licence duty against Mr Paterson, which as your Lordships are aware is charged upon a sliding scale according to the value of the premises, is or is not entitled to aggregate with the other subjects the value of the billiard room.

Now, that question turns upon the phraseology of the 43rd section of the Inland Revenue Act of 1880, which imposes the duty, and that section is as follows:—[*reads section*]. Now, it is clear that anything to be included in the valuation must be in one of two categories. It must be either "the dwelling-house in which the retailer shall reside or retail spirits"—and I may say in passing that certainly in the process of years the emphasis upon the word dwelling may be said to have been taken away, and it is held that a house in which a retailer retails spirits is a house of this character, even although he does not dwell in it, in the sense of sleeping in it—it must be either that or it must be "the office, court, yard, or garden" which is occupied with the dwelling-house in which the retailer shall reside or retail spirits. Now, I take those two questions separately. First of all, is this billiard room a part of the dwelling-house in which the retailer shall reside or retail spirits? I think it is clearly not, and I think so for this reason, that in the question of the unity of a house, as to which there is a great deal of authority, not only in connection with this statute but also in connection with the Inhabited House Duty Statutes, I think the criterion has always come to be, whether there is or is not internal access. The simplest case of a house is where a house is entirely self-contained. You enter on the ground floor and obtain access to all the rest of the house from that floor. But houses may be built in storeys, and they may be built in such a way that storeys or even different parts of one storey may be in the sense of the law separate houses. That is so in the case of the inhabited house duties, and it is so also, so far as I know, in other cases in which the law has construed what a house is. Now, applying that criterion here, I cannot doubt that this second flat is a separate house; in other words, it is not a part of the house in which this retailer resides or retails spirits. The Lord Ordinary has taken the same view, but then he has held that although it is not that, it is within the term "office, court, yard, or garden" occupied with the house in which the retailer resides.

Now, how does that stand? The history of this second storey is that while in the original lease it was let as part of the whole premises, it was only let in that way for a certain limited period, and it was provided that the landlord should resume possession at an early date, which the landlord did. After that it became the subject of a separate lease, and the tenancy of Mr Paterson as a billiard room keeper rested upon a separate lease in which this separate subject is let to him as a billiard room. Now, in these circumstances, I am bound to say that I cannot bring myself to the conclusion that it is an office occupied with the public-house. I quite agree that there is an intimate connection between the two, and that probably, in Mr Paterson's view, it was a matter of advantage both for his public-house that he should have the billiard room, and for his billiard room that he should have the public-house. Nay more, I think it is shown by the terms of the lease that that view was shared by the landlord, because one of the leading provisions of the lease provides that whereas the lease of the public-house is a lease to assignees whomsoever, the lease of the billiard room excludes assignees and sub-tenants. Nevertheless, if the present tenant of the public-house sells the public-house—that is to say, sells his tenant right in the public-house to assignees whomsoever—the landlord becomes bound to let to that tenant the

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billiard room. I think that shows that this idea of the two businesses being run together was as clearly present to the landlord's mind as it was to the tenant's. But then that does not seem to me to further the matter as regards the meaning of the statute. I think when you have the expression "dwelling-house together with offices, courts, yards, and gardens therewith occupied," you necessarily point to something that is an appanage of the dwelling-house, or which is connected with the dwelling-house. I do not say that it is a necessity to the dwelling-house, because the dwelling-house might do with either no offices at all or with fewer offices, but the use of the office must be a subordinate use to the dwelling-house. Now, I do not call the use of the billiard room a subordinate use to the public-house; I call it a co-ordinate use. Accordingly, upon the whole matter, I am of opinion that the Lord Ordinary's interlocutor should be reversed, and that we should find that the Crown is not entitled to aggregate in the value of these premises the value of the billiard room, and that decree should be given to Mr Paterson accordingly.

LORD M'LAREN—I am of the same opinion. I do not think that the billiard room falls under the description of a "dwelling-house with the offices, courts, yards, and gardens therewith occupied." It seems to me that when the house was built the upper flat was designed for separate occupation from the lower, because they have separate entrances. You can only obtain access from the one to the other by going out to the street or going into the courtyard behind. Then the businesses are separate. In this country at least it is not a usual combination to have a billiard room attached to a licensed public-house. I am of opinion that we ought to sustain the claim for return, which is the subject of this action.

LORD KINNEAR—I concur.

LORD PEARSON—I also concur.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [of 7th March 1906]: Find, declare, ordain and decern against the defender conform to the conclusions of the summons: Find the pursuer entitled to expenses, and remit . . ." &c.

Counsel for Pursuer and Reclaimer—M'Clure, K.C.—Macmillan. Agents—Gardiner & Macfie, S.S.C.

Counsel for Defender and Respondent—Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, June 21.

FIRST DIVISION.

[Sheriff Court at Airdrie.

HAMILTON & CALDER *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Rates and Charges—Distinguishing Rates—Terminal Charges—Traffic Carried over Railway from One Private Siding to Another—Right of Trader to Specification as to how Charge for Services Made up—"Terminals"—"Special Services"—Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 33, *sub-sec.* (3).

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), section 33 (3), enacts—"The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified."

Held (1) that the above-quoted enactment was not limited to "station-to-station" rates but was also applicable to "siding-to-siding" rates; and (2) that "terminal charges" as therein used included not only terminal charges proper, *i.e.*, "terminals" in the sense of the Railway Rates and Charges No. 19 (Caledonian) Railway, &c., Order Confirmation Act of 1892 (the Act regulating the right of the railway company to charge), but also charges for services which under the nomenclature of the Act of 1892 would be "services" as distinguished from "terminals."

Hamilton & Calder, boilermakers, Vulcan Boiler Works, Coatbridge, with the concurrence of the Procurator-Fiscal there, brought a complaint in the Sheriff Court at Airdrie under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, the Criminal Procedure (Scotland) Act 1887, and the Railway and Canal Traffic Act 1888, against the Caledonian Railway Company, charging them with an offence under section 33 (3), of the Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25), in respect that they had failed, when called upon to do so, to render an account in which a certain charge for goods carried was divided, and the charge for conveyance over the railway distinguished from the terminal charges, and the nature and details of the terminal expenses or charges

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therein contained specified, whereby the Caledonian Railway Company had become liable on summary conviction to a penalty not exceeding £5. The charge made was in respect of the carriage of plates of the weight of 9 tons 2 cwts. from Vulcan Boiler Works, Coatbridge, to the Glengarnock Iron and Steel Company's siding, Ardeer Iron Works, Stevenston, for which the Railway Company charged the sum of £3, 8s. 3d., being at the rate of 7s. 6d. per ton, and which rate included a charge of 1s. 7½d. per ton for terminal charges (or as subsequently described, balance of charge).

The respondents stated, *inter alia*, the following objections to the complaint:—"(3) The charge in question being made by the respondents in respect of special services rendered by them to the complainers at or in connection with a siding not belonging to the respondents in terms of section 5 of the Schedule of Maximum Rates and Charges referred to in the Provisional Order scheduled to and confirmed by the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, the provisions of sub-section (3) of section 33 of the Railway and Canal Traffic Act 1888 are not applicable thereto. (4) The charge in question not being a terminal charge within the meaning and application of sub-section (3) of section 33 of the Railway and Canal Traffic Act 1888, the respondents are not bound to specify the nature and detail of the expenses or charges in respect of which it is made."

The Sheriff-Substitute (GLEGG) repelled the objections, and after a proof found the respondents guilty of the contravention charged, and imposed a penalty of £2, 10s.

The Railway Company appealed on a case stated.

From the case it appeared that "on 14th April 1905 the respondents sent to the appellants the following letter:—'In terms of section 33, sub-section (3), of the Railway and Canal Traffic Act 1888, we hereby request you to render to us an account in which the undernoted charge made by you for the carriage of the undernoted merchandise consigned by us is divided, distinguishing the charge for conveyance from the terminal charges and specifying the detail and nature of the terminal expenses or charges, viz.—

'1904.

'Sept. 1st. From Vulcan Boiler Works to the Glengarnock Iron and Steel Company's siding, Ardeer Iron Works, Stevenston.

	T.	C.			
'Plates	9	2—7s. 6d.	.	£3	8 3.'

"The appellants replied by letter of 19th April in the following terms:—'With reference to your letter of 14th inst., addressed to Mr Blackburn, secretary of this company, I beg to state that the rate in question, viz., 7s. 6d. per ton, is for traffic in Class C, and is made up as follows:—

'Conveyance . . 5s. 10½d. per ton.
'Terminals . . . 1s. 7½d. ,, '

"The appellants refused to give further information."

[At the hearing counsel for the appellants stated that the word "terminals" in the Railway Company's letter of 19th April had been wrongly used, and that what was meant was "balance of charge."]

The goods had been carried from a private siding of the respondents to a private siding of the Glengarnock Iron and Steel Company, and with respect to the nature of the services rendered the case stated:—"The entire haulage inside and outside the respondents' boundary was done by an engine of the appellants. The respondents loaded the trucks and no services of loading or covering were performed by the appellants. . . . The appellants' siding, which connects with the respondents', enters the appellants' system at an awkward place. It comes in at the junction of two main lines, on both of which there is a large amount of traffic. . . . The charge for 'terminals' is made up of—(1) Provision of siding so far as on Caledonian property (31 yards), including gate. (2) Maintenance of siding so far as on Caledonian property (31 yards), including gate. (3) Signalling in vicinity of private siding and working points for private siding and other sidings. (4) Taking empty waggons from station to private siding. (5) Use of waggons on private siding. (6) Engine working on private siding. (7) Use of sidings in vicinity of private siding for shunting purposes. (8) Working between siding and station (line and accessories, engine-power, waggons, and staff). (9) Accommodation and marshalling at station. (10) Clerkage and checking, including office accommodation and foreman porter's visits to private siding when made. (11) General supervision, being supervision by stationmaster at Coatbridge. (12) Provision of chains and blocks when required. (13) Taking chains and blocks from station to siding. . . . At . . . the beginning of the private sidings of the Ardeer Iron Works the trucks are taken over by an engine belonging to the Ardeer Iron Works, and the appellants are not required to supply further haulage under their contract. . . . The charge for 'terminals' at this end is similar to that at the other, and is made up of (1) accommodation and shunting at Stevenston Station or junction at Ardeer Branch, as the case may be, inclusive of signalling. (2) Working from branch junction to station and *vice versa* in certain cases (line and accessories, engine-power, waggons, and staff). (3) Use of waggons on private lines. (4) Engine working on private lines. (5) Clerkage and checking, including office accommodation and number taking. (6) General supervision. (7) Use of chains and blocks when required on private lines, and returning same. At the proof Archibald Hillhouse, the general goods manager for the appellants—who wrote the letter of 19th April—explained that by 'terminals' he meant charges for services as described above. He said these were made under section 5, sub-section (1), of the Schedule of Maximum Rates and Charges, &c., contained in Appendix to the Caledonian Rates and Charges Act 1892. It

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was admitted that the charge of 1s. 7½d. was not made up from items for work actually done on the occasion in question, but was a general or overhead charge."

The following questions of law for the opinion of the Court were submitted by the Sheriff-Substitute:—"(1) Do the provisions of section 33 (3) of the Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25) apply to charges or expenses for the services above specified, or any of them? (2) Are the services rendered by the appellants to the respondents, in respect of which the foresaid charge of 1s. 7½d. has been made, services rendered at or in connection with sidings not belonging to a railway company within the meaning and application of section 5 of the Schedule of Maximum Rates and Charges, &c., annexed to the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, and if so, are they outwith the application of section 33 (3) of the Railway and Canal Traffic Act 1888? (3) In the circumstances above set forth was I right in convicting the appellants of the contravention charged?"

Argued for the appellants—Section 33 of the Railway and Canal Traffic Act 1888 applied only to station-to-station rates, where the work was done on the railway company's premises. It did not apply to rates from one private siding to another. The section which dealt with siding-to-siding rates was section 34. That being so, sub-section 3 of section 33 was not applicable—*Pelsall Coal and Iron Company* v. *London and North Western Railway Company*, January 12, 1891, 7 R. and C. Traffic Cases, 36. "Terminal charges" were defined in section 55 of the Act, and did not include services rendered at private sidings but only at stations, sidings of the railway company, &c. Provision as to furnishing particulars of charges for goods was originally made by section 17 of the Regulation of Railways Act 1868 (31 and 32 Vict. cap. 119), and later by section 14 of the Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48). These did not apply to private sidings. The Act of 1888 was to be read along with the previous statutes and so its corresponding section, *i.e.*, 33 (3), did not so apply. The Sheriff-Substitute had construed the word "terminals" as including all services rendered at the termination of the journey *i.e.*, everything except conveyance. That was a wrong construction. The statutes distinguished between (1) "station terminals"; (2) "service terminals"; and (3) "special services"—*vide* the Railway Rates and Charges No. 19 (Caledonian Railway) Order Confirmation Act 1892 (55 and 56 Vict. cap. 57), Schedule "Maximum Rates and Charges," sections 1, 2, 3, 4, and 5. (An Order in identical terms is printed in Ferguson's Scottish Railway Statutes at p. 420). As to the history of "terminal charges," reference was made to Deas on Railways (Ferguson's Ed.), p. 549 *et seq.* In "terminals" proper the terminus was always a station or a wharf, not a private siding. Section 24 of the 1888 Act provided that the "terminal charges" were to be stated, but these charges meant charges made at stations provided by the Railway Company, and not such a might be made at private sidings. What had been charged for here was "special services," not "terminals." Accordingly, even if sub-sec. (3) did apply to "siding-to-siding" rates, the appellants were not bound to give the information asked for seeing they were not bound to do so in the case of "special services" but only in the case of "terminals" properly so called. "Terminal station" was defined in section 25 of the Schedule (*ut supra*). Sidings were not terminal stations. Reference was also made on this subject to Boyle and Waghorn on Railway and Canal Traffic, vol. ii, pp. 80 and 127. Section 5 of the Schedule annexed to the Railway Rates and Charges No. 19 (Caledonian) Order Confirmation Act 1892 provided for differences being settled by arbitration, and the respondents ought to have applied to the Board of Trade for the appointment of an arbitrator. *Vide* also the Railway and Canal Traffic Act 1894 (57 and 58 Vict. cap. 54), secs. 3 and 4.

Argued for respondents — It was the interest of the trader to have the charges detailed, as he might do the work more cheaply himself. Section 55 of the Act of 1888 (*ut supra*) defined "terminal charges" as including charges for services rendered at stations, sidings, &c. If private sidings were not meant to be included the Act would have said so. Private sidings were also dealt with in the Report by Lord Balfour and Sir C. Boyle to the Board of Trade (see Report in Boyle and Waghorn on Railways and Canals, vol. ii, p. 118), on which the Act of 1892 proceeded. The charges in question included charges for "terminals" and charges for "special services." Sub-section (3) of section 33 was explicit in its terms, and entitled the trader to details of (1) conveyance rates, and (2) terminal charges, *i.e.*, everything not covered by the conveyance rate, and that whether the charges were for "station" services or "special" services. Both section 34 of the 1888 Act (which corresponded to section 14 of the 1873 Act) and section 33, sub-section (3), applied to places at which goods were received, which need not necessarily be "stations." The terms of the statute had to be obeyed and the Sheriff was therefore right in convicting—*New Union Mill Company* and *Great Western Railway Company*, April 14, 1896, 9 R. and C. Traffic Cases, p. 152. If the appellants thought they were unfairly treated they could resort to the Railway Commissioners, who had jurisdiction over private sidings.

At advising—

LORD PRESIDENT—The Caledonian Railway Company having carried a consignment of iron plates from the Vulcan Boiler Works, Coatbridge, to the Glengarnock Iron and Steel Company's siding, Ardeer Iron Works, Stevenston, the respondents, who carry on business at the said Vulcan Works, applied on 14th April 1905 for a specification of how the rate of 7s. 6d. per

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ton charged was made up. This demand was based on the 3rd sub-section of the 33rd section of the Railway and Canal Traffic Act 1888, which is in these terms:— . . . (*quotes Act supra in rubric*) . . .

The Caledonian Railway Company replied that the rate was made up of 5s. 10½d. per ton for conveyance and a balance of 1s. 7½d., but refused to give further specification of the nature and detail of the expenses included in the said balance of 1s. 7½d. The respondents raised a prosecution under subsection 7 of the same section for non-compliance with the provisions of the section. The Sheriff-Substitute convicted the Railway Company, and the present case is an appeal on a stated case against that conviction.

The Railway Company in their original letter represented the 1s. 7½d. as a charge for terminals. They subsequently explained that that word was used by inadvertence, and the case has accordingly been taken as if the word had been as I have used it, viz., balance of charge. The real defence of the Railway Company arises out of the circumstances in which the traffic is carried. These circumstances are fully detailed in the case, but so far as necessary to raise the argument they may be very briefly stated. The traffic in question originates on a private siding belonging to the respondents. The Railway Company do the haulage on that siding and also provide a short piece of line (some 30 yards) which connects the siding with the main line. The junction to the main line necessitates extra signalling. They also do various services in connection with the loan of waggons and returning empties. The traffic is then carried over the railway to its destination at another private siding, where the arrangements are practically the same. It is not loaded or unloaded at any station of the Railway Company, the journey, as above explained, beginning on one private siding and ending at another.

The right of the Railway Company to charge is now regulated by the Railway Rates and Charges Caledonian Railway Order Confirmation Act of 1892.

That Act specifies *maxima* for (1) conveyance, (2) station terminals, and (3) service terminals. It also allows charges for special services, as detailed in section 5 of the schedule, such charge to be a reasonable sum in addition to the tonnage rate, and to be determined in the case of difference by an arbiter appointed by the Board of Trade.

The defence stated by the Railway Company is twofold. They say that sub-section (3) of section 33 of the Act 1888 does not apply to traffic other than from station to station, and secondly, that the requirement as to "nature and detail" is confined to terminal charges, and that the charges here are not terminal but special.

As regards the first point, so far as the mere language is concerned, it must be conceded that the traffic in question is "carried over the railway," and therefore the section would seem to apply. The Railway Company really rest their argument on the place of the sub-section which is incorporated in section 33, the other sub-sections of which deal they say with station to station traffic, while it is not repeated in section 34 which deals with places other than stations.

The position of sub-section 3 is from the point of view of draughtmanship in truth most inartistic, but I do not think that that of itself can alter its meaning, especially when one considers that it has truly nothing to do with the rest of section 33. To bring this out clearly it is necessary to go back and trace the legislation on these matters.

Under the Act of 1845 it was provided by section 86 that a list of tolls should be exhibited on a board in or near each station. These tolls were, however, tolls for conveyance only. In nearly all special Acts, besides the toll clause specifying maximum charges for conveyance, there was another clause which afterwards came to be known as the terminal charge clause, which allowed the company when it acted as a carrier to make other charges. The phraseology varied, but an ordinary form, after specifying certain services, such as loading, unloading, collection, delivery, &c., wound up with the words, "and other services incidental to the business of a carrier." Accordingly, it was practically decided by the case of the *Scottish North-Eastern Railway Company* v. *Anderson*, 1 Macph. 1056—a similar opinion having been expressed in the English case of *Garton* v. *Bristol and Exeter Railway Company*, 30 L.J., Q.B. 273—that the requirements of section 86 were limited to tolls proper, *i.e.*, to the use of the railway as a railway, and that they did not extend to charges made by a railway company as carrier.

So stood the law until 1868. By this time the modern development of railways was fully accomplished, that is to say, the old idea that the railway company was to let out the line as a highway to others was practically exploded and they acted in every respect as carriers. By section 15 of that Act a list of passenger fares was bound to be exhibited in stations. But by section 17 a new provision entirely was introduced, and the person who sent goods was entitled to get from the railway company a splitting up of every charge made into two heads—(1) use of railway, *i.e.*, the proper toll plus use of carriage and locomotive power, or in one word conveyance proper; and (2) charges for loading or unloading, covering, collection. delivery, and other expenses, but without particularising the several items.

It will at once be seen that a person getting this specification could compare the charge under (1) with the toll proper on the board, and he could then consider whether, first, the difference between the the maximum on the toll board and the charge under (1), and, second, the charge under (2), was so "unreasonable" as to permit him to go to law.

In 1873 a new departure ensued. The body known as the Railway Commissioners was established, and the cognisance of

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many matters hitherto left to the ordinary tribunals was entrusted to them. Of these matters the principal were overcharge and undue preference. Accordingly, section 14 of the Regulation of Railways Act, 1873, provided for the publication of rates for goods at all stations. This was really an amendment of the old section as to tolls, coming abreast with the *de facto* position of the company acting as carriers. It provided for rates as a whole being published, and it gives a power on application to the Railway Commissioners to have these rates split. But it did not deal with the question of the individual trader's right to have the charge for his own consignments analysed. That remained on the 17th section of the 1868 Act, and it did not deal with passenger fares which had been sufficiently dealt with by the 15th section of that Act.

In the portion of the section providing for the rate to be split, the distinction is made between rates for conveyance and "other expenses."

By section 15 another important alteration is made. By it the Commissioners are made the judges of what is a reasonable sum for "terminal charges" instead of leaving it to the courts of law.

Then came the Act of 1888. By it the Railway Commissions were reorganised as the Railway and Canal Commissioners, and various amendments of the law were introduced. When we come to section 33 we find, first of all, a provision for the publication at stations of the general classification of merchandise. It will be observed that this is in supplement and not in lieu of the provisions of section 14 of the Act of 1873, for a general classification is not a rate. Several of the other sub-sections are exegetical of this. But two sub-sections have to do with quite other matters. Sub-section 6 provides for increase of charges, and enacts that a certain notice must be given before an increase can take effect, even although published as required by section 14 of the Act of 1873. Then there is sub-section 3. Now, sub-section 3 has nothing to do with publication in general, or with the Act of 1873; it is truly an amendment of section 17 of the Act of 1868. It seems to me, therefore, that no argument can be drawn from its position. If it had truly to do with the other parts of the section then an inference might be drawn from its non-repetition in section 34, which deals with the public exhibition of rates which are not from station to station. But as it is, sub-section 3 ought truly to have been a separate section, and bears no more relation to the other parts of section 33 than it does to section 34.

There is the further consideration that so far as the reason of the thing goes it seems just as important for the trader to know the component parts of a siding-to-siding rate as it is to know those of a station-to-station rate.

Turning now to the second argument, it would be of great force if the phraseology to be interpreted depended upon the terms of the Confirmation Act of 1892. By that Act a clear distinction is made between terminals—divided into station and service and special services. As to terminals proper, a maximum is fixed; as to services no fixed maximum is required. The reason is obvious, and is to be found clearly expressed in the lucid report by Lord Balfour of Burleigh and Sir C. Boyle to the Board of Trade which was the foundation of the various orders promulgated; and it is that special services vary so infinitely with circumstances that a maximum is not possible, whereas the terminals proper are sufficiently well known as to admit of maxima being fixed. But the question does not depend on the phraseology of the Act of 1892, but upon the sense in which "terminal charge" was used in the Act of 1888.

The Act contains a definition which does not help much in the question. It is this—"The term 'terminal charges' includes charges in respect of stations, sidings, wharves, depôts, warehouses, cranes, and other similar matters, and of any services rendered thereat."

It is obvious that this definition is inclusive and not exclusive, and moreover the words "sidings . . . and other similar matters" are of such a general character as to leave it doubtful whether it applies only to sidings owned by the railway company.

I am unable to say when the expression "terminal" was first used in any Act of Parliament, because that would involve an examination of all the different Special Acts. But it is clear that at least by 1873—and so far as brought to my notice that is the first public Act in which it is used—the expression had a well-defined meaning, because section 15 uses it as a known phrase which it *in gremio* explains as tantamount to loading, unloading, covering, collection, delivery, and "other services of a like nature." I think, therefore, that we may well assume that terminal charges in section 33, sub-section 3, of the Act of 1888, meant the same as terminal charges in the Act of 1873, sec. 15.

Now it is quite certain that by judicial decision the charges for services which, under the nomenclature of the Act of 1892, would be services as distinguished from terminals proper, fell under the description of terminal charges in section 15 of the Act 1873. For the Commissioners were invoked in many cases to regulate them. A whole series of cases will be found in the 4th vol. of The Railway and Canal Traffic Cases, and in one at least, *Neston Colliery Company* v. *London and North Western Railway Company*, the actual point seems to have been specially raised, for I find on page 261 the following passage:—"A further objection made to our jurisdiction is that section 15 is limited to fixing the amount to be paid for an admitted terminal service, and that if the nature of the service is questioned there is nothing for us to determine. But the scope of the section is not so limited as this view of it supposes. As its express language shows, it deals with terminal charges, making the question not one of definition of terminal service, but whether any given service performed is one for which a terminal charge can be made, and

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if as to the particular services for which the joint companies claim to make or to be entitled to make such charges, any of these services should appear to us to be incidental to conveyance, and covered therefore by the mileage rate, or not to be services of the kind to which the power of the companies to make terminal charges applies, we think we are authorised by our Act to decide that in such cases the rates for conveyance cannot be increased by the addition of terminal charges."

It is true that the actual decision on the merits in the series of cases cannot be taken to be law, because they were all reviewed in the case of *Hall & Company*, 15 Q.B.D. 505. But that very case, though altering many of the points on the merits, necessarily confirms the jurisdiction, and in one particular item affords an instance of a charge for a service which under the 1892 nomenclature would not be a terminal, being held and adjudicated on as a "terminal charge." I refer to the conveyance of chalk from Stoat's Nest, in which case (page 507) no use was made of the company's sidings, but the applicants had a private siding, whereas the rate charged exceeded the conveyance maximum (page 511). And finally, as to *Hall & Company's* case, though an appeal in that case from the Divisional Courts was held incompetent, yet the decision of Mr Justice Wills and Mr Justice Manisty was held to be sound and followed by the Court of Appeal presided over by Lord Halsbury in the case of *Sowerby & Company* v. *Great Nothern Railway Company* (7 Railway and Canal Traffic Cases, 156).

It is further on principle, I think, impossible to doubt that the decision was good. For in 1873 it is certain that, as was decided by the House of Lords in *Gidlow's* case (7 E. & I., A.C. 517), a railway company could only charge either for (*a*) conveyance proper, or (*b*) for services incidental to the business of a carrier, and it is also certain that while all Special Acts contain maxima for (*a*), but few did for (*b*). When therefore the Legislature in 1873 proposed to allow the Commissioners to become judges of what were reasonable charges under (*b*), it is extremely unlikely that the scope of the Commissioners' jurisdiction would be less than the scope of the railway's power to charge—there being no means of discriminating one service from another, which fell under the generality of the description "services incidental to the business of a carrier."

I am therefore of opinion that the 3rd sub-section of the 33rd section of the Act of 1888 used the word "terminal charge" in the same sense as the Act of 1873, and that it includes not only "terminals" proper in the nomenclature of 1892 but also special services.

The result is that in my opinion the Sheriff-Substitute was right to convict, and the appeal ought to be refused. But I think it necessary to append to my opinion one portion of the Sheriff-Substitute's note:—"The Sheriff is not required under the 1888 Act to consider the technical question what details should be supplied. The Act simply says that they shall be supplied, and I suppose if a railway company made an *ex facie* reasonable specification of details that a Sheriff would hold that the Act had been complied with. If the charges so detailed were unsatisfactory, then the trader would have his ultimate remedy under the 1892 Act. In fact the 1888 Act and the 1892 Act work together, and the final arbiter as to the propriety of the charges is not the Sheriff but the Board of Trade." With that passage I entirely agree.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the third question in the case in the affirmative.

Counsel for the Appellants—Guthrie, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Hunter, K.C.—Mercer. Agents—Gray & Handyside, S.S.C.

Thursday, June 21.

FIRST DIVISION.

[Sheriff-Substitute at Forfar.

MILNE (CHRISTISON'S TRUSTEE) *v.* CALLENDER-BRODIE.

Arbitration—Procedure—Plea Prejudicial to Arbitration Stated after Arbiter has entered upon Arbitration—Competency—Agricultural Holdings (Scotland) Acts 1883 and 1900 (46 and 47 Vict. c. 62, 63 and 64 Vict. c. 50).

In an arbitration under the Agricultural Holdings (Scotland) Acts 1883 and 1900, the proprietrix, after the arbiter who had been nominated by the Board of Agriculture had entered upon the arbitration and considered the claim and counter-claim stated, desired to withdraw her counter-claim. The arbiter being in doubt as to whether she could competently do so, framed a case to the Sheriff-Substitute under rule 9 of Schedule II of the Agricultural Holdings (Scotland) Act 1900 asking his opinion on the matter. Thereupon, on the crave of the proprietrix, certain questions equivalent to pleas prejudicial to the arbitration were added. These had not been raised in the pleadings before the arbiter, although objections to a similar effect had been stated to the nomination of an arbiter. Objection was taken to the competency of the questions at that stage of the case, the proper and only remedy having been, as maintained, to have interdicted the arbiter from proceeding.

Held that the questions could competently be considered.

Observations (*per* the Lord President) as to rules of pleading in arbitrations.

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John Milne junior, auctioneer, Brechin, trustee on the sequestrated estates of Charles Christison, sometime tenant of the farms of Bractullo and Gateside on the estate of Idvies, Forfarshire, brought an appeal against an interlocutor of the Sheriff-Substitute (LEE) at Forfar, pronounced on 2nd April 1906 in a special case presented for David A. Spence, arbiter in an arbitration under the Agricultural Holdings (Scotland) Acts 1883 to 1900 between the said John Milne junior and Mrs Callender-Brodie, proprietrix of the said estate. The Sheriff-Substitute had, *inter alia*, decided favourably for Mrs Callender-Brodie two questions of law submitted *inter alia* to him, and the point with which this report deals is whether these questions could competently be considered at the stage which the case had reached.

The two questions were—"(1) . . . (2) Was the said John Milne junior, as trustee foresaid, on 7th November 1905 a 'tenant' within the meaning of the Agricultural Holdings Acts 1883 to 1900, and particularly section 42 of the first-recited Act, and as such entitled to make the foresaid claim and to apply to the Board of Agriculture and Fisheries for the appointment of an arbiter? (3) If the foregoing question be answered in the affirmative, was there, at Martinmas 1905, a 'determination of the tenancy' within the meaning of the Agricultural Holdings Acts, and was the said John Milne junior, as trustee foresaid, entitled to claim compensation under the said Acts, in view of the fact that the said Charles Christison abandoned the said holding of Bractullo and Gateside, and failed to implement his part of the said contract of lease, to the pursuer's loss and damage? (4) . . ."

The Sheriff-Substitute's finding was—'. . . And with respect to the second and third questions of law, finds that John Milne junior, as trustee for the creditors of Charles Christison, sometime tenant of the farms of Bractullo and Gateside, was not, within the meaning of the Agricultural Holdings Acts 1883 to 1900, a tenant whose tenancy determined at Martinmas 1905, and was not under said Acts entitled to compensation from the proprietrix of said farm for unexhausted improvements."

The following narrative of the facts is taken from the Lord President's opinion:—"This is an appeal from a decision of the Sheriff-Substitute of Forfarshire, answering certain questions submitted to him by an arbiter under the provisions of the Agricultural Holdings Acts. The circumstances out of which the matter arose are these:—A farm of the name of Bractullo was let by the landlord, Mrs Callender-Brodie, for nineteen years from November 1896, to one Anderson. In 1902 Anderson, with consent of the landlord, assigned his lease to Charles Christison. It was part of the arrangement under which the assignment was made that Anderson, and Christison's brother Robert, and his sister Mrs Hunter, should become bound as principals and full debtors for all the provisions of the lease. In 1903 Christison, the tenant, got into difficulties and granted a trust-deed in favour of one Milne. Milne managed the farm up till Martinmas 1905, when admittedly—because there is no controversy on that point—the farm was re-let on a new lease altogether to Mr Milne as an individual. At or about the same time payment was taken from two of the parties who had become bound to see that the stipulations of the former lease were carried out—I mean Mr Christison and Mrs Hunter—the reason of this payment being that the rent which Milne was to pay was a less rent than the original rent under the nineteen years' lease. Milne then presented a petition to have compensation paid to him as an outgoing tenant for unexhausted manures under the Agricultural Holdings Acts, and he applied—as under the recent Act is necessary—to the Board of Agriculture for the nomination of an arbiter. The landlord objected before the Board of Agriculture to any arbiter being nominated, and said that there was no state of circumstances which allowed of a claim being made. The Board of Agriculture, however, did not go into that matter, but appointed an arbiter. Parties met before the arbiter, and the claimant proponed his claim, which was met by a counter-claim. Certain procedure seems to have taken place before the arbiter, but before any final decree was pronounced by the arbiter the landlord proposed to withdraw his counter-claim. That being objected to, the arbiter seems to have taken the view that that was a question of law on which he required instruction, and therefore proceeded to frame a case to the Sheriff, asking his opinion on that matter of law. Thereupon, on the crave of the landlord, three other questions were added, two of which really raised the same question as had been attempted to be raised before the Board of Agriculture, namely, whether there was any matter which could be adjudicated upon; and it is on these questions that the Sheriff-Substitute has given his opinion which is now under review.

"As finally put there were four questions, on the first of which no appeal has been taken, nor has any appeal been taken on the fourth, but the two questions on which the argument has turned were, first, whether the said John Milne was a 'tenant' within the meaning of the Agricultural Holdings Acts; and secondly, if that question be answered in the affirmative, whether there was at Martinmas 1905 a 'determination of the tenancy' within the meaning of the Agricultural Holdings Acts, and was the said John Milne as trustee entitled to claim compensation."

Argued for appellant—It was too late after entering upon an arbitration to state a plea prejudicial to the arbitration. An arbitration was a contract between the parties which was binding. If the proprietrix thought the arbitration ought not to have gone on, she should have interdicted the arbiter from proceeding with the reference—*Sinclair* v. *Clynes Trustees*, December 17, 1887, 15 R. 185, 25 S.L.R. 172.

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Objection ought also to have been taken before the arbiter. Not having done so, and having joined issue, she was bound by the contract to arbitrate, and any competent objections to the arbitration not having been stated must be held to have been waived. The Sheriff-Substitute had no right to deal with these questions, as they were not questions of law arising in the course of an arbitration in the sense of rule 9 of Schedule II of the Agricultural Holdings Act 1900.

The Court did not call for a reply.

At advising—

LORD PRESIDENT—[*After narrating the facts of the case ut supra*]—Now, before we get to the merits there was a preliminary question raised which practically goes to competency. That question may be stated thus—the original appellant, Milne, holds that, inasmuch as the parties had gone before the arbiter, and that a claim had been lodged on the one side and a counterclaim on the other, and the arbiter had been allowed to apply his mind to these claims with the view of coming to a decision on the matter, it was too late to raise the question of whether there was any matter to be adjudicated upon, or in legal language too late to raise a prejudicial plea, and the argument of counsel was that the only competent way to raise this question was by an action of interdict. I have not been able to see that there is actually any incompetency here. If a man who can show *prima facie* ground for saying he is a tenant—I mean not a mere man in the street—proceeds to make a claim against his landlord for compensation, which the landlord does not admit, and then the tenant goes to the Board of Agriculture and says "I want you to appoint an arbiter," I think it is clear what the Board of Agriculture will always do, and rightly do, as they did in this case—they will refuse to constitute themselves a legal tribunal to find if this is a proper claim or not, but will appoint a gentleman to act as arbiter, and leave the parties to work out the question in the arbitration. Now, I am not doubtful that as a matter of competency the next step might have been taken by way of interdict, because the case was of a class that raised the point clearly and plainly before any proceedings had been taken, and so, no doubt, the arbiter could have been interdicted from proceeding, just as in many cases arbiters have been interdicted from proceeding under Lands Clauses References. But I am far from thinking that that is the only procedure competent, or that in not taking that procedure the party must be held to have waived all other remedy. But I hesitate from laying down any general rule, because I think that the matter must really depend on the circumstances of each case, and I cannot bring myself to think that one is in a position to see so clearly *ab ante* all the different classes of circumstances that might arise as to be able to lay down a general rule and say that in such and such a case you ought to raise an interdict and in such and such a case you ought not. But you are well aware there are many cases in the books on what is certainly an analogous subject, namely references under the Lands Clauses Act, as to stopping arbitration proceedings where it is said an arbiter is proposing to exceed his jurisdiction or for other reasons; and I do not think I am going too far when I say that the tendency of judicial opinion has been rather against raising the matter *ab ante* by interdict, and rather in favour of considering the question after it has been before the arbiter himself. At the same time I am not wishing to say for an instant that interdict might not quite well be used, yet I hesitate to go so far as the Sheriff-Substitute in his note, where he says that clearly interdict was the right method. I think the matter would have been equally well and properly done had they gone before the arbiter, and then on the pleading before the arbiter put in a prejudicial plea. Now, that was not done here, and I think that it is a pity it was not done. After all, every arbiter has to settle his own jurisdiction, and decide that he has jurisdiction before proceeding to consider the matters referred to him, though, of course, his settling his jurisdiction is not final, because it can always be reviewed by the Court if wrong. But still he is bound to take the first step, and if he comes to a negative conclusion he would be bound to say so and refuse to go on. But though this was possibly the best course, as a matter of strict pleading one must remember there is no absolutely strict rule of pleading in a reference to an arbiter. Though the general practice known as making up records obtains before an arbiter, yet that is merely a matter of convenience; and a good illustration of how much it is a matter of convenience may be taken from this fact—that anyone who has had, as I happen to have had, acquaintance with English arbitrations, knows that the forms there are quite different from the forms we use here. Accordingly, although this arbiter was not asked to give a decision on this plea, I cannot think, as a matter of competency, that it can be held to be now too late to raise it; because to hold otherwise would be to hold that if a person in an arbitration does not put in a prejudicial plea in the initial stages he must be held to have waived it altogether. To hold that would be to hold that rules applied to arbitration proceedings which do not apply in ordinary actions, for everyone is well aware that if such a thing happened in Court, although there might be a salutary award of expenses, yet even at the last moment of the day before the actual judgment has gone forth there is always time to put in a plea, though that plea might go to render nugatory the whole proceedings that had taken place. I know no better instance than what happened in this Court very recently. I am alluding to the *Clippens Oil Company* against the *Edinburgh and District Water Trust* (July 6, 1905, 42 S.L.R. 698), in which case, after there had been judgment of the Lord Ordinary following on a proof extending for many days, a plea

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was allowed to be put in based on the Public Authorities Protection Act, which plea, if good, would have obviated the necessity for any inquiry into the case at all. Accordingly, as undoubtedly this plea did get into the arbitration—because here it is—I cannot think there is any incompetency in considering it, although I quite think that, as bearing on the expenses of the arbitration, the tardy production of the plea might be an element for consideration.

[*His Lordship then proceeded to consider the merits, and stated his reasons for holding that the questions fell to be answered in the negative.*]

LORD M'LAREN concurred.

LORD PEARSON—I agree in the judgment proposed. In the first place, I have no doubt as to the competency of now taking up and disposing of the preliminary questions which were added to the special case by the Sheriff. These questions were timeously raised by the landlord in his original representation to the Board of Agriculture. They are questions which might have been competently stated by him for the determination of the arbiter at the outset of the arbitration. His determination upon them would not have been final. But he could have decided them in the first instance, and as we are now in a proceeding within the arbitration, upon a case stated by the arbiter, I hold that these questions are competently before us for our decision.

[*His Lordship then considered the merits, in which he arrived at the same conclusions as the Lord President.*]

LORD KINNEAR was absent.

The Court pronounced an interlocutor affirming the interlocutor of the Sheriff-Substitute of 2nd April 1906 in so far as it answered the second and third questions stated in the special case as amended.

Counsel for Appellant—Younger, K.C.—A. R. Brown. Agents—Finlay, Rutherford, & Paterson, W.S.

Counsel for Respondent—Chree—Strain. Agents—John C. Brodie & Sons, W.S.

HIGH COURT OF JUSTICIARY.

(GLASGOW CIRCUIT COURT.)

Wednesday, June 27.

(Before Lord Stormonth Darling.)

HIS MAJESTY'S ADVOCATE *v.* DARINI.

Justiciary Cases — Alien — Expulsion — Aliens Act (5 *Ed. VII, cap.* 13), *sec.* 3—*Act of Adjournal, 1st February* 1906.

Circumstances in which a certificate of conviction and recommendation for expulsion were *granted* under the Aliens Act (5 Ed. VII, cap. 13), section 3, (1) (*a*), and Act of Adjournal of 1st February 1906.

The Aliens Act 1905 (5 Ed. VII, cap. 13), section 3 (1), enacts—"The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom—(*a*) if it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted by that court of any felony, misdemeanour, or other offence for which the court has power to impose imprisonment without the option of a fine, or of an offence under paragraph 22 or 23 of section 381 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) . . . and that the Court recommend that an expulsion order should be made in his case either in addition to or in lieu of his sentence. . . ."

The Act of Adjournal of 1st February 1906, section 2, provides that the forms of certificates set forth in the schedule may be used for the purposes of the Aliens Act 1905. The schedule gives the following form for a certificate of conviction and recommendation for expulsion [section 3 (1) (*a*)]:—

"In the Court of , held at , on the day of , Nineteen hundred and .

"Before .

"I (*or* We) hereby certify that A B, to whom the particulars shown in the annexed schedule relate, having been found by the court to be an alien, was this day convicted of the offence shown in the said schedule, being an offence within the meaning of section 3 (1) (*a*) of the Aliens Act 1905;

(and was committed to one of His Majesty's Prisons to be detained there for the space of).

And that the Court recommend that an Expulsion Order should be made in the case of the said A B (in addition to the said sentence) *or* (in lieu of sentence).

"(Signature of Judge or Judges.)

"Schedule.

Name.....
Nationality.....
Age.....
Dependents (if any).....
Offence.....
Sentence.....
Prison to which committed.....
Parish and County or Burgh in which offence committed.....

"(Signature of Judge or Judges)."

Giovanni Batista Darini was indicted at the instance of H. M. Advocate on the following charges:—That he did "on 21st January 1906, in the back court behind John Toma's ice-cream shop 31½ Ardgowan Street, Port-Glasgow, (1) attempt to break into said shop, with intent to steal therefrom; (2) discharge five chambers of a revolver loaded with ball cartridge at James Duncan, police constable, Port-

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Glasgow, one of His Majesty's subjects, while engaged in the execution of his duty, to the serious injury of his person and the danger of his life, and this you did contrary to the Act 10 George IV, chapter 38, section 2; and (3) assault the said James Duncan, engaged as aforesaid, and throw stones and bricks at him, whereby he was seriously injured."

The accused emitted a declaration before the Sheriff-Substitute at Greenock in which he pled "guilty" to the first charge and "not guilty" to the second and third charges. The said declaration also contained the following statement:—"I am a stucco figure maker. I belong to Italy. My last address is 6 Royal Street, Belfast. I am nineteen years of age and unmarried."

The proceedings before the Sheriff were conducted through a sworn interpreter, as were also all communications with the accused at the trial.

The trial took place at the Glasgow Circuit Court on 27th June 1906, when after hearing the evidence the jury unanimously found the panel guilty as libelled under the first charge in terms of his own confession, found him guilty at common law under the second charge, and guilty as libelled under the third charge.

LORD STORMONTH DARLING sentenced the panel to ten years' penal servitude, and having found the said Giovanni Batista Darini to be an alien of Italian nationality recommended that an expulsion order should be made in his case in addition to the said sentence. A certificate of conviction and recommendation for expulsion in terms of the Act of Adjournal of 1st February 1906 was accordingly issued.

Counsel for H. M. Advocate—E. Adam, Advocate-Depute. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for Darini—J. R. Haldane. Agent—A. Macfarlane, Solicitor, Port-Glasgow.

COURT OF SESSION.

Friday, June 22.

FIRST DIVISION.

[Lord Low, Ordinary.

LADY SEAFIELD *v.* MACBRAYNE.

Statute—Construction—Canal—Pier Dues—Right to Charge Dues subject to Power in Commissioners to Regulate Stated to be in Statute—No Provisions in Statute for such Regulation—Rates Chargeable by Private Owner of Public Pier—"Wharfage" Rates—Right of Owner of Pier to Levy Rates on Vessels Touching—Caledonian Canal Acts 1804 (44 *Geo. III, c.* 62), *sec.* 58; 1857 (20 *and* 21 *Vict. c.* 27), *Schedule; and* 1860 (23 *and* 24 *Vict. c.* 46), *sec.* 10.

The Caledonian Canal Act 1804, sec. 58, after providing for the owners of lands adjoining the canal having power to erect wharfs, quays, landing places, &c., and to land goods, &c. thereon, enacts—". . . and all rates and duties which shall be paid to the use and benefit of the said wharfs, quays, landing places, cranes, weigh beams, and warehouses, shall be (subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage) and are hereby vested in such owner or owners of the lands, grounds, or wastes who shall make, construct, and erect the same respectively as aforesaid, and his, her, and their representatives, so that the rates and powers herein granted to the said Commissioners shall not be thereby reduced or infringed." The Act contains no provisions dealing with the limitation, &c. of such rates and duties by the Commissioners.

Held (1) that the section conferred a power to charge rates and duties although there were no provisions dealing with the exercise by the Commissioners of the power to limit, &c., but (2) that such rates and charges were "wharfage" rates only, *i.e.*, a rate upon goods and passengers landed at or shipped from the pier, and not "tonnage" rates, *i.e.*, a rate on the tonnage of the boat touching at the pier.

The Right Hon. Caroline, Countess-Dowager of Seafield, proprietrix of, *inter alia*, the lands of Urquhart and Abriachan, on the shore of Loch Ness, brought an action against (1) David MacBrayne, shipowner, Glasgow, and (2) the Commissioners of the Caledonian Canal, incorporated by Act of Parliament, who were called for their interest but did not enter appearance.

The conclusions of the action, which dealt with the payments to be made on the defender's ships touching at Temple Pier and Abriachan Pier on Loch Ness, on the Caledonian Canal, were, *inter alia*, as follows:—"And (II) it ought and should be found and declared by decree foresaid that the pursuer is entitled to levy on the defender the said David MacBrayne (*a*) in respect of every ship or boat other than a steamboat belonging to the said defender which shall so touch, load, or discharge, the sum of one penny per registered ton for each time that such ship or boat shall so touch, load, or discharge, and (*b*) in respect of every steamboat belonging to the said defender which shall so touch, load, or discharge, the sum of 1s. 6d. for every time that such steamboat shall so touch, load, or discharge; (III) or otherwise it ought and should be found and declared by decree foresaid that the pursuer is entitled to levy on the said defender in respect of every vessel belonging to the said defender which shall land or receive on board passengers, animals, carriages, or goods at or from either of the said piers, a rate of 2d. for every ton burden of such vessel according to its register or measurement for every time that such vessel shall

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so land or receive on board such passengers, animals, carriages, or goods. . . ."

The pursuer pleaded—"(1) The piers mentioned in the condescendence being the private property of the pursuer, she is entitled, subject to such limitations and regulations as have been or may be legally imposed by the Caledonian Canal Commissioners, to levy on the defender dues in respect of all steamboats or other vessels belonging to him which touch at or make use of the same. (2) The rate of 1s. 6d. per visit of each steamboat having been duly approved by the Canal Commissioners, the pursuer is entitled to decree of declarator in terms of the second conclusion. (3) Or otherwise the rate of 2d. per ton prescribed by the Act of 1860, being the only effective limitation of the pursuer's right to levy rates, decree of declarator should be granted in terms of the third conclusion."

The defender pleaded—"(2) The pursuer having no right to levy dues upon the steamboats or other vessels belonging to the defender which touch at or make use of the piers referred to, the action ought to be dismissed."

The Caledonian Canal is maintained by the Caledonian Canal Commissioners under authority of various statutes, and particularly of the Acts of 1803 (43 Geo. III, cap. 102), 1804 (44 Geo. III, cap. 62), 1848 (11 and 12 Vict. cap. 54), 1857 (20 and 21 Vict. cap. 27), 1860 (23 and 24 Vict. cap. 46), and 1896 (59 and 60 Vict. cap. 79). So far as necessary for this case the following are the provisions.

The Act of 1804 in sec. 58 allowed abutting landowners to erect piers and provided for charges thereat (*v. sup. in rubric*). Section 59 allowed the Commissioners to erect piers, &c., if the landowners did not do so. Section 62 provided that nothing in the Act should authorise the Commissioners or other person to use a wharf erected for private use only.

The Act of 1857, sec. 3, enacted—"From and after the passing of this Act it shall be lawful for the Commissioners to levy and receive at every pier, jetty, or landing place erected or to be erected or improved on lands belonging to the Commissioners, or on or in connection with the canals respectively, such rates on passengers, animals, goods, and carriages landed or shipped at such pier, jetty, or landing place as the Commissioners may from time to time deem expedient, not exceeding the rates specified in the schedule hereunto annexed." The schedule did not deal with tonnage dues. Section 4 authorised the Commissioners to enter into agreements with the owners of any lands on the Canal with respect to any piers or landing places erected or to be erected by such owners at their own expense, and with regard to the management and maintenance thereof, and the levying and receiving thereat of rates not exceeding those in the said schedule.

The facts of the case are given *infra* in the opinions of the Lord Ordinary (Low), who on 17th February 1905 before answer allowed a proof.

Opinion.—"The pursuer is proprietor of two piers upon Loch Ness, known as Temple Pier and Abriachan Pier, which are used in connection with the navigation of the Caledonian Canal. The former was built in 1858 and the latter in 1881. The defender is a shipowner in Glasgow, who runs a line of steamers through the canal for the conveyance of passengers and goods. The defender's steamers call daily at Temple Pier. They used also to call at Abriachan, but have not done so since early in 1904.

"From the time that Temple Pier was built the pursuer or her predecessors have made charges for the use of that pier, and since 1869 the defender has paid to the pursuer an annual sum of £22, 10s. The pursuer now proposes, instead of taking an annual payment of a fixed amount from the defender, to charge dues at a certain rate upon passengers and goods landed or embarked at both piers, and also certain tonnage rates upon all vessels touching at the piers.

"I understand that the defender does not dispute the pursuer's right to exact landing charges upon passengers and goods (at all events at Temple Pier), but he maintains that she is not entitled to charge tonnage dues upon vessels touching at or using the piers. The present action is brought by the pursuer for the purpose of having her alleged right to do so declared.

"There are a number of Acts of Parliament relating to the Caledonian Canal, and to these both parties appeal in support of their respective contentions.

"The first Act was passed in 1803, and by it a Parliamentary grant of £20,000 was made to certain Commissioners for the purpose of making the Canal. By an Act passed in the following year—1804—the grant was increased to £50,000, and the Commissioners were authorised to construct all necessary works and to levy rates and duties. The 58th section of the latter Act contains provisions which are admittedly applicable to the piers in question. By it the owners of lands 'through which the said navigation shall be made' are authorised to construct 'wharfs, quays, and landing-places,' and to land goods, wares, and merchandise or commodities upon such wharfs, quays, and landing-places. The section then proceeds:— . . . [*quoted supra in rubric*]. . . .

"In that section it is assumed that rates and duties will be levied for the use of such landing-places, because without express authority being given to anyone to do so it is declared that 'the rates and duties which shall be paid' shall be vested in the owners. Now if rates and duties for the use of the landing-places were vested in the owners I think that it follows that the owners were empowered to levy such rates and duties, and no express limitation is put upon the right except that it shall in some way be regulated by the Commissioners.

"It was argued, however, for the defender that the kind of rates and duties which might be levied was by implication limited to charges for the use of the landing-places for loading and unloading goods and merchandise. It was pointed out that what

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was expressly authorised by the section was to construct wharfs, quays, and landing-places, 'and to land any goods, wares, merchandise or commodities upon such wharfs, quays, or landing-places;' and further, that what the Commissioners were empowered to regulate was 'such rates of wharfage'—an expression, it was argued, which is appropriate for landing charges but not for tonnage dues.

"I am not satisfied that the term 'wharfage' when applied to rates or duties is necessarily confined to charges made for landing or embarking goods or passengers. I think that it may include all charges which may be made for the use of a wharf, and if the statutes authorise tonnage rates for the use of a wharf I do not think that the mere use of the expression 'rates of wharfage' is sufficient to exclude such rates.

"The question seems to me to depend in the first place upon what is the true construction of the provision that the rates and duties 'shall be subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage.'

"I confess that when I read that clause I expected to find in the Act special powers given to the Commissioners to fix and regulate the rates and duties which might be exacted at wharfs and landing-places of the kind dealt with by the section, but there is no such provision in the Act. I therefore come to the conclusion that what is referred to are the general powers given to the Commissioners to fix (within the statutory limits) and to regulate the rates and duties which they are authorised to charge for the use of the canal or of the works connected therewith. These included (at the date of the Act) tonnage rates for every vessel entering the Canal, and a certain rate per ton upon all goods loaded or unloaded at the harbours, docks, or basins at the entrances to the Canal (Act 1803, section 23), a rate not exceeding 2d. per ton per mile upon goods carried upon or through the Canal for 'tonnage and wharfage' (Act 1804, section 40), and certain rates for, *inter alia*, using wharfs and quays for loading or unloading goods (Act 1804, section 50).

"Now, of course, the rates which the Commissioners were empowered to charge, whether upon ships or goods, for the privilege of entering or navigating the Canal had no application to wharfs or landing-places of the kind in question, but only such rates as they were empowered to levy for the use of wharfs and landing-places. That I take to be the reason why, in the clause of the section which I have quoted, the reference to the power of the Commissioners to make regulations is limited to 'such rates of wharfage.'

"I am therefore of opinion that the owners of such piers as those in question were authorised to charge for their use such rates as the Commissioners could have charged if the piers had been vested in them, but no other or greater rates.

"How precisely the provision that the rates and duties should be subject to the statutory powers of the Commissioners was intended to be carried into operation is not very clear, but what the pursuer's predecessors did (and I do not understand that the pursuer proposes to adopt any other course) was to obtain the Commissioners' approval and sanction to a table of rates to be exacted at the piers. I think that such a course was quite in conformity with the provisions of the statute, and that the pursuer is entitled to levy such dues as are approved by the Commissioners, provided that they are of a kind and of an amount which the Commissioners could themselves have charged if the piers had belonged to them.

"The last table of dues which is said to have been approved by the Commissioners, and which the pursuer now seeks to enforce, is dated in 1870. So far as I can judge from the excerpts from the statutes which have been printed, the Commissioners had at that date power to charge a tonnage rate on vessels landing or receiving on board goods or passengers as well as rates upon the goods and passengers themselves, but it seems to be doubtful whether they had power to charge a tonnage rate upon vessels merely touching at a pier without landing or embarking goods or passengers. Further, there has been legislation on the subject since 1870, because in 1896 an Act was passed confirming a Provisional Order made by the Board of Trade pursuant upon the Railway and Canal Traffic Act 1888. What the precise effect of that order was I do not know, but the schedule attached does not appear to contain any tonnage rate for vessels using a quay or pier.

"I am therefore not in a position to dispose of the case without further information. I cannot tell from the excerpts from the statutes which have been printed what precisely are the rates and duties now in force. That could only be ascertained by a close comparison of the provisions of the various statutes and schedules, and probably some knowledge of the local conditions to which the statutes are applicable would be necessary. Further, there are certain important matters of fact which are in dispute. Thus the defender denies that a table of rates was ever adjusted and approved by the Commissioners, while the pursuer's case to a large extent rests upon the averment that that was in fact done. Again, the pursuer seeks to have it declared that she is entitled to levy the dues which she specifies, both in respect of Temple Pier and Abriachan Pier. The defender, however, avers that dues have never been levied at Abriachan, and the table of rates of 1870 bears to be for Temple Pier only.

"It therefore seems to me that the safe course to adopt is to allow a proof before answer without disposing of any of the pleas at this stage."

On 26th September 1905 the Lord Ordinary (Low) assoilzied the defender from the conclusions of the summons.

Opinion.—"The provisions of the 58th and 59th sections of the Act of 1804 seem to

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me to show that the policy of the Act was to induce the owners of lands through which the Caledonian Canal passed to construct at their own expense such wharfs or landing places as might be necessary to render it fully available for the various districts which it was intended to serve. The provisions of the 58th section, however, in regard to the rates and duties which might be levied at such wharfs or landing places were so vague, and left the position of a landowner who might build a wharf so uncertain, that up to 1856 no landowner had taken advantage of the section, nor had the Commissioners, under the powers conferred upon them by the 59th section, called upon any landowner to do so.

"In 1856, however, Lord Seafield commenced the erection of Temple Pier. The circumstances under which he did so were these—A pier at Temple was very much needed for the Urquhart district, which forms part of the Seafield estates. The Canal Commissioners were not financially in a position to build the pier, and accordingly Lord Seafield ultimately resolved to do so himself. The matter was carried through by Mr Bruce, the commissioner upon the Seafield estates. That gentleman seems to have taken the view that under the 58th section a landowner who built a pier was entitled to fix the rates and duties subject to a power of alteration by the Canal Commissioners. He accordingly proposed, before building the pier, to obtain the approval of the Commissioners to a table of rates of an amount which, while not checking trade, would remunerate Lord Seafield for his outlay and enable him to maintain the pier. His idea was that if such a table was approved by the Commissioners before the pier was built, the rates would not be likely to be subsequently reduced by the Commissioners, and Lord Seafield might proceed to build the pier with a reasonable certainty that he would not be out of pocket. A table of rates was accordingly prepared and sent to the Commissioners, and although there is nothing to show that they formally approved of it, it was put in force when the pier was built and has been in use ever since.

"The construction of Temple Pier was commenced in 1856 and was completed early in 1857. At that time the Commissioners were preparing to apply to Parliament for additional powers, and it naturally occurred to them that the opportunity should be taken to have the difficulties which had arisen in regard to the 58th section of the Act of 1804 cleared up. It was at first proposed to insert a clause in the Bill dealing specially with Temple Pier —transferring it, I understand, to the Commissioners—but Lord Seafield objected to the proposed clause, and it was accordingly dropped and two clauses substituted, which became sections 3 and 4 of the Act of 1857. The 3rd section empowered the Commissioners to levy rates upon passengers, goods, animals, and carriages landed or shipped at piers or jetties belonging to them, not exceeding the rates specified in the annexed schedule. By the 4th section the Commissioners were empowered to enter into contracts and agreements with the owners of lands who had erected piers, jetties, or landing places, 'with respect to the management and maintenance of such piers, jetties or landing places, and the levying and receiving of rates thereat not exceeding the rates specified in the schedule hereunto annexed.'

"I take it that the latter section was intended to supply what had been omitted in the Act of 1804. By the 58th section of that Act the rates and duties to be levied at landing places built by a landowner were declared to be vested in him 'subject to the powers herein contained for the said Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage.' No such powers were, however, in fact, conferred by the Act. The result was to render the 58th section incomplete, and the object of the 4th section of the Act of 1857 was to supply the defect in the Act of 1804, and to define the powers of the Commissioners for the purposes of the 58th section in regard to rates of wharfage.

"Accordingly it seems to me that the 58th section of the Act of 1804 must be read along with the 4th section of the Act of 1857, the latter section containing the powers to the Commissioners in regard to the rates of wharfage referred to in the former section. The result of the two sections read together appears to me to be as follows:—(1) A landowner is authorised to erect a pier of the nature of those in question; (2) the Commissioners are authorised to make an agreement with the landowners in respect to the levying and receiving of rates thereat; (3) such rates are vested in the landowner; and (4) they shall not exceed the rates specified in the schedule to the Act of 1857.

"The position taken up by the pursuer is that a landowner who builds a pier at his own expense upon his own land can do what he likes with it, and if he chooses to allow the public to use it can fix his own terms. The only qualification of that right, it was argued, was that the Canal Commissioners were empowered to regulate the rates to be charged; and it was contended that they had in fact done so by having all along recognised the rates contained in the table prepared in 1856. That being so, no third party had a right to object to the rates.

"I cannot assent to the view that a pier built under the 58th section is under the absolute control of the landowner, except in so far as the Commissioners have right to regulate the rates. The 58th, 59th, and 62nd sections of the Act of 1804 seem to me to make it plain that a pier built under the 58th section is a public pier, for the service of the navigation, which the public are entitled to use, and for the use of which the landowner can only charge such rates as are authorised by the statutes and agreed to by the Commissioners.

"That being so, it is not for this Court,

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at all events in the first instance, to fix what rates the owner of such a pier is to be allowed to charge. That is a matter to be settled by agreement between him and the Commissioners acting within the limits imposed by the statutes. I have therefore some doubts as to the competency of the action.

"The question raised, however, is as to the legality of a particular rate which the pursuer has been in the habit of charging, and which she desires to continue to charge, and as that is a question upon the construction of the statutes, perhaps I am bound to express my opinion upon it. The table of rates of 1856, besides rates for goods and passengers landed or shipped, contained a tonnage rate upon all vessels touching at the pier. The defender Mr MacBrayne, who has a number of steamers upon the Canal, objected to pay the tonnage rates, and accordingly the pursuer brought this action to have her right to do so declared. The Canal Commissioners have been called as defenders, but they have not entered appearance, so I suppose it may be taken that so far as they are concerned they are willing that the tonnage rates in question should be levied by the pursuer.

"I am of opinion, however, that the statutes do not authorise tonnage rates upon vessels to be levied at piers built under the 58th section. The fourth section of the Act of 1857 only authorises rates not exceeding those in the annexed schedule to be levied at such piers, and the schedule contains no tonnage rate upon vessels.

"It was said that by subsequent Acts the Commissioners were authorised to charge tonnage rates. That may be so, but no authority is given to the Commissioners to agree to such rates being levied at piers built under the 58th section. There is no reference whatever in the statutes to such piers after the 4th section of the Act of 1857, and under that section the rates which may be levied are limited to those specified in the annexed schedule.

"I am therefore of opinion that the pursuer is not entitled to decree."

The pursuer reclaimed, and argued—Section 58 of the Act of 1804 conferred a power on the owner of wharves to levy rates and duties. The power had not been superseded by the Act of 1857. That Act also allowed the Commissioners to enter into agreements with the owners of private piers as to levying rates. The Commissioners had power to levy tonnage dues (2d. per ton) on vessels landing or receiving passengers or goods—Act of 1860 (section 10)—and they might agree to such rates being levied by owners of private piers. That had happened here. The Commissioners were to apportion the rate payable and to charge it partly on the vessel (tonnage rate) and partly on the goods (wharfage rate)—Act of 1860, section 16. There was no such distinction between wharfage and tonnage dues in the Acts cited as the respondent maintained. The rates chargeable were not limited to wharfage rates—Act of 1804, section 41. The reclaimer was entitled to be paid for the use of her pier per ton of ship's burden and per ton of goods landed. On the construction of section 58 reference was made to Maxwell on the Interpretation of Statutes (1905 ed.), pp. 534–6; and to Hardcastle on Statutory Law (1901 ed.), p. 124.

Argued for respondent—The right, if any, conferred on the owners of private piers was a right to levy wharfage dues. Section 58 of the 1804 Act contemplated a rate on goods landed, *i.e.*, a "wharfage" rate. In shipping circles "wharfage dues" meant charges on goods landed on wharves or piers. That was the meaning of the word in the opinion of Lord Mansfield—*Stephen* v. *Costor*, June 10, 1763, 3 Burrow's Rep. 1409, at p. 1415. The rates sanctioned by the 1857 Act were the rates specified in the schedule thereto appended. The "tonnage" rates contended for were not in the schedule. There was a clear distinction in the Acts cited between the powers of the Commissioners to levy rates and those of private owners. The power to levy rates which section 58 assumed had been conferred was not in fact conferred by that Act. A "wharfage" rate could not be imposed on a ship bringing goods to a pier any more than on a porter who carried them off the pier after being landed. The pursuer was not entitled to the declarator craved.

At advising—

Lord President—This is an action at the instance of Lady Seafield, who is proprietrix of, *inter alia*, the lands of Urquhart and Abriachan in the county of Inverness, and it is directed against Mr MacBrayne, shipowner in Glasgow, who, as is well known, runs a service of boats on the Caledonian Canal and Loch Ness.

Lady Seafield, as proprietrix of these lands, is also proprietrix of a pier known as Temple Pier, which is a stopping-place in ordinary course of all boats which run through the Canal, and the conclusions of the summons are directed against Mr MacBrayne in order to have it found that Lady Seafield is entitled to charge a sum against Mr MacBrayne for the uses which his boats make of the pier in bringing up to it in order to land goods and passengers, such sum to be calculated in respect of the tonnage of the vessels so landing. There are different conclusions which propose to institute other different methods of calculating the toll, but practically the question raised in the case is whether the pursuer has right to levy these duties against each vessel over and above duties which may be levied upon the defender's vessels either for goods there deposited or for passengers making their way along the pier to land.

Now the Caledonian Canal was created under an Act of Parliament in the year 1803, and there are a series of statutes dealing with what in the words of the Act is called "the Inland Navigation" extending from sea to sea, which consisted partly of the made canal and partly of various lochs which are there situated. Admittedly

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the right to charge dues or tolls must rest upon the provisions of these various Acts of Parliament. The Act of 1804, which was the second Act, *inter alia*, allowed landowners to erect wharfs or piers upon their own land, and I shall immediately give the section which relates to that matter.

As a matter of fact, for a very long time after the opening of the Canal, which was early in the century, no piers or wharfs in intermediate places were erected. There was nothing but a pier at each end. The pier we are dealing with was the earliest of the intermediate piers, and it seems to have been erected about the year 1857. Before the erection of Temple Pier certain negotiations were entered into between Lord Seafield, the proprietor of the ground at that time, and the Commissioners, and the result of these negotiations was undoubtedly that a table of tolls was got ready, and I think it is made clear that a copy of that table of tolls was exhibited on the pier and that the table contained a charge for the touching of a vessel. As a matter of fact every particular toll was not enforced against Mr MacBrayne, for he entered into what I may call a composition arrangement by which he paid a certain sum in respect of all that might be demanded from him on that account. Recently the proprietrix thought that sum ought to be increased, a proposition to which Mr MacBrayne did not give his adhesion, and accordingly the present dispute has arisen.

Now the Lord Ordinary has assoilzied the defender from the conclusions of the summons, and his Lordship's view briefly is this—Although he finds that the 1804 Act gave an inchoate power to charge dues on the piers of private owners which they had put up, he finds that, in so far as the 1804 Act was concerned, that was inchoate for this reason, that while the Act assumed to make provision for the way in which these dues should be regulated and limited, it did not in the succeeding sections make any such provision. His Lordship therefore holds that though there was an inchoate power to charge, the real power of charging was not provided till we come to the Act of 1857. When we look at the schedule of the Act of 1857 there is no provision made for charging a vessel—the only provision being for charging goods put out on the pier, or passengers who go out on the pier, and accordingly he holds that there is no authority for the charge which is sought to be made good in the summons. To finish the matter I ought also to say his Lordship holds the subsequent Act (the Act of 1860) does not apply in its schedule to charges made by a private owner at all, but only to charges made by the Commissioners themselves.

Now the argument to your Lordships by counsel for the pursuer made, I think, but a small attack on the last portion of the Lord Ordinary's view. But what they did say was this, that the power to charge was quite complete under the Act of 1804, and did not at all need the schedule of the Act of 1857, and that the power to charge was a general power subject only to be limited by the Commissioners, and that inasmuch as the Commissioners had sanctioned this table there was nothing wrong with the charge. That will depend upon the provisions of the Act of 1804, and I think it is common ground that the section of that Act on which the case depends is the 58th section. The 58th section provides that owners of ground through which the said navigation should be made might construct wharfs or landing-places upon their lands, and land goods thereat, and then it goes on as follows:—[*His Lordship quoted the section, v. sup. in rubric.*] Now, as I have indicated, his Lordship thinks that is not a complete power, because whereas it says these rates and duties shall be vested in the owners, "subject to the powers therein contained for the Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage," yet, in truth, perusing the Act we find there is nothing said about the Commissioners ascertaining and making regulations. So far as I am myself concerned I confess I do not think I could bring myself to that view. It seems to me that on a fair reading of the 58th section it does contemplate that there shall be a rate and duty, and that that duty shall be vested in the owner of the quay—in other words, shall be exigible by the owner of the quay—and I think the only limit put on it is that the Commissioners have a right to regulate the rate, and the mere fact that the Act does not prescribe any regulations, that is to say, does not put a limit on the Commissioners, does not seem to make the taxing clause a bad one. It was check enough that the Commissioners, who were a public body, should be given the power to see that a private owner did not try to charge too much. It was quite unnecessary to put in schedules to check the Commissioners, but it was thought the Commissioners could be trusted to protect the public against private owners. I am therefore inclined to hold that the 58th section is a good charging section and gave the power of charging a rate.

But there remains the question of what rates may be charged. Now, first of all, it is clear that a private owner is not entitled to anything for transit and navigation. In the first place, he had nothing to do with the creating of the canal, and secondly, these matters are all dealt with in the power of the Commissioners to charge a transit rate. For what is he to be paid? There is the accommodation he has given in putting up the quay, which is not to serve himself only but other people who use it. I agree with the Lord Ordinary in that I cannot hold that quays created under section 58 are private quays or wharfs in the proper sense of the word, because I think it is perfectly clear that the statute contemplates private wharfs also. That is very clearly shown by section 62. In other words, I think the statute contemplates three kinds of quays—(1) private wharfs proper which a person would use for his own purposes; (2) wharfs

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under section 58 of the Act of 1804; and (3) wharfs not private but built by the Commissioners under the Act, if a private owner will not make a wharf under section 58. That being so, one would not expect a private owner to be paid anything except for the use of a private wharf, and, accordingly, I am not surprised to find the sentence in section 58, which is, "subject to the powers of the Commissioners to limit, ascertain, and make regulations of and concerning such rates of wharfage." Now, that seems to me to refer back quite clearly to the "rates and duties which shall be paid to the use and benefit of the said wharfs, quays, landing-places," &c. And, accordingly, I think, in the language of the statute, all the rate that could be charged by a private owner is the rate of wharfage. I have no doubt that according to the ordinary use of the word it is a rate for things landed on the wharf and not for a ship merely touching at it. Certain evidence was read to your Lordships on that point. I do not know that the evidence could help us very much, because so far as language is concerned we are entitled to deal with it without evidence. If the interpretation of this word depends on some use of language that is different from the use of language nowadays, evidence may be of some value. But there was quoted to us a sentence from a judgment of Lord Mansfield in the case of *Stephen* v. *Costor* (1763, 3 Burr., 1409, at 1415)—"A duty for wharfage and cranage cannot be due where the party has not had the use of the wharf or crane. Wharfage is due for landing on the wharf." The judgment in that case was really an application of that proposition. I am bound to say a judgment of Lord Mansfield as to what wharfage is is excellent authority for interpreting the word in the Act of 1804, because though this Act is connected with Scotland, it is an Act which has the scent of Westminster all over it. It has forms and phrases which are now obsolete, and in my opinion the meaning applied to the word by Lord Mansfield would be the meaning of the word wharfage as used in these Acts of Parliament.

The result is, that I agree with the Lord Ordinary, though not precisely on the same grounds, and I think the defender here should be assoilzied. It is quite true that for a certain time the pursuer has drawn dues of this sort, but that, of course, can never give her the right if she has not got it by Act of Parliament.

LORD PEARSON—I agree in the view expressed by your Lordship. The case is attended with some difficulty owing to the rather loose and indefinite terms in which the older statutes are expressed, and to the necessity of applying them to modern conditions of traffic, which were not contemplated when the Canal was made. In particular, the position of an owner building a pier on his own land was left somewhat vague so far as regards his power to levy dues or rates. As between the pursuer and the defender, the difficulty has for many years been solved in practice by an annual payment of £22, 10s. But the pursuer is dissatisfied with the amount, and we have now to decide whether the larger claim which she makes for tonnage dues on ships touching at or using the piers is well founded.

In my opinion there is no warrant in the statutes for the levying of tonnage-dues on ships at the instance of the private owner of a pier—I mean, of a public pier. I think that such dues are leviable by the Commissioners alone, and that the rights of the private owner are to be determined by the Statute of 1804, section 58, and the Statute of 1857. I am disposed to agree with what your Lordship has said as to the scope of the 58th section, and to think that it could have been made effectual to owners of piers even before the legislation of 1857. But I think it is necessary to distinguish sharply between the rates and dues which the Commissioners can levy and those which a pier-owner can levy. The former are the owners of the whole navigation, with the harbours at each end. The latter is a riparian owner, who is permitted to connect himself with it on certain terms. *Prima facie*, the services rendered by one who builds a pier or landing-stage are, I think, wharfage services only, as that term is used in section 58 of the older Act. It is there used in a wide sense, as including a good many services which, now that things have become much more specialised, might now be called by other names. But, taken generally, they are services of the nature of and ancillary to wharfage and the loading and unloading and storing of goods as distinguished from transit rates on the one hand and harbour rates proper on the other. There may in the case of this pier or landing-stage have been some deepening required to furnish a safe depth of water, and I have no doubt also that a timber construction of the kind may after a course of time have its stability impaired by contact with the heavier class of the ships using it. But I should suppose that *prima facie* the appropriate basis of charge for the service of such a place is not a charge per ton burthen of the ship but a rate per ton or per barrel of the goods shipped or landed, and a rate per head for passengers. As I read the statutes, they are in conformity with this view, and therefore I hold that the claim of the pursuer must fail.

LORD MACKENZIE—I concur.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Clyde, K.C. — Smith, K.C. — Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender and Respondent — Dean of Faculty (Campbell, K.C.) — Hunter, K.C.—Macmillan. Agents—J. & J. Ross, W.S.

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Friday, May 25.

OUTER HOUSE.

[Lord Dundas.

TURNER'S TRUSTEES *v.* M'FADYEN AND OTHERS.

Succession — Will — Direction to Divide Residue according to Verbal Instructions —Nuncupative Legacy.

A testatrix directed her trustees to divide the residue of her estate according to her wishes as expressed verbally to A. In an action of multiplepoinding raised by the trustees, A averred that the testatrix had told her—"I wish £100 given to the poor of Inverary Parish and you will come and take the rest"—and claimed to be ranked and preferred to the whole of the residue with the exception of the said sum of £100. *Held* by the Lord Ordinary (Dundas) that it was incompetent to prove such verbal instructions by parole evidence or by reference to the oath of A, and that the residue of the estate had therefore fallen into intestacy, but that A and the Inspector of Poor of Inverary Parish, who was also a claimant, were entitled to lead proof by parole evidence of nuncupative legacies in their favour respectively of £8, 6s. 8d.

R. S. Corrigall, solicitor, Dunoon, and Mrs Margaret Smith or M'Fadyen, the trustees of a Miss Turner who died on 23rd October 1904, acting under her trust-disposition and settlement dated 4th April 1902 with relative codicils, brought an action of multiplepoinding in which claims were lodged by (1) Mrs M'Fadyen, (2) the Inspector of Poor of Inverary Parish, (3) Mrs Elizabeth M'Kellar or Strathearn and others, the next-of-kin of the testatrix, and (4) the King's Remembrancer. The fund *in medio* was the residue of Miss Turner's estate, which Mrs M'Fadyen claimed, as did the next-of-kin and the King's Remembrancer, while the Inspector of Poor claimed £100 thereof.

The circumstances of the case and the authorities quoted in argument are set forth in the Lord Ordinary's opinion, which was as follows:—

Opinion.—"The testatrix Miss Turner died on 23rd October 1904. She left a formally executed trust-disposition and settlement dated 4th April 1902, and two codicils dated respectively 12th April 1902 and 14th February 1903. Her accepting and acting trustees and executors are Mr Corrigall, solicitor, Dunoon, and Mrs Margaret Smith or M'Fadyen, a first cousin of her own, and they are the pursuers and real raisers of the present action. The fund *in medio* is the residue of Miss Turner's estate, which apparently amounts to about £300. The question arises from the manner in which the third purpose of Miss Turner's trust settlement is expressed. It is in these terms—'With regard to the residue of my estate, failing my leaving special written instructions to the contrary, my trustees shall divide the same according to my wishes as expressed verbally to the said Mrs Margaret Smith or M'Fadyen, or in any letter or informal writing which I may address to her.' No letter or informal writing by the testatrix to Mrs M'Fadyen is produced or said to exist. But Mrs M'Fadyen has lodged a claim by which she seeks to be ranked and preferred as an individual to the whole fund *in medio* except such legacy as may be held to be due to the poor of the parish of Inverary. The averments contained in her condescendence require to be attended to, because the question at issue is whether or not they are competent and relevant to probation. Mrs M'Fadyen states, *inter alia*, that 'on 5th April 1902, the day after the execution of her will, Miss Turner entered into conversation with the claimant about the disposal of her means, in the course of which she stated to the claimant whatever means I do not "give away you are to come and take."' Then it is averred that in the summer of 1903, when Mrs M'Fadyen was visiting Miss Turner, the latter lady remarked to her in conversation, and with reference to the codicil dated 14th April 1903—'I have given £100 away, and I am sure you will be pleased with what I have done;' and after giving her certain instructions as to specific moveable effects, added —'I wish £100 given to the poor of Inverary Parish, and you will come and take the rest.' 'Throughout the whole course of the conversation she' (the testatrix) 'spoke to the claimant on the footing that she wished her to be and contemplated her as her residuary legatee.' These are the most specific of the averments which Mrs M'Fadyen desires to be allowed to prove. A claim is also lodged for the Inspector of Poor for the Parish of Inverary, in which, founding upon the alleged verbal instructions given by the testatrix to Mrs M'Fadyen, the claimant seeks to be ranked and preferred to the fund *in medio* to the extent of £100. Upon the other hand, the claimants Mrs Elizabeth M'Kellar or Strathearn and others, who assert that they are the nearest of kin and lawful heirs *in mobilibus* of the testatrix, maintain that the averments of Mrs M'Fadyen, assuming them to be correct in fact, are incompetent, or otherwise irrelevant to probation; that the claims of Mrs M'Fadyen and of the Inspector of Poor ought to be repelled; and that the next-of-kin ought to be ranked and preferred to the whole fund *in medio* upon the footing that the residue of Miss Turner's estate has fallen into intestacy.

"The question thus raised is, in my opinion, one of some nicety, and not expressly covered by any decision of which I am aware. I have come to the conclusion that the principal contention put forward by Mrs M'Fadyen, and in a subsidiary sense by the Inspector of Poor, is unsound. The main authorities which were referred to at the discussion in the procedure roll were Stair's Inst., iii, viii, 34, 35, 36; Ersk. Inst., iii, ix, 7; Bell's Prin., sec. 1869; *Phin & Others*, 1738, 5 Br. Supp. 203, M. 3837;

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Rankine, February 7, 1849, 11 D. 543; *Nasmyth*, July 27, 1821, 1 Shaw App. 65; *Forsyth's Trustees*, January 18, 1854, 16 D. 343; *Baird* v. *Jaap*, July 15, 1856, 18 D. 1246; *Wilsone's Trustees* v. *Stirling*, December 13, 1861, 24 D. 163; *Young's Trustees* v. *Ross*, November 3, 1864, 3 Macph. 10; *Fraser* v. *Forbes' Trustees*, February 3, 1899, 1 Fr. 513, 36 S.L.R. 469; *Campbell's Trustees* v. *Campbell*, January 30, 1903, 5 F. 366, 40 S.L.R. 335. Upon a careful consideration of the authorities I think that it must be held to be now settled law that a testator may by a formal testamentary disposition of his moveable estate prescribe the degree and manner of the solemnities (either in addition to or in diminution of what the law requires) which shall be necessary to confer testamentary effect upon writings by him either then existing or thereafter written by him, or, in other words, may appoint and declare the kind of written evidence by which his executors are to be guided in the distribution of his estate. The theory of the cases is, I apprehend, that the direction in the formal settlement communicates to the informal writings its own probative character. I am aware that a doubt has been authoritatively expressed (M'Laren's Wills and Succession, 3rd ed., pp. 290 and 293) as to the soundness of some of the decisions, and especially of *Wilsone's Trustees* (*sup. cit.*). But accepting, as I apprehend I am bound to accept, the reported cases as being well decided, it appears to me that what I am asked by Mrs M'Fadyen's counsel to hold in this case is entirely beyond anything that has as yet been sanctioned in the law of Scotland. The question here is not as to informal or improbative writings, but as to the competency or the reverse of admitting to parole proof, or to a reference to Mrs M'Fadyen's oath, averments of alleged verbal instruction to that lady by the testatrix as to disposal of the residue of her estate. The old case of *Phin and Others* (*sup. cit.*) gives no support to Mrs M'Fadyen's contention. The decision there was plainly based upon the ground that the gentleman, the competency of whose oath was in question, was not merely executor but 'intromitter and general disponee,' and having 'right to the residue of the effects.' (See Lord Ivory's note to Ersk. Inst., iii, 9, 7). Here Mrs M'Fadyen's connection with the estate, so far as appearing upon the face of the written settlement, is purely official, and not that of a beneficiary. In other words, Mr Guthrie's evidence in *Phin's* case was in the nature of an admission; but that of Mrs M'Fadyen, if admitted here, would be in support of a claim. To allow proof or reference to oath of the averments in question would, in my judgment, amount or come dangerously near to an infringement of the cardinal rule of our law that a will must be in writing. This view appears to me to be strongly supported by the case of *Forsyth's Trustees* (*sup. cit.*), and also by the opinion of Lord M'Laren (Wills and Succession, 3rd ed. p. 1058).

"I am therefore prepared to negative the principal contention put forward by Mrs M'Fadyen and by the Inspector of Poor respectively. But I think that the authorities go to show that these claimants are entitled to prove if they can by parole evidence nuncupative legacies in their favour respectively of £8, 6s. 8d. To this extent I think that their averments are relevant and may be competently admitted to probation, unless the parties are prepared to agree upon the facts without the necessity of a proof. Another matter which would require investigation, unless it can be arranged by parties, is as to the soundness of the claim by Mrs Strathearn and others to be the heirs *in mobilibus* of Miss Turner. All that I can do at this stage appears to be to pronounce findings in conformity with the opinion above expressed, and to appoint the cause to be enrolled for further procedure."

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that it is not competent to prove by parole evidence nor to refer to the oath of the claimant, Mrs Margaret Smith or Fadyen, the verbal instructions alleged to have been given to her by the testatrix as to the disposal of the residue of her means and estate; and that the said residue is therefore undisposed of by the testatrix and has fallen into intestacy; but (2) that the averments made by the claimants Mrs M'Fadyen and Robert Fraser respectively are relevant, and may competently be proved to the extent and effect of establishing a verbal legacy of the amount of £8, 6s. 8d. by the testatrix to each of the said claimants respectively: With these findings, appoints the cause to be put to the roll for further procedure, and reserves meantime all questions of expenses."

Counsel for the Pursuers and Real Raisers, and for the Claimants Mrs M'Fadyen and the Inspector of Poor of Inverary Parish—J. R. Christie. Agent—George Stewart, S.S.C.

Counsel for Claimant, the King's and Lord Treasurer's Remembrancer—Howden. Agent—W. G. L. Winchester, W.S.

Counsel for Claimants Mrs Strathearn and Others—J. M. Irvine. Agent—J. D. Boswell.

Wednesday, June 27.

SECOND DIVISION.

M'KENNA *v.* THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (4)—*Expenses of Unsuccessful Trial at Common Law and under Employers' Liability Act Deducted from Compensation—Expenses after Verdict Applied Allowed to Neither Party—Process.*

A workman brought an action at common law and under the Employers' Liability Act, but containing no reference to the Workmen's Com-

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pensation Act 1897, to recover damages from his employers for injuries sustained when in their employment. A jury returned a verdict for the defenders, whereupon the pursuer moved the Court to assess compensation under the Workmen's Compensation Act 1897. The motion was postponed, and renewed when the case was in the roll to apply the verdict. The defenders admitting liability, the Court applied the verdict, found the defenders entitled to expenses, and of consent found them liable in compensation under the Workmen's Compensation Act, but there being no evidence on which to assess the compensation, allowed a proof as to the amount. Thereafter parties having agreed as to the amount of compensation due, the defenders moved, under sec. 1 (4) of the Workmen's Compensation Act, to deduct from this their taxed expenses down to the date when the verdict was applied. The pursuer opposed this, and moved for his expenses since that date.

Held that the defenders were entitled to deduct from the award of compensation their expenses as taxed down to the date when the verdict was applied, and thereafter that no expenses were due to or by either party.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, (4), enacts—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ."

James M'Kenna, a bogieman, brought an action in the Sheriff Court of Lanarkshire at Hamilton against the United Collieries, Limited, his employers, to recover damages at common law or under the Employers' Liability Act 1880 for injuries sustained by him while in their employment. No reference was made in the record to any claim under the Workmen's Compensation Act 1897. The case was appealed for trial by jury, issues were allowed, and the case having been tried, a verdict was returned for the defenders. Thereupon the pursuer moved the Court under sec. 1 (4) of the Workmen's Compensation Act 1897 to assess compensation under that Act. The motion was postponed, and when the defenders enrolled the case to apply the verdict the pursuer again made the motion. The defenders while admitting liability under the Workmen's Compensation Act maintained that no evidence had been led to enable the Court to assess the amount of compensation. The Court, holding that this was so, applied the verdict, dismissed the action, found the defenders entitled to expenses; further, of consent found that the injury to the pursuer was one for which the defenders were liable to pay compensation to the pursuer under the Workmen's Compensation Act, and allowed the pursuer a proof as to the amount of compensation. The defenders lodged an account of their expenses down to the date when the verdict was applied, and these were taxed at £187, 12s. 11d., for which sum decree in their favour was pronounced. Thereafter parties having agreed that the amount of compensation due was 12s. per week lodged minutes to that effect, and the case having been enrolled to give effect to this agreement, the defenders moved under sec. 1 (4) of the Workmen's Compensation Act to be allowed to deduct from the award of compensation their whole taxed expenses down to the date when the verdict was applied. The pursuer opposed and also moved for his own expenses since the date when the verdict was applied.

Argued for the defenders—None of the expenses of the jury trial were incurred in respect of any claim under the Workmen's Compensation Act, of which no mention was made on record. There had been no question fought which could only arise under that Act. The deduction should therefore be allowed—*Cattermole* v. *Atlantic Transport Company, Limited*, [1902] 1 K.B. 204.

Argued for the pursuer—The defenders should have admitted liability under the Workmen's Compensation Act before the expense of the trial had been incurred. The effect of deducting the taxed expenses of the defenders from the compensation would practically nullify the award of compensation. The words of sec. 1 (4) of the Act were permissive, and the Court should not at any rate deduct the whole of defenders' expenses—*Hoddinott* v. *Newton Chambers & Company, Limited*, [1901] A.C. 49, at 74; and *Cattermole* (*sup. cit.*) In any event pursuer should get expenses since the verdict was applied.

LORD JUSTICE-CLERK—As I tried this case I think it right to say that I considered then that the action was wholly uncalled for, and that there was no ground whatever for the proceedings taken by the pursuer for jury trial. He would have been much better advised if at the beginning he had been content to take his remedy under the Workmen's Compensation Act. It is a matter of discretion for the Court whether the expenses of an unsuccessful trial are to be deducted from a subsequent award of compensation. That is a wise provision of the Legislature, because there might be cases in which no such deduction should be made. But I do not think the Court should take a course which would result in this, that every workman in such cases would be able first to have an expensive jury trial, and then, if unsuccessful in that, to get an award of compensation without

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being liable in any of the costs of the trial. If we decide this case in the way proposed by Mr Moncrieff it would just be to establish such a principle. I can see no ground whatever for not deducting from the compensation the expenses which have been caused by the pursuer bringing this action instead of proceeding under the Act.

As to the expenses incurred since the trial, this is a novel question, and the discussion which has taken place has been necessary in order that the point might be cleared up. On the other hand the pursuer did not lead any evidence at the trial in support of his claim under the Workmen's Compensation Act as he might have done. I think the proper course will be to deduct from the award of compensation the expenses to which the defenders have been found entitled down to the date when the verdict was applied, and to allow no expenses to either party since that date.

LORD KYLLACHY—I entirely agree.

LORD LOW—I am of the same opinion. The Legislature in the Workmen's Compensation Act conferred on workmen who were injured a very valuable right in the way of giving them compensation, and if a workman who is injured chooses not to take compensation to which he is entitled under that Act, but brings an action at common law with the object of obtaining a larger sum, it seems reasonable he should do so at his own risk.

It would be intolerable if the defenders had both to bear the expenses of successfully defending an action, and also had to pay large sums in compensation under the Workmen's Compensation Act. It seems to me that is just the kind of case which the provisions of section 1, sub-section 4, of the Act were designed to meet. I entirely agree with your Lordships.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor:—

"... Decern against the defenders for payment to the pursuer of compensation at the rate of twelve shillings per week from 31st December 1904, in terms of the Workmen's Compensation Act 1897, under deduction of the sum of One hundred and eighty-seven pounds twelve shillings and eleven pence decerned for by interlocutor of 20th March 1906: *Quoad ultra* find no expenses due to or by either party."

Counsel for Pursuer—M'Clure, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—G. Watt, K.C.—Horne. Agents—W. & J. Burness, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

COCHRAN & SON *v.* LECKIE'S TRUSTEE.

Contract—Bankruptcy—Ranking—Preference—Invoice—Receipt Note—Goods in Custody of Bankrupt—Clause Printed in Invoice or Receipt Note that "All Goods Held in Trust Covered by Insurance against Fire"—Claim on Sum Recovered by Trustee in Bankruptcy from Insurance Company.

A miller who was insured against fire received hay to be cut, and sent in return receipt notes or invoices with the following clause printed on them:—"All goods held in trust covered by insurance against fire." A fire having occurred, hay belonging to a customer was destroyed, and, the miller having become insolvent, the trustee on his sequestrated estate recovered from the insurance company the estimated loss by the fire.

Held (1) that the miller had undertaken to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession, and (2) that whether his customers' risks were or were not covered by the policies, the insurance company having paid, the customer was entitled to a ranking on the money recovered preferable to the general creditors.

Insurance—Fire Insurance—Goods in Custody of Insured—Policy Covering Property Held by Insured "in Trust or on Commission, for which he is Responsible."

A miller who received from customers hay to be cut, was insured against fire by policies "on stock-in-trade the property of the insured, or held by him in trust or on commission for which he is responsible."

Opinion per Lord Kyllachy that the policies might "quite well be read as constituting an insurance by the bankrupt, for himself and all others concerned, of the whole goods in his premises."

This was an appeal from the Sheriff Court at Glasgow brought by Alexander Mitchell, C.A., Glasgow, the trustee on the sequestrated estate of Malcolm John Knox Leckie, who carried on business as a grain crusher and miller at 69 Finnieston Street, Glasgow.

Leckie's chief business consisted of crushing grain of various kinds and chopping hay belonging to customers. James Cochran & Son, grain merchants, Glasgow, were his customers, and occasionally sent hay to him for the purpose of cutting. Each invoice or receipt note received by them from Leckie bore the words "All goods held in trust covered by insurance against fire." In form the invoices or receipt notes were similar to the following:—

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"Grain Crushing and Forage Mills,
69 Finnieston Street,
Glasgow, 1905.

"Messrs James Cochran & Son.
To M. J. Knox Leckie.

"*All Goods held in Trust covered by Insurance against Fire.*

1905.				c.		
"Feby.	3.	G. 33 B/s	Hay	29½,	10s.,	£0 14 9
	6.	,, 36	,,	42½,	10s.,	1 1 3
						£1 16 0"

[This invoice is referred to subsequently as No. 6 of pro.] On the 11th February 1905 there was in Leckie's stores belonging to the appellants hay to the value of £19, 9s. 3d., for the purpose of being cut. This had been kept separate and distinct from the rest of the goods there. On that date a fire took place by which considerable damage by fire and water was occasioned, and the hay belonging to Cochran & Son was destroyed. Leckie was insured with the London & Lancashire Insurance Company by three policies:—(1) No 5070555, which insured on stock-in-trade the property of the insured, or held by him in trust or on commission, for which he is responsible, in his grain crushing mills, known and situate at 69 Finnieston Street—£500; (2) No. 4202639, which insured on stock-in-trade the property of the insured, or held by him in trust or on commission, for which he is responsible, in his grain crushing mills, known and situate at 69 Finnieston Street, Glasgow—£500; (3) No. 5070563, on office furniture, &c., £70, and gas engine, £30—£100. These three policies were issued in name of M. J. Knox Leckie, Finnieston Grain Mills, 69 Finnieston Street, Glasgow, grain crusher. Before a settlement was adjusted with the insurance company the appellants arrested the amount of their claim in the hands of the insurance company. Leckie having become insolvent, his estate was sequestrated on 22nd April 1905, and Alexander Mitchell, C.A., Glasgow, was appointed trustee. Under said policies the trustee recovered the sum of £363, 18s. 8d., allocated as follows:—(1) No. £168, 14s. 5d.; (2) No. £168, 14s. 5d.; (3) No. £26, 9s. 10d. This sum of £363, 18s. 8d. was included by the trustee in the trust estate.

On 1st May 1905 Cochran & Son lodged a claim in the sequestration for £19, 9s. 3d., as the value of their hay which had been destroyed in the store, and claimed "a preference for said sum in respect of contract of insurance and indemnity for goods held in trust." By a deliverance on 4th September 1905 the trustee rejected this claim to a preferable ranking on the estate, but admitted it to an ordinary ranking. Cochran & Son appealed to the Sheriff against this deliverance.

On 17th April 1906 the Sheriff-Substitute (MITCHELL) pronounced the following interlocutor:—"Having heard parties' procurators, for the reasons contained in the annexed note sustains the appeal, recals the deliverance appealed against, and ordains the respondent to rank the appellants preferably on the sum of £337, 8s. 10d. received by the respondent from the insurance company *pari passu* with any other appellants who can establish a similar right, and to pay them the amount thereof, with bank interest thereon. . . ."

Note.—"The parties' procurators at the bar renounced probation, and the circumstances are clearly set forth in the condescendence and answers, the question raised being a legal one on the interpretation of the invoice for hay-cutting produced by the appellants (No. 6 of process). It is admitted that there were a series of transactions in January and February 1905 (evidenced in the account lodged with the pursuers' affidavit), and even before that, and that all Mr Leckie's accounts or invoices had the same words printed on them, viz., 'All goods held in trust covered by insurance against fire.'

"The question is whether these constituted an offer on Mr Leckie's part, accepted by the customer through the hay, &c., being sent to him for cutting, that he was to insure for his customer, so that the customer would get the insurance money if there was a fire, or were only an intimation that Mr Leckie voluntarily took on or took over the risk of fire in respect of the goods, and insured that risk to cover his own personal liability thus undertaken.

"I am inclined to think that the words on the invoice and the course of dealing would be naturally understood by the customer as an agreement or contract that Mr Leckie was to do the insurance in room of, or as agent for, the customer, and that the benefit was to accrue to the customer just as if he had made the insurance himself. Obviously an insurance was desirable or necessary, and these words on the invoice seem to suggest that of two alternatives—insurance by each of many customers or by the single miller—the latter was proposed. The convenience of such a course would be obvious, and it would naturally be expected that the price paid for cutting would be fixed to cover the outlay. Trade might be or might be assumed to be more easily got if the miller took this work on for his customers. Again, the precise terms indicate the same result—the goods are held 'in trust,' and their fire risk is 'covered' surely as a trust risk, that is, on behalf of the truster.

"I think this is the natural reading, and that the subtle interpretation given by the respondent would not occur to anyone, viz., that it was only an intimation that the miller took over a risk that did not lie on him, and covered himself by insurance. Notice that the customer need not insure, because insurance was done for him, is what I think the customer would read out of the printed words, and is also what I take to be their natural meaning. Nothing is said about where the risk lay apart from agreement; and anyone reading the printed words would think the whole matter of insurance was covered by them and nothing less than the whole risk—not merely an eke to the miller's personal credit in taking over an unnecessary risk.

"If Mr Leckie meant one thing and the

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customer read another meaning, I think Mr Leckie was to blame for so expressing himself, and that he would have to take the consequences, and so I think his trustee and creditors must take the consequences too. The case of *Dalgleish* v. *Buchanan*, 16 D. 332, cited for respondent, differs from the present case in the absence there of any contract or agreement to secure the trusted goods by insurance."

The trustee appealed to the Court of Session.

Counsel for the appellant pointed out that, strictly speaking, the respondents' claim to a preferable ranking in the sequestration was not in order, for where money was held in trust the proper procedure was by petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). This objection, however, they did not wish to press, but would argue as if the correct procedure had been followed.

Argued for the appellant—(1) Leckie never contracted with his customers to insure their goods so that the proceeds of the insurance policy would be directly available to them. At most he only contracted to insure his own rights and interests in his business premises, and any rights which arose from the conduct of his business. The real contract was one for cutting hay, and it was not qualified by the clause in the receipt note, which was mere advertisement—*Buchanan & Company* v. *Macdonald*, December 10, 1895, 23 R. 264, 33 S.L.R. 200. (2) Assuming that Leckie ought to have insured customers' goods, in point of fact he had not validly done so, and the Insurance Company need not have paid for his customers' losses—*North British and Mercantile Insurance Company* v. *Moffat and Another*, 1871, L.R., 7 C.P. 25. It was true the company had in error of law paid the money, but this was immaterial in a question with Cochran & Son, and the sum paid belonged to the sequestrated estate—*Dalgleish* v. *Buchanan*, January 17, 1854, 16 D. 332.

Counsel for the respondents were not called upon.

LORD KYLLACHY—I think the judgment of the Sheriff is quite right. In particular, I entirely agree with him as to the just construction of the note attached to the "invoice or receipt note" declaring that "all goods held in trust are covered by insurance against fire." These words as it seems to me have only one sensible meaning, viz., that the bankrupt, in respect of the charges made by him, undertakes to cover by insurance the risk which his customers ran of their goods being destroyed by fire while in his possession. Any other construction would, I think, make the clause futile. The risk to be covered was, I think, plainly the risk of the customers. And I think it is equally plain that the bankrupt was not himself to be the insurer, but was to effect the stipulated cover by policy of insurance in the usual way. That being so, I think it follows (because anything else would have been unlawful) that if the bankrupt took the policies in his own name he must be held to have done so on behalf of and for the benefit of his customers.

But then it is said that, even supposing the bankrupt undertook to take out on behalf of his customers a policy or policies which should cover their goods, he in point of fact did not do so, but took out a policy which covered only his own risk—that is to say, his own common law liability to his customers for damage by fire caused by his own negligence. It seems to me, I confess, that this is a construction of the policy which is at least hypercritical. I rather think the policy may quite well be read as constituting an insurance by the bankrupt for himself and all others concerned of the whole goods in his premises, whether his own goods or goods of which he was the custodier under trust or commission. But even if that construction were wrong it seems enough to say that it was the construction which the Insurance Company accepted, and on the footing of which they paid the amount in question to the trustee who is now in possession of the money. It seems to me that in these circumstances we are not bound to inquire further. The money having been paid by the Insurance Company on the footing that it was due in respect of the insurance of the respondents' goods, the notion that the trustee can retain it for the benefit of the general body of creditors is in my opinion out of the question.

LORD LOW—I am of the same opinion. I do not think that the meaning of the words printed on the document No. 6 of process is doubtful. Looking to the circumstances in which that document was issued, the words must mean that customers need not trouble themselves to insure against fire, because their goods were insured under policies taken out by the grain crusher. I do not see why that should not be an insurable risk. What was meant was either that the grain crusher undertook to be responsible to his customers for loss caused by accidental fire or to insure the customers' goods as agent for them. The insurance companies have accepted the view that the risk was insurable, and that the policies issued by them covered it, and they have paid the money. That being so, the trustee cannot retain the money so obtained and distribute it among the general creditors. It may be that it should never have been included in the bankrupt estate at all, but the same result will be arrived at if the customers are found entitled to it preferably to the other creditors.

LORD JUSTICE-CLERK—I agree. It is a most extraordinary contention that the trustee is not bound to pay over this insurance money. He ought never to have got the money himself. He did get it. The insurance company paid it at his request. He is not now entitled to keep it for behoof of the general creditors.

LORD STORMONTH DARLING was absent.

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The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Appellant—T. B. Morison. Agent—F. J. Martin, W.S.

Counsel for the Respondents—W. Thomson. Agent—W. J. Haig Scott, S.S.C.

Saturday, July 7.

SECOND DIVISION.

MIDDLETON'S TRUSTEES *v.* MIDDLETON.

Succession—Faculties and Powers—Power of Appointment — Exercise — Validity — Power to Appoint to Fee—Appointment to Fee Subsequently Restricted to Liferent —Restriction Held pro non scripto—Introduction of Appointees not Objects of Power.

By her marriage contract a wife was empowered to apportion the fee of a sum of money among the children of the marriage "in such proportions, and with such restrictions, and on such terms, and payable at such periods" as she might declare in writing. There were two children, a son and daughter. By her will and codicil she appointed the whole sum to her son, with a declaration that instead of being paid to him it should be held by her testamentary trustees for his liferent use allenarly and his issue in fee, subject to such conditions and in such shares as he might appoint, and failing appointment, equally. There followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by issue, as also powers to the trustees to make advances to the son out of capital, and to the son to provide a liferent to his wife if he married in case of her surviving him.

Held (1) that the provisions restricting the son's right to a liferent, and disposing otherwise of the fee, were *ultra vires* and wholly invalid, the suggestion being rejected that the valid could be eliminated from the invalid with the effect of giving a fee to the daughter and a liferent to the son, as figured by Lord M'Laren in *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; (2) that they fell to be treated as *pro non scriptis*, the son taking the fee of the whole fund under the initial part of the appointment. *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, 12 S.L.R. 635, *followed*.

By an antenuptial contract of marriage between John Archibald Middleton and Elizabeth Somervell, the latter conveyed her whole means and estate to trustees, the fourth purpose of the contract providing that the fee should be held and applied by the trustees, burdened with a liferent to the surviving spouse, for behoof of Elizabeth Somervell's lawful children, and the survivors and survivor of them, and the lawful issue of such of them as might decease leaving issue, "in such proportions, and with such restrictions, and on such terms, and payable at such periods as the said Elizabeth Somervell, whom failing the said John Archibald Middleton, may appoint by a writing under her or his hand, and failing such appointment, equally to and amongst the said children if more than one, or the survivors or survivor of them jointly with the lawful issue of such of them as may decease leaving issue (the division being *per stirpes*), payable, unless otherwise directed as aforesaid, at the first term of Whitsunday or Martinmas occurring after the death of the survivor of the said Elizabeth Somervell and John Archibald Middleton, and after the said child or children, being sons, shall attain majority, or being daughters shall attain majority or be married, whichever of these events shall first happen. . . ."

John Archibald Middleton died in 1897.

Mrs Elizabeth Somervell or Middleton died on 26th September 1904 survived by two children, the only offspring of the marriage, viz., Constance Henrietta Middleton or Robertson Aikman and George Graham Middleton, and leaving a trust-disposition and settlement by which she conveyed her whole means and estate to trustees. The daughter Constance had by antenuptial contract of marriage entered into in 1899 conveyed her whole means and estate to trustees.

By the third purpose of her trust-disposition Mrs Middleton directed that the means and estate over which she had power of appointment under her antenuptial contract of marriage should be divided and apportioned as follows, viz.—(*First*) To her daughter Constance Henrietta Middleton the sum of £1000 sterling, payable to her at the period provided by the contract of marriage; (*Second*) to her son George Graham Middleton the remaining sum of £4001 sterling. And with respect to the sum thereby apportioned to her son, Mrs Middleton provided "that instead of being paid over to him, the same shall be paid to and held by my trustees as and when the same becomes available and invested in their own names as trustees foresaid for the liferent alimentary use allenarly of my said son, and for behoof of his lawful issue in fee, in such shares and proportions, and subject to such conditions and limitations, including the restriction of the share of any child to a bare liferent, as my said son may appoint, and failing such appointment, equally among them, share and share alike: Declaring that should my said son die without being survived by a child or children or remoter issue, the share of residue falling to him in liferent and his issue in fee shall fall and accresce to my said daughter or her issue equally among them: And notwithstanding what is above written, I hereby authorise and empower my trustees to advance and pay to my said son by way of loan or otherwise, and for any purpose they may consider proper, such sum or sums out of the capital of the

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sum to be liferented by him as aforesaid as they in their own absolute discretion may think fit, and the receipt of my said son for any sums so advanced or paid to him shall be a sufficient exoneration and discharge to my trustees: And I hereby empower my said son to confer upon any wife whom he may marry, in the event of her surviving him, a liferent of said sum of £4001, or any portion thereof."

Mrs Middleton also left a codicil by which she revoked the appointment made in the third purpose of her trust-disposition and settlement set forth above, and in lieu appointed the whole of said fund of £5001 to her son George Graham Middleton, "and that under the same provisions and declarations, and with the same authorities and powers, as are specified in my said trust-disposition and settlement with regard to the proportion of said fund thereby originally provided to him."

The present special case was brought to elucidate certain questions which arose as to the effect of the exercise of her power of appointment by Mrs Middleton.

The antenuptial contract trustees of John Archibald Middleton and Mrs Middleton were the *first* parties to the case; the trustees acting under Mrs Middleton's trust-disposition and settlement and codicil were the *second* parties; George Graham Middleton was the *third* party; the antenuptial marriage contract trustees of Mrs Constance Henrietta Middleton or Robertson Aikman were the *fourth* parties.

The third party maintained that the power of appointment reserved to Mrs Middleton under her antenuptial contract of marriage had been validly exercised by her in so far as she made an appointment of the whole fund to him, but that the conditions and restrictions which the appointer endeavoured to impose were *ultra vires* and invalid, and ought therefore to be disregarded. In this contention the second parties concurred. Alternatively the third party maintained that Mrs Middleton validly exercised the power of appointment conferred upon her, and that the provisions made by her with regard to the destination of the fund were valid in their entirety. He further contended that in the event of its being held that he was entitled only to a liferent of the fund, and that he had no power of disposal with regard to the fee, the fee would fall to his issue if he had any.

The fourth parties maintained that Mrs Middleton had not validly exercised the power of appointment, and that the estate in the hands of the first parties fell to be divided equally between the third and fourth parties. Alternatively the fourth parties maintained (*a*) that the power of appointment was validly exercised by Mrs Middleton to the extent of appointing an alimentary liferent of the estate to the third party, and the fee to Constance Henrietta Middleton or Robertson Aikman, in which case the estate became wholly payable to the fourth parties on the termination of the third party's liferent thereof; or otherwise (*b*) that the power of appointment was validly exercised by Mrs Middleton only to the extent of appointing an alimentary liferent of the estate to the third party, leaving the fee unappointed and divisible equally between the third and fourth parties at the termination of the third party's liferent. In any event they maintained that the clauses authorising the trustees to make advances of capital to the third party, and empowering the third party to confer a liferent of the fund on his widow, were *ultra vires* and invalid.

The following questions were, *inter alia*, submitted to the Court—"1. Is the appointment of the marriage-contract funds contained in the said trust-disposition and settlement and codicil (1) wholly valid, or (2) only partly valid, or (3) wholly invalid? 2. If the second alternative be answered in the affirmative—(*a*) Is the third party entitled to the fee of the whole fund absolutely? or (*b*) Has there been a valid restriction of the third party's interest to a bare liferent?"

Argued for the third party—The only power the appointer had being that of appointing to the fee, any attempt to restrict was clearly *ultra vires*, fee and liferent being in no sense *ejusdem generis*—*Baikie's Trustees* v. *Oxley & Cowan*, February 14, 1862, 24 D. 589; *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R., 273; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, Lord Adam at 639, 39 S.L.R. 426; *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401. Initially, however, the appointer had made a valid appointment of the fee to the third party, and it was now well settled that where a good appointment was hampered by invalid restrictions, and where the good could be separated from the bad, the appointment was treated as absolute and the invalid conditions read *pro non scriptis* —*M'Donald* v. *M'Donald's Trustees*, January 17, 1875, 2 R. (H.L.) 125, at 132, 12 S.L.R. 635; *Warrand's Trustees*, *cit. sup.*, *Matthews Duncan's Trustees*, *cit. sup.*; *Carver* v. *Bowles*, 1831, 2 Russell & Mylne 301; *Woolridge* v. *Woolridge*, 1859, Johnson's Reports, 63, at 69. In the present case all the conditions were invalid and must go by the board. This was admitted, except as to the accretion to the daughter, which it was argued was good, she being one of the objects of the power, the result being, it was contended, to give the fee to her, subject to a liferent by the third party. The answer, however, was that the various parts of the destination were inextricably bound up with one another, the destination to the daughter being a mere destination-over, and one which the testatrix obviously did not intend to have the effect of an unconditional gift of fee. This was not the class of case figured by Lord M'Laren in *Neill's Trustees*, *cit. sup.*

Argued for the fourth parties—The whole appointment was bad. The testatrix would never have intended the initial words of gift to stand without qualification. The cases founded on by the third party where conditions which were *ultra vires* had been

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eliminated were all distinguishable. But if the appointment was good at all it was an appointment of the fee to the daughter burdened by a liferent to the son—*Neill's Trustees, cit. sup.*, Lord M'Laren; *Dalziel* v. *Dalziel's Trustees*, March 9, 1905, 7 F. 545, 42 S.L.R. 404. The only way to restrict a fee was to limit it to a liferent. Compare also *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450; *Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *Marder's Trustees* v. *Marder*, March 30, 1853, 15 D. 633.

LORD KYLLACHY—In this case the late Mrs Middleton had, under her marriage contract, in the events which have happened, power to apportion the fee of a sum of £5001 between the two children of the marriage, who, it is common ground, both survived its dissolution, and subject to the exercise of the power had each a vested interest in the fund. The apportionment was to be an apportionment of the fee, but it might be made "with such restrictions and on such terms and payable at such periods as Mrs Middleton or, failing her, her husband" (who predeceased her) "might appoint."

In pursuance of this power Mrs Middleton by her trust-disposition and settlement made in the first place in absolute terms a division of the fee between her son and daughter, giving £1000 to the daughter and £4001 to the son. But then she proceeded with respect to the sum apportioned to her son to provide and declare that he should (subject to certain powers to the trustees to make advances to him out of capital, and a power to himself to provide a liferent of the fund to his wife) *be restricted to an alimentary liferent*, the fee going on his death to his issue, if he left any, whom failing to his sister, the other child of the marriage, whom failing to her issue, if she left issue.

A codicil which was executed on the daughter's marriage revoked the appointment thus made, and in lieu thereof appointed the whole fund to the son, but under the same provisions and declarations as were expressed in the trust-disposition and settlement.

The first question to be decided is whether the above adjected "provisions and declarations," by which the son's right was in effect reduced to a liferent, and the fee disposed of as above expressed, were within or beyond the power conferred by the marriage contract. It was not disputed that, taken as a whole, they are beyond the power. For they not only restrict to a mere liferent the son (the third party to the case), who had right under the contract to obtain a share of the fee, but they carry the fee primarily to persons who are not objects of the power at all, and failing them — at least contingently — to other persons who are also not objects of the power.

The suggestion, however, is that among the persons who under the adjected provisions might in possible circumstances take the eventual fee, is included the third party's said sister — the daughter of the marriage—and she being, of course, personally an object of the power, it is contended that that circumstance brings the case within the exception figured by one of the judges in the case of *Neill's Trustees*, 4 F. 636, and more recently approved, if not accepted, in the case of *Dalziel's Trustees*, 7 F. 545.

Now without at all expressing or suggesting any opinion adverse to the exception referred to, or to anything said or decided in either of the cases just mentioned, it appears to me to be, for present purposes, a sufficient answer that the somewhat complex set of provisions or declarations which are here in question must necessarily be read as a whole, and must stand or fall as a whole. In other words, they cannot upon their just construction be broken up into parts, and (all their illegitimate elements being cut out) be read as providing substantially that while the son (the third party) shall have only a liferent, the fee shall belong wholly to his sister, the other child of the marriage. As against that suggestion it seems enough to point out that it would be making, in effect, a new apportionment for Mrs Middleton—an apportionment which there is no reason to think she would have desired. Assumptions on such matters are, of course, inadmissible, but even if that were otherwise it would I think be a violent assumption that Mrs Middleton if she had known or been informed that the whole provisions in favour of her son's issue and her daughter's issue were ineffectual, would have desired that the contingent fee given in certain events to her daughter, should go to her daughter absolutely and carry to her the fee of the whole fund. Nothing of that kind was affirmed in the cases of *Neill's Trustees* and *Dalziel's Trustees*, nor is there, so far as I know, any principle or authority for such a contention.

It therefore appears to me that the provisions or declarations—or whatever they may be called—which are here in question, are not partially but wholly outside the power, and are therefore wholly *ultra vires* and invalid.

The question which remains is whether that being so the said provisions and declarations are so attached to and bound up with the initial gift as to make their efficacy a condition of the gift, and thus in result to make the whole apportionment invalid. That is the alternative contention of the fourth parties, who represent the daughter—a contention which would give them one-half of the fund. As to this I do not, I think, need to say more than that it is now too late to quarrel or canvass the canon of construction which has in this matter been conclusively established by the class of cases of which *Carver* v. *Bowles* (2 Russell and Mylne, 301) and *M'Donald* (2 R. (H.L.) 125) are the best known examples. That rule or canon is, I apprehend, just this, that if in terms absolute and unqualified an initial gift, self-contained and

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complete, is given under a power of apportionment or of appointment to an object or objects of the power, any adjected conditions or restrictions which are in excess of the power have no effect and are to be treated simply as *pro non scripto*. Applying that principle I am unable to doubt that the result here is as contended for by the third party and that he is entitled to have immediate payment of the whole fund.

LORD STORMONTH DARLING—The power which the late Mrs Middleton had by her marriage contract to appoint the sum of £5001 among her children was coupled with an option to appoint "with such restrictions and on such terms, and payable at such periods," as she might declare in writing. She exercised the power by a will dated in 1898 and a codicil dated in 1900. She herself died in 1904, leaving two children, an unmarried son (Captain Middleton) and a married daughter (Mrs Robertson-Aikman). The effect of her will and codicil taken together was to appoint the whole fund of £5001 to her son, but declaring that instead of being paid over to him the same should be held and invested by her testamentary trustees for his liferent use allenarly, and for behoof of his lawful issue in fee, in such shares and subject to such conditions and limitations (including the restriction of the share of any child to a bare liferent) as her son might appoint, and failing such appointment, equally. Then followed a destination-over in favour of the daughter or her issue in the event of the son dying without being survived by a child or children or remoter issue, as also a power to the trustees to make advances to the son out of the capital for any purpose they might consider proper; and lastly, a power to the son to provide a liferent to any wife he might marry in case of her surviving him.

Now, a power to appoint a fee "with such restrictions, and on such terms, and payable at such periods," as the donee of the power may appoint, does not, either on principle or authority, justify its exercise by cutting down the fee to a liferent and giving the fee to somebody else. Whatever the restrictions are they must be such as are consistent with a right of fee in the beneficiary or beneficiaries who are objects of the power, Here the possible issue of Captain Middleton were not objects of the power, and the attempt to give a fee to them and a mere liferent to Captain Middleton was plainly *ultra vires*.

But it does not follow that the whole appointment is thereby vitiated. The judgment of the House of Lords in *M'Donald* v. *M'Donald's Trustees* (2 R. (H.L.) 125), as explained by Lord Chancellor Cairns at p. 132 and by Lord Selborne at p. 135, makes it clear that where you have a gift to an object of the power, and nothing which can invalidate that gift but conditions superadded as to the mode in which the object of the power is to enjoy what is given, the gift is valid, and takes effect without reference to the conditions, notwithstanding that the conditions may have operated as a motive in the mind of the person appointing.

Here the initial gift to Captain Middleton is as plain as words can make it. The words of the will are—"To my son George Graham Middleton the remaining sum of £4001; and with respect to the sum hereby apportioned to my said son, I hereby provide and declare," and so on. Then in the codicil, when the sum mentioned in the will is increased to £5001, the words are—"I hereby appoint the whole of said fund of £5001 to my son George Graham Middleton, and that under the same provisions and declarations" as in the will. The reason for this change of amount is explained in the codicil on the ground that the lady's daughter "is now otherwise sufficiently provided for."

The true effect, therefore, of what Mrs Middleton has done is to give the whole fee absolutely to her son, the third party. The case would really be too clear for argument, except for an ingenious contention by the marriage-contract trustees of Mrs Robertson-Aikman, which, as I understood it, was this—"That inasmuch as there was a destination-over in favour of her or her issue, and she was undoubtedly an object of the power, the proper way to construe the will and codicil was to read out everything in favour of Captain Middleton's possible issue as not being objects of the power, and to hold that the power was validly exercised to the effect of giving the fee to Mrs Aikman (or to the trustees themselves for her behoof) subject to an alimentary liferent in favour of Captain Middleton. When any case arises where the donee of a power to appoint a fee between two persons attempts to exercise it by giving an immediate fee of the whole to one of them subject to a liferent of the whole (or a part) to the other, it will be time enough to deal with it. That was probably the kind of case suggested by Lord M'Laren in *Neill's Trustees* (4 F. 636), which his Lordship described as "unlikely to occur, because a testator generally wishes to give the fee to the children of the person to whom he gives the liferent." But I do not see how the recent judgment of the First Division in *Dalziel's* case (7 F. 545) touches the question in any way. And certainly the case suggested is miles away from the present case. The destination to Mrs Aikman's trustees is a mere destination-over, to take effect only "should my said son die without being survived by a child or children or remoter issue." To turn that into an immediate and unconditional gift of the fee, particularly to a person described as "otherwise sufficiently provided for," would be to do such violence to Mrs Middleton's plain intention as to be quite inadmissible on any known canon of construction.

Accordingly, I agree that the second alternative of the first question and head (*a*) of the second question should be answered in the affirmative, and that all the other questions are superseded.

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LORD LOW—I am of opinion that the rule laid down in the House of Lords in the case of *M'Donald* (2 R. (H.L.) 125), and which has been so accurately stated by Lord Kyllachy, is applicable to the present case. The rule had not been recognised in Scotland prior to the case of *M'Donald*, but it was well settled in English law, the leading case being *Carver* v. *Bowles* (2 Russell and Mylne, 301, and 34 "Revised Reports," p. 102). And it is worthy of notice that the circumstances in the latter case closely resembled those with which we are dealing.

There as here a certain sum was conveyed to trustees under an antenuptial marriage contract which they were directed to hold for the spouses and the survivor in liferent, and upon the death of the survivor to transfer the fund to and among the children of the marriage at such times, in such shares, and under such conditions, restrictions, and so on, as the spouses or the survivor might appoint.

The husband survived his wife, and exercised the power of appointment in his will, whereby "in pursuance of said power" he did "direct and appoint, give and bequeath the said sum unto my five children" (whom he named) "equally to be divided among them, share and share alike." He then, however, went on to declare that the shares appointed to his daughters should be held by his trustees "upon and for the same trusts, intents, and purposes for the benefit of each of my said daughters and their issue," as were directed in regard to the shares of the residue of his personal estate which he had bequeathed to his daughters and their issue. These trusts were for the daughters in liferent for their separate use without power of anticipation, and for their issue in fee.

The Master of the Rolls held that the initial words of appointment were sufficient to vest the shares absolutely in the daughters, and that the attempt to restrict their interest by limitations to their issue being inoperative did not cut down the absolute appointment.

Now in the present case the circumstances are, for the purpose of the question at issue, practically the same as in the case of *Carver*. I think that it is convenient to take the clause exercising the power of appointment as it originally stood in Mrs Middleton's settlement, because it is upon that clause that the question depends, and the result is not affected by the change which was made by the codicil. The clause commences with words which unequivocally and unconditionally appoint the fund to Mrs Middleton's son and daughter—£1000 to the latter and £4001 to the former. Mrs Middleton, however, having made that absolute appointment proceeded to attempt to restrict the interest of the son by limiting his enjoyment to a liferent and giving the fee to his lawful issue. That being an attempt to appoint to the fund persons who were not objects of the power, was, according to the rule laid down in the case of *Carver*, and adopted by the House of Lords in *M'Donald's Trustees*, inoperative, and falls to be disregarded, leaving the initial absolute appointment unaffected.

It was, however, further argued that if all the provisions in favour of persons who were not objects of the power were struck out there would remain not an absolute gift of £4001 to the son Captain Middleton, but a gift of that amount to him in liferent only and to his sister Mrs Aikman (who was also an object of the power) in fee. Now I do not think it necessary to consider whether if that had in fact been the appointment which was made, it would or would not have been valid, because it seems to me to be impossible to separate the contingent right of fee which was given to Mrs Aikman from the context. The primary object which Mrs Middleton had in view in limiting her son's interest to a liferent was to secure the fee to his issue, and accordingly it was only failing his issue that Mrs Aikman and her issue were brought in. But a destination to Captain Middleton in liferent and his children in fee, whom failing to Mrs Aikman or her issue, and a destination to Captain Middleton in liferent and Mrs Aikman in fee, are entirely different destinations, and to read the former (by striking out everyone who was not an object of the power) as meaning the latter, would be not to construe the disposition of the fund which Mrs Middleton actually made, but to make a disposition for her. The disposition was obviously made upon the assumption that Mrs Middleton had power to give a fee to her son's issue, and it is impossible to say what she would have done if she had been aware that such a destination was *ultra vires* of her and would be altogether inoperative.

I am therefore of opinion that the second branch of the first question should be answered in the affirmative and the other two branches in the negative, and that branch (*a*) of the second question should be answered in the affirmative and branch (*b*) in the negative. The first two questions being answered in that way, it is probably unnecessary to dispose of the remaining questions.

LORD JUSTICE-CLERK—The restrictions in the deed in this case were plainly not within the power of appointment, as they were proposed to be exercised in favour of beneficiaries who were not within the objects of the power.

That being so, the question is whether the provisions and restrictions must be read as a whole, and on that matter I agree with Lord Kyllachy in holding that they must.

It would, I think, be a stretch such as has never been made in similar cases to give effect to any other contention. The remaining question is Whether, as was ingeniously contended, the destination-over to the daughter can be read as a gift of the fee to her in fulfilment of the power of appointment? The purpose of the proposed liferent was solely to secure the fee to her son's children. I agree with all that your Lordships have said.

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The Court answered the second alternative of the first question and head (*a*) of the second question in the affirmative.

Counsel for the First and Second Parties—Black. Agents—Forrester & Davidson, W.S.

Counsel for the Third Party—Hunter, K.C. — Macmillan. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Fourth Party—Dickson, K.C.—Hon. W. Watson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

CROOKE *v.* THE SCOTS PICTORIAL PUBLISHING COMPANY, LIMITED.

Copyright — Photograph — Copyright in Photographs — More than One Person Interested in Sitting.

"It seems settled that if a person goes to a photographer and asks for a sitting, he is entitled to the copyright of the photographs then taken, it being presumed that he is liable to pay for them and intends to pay for them. On the other hand, it seems that if a photographer invites some celebrated person to give him a sitting, and the person agrees to do so, the copyright of the photograph is the photographer's, even though the sitter should afterwards pay for copies. Further, if a third person employs a photographer to take the likeness of another person, whether that person be a celebrated person or not, and arranges for a sitting accordingly, the photographs taken at such sitting belong to the third person, and he is liable to pay for the sitting."

Application of the law above stated in a case where more than one person was interested in the sitting.

The Copyright (Works of Art) Act 1862 (25 and 26 Vict. cap. 68), sec. 1, enacts—"The author, being a British subject, or resident within the dominions of the Crown, of every original . . . photograph . . . . and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying . . . such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author and seven years after his death, provided that when . . . the negative of any photograph shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or disposing of, or making or executing the same shall not retain the copyright thereof unless it be expressly reserved to him by agreement in writing, signed at or before the time of such sale or disposition by the vendee or assignee . . . of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such . . . negative of a photograph or to the person for or on whose behalf the same shall have been made or executed, nor shall the vendee or assignee thereof be entitled to any such copyright unless, at or before the time of such sale or disposition an agreement in writing, signed by the person so selling or disposing of the same or by his agent duly authorised, shall have been made to that effect."

On 18th November 1904 William Crooke, photographer, Princes Street, Edinburgh, brought an action against The Scots Pictorial Publishing Company, Limited, Hope Street, Glasgow. In it the pursuer sought, *inter alia*, (1) to have the defenders interdicted "from repeating, copying, colourably imitating, or otherwise multiplying or causing or procuring to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, without the consent of the pursuer, a photograph of Sir Henry Irving, taken on or about 28th April 1904, of which the pursuer is the author, and of the copyright of which he is the proprietor, duly registered at Stationers' Hall in terms of the Act 25 and 26 Vict. cap. 68, or of the design of said photograph, and from selling, publishing, letting to hire, exhibiting, or distributing, or offering for sale, hire, exhibition, or distribution, or causing or procuring to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution any repetition, copy, or imitation of said photograph or the design thereof made without such consent as aforesaid;" and (4) to have them ordained to make payment to him of £2000 as damages sustained by him through the infringement by the defenders of his said copyright.

The defenders, *inter alia*, pleaded—(1) "No title to sue. (2A) The pursuer not having copyright in, and not being entitled to register himself as proprietor of the copyright of the photograph founded on, the defenders should be assoilzied."

The facts in the case are given in the opinions, *infra*.

On 6th July 1905 the Lord Ordinary (ARDWALL), after a proof taken on 27th June, pronounced an interlocutor sustaining pleas 1 and 2A for the defenders and assoilzieing them from the conclusions of the summons so far as not previously disposed of.

"*Opinion.*—At the hearing on the evidence it was conceded by the counsel for the defenders that the picture of Sir Henry Irving published in the *Society Pictorial*, which forms the subject of the complaint in the present action, must be held to be a reproduction of the photograph which has been registered by the pursuer. The history of the reproduction is a short one. A copy of the said photograph was published in the *Sphere* of June 11, 1904. On the occasion of Sir Henry Irving's visit to

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Dundee in October of the same year the *Dundee Advertiser* in its issue of October 31st published a reproduction of the Sphere picture. This reproduction was made by an artist first taking a tracing of a postcard paper from the Sphere portrait, filling it in with black lines in certain places, and then getting it transferred to a zinc block which was used for throwing off the impressions.

"Shortly thereafter Sir Henry Irving's advance manager, in view of Sir Henry's visit to Scotland, requested the managing director of the *Society Pictorial* to insert a portrait of Sir Henry Irving in their issue of November 12, 1904. There was some difficulty about getting a suitable portrait, but finally Sir Henry's manager sent the block which had been prepared for the *Dundee Advertiser* to the defender's manager, and it is an impression from this block which appeared in the issue of the *Society Pictorial* complained of in this action. The defenders' managing director had no idea that he was infringing any copyright, and apparently he was told by Sir Henry Irving's manager that he was not doing so in publishing the portrait in question.

"The principal question which falls to be disposed of in this action is whether the pursuer is the true proprietor of the copyright of the large full-length photograph, of which the portraits in the *Sphere*, the *Dundee Advertiser*, and the *Society Pictorial* are reproductions. Counsel for the parties did not seem to be much at variance as to the law of the case, for which I was referred to section 1 of the Fine Arts Copyright Act 1862 (25 and 26 Vict. cap. 68) and to the judgments in the case of *Boucas* v. *Cooke and Others*, 1903, 2 K.B. 227. It seems settled that if a person goes to a photographer and asks for a sitting he is entitled to the copyright of the photographs then taken, it being presumed that he is liable to pay for them and intends to pay for them. On the other hand it seems that if a photographer invites some celebrated person to give him a sitting, and the person agrees to do so, the copyright of the photographs is the photographer's, even though the sitter should afterwards pay for copies. Further, if a third person employs a photographer to take the likeness of another person, whether that person be a celebrated person or not, and arranges for a sitting accordingly, the photographs taken at such sitting belong to the third person, and he is liable to pay for the sitting.

"The facts in this case are somewhat peculiar owing to the pursuer having written some extraordinary letters and taken up a position with a view to securing the copyright of certain photographs of Sir Henry Irving for himself, but I have come without any difficulty to the conclusion that the truth of the matter is that the sitting at which the photograph in question was taken was a sitting given at the request of Mr Shorter as acting for the *Sphere* newspaper, and that he is *prima facie* entitled to the copyright of all the photographs taken at that sitting, unless it could be shown that Sir Henry Irving or Mr Shorter himself agreed to the copyright of any of the photographs becoming the property of the photographer or other person. This I think has not been shown with regard to the photograph in question. On the contrary, I hold it proved that it was taken for Mr Shorter, that he is the person entitled to the copyright thereof, and that any agreement by him to give up the copyright of the photograph in question was entered into by him under essential error induced by the misrepresentations of the pursuer. . . . *His Lordship then reviewed the evidence as to what occurred prior to, at, and subsequent to the sitting.* . . .

The pursuer reclaimed, and argued—The Lord Ordinary was wrong in holding that the pursuer had made any misrepresentations in fact. On the contrary, an examination of the correspondence showed that he had disclosed all the facts within his knowledge both to Sir Henry Irving and Mr Shorter. The sitting was not for the latter only. The allocation of the copyright in the various negatives taken at the sitting which was proposed by the pursuer was communicated to Sir Henry and Mr Shorter and agreed to by them, and under it Mr Shorter received the copyright of the two photographs allotted to him. It was therefore clear that the copyright of the photograph in question was not in Sir Henry, and the correspondence showed that the contract which Mr Shorter had with the pursuer was that he should get the copyright of two photographs and the right to reproduce another, none of these being the photograph in question. The pursuer therefore retained his rights in the photograph in question by the law as laid down by the Lord Ordinary, and the copyright thereof was still with him. The interlocutor of the Lord Ordinary should be recalled.

Argued for the defenders and respondents—There was an agreement between Mr Shorter and the pursuer under which Sir Henry Irving went to the latter's studio for a sitting. Apart therefore from misrepresentation by the pursuer, the copyright of the resulting photographs was in Mr Shorter—*Boucas* v. *Cooke and Others* [1903], 2 K.B. 227. But even if Sir Henry consented to sit for the pursuer also, then Sir Henry's will was the determining factor, no copyright could exist without his consent, and he had the right to allocate particular photographs to particular persons. On the facts, he exercised this right and selected for Mr Shorter the photograph first taken, which was proved to have been the one now in question. By sec. 1 of the Copyright (Works of Art) Act 1862 the copyright in that photograph vested in Mr Shorter from the creation of the negative. Therefore the pursuer could not subsequently select so as to divest Mr Shorter or acquire his right save as provided by the statute.

At advising—

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LORD PRESIDENT—In this case the defenders, the Scots Pictorial Publishing Company, admittedly published in the *Society Pictorial* a portrait of the late Sir Henry Irving without leave asked or obtained of the pursuer Mr Crooke. That portrait, it is now admitted, was a reproduction of a photograph of Sir Henry which had been taken by the pursuer, and of the copyright of which the pursuer was the registered owner. The present action is brought to obtain interdict against further publication of the portrait, and for damages. The defence of the publishing company is that the photograph is not the property of the pursuer.

I do not think there has in this case been any controversy as to the law governing property in the copyright of photographs. That law has been laid down in the case of *Boucas* v. *Cooke and Others*, L.R. [1903], 2 K.B. 227, which the Lord Ordinary has adopted in the present case, and I agree with his Lordship when he says . . . [*quotes statement of law by Lord Ordinary given supra in rubric*] . . . I entirely adopt that general proposition. The Lord Ordinary has applied that statement of the law to the present case, with the result that he has assoilzied the defenders. From his Lordship's long and careful opinion the ground of his judgment may be taken in a single sentence, namely—"I hold it proved that the photograph in question was taken for Mr Shorter; that he is entitled to the copyright thereof; and that any agreement by him to give up the copyright of the photograph in question was entered into by him under essential error induced by the misrepresentations of the pursuer." Accordingly the Lord Ordinary held the copyright of the photograph to be in Mr Shorter and assoilzied the defenders. I have not been able to take the same view as his Lordship.

The history of what led up to the matter is not in doubt. It was known that Sir Henry Irving was coming to pay a visit to Edinburgh, and there were at least two if not more persons at that time who were anxious to have Sir Henry's photograph taken. There is no doubt that Mr Shorter, who had to do with the *Sphere* newspaper, was anxious to publish a photograph of Sir Henry, and he was also undoubtedly anxious to have a photograph of which he should own the copyright. It is, in my opinion, satisfactorily proved that Mr Shorter, who though a friend of Sir Henry had been unable to prevail upon him to give a sitting for his photograph in London, seized upon the opportunity of his being in Edinburgh to have his photograph taken. It is also quite certain that Mr Crooke wished to have a photograph of Sir Henry, probably as an advertisement of his own powers of photography, and he was willing, probably also as an advertisement, to take the photograph gratis, and to give a copy of the photograph so taken to each of the members of the Pen and Pencil Club, he having, it seems, done the same thing on other occasions with regard to celebrities. The result of all this was that arrangements were made for Sir Henry going to sit for Mr Crooke. There is some controversy upon the letters which preceded the granting of that sitting, and it was very strongly pressed upon the Court that the pursuer had gone further than the true facts warranted him in a certain letter in which, at an early period when Mr Shorter applied to him, he replied that arrangements were already in train for Sir Henry giving a sitting. Now I am bound to say I think the pursuer's letter did go beyond the very strict statement of facts, but I do not think, for the purposes of this case, that that very much mattered, because in my opinion the result was that Sir Henry Irving came to the pursuer's studio well knowing that he was to be photographed for more persons than one. He knew he was going to be photographed for the purpose of a copyright photograph for his friend Mr Shorter. Nay more, if it had not been for his friendship for Mr Shorter I think that it is more than probable Sir Henry would have given no sitting at all. At the same time he equally well knew that while he was there he was going to be photographed with a view to a presentation copy of his photograph being given to the members of the Pen and Pencil Club, and he knew also he was going to be photographed for Mr Crooke so far as copyright was concerned. Sir Henry, through his manager, made a very proper and obvious arrangement that as he was putting himself to the trouble of being photographed like that, he should be allowed first of all to have a veto upon what photographs were to be published; and secondly, that he should be allowed to have copies for his friends at so much per copy. All that was arranged, and accordingly Sir Henry went and subjected himself to the ordeal of the camera. There is a little dubiety as to which of the various photographs that were thus taken was precisely taken first. I do not think that matter can be cleared up with perfect certainty. In the pursuer's books the photographs were put in a certain order. That order would make out that the large photograph which is said to have been the subject of piracy was taken first. On the other hand, the pursuer himself said that he thought that exceedingly improbable. I am bound to say I do not think the question is one of importance. I do not think there was an appropriation of photographs made by Sir Henry at the time, nor that he said—"Now this time I am before the camera the photograph belongs to Mr Shorter, this time it is for the Pen and Pencil Club, and this time it is for yourself." It is not in common-sense to suppose that anything of that kind happened. Sir Henry, like any other sitter, would be very anxious to get the sitting over as soon as he could. The photographs were taken, and the particular one in question was taken in rather an unusual manner, because at the precise moment at which Sir Henry sat for this large photograph he was operated on by two cameras at once, the result being the large photo-

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graph, and the small photograph which was afterwards given to the Pen and Pencil Club. While what precisely passed in the matter of time in the photographer's studio is uncertain, what happened afterwards is perfectly certain, because we have the correspondence of the parties written at a time when there was no question of this or any other dispute. On 10th May 1904 Mr Crooke, the pursuer, having submitted to Sir Henry, as he promised, the whole of the negatives of the photographs thus taken, wrote to Mr Shorter—"Sir, I am herewith sending you the two negatives of Sir Henry Irving, of which you can buy the sole copyright, no copies having been printed except two of each for himself. I am also sending you for inspection a copy of the picture taken for the Pen and Pencil Club. My price for the sole copyright and possession of the two negatives, and also the permission to reproduce, if you wish, the full length now sent for your inspection, with those Sir Henry Irving is reserving for himself, if he has no objection, is £5, 5s." Mr Shorter on 11th May 1904 wrote to Mr Crooke as follows:—"Dear Sir, I accept your terms, and shall be glad if you will send in an account for five guineas to cover the copyright of the two pictures. I am also glad of your permission to reproduce the one sent to the Pen and Pencil Club, which I actually prefer." That, to my mind, ended the business. It was an offer by Mr Crooke, for the sum of five guineas, to give up the copyright of these two photographs, and it was accepted by Mr Shorter. I am bound to say I do not understand what the Lord Ordinary means by the misrepresentation of the pursuer. There is no representation in the letter at all. His Lordship cannot call representation the mere statement of fact that Sir Henry had barred the publication of certain of the negatives altogether. The pursuer's statement was that Sir Henry had chosen two, that the pursuer proposed to keep one for the purposes of the Pen and Pencil Club, and there was the offer of the other two to Mr Shorter. If Mr Shorter wanted to make that a question of selection he was bound in his letter to say so. Mr Shorter did not kick at the idea of the larger one being reserved for the Pen and Pencil Club. He did not start any theory such as has now been started, which is really a theory of there having been a determinate appropriation at the time Sir Henry sat in front of the camera. If that be so, it seems to me to end the case, the result being that as the only person who paid five guineas at all was Mr Shorter, who for that sum purchased these two pictures, neither of which was the one in question, the copyright must be in the pursuer, simply because nobody else paid for it.

I am of opinion that the pursuer is entitled to decree. What the decree is to be is another matter. It does not seem to me a case where there is any necessity for pronouncing interdict, because the wrong has been done, and it is not to be supposed that the picture complained of will again be reproduced. There remains the question of damages. We have evidence that supposing a newspaper has to ask a photographer to allow a picture to be reproduced, the ordinary price would be from half-a-guinea to a guinea. Now, here there has been taken what is called "French leave," and no doubt by the taking of "French leave" the photographer did not get what he generally did get—the right to stipulate that his name as the author of the photograph should be put in a conspicuous position. But then the damage suffered by Mr Crooke, the pursuer, seems to me exceedingly small, because one cannot as a person of common sense think really that there is a great deal of money in such copyrights. The only persons likely to want such rights are those who wanted the photographs for themselves, or other newspapers who wanted to reproduce it, and such could probably get the right for half-a-guinea or a guinea. I think the pursuer will be amply remunerated here if he gets an award of five guineas.

LORD KINNEAR—I agree.

LORD PEARSON—I do not think that the parties are much at variance either as to the law applicable to this case or as to the more important facts on which the decision of it depends. Nor do I think that it raises any question of credibility which really affects the merits. But I am unable to agree with the Lord Ordinary in the inferences which he draws from the evidence.

I assume, and I do not doubt that primarily the sitting at which the photographs in dispute were taken was Mr Shorter's sitting in this sense, that he and he only was "the occasion" of that sitting. It is true that some twelve years before, Sir Henry Irving had given what was regarded as a promise to give a sitting for a photograph to be supplied to the members of the Pen and Pencil Club. But that had lain over so long that it probably would have lain over for some time further had it not been for Mr Shorter's arrangement with Sir Henry Irving to take advantage of his visit to Edinburgh to give the pursuer a sitting. But then in point of fact, and as things turned out, it became a combined sitting (if I may so express it); for it is certain that, either in fulfilment of an old promise or owing to Mr Crooke's pressing request at the moment, Sir Henry Irving consented to give him the benefit of a sitting. So it turned out to be not only Mr Shorter's sitting but also Mr Crooke's sitting; and I do not think there is any foundation in the facts for saying that Mr Crooke's part of it was really for and on behalf of the Pen and Pencil Club in any other sense than this, that Mr Crooke intended the photograph of which he was to be the proprietor to be used by him primarily for the purpose of presenting copies of it to the members of the club. This intervention of Mr Crooke introduces this peculiar feature into the case, that not only was the sitting to be a joint sitting, but that one of the two persons interested in it was the artist himself.

Now, on that state of the facts, what is to be the test according to which the

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various portraits taken at that sitting are to be appropriated among the persons interested; and by what criterion is the right in each of them to be determined? I do not favour the suggestion that that is to be determined by the order in which the negatives were taken in point of time. I do not doubt that the parties might have so arranged. Or, there being no presumption that the first taken will also be the best, they might have agreed that the choice among the portraits taken at the sitting should lie with the prime mover, Mr Shorter, or with Sir Henry Irving himself. But there was no such arrangement, and indeed I do not suppose that anyone applied his mind to that question at the time. In the absence of any arrangement, I see no alternative but to hold that it lay with the pursuer to make such apportionment of the results of the sitting as he thought fair to all concerned; and while he may have kept the best to himself from among the five which were selected by Sir Henry as being "admirable ones," all parties were in the first instance satisfied with the apportionment, and as between Mr Crooke and Mr Shorter the matter was closed by a distinct agreement embodied in letters, by which Mr Shorter accepted the copyright of two out of the five approved portraits, with the permission to reproduce in the *Sphere* the one now in dispute.

On the remaining parts of the case as to the alleged misrepresentations and as to amount of damages, I entirely agree in what your Lordship has said.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor [of July 6, 1905]: Find it unnecessary to dispose of the first, second, third, and fifth conclusions of the summons, and under the fourth conclusion decern against the defenders for payment to the pursuer of the sum of Five pounds sterling in full of the claim under that conclusion, with interest on said sum at the rate of 5 per centum per annum from the date hereof until paid."

Counsel for the Pursuer and Reclaimer — Younger, K.C.—Morison. Agents — P. Morison & Son, S.S.C.

Counsel for the Defenders and Respondents — Johnston, K.C. — C. D. Murray. Agents — Fraser, Stoddart, & Ballingall, W.S.

Tuesday, June 26.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

M'ARTHUR *v.* MAGISTRATES OF EDINBURGH.

Burgh — Dean of Guild — "Court Open and Accessible to the Public"—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxvii*), *sec.* 5—*Edinburgh Municipal and Police* (*Amendment*) *Act* 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 40.

A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. The only access to the tenement was to be through the remaining part of the back-green, and through a passage leading therefrom, along one side of the villa, to the public street.

Held (*aff.* the Dean of Guild) that the court which would be formed out of the remainder of the back-green after the erection of the tenement, would not be "open and accessible to the public," and so would not be a court as defined in sec. 5 of the Edinburgh Municipal and Police Act 1879, and accordingly that the provisions of sec. 40 of the Edinburgh Municipal and Police (Amendment) Act 1891, requiring the submission of plans and sections of new courts, did not apply.

Burgh — Dean of Guild — "Tenement" — Edinburgh Municipal and Police (*Amendment*) *Act* 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 50—*Edinburgh Improvement and Municipal and Police* (*Amendment*) *Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 7—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxviii*), *sec.* 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 50, as amended by the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, sec. 34, sub-sec. 7, and the Edinburgh Corporation Act 1900, sec. 80, regulates the open space required to be attached to houses, and, *inter alia*, provides that "in the case of houses in tenements intended to be occupied or used as flats or separate dwellings," any open space in front is not to be reckoned as part of the open space required.

A semi-detached villa was by a horizontal partition divided into two dwelling-houses, each having its separate entrance.

Held that it was not a house "in tenements," and accordingly that in reckoning the open space required, the open space in front was to be taken into account.

Opinion per the Lord Justice-Clerk that, "speaking generally, the word 'tenement' is used to describe a build-

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ing containing a number of dwelling-houses within four walls, all or a number of them having a common access from the street."

Burgh—Dean of Guild—Building Regulations—Open Space "Used Exclusively in Connection with" House—Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 50—*Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv.*), *sec.* 34, *sub-sec.* 7—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 50, as amended by the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, sec. 34, sub-sec. 7, and by the Edinburgh Corporation Act 1900, sec. 80, provides that the requisite open space attached to houses shall be "pertaining to and used exclusively in connection with" such houses.

A petitioner sought a warrant to erect a tenement on the back part of the back-green of a semi-detached villa. Access to the tenement from the street was to be obtained through a passage at one side of the villa, and through the remaining part of the back-green.

Held (*reversing* the Dean of Guild) that the petitioner was not bound to erect a fence in continuation of the side wall of the villa so as to separate the passage to the new tenement from the back-green to be used exclusively in connection with the villa.

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 5, defines "court" as including "any court or passage used solely for foot-passengers, and open and accessible to the public from a street or private street and forming a common access to lands and heritages separately occupied."

The Edinburgh Municipal and Police Amendment Act 1891 (54 and 55 Vict. cap. cxxxvi), sec. 40, provides—"Every person who proposes to lay out or make any new street or court, or part of a street or court, shall give notice of such proposal to the Magistrates and Council, and shall . . . submit plans and sections thereof for the approval of the Magistrates and Council, and such plans shall show the levels and widths thereof, its intended position in relation to the streets nearest thereto, the intended lines of drainage, and the intended size, depth, and inclination of each drain, and the details of the arrangements proposed to be adopted for the ventilation of the drains. . . ."

Section 50, as amended by section 34, sub-section 7, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893 (56 and 57 Vict. cap. cliv), and by section 80 of the Edinburgh Corporation Act 1900 (63 and 64 Vict. cap. cxxxiii), provides—"Every new house and any building altered for the purpose of being used as a house, shall have in the rear thereof or directly attached thereto, and pertaining to and used exclusively in connection with such new house or building altered for the purpose of being used as a house, an open space at least equal to three-fourths of the area to be occupied by the intended house where such house is not of greater height than three storeys . . . Provided always that, in any case where the thorough ventilation and light of any house or building is in the opinion of the Dean of Guild Court otherwise secured, or under other special circumstances, the said court may in their discretion allow the open space to be reduced . . . Provided, further, that from and after the passing of this Act (1891 Act) all existing houses having any open space adjacent thereto shall as regards such open space be subject to the foregoing provisions of this section applicable to new houses to the extent to which such open space is available: Provided always that in the case of houses in tenements intended to be occupied or used as flats or separate dwellings having an open space or plot in front thereof, such open space or plot shall not be reckoned as part of the open space required to be provided as aforesaid."

Alexander M'Arthur, painter, proprietor of a house 34 Tower Street, Portobello, presented a petition in the Dean of Guild Court, Edinburgh, in which he called as respondents amongst others the Lord Provost, Magistrates and Council of the City of Edinburgh, and craved warrant to build a small tenement on the garden ground behind his house with cement footpath and court thereto. No. 34 Tower Street had two storeys, and formed one-half of a block of two semi-detached villas. The other half was still occupied as a semi-detached villa, but No. 34 had by a horizontal partition been converted into two dwelling-houses, the one on the ground floor, the other on the floor above. Each had its separate entrance, the ground floor house retaining the old entrance, the upper floor having its entrance by an outside stair at the back. In front of the house there was a garden plot, and at the side of the house there was a passage leading from Tower Street to a considerable area of ground behind the house; this all belonged to the petitioner. The proposed tenement, which was to consist of four dwellings, was to be built on the back part of the ground to the back of No. 34. The only access was to be through the side passage, and thence through No. 34's back-green, the proposed court. Both the front plot and also the ground or court at the back which would remain after the erection of the new tenement, extended to more than three-quarters of the area of No. 34.

The Lord Provost, Magistrates and Council appeared as respondents, and stated amongst others objections to the following effect:—(1) That the petitioner proposed to form a 'court' within the meaning of section 5 of the Act of 1879 in front of the proposed tenement, and that plans and sections of this court required to be submitted to and approved of by the Magistrates and Council as provided

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by section 40 of the Edinburgh Municipal and Police Amendment Act 1891, but that this had not been done; and (2) that if the tenement was put up as proposed, the open space required to be left for the existing house, No. 34 Tower Street, would be curtailed below the area required by the Edinburgh Municipal and Police Acts.

The Dean of Guild (WILSON) on 22nd February 1906 refused to grant the warrant craved and sustained the latter objection of the Magistrates.

Note.—". . . . The first objection put forward by the Magistrates and Council depends upon the interpretation of section 5 of the Edinburgh Municipal and Police Act 1879, in which the word 'court' is defined as including 'any court or passage used solely for foot-passengers, and open and accessible to the public from a street or private street, and forming a common access to lands and heritages separately occupied.' There is no dispute that the petitioner proposes to form a court in front of the proposed tenement, but there is a dispute as to whether such court would be a court within the meaning above given. If it is a court within that meaning, it is certain that by section 40 of the 1891 Act the petitioner is bound to submit a plan of it to the Magistrates and Council, and to get their approval. The Dean of Guild is unable to take the view that the court to be formed by the petitioner is one within the meaning of the Edinburgh Acts, which requires the approval of the Magistrates and Council. The court to be formed by the petitioner will undoubtedly be solely for foot-passengers, it will be open from a street, and it will form a common access to lands and heritages separately occupied, but it will not be accessible to the public. The petitioner would be entitled to put up a gate upon the passage from the street to the area behind the existing house, No. 34 Tower Street, and the inhabitants of the proposed new tenement would be entitled to exclude the public from what the respondents say will be a court which requires their approval before it can be formed. It therefore appears to the Dean of Guild that the court proposed to be formed by the petitioner is not a court for which the petitioner requires to get the approval of the Magistrates and Council.

"The second objection insisted in by the Magistrates and Council . . . is that if the proposed tenement is erected on the site now proposed, the area attached to and in rear of the existing house, 34 Tower Street, will be curtailed below what is required as open space under the provisions of section 50 of the Edinburgh Municipal and Police Amendment Act 1891, as amended by section 34, sub-section 7, of the Edinburgh Improvement and Municipal and Police Amendment Act 1893, and by section 80 of the Edinburgh Corporation Act 1900. The objection really amounts to this, that although, if the proposed tenement were erected, there would be sufficient area of open space in rear of the existing house to comply with the requirements of the Acts, that area will not be 'used exclusively' in connection with that house, as it will form part of the court for the proposed tenement. It appeared, however, to the Dean of Guild that the passage from the street could be continued up to the proposed new tenement by putting up a fence in continuation of the side wall of 34 Tower Street, and the ground immediately in rear of 34 Tower Street would then not be used as part of the court of the proposed new tenement, but would be used exclusively in connection with 34 Tower Street. The area thus used exclusively in connection with 34 Tower Street would satisfy the requirements of the Acts. The Dean of Guild, therefore, gave the petitioner an opportunity of amending his plans by showing a fence which would separate the passage to the new tenement from the ground to be used exclusively by 34 Tower Street. The petitioner, however, refused to amend his plans, and on the plans as now before the Court the petitioner proposes to utilise, in connection with the new building, land which under the Municipal Statutes must be used exclusively in connection with the old. The Dean of Guild is therefore obliged to sustain this objection to the petitioner's plans. . . ."

On 8th March 1906 the petitioner appealed to the Court of Session, and argued—(1) No. 34 Tower Street was not a tenement in the ordinary sense of the word, which implied a number of dwellings with a common entrance; it must be taken in this sense, for there was no definition in the Municipal Statutes. That this was the meaning of "tenement" was confirmed by the references in the Municipal Acts to the duties of persons living in tenements, *e.g.*, Edinburgh Municipal Act 1891, section 52, and Building Rules in Schedule annexed; Edinburgh Corporation Act 1900, section 80. There were only two dwellings in No. 34, and each had its separate entrance. If it were not a tenement the plot in front could be reckoned, and was sufficient to fulfil the requirements of the Acts as to open space. (2) In any event the ground at the back fulfilled the statutory requirements. "Used exclusively in connection with" meant that more than one house could not have the same "open space." The new tenement would admittedly have sufficient open space elsewhere. The erection of a fence was not necessary and would not give more light or ventilation. The statute must be read reasonably, and in view of its object to provide sufficient light and ventilation. Counsel for the petitioner was not called upon to reply to the objection that although a "court" would be formed, plans had not been submitted and approved.

Argued for the respondents—(1) No. 34 Tower Street was a "house in tenements" even although the flats had separate entrances—*Couper* v. *Surveyor of Maryhill*, March 6, 1891, 18 R. 642 (the Lord Justice-Clerk at p. 644-5), 28 S.L.R. 454. The open space in front could therefore not be considered. (2) No. 34 would no longer, if the tenement were built, have its

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back-green "pertaining to and used exclusively" by itself, for the petitioner had declined to erect the necessary fence; its back-green would be used as much or more by the new tenement as by itself. (3) The back-green of No. 34 would by the erection of the new tenement be made into a "court" within the meaning of section 5 of the Act of 1879; plans of it should therefore have been submitted to the Magistrates. The Dean of Guild was wrong in holding it would not be "accessible to the public." Any member of the public would be able to walk in; the phrase implied lack of physical obstruction, not right of access; that would give the words, which applied to courts opening off private streets and courts on private ground (*Couper, cit. supra*), no meaning.

LORD JUSTICE-CLERK—It is certainly a most unfortunate thing that one of the most important terms with which we have to deal in this class of case—the term "tenement"—is not defined in the statutes we have to deal with. We are accordingly obliged to take the term in the sense in which the word is used in ordinary language at the present day. Taking it in this sense, I am clearly of opinion that it does not include any building such as the existing house at 34 Tower Street. It appears that one-half of this house is still used as a semi-detached villa. The other half has been divided into two dwellings, one on the ground floor with its own entrance, and the other on the upper floor with a separate entrance by means of a stair at the back. This is not a "tenement" at all in the ordinary sense of the word. Speaking generally, the word tenement is used to describe a building containing a number of dwelling-houses within four walls, all or a number of them having a common access from the street. This view is confirmed by the references in the various statutes to the duties of the persons inhabiting the tenement, such as the duty of attending to the cleaning and lighting of the common entrance and stair. I think it would be absurd and an abuse of language to extend the meaning of the word tenement to cover a building such as that in question in the present action.

The Corporation take advantage of this appeal to raise another question—the question, namely, whether the space between the back of the existing house and the front of the proposed new building is a "court" within the meaning of section 5 of the Act of 1879. I am of opinion that it is not. All that the petitioner proposes to do is to build a house on his back-green. That is not building a court within the sense of the statute. I quite concede that it is a question of degree, for I can conceive many cases of buildings being erected at the back of other houses in such a way that the space between the houses was a court in the sense of the statute. But that is not so in the present case. I do not think that the space proposed to be left at the back of 34 Tower Street will be "open and accessible to the public." In a general sense the terms open and accessible may be applied to it, but it is not open and accessible in the sense of the statute —in the sense, that is, that members of the public would be entitled to go there as a matter of right. Persons might be allowed to go there on business, as, for instance, for the purpose of delivering goods or visiting, or even sanitary inspection, but such use would not be as a matter of personal right to members of the public as such. Accordingly on this point I agree with the judgment of the Dean of Guild.

LORD KYLLACHY—I am of the same opinion. As to the point last argued, I agree with the Dean of Guild, and do not think it necessary to add anything. As regards the other point, viz., whether the building in question falls under the class of "houses in tenements intended to be occupied or used as flats or separate dwellings," I shall not attempt any definition of the word "tenement." All I need say is that I am unable to assent to the proposition that wherever a semi-detached villa is divided either vertically or horizontally into two dwellings, each with its own entrance, it thereby becomes a tenement in the sense of these statutes.

LORD STORMONTH DARLING—I agree with your Lordships on both points which are necessary to be decided here. With regard to the question of the fence, I think that it is a carping objection, because although it professes to deal with light and ventilation it has nothing to do with either, since both are amply secured by open spaces in front and behind.

LORD LOW—I am of the same opinion. As regards the meaning of the word "tenement" in the provision under construction, I have no doubt that what your Lordship in the chair has said correctly describes what is generally meant nowadays in Scottish burghs by the word "tenement." It might, however, be better that we should not tie ourselves down to any exact definition, because there may possibly be buildings not having a common entrance which would fall within the category of tenements. I am quite clear, however, that in the present case the building in question is not a tenement within the meaning of the statutes.

The next question is, whether, there being in point of fact sufficient space left for light and ventilation, it is necessary in order to satisfy the precise words of the statute that a fence should be put up to make it certain that the area be used "exclusively" in connection with 34 Tower Street. The statutory provision requiring a certain open space to be attached to each house is designed to secure in the public interest thorough ventilation and sufficient light, but it is nevertheless a restriction on the use of private property, and ought to be construed and administered so as not to impose a greater burden upon proprietors than is necessary to attain the object in view. Here, as I have said, the space allowed admittedly satisfied the statutory

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requirement, and the suggested fence would serve no practical purpose, while it would put the proprietor to considerable expense.

On the question whether the space would be a "court" I agree with your Lordships, and have nothing to add.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the said interlocutor [of 22nd Feb. 1906] appealed against: Find (1) that the court proposed to be formed by the petitioner is not a court for which the petitioner requires to submit plans for the approval of the Dean of Guild Court; (2) that the presently existing house at No. 34 Tower Street is not a tenement, and that accordingly in determining the open space required to be attached thereto the petitioner is entitled to take into account the open space left in front thereof, and is not restricted to open space left at the back thereof; and (3) that the petitioner is not called on to erect a fence in continuation of the side wall of 34 Tower Street: Remit to the said Dean of Guild to grant the lining craved."

Counsel for Petitioner (Appellant)—A. M. Anderson—J. A. Christie. Agents—Balfour & Manson, S.S.C.

Counsel for Respondents—M'Clure, K.C. —Kemp. Agent—Thomas Hunter, W.S.

Wednesday, June 27.

FIRST DIVISION.

A *v.* B.

Expenses—Husband and Wife—Petition by Wife for Custody of Children—Wife's Expenses—Whether Wife Entitled to Expenses as between Party and Party or as between Agent and Client—"Necessary" Expenses.

Held that as the expenses incurred by a wife in a successful petition for custody of children were not "necessary" expenses which a husband was bound to pay, the petitioner was only entitled to expenses in ordinary form.

Question (*per* Lord Kinnear) as to the rule observed in awarding a wife expenses in a consistorial cause, "whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband, should be applicable to the case of a wife having a considerable separate estate."

A, wife of B, presented a petition for the custody of the pupil children of the marriage between her and B, under section 5 of the Guardianship of Infants Act 1886, and at common law. Answers were lodged by the respondent, and these were followed by certain steps of procedure, but before a proof, which had been ordered, had been taken the respondent lodged a minute consenting to the prayer of the petition being granted with expenses.

On the minute appearing in the Single Bills, counsel for the petitioner moved for expenses as between agent and client. The respondent, while consenting to an award of expenses in ordinary form being pronounced against him, opposed the motion. It was admitted that the petitioner was liferented in about £50,000 of separate estate, and that the respondent was a man of ample means.

At advising—

Lord President—The facts here are that this is a petition by a lady for the custody of certain children, in which she makes some very strong averments against the character of the respondent. At first the respondent resisted the crave of the petition, but afterwards he lodged a minute consenting to the prayer being granted, and the sole question now before us is whether the expenses of the petitioner should be given her as ordinary expenses or as expenses as between party and agent. The only other fact in ths case that it is necessary to mention is that the respondent is a man of ample means, and that the petitioner, though not possessed of such ample means as the respondent, yet is the possessor of a separate estate.

I have looked into the authorities, and it appears to me that the only ground in this class of case for awarding expenses as between party and agent instead of in the ordinary way, is for the purpose of avoiding circuity, and by circuity I mean that a wife, having recovered expenses awarded to her in the ordinary way, should thereafter claim and receive from her husband, as a debt due to her, the difference between the expenses awarded to her as between party and party and the expenses incurred by her as between party and agent. To avoid this circuity the Court will give expenses as between party and agent. The test in all such cases therefore is this—were the expenses "necessary" expenses of the wife. Now, it has been settled that expenses incurred by a wife in a petition for custody of children are not "necessary" expenses (Fraser, Husband and Wife, i. 646), so I think that the only expenses to which the petitioner is entitled here are expenses taxed on the ordinary scale.

Lord M'Laren—I agree. The only class of cases where a wife gets expenses as between agent and client, instead of on the more moderate scale, are such as were originally consistorial causes. Now an application for custody of children is not a consistorial cause, but is an appeal to the *nobile officium* of the Court, and the proof of this is that the case does not originate in the Outer House, as consistorial causes do, but in the Inner House. This then is not a case to which either the principle or the practice of awarding expenses in consistorial causes can be applied.

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LORD KINNEAR — I am of the same opinion, and agree with your Lordship's exposition of the principles on which expenses as between agent and client are generally allowed in consistorial cases. The case cited by Lord Fraser—*M'Alister* v. *Her Husband* (1762), M. 4036; Fraser, Husband and Wife, vol. i, 614—as the foundation of the whole practice was that of an action brought, not by the wife, but by the wife's law-agent to recover the difference between the expenses which he had already recovered as taxed between party and party, and the balance of expenses as between agent and client still due by the wife. It was held that expenses incurred by the wife in defending her honour or safety were necessaries for which the husband was bound to provide, and so the claim of the law-agent was sustained, and as your Lordship has pointed out the Court has thought it expedient in such cases to avoid this circuitous method by giving decree for expenses as between party and agent in the first instance. But it has never been held that petitions for the custody of children are necessaries for which the husband is bound to pay, and Lord Fraser points out that the contrary has been decided in Ireland. I do not see, therefore, that the rule hitherto followed in consistorial cases is applicable to the present. Whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband should be applicable to the case of a wife having a considerable separate estate is a different question which it is not necessary to decide.

LORD PEARSON—I concur.

The Court awarded the petitioner expenses in ordinary form.

Counsel for the Petitioner — Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—J. G. Jameson. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—Lord Advocate (Shaw, K.C.)—R. S. Horne. Agents—Carmichael & Miller, W.S.

Thursday, July 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

CRAWFORD AND ANOTHER (OWNERS OF THE S.S. "WARSAW") *v.* GRANITE CITY STEAMSHIP COMPANY, LIMITED (OWNERS OF THE S.S. "LINN O' DEE").

Ship—Collision—Fog—Rules to be Observed by Vessels Navigating in Fog—Regulations for Preventing Collisions at Sea—Relation of Article 16 *to Articles* 19, 21, 23.

The Regulations for Preventing Collisions at Sea provide:—By article 16—That a steamer in a fog hearing another vessel's fog-signal forward of her beam shall stop her engines and then navigate with caution. By article 19—That when two steamers are crossing with risk of collision the vessel which has the other on her starboard side shall keep out of the other's way. By article 23—That every steam vessel directed to keep out of another vessel's way shall on approaching, if necessary, stop and reverse.

The steamer "Linn o' Dee," navigating in a fog, heard forward of her beam and upon her starboard side the fog-signal of an unseen steamer. The sound seemed gradually to "broaden," which indicated a possibility that the vessel from which it proceeded was crossing the course of the "Linn o' Dee" from starboard to port. The "Linn o' Dee" stopped her engines in conformity with article 16. A collision took place. *Held* that she had acted rightly, and was not bound to have acted upon article 23 and reversed her engines.

Opinions that while all the articles are to be read together so far as practicable, article 16 contains all the obligatory directions with reference to speed in fog, and is imperative so long as the position of the other vessel has not been ascertained with certainty.

The Regulations for Preventing Collisions at Sea provide as follows:—"Article 16—Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

Article 19—"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Article 21—"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. *Note.*—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone she also shall take such action as will best aid to avert collision. (See articles 27 and 29.)"

Article 23.—"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop and reverse."

In the present action John Wood Crawford and Duncan M'Intyre, shipowners, Leith, registered owners of the steamship "Warsaw," sued the Granite City Steamship Company, Limited, registered owners of the steamship "Linn o' Dee," for £300 as damages sustained by the "Warsaw" in a collision with the "Linn o' Dee." A cross action at the instance of the owners of the "Linn o' Dee" against the owners of the

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"Warsaw" was before the Court at the same time. The collision took place on the 27th of August 1905 in a dense fog, about 3·30 in the afternoon, at a point some few miles to the south-east of St Abb's Head.

The facts of the case are fully set forth in the opinions of their Lordships *infra*, and are briefly summarised in the following passage, which is taken from the opinion of the Lord Justice-Clerk:—"The facts, as I consider them to be established by the evidence, are—(1) That when both the 'Warsaw' and the 'Linn o' Dee' were in a fog which made it impossible for a view to be obtained by one vessel of the other, the horn of the 'Warsaw' was heard upon the 'Linn o' Dee's' starboard bow, and was responded to; (2) that when the 'Warsaw's' signal was heard the 'Linn o' Dee's' engines were stopped; (3) that when the vessels came into view of one another there was but a short distance between them, and the 'Warsaw' was pointing towards the starboard side of the 'Linn o' Dee;' (4) that at this time the way was nearly off the 'Linn o' Dee;' (5) that to avoid the collision, or prevent her being struck amidships, the 'Linn o' Dee' put her engines full speed ahead and her helm hard a-port: (6) that the 'Warsaw' continued to come on at a considerable speed—not less than five knots an hour—and struck the 'Linn o' Dee' and cut clean into her in a slanting direction from her starboard quarter towards her port side; (7) that at the moment of contact there was none, or very little way on the 'Linn o' Dee;' (8) that the 'Warsaw' had been kept at a considerable speed up to the time of the vessels sighting one another, and that when she struck she had still considerable way upon her; (9) that the blow was a direct and horizontal blow, and not a blow by the sea throwing the 'Warsaw' down upon the 'Linn o' Dee.'"

On 9th January 1906 the Lord Ordinary after a proof, at which he was assisted by a nautical assessor, pronounced the following interlocutor:—"Finds that the collision which took place between the steamship 'Warsaw' of Leith and the steamship 'Linn o' Dee' of Aberdeen, on Sunday the 27th August 1905, was caused by the fault of those in charge of the steamship 'Warsaw' in navigating the said vessel at too high a rate of speed in a dense fog, and in not stopping and reversing her engines when it became apparent from the direction of the sound signals coming from the 'Linn o' Dee' that that vessel was proceeding in a direction from port to starboard of the 'Warsaw': Finds that those in charge of the 'Linn o' Dee' were not to blame to any extent for the said collision: Therefore, in the action at the instance of John Wood Crawford and another, the owners of the 'Warsaw,' against the Granite City Steamship Company, Limited, the owners of the 'Linn o' Dee,' assoilzies the defenders from the conclusions of the action; and in the action at the instance of the Granite City Steamship Company, Limited, against John Wood Crawford and another, finds the defenders liable to make payment to the pursuers of such sum as shall represent the damage caused to the pursuers by the said collision."

Opinion.—"The collision which forms the subject of the present action, took place about 63 miles south-east by east of the Bass Rock. The 'Warsaw' was proceeding across the North Sea on a voyage from Leith to Hamburg, and the 'Linn o' Dee' was on a voyage from Libau to Bo'ness, but not having been able to take observations owing to the weather she had kept a little to the south of her true course in order to enable her sooner to pick up lights or landmarks on the coast. Prior to hearing each other's steam whistles the courses of the respective vessels were slightly angled to each other.

"On the day of the collision the 'Warsaw' prior to the collision had passed through patches of fog at full speed, 8 or 9 knots, with no lookout on the forecastle head, and without any precautionary measures to prevent collisions with vessels which may have been in the patches of fog, and possibly the success of having done so without an accident might encourage those in charge of the vessel to continue at full speed longer than prudent men would have done in the existing foggy weather. It was particularly necessary for the 'Warsaw' to go at a low rate of speed, inasmuch as she had a very awkward deck cargo of thirteen horses and a pony, which, as described by the captain, kept 'stampeding' about the deck and behaving like 'mad things' when the fog whistle began to sound.

"It is stated by the master of the 'Warsaw' that the engines were slowed down upon their entering the fog, and were stopped as soon as they heard distinctly a whistle from the vessel which proved to be the 'Linn o' Dee.' The captain says that when the fog came down and the engines were slowed, the 'Warsaw' was doing about 4 or 5 knots per hour, and that they were going at this pace for about fifteen minutes, till about 3·35 p.m., and that then the engines were stopped, and he and the other witnesses on board the 'Warsaw' say that the result of the slowing and stopping was that the 'Warsaw' was practically stationary at the time the collision happened. I do not believe this evidence. There was no stopping of the engines apparently according to the engine time book till 3·36, almost immediately before the collision, and in the bridge log book there is nothing said about the engines being stopped at all, but only slowed, and the figure opposite that entry has evidently been tampered with. But further, as I shall have occasion to point out afterwards, the nature and direction of the hole cut in the 'Linn o' Dee' by the 'Warsaw' renders it quite impossible that at the time of the collision the 'Warsaw' could have been anything like stationary. On the contrary it would seem that she must have been going at about 5 or 6 knots an hour, which would be explained if the engines were not stopped till immediately before the 'Linn

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o' Dee' came in sight. Those on board the 'Linn o' Dee' state that the 'Warsaw' came upon them at a high rate of speed—at least 5 knots an hour—and that the collision became inevitable from the time the vessels sighted each other. In this last point those on both vessels are agreed, for those on board the 'Warsaw' also state that a collision had become inevitable when they saw the 'Linn o' Dee,' because they state that she was bearing down on them at the rate of 5 or 6 knots an hour, and the captain of the 'Warsaw' says that at that time the 'Linn o' Dee' was coming at a great rate of speed, and the second officer says that the 'Linn o' Dee' was going at the rate of 5 or 6 knots an hour, and that the 'Warsaw' was stopped at the time the collision happened. All this evidence I entirely disbelieve, as I think it is disproved by the actual facts of the collision. But on the showing of those on board the 'Warsaw' themselves I think that the master of that vessel was in fault in not reversing his engines as well as stopping them, as he says he did, when it became evident that the sound signals that were heard from another vessel closing and narrowing on the 'Warsaw's' port bow indicated that the vessel, which proved to be the 'Linn o' Dee,' was proceeding in a direction from port to starboard of the 'Warsaw.' Upon such indications the engines of the 'Warsaw' should have been at once reversed and the way taken off her, and signal (*b*) article 15 of the Regulations for the Prevention of Collisions at Sea should have been sounded. Such precautionary measures would have prevented the collision, and the hearing of the said signal would have been sufficient intimation to the 'Linn o' Dee' and other vessels navigating in the vicinity that there was a vessel stopped with no way through the water. In these circumstances the master of the 'Warsaw' was not entitled, upon the information given him by the sound signals narrowing on his bow, to wait till he saw the other ship before he reversed. In these views the nautical assessor concurs.

"The master of the 'Warsaw,' however, did not reverse, and he did not take such way off his vessel as that he could come to a standstill after the other vessel whose whistle he had heard appeared suddenly out of the fog. As the nautical assessor says, there is no legal rule compelling him to do so, but he observes that if a master of a steamship elects to proceed through a thick fog when the near presence of another vessel is known to him, his speed through the water should be so regulated that he can stop in half the distance he can see ahead. In my opinion the master of the 'Warsaw' being anxious to run up to his schedule time, and being afraid of taking the way off his vessel altogether, with the risk of getting into the trough of the sea, and having his deck cargo rolling about and possibly breaking their legs, took his chance of going through the fog at a greater speed than he was entitled to, having regard to the safety of other vessels, and in particular of the vessel whose whistle he had heard.

"Turning now to the evidence for the 'Linn o' Dee,' it appears that early in the morning of the 27th, when the weather began to get hazy, the master of that vessel at once placed a look-out man on the fo'castle head in order that vessels might be at once reported in time to prevent collisions. There was every indication of caution and care in the navigation of that ship immediately prior to the collision when they passed a fleet of fishing boats and some trawlers. When he got into the fog the captain gave the order to reduce speed to half-speed, which would be about three knots at that time, and then shortly after, hearing a bell from a boat on the port bow, the speed was reduced to slow, which would be between one and two knots according to the master. That rate was continued for about ten minutes, and then the first whistle was heard from what afterwards turned out to be the 'Warsaw,' and as soon as the first whistle was heard the engines of the 'Linn o' Dee' were stopped, and remained so till the 'Warsaw' loomed in sight. The 'Linn o' Dee' had thus practically all the way taken off her except what was due to the following sea. The master of the 'Linn o' Dee,' who of course could not see the 'Warsaw' any more than they could see him, imagined from the direction from which the sound signals were coming from the 'Warsaw' to him that they were becoming broader on his starboard bow, and that the two were passing vessels, as indeed they very nearly were, and that they would pass starboard to starboard, as they probably would have done had the 'Warsaw' not been going at an excessive rate of speed. When the 'Warsaw' came in sight, the master of the 'Linn o' Dee' saw that his only chance of avoiding a collision was to go full speed ahead and put his helm hard to port, so as to send his stern away from the bow of the 'Warsaw,' and this manœuvre would have been successful had the 'Warsaw' not been going at an excessive rate of speed, or if the 'Linn o' Dee' had had some way on her before the engines were ordered ahead, which very properly she had not, as I have already explained. The result was that the engines had only made a few revolutions before the collision took place, and these were insufficient to get up such way as to escape from the rapidly approaching 'Warsaw.' It is clear from the evidence that with the amount of sea following the 'Linn o' Dee' it would have been impossible for her to have gone astern before the lapse of some time had she reversed her engines and attempted that manœuvre. Indeed it is plain that if she had attempted to do so it would have resulted in the 'Warsaw' cutting into the 'Linn o' Dee' amidships. The account given by those on board the 'Warsaw' of what the 'Linn o' Dee' did shows how little they were capable of taking in the situation at the time, owing very probably to the confusion they had just been in with their horses; for, according to them, the 'Linn o' Dee' starboarded her helm, thus sending her head to port, and thereafter ported

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her helm and brought her into collision with the 'Warsaw' in the manner described by both parties, which is an impossibility, considering the distance the vessels were from each other, and the length and tonnage of the 'Linn o' Dee.'

"It is noticeable that in the deposition made by the captain of the 'Warsaw' before the Receiver of Wrecks, he says that in his opinion the cause of the casualty was the dense fog and the 'Linn o' Dee' starboarding, and that it might have been avoided by that vessel having ported her helm. Now it is proved that this last was exactly what the 'Linn o' Dee' did, and further, it is plain that if the 'Warsaw' had been going at a less rate of speed that manœuvre would have been successful in avoiding the collision altogether. The master of the 'Linn o' Dee,' on the contrary, in his deposition states that the cause of the casualty was the 'Warsaw' being navigated at too high a speed, and that it might have been avoided by that vessel feeling her way past the 'Linn o' Dee,' as was required in such weather. This statement is, in my opinion, in accordance with the facts of the case.

"The question of the respective speeds at which the two ships were being navigated is, in my opinion, settled by the nature of the injuries which each vessel received. The nature of these injuries is very well shown by the photographs which have been lodged in process, and it is sufficient here to say that the hole in the 'Linn o' Dee' is 20 feet wide along her bulwark, that its length is 17 feet 9 inches, and that it was delivered in a slanting direction on her starboard quarter. It must have been a blow delivered with very great force, and but for the propeller shaft which the 'Warsaw' came against in cutting into the 'Linn o' Dee,' and which is a piece of solid iron nine or ten inches in diameter, it is apparent that the 'Warsaw' would have sawn the stern of the 'Linn o' Dee' right off. As it was, the propeller shaft was indented and disconnected from the engines by the blow it received. The experts' evidence is that to make a cut of that kind the 'Warsaw' must have been proceeding at from five to six knots through the water. On the other hand, the injuries to the 'Warsaw' were of the most trifling description. The only serious indentation was in her stem where it had struck the propeller shaft of the 'Linn o' Dee.' Beyond that, on the starboard bow, No. 2 plate was broken and No. 3 plate was also broken, and the whole damage done took no more than an hour to repair.

"Now the experts say, and I think it stands to reason, that had the 'Warsaw' been, as those on board of her say she was, at a standstill, and the 'Linn o' Dee' had come scraping across her stem at a speed of from five to six knots an hour, which they also allege, the 'Warsaw's' stem would have been deflected to starboard, and instead of a deep direct cut into the quarter of the 'Linn o' Dee,' the whole of her quarter and stern would have been torn away in a ragged fashion to her very stern post. The experts for the 'Linn o' Dee, whose opinion is concurred in by the nautical assessor, state that there is really no doubt that the 'Warsaw's' speed was excessive at the moment of the collision, considering the foggy weather that prevailed, and that the 'Linn o' Dee's' headway was practically so small as to be of no consequence. This, I think, settles the matter.

"It was submitted by the counsel for the 'Warsaw' that the 'Linn o' Dee' had broken a great number of the Regulations for the Prevention of Collisions at Sea, and in particular Nos. 16, 19, 22, and 23. With regard to 16, I am of opinion that the 'Linn o' Dee' observed that article, whereas the 'Warsaw' did not; while with regard to articles 19, 22, and 23 they appear to me to have no application to the present case, for these regulations apply only to cases where the party who ought to observe them is aware that they are applicable to the circumstances in which he finds himself, but if the circumstances are such that a competent seaman exercising care could not have discovered that the regulations were in fact applicable, a ship failing to obey one of these regulations is not deemed to be in fault. See *Baker* v. *The Owners of the 'Theodore H. Rand,'* L.R. 12 A.C. 247; *Windram* v. *Robertson*, 7 F. 665; and *'The Ceto,'* L.R. 14 A.C. 670. Now, the master of the 'Linn o' Dee' and those on board of her thought, and in my opinion were not to blame in supposing, that his vessel and the 'Warsaw' were passing ships, and indeed they very nearly were so, as their courses were only slightly angled to each other, and the whistles from the 'Warsaw' seemed to be broadening on the starboard bow of the 'Linn o' Dee.' Then, when they did find that they were crossing vessels, it is proved that for the 'Linn o' Dee' to have stopped and reversed would have rendered the collision absolutely inevitable, whereas by adopting the manœuvre which she did she gave herself the only chance of escape, and, as the result showed, she nearly succeeded, and would have succeeded but for the careless navigation of the 'Warsaw'."

The owners of the "Warsaw" reclaimed, and the case was heard by the Judges of the Second Division along with a nautical assessor.

Argued for the reclaimers—The "Linn o' Dee" was in fault in only stopping her engines. Looking to either general considerations of prudent navigation or the regulations she ought to have reversed. The fact that the "Warsaw's" fog-signal was heard on the "Linn o' Dee's" starboard side was consistent with two possibilities—firstly, that the "Warsaw" was a passing vessel, in which case there was no danger; secondly, that she was a vessel crossing from starboard to port, a case of danger. Of the two alternatives, assuming them equally probable, it was the duty of the "Linn o' Dee" to act upon the latter, the law being that a vessel must always assume that the more dangerous of two alternatives

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will happen. But in this case the latter was far the more probable, the "broadening" of the sound pointing to a crossing vessel. That being so, the "Linn o' Dee" was under article 19 bound to keep out of the other's way, and under article 23 to reverse. The "*Ceto*," 14 App. Cas. 670, see Lord Watson at 686; the "*Kirby Hall*," 8 P.D. 71; the "*John McIntyre*," 9 P.D. 135; the "*Dordogne*," 10 P.D. 6; the "*Ebor*," 11 P.D. 25; the "*Rondane*," 1900, 82 L.T. 828; the "*Cathay*," 1899, 81 L.T. 391. The articles were all to be read together, and 19 and 23 were not superseded in fog by article 16—the "*Merthyr*," 1898, 79 L.T. 676. But even if article 16 alone applied, "navigation with caution" made reversing necessary.

Argued for the respondents—Article 16 alone applied and furnished a complete code for the guidance of vessels in fog. The second paragraph of the article appeared for the first time in the Regulations of 1897, a fact which detracted from the value of decisions prior to that date. Articles 19, 21, 22, 23 could obviously only apply where the relative positions of the vessels had been ascertained; until then, compliance with these regulations was impossible. See the "*Theodore H. Rand*," 12 A.C. 247; *Taylor* v. *Burger and Another*, February 15, 1898, 35 S.L.R. 398; *Windram* v. *Robertson*, May 23, 1905, 7 F. 665, 42 S.L.R. 602; Marsden on Collisions, 5th ed., pp. 380, 381.

LORD JUSTICE-CLERK—[*After the narrative of facts set forth above*]—Holding these facts to be established by the evidence, the question where the blame lay can, I think, be easily determined. The counsel for the "Warsaw" maintain that when the "Linn o' Dee" noticed the sound of the "Warsaw's" horn broadening on her starboard bow, she committed a breach of the regulations in not reversing as well as stopping her engines. I am unable to assent to that contention. In my opinion the duty of the "Linn o' Dee" was to adhere strictly to the directions of rule 16, which, for the first time in the navigation regulations, speaks not of stopping and reversing, nor of stopping or reversing, but gives a very distinct and simple order, "shall stop her engines." The purpose of that seems to be to stop as much as possible all sound from throbbing engines, rush of water, or rush of air created by the rapid motion of the vessel, and to give opportunity for accurate observation of sound, while at the same time not executing any manœuvre at all until there is such certainty as to the situation as shall make manœuvring at all a careful act in itself, and not a change of direction or speed done blindly, when the exact position of the other vessel is not known. We are advised by the nautical assessor that it is not possible to ascertain accurately the direction from which a sound is coming, particularly in a fog. That being so, my view is that article 16 is imperative as long as there is not certainty as to the position of the other vessel and what it is doing.

The "Warsaw" further maintains that the "Linn o' Dee," immediately before the collision, was travelling through the water at several knots an hour, and that she starboarded her helm first and then ported when too late. This must mean that those on board the "Warsaw" saw that the "Linn o' Dee" was put on a starboard helm and then changed and came round on a port helm. It seems to me to be impossible that those on board the "Warsaw" could have seen anything of the kind. The distance between the vessels when a view was possible did not admit of any such double manœuvre being executed, and if it be correct to hold that the way was practically off the "Linn o' Dee," then it was physically impossible that this double manœuvre could have been executed in the circumstances. I am satisfied that the statements made to the effect that starboarding followed by porting took place are untrue. That makes it difficult to accept the evidence given by those on board the "Warsaw" as to the facts of the occurrence in other respects.

The allegation of the "Warsaw" that the "Linn o' Dee" was going several knots through the water at the time of the collision is also in my opinion quite untrue. The position of the two vessels when they came in sight of one another was such that if the "Linn o' Dee" had been going ahead at some speed through the water at that time, she could not possibly have been struck as and where she was. But the real evidence on this matter is conclusive. The "Linn o' Dee" was loaded with timber and had a deck load. The effect of the collision was to cut clean into her, through the side plates, decks, and timber load, and to strike against her ten-inch propeller shaft with such force that it was torn from its bearings and sent several inches laterally to port. (I may point out in passing that these facts are quite inconsistent with the view that the "Warsaw" was lifted by the sea and thrown down upon the "Linn o' Dee.") It is, I think, not matter for doubt that had the "Linn o' Dee" been going through the water at a speed of four or five knots, as is alleged, the injuries could not have presented the appearance which they did. The momentum of the "Linn o' Dee" would necessarily have forced the edges of the sternmost side of the cut against the "Warsaw's" port bow, and either the "Warsaw's" plates must have given way or the edge of slice cut off from the "Linn o' Dee" towards the stern must have been doubled back towards the stern, and the slice more or less pulled off, making the gap much wider than the width of the "Warsaw's" stem so far as it penetrated into the "Linn o' Dee." The fact is, that the cut was practically clean, without any turned-back edge, and was of the width of the wedge which made the cut, and that there was no sign of violence done to the port-bow of the "Warsaw."

The whole evidence points to the way having been practically off the "Linn o' Dee," and it follows necessarily that the way on the "Warsaw" must have been considerable.

Considering the whole case, with the

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aid of the advice on technical matters obtained from the nautical assessor, I have no difficulty in moving your Lordships to accept the general view of the case stated by the Lord Ordinary.

It might be well, as suggested by one of your Lordships, to vary the interlocutor by deleting the words "and in not stopping and reversing her engines," which it is not necessary to find in the view I take of the case, and also to delete the words "was proceeding in a direction from port to starboard of the 'Warsaw,'" and to substitute for these words the following, "was in a position near to the 'Warsaw.'"

LORD KYLLACHY—I concur in the opinion which your Lordship has just delivered. I have also had an opportunity of reading the opinion of Lord Stormonth Darling, with which I also concur. I have nothing to add.

LORD STORMONTH DARLING—I agree with the Lord Ordinary that this collision was caused by the fault of the "Warsaw" alone, although I think that we should vary his Lordship's interlocutor by omitting the words "and in not stopping and reversing her engines," and also by substituting (after the words "that vessel") the words "was in the immediate neighbourhood of the 'Warsaw,'" for the words "was proceeding in a direction from port to starboard of the 'Warsaw.'" We shall thereby lay the findings entirely on a failure to observe the 16th article of the regulations, which forms, I think, their true basis. The whole controversy seems to me to be one of speed in a dense fog.

The Lord Ordinary tells us that he disbelieves the evidence of those on board the "Warsaw" both as to the time when they say her engines were stopped and also as to the speed at which she was going when the collision took place. His Lordship also substantially accepts the story of the "Linn o' Dee," both as to her engines being stopped when the whistle of the "Warsaw" was first heard, and also as to the "Linn o' Dee," when the "Warsaw" loomed in sight, having practically "all the way taken off her except what was due to the following sea." It would be difficult for a court of review to go against these clear indications of the opinon of the judge of first instance—difficult in any case, but especially so in a case of collision at sea. But it seems to me that the real evidence in the case supports the Lord Ordinary's conclusion. I refer particularly to the distance which the two ships are known to have travelled after they loomed out of the fog, and to the nature, force, and direction of the blow which the "Warsaw" inflicted on the starboard quarter of the "Linn o' Dee" as contrasted with the slightness of the injury done to her own stem.

The main argument of the Solicitor-General in endeavouring to establish fault on the part of the "Linn o' Dee" (either solely or jointly) was that from the moment when the sound of the "Warsaw's" whistle indicated that she was on the starboard bow of the "Linn o' Dee" the latter was bound to treat the "Warsaw" as a crossing vessel, and therefore her own duty was to keep out of the "Warsaw's" way, and when approaching her to stop or reverse. This argument involves a calling-in of articles 19, 21, and 23 as supplementary to article 16, which is the main or leading article regulating the duty of vessels in a fog.

Now I do not doubt that all the articles are to be read together so far as they can be so read, and, accordingly, that it may be quite right to read article 16 along with any other article which will live with it. For example, the note to article 21, by its reference to "thick weather or other causes," shows that it may be read along with article 16 when the emergency arises to which it refers. But it is equally clear that article 21 itself cannot be so read, because that would involve the contradiction that in certain circumstances the same vessel was both to stop her engines and navigate with caution and to keep her course and speed. The truth is that article 16, in its two paragraphs, seems to contain all the obligatory directions with reference to speed in a fog. It deals (1) with the case of a vessel finding herself in a fog without knowing of any other vessel near her, in which case her duty is simply to go at a moderate speed, and then (2) with the case of her hearing the fog-signal of a vessel apparently forward of her beam but in an otherwise unascertained position, in which case her duty is to stop her engines, and then to navigate with caution until the danger of collision is over. Plainly, I think if a vessel obeys these directions she is not bound to act as if she saw the other vessel and knew all about her exact position. It is an acknowledged fact (which our skilled adviser corroborates) that sound in a dense fog may be very misleading, and a shipmaster who governed his conduct by conclusions so drawn, instead of following the safe and cautious directions of article 16, might be very much to blame.

Holding, therefore, with the Lord Ordinary, and with your Lordship in the chair, that the "Linn o' Dee" did, and the "Warsaw" did not, observe article 16 by stopping his engines and navigating with caution before the two vessels came in sight of one another, and holding further that the final manœuvre of the "Linn o' Dee" in going full speed ahead and porting her helm was the best thing that could be done in the circumstances, and would probably have succeeded in averting the collision if the speed of the "Warsaw" had not been too great, I cannot hold the "Linn o' Dee" as in any degree to blame; and I am for adhering with the slight variation which I have suggested. It is a satisfaction to know that, so far as the rules of good seamanship are concerned, our nautical adviser concurs in these conclusions.

LORD LOW—This is a case of considerable difficulty, but I am of opinion that the Lord Ordinary was right in holding that the

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"Warsaw" was in fault, while the "Linn o' Dee" was free from blame.

In the first place, I think that the evidence of the "Linn o' Dee" witnesses must be accepted as substantially correct. The Lord Ordinary, who heard the evidence, believed that these witnesses were speaking the truth, and the story which they told is entirely consistent with the real evidence, and in particular with the nature of the injuries which the "Linn o' Dee" and the "Warsaw" respectively sustained. The account given by the "Linn o' Dee" witnesses is that that vessel was proceeding with her engines at "slow," and when the "Warsaw's" whistle was heard, the engines were at once stopped. Accordingly, when the "Warsaw" was sighted some five minutes later, the "Linn o' Dee" had but little way upon her—probably between one and two knots an hour.

On the other hand, the evidence of the leading witnesses for the "Warsaw"—the master and second officer—is that when the whistle of the "Linn o' Dee" was heard the "Warsaw" was going at "slow"; that the engines were then stopped; that when the "Linn o' Dee" appeared out of the fog—at a distance of about 400 feet—the engines were put full speed astern; that the way of the "Warsaw" was thereby entirely stopped before the collision happened; but that the "Linn o' Dee" came on at speed and struck the "Warsaw's" stem with her starboard quarter.

Now I think that it is practically certain that that account is not true. In the first place, there is the real evidence afforded by the nature of the injuries sustained by the vessels respectively, which is almost conclusive. It is proved that these injuries were entirely inconsistent with the idea that the "Warsaw" was stationary or nearly so when the collision occurred, while the "Linn o' Dee" was going at a high rate of speed. On the contrary, the plain inference from the nature of the injuries is that the "Warsaw," when going at what in the circumstances was excessive speed, rammed the "Linn o' Dee," and that the latter vessel was going through the water so slowly that her motion had no appreciable effect. Further, careful consideration of the evidence as a whole leads me to the same conclusion. In particular, I think that it is very doubtful if the "Warsaw's" engines were stopped at all until the "Linn o' Dee" was actually sighted.

I am therefore of opinion that fault on the part of the "Warsaw" has been established.

Before leaving this branch of the case, however, there is one argument which was strongly pressed by the Solicitor-General upon which I think it right to say a few words.

The "Linn o' Dee" witnesses say that the whistles given by the "Warsaw" broadened upon her (the "Linn o' Dee's") starboard bow, while the "Warsaw" witnesses say that the whistles given by the "Linn o' Dee" narrowed upon her (the "Warsaw's") port bow. The Solicitor-General contended that that proved conclusively that the "Linn o' Dee" was going at a greater speed than the "Warsaw." Now the "Warsaw" was steering S.E. by E. and the "Linn o' Dee" W. ¾ S., and I think that it is the case that if the vessels were steering their courses truly, and if the "Linn o' Dee" was sailing the faster of the two, the sound of the "Warsaw's" whistle would broaden on her starboard bow while her whistle would narrow on the "Warsaw's" port bow. The inference therefore which the Solicitor-General asks us to draw from the evidence as to the apparent direction of the sounds, might, if the point had been raised at the proper time, have merited serious consideration. As matters stand however I do not think that we are in a position to deal with the argument the one way or the other. The point should have been put to the witnesses at the proof, and if that had been done the apparent broadening of the sound upon the "Linn o' Dee's" bow might have turned out to be capable of a very simple explanation apart from the respective speed of the vessels; indeed, it is not difficult to figure circumstances which would have afforded such an explanation. Further, I doubt whether in any case much weight could have been attached to the impression received by those on board the "Linn o' Dee" as to the precise direction from whence the sounds came, it being a matter of common knowledge that sounds heard in a dense fog are extremely misleading and difficult to locate.

There remains the question whether the "Linn o' Dee" was not also in fault. It was argued that when the whistle of the "Warsaw" was heard upon the starboard bow of the "Linn o' Dee," those in charge of the latter vessel were bound to contemplate the contingency that (as in fact turned out to be the case) the whistle came from a crossing ship. The "Linn o' Dee" therefore (it was contended), whose duty it was to keep out of the way of a ship crossing her from starboard, was bound in terms of articles 19 and 23 of the regulations not only to stop her engines but to reverse until she was brought to a standstill. Now we were advised by the nautical assessor (and apart from that advice I should have come to the same conclusion) that rules 19 and 23 did not come into operation in the circumstances, but that the rule which applied was number 16. If that be the sound view, then it is plain that the "Linn o' Dee" was not in fault, because she followed precisely the direction given in that rule.

The Court pronounced this interlocutor:—

"Refuse the reclaiming note: Vary the said interlocutor reclaimed against by deleting therefrom the words 'and in not stopping and reversing her engines,' and the words 'proceeding in a direction from port to starboard of the "Warsaw,"' and in lieu of the said second deletion inserting the words 'in the immediate neighbourhood of the "Warsaw"': With the above alterations affirm the said interlocutor reclaimed against, and decern."

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Counsel for the Reclaimers—The Solicitor-General (Ure, K.C.)—Horne. Agents—Beveridge, Sutherland & Smith, S.S.C.

Counsel for the Respondents—Scott-Dickson, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Saturday, July 7.

SECOND DIVISION.

SCOBIE AND OTHERS *v.* ATLAS STEEL WORKS, LIMITED.

Company — Winding-up — Petition for Winding-up Order—"Just and Equitable"—Petition by Individual Shareholders within Six Months from Incorporation and before any Shareholders' Meeting—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79 (1), (2), (5).

Section 79 of the Companies Act 1862 provides that a company may be wound up by the Court "(1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; . . . (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Less than six months after the incorporation of a limited company formed for the purpose, *inter alia*, of working a patent for horse-shoes, three preference shareholders presented a petition under section 79 (5) for winding-up by the Court, averring that the patent was worthless, that no shoes had been manufactured, that the actual cost of making the shoes largely exceeded that estimated in the prospectus, that the capital had all been spent, that the plant was insufficient, that business could only be carried on at a loss, and that there had been mismanagement by the directors. Answers were lodged by the company explaining the delay in commencing business and generally denying the averments of the petitioners. No meeting of shareholders had ever been summoned to consider the question of winding-up.

The Court *dismissed* the petition.

Per the Lord Justice-Clerk—"I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done."

Per Lord Stormonth Darling—"Where a petition is presented under sub-section 5 of section 79—that is, the 'just and equitable' head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen."

The Atlas Steel Works, Limited, was on the 15th December 1905 registered and incorporated under the Companies Acts 1862 to 1900, with its registered office at Moorepark, Renfrew. The capital of the company was fixed at £10,000 divided into 5000 preference shares of £1 issued to the public and 5000 ordinary shares of £1 each taken by the vendors. The objects for which the company was formed were to acquire the Atlas Steel Foundry, Renfrew, and to carry on general foundry work, also, *inter alia*, to acquire British Patent No. 9404 of 1904 for an improved method of making horse-shoes. The consideration payable to the vendors was £1500 cash, being the price of the foundry and plant, and all the ordinary shares in the company, being the price of the patent. The minimum subscription on which the directors were entitled to proceed to allotment was £2000, and they in fact proceeded to allotment on a subscription of £2007.

On 9th June 1906 Alexander Scobie, the late works manager of the company, 58 West Regent Street, Glasgow, and two others, all being preference shareholders, presented a petition to the Court under the Companies Acts 1862 to 1900, and specially under the Companies Act 1862, secs. 79, 82, 92, for an order for the winding-up of the company by the Court. They stated—"A prospectus dated 15th December 1905 was issued inviting the public to subscribe for the preference shares. . . . In said prospectus the following statement and certificate appeared:—'The Atlas Foundry was acquired in the winter of 1904, and since then has been put into thorough repair and the furnace into complete working order at considerable expenditure, after which experimental work was carried on making horse-shoes. The work was in charge of Mr Duncan M'Neill, steel works manager, who has for many years held a responsible position in the Mossend Steel Company. Mr M'Neill has granted the following certificate:—"The experimental work in connection with the casting of steel horse-shoes at the Atlas Foundry, Renfrew, a few months ago, was carried out under my personal supervision and instructions. . . . By systematically arranging the moulding, the cost of making steel horse-shoes complete, ready for nailing on, should be less than £8 per ton, melting five tons per day, and if the moulders can deal with ten tons per day (which can be produced from the same furnace), the cost should be under £7, 10s. per ton. From my knowledge of the wearing capacity of steel and wrought iron, I am satisfied that shoes cast in steel of the quality produced at the experimental tests, will wear longer than similar hand-made shoes of wrought iron."' . . . After sundry testimonials to the quality of horse-shoes made in the said

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experiments, the said prospectus proceeded to state—'The present market price of horse-shoes runs from £15 to £20 per ton according to size. It will be noted that the difference between the price of making the patent shoes as certified by Mr M'Neill and the selling prices is considerable and leaves a very large margin for profit in working the undertaking.' . . . The said estimate of profits is based on totally erroneous and misleading statements. No complete experiments for determining the cost of manufacturing horseshoes were made by the said Duncan M'Neill. The said experiments by him were in smelting only, and no experiments were made by him to discover the cost of moulding, dressing, and finishing, which constitute a very large item in ascertaining the cost of turning out the finished article. So far, however, as the said experiments show the cost of manufacturing horse-shoes, they indicate that the said estimate falls far below the actual cost. The five cwt. of finished shoes manufactured in the said Duncan M'Neill's experiments cost about £40. The said Duncan M'Neill was not qualified to conduct said experiments. He was incorrectly described in said prospectus as a steel works manager, being a foreman smelter in the employment of the Mossend Steel Company. His only experience was in smelting. Further, the said Atlas Foundry is incapable of finishing more than one ton of shoes per day, as not more than this quantity of steel can be dried in the stoves. The small quantity of horse-shoes manufactured in said foundry since the company acquired it cost at the rate of about £88 per ton. The company therefore cannot carry on business as manufacturers of horse-shoes except at a heavy loss. The patent acquired by the company is believed to be worthless. No advantage is to be derived from manufacturing horse-shoes under it, and since the company was formed no attempt has been made to use it. The principal object of the said company, which was to manufacture horse-shoes under said patent, has therefore failed. The petitioners believe that the promoters of the company never had any expectation that the work proposed would be carried on. The plant is quite inadequate for dealing with a sufficient quantity of steel to make work in the foundry profitable. To supply sufficient plant to enable the company to deal with the weight of shoes referred to in the certificate granted by the said Duncan M'Neill, and quoted in the prospectus, would involve an outlay of at least £2000. Further, the office in the foundry is supplied with neither furniture nor books. Since work was begun at the foundry all that has been done has been the casting of six steel ingots of about 22 cwts. each, and the making of 1 cwt. of horse-shoes. The company has now ceased to do business, and the directors, to whose number the vendors have now been added, have closed the foundry and dismissed all the employees at it except the petitioner Alexander Scobie, who is the works manager, and two watchmen. The sum subscribed for the preference shares was £2007. Of this there is a sum of £174, 5s. outstanding for unpaid calls, which are believed to be irrecoverable. £1500 was to be paid to the vendors. The sum left is inadequate to pay expenses of flotation, which have been estimated at £150, material and plant purchased by the company at the price of about £400, which is mostly unpaid, and the wages bill paid and incurred to the company's employees of over £300. No return has yet been obtained for the work done in the foundry, and should such return be received it could only amount to about £40. The company has therefore insufficient funds to discharge its liabilities. If, however, all the assets of the company, including the foundry itself, were forthwith realised there would still be an available balance for the shareholders. The petitioners believe that in their negotiations with the said company the said vendors used such misrepresentations as to the equipment and value of said foundry that repetition of the price paid therefor may be claimed from them, and in particular that the vendors represented that they had expended £1500 in acquiring and providing plant and furnishings for said foundry, the fact being that the sum so expended did not by much exceed half of said sum. It is therefore desirable that an official liquidator should be appointed. The directors are not carrying on the management of the company in compliance with the provisions of the Companies Acts, and in particular no register of members is kept at the registered office. No books are kept at the registered office, and all letters addressed to the company are re-addressed by the post-office to the office of the vendor . . . at 45 Renfield Street, Glasgow. The present secretary, Colin Wilson, is a clerk in the office of Messrs Lindsay, Meldrum, & Oatts, the companys' solicitors, who are also the vendors' solicitors. Mr George Adamson, chemist, Govan, was originally appointed by the vendors secretary of the company at a salary of £2, 10s. per week, but was never allowed to take up the duties of secretary. He drew said salary until the beginning of May 1906, when he resigned. He frequently applied for the company's books, but though they were promised to him he did not receive them. Meantime the said Colin Wilson acted as secretary. In these circumstances the petitioners are dissatisfied with the management of the company. The petitioners are all preference shareholders in the company and subscribed for shares on the faith of the said erroneous statement in the prospectus. . . ."

Answers were lodged by the Atlas Steel Works (Limited), who denied the petitioners' averments and averred that the capital was not exhausted; that the purpose had not failed, it having been understood that the company was not to begin manufacturing horse-shoes on a large scale until a favourable opportunity offered; that the patent was a valuable one; that the cost of the experimental work was no

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criterion of what the running cost would be in normal conditions; and that there was no cause to complain of the origin and management of the company.

Argued for the petitioners—This was a case where it was "just and equitable" that a winding-up order should be pronounced. The company being commercially insolvent, there yet remained sufficient assets to return something to the shareholders—*in re European Life Assurance Society*, L.R. (1869), 9 Eq. 122; the objects of the company had failed—*in re Amalgamated Syndicate*, [1897] 2 Ch. 600; the patent could not be worked to advantage—*in re Coolgardie Consolidated Gold Mines (Limited)*, 1897, 76 L.T. 269. The vendors here controlled the company, making it useless to refer the matter to a meeting of shareholders and rendering this petition necessary—*in re The Varieties (Limited)*, [1893] 2 Ch. 235; compare also *Pirie* v. *Stewart*, June 28, 1904, 6 F. 847, 41 S.L.R. 685. At anyrate the petition should be continued and an inquiry ordered into the financial position of the company and the value of the patent.

Argued for the respondents—Inquiry would be as harmful as winding up, and winding up by the Court was out of the question, until at any rate the matter had been brought up at a meeting of shareholders, the proper forum for the settlement of the domestic differences of a company—*in re Langham Skating Rink Company*, 5 Ch.D. 669; *Symington* v. *Symington's Quarries (Limited)*, November 21, 1905, 8 F. 121 (*per* Lord President), p. 129, 43 S.L.R. 157.

LORD JUSTICE-CLERK—It seems to me quite out of the question to grant this petition as it stands. Mr Bartholomew asked us as an alternative to order an inquiry into the statements made in the petition. But it is for the company to take the first step and to ascertain the wishes of the members in the usual way. I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done. It is not suggested that the company has taken any steps in the matter, and until it has we cannot think of interfering. Then it is suggested that this petition ought to be hung up pending the ascertainment of the wishes of the members. I must say that I sympathise with what Mr Lippe said as to the disastrous effect which that course would probably have on the prospects of the company. A new petition can be brought at any time. On the whole matter I think that this petition should be dismissed, and I move your Lordships accordingly.

LORD KYLLACHY—I am of the same same opinion. I make no attempt to lay down any general rule. I think it enough to say that, having regard to the whole circumstances, we ought not, in my opinion, to entertain this petition.

LORD STORMONTH DARLING—I also concur, and would also refrain from laying down any general rule on the construction of clause 79 of the statute. I confine myself to saying that where a petition is presented under sub-section 5 of section 79—that is, the "just and equitable" head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen.

That being the case here, Mr Bartholomew has, I think, failed to show that we would be justified in taking the case out of the jurisdiction of the "domestic tribunal" (as it has been called) which the statute contemplates.

LORD LOW—I am of the same opinion. It seems to me that in the circumstances it would not be just and equitable to order the winding up of the company.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Bartholomew. Agent—Henry Robertson, S.S.C.

Counsel for the Respondents—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, June 27.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BROWN *v.* FRASER.

Reparation — Wrongous Information — Privilege — Malice — Probable Cause — Facts and Circumstances Inferring Malice — Whether Malice Necessarily Antecedent—Relevancy.

A, a plasterer, brought an action against B, a builder, for damages for false information having been given to the police leading to his arrest and trial for theft in the following circumstances:—B, in order that A might do certain plaster work for him, employed him to make according to a plan belonging to B five cornice moulds. These A made with his own zinc, but with B's wood as a backing. He did not, however, he averred, follow the plan, as it had been departed from and was worthless. B paid for making the moulds, but, as A averred, not for the zinc, of which B was aware. Having been dismissed by B, A, admittedly to cause inconvenience, removed the moulds and plan, and wrote falsely stating that he had burnt them, adding, "You are at liberty to give me in charge for theft if you fancy you have a case."

B informed the police, but, as A averred, maliciously withheld the fact that the zinc was his. A was arrested

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and tried for theft, but acquitted, and averred that the information was given in answer to the challenge in his letter or in retaliation for a small-debt summons which had been served at his instance.

Held that facts and circumstances inferring antecedent malice did not require to be averred, and that the action was not irrelevant, and an issue including malice and want of probable cause allowed.

James Brown, plasterer, Edinburgh, brought an action against James Smith Fraser, builder, in which he sought to recover damages suffered by him owing to the defender having given false information to the police leading to his having been arrested and tried for theft.

The nature and substance of the pursuer's averments sufficiently appear from the opinion of the Lord Ordinary (SALVESEN), who on 22nd May 1906 approved of an issue as amended, which included malice and want of probable cause.

Opinion.—"The pursuer in this case was apprehended and subsequently tried on a charge of theft, alleged to have been made against him by the defender. He was acquitted; and he now brings this action to recover damages against the defender in respect of the false information which led to the public exposure necessarily incident to such a trial. As the action is not one of slander but is laid entirely on the information given to the authorities, it is plain that malice and want of probable cause must go into the issue, and the contrary was not seriously contended by the pursuer's counsel.

"The defender argued that the action should be dismissed on the grounds (1) that there was no relevant averment of facts from which malice could be inferred; and (2) that the pursuer's own averments disclosed that the defender did not act without probable cause. If the defender is right in either of these propositions it follows that the action must be thrown out.

"The articles said to have been stolen consisted of five cornice moulds and a plan. These moulds had been made by the pursuer in order to enable him to do certain plaster work on the defender's employment, and the plan had been handed to him in order that he might make the moulds in accordance therewith. The pursuer says, however, that the plan was departed from and was treated as valueless. As regards the cornice moulds the pursuer avers that they were made by him at his own expense, of materials purchased by him out of his own funds. This statement is plainly inaccurate, because the account No. 7 of process (the genuineness of which was admitted) shows that the pursuer charged and was paid for the cost of making the zinc moulds. The 'horsing' or wooden backing of the zinc moulds seems also to have been made from materials belonging to the defender; but there remains the substantial averment—which is said to have been admitted by the defender in the evidence which he gave at the trial in the police court—that the zinc, which formed the most valuable part of the moulds so far as the materials were concerned, was purchased by the pursuer out of his own funds. It is rather a nice question, in these circumstances, in whom was the property of the moulds, but I have little doubt that the defender on paying for the price of the zinc would in a civil action have been found entitled to them.

"While the pursuer was still using these moulds his employment was suddenly terminated by the defender. The pursuer resented his dismissal, and, as his own post-card shows, determined to put the defender to as much inconvenience as possible by removing the moulds. When he was written to by the defender to return them he admitted having removed them with that object, and falsely added, 'I cannot now return them, for I made firewood of them on Tuesday morning. You are at liberty to give me in charge for theft if you fancy you have a case. This I question." The defender thereupon gave information to the police, which resulted in the pursuer's apprehension and trial on a charge of theft of the cornice moulds.

"I cannot but think that the pursuer's conduct was highly improper, and that the post-card which he wrote to his former employer was just the kind of communication which was likely to lead the latter to take extreme measures. But the question here is not with regard to the pursuer's conduct, but with regard to the defender's; and if the pursuer's version of the facts be accurate—as I must assume at this stage—I think the defender acted both maliciously and without probable cause. According to this version the defender knew that part of the materials of the cornice moulds had been paid for by the pursuer. He knew further that however unwarranted the removal of the moulds might be from a civil point of view, there was no question of theft in the ordinary sense; and the pursuer alleges that the information which he gave to the police was by way of retaliation to the small-debt summons with which he was served on the 6th of November at the pursuer's instance; or (what seems more likely on the defender's averment) in answer to the challenge contained in the pursuer's post-card. At all events there is, I think, room for the view that the information was given not in the *bona fide* belief that a crime had been committed against the defender, but for the double purpose of punishing the pursuer and of recovering through the action of the police authorities the possession of property the right to which would have been properly dealt with in a civil proceeding. The pursuer says further that the defender maliciously withheld from the police the fact that portions of the moulds were the pursuer's property; and that after he had given his explanation of the matter it was disregarded by the authorities because of the insistence by the defender in the charge of theft. On these averments I think there is at least room for the view that the defender acted mali-

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ciously and without probable cause; and I am unable to support the contention of the defender's counsel that the mere fact that the prosecution was proceeded with by the authorities, after the pursuer's explanation had been obtained, is sufficient proof that the defender acted with probable cause. The case appears to me closely to resemble that of *Denholm* v. *Thomson*, October 22, 1880, 8 R. 31, 18 S.L.R. 11, in which the Second Division, after a proof, held that sufficient had been established to entitle the pursuer to damages.

"I have not overlooked the fact—which was much pressed in argument—that there was no dispute as to the property of the plan being in the defender, and that it had been improperly removed by the pursuer. There is nothing, however, in the pursuer's averments to suggest that it was feloniously removed—which indeed would be out of the question if it were (as he says) valueless, and had been so treated by both parties. It was not included in the requests which the defender made for the return of the articles removed, and I cannot but think that it plays a very subordinate part in the story. I have therefore come to the conclusion that I cannot refuse the pursuer an issue; and I shall approve of the issue lodged, with the insertion at the proper place of the words 'maliciously and without probable cause."

The defender reclaimed, and argued—(1) There was no averment of facts and circumstances from which malice could be inferred. In order to show malice, facts and circumstances extrinsic from and antecedent to the matter in question must be averred and proved—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221. (2) The pursuer's own averments showed that the defender in giving information to the police did not act without probable cause.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—The facts stated by the pursuer do not indicate any very substantial case. I should be surprised if a jury were to give him any sum by way of damages which were worth fighting for. But the question for us is whether the action is irrelevant. I do not think it is. Mr Anderson refers to the rule that facts and circumstances inferring malice must be averred in a case of this kind, and he says that the facts and circumstances averred must be independent of the incidents which gave rise to the action, and must show antecedent ill-will on the part of the defender. That may be so in many cases, as, for example, in cases arising with regard to characters given to servants. But when the case arises out of the pursuer having been accused or handed over to the police on a criminal charge, I cannot understand how it can be laid down as a general rule that it is necessary in every case that facts independent of the act complained of and its surrounding circumstances should be averred showing antecedent malice on the part of the defender. It would be very undesirable if that were so, as in cases of handing over to the police the whole matter may arise in a moment without any previous acquaintance between the parties, and the malice alleged may arise only at the time of the pursuer being accused. In such a case, according to Mr Anderson's argument, however unfounded and without reasonable ground the accusation may have been, and however recklessly it may have been made, there could be no action against the accuser, because the pursuer could not aver preconceived malice and state facts to support the averment. I do not think that is the law. I am therefore for adhering to the interlocutor reclaimed against.

LORD KYLLACHY and LORD LOW concurred.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—C. A. Macpherson. Agent—Charles Garrow, Solicitor.

Counsel for the Defender (Reclaimer)—G. Watt, K.C.—D. Anderson. Agent—W. J. Graham, Solicitor.

Saturday, June 30.

SECOND DIVISION.

ABERDEEN UNIVERSITY COURT *v.* ABERDEEN UNIVERSITY SENATUS ACADEMICUS.

(*See ante Milne's Executors* v. *Aberdeen University*, May 16, 1905, 42 S.L.R. 533, and 7 F. 642).

Bursary — University — Power to Award Bursaries — University Court — Senatus Academicus—Universities (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 55), *secs.* 6 (1) (2) *and* 7 (1).

The Universities (Scotland) Act 1889, section 6, provides—"The University Court, in addition to the powers conferred upon it by the Universities (Scotland) Act 1858, shall . . . have power (1) to administer and manage the whole revenue and property of the University . . . including funds mortified for bursaries and other purposes." Sec. 7—"The Senatus Academicus shall continue to possess and exercise the powers hitherto possessed by it, so far as they are not modified or altered by the Universities (Scotland) Act 1858, or by this Act, and shall have power (1) to regulate and superintend the teaching and discipline of the University. . . ."

The University Court of a University having presented a scheme for the administration of a bursary fund, *held* that while it was right that the views of the Senatus Academicus should be heard in the adjustment of the scheme, the power of appointment to bursaries lay by statute in the hands of the University Court.

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This case arose out of the case of *Milne's Executors* v. *Aberdeen University*, reported *ante ut supra*.

The Universities (Scotland Act 1889 (52 and 53 Vict. cap. 55) enacts—Section 6—"The University Court, in addition to the powers conferred upon it by the Universities (Scotland) Act 1858, shall . . . have power (1) to administer and manage the whole revenue and property of the University . . . including the share appropriated to such University out of the annual grant hereinafter mentioned, and also including funds mortified for bursaries and other purposes. . . . (2) To review any decision of the Senatus Academicus on a matter within its competency which may be appealed against by a member of the Senatus or other member of the University having an interest in the decision, . . . and to take into consideration all representations and reports made to it by the Senatus Academicus and by the General Council. . . ." Section 7—"The Senatus Academicus shall continue to possess and exercise the powers hitherto possessed by it, so far as they are not modified or altered by the Universities (Scotland) Act 1858, or by this Act, and shall have power (1) to regulate and superintend the teaching and discipline of the University. . . ."

On 23rd May 1906 the University Court of Aberdeen University, who had, by interlocutor dated 16th May 1905 been found entitled to the balance of the residue of the estate of the late Alexander Milne of Aberdeen, "on condition that a scheme for the administration of the same as a bursary fund is submitted by them to and approved by the Court," presented a scheme for the administration of the said fund. The Senatus Academicus on 26th June were allowed to sist themselves as parties and lodged objections to the scheme.

The scheme, *inter alia*, provided—"III. The said bursaries shall be open to all matriculated students of the University of Aberdeen, whom the University Court, on report by the Senatus, considers to require pecuniary assistance to enable them to prosecute their studies at the University, and to be by their ability and diligence deserving of such assistance. IV. The bursaries on this foundation shall be awarded by the University Court on report and recommendation by the Senatus as to the needs and merits of the applicants. The Senatus shall be entitled, for the purpose of such report and recommendation, if they think fit, to submit any or all of the applicants to examination in such subject or subjects as they may prescribe."

The objections included, *inter alia*:—1. "Article III of the proposed scheme of administration of the 'Alexander Milne Bursary Fund,' is in the following terms—. . . [*supra*] . . . The Senatus Academicus have in the past conducted all applications for bursaries in the gift of the University of Aberdeen. Their inquiries are conducted verbally with a view to privacy. If the aforesaid provision were to be approved by the Court, a written report by the Senatus would require to be submitted to the University Court, which procedure would entail a greater degree of publicity. The University Court meets in public. The Senatus Academicus meets in private. The public press is invariably represented at the meetings of said Court. It would be an undoubted hardship on applicants for participation in said fund if their applications were submitted to discussion in public, and this would tend to discourage applicants from coming forward and thus defeat the wishes of the testator." 2. "The result of the foregoing provision in the event of its receiving the approval of the Court would be that after the Senatus had made full inquiry into the applications for bursaries under the said fund, and had satisfied themselves that certain applicants were proper persons to participate in the said fund, the University Court would have the power to institute and conduct further inquiries. They would be entitled to refuse to recognise the recommendations of the Senatus. The delay involved by such procedure would not be conducive to the practical working out of the scheme." 3. "The Senatus further object to the first sentence of Article IV of the said proposed scheme, which is in the following terms . . . [*supra*] . . . The power to appoint candidates to bursaries connected with or in the gift of the University has from time immemorial been exercised by the Senatus and not by the University Court. The Universities (Scotland) Acts of 1858 and 1889 confer no such power on the University Court. By section 7, sub-section 1, of the Universities (Scotland) Act 1889 the Senatus have power to regulate and superintend the teaching and discipline of the University. The power of appointment to bursaries falls within the scope of this provision. The General Report by the Commissioners under the Universities (Scotland) Act 1889, and relative ordinances by the Commissioners, contain no warrant for such change as that suggested in the proposed scheme, but on the contrary without exception leave the power of appointment in the hands of the Senatus. There is no precedent in the University of Aberdeen or any other Scottish University for withdrawing the power of appointment to bursaries from the Senatus and conferring it on the University Court. The Senatus have on all occasions exercised the power to appoint with due care and discretion. There is no necessity for making a precedent in this case adverse to rights of the Senatus."

The Senatus lodged an alternative scheme and moved for a proof as to the custom of appointing bursars in the University since 1889.

Argued for the University Court—The Senatus Academicus had no *locus standi* to entitle them to be heard. This was a matter of administration and management of revenue; to give effect to the objections would be to take away from the University Court their statutory power and to give it to the Senatus, who had been deprived of it by statute.

Argued for the Senatus—This was a matter of teaching and discipline. From time im-

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memorial it had been the custom of the Senatus to appoint to bursaries, and this had not been changed by the Act of 1889. A proof on this point, if it were denied, should be allowed—Reference was made to Universities (Scotland) Act 1858 (21 and 22 Vict. cap. 83), sections 5, 12 (1) (6).

LORD JUSTICE-CLERK—I think it unnecessary to deal with the suggestion of Mr Brown that the Senatus Academicus has no *locus standi* here at all. In a case like this it is inexpedient that we should be bound by any strict rules as to *locus standi;* it is certainly right that the Senatus Academicus should be allowed to have an opportunity of appearing and stating their views. The case which the Senatus present against this scheme apparently is, that if the scheme is passed in the terms proposed there will be no security that the recommendations of the Senatus, which the scheme entitles the Senatus to make, will be given effect to by the University Court, because, it is said, the University Court will naturally favour students from Aberdeen since the majority of the members of the University Court belong to the town of Aberdeen. I think that this cannot be assumed for a moment. If there is to be any assumption in the matter, it would, I think, be the exactly contrary assumption. I assume that the University Court will always be composed of persons who will act conscientiously and from right motives in everything they do.

The practical question is whether the fourth clause, which provides that the bursaries shall be awarded by the University Court on the report and recommendation of the Senatus, shall be allowed to stand as part of the scheme. I think that it was admitted that the bursaries cannot be awarded by anyone else than the Court, in this sense at least, that the University Court being in possession of the fund the bursaries can be paid only with their sanction. But the suggestion is that while the administration of the bursary fund is vested in the University Court for the purposes of investment and other similar purposes, the actual appointment to the bursaries themselves belongs to the Senatus, the University Court being the mere hands of the Senatus in paying over the money to the bursars whom the Senatus have elected. It is said that the power to appoint to bursaries has from time immemorial been exercised by the Senatus, and that this practice has continued since the Act of 1889. As regards what happened before the Act of 1889, I think that we have nothing whatever to do with that. I think that it can throw no light whatever on the present question, because down to the Act of 1889 the whole funds of the University were—subject to the modifications introduced by the Act of 1858—in the hands of the Senatus. Since 1889—a very short time—I should have been very much surprised to find that there had been any outward change in the practice. I should expect to find that the University Court gave effect to the recommendations of the Senatus as a matter of course, unless in very exceptional circumstances, and if such exceptional circumstances did occur, I should expect to find that the University Court consulted with the Senatus in order to determine the best thing to be done. But I think that the whole matter is really settled by the Act of 1889, which is as clear as anything can be. The first sub-section of the sixth section of the Act gives the University Court power to "administer and manage the whole revenue and property of the University," including "funds mortified for bursaries." I think that that places the whole administration and management of bursary funds, including the power of appointment to bursaries, in the hands of the University Court. In these circumstances I think that this scheme has been very fairly presented with a view to carrying into effect the power which has been conferred on the University Court, by providing that the bursaries are to be awarded by the University Court on the recommendation of the persons best fitted to judge—there is no doubt of that—namely, the Senatus, and by giving the Senatus a perfectly free hand as to the selection of the persons whom they are to recommend to the University Court.

On the whole matter I am of opinion that we should approve of the scheme subject to the modifications suggested by Lord Stormonth Darling.

LORD KYLLACHY—Your Lordship has exactly expressed my views, and I have nothing to add.

LORD STORMONTH DARLING—I am of the same opinion. I should only desire to add that the claim of the Senatus is practically a claim to the absolute and uncontrolled patronage of these bursaries, and that it is founded on the alleged practice before 1889. But that is scarcely a matter for our consideration, for the whole relations of the University Court and the Senatus, *inter se*, were altered by the Act of that year. Under the scheme as proposed by the University Court I do not suppose that there will be any practical difference in the practice as it has been in the past. But it can hardly be maintained that, as a matter of right, the patronage of bursaries is covered by the power which the Act confers upon the Senatus "to regulate and superintend the teaching and discipline of the University;" and there is nothing else in the Act on which the Senatus can found their claim.

LORD LOW was absent.

The Court repelled the objections and approved of the scheme with certain modifications in detail.

Counsel for the University Court—A. R. Brown. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Senatus—Cooper, K.C.—Dallas. Agents—Forbes Dallas & Company, W.S.

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Thursday, July 19.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Dundas, Ordinary.

BRAY AND OTHERS *v.* PETERKIN (BRUCE'S TRUSTEE) AND OTHERS.

Succession—Faculties and Powers—Power of Appointment—Exercise by General Settlement—Intention—Onus—English Wills Act 1837 (1 *Vict. c.* 26), *sec.* 27, *a Correct Expression of Law of Scotland.*

Section 27 of the English Wills Act 1837, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have a power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will," *held* to be a correct expression of the law of Scotland. Lord Brougham's dictum as to the law of Scotland in *Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. p. 106, at p. 141, on which the above section is founded, *approved*.

Opinion per Lord Low that the presumption in favour of the exercise of the power can be rebutted only by evidence of intention amounting practically to a declaration that the power is not exercised.

A testator conveyed his whole means and estate, heritable and moveable (except the estate of X to be settled in the fourteenth place), to trustees for various purposes, including *fourth*, division of furniture among A, B, C, grandnieces of wife failing exercise by wife of power of appointment conferred on her; *eighth*, liferent of whole income to wife; *twelfth*, on death of wife if she survived him, payment of residue of moveable estate as appointed by her, or, failing appointment, equally among grandnieces A, B, C; *fourteenth*, as regarded estate of X, on death of wife sale of estate and payment of proceeds as she might appoint, or, failing appointment, division among certain relatives of wife from whom A, B, C, otherwise provided for, were excluded. By her will the wife, after expressly exercising the power of appointment as to furniture, provided, "as regards the remainder of my means and estate I provide" that the residue be divided between her grandnieces A and B (C had died) in the proportion of two-thirds to A and one-third to B. By subsequent codicil she expressly exercised the power of appointment over the residue of her husband's moveable estate in favour of A and B.

Held (*dub.* Lord Stormonth Darling) that the power of appointment conferred on the wife by purpose *fourteen* as regarded the proceeds of the sale of X, had been validly exercised by her will in favour of A and B.

Mackenzie v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612, *commented on*.

On 27th January 1905 Mrs Charlotte Wheeler or Bray, widow, residing at Wimborne House, Albert Road, Bromley Common, Kent, and others, beneficiaries under the trust-disposition and settlement of the deceased James Bruce of Inverquhomerie, raised an action against, *inter alios*, Henry Peterkin, solicitor, Aberdeen, the sole surviving trustee of the said James Bruce, *inter alia*, to have it declared that Mrs Diana Wheeler or Bruce, widow of the said James Bruce, had not validly exercised a power of appointment over one moiety of the proceeds of the sale of certain property at Chislehurst, Kent, known as Blackmount, conferred upon her by her husband's trust-disposition and settlement.

They, *inter alia*, pleaded—"(1) On a sound construction of the fourteenth purpose of the said trust-disposition and settlement and codicils thereto of the said James Bruce, the legacy of the first moiety of the Blackmount property referred to in summons, or the proceeds of a sale thereof, vested (in default of any appointment in terms of such purpose of his wife) in the pursuers and the other parties mentioned in the said fourteenth purpose as at the death of his wife, according to their share as mentioned therein. . . . (2) The wife of the said James Bruce never having exercised the power of appointment conferred on her by the said fourteenth purpose of his settlement over the moiety in question, the pursuers are entitled to have decree to that effect pronounced in terms of the declaratory conclusions of the summons."

The facts are fully stated by the Lord Ordinary (DUNDAS) in his opinion *infra*.

The following is the text of the material portions of the deeds of which the Lord Ordinary states the general tenor:—I. Trust-disposition and settlement of James Bruce, dated 14th May 1897—"I, James Bruce, do . . . hereby . . . dispone [to certain trustees] all and whole the lands of Inverquhomery . . . as also my whole moveable means and estate of every kind and denomination, heirship moveables included, but excepting my freehold property in England consisting of a messuage or tenement and premises at Chislehurst, Kent, which are to be devised and settled by me in trust hereafter in the fourteenth place . . . But declaring always that these presents are granted in trust for the ends, uses, and purposes after mentioned, *videlicet* . . . (*Fourth*) that my trustees shall convey and make over to my said wife, subject to the declaration after written, all the furniture and effects which may at the time of my death be in the mansion-house of Inverquhomery. . . . But I declare and provide that although the furniture, effects, and others hereby in the fourth place directed to be conveyed and made over to my said wife are intended by me to be used and disposed of by her as

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her own absolute property, yet in the event of her not having herself disposed of them during her lifetime, or by any testamentary writing to take effect after her death, my trustees shall divide and deliver such of the said furniture, effects, and others as may be undisposed of at the death of my said wife to and amongst her grandnieces, Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, equally among them, or as nearly equally as my trustees shall find to be practicable and as they may consider just in their discretion, which no one shall be entitled to interfere with or question. . . . *Eighth*, that my trustees shall provide for the full and free liferent use and enjoyment by my said wife of the income of the whole of my said estates, means and effects . . . *Twelfth*, on the death of my said wife in case she survive me my trustees shall pay and convey and make over the residue of my said moveable and personal estate to such person or persons, or in such way or manner as my said wife may direct and appoint by any writing under her hand, and failing such direction and appointment by her my trustees on her death shall pay and convey and make over the said residue to the said Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, and the survivors and survivor of them equally, but declaring that should any of them have predeceased the time appointed for such division leaving lawful issue the share of the said residue to which the party so predeceasing would have been entitled if alive shall be paid and divided to and amongst such lawful issue equally share and share alike. . . . *Fourteenth* . . . I devise my freehold house and premises at Chislehurst aforesaid, known as Blackmount, to my trustees upon trust to permit my said wife to occupy the same during her life, or so long as she shall think fit so to do . . ., and after her death or in her lifetime if she shall elect no longer to occupy . . . to sell . . . and I declare that my trustees shall stand possessed of the proceeds of my freehold house and premises known as Blackmount aforesaid, upon trust if my wife shall be living at the time of sale to invest the same . . . and to stand possessed of the investments hereinbefore directed to be made (hereinafter called 'the trust fund') and of the annual income thereof upon trust to pay the income thereof to my said wife during her life for her separate use without power of anticipation, and after her death shall stand possessed of the capital and income of the trust fund, or if she shall have died prior to such sale of my Blackmount estate then of the proceeds of sale of my said Blackmount estate, upon trust to divide the same into two equal moieties, and shall stand possessed of one moiety thereof upon and for such trusts, intents, and purposes as my said wife shall, whether covert or sole, by will or codicil appoint, and in default of such appointment or so far as no such appointment shall extend, then upon trust to divide the same equally (except as hereinafter mentioned) amongst the following persons, namely, my wife's surviving sister Mrs Charlotte Wheeler or Bray, her niece Mrs Mary Ann Hedges or Freeman, all the children then living of the said Mary Ann Hedges or Freeman (except Kate Freeman and Emily Blanche Freeman), all the children then living of the said Charlotte Wheeler or Bray (except William Bray), all the children then living of my wife's niece Mrs Rosa Bray or Warwick (except Dora Sylvia Warwick), my wife's half brother Edward Warwick, all the children then living of my wife's half brother William Warwick, and all the children then living of the said Edward Warwick (except his eldest daughter Ellen Matilda), so nevertheless that the said Mary Ann Hedges or Freeman and Rosa Warwick or Bray shall respectively take each a double share in the trust fund: And I direct that all such children and grandchildren shall take equally *per capita* with the other persons hereinbefore named, and shall stand possessed of the other moiety thereof upon trust to pay the sum of £200, which shall carry interest at the legal rate from the date of the death of my said wife, to Charles Warwick, who is now in my service at Blackmount aforesaid: And subject thereto shall stand possessed of such second moiety in trust for all or some one or more of my said wife's three grandnieces Kate Freeman, Emily Blanche Freeman, and Dora Sylvia Warwick, at such times, in such manner, and subject to such conditions as my said wife, whether covert or sole, shall by deed or will appoint, and in default of or subject to such appointment in trust for my wife's said three grandnieces or such of them as shall respectively attain the age of twenty-one years or be married, in equal shares as tenants in common."

II. Will of Mrs Diana Bruce, widow of James Bruce, dated 29th April 1903—"I, Mrs Diana Bruce, widow of the late James Bruce, and residing at Inverquhomerie, Longside, with the view of providing for the disposal of my means and estate after my death, hereby appoint Henry Peterkin, solicitor in Aberdeen, to be my executor with all the usual powers; and with reference to the furniture and effects referred to in my said husband's settlement in article fourth thereof, and there directed to be made over to me, as well as with reference to any other effects at Inverquhomerie belonging to me, I provide as follows:—My niece Kate Freeman shall be entitled as her absolute property to such articles of furniture as she may select and as my executor may consider suitable and sufficient to furnish a house for her, and which shall be delivered over to her out of said furniture at Inverquhomerie. With regard to silver my said niece Kate Freeman shall receive the larger tea service and large tray and tea urn, my niece Emily Blanche Freeman or Blackett shall receive the small tea set, and the remaining silver shall be divided by my executor between Kate Freeman above named and the above named Emily Blanche Freeman or Blackett in such way as shall in his opinion give Kate two-thirds of the value thereof and Emily one-third of the value

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thereof. As regards linen, bedding, and blankets, these shall be divided amongst the said Kate Freeman, the said Emily Blanche Freeman or Blackett, and my niece Rose Warrack, but so that my executor may in his opinion give Kate the best share. The crockery and other things of that kind and the large pictures brought from Chislehurst shall be divided between Kate and Emily above referred to. The whole furniture and effects referred to in article fourth of my said husband's settlement, and any other furniture and effects belonging to me at Inverquhomerie, and not hereby specially disposed of, shall be sold, and the free proceeds after deducting all duties and expenses thereon shall be paid over to the said Kate Freeman and the said Emily Blanche Freeman or Blackett in the proportions of two-thirds thereof to Kate and one-third thereof to Emily. And my said executors shall have full discretion as to the divisions above directed and as to what is to be sold. And as regards the remainder of my means and estate I provide that after payment of all my debts and freeing my means and estate of all obligations thereon, the same shall be disposed of as follows: First, in payment of the following legacies, viz., to William Davidson, gardener, if in my service at the time of my death, the sum of fifty pounds, to my sister Mrs Charlotte Freeman the sum of five hundred pounds, to my niece Rose Warrack the sum of five hundred pounds, to my grandniece Mary Ann Freeman the sum of two hundred pounds; and I direct that the residue of my means and estate shall be divided between my said nieces Kate and Emily in the proportions of two-thirds thereof to my said niece Kate Freeman and one-third thereof to my said niece Emily Blanche Freeman or Blackett."

III. Codicil of Mrs Diana Bruce, dated 23rd November 1903. (This codicil altered the amounts of certain legacies and is immaterial.)

IV. Codicil of Mrs Diana Bruce, dated 22nd March 1904—"I, Mrs Diana Bruce, widow of the late James Bruce, and residing at Inverquhomerie, Longside, have reconsidered the terms of the will made by me the twenty-ninth day of April Nineteen hundred and three, and of the codicil made by me the twenty-third day of November Nineteen hundred and three, and desire to make the following legacies in addition to those mentioned therein: . . . and further considering that by the twelfth purpose of my late husband's settlement, which is dated the fourteenth day of May Eighteen hundred and ninety seven, and recorded along with two relative codicils in the Books of the Lords of Council and Session on the nineteenth day of February Nineteen hundred, the trustees acting under the said settlement were directed to pay and convey and make over the residue of my said husband's moveable and personal estate to such person or persons or in such way or manner as I might direct and appoint by any writing under my hand, I therefore hereby direct and appoint the said trustees to pay and convey and make over the said residue of my said husband's moveable and personal estate to my said grandnieces Kate Freeman and Emily Blanche Freeman or Blackett and the survivor of them, but declaring that should either of them have predeceased me leaving lawful issue the share of the said residue to which such predeceaser would have been entitled if alive shall be paid and divided among such lawful issue equally share and share alike, and in the event of females being entitled to receive any principal sums of money under this provision being in minority when such sum shall become payable, the said trustees shall during such minority of each such female invest the sum to which she shall be so entitled in such security as is authorised by law and apply the interest thereof for her benefit in such manner as the said trustees shall in their absolute discretion see fit; and subject to the foregoing amendments and additions I homologate and approve of said settlement and codicil. I provide that the said residue of my said husband's moveable and personal estate is to be paid equally to my said grandnieces equally if both survive, and direct and appoint the said trustees to pay the same accordingly . . ."

V. Codicil of Mrs Diana Bruce, dated 8th April 1904. (This codicil merely altered the amount of certain legacies and is immaterial.)

On 1st June 1905 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—". . . . Finds that the power of appointment in regard to the first moiety of the proceeds of the sale of Blackmount, conferred upon Mrs Bruce by the fourteenth purpose of the trust-disposition and settlement of her husband, was validly exercised by her will, dated 29th April 1903. . . . ."

Opinion.—"James Bruce of Inverquhomerie, in Aberdeenshire, died on 12th February 1900, leaving a trust-disposition and settlement, dated 14th May 1897, and two codicils. The main question in the case is whether or not his wife validly exercised a power of appointment conferred upon her by the fourteenth purpose of the said trust-disposition over one moiety of the proceeds of the sale of certain freehold premises at Chislehurst, known as Blackmount, which belonged to her husband. By the said fourteenth purpose Mr Bruce devised Blackmount to his trustees, upon trust to permit his wife to occupy it during her life upon certain conditions, and after her death, which occurred on 10th April 1904, to sell it by public auction at a reserved price to be signified in writing by him (and which was in fact signified by him as at £13,000), and he gave directions as to the means to be adopted for selling the property if not sold at such public auction. In point of fact, the trustees have found it impossible to sell Blackmount at the price signified by Mr Bruce, and I am informed that they have recently obtained the authority of the Court of Chancery in England to sell it for the best price which they can obtain. Mr Bruce further directed his trustees by the said fourteenth purpose, after the death

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of his wife, or if she should have died (as happened) prior to the sale of Blackmount, to stand possessed of the proceeds of such sale upon trust to divide the same into two equal moieties, and that they should stand possessed of one moiety thereof upon and for such trusts, intents, and purposes as his said wife should by will or codicil appoint, and in default of such appointment, or so far as any such appointment should not extend, then upon trust to divide the same amongst the persons and in the manner therein specified. The second moiety of the proceeds of the sale of Blackmount is not here in question. Other powers of appointment, to which I shall refer later, were by the said trust-disposition and settlement conferred upon Mrs Bruce.

"The pursuers claim to be certain of the persons entitled to take this first moiety, upon the assumption that Mrs Bruce did not validly exercise her said power of appointment in regard to it. The conclusions of the summons are that the said power was not validly exercised by her to any extent; that the executors-nominate of Mrs Bruce and the residuary legatees under the will and codicils have no right or interest of any kind in the said moiety; that the legacy, bequest, or provision of the said moiety vested in the legatees or beneficiaries named in the said fourteenth purpose as at the death of Mrs Bruce, and that it falls accordingly to be divided among the pursuers and the other beneficiaries named in said purpose; and that the pursuers in right of shares of the said moiety are entitled to sell and dispose of their interests by way of sale or security or otherwise. The defenders called are (1) Mr Bruce's surviving and acting trustee, (2) the executors-nominate of Mrs Bruce under her will and codicils, and (3) her residuary legatees.

"The defender, Mr Bruce's trustee, states preliminary pleas to the effect that the pursuers have no title to sue, and that the action is premature and unnecessary. [*These were not argued in the Inner House.*] These were not very strenuously maintained, and I do not think that there is much substance in them. The theory is that the pursuers' right, if any, is to a share of the proceeds of the sale of Blackmount, whereas no sale has yet taken place, and there is no absolute duty upon the trustee to sell for some time to come. But I think that the material date is not that of actual sale but that of Mrs Bruce's death, and that if the power of appointment has not been validly exercised by her the pursuers would have a vested interest and would be entitled to sue this action of declarator. Similar pleas are stated on record by the other defenders, but were expressly abandoned at the debate. I see no reason why I should not decide in this action the real question at issue, viz., whether or not Mrs Bruce validly exercised her power of appointment as regards the first moiety of the proceeds of the sale of Blackmount.

"Mrs Bruce's will is dated 29th April 1903. She appoints an executor, and at once proceeds to expressly exercise one of the powers of appointment conferred upon her by her husband's settlement—(*fourth* purpose)—viz., to dispose of his furniture and effects. There was a good reason for the special exercise of this power, because one of the three ladies to whom, failing appointment, the furniture and effects were destined, in equal shares, by the settlement, viz., Miss Dora Sylvia Warwick, had died on 15th March 1901. Mrs Bruce exercises the power of appointment by a division between the other two ladies in the proportions, roughly speaking, of two-thirds and one-third. The will then proceeds, 'And as regards the remainder of my means and estate' (a phrase which the defenders point to as indicating that Mrs Bruce considered the subjects of the power which she had just exercised as part of 'her' means and estate), and after providing for payment of debts and certain legacies, directs 'that the residue of my means and estate shall be divided' between the two ladies above referred to in the proportions of two-thirds and one-third.

"If this will had to be considered by itself, apart from any codicil, I should say without much hesitation that the residue clause imported a valid exercise by Mrs Bruce of all her powers of appointment (including the one now in dispute) so far as not otherwise specifically exercised. I had the benefit of a full citation of the authorities, from *Smith* v. *Milne*, 1826, 4 S. 679, to *Tarratt's Trustees*, 1904, 6 F. 698. The result of these is, I think, correctly summarised in the last-named case by Lord Trayner, where he says that, 'it has been decided that words of general conveyance in a will . . . are a sufficient exercise of a power of appointment possessed by the testator. It is for those who contend that they are not to show reason for their contention.' Upon a consideration of the will by itself I should hold that the pursuers had clearly failed to rebut the general presumption. It remains to consider whether anything in the codicils can be said to rebut it. By her first codicil, dated 23rd November 1903, Mrs Bruce, on the narrative that she has 'reconsidered' her will and 'desires to make the following alterations thereon,' bequeaths certain legacies with which this case has no concern. The second codicil, dated 22nd March 1904, narrates that Mrs Bruce has 'reconsidered' her will and codicil, makes some additional legacies, and bequeaths a small piece of ground (part of Inverquhomerie) which she had obtained in feu from her husband's trustees, in accordance with a direction to them, contained in the *eighth* purpose of this settlement, to grant such feu to her if she should request it. Mrs Bruce then proceeds in said codicil, upon the narrative of the *twelfth* purpose of the said settlement, to exercise the power of appointment thereby conferred upon her over the residue of her husband's moveable and personal estate, and to appoint it to the same ladies who are her own residuary legatees, but not in the same proportions, 'and subject

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to the foregoing amendments and additions I homologate and approve of said settlement and codicil.' A third codicil, dated 8th April 1904, need not be noticed. The pursuers say that Mrs Bruce, having thus expressly exercised the powers of appointment conferred upon her by her husband's settlement above set forth, must be presumed to have intended to abstain from exercising her power over the moiety of the proceeds of the sale of Blackmount, here in question, of which no express appointment is made by her. But the burden is upon the pursuers, and I do not consider that there is any sufficient ground for holding that they have rebutted the general presumption already indicated. They referred to the case of *Mackenzie* v. *Gillanders*, 1 R. 1050. But that was a very peculiar case, and decided upon special grounds, as was observed by the learned Judges in *Clark's Trustees*, 21 R. 546. A sufficient, if not the principal ground of judgment appears to be that stated by Lord Ardmillan thus (1 R., at p. 1055)—'The power was peculiar. It was not power to dispose of a specified sum, but of a sum of £2000, to the extent of £1000. She might dispose of £20, or £500, or £1000. She has not expressed her will on that subject, which I think she would have done if she had intended to exercise such a power.' Upon the whole matter, therefore, I hold that the power of appointment here in question was validly exercised by Mrs Bruce, and I shall sustain the pleas stated by the defenders to that effect."

The pursuers reclaimed.

The case was argued before the Judges of the Second Division in December 1904, and was thereafter sent for rehearing to a bench of Seven Judges. The arguments of the parties are sufficiently indicated in the opinions *infra*, particularly those of Lords Kyllachy, Stormonth Darling, and Low. The following authorities were cited—*Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. 106, Lord Brougham at p. 141; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Dalgleish's Trustees* v. *Young*, June 29, 1893, 20 R. 904, 30 S.L.R. 802: *Clark's Trustees* v. *Clark's Executors*, February 16, 1894, 21 R. 546. 31 S.L.R. 430; *M'Tavish's Trustees* v. *Ogston's Executors*, March 10, 1903, 5 F. 641, 40 S.L.R. 458; *Tarratt's Trustees* v. *Hastings*, July 7, 1904, 6 F. 968, 41 S.L.R. 738; *Cunninghame* v. *M'Leod*, August 13, 1846, 5 Bell's App. 210; *Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050, 11 S.L.R. 612; *Whyte* v. *Murray*, November 15, 1888, 16 R. 95, 26 S.L.R. 67.

At advising—

LORD PRESIDENT—If the question were an open one I think there would be much to be said in favour of the view that a disposition of "my" property and effects could not be the exercise of a power of disposition over property which never was and never could be mine. But it has long ago been settled by a series of cases that, so far as phraseology is concerned, the expression "my" is capable of being referred to a power over the property of another.

Further, I do not think that the Solicitor-General was at all successful in his attempt to show that the dictum of Lord Brougham in *Cameron* v. *Mackie* was incorrect. On the contrary, it was repeated in *Cunninghame* v. *M'Leod*, and its weight is certainly not lessened by the fact that a statute was passed altering the English law so as to be exactly in conformity with what the Scotch law, as Lord Brougham put it, was.

I therefore concur with the view of the Lord Ordinary that the words used are sufficient to exercise the power; that it is for those who say that it was not exercised to show special reasons for inferring it was not; and that they have failed to do so.

I have not thought it necessary in this opinion to critically examine the deed, because that has been done by Lord Kyllachy in the opinion which he is about to deliver, in which opinion I concur.

LORD JUSTICE-CLERK—I am of the same opinion. I have had the advantage of reading the opinions of your Lordship and of Lord Kyllachy, with which I entirely concur, and I do not think it necessary to add anything.

LORD KINNEAR—I also agree with your Lordship. Like the Lord Justice-Clerk I have had the advantage of reading the opinion of Lord Kyllachy, with which I entirely concur, and I do not consider it would be desirable that I should detain the Court by saying the same thing in other words.

LORD KYLLACHY—In this case I agree with the Lord Ordinary that the pursuer has failed to show cause why this moiety of the price of the estate of Blackmount should not pass by Mrs Bruce's will and be payable by her executors to her residuary legatees. She (Mrs Bruce) had, under her husband's settlement, right to the income of the moiety during her life, and she had also a power of appointment over the capital, to be exercised by will or codicil. I am unable to hold otherwise than that her will now before us contains a sufficient exercise of this power.

The law on the subject, long settled in Scotland, and now in England by the Wills Act of 1837, is what is expressed in the 27th section of that Act, which provides, *inter alia*, that "all bequests of personal estate of a testator shall be construed to include any personal estate . . . which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will." It is, I think, generally acknowledged that this enactment correctly expresses what is now the law of both countries on the subject.

The onus is therefore upon the pursuers to make good in the present case the "contrary intention"; and, as I understand them, they seek to do so by reference mainly to a single circumstance, viz., that, there being here two other powers of appointment conferred on Mrs Bruce by her husband's settlement, she exercised both of those powers specially, and with express

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reference to her husband's deed. From this the pursuers propose to infer that if the third power (the power in question) had been intended to be exercised, it would also have been exercised specially and with express reference to the husband's deed.

Now, I am not myself partial to the invocation of the maxim *expressio unius est exclusio alterius* as a canon in the interpretation either of wills or of Acts of Parliament. It has been more than once observed that, speaking generally, it is by no means a safe canon of construction. At the same time it may perhaps be allowed that if Mrs Bruce, having powers of appointment over three separate subjects, which, if she had said nothing about them, would all simply have formed part of her Residue, had yet made by her will, with respect to two of the subjects, an express provision that they should form part of her Residue, while with respect to the third subject she made no provision at all—that circumstance might at least found an argument that her intention was to make a distinction, and to declare implicitly that as regards the third subject she had resolved to forego her power of appointment. That might perhaps be arguable. As it happens, however, the position in fact is entirely different. Mrs Bruce had power to dispose (1) of certain furniture, (2) of the residue of her husband's estate, and (3) of this moiety of the price of Blackmount. If she made no contrary provision, she knew, or must be held to have known, that all three subjects would form part of her own Residue, and pass to her own residuary legatees. But as regards two of them—viz., the furniture and the husband's residue—she apparently did not desire that that should be so. Accordingly, she dealt specially and expressly with those two subjects, in the one case by her will, and in the other by her second codicil—dividing the furniture among particular legatees, and as regards the husband's residue, providing in substance that it should go, not to her own residuary legatees, but to the residuary legatees of her husband. That is really the position, and I must say that I fail to see how in such circumstances any inference can be deduced as to the lady's intention with respect to the third subject (the subject here in question), except the inference that she desired that it should remain part of her own Residue.

It is true that in disposing of the furniture she makes reference to the clause in her husband's settlement which created the power. That was, indeed, necessary for purposes of identification. It is true also that the bequest expressed in her codicil of her husband's residue to her husband's residuary legatees is prefaced by a recital of the clause in the settlement which created the power. And that may have been, like many other recitals, superfluous. But that is really all that can be said on the subject. What is, I think, of more importance is this, that the codicil in question—that which deals with the husband's residue—would (as regards the part of it applicable) have been altogether unnecessary except on the footing that Mrs Bruce's will as it stood carried by its residuary clause everything falling under her powers and not specially appointed otherwise. Unless that was so, it is conceded that the residuary destination in her husband's settlement remained operative, and being so operative, there could have been no object in her making a provision by codicil, which simply—and indeed *totidem verbis*—repeated that destination. That it simply did so is quite certain—the only difference being that one of the husband's residuary legatees having died without issue the codicil carries the fund, as the husband's settlement carried it, to the two survivors and their issue. This, I confess, seems to me to be really conclusive as to the meaning which Mrs Bruce herself put upon the residuary clause in her will. And the gloss thus derived is accentuated by this, that the codicil proceeds to declare that, "subject to the foregoing amendments and additions," the testatrix homologates and approves of her existing will. The defenders contend that the word "amendments" is significant, and I think they are entitled to do so. For it is quite certain that the only "amendment" upon the lady's will which the codicil in any view of its terms makes, is that it restores her husband's destination of residue, as against that contained implicitly in the residuary clause of her own will. I need not, of course, point out that if Mrs Bruce's residuary clause (apart from the codicil) carried, and was intended to carry, the husband's residue, there can be no possible ground for concluding that the moiety of the price of Blackmount was in a different position.

It appears to me, therefore, that the codicil in question, construed upon ordinary principles, so far from displacing, supports the legal presumption, and indeed instructs affirmatively that the testatrix did in fact intend what the law presumes. The lady's assumption plainly was that by her will as it stood she had effectually exercised her whole powers of appointment. So assuming she proceeds to make a new disposition with respect to the subject of one of the powers, and having done so she goes on to declare in express terms that *quoad ultra* her will shall remain in force.

With regard to previous cases I do not, I confess, think that much help in questions of this class can be derived from decisions or dicta either Scotch or English. So far as they go, the Scotch cases from *Hyslop* v. *Maxwell* downwards, and the English cases since the passing of the Act of 1837, seem fairly uniform in supporting the legal presumption as against mere general inferences as to what was or was not likely to have been the testator's intention. Beyond that I do not find it necessary to examine the decisions, most of which were fully cited to us. All I need say is that I do not find myself either assisted or embarrassed by the decision in the case of *Gillanders* v. *Mackenzie*—a case as to which I agree with the observations of the Lord Ordinary. Rightly or wrongly

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the determining element in that case plainly, I think, was the peculiar character of the power—a power which seemed to require for its exercise something very like the exercise of a discretion. I certainly cannot accept the suggestion that the decision proceeded upon the existence in the deed creating the power of a destination-over failing its exercise, or upon the further circumstance that the power was exercised by a will proper and not by a trust-disposition and settlement. The destination-over might have been important (as has been held in England) if the testatrix had herself created the power by some previous deed. And the other element might have been important if the will under construction had consisted simply of a nomination of executors without any expressed purposes or bequests. It seems enough for present purposes that there is no room for either argument here. The destination-over here is in no different position from that, for instance, in the case of *Tarrat's Trustees* referred to by the Lord Ordinary; and although Mrs Bruce's will is doubtless a proper "will," and begins with a nomination of executors, it contains also distinct words of bequest and conveyance— words of bequest and conveyance, first, of certain parts of her estate, and next of the whole residue of her estate to certain named beneficiaries.

I am therefore of opinion that the Lord Ordinary's judgment is right and should be affirmed.

LORD STORMONTH DARLING — I understand your Lordships to lay down in substance that section 27 of the English Wills Act of 1837 must be held to express the law of Scotland as it has existed from a period considerably earlier than 1837. I do not in the least dissent from that general rule. It is convenient that in a mere bye-path of the great highway of succession the two laws should be the same, and certainly we cannot complain when assimilation takes place by the rule of our neighbours' law being made to conform to our own.

The effect may be to strengthen the presumption which the Act introduces in favour of the power being exercised by the donee of the power, though by words of general gift which in terms would apply only to property belonging to himself. Such an instrument is to operate as an execution of the power "unless a contrary intention shall appear by the will." But the search for the contrary intention is still open; and I am afraid that no rule of law which establishes a mere presumption can ever save courts of law the necessity of examining the instrument to see whether the presumption can be rebutted. The really difficult question must always be, what is enough to show an intention to the contrary? Your Lordship in the chair has referred to the famous and rather mysterious dictum of Lord Brougham made so far back as 1833 in the case about the Dick bequest, with which it had very little connection. That dictum came supported originally by no Scottish authority—though probably a Lord Chancellor is exempt from the necessity of relying on authority—and for a long time it found no place in the development of the Scots law applicable to this question. Lord Corehouse did not found upon it in his well-known judgment in *Hyslop* v. *Maxwell* in 1834, though it was cited in argument, and it was not so much as cited in *Mackenzie* v. *Gillanders* in 1874, forty years later. It is only within comparatively recent years that it has come into prominence. I do not say this as at all attempting to detract from its authority. But even if it be treated as containing the doctrine which was afterwards embodied in the Wills Act, it does not alter the fact that the rule is at best a presumption, for Lord Brougham, after stating what he understood to be the law of Scotland with sundry variations not wholly consistent, ends at p. 143 of 7 Wilson & Shaw by saying that what you have to ascertain is the intention of the maker of the instrument alleged to be an execution of the power, and that you are to gather his intention "in every way you can from the instrument itself."

Now, what I have had difficulty in holding—and I confess my doubts have not been altogether removed, though of course they have been shaken by your Lordships' views—is that Mrs Bruce, the donee of the three powers with which her husband had invested her, did not manifest an intention contrary to the legal presumption as regards the third power. It would be tedious and useless to give in detail my reasons for so doubting. But I may say in a sentence that the considerations which have weighed with me more than with your Lordships were (1) that her husband had made in his own will a detailed destination-over of the property which was the subject of this third power in favour of relatives of the wife; and (2) that Mrs Bruce expressly recited in her testamentary writings two of her powers (thereby showing that to be her way of declaring her intention to exercise them) while omitting all mention of the third, which indicates to my mind that her intention with respect to that power was to leave her husband's destination untouched.

LORD LOW—It seems to me that this case raises sharply a question of general interest, namely, what precisely is the rule of law applicable to cases of this kind?

There is a series of decisions which I have been accustomed to regard as authoritative, in which, as I read them, the question whether the donee of a power of appointment has exercised the power by a general settlement of his own means and estate containing no reference to the power, has been regarded as a question of intention to be determined in the ordinary way upon a fair reading of the settlement, there being, however, a certain presumption—stronger or weaker according to circumstances—in favour of the exercise of the power.

I may refer in particular to the cases of

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Smith v. *Milne* (4 S. 679); *Hyslop* v. *Maxwell's Trustees* (12 S. 413), a case frequently cited, and the opinion of Lord Corehouse in which has often been quoted with approval; and *Mackenzie* v. *Gillanders* (1 R. 1050), where, in circumstances very similar to those of the present case, it was held that the power had not been exercised.

In regard to the presumption in favour of the exercise of the power I imagine that it originated in a recognition that, generally speaking, it is just as natural that the donee of the power should exercise it as that he should dispose of his own estate, and accordingly I find in the class of cases to which I have referred that the question of the weight to be given to the presumption, or whether it applied at all in a particular case, seems to have been regarded as a question of circumstances.

Accordingly, when this case was first argued before the Second Division, the circumstances presented great difficulties to my mind, because the donee of the power, Mrs Bruce, was, in a more marked manner than in any other case which has arisen, put to her election whether she would allow a careful destination of the funds which had been made by her husband in favour of her relations to stand, or alter it and dispose of the funds in a different way. I had difficulty in seeing why in such a case it should be presumed that the wife would, as a matter of course, alter the destination made by her husband. It appeared to me that the more natural presumption was that her desire would rather be to respect her husband's wishes, and that she would not alter the destination made by him unless she had very good reason for doing so. That was a consideration which weighed strongly with the Court in *Mackenzie* v. *Gillanders*, although the option which in that case was given to the donee of the power, who was a daughter of the donor, was not nearly so pointed as it is in this case.

It further seemed to me that the circumstance to which I have referred having rendered the presumption in favour of the exercise of the powers a very weak one, there were other circumstances which went far to show that it was not Mrs Bruce's intention to exercise her powers except in the cases in which she did so expressly. In the first place, she used the form of will which, of all others, was the least suited for the exercise of the powers by implication. In the face of the decided opinion expressed by Lord President Inglis in *Mackenzie* v. *Gillanders* that a testament merely appointing an executor for the distribution of the testator's personal estate amongst legatees cannot be presumed to be an exercise of a power of appointment, I could not imagine that Mrs Bruce's law-agent would advise her that such a testament would without doubt be an exercise of all the powers conferred upon her. Again, assuming that she had received that advice, and believed that the residue clause in her will disposed of the three funds over which her husband had given her power, why, when she desired slightly to alter the appointment in regard to one of the funds, was it thought necessary to do so by a formal deed of appointment reciting the power conferred upon her by her husband? I should have expected that she would simply have said that she altered the residuary clause in her will, to the extent specified, so far as regarded the residue of her husband's estate. It is true that the result of the alteration was to give the residue of her husband's estate to the very persons whom he had selected, and, of course, there is great force in the argument that it would have been quite unnecessary to do so, unless by her will she had altered her husband's destination. One of three persons, however, to whom the husband had destined the residue of his estate had died, and it seemed to me that Mrs Bruce's formal appointment might reasonably be attributed to her desire to make it clear that although the condition of matters which her husband had contemplated had changed, she did not wish to interfere with the destination which he had made.

I should still regard these considerations as sufficient to justify the conclusion that Mrs Bruce did not exercise the powers except those to which she expressly referred, if it had not been that I have come to be satisfied that the sound view of the law is that the presumption in favour of the exercise of the power is very much stronger than I had understood it to be, so strong indeed that it can only be rebutted by evidence of intention amounting practically to a declaration that the power is not exercised.

I do not know why Lord Brougham's statement of the law in *Cameron* v. *Mackie* (7 W. & S. 106) has apparently been to a great extent disregarded in this Court. It would certainly have afforded a very easy solution of the case of *Hyslop* v. *Maxwell's Trustees*, which was decided in the following year, and indeed of most of the cases which have subsequently arisen. Lord Brougham's statement of the law, however, must be regarded as being of the highest authority, because although it was not necessary for the decision of the case in which it was made, it was relevant to the question at issue, and none of the other noble and learned Lords who took part in the judgment indicated any dissent.

Now, it seems to me that the substance of Lord Brougham's statement of the law (which was somewhat discursive) is succinctly embodied in the 27th section of the English Wills Act of 1837. That enactment, which appears to have materially altered the English law, and to have been intended to assimilate it to that of Scotland, as laid down by Lord Brougham four years before the passing of the Act, provides that "a bequest of the personal estate of the testator shall be construed to include any personal estate which he may have the power to appoint in any manner which he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will."

Now, this question relates to a branch of

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the law in which, as a rule, there is no difference between the law of England and that of Scotland; and it is certainly desirable that the law of the two countries should be the same. Therefore if, as I understand to be the case, your Lordships' opinion is that the rule of the common law of Scotland is the same as the English statutory rule, I am ready to concur.

What, then, is the result of applying the rule to this case? The element of intention is not altogether excluded, but its scope is very much restricted, because the rule makes it imperative upon the Court to construe Mrs Bruce's will "to include" all the personal estate which under her husband's settlement she had power to appoint. I think that that practically means that Mrs Bruce's will must be read as if she had actually defined the residue of her estate as including all the funds which she had power to appoint, and, if so, I agree that she must be held to have exercised all the powers.

LORD PEARSON—I am of opinion in this case that the power of appointment has been effectually exercised; and I entirely concur in the reasons for that opinion which have been expressed by your Lordship in the chair and Lord Kyllachy.

The Court adhered.

Counsel for the Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for the Defenders and Respondents—Younger, K.C.—A. R. Brown. Agent—Arthur B. Paterson, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BURGHEAD HARBOUR COMPANY, LIMITED *v.* GEORGE (COLLECTOR OF DUFFUS PARISH).

Valuation Acts—Valuation Roll—Conclusive Evidence of Annual Value from which Deductions to be Made—Poor-Rates—Assessment—Harbour.

Held that in assessing a harbour for poor-rates a parish council is bound to accept as conclusive the annual value as appearing in the valuation roll, and to make therefrom the deductions allowed by section 37 of the Poor Law Amendment (Scotland) Act 1845, whatever deductions may already have been made by the assessor in arriving at such annual value. *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229, and *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241, *followed.*

Poor—Poor-Rates—Harbour—Rights and Powers Below Low-Water Mark—Deductions from Annual Value—Expense of Dredging Harbour—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 37—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91).

A parish council refused to allow as a deduction from the annual value of a harbour, under section 37 of the Poor Law Amendment (Scotland) Act 1845, the average cost of dredging the harbour, on the ground that such expense was not incurred in maintaining the lands and heritages, the subjects of assessment, but was an expense of carrying on business incidental to an incorporeal right of harbour in the harbour company not included in the entry in the valuation roll, or alternatively was expenditure in operations on the *solum* of the sea below low-water mark which did not form part of the harbour as that subject fell to be and was entered in the valuation roll.

Held that the average cost of dredging was a proper deduction, inasmuch as (1) it was an expense necessary for maintaining in use the wharves, &c.; and (2) harbour was a complex heritable subject, duly entered in the valuation roll, which embraced any right such as was now sought to be distinguished, and required for its maintenance such expense. *Adamson* v. *Clyde Navigation Trustees*, June 26, 1863, 1 Macph. 974, June 22, 1865, 3 Macph. (H.L.) 100; *Mersey Dock and Harbour Board* v. *Jones*, June 22, 1865, 3 Macph. (H.L.) 102, note; and *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213, *commented on.*

Poor—Poor-Rates—Deductions—Insurance where no Premiums Paid—Rates and Taxes—Whether Actual or Average—Whether Owners Only or both Owners and Occupiers—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37.

Held (*per* Lord Stormonth Darling, Ordinary, and acquiesced in) (1) that in calculating over an accepted number of years the "probable annual average cost of insurance" for deduction from the annual value, under section 37 of the Poor Law Amendment (Scotland) Act 1845, prior to assessing, no allowance fell to be made for insurance in years in which no premiums had been paid or money set aside in lieu thereof—*Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, *distinguished;* (2) that the rates, taxes, and public charges which fell to be deducted under the section were those actually payable and not an average estimate thereof; and (3) that where the owner was also the occupier the proportion of taxes deductible was the owner's proportion only.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 37, enacts—"In estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year

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with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates and taxes and public charges payable in respect of the same . . . ."

The Burghead Harbour Company, Limited, 1 North Street, Elgin, complainers, brought a note of suspension and interdict against Joseph Stuart George, Collector of Poor Rates for the Parish of Duffus, in the county of Elgin, respondent, in which they sought to restrain him from proceeding further or enforcing a notice of assessment, dated 22nd November 1902, a sheriff's warrant authorising him to poind the complainers' goods for non-payment of the sum in the notice, and an execution of charge following thereon.

The notice of 22nd November 1902 intimated to the complainers that they were assessed for the year Whitsunday 1902 to Whitsunday 1903, under the different Acts of Parliament, as owners and occupiers of the following lands and heritages:—

Burghead Harbour (Shore dues of).

1. *Owner.*

Poor Rate, . .	9¾d.	
School Rate, .	8¾d.	1s. 7d. per £1.
Cemetery Rate,	¼d.	
Registration Rate,	¼d.	

Of the annual value of £310, 10s. £24 11 7½

2. *Occupier.*

Poor Rate, . .	9¾d.	
School Rate, .	8¾d.	1s. 7d. per
Cemetery Rate,	¼d.	£1.
Registration Rate,	¼d.	

Of the annual value of £310, 10s. 24 11 7½

Total £49 3 3

The annual value stated in the notice was arrived at by making a deduction of 50 per cent. for allowances under sec. 37 of the Poor Law Amendment (Scotland) Act 1845 (*v. sup.*) from the valuation appearing in the valuation roll for the year to Whitsunday 1903. The complainers maintained that they were entitled to deductions which would give them total exemption from such rates and, *inter alia*, to the following:—

I. *Repairs and Maintenance.*

(1) Repairs and material, £118 14 0		
(2) *Expenses of Dredging.*		
(*a*) Wages . .	142 15 8	
(*b*) Upkeep of dredger	122 9 6	
	£265 5 2	
(3) Lighting, &c. . .	14 5 2	
		£398 4 4
II. *Insurance* . . .		83 17 8
. . . . .		
IV. *Rates and Taxes.*		
Income Tax . .	£43 2 6	
Burgh Assessments .	157 0 7½	
Poor, School, and other rates	35 11 7½	
County Assessments .	15 11 4	
		251 6 1

The complainers pleaded—"(1) The amount stated in the valuation roll, made up by the assessor as the annual value of the undertaking of the complainers, is conclusive as regards the respondent, and he is not entitled to re-open that valuation or to inquire as to the basis upon which the same was made up. (2) The complainers being entitled to deductions under sec. 37 of the Act 8 and 9 Vict. cap. 83, for which the respondent refused to give them credit, the proceedings complained of ought to be suspended and interdict granted against the respondent as craved."

On 26th May 1903 the Lord Ordinary (Stormonth Darling), before answer, made a remit to John Stuart Gowans, C.A., Edinburgh "to consider and report with special reference to the statements and pleas of parties as to the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the complainers' subjects assessed in their actual state, and the rates and taxes and public burdens payable in respect of the same, it being the object of this remit to ascertain the deductions to be made in terms of the 37th section of the Poor Law (Scotland) Act 1845, and to report upon any other matter which either party may consider material to the question at issue."

On 28th June Gowans reported that having examined the complainers' books, &c., in his opinion the annual average cost during the five years ending 31st May 1903 of the repairs, insurance, and other expenses was £399, 16s. 6d., that in his opinion that sum was the deduction in respect of such repairs, &c., which fell to be made from the valuation before assessment in terms of section 37 of the Act, and that it included the average amounts paid by the complainers for "(1) Materials, wages, and tradesmen's accounts in connection with repairs of harbour and upkeep of dredger. (2) Wages in connection with dredger. (3) Coals and firewood for dredger. (4) Insurance, including insurance on dredger. (5) One-half of harbourmaster's salary."

The reporter further stated—"The reporter understands from reading the case of *Edinburgh and Glasgow Railway Company* v. *Hall*, 4 Macph. 301, that income tax is not one of the rates, taxes, and public charges payable in respect of land and heritages which under the 37th section of the Poor Law (Scotland) Act 1845 fall to be deducted in estimating the annual value of such lands and heritages. If that tax is deducted . . . the annual average of taxes paid during the four years ending 15th May 1902 amount to £269, 1s. 1d., whereof there is applicable to owner £100, 17s. 11d., and occupier £168, 3s. 2d.

"The respondent contends that an average of rates and taxes is not a proper deduction, but that the deduction should be the taxes of the year in question. He refers to the case above quoted of *Edinburgh and Glasgow Railway Company* v. *Hall*. The rates and taxes exclusive of income tax under Schedule D, but inclusive of property tax Schedule A, paid and assessed during the year ending 15th May 1903, are as follows:—

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	Owner.			Occupier.			Total.		
Paid—	£	s.	d.	£	s.	d.	£	s.	d.
Property Tax, Schedule A .	1	13	6		...		1	13	6
County Assessments . .	10	12	8	4	0	6	14	13	2
Burgh Assessments . .	31	7	5½	103	2	11¼	134	10	4¾
Parish Rates .	1	16	1	0	13	4	2	9	5
	45	9	8½	107	16	9¼	153	6	5¾
Unpaid, but consigned in Court—									
Parish Rates .	24	11	7½	24	11	7½	49	3	3
Total, .	70	1	4	132	8	4¾	202	9	8¾

"The respondent further contends that only the owners' proportion of taxes forms a deduction from the gross rental for the purpose of ascertaining the net rental, and quotes the case of *Wilson* v. *Pumpherston Oil Company*, 3 F. 1099.

"In the course of the remit the respondent contended that it was the reporter's duty to ascertain what was the assessable value of the shore dues of Burghead Harbour which should be entered or which should have been entered in the valuation roll of the county of Elgin for the year ending at Whitsunday 1903, and that it was the reporter's duty to ascertain how the assessable value of £621 for the year ending at Whitsunday 1903, as averred in statement 2 of the statement of facts for the complainer, had been arrived at, and what deductions had been made in fixing that sum.

"The reporter is of opinion that this matter is outwith the remit, and that in view of the cases *The Magistrates of Glasgow* v. *Hall*, 14 R. 319, and *The Pumpherston Oil Compny, Limited* v. *Wilson*, 38 S.L.R. 830, the respondent is bound to accept the valuation appearing in the valuation roll, and is debarred from inquiring what deductions fell to be made in making that valuation.

"The sum of £621 is the yearly rent or value of the lands and heritages belonging to the complainers as fixed by the Assessor for the County of Elgin for the year ending Whitsunday 1903, although that sum is entered in the valuation roll as 'shore dues of Burghead Harbour.'

"The respondent contends that the lands and heritages in respect of which the complainers are assessed consist of quays, wharves, sheds, buildings, and other heritages, but that the part of the sea below high-water mark, which is included within the boundaries of the harbour, is no part of the lands and heritages belonging to the complainers. Following on this contention he objects to any sums being deducted in respect of dredging operations.

"The reporter has not been able to adopt this view."

Both parties lodged objections and answers to the report.

The complainers maintained, *inter alia*, (1) that the probable average cost of insurance proposed to be allowed was insufficient inasmuch as for the first three of the five years taken by the reporter the dredger, which for the last two of the five years was insured and would in the future be insured at a premium of £80, had not been insured, and so £80 for each of the first three years should have been added, and (4) that (*a*) an average of the rates and taxes should be taken to arrive at the deduction therefor, and (*b*) the rates and taxes to be included should not be the owner's proportion only but both owner's and occupier's.

The respondent objected to the report, *inter alia*, on the following grounds:—(Obj. I). That the report did not contain information which would have enabled him to show that the deductions allowed by the reporter had already been taken into account by the assessor in stating the yearly rent or value of the subjects in the valuation roll at £621; for example, while the subjects were entered in the valuation roll for that year as "Shore dues of Burghead Harbour, £621," the shore dues for that year amounted to £2251, 19s., while the profits in each of the preceding four years, on which income-tax had been paid, were as follows:—1898-9, £795; 1900-1, £952; 1901-2, £804; 1902-3, £795. (Obj. II). The respondent also objected to the sum of £399, 16s. 2d. allowed by the reporter for deductions as excessive, and averred—"The lands and heritages at Burghead Harbour belonging to the complainers, entered in the valuation roll, consist of quays, wharves, sheds, offices, a steelyard, and a pier, these being the only subjects legally assessable. Of these, the sheds, offices, and steelyard are separately entered in the valuation roll, and the quays, wharves, and pier are the subjects covered by the entry therein of 'Shore dues of Burghead Harbour,' and are the subjects the assessment of which is in question in the present case . . . The complainers have right under their statutes, and subject to the supervision of the Board of Trade, to dredge and deepen the portion of the sea included within the boundaries of the harbour, but the sea within the harbour boundaries is no part of the lands and heritages belonging to the complainers. The respondent accordingly submits that there should be disallowed all items of expenditure which do not relate to the complainers' lands and heritages as above mentioned, and that the whole expenses connected with the dredger and with dredging should be disallowed in respect (1) they are ordinary working expenses and not repairs or expenses within the meaning of the statute, and (2) they are not operations upon the complainers' lands and heritages assessed under the said entry. The respondent also maintains that the one half of the harbourmaster's salary which the reporter proposes to allow as a deduction under head 5 ought to be disallowed. The harbourmaster's salary is entirely an expense of the complainers' business, and has no relation to the deductions allowed by the statute. It is in no sense an expense of the upkeep of the harbour as an assessable subject." (Obj. III). The respondent maintained that the proper deduction for rates and taxes was (*a*) not an average, but the rates and taxes for the particular year, and (*b*) the proportion of

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the rates and taxes payable by the owner, and not both that payable by the owner and that payable by the occupier.

On 19th January 1905 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor repelling the complainers' objections, and also objections 1 and 2 for the respondent, and sustaining objection 3 for the respondent.

Opinion.—"This suspension raises the question whether the complainers, as proprietors of the harbour of Burghead, in the parish of Duffus and county of Elgin, have received from the respondent the full amount of deductions to which they are entitled, under the 37th section of the Poor Law Amendment Act 1845, before being assessed for poor and other parochial rates (levied on the basis of the poor rate) for the year from Whitsunday 1902 to Whitsunday 1903. That section provides that . . . [*quotes section*] . . .

"The yearly rent or value of the lands and heritages belonging to the complainers was fixed by the Assessor for the County of Elgin, according to the valuation roll made up by him for the year ending at Whitsunday 1903, at the sum of £621; and the respondent as collector of poor and other rates for the parish of Duffus, intimated to the complainers that he had assessed them as owners and occupiers of lands and heritages of the annual value of £310, 10s., being a deduction of 50 per cent. from the amount appearing in the valuation roll, in respect of the allowances mentioned in the 37th section. The complainers, on the other hand, came into Court maintaining that, if the full statutory deductions were allowed, they would be entitled to total exemption from the rates.

"I followed the usual course of making a remit to a man of skill—in this case Mr Gowans, C.A., Edinburgh—to examine the complainers' books, and to report as to the items of expenditure mentioned in the statute. He reported that, in his opinion, the sum of £399, 16s. 2d. was the probable annual average cost of the repairs, insurance, and other expenses necessary to maintain the subjects of assessment in their actual state; and he further stated alternative views of the amount of rates, taxes, and public charges payable in respect of the same, the alternatives depending on whether these burdens were to be taken, like the repairs, on an average of years or for the year of assessment, and whether they were to include all rates or only rates payable by the owner. Both parties lodged objections and answers to his report; and I shall deal with these in their order, beginning with the objections made by the respondent, as being the most important. But before doing so I may make this general observation, that the whole matter is one of statute, as interpreted by decision. Counsel for the respondent indicated that the course of decision has resulted in deductions being allowed to so large an amount as practically, in the case of some industrial undertakings, to make the subjects not worth assessing. If so, I can only say that the remedy must be sought, not by asking the Court to go back on decisions which have been acted on for half a century, but by the action of Parliament.

"This preliminary observation has a special bearing on the first objection for the respondent, in which he complains that the report does not contain certain information which he thinks would have enabled him to show that the deductions allowed by the reporter had already been taken into account by the assessor in fixing his valuation of £621. But the case of *Magistrates of Glasgow* v. *Hall*, 14 R. 319, followed in *Pumpherston Oil Company* v. *Wilson*, 3 F. 1099, settled that this Court has no jurisdiction to review the assessor's valuation or to inquire into the process by which it was reached, and that the deductions allowed by the Poor Law Act must be made from the sum entered in the valuation roll. It seems to me, therefore, that the reporter was quite right to refuse the respondent's demand. Counsel for the respondent conceded that if the information were supplied neither I nor the Inner House could make any use of it. But he suggested that it might come to be useful if he carried the case further. That seems to me not a good reason for sustaining his objection. If the House of Lords should be appealed to, and should desire the information, their Lordships have ample power to make an order by which it can be obtained.

"The respondent, by his second objection, takes exception to the items of expenditure allowed by the reporter for dredging the harbour, including the upkeep of the dredger itself and the wages paid in connection with it. The argument is that dredging is not an expense necessary to maintain in their actual state the lands and heritages which are the subjects of assessment, because the right of harbour, which is an incorporeal right, is not within the definition of 'lands and heritages' as contained in the Poor Law Act. That is quite true; and I hardly think it is a sufficient answer to that argument to say that the Valuation Act of 1854 does (by section 42) contain the word 'harbour' as within the enumeration of 'lands and heritages.' Moreover, it must be admitted that judicial opinion has not been uniform on this formal point. I call it so, for it is a point much more of form than of substance. It has twice at least been urged—in the *Leith Dock Commissioners* case and in the *Clyde Trust* case—and on both occasions on behalf of the harbour authorities, for the purpose of resisting assessment. It has never before, so far as I am aware, been urged by the rate-collector as a reason for refusing to allow harbour expenditure to be deducted from annual value.

"In the *Leith* case (2 Macph. 1234) Lord Jerviswoode, who was the Lord Ordinary, expressed (at p. 1239) his concurrence with the opinion of Lord Rutherfurd in a former *Leith Dock* case to the effect that 'the interpretation clause of the Poor Law Act was not intended to be exclusive of all it did not contain,' and therefore that a right of harbour granted by the Crown 'must be dealt with as heritage in the sense of the

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statute and as assessable accordingly. Lord President M'Neill, in moving that the Lord Ordinary's interlocutor should be adhered to, said simply (at p. 1242), 'Then there arises an important question whether these subjects are in their own nature to be regarded as lands and heritages in the sense of the Poor Law Act. I have no doubt they are, so far as use is made of them.' When the case went to the House of Lords, it appears from the report in 4 Macph. (H.L.), at p. 16, that Lord Advocate Moncreiff urged as part of his argument on behalf of the appellants that the Scotch Poor Law Act did not include harbours in the enumeration of assessable property, and that a right of harbour was an incorporeal right and could not be included in the corporeal property therein defined. But the respondent's counsel were not called upon, and Lord Chancellor Cranworth, apparently dismissing the idea that there was any difference between the laws of England and Scotland on that matter, said (at p. 18 of 4 Macph. H.L.), 'It must now be held in Scotland, as in England, that the commissioners or trustees of docks, harbours, wharves, and everything of that sort, are liable to be rated in respect of their receipts, whether in the form of dues or otherwise, and whatever be the purposes to which the receipts are applied.' In the case of *Adamson* v. *Clyde Navigation Trustees*, 1 Macph. 974, it was decided that the trustees were not liable to be assessed in respect of the river and incorporeal right of harbour, as subjects apart from the wharf, quays, and other accommodation of which that harbour consisted, and Lord Justice-Clerk Inglis explained (at p. 987) that he did not read the Clyde Acts as vesting the trustees with any *jus incorporale*, by which they could be said to be, in the common law sense of the term, proprietors of the right of harbour. So far as that consideration affected his Lordship's opinion, it would not apply here, because the complainers undoubtedly represent the original grantee of the harbour of Burghead. But it is right to add that his Lordship did not proceed entirely upon that view. Lord Cowan based his opinion solely on the ground that a right of harbour was not in express terms within the Poor Law Statute; Lord Benholme concurred with the Lord Justice-Clerk; and Lord Neaves held that an incorporeal right of harbour was no more assessable than a right of copyright. The case went to the House of Lords, but only on the general question whether the Clyde Trustees were exempted from assessment altogether by reason of their holding for public purposes, and the judgment of this Court was affirmed, without reference to this special point. If, therefore, the question were directly raised whether an incorporeal right of harbour was an assessable subject under the Poor Law Act, it could not be said to be finally settled, there being conflicting opinions of eminent judges, resulting in a Second Division judgment one way in 1863 and a First Division judgment the other way in 1864, both of which were affirmed by the House of Lords, but without this particular point being raised at all in 1863, or very seriously considered in 1864.

"I must apologise, however, for being decoyed by professional interest into a discussion which, as regards the question here, is really academic. For what does it matter to the deduction for dredging whether the complainers are assessable on the incorporeal right of harbour or not? They are undoubtedly assessable on the physical structures connected with the harbour, which are expressly mentioned (as quays, wharves, and so on) in the Poor Law Act, and which derive their whole use and value from being pertinents of a harbour. The entry in the valuation roll of 'Burghead Harbour (Shore Dues of)' may not be very accurate, for the dues are not the assessable subject, they are the source of value which the subject possesses. But the respondent can hardly complain of the entry, for he accepts it, and is bound to accept it, as conclusive of value, and without it there could be no assessment. What he does say is that no expenditure can be allowed as a statutory deduction unless it is made on the actual physical structure which is the subject of assessment. But where does he find the warrant for that in the language of section 37? It does not say that the 'repairs, insurance, and other expenses' must be made on the actual lands and heritages, but that they must be 'necessary to maintain such lands and heritages in their actual state.' Now, what is more necessary to maintain quays and wharves in their actual state (that is, in a state to command the hypothetical rent) than an operation which is intended to prevent the accumulation of silt, and so to keep the way open for ships to reach the wharves and quays? How could their value, which it is proposed to assess, be preserved without such an operation? I quite agree that dredging might be carried much further than the mere preservation of the *status quo*. It might really mean deepening or enlarging. But then we have the uncontroverted statement of the reporter that he has allowed nothing of the nature of capital expenditure, and therefore I have come to the conclusion that in fixing the sum of £399, 16s. 2d. he has rightly apprehended the nature of the inquiry with which he was charged, and that the second objection for the respondent must also be repelled. There might have been a question about the half of the harbourmaster's salary, but it appears that he acts as skipper of the dredger, and therefore this proportion of his salary is in the same position as other wages in connection with the dredger, and is truly part of the cost of working it.

"This is the natural place at which to notice the first objection for the complainers, which seeks to enlarge the allowance of £399, 16s. 2d., of which I have just expressed my approval. The objection is that the reporter, in taking, with the assent of the parties, five years as a reasonable period from which to strike an average, has stated the premiums of £80 paid for insuring the

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dredger only for the two years 1902 and 1903, in which these premiums were actually paid, and that he ought to have added, contrary to the fact, £80 for each of the first three years of the period, with the result of increasing the total average from £399, 16s. 2d. to £447, 16s. 2d. All I can say is that if the reporter had done so I think he would have gone wrong. The complainers cite the case of *Glasgow Gas Light Company* v. *Adamson*, March 23, 1863, 1 Macph. 727, in which apparently a sum was allowed for insurance although no premiums were paid, on the footing that the company were their own insurers. But it appears from the Lord Ordinary's interlocutor (p. 729) that a sum was annually laid aside to meet the risk of destruction by fire. That being so, it may have been correct to describe the company as 'their own insurers'; but I should demur altogether to such a phrase being used where the owners of perishable subjects neither insure nor make any provision in lieu of insurance but simply take their risk of fire. I fail to see why in such a case they should get any deduction under the head of insurance. And where a period of years has been adopted as affording a fair basis for an average I think it would be wholly misleading to take any but the actual figures which the books of the owners supply. No doubt the phrase in the 37th section is 'the probable annual average cost,' but the word 'probable' must be read in connection with the word 'average,' and if an average of years is to be taken, it must be taken correctly as affording a test of probability. The complainers say that it is their intention to maintain this insurance in future. That may be; and if they carry out their intention they will be entitled to get the benefit of it at the end of five years from the time when they began to insure at that figure. But at present the experience of the five years down to 1903 is against them, and, having assented to that period as a fair test of actual outlay, and accepted it as regards some items of expenditure, they are not entitled to repudiate it as regards other items merely because imaginary figures would suit them better. I shall therefore repel the first objection for the complainers. They did not press their second and third objections, and these also I shall repel.

"That only leaves the third objection for the respondent, which may be taken along with the fourth objection for the complainers. Both refer to the reporter's method of dealing with the deduction allowed by section 37 for all rates, taxes, and public charges payable in respect of the lands and heritages. He has not expressed an opinion as to the proper method of dealing with these, but he has given alternative figures which enable me to dispose of the question between the parties. The contention of the respondent, as stated in his third objection, is twofold. He says (1) that the rates, taxes, and public charges to be deducted under section 37 are not to be estimated on any annual average but are to be those actually payable for the year of valuation; and (2) that it is only the owner's taxes that ought to be deducted. I agree with the respondent in both of these contentions. With regard to the first point, I think that the grammatical construction of the section requires you to hold that the words 'all rates, taxes,' &c., are governed by the words 'under deduction of,' and not by the words 'the probable annual average cost of.' I also think that the presumable intention of the section points to the same conclusion, for the taxes actually payable for the year are capable of precise ascertainment, and there is no necessity for resorting to a hypothetical estimate, as there is in the case of repairs and expenses of maintenance. That was the judgment of Lord Kinloch in the case of *Edinburgh and Glasgow Railway Company* v. *Hall*, January 19, 1866, 4 Macph. 301, at p. 306, and that part of his Lordship's interlocutor was not reclaimed against.

"The second part of the respondent's contention may be more doubtful, and there is no decision on the point, although it is significant that in *Pumpherston Oil Company (Limited)* v. *Wilson* (*supra cit.*) the company, who were owners and occupiers of chemical works, admitted that only owner's and not occupier's taxes fell to be deducted from the valuation. The complainers also refer to that case for certain observations made by Lord Kinnear about the difficulty of distinguishing between the outlay which a landlord ought to make and the outlay which a tenant ought to make in repairing a complex heritable subject. But there is no such difficulty about public charges, which are separately imposed upon owners and occupiers, even when the owner happens to be in occupation. Lord Kinnear conceded 'that as a rule the deductions contemplated by the statute are those required by the outlays of the proprietor.' In saying so his Lordship had specially in view the deductions allowed for repairs and other expenses. But it seems to me that the same may be said of the deductions allowed for public charges, because the intention is the same in both cases, viz., to get at the burden on the gross rental hypothetically received by the landlord. In short, the whole conception of the section is that there is an imaginary tenant, and that the sum in the valuation roll is the rent which he might be expected to pay. If this be so I think it would be absurd to deduct from the amount supposed to be received by the landlord not merely his own rates and taxes, which are, properly speaking, 'payable in respect of the lands and heritages,' but also the rates and taxes payable by the occupier in respect of his occupation. The complainers argue that the section makes no distinction between owner and occupier, and that consequently all rates and taxes must be deducted. But that argument goes too far, because it was held in the second case of *Edinburgh and Glasgow Railway Company* v. *Hall*, June 29, 1866, 4 Macph. 1006, 2 S.L.R. 159, that, notwithstand-

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ing the generality of the words used in the section, property and income-tax charged on income derived from lands and heritages is not deductible. In short, the section must be read consistently with its manifest purpose, and that purpose being to ascertain the amount of nett receipts which the owner would draw from the subjects if he had a tenant, it seems to me that only the owner's rates and taxes for the year ending Whitsunday 1903 can be deducted. I shall therefore sustain the respondent's third objection and repel the complainers' fourth objection.

"The result, I suppose, will be to add the sum of £68, 7s. 10d. to the sum of £399, 16s. 2d. (together £468, 4s.) as the total sum to be deducted from the valuation of £621."

The respondent reclaimed against the Lord Ordinary's interlocutor in so far as it repelled 1 and 2 of his objections.

Argued for reclaimer—The assessment here was on "lands and heritages" in terms of the Poor Law Act of 1845 (8 and 9 Vict. cap. 83), and the deductions allowed were those specified in sec. 37 thereof. Two questions arose, viz., (1) Did the incorporeal right of harbour fall under "lands and heritages"; and (2) were the expenses deducted such as sec. 37 contemplated, *i.e.*, those necessary to keep the subject in its actual state, or such as it did not, *i.e.*, expenses incidental to the carrying on of a business? The subjects assessable were "lands and heritages," and it must be presumed that the assessor had valued the appropriate subjects. From dicta in the following cases it appeared that an incorporeal right such as a right of harbour was not assessable—*Adamson* v. *Clyde Navigation Trustees*, January 27, 1860, 22 D. 606; June 26, 1863, 1 Macph. 974; *affirmed* June 22, 1865, 3 Macph. (H.L.) 100; *Clyde Navigation Trustees*, July 22, 1866, 4 Macph. 1143. No deduction was therefore to be made for expense incurred in connection with the incorporeal right of harbour and the cost of dredging must come out. Further, the statute contemplated expenses incident to keeping the harbour in its actual state, not such as were incidental to making it a profitable or revenue-earning subject. *Esto* that the harbour was assessable, the only deductions which the complainers were entitled to make were the expenses of keeping the docks, wharves, and quays in their actual state—Poor Law Act 1845, secs. 34 and 37; Valuation Act 1854, sec. 41; and actual state meant physical state. What was being dredged here was the *solum* below low-water mark. That was not part of the harbour as entered in the valuation roll. The only repairs deductible were such as were actually made on the quays, wharves, &c., *i.e.*, the actual subjects. These subjects alone were assessable as lands and heritages. As to repairs, &c., the cost of which was deductible under sec. 37 of the Poor Law Act, reference was made to *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229; *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241; and *Pumpherston Oil Company (Limited)* v. *Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830.

Argued for the complainers—The Lord Ordinary was right. The assessor had followed the usual practice of valuing the harbour as a whole. The harbour fell to be regarded as a *unum quid—Ayr Harbour Trustees* v. *Assessor for Ayr*, May 25, 1894, 21 R. 807, 31 S.L.R. 726. That course was warranted by section 42 of the Valuation Act of 1854. The theory that there was an incorporeal right of harbour which was not assessable was negatived by the House of Lords in *Leith Dock Commissioners* v. *Miles*, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213; also in *Gardiner* v. *Leith Dock Commissioners*, June 17, 1864, 2 Macph. 1234. Reference was also made to *Cuninghame* v. *Assessor for Ayrshire*, March 30, 1895, 22 R. 596, 32 S.L.R. 453; and *Mersey Docks* v. *Liverpool*, November 19, 1873, L.R. 9 Q.B. 84. The dredging was necessary to keep the harbour open, and was not done merely for profit-earning purposes. The duty of keeping their harbour open was a common law obligation on those having a grant of harbour—Bell's Prin. 654; *Officers of State* v. *Christie*, February 2, 1854, 16 D. 454.

At advising—

LORD KINNEAR—This is a suspension of a charge for payment of poor rates at the instance of the Inspector of Poor of the parish of Duffus against the Burghead Harbour Company, Limited, who are according to their own statement the proprietors of the harbour. The complainers bring the suspension on the ground that they are entitled to have certain deductions made from the valuation of the harbour as ascertained by the assessor under the Valuation Act. The Lord Ordinary for the purpose of ascertaining the facts upon which the question arose made a remit according to the ordinary course of proceeding to an expert . . . [*quotes remit.*] . . . The questions in dispute between the parties are raised in the form of objections to Mr Gowan's report. The Lord Ordinary has disposed of these objections by various findings for and against either party, but there are only two of his Lordship's findings which are brought to review before this Court, the parties having acquiesced in the judgment in all other respects. The deduction claimed by the complainers are deductions of the amount of moneys expended by them in repairing and maintaining the harbour—deductions to which they are entitled under the 37th section of the Poor Law Act of 1845—and the two objections which still remain for consideration are, first, that the whole of the deductions which the Lord Ordinary allows have already been taken into account by the assessor in making up the valuation, and that they cannot be allowed a second time, and secondly, that certain items alleged to be items of expenditure falling under the 37th section of the Act, involve expenditure outside the limits of the heritable subject, which alone, according to the argument, can be assessed, being

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expenditure on dredging the harbour which it is said, ought not to have been sustained, because they are not expenses for maintaining the lands and heritages assessed in their actual condition. The first point although it is formally insisted in was not seriously pressed by the counsel at the bar, who admitted that it must be taken as settled by decisions that are binding upon this Court in the cases of the *Edinburgh and Glasgow Railway Company* v. *Meek*, and the *Magistrates of Glasgow* v. *Hall*. The rule established by these decisions, which it is, I think, conceded we at least must follow, is thus explained in the latter. It is shown that starting with the liabilities created by the Poor Law Act, there are two duties imposed upon the collector of poor rates or on the parochial board by that statute. They were required in the first place to estimate the annual value of the land and heritages, taking such value as the sum at which one year with another they might in their actual state be reasonably expected to let, and that rent having been ascertained they were directed, secondly, to make the deductions which I have already mentioned to your Lordships. These were their two duties. It was further held that the first of these duties was transferred from the assessing board to the assessor created by the Valuation Act of 1854, but that the second duty was not so transferred, that the valuation prepared by the assessor in terms of the Act of 1854 must be taken as conclusive evidence of what is the gross rent or annual value of the lands and heritages in question, and that the Court has no jurisdiction to inquire whether that valuation has been rightly or wrongly made. It is taken as conclusive, and that being accepted the collector of the poor rates of the collecting parish must then go on to perform the second duty, which was originally laid upon the poor law authorities by the 37th section of the Act, of making the deductions to which the person assessed has right from the gross rental or value already ascertained by the assessor. This is the effect of these decisions, and it is admitted that they are binding upon the Court. The first objection of the respondent must therefore be repelled, although if the question were open it might require serious consideration.

The second objection raises a question of a different kind. It is said that in deducting the expense of repair the Lord Ordinary following the report has allowed a deduction of the expense of dredging, including the cost of keeping up the dredger itself, which does not properly fall within the description of expenditure on the lands and heritages assessed; and the ground upon which that is maintained is that this harbour consists not only of quays, wharves, sheds, offices, and piers, but also embraces the right which the complainers have in their title of dredging a portion of the sea included within the harbour boundaries, and that portion of the sea is not part of the lands and heritages belonging to the complainers; therefore it is said this expense of dredging which is not incurred in maintaining the heritable subjects is not a proper deduction from the gross value allowed by the assessor. The answer which the Lord Ordinary makes to that argument is a short one, but it seems to me to be perfectly conclusive. His Lordship says—"What does it matter to the deduction for dredging whether the complainers are assessable on the incorporeal right of harbour or not. They are undoubtedly assessable on the physical structures connected with the harbour which are expressly mentioned (as quays, wharves, and so on) in the Poor Law Act, and which derive their whole use and value from being pertinents of a harbour. . . . Now, what is more necessary to maintain quays and wharves in their actual state—that is, in a state to command the hypothetical rent—than an operation which is intended to prevent the accumulation of silt, and so to keep the way open for ships to reach the wharves and quays?" I entirely agree that the expense of keeping the harbour clear is necessary to maintain it in a condition in which it can be used as a harbour, and therefore in a condition in which the proprietors are enabled to levy dues. But as the argument was pressed upon us and was founded upon a view of certain decisions to which the Lord Ordinary himself gives some countenance, it may perhaps be proper to examine it a little more closely in order to see whether it has really any foundation. The Lord Ordinary states it in an early part of his opinion when he says—"The argument is that dredging is not an expense necessary to maintain in their actual state the lands and heritages which are the subjects of assessment, because the right of harbour, which is an incorporeal right, is not within the definition of 'lands and heritages' as contained in the Poor Law Act." I must confess that I do not understand what is precisely meant by the statement that a harbour is an incorporeal right. The distinction between corporeal and incorporeal in the Roman law from which our law borrowed it, and as it is explained also in our own text writers, is not a distinction between rights; it is a distinction between things. *Res corporales* are, according to the legal definition, physical things which can be touched; and *res incorporales* are things that do not admit of being handled, but consist *in jure*, and so are more properly rights than subjects — I am quoting the definition of Mr Erskine—such as rights of property, rights of servitude, succession, and so on. All rights therefore are incorporeal, and the distinction really is not between two kinds of right but between things which are objects of right and the legal conception of the right itself. I therefore have some difficulty in following the argument which is based on this alleged distinction. If it means that a harbour is not *res corporalis*, so that it is not included in the category of rights which are summed up by "lands and heritages" I must respectfully dissent from that proposition altogether. I think the right of harbour is perfectly well known to the law of

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Scotland as a heritable right, and that the subject, or rather object, of the right is a physical thing. The general rule of course is that harbours are vested in the Crown, by whom alone they can be erected or held, but then it is very familiar law that the right may be granted either by charter followed by infeftment or by Act of Parliament in favour of individuals or public bodies. With both these kinds of right we are perfectly familiar; and when that right has been so created in the subject there is no question so far as I understand the law as to what it embraces. It comprehends, according to the statement in Bell's Principles, in the first place, the natural access which makes safe a landing-place, and of course includes piers, wharves, and all physical structures which were erected for the purpose of making the landing-place convenient and safe; secondly, it includes artificial operations by which the harbour is improved for the convenience of navigation, and the power and privilege of monopoly within the bounds of the harbour; and third, it includes the right to levy duties for the maintenance of the harbour. These, according to Bell's statement, are the component elements of the heritable right of harbour, and it does not appear to me doubtful that that kind of subject is *res corporalis*, a heritable subject perfectly well known to the law, and that the right to levy duties which is attached to it is an incident attached to that right which gives it its value. Accordingly, the question whether a harbour can be included within the term "lands and heritages" does not appear to me, so far as I can find, to have been raised as really a disputable question until the case to which I shall advert immediately. If it could have been raised at any time I think it cannot possibly be raised now, because the Valuation Act in the definition of lands and heritages includes in terms ferries, piers, harbours, quays, wharves, and docks. It appears to me therefore we must take it that a harbour is a heritable subject included within the description of lands and heritages and therefore assessable. In the series of cases in which it was held in this Court, as it was at the same time held in England, that harbour trustees were not assessable for poor rates, the ground of exemption was not that the harbour is not in itself a land and heritage subject to assessment like any other heritable property, but that the whole revenues of the harbour being specially appropriated for public purposes there remained nothing in the hands of the trustees or commissioners which could possibly form the subject of assessment. That was the view which obtained both here and in England, but which so far as this Court was concerned was finally and conclusively rejected in the case of *Adamson* v. *Clyde Navigation Trustees*. In that case it was held that the harbour as a heritable subject in the hands of the Clyde Navigation Trustees was liable to assessment because the trustees were owners and occupiers of lands and heritages, and that they had no such exemption as had been maintained in consequence of the special appropriation of the duties they were entitled to levy. That judgment was affirmed by the House of Lords in accordance with the decision of that House in the case of the *Mersey Docks* v. *Jones*, in which the same doctrine was laid down. But then it is said that the point which the respondent maintains now was decided in his favour in a later stage of the case of *Adamson* v. *The Clyde Navigation Trustees*; and that is a view which the Lord Ordinary is disposed to take. I respectfully differ from it. After the question had been decided whether the Clyde Trustees were exempt from assessment altogether or not, it became necessary to determine what the subjects were which were assessable in terms of the statute; and the Court held without difficulty that the ferry, quays, wharves, docks, and a variety of moveable machinery which had become heritable by situation, were fairly within the description of "lands and heritages" and must be assessed. But two points were taken by the assessor which the Court declined to sustain. In the first place, it was said that in assessing the Trustees there must be taken into account the dues which were leviable for navigation in the river Clyde from its mouth to Glasgow Harbour; and in the second place, it was said that apart altogether from the heritable subjects which constituted the physical harbour there was what was called the incorporeal right of harbour, which ought to be taken into account also. As to the first of these two points it was held in the first place that the Clyde being a navigable river the Trustees were not owners and occupiers of lands and heritages in the sense of the statute at all. Whether the decision was altogether in accordance with what was laid down in the *Mersey Dock Trustees* v. *Jones* may perhaps be a question, but it is not a question which we have to consider in this action, because it has no bearing whatever upon the only point in dispute between the parties. The second point is said to decide the question. The Court also rejected the view that there was to be taken into account what was called the incorporeal right of harbour, but that was upon the ground, as is very clearly explained by Lord Justice-Clerk (afterwards Lord President) Inglis that on an examination of the statute he could not find that there was any such incorporeal right. There was no incorporeal right so far as he could find separate from the right in the physical subjects which the Clyde Navigation Trustees held in property. It is quite true, as the Lord Ordinary points out, that Lord Neaves, who expresses his entire agreement with everything the Lord Justice-Clerk says, goes on to say that an incorporeal right of harbour was no more assessable than a right of copyright. That observation must of course be referred to the argument which he was considering. It is only a lively way of saying that *res incorporales* are not lands and heritages. I do not see any ground for thinking that his

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Lordship meant to lay down as a general rule of law that every harbour included or consisted of an incorporeal right which could not be made the subject of assessment. That was not a matter before him. It really came to nothing more than this, that if there were any right separate and apart from the right to physical structures which form the physical harbour, that was not a right which should be taken into account, because the thing to be assessed was the heritable subject which fell within the description of lands and heritages. But then whatever view might be taken of these two findings of the Court, it would not in my opinion have any direct bearing upon this question, because it was not the question which we are now considering. The point which is now made for the respondent is that the harbour includes a certain right in land covered by water below low-water mark, that that is not an assessable subject because it is incorporeal and because no part of the sea beyond the foreshore is within the parish which forms the assessable area, that this part of the subject cannot have been taken into account by the assessor in making his valuation, and that therefore no deduction ought to be made in respect of expenses incident to the exercise of any right the trustee may have in it. Now that question, which did not arise in *Adamson* v. *Clyde Navigation Trustees*, was raised directly in the next case — *Gardiner* v. *Leith Dock Commissioners*. I cannot quite agree with the Lord Ordinary in his observations upon that case when his Lordship says that the matter was not treated thoroughly or carefully either here or in the House of Lords, but was treated as a subject of no importance. I think that is hardly so. The objection taken was that no assessment could be leviable in respect of land gained from the sea, or for docks or works erected on such land, and that no such subjects if situated beyond high-water mark could be assessed for poor-rates. That objection was very fully considered in the very careful judgment of Lord Jerviswoode, who was the Lord Ordinary in the case, and the Lord Ordinary comes to the conclusion that there is no authority and no reason sufficient to support the proposition. His Lordship says—"He is not aware that it has ever been held that such property was extra-parochial, and if it be not so, within what parish can it be situated other than that in which the shore itself, from which the works extend, lies, unless indeed express evidence of the contrary be adduced." Accordingly his Lordship rejected that contention, and his opinion was affirmed in the Inner House. It is quite true, as the Lord Ordinary says, that the opinion of Lord President M'Neill in affirming it is very concise, but it is not the less deliberate and authoritative on that account. His Lordship says—"I think that view (that is, the view that part of the harbour was below high-water mark) is quite untenable"—and accordingly it was held that the whole harbour was assessable. But when the case went to the House of Lords the law was stated in a perfectly clear and distinct manner, because Lord Advocate Moncreiff pressed upon the House of Lords the argument which we have heard in this case, and which was pressed upon the Second Division, that because a right of harbour was an incorporeal right it could not be included in the corporeal property enumerated in the Poor Law Act. That argument was very distinctly rejected by the House of Lords. The Lord Chancellor said—"In the last session of Parliament, after a very elaborate consideration of the subject by all the Judges, the question was finally decided by your Lordships' House in favour of the rateability of all trustees or commissioners having harbours, docks, wharves, and other property of the same sort in their possession in respect of which they levied harbour dues, tolls, or other sums of money. It was held that all these were on the correct construction of the statute of Elizabeth in England (and there is no substantial difference in the language of the statute which regulates the poor law in Scotland) liable, with the single exception that as the Crown is not mentioned in the Poor Law Acts the Crown is not bound." I take that to be a perfectly clear decision of the House of Lords that harbours are lands and heritages in the sense of the Poor Law Act, and therefore assessable, as they are undoubtedly lands and heritages within the definition of the Valuation Act. Then his Lordship goes on to say that he had thought this question had been finally determined the year before in *Adamson's* case, but the Lord Advocate had shown that there were some matters which had been held to be chargeable in the *Mersey Dock* case, and which had not formed the subject of appeal in *Adamson's* case, and therefore had not been decided by the House of Lords. But then his Lordship says that what was deficient in *Adamson's* case would now be added in this case. Now, what was added by the case which he calls this case to the decision in *Adamson's* case, except that liabitity extended not only to the harbour, wharves, and similar structures on shore but extended also to whatever dues might be shown to be attachable to the use of the harbour so far as it was occupied by sea or extended below low-water mark. Therefore I think it is finally decided by authorities which cannot be called in question that harbours as such are lands and heritages assessable for poor-rates, and if that be so, the objection to allowing the expenses of dredging the harbour below low-water mark as a deduction from the assessor's valuation necessarily falls. A harbour is a complex heritable subject, and the attempt to analyse it so as to distinguish between its corporeal and incorporeal elements seems to me a logical exercise which for the present purpose is not very profitable. It is a heritable subject known to the law. It is the property, the complainers aver and the respondent does not deny, of the Burghead Harbour Company, and therefore they are owners and occupiers of this complex heritable subject described as Burghead Har-

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bour. It is not objected that the assessor in making up his valuation has taken into account anything except the value which ought to attach to that heritable subject. Therefore I am unable to see that there is any ground for holding that the owners are to be excluded from claiming as a deduction from the gross rent ascertained by the assessor the annual cost of maintaining the subject assessed in the condition in which it was at the time of the assessment. The other findings of the Lord Ordinary are acquiesced in, and I am of opinion, for these reasons, that we should affirm the Lord Ordinary's interlocutor in so far as it deals with the two objections which were brought before this Court.

LORD M'LAREN—I concur.

LORD PRESIDENT—I also concur. I have really nothing to add to what has been said by my brother Lord Kinnear except this, that it seems to me that in this case we are bound to come to the conclusion that Lord Kinnear has proposed if we follow two cases—*Gardiner* v. *Leith Dock Commissioners* seems to me to settle the matter in respect of the third declaratory finding of the Lord Ordinary in that case. The third declaratory finding was that in estimating the yearly rent or value of the subjects, the harbour &c. dues are to be taken into account, and that finding was affirmed by the Inner House, and was also affirmed by the House of Lords. That seems to me to conclude the question here taken along with the general rule that was laid down in the *Magistrates of Glasgow* v. *Hall*. If the whole matter were open I think there might be a great deal to be said upon the question whether there should be a double deduction, but I quite agree with your Lordship that the matter is not open for us now because the *Magistrates of Glasgow* v. *Hall* has been subsequently followed in other cases, and that is certainly a rule for this Court and cannot be impugned short of the House of Lords.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Complainers and Respondents — M'Lennan, K.C. — A. M. Laing. Agents—Mustard & Jack, S.S.C.

Counsel for the Respondent and Reclaimer — Solicitor-General (Ure, K.C.) — Younger, K.C.—Constable—G. Moncrelff. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, July 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

HAMILTON *v.* THE DUKE OF MONTROSE.

Landlord and Tenant—Lease—Reduction—Damages—Misrepresentation—Warranty—Advertisement—False Statement in Advertisement on a Matter of Opinion—Essential Error—Relevancy.

A tenant raised an action against his landlord for reduction of his lease, or alternatively for damages, on the averment that whereas the farm had been advertised as "comprising a hill capable of keeping about 2000 blackfaced sheep and summering 100 cattle," it was not so capable, nor of "maintaining and summering anything like these numbers. At most it could and can only properly carry 1400 sheep, and there is no summering for cattle." He pleaded (1) that he was induced to enter into the lease by the defender's false and fraudulent representations, and (2) essential error induced by the defender.

Held, affirming the Lord Ordinary (Ardwall), that the pursuer's averments were irrelevant.

Landlord and Tenant—Lease—Obligation—Contract—Breach of Contract—Damages—Personal Exception—Statement of Damage from Failure to Repair Fences—Prejudice through Want of Notice and Specification—Relevancy.

A tenant brought an action of damages against his landlord on the averment that the defender had in the lease undertaken within a reasonable time after its commencement (Whitsunday 1899) to execute all necessary repairs to the existing fences on the farm; that though repeatedly called upon to execute the said repairs he did not complete them till October 1904; that the insufficiency of the fencing, and in particular of two fences specified, had enabled the sheep to stray on to the lower ground in summer and eat the winter grazing, and that the loss thereby sustained by the pursuer, in particular in having to buy food stuffs for winter feeding, amounted to not less than the sum sued for.

Held that, there being no averment of damage such as a landlord could be called upon to meet, pursuer's averments were irrelevant.

Per LORD LOW—"I am not satisfied, however, that what was said in" *Broadwood* v. *Hunter*, February 2, 1855, 17 D. 349, "to the effect that a tenant loses his right to claim damages if he does not make a specific claim year by year and pays his rent without deduction, applies in the general case to a claim for damages in respect the landlord has failed to implement obligations undertaken by him in the lease."

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On 6th June 1905 James Hamilton, dairyman, Glasgow, brought an action against the Duke of Montrose in which he sought reduction of a "pretended" missive of lease of a farm called Braval, Mounevreckie, &c., in the parishes of Aberfoyle and Port of Monteith, belonging to the defender, and a "pretended" lease entered into between the pursuer and the defender dated 15th February and 30th March, both in the year 1899, with repetition of the rents paid, under deduction of the sum of £950 or of such other sum as might be ascertained "to be a reasonable equivalent for the possession by the pursuer under the said pretended missive and lease from and since the term of Martinmas 1898, being the date of his entry to the arable ground, and the term of Whitsunday 1899, being the date of his entry to the pasture and houses;' 'or alternatively, payment of £2400 as damages for alleged fraudulent misrepresentation as to the carrying capacity of the farm. Secondly, the pursuer sought £200 damages in respect of the alleged failure of the landlord to repair the fences on the farm.

The pursuer averred in support of his *conclusion for reduction* that in the Glasgow Herald of 26th October 1898 and of other dates an advertisement (quoted in the Lord Ordinary's opinion) appeared of the farm whose lease was in question, describing it as "a hill grazing capable of keeping about 2000 blackfaced sheep and summering 100 cattle." "Cond (3) Upon the faith of the statements in said advertisement the pursuer offered to . . . the defender's chamberlain to lease the said farm of Braval, Mounevreckie, &c. (with part of Auchyle), as advertised, at a rent of £350 per annum on a lease for fifteen years. After certain verbal communings his offer was accepted by the said . . . on behalf of the defender, by letter dated 10th December 1898. This letter constitutes the writ sive libelled. Thereafter a formal lease was drawn up and signed by the pursuer and defender on 15th February and 30th March 1899. . . . Cond (4) By the said advertisement the defender represented, or intended to represent, that the said farm of Braval, Mounevreckie, &c., was capable of maintaining about 2000 blackfaced sheep and of summering 100 cattle. The said statement was material, and the pursuer would not have entered into said contract but for it. The pursuer has since discovered and avers that the said farm was and is not capable of maintaining 2000 blackfaced sheep and summering 100 cattle, or maintaining and summering anything like these numbers. At most it could and will only properly carry 1400 sheep, and there is no summering for cattle. . . . Cond. 5), The defender, or his said chamberlain was well aware of the facts set forth in the preceding article, and the representations as to the carrying capacity of said farm made in said advertisement were so made with knowledge that the same were false, or at least with gross recklessness and without regard to their truth or falsehood. (Cond. 6). . . . The rents payable as at Martinmas 1901 and Whitsunday 1902 were paid by the pursuer under protest, and under reservation of all pleas and objections, and the payments since then were made on or about 21st November 1904, under pressure of a charge served upon him by the defender on 9th November 1904, and also under reservation of all his claims and contentions . . ."

The pursuer's averments dealing with the alleged *failure to implement the obligation as to fencing* [the portions printed in italics being added by a minute when the case was before the Inner House], were:—"(Cond. 10). By the foresaid lease the defender undertook, *inter alia*, 'and that as soon as possible and within a reasonable time after the commencement of this lease, to execute all necessary repairs to the existing houses (including shepherds' houses, but excluding cottars' houses, for the repair of which there will be no liability on the proprietor, and the same are specially exempted from the provisions of this clause) and fences on and around the farm, and also to erect a fence to enclose the unfenced part of the portion of Auchyle included in this lease.' The pursuer repeatedly called upon the defender to execute the said repairs, but the defender refused or delayed to do so, and it was not until October 1904 that the whole work undertaken by the defender was completed. The pursuer has thereby suffered great loss and inconvenience. *Inter alia*, the insufficiency of the fences has prevented him from keeping the sheep on the higher ground of the farm during the summer months, and away from the lower ground, which it is usual to keep for winter grazing. *In particular, the following fences dividing the higher and lower ground were not put in order till the autumn of* 1904, *viz., a fence running southwards from a point on the south side of Loch Drunkie, and about* 600 *yards from the west end thereof to Trombuie, and a fence running southeastwards from a point about* 150 *to* 200 *yards to the north of the shepherd's house at Upper Dounance to a point where it joins the parish boundary.* The loss, injury, and damage sustained by the pursuer in consequence of the defender's failure and delay to fulfil his said obligations, *and particularly on account of the pursuer having to purchase other food stuffs for winter feeding in place of the said winter grazing which he was thus unable to reserve*, is not less than £200, being the sum last concluded for. . . ."

The pursuer pleaded—"(1) The pursuer having entered into said missive and lease under essential error induced by the defender, and, *separatim*, the pursuer having been induced to enter into the said missive and lease by the defender's false and fraudulent representations, he is entitled to decree of reduction as concluded for. (2) The said missive and lease being reduced, the pursuer is entitled to repetition of the rents and interest paid by him as condescended on, with relative interest, under deduction of a reasonable equivalent for his possession; . . . (3) In the event of the pursuer's failure to obtain decree of reduc-

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tion and restitution as concluded for, he is entitled to damages for the loss, injury, and damage caused to him by the said fraudulent misrepresentations. (4) In the like event, the pursuer is entitled to damages for the loss and damage sustained by him until the defender's obligations in regard to said . . . fences were implemented."

On 5th September 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Assoilzies the defender from the whole conclusions of the summons except the conclusion for payment of £200: Dismisses said conclusion for £200. . . ."

Opinion.—"The ground on which the pursuer seeks reduction of the lease libelled is that he was induced to enter into it by the false representations as to the carrying capacity of the farm contained in an advertisement thereof in the *Glasgow Herald* of 26th October 1898. Among the farms there advertised to be let is the farm now tenanted by the pursuer, which is thus described in the advertisement:—'Perthshire, Montrose Estates. Farms to be let, for such number of years as may be agreed on, with entry to the ploughable lands immediately after set, and to the houses and pasture at Whitsunday 1899. (1.) Braval, Mounevreckie, &c., in the parishes of Aberfoyle and Port of Monteith, comprising a hill grazing capable of keeping about 2000 black-faced sheep and summering 100 cattle, and 230 or thereby acres of arable and meadow land.'

"It is alleged by the pursuer that the said farm cannot carry 2000 black-faced sheep and summer 100 cattle, and that, in respect of the false statements in the advertisement he is entitled to have the lease reduced.

"I am of opinion that the pursuer's statements are irrelevant. There is no warranty given that the farm would carry 2000 black-faced sheep and 100 cattle, and statements in an advertisement are not intended to be accepted by offerers as correct without inquiry, nor in point of fact do offerers for a farm accept such statements without looking into the matter for themselves; no ordinary person would. But, besides that, it appears to me that the statement complained of is merely an expression of opinion as to what the farm would carry, and, as was said in another case I shall presently refer to, was not intended to exclude, but to invite inquiries. If the pursuer desired to have the representation regarding the carrying capacity of the farm warranted he should have got it warranted or otherwise made part of the contract. Further, it cannot be said that the representations so made were *in essentialibus* of the contract. There is no dispute as to what the subject let was, and it was the pursuer's business as a prudent man to find out what were its capabilities. I may refer to the case of *Wood* v. *Tulloch*, 20 R. 477, which, although a question of the sale of a property, contains some law bearing upon the present case. I may also refer to the case of *Grieve* v. *Rutherford's Trustees*, 1871, 9 S.L.R. 60, which, although principally decided on the question of *mora*, yet contains several observations applicable to the present case. There the misrepresentation founded on as a ground of reduction was very similar to the present, namely, that 'the farms are capable of carrying about 2000 sheep besides cattle,' and the Lord Ordinary, whose judgment was affirmed by the Inner House, said that this representation was no warranty, but merely an expression of opinion on which the intending tenant should exercise his own judgment. The pursuer's counsel relied on the case of *Macpherson* v. *Campbell's Trustees*, 41 Scottish Jurist, p. 634, where issues of reduction of a lease were allowed. But when examined it appears to me that that case is an authority against the pursuer rather than for him. The misrepresentations alleged in that case were contained, first, in an advertisement, and second, in a note of particulars furnished on inquiry by the factor for the landlord, and Lord Barcaple, who was Lord Ordinary in the case, held that the statements in the advertisement could not form a ground of reduction, but that those in the note of particulars could, and apparently his view was concurred in by the Inner House, although the report does not distinctly say so. In that case the advertisement contained a clause in these terms:—'The lands are at present stocked with superior black-faced sheep and estimated to carry about 5500.' Lord Barcaple deals with this statement thus—The Lord Ordinary thinks that 'from the subject matter of the statement, and the form in which it is made, it invited, and was not intended or calculated to exclude inquiry. No person of ordinary prudence would without inquiry rely upon such a statement as satisfactory evidence of the capabilities of the farm. The Lord Ordinary is therefore of opinion that in so far as the pursuer's averments are rested upon statements in the advertisement they may be dismissed from consideration in this question of the relevancy of the action.' He then goes on to point out how the note of particulars by the landlord's factor stood in a totally different position. Taking the view I do regarding the effect of the advertisement, I do not need to enter into consideration of the question of bar raised by the fifth plea-in-law for the defender, but it appears to me that, considering that the pursuer entered on the farm in question at Martinmas 1898, that plea forms a very formidable obstacle in the way of the pursuer insisting in an action of reduction of the lease after being in possession of the farm under that lease for more than six years, and having insisted on the landlord fulfilling the obligations undertaken in the lease of which he now seeks reduction.

"With regard to the conclusions of the summons other than the reductive conclusion and the conclusions which depend on it, there is a conclusion for £2400 of damage said to have been caused by the fraudulent misrepresentations in the advertisement. I am of opinion that the defender is entitled to be assoilzied from that conclusion on the same grounds that I

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have held that he is entitled to be assoilzied from the reductive conclusions. With regard to the conclusion for payment of the sum of £200 sterling, the statements in support of which are set forth in Condescendence 10, there is no relevant averment of the specific damage suffered by the pursuer in each year of the lease, or of any definite claim for damage being made on paying the rent from half year to half year. I therefore hold, on the authority of the cases *Broadwood* v. *Hunter*, 17 D. 340, and *Emslie* v. *Young's Trustees*, 21 R. 710, that there are not relevant averments to support this conclusion. It looks as if, indeed, the pursuer were barred from making any claims for damage prior to Whitsunday 1904, he having apparently paid his rent without reservation down to and including that date, and it appears from the statement in Condescendence 10 that all the repairs the want of which caused the alleged damage were completed by October 1904. However, as this is a question of relevancy, I shall merely dismiss this conclusion."

The pursuer reclaimed and argued—The lease was entered into under essential error, as defined by Lord Watson in *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, at p. 142, 30 S.L.R. 530. Even if the landlord were ignorant that the representations were untrue that made no difference—*Reese River Silver Mining Company* v. *Smith*, 1869, L.R., 4 E. and I. Ap. 64, Lord Cairns, at p. 79. The misrepresentations in the advertisement were material, and were imported into the contract because the missives of lease, both offer and acceptance, referred to the farm "as advertised." The pursuer's averments were relevant and proof should be allowed. *Woods* v. *Tulloch*, March 7, 1893, 20 R. 477, 30 S.L.R. 497, was to be distinguished because the misrepresentation there was not essential—*Grieve* v. *Rutherford's Trustees*, 10th November 1871, 9 S.L.R. 60, because it turned on the prolonged delay—ten years—in advancing the claim for reduction. The carrying capacity of a farm remains much the same, so in that respect the landlord could not be prejudiced by delay. That distinguished the present case from *Broadwood* and *Emslie* (*cit. infra*). [LORD KYLLACHY—These two cases were referred to by the Lord Ordinary on the other branch of the case. Have you any case where it was held there was essential error or fraudulent misrepresentation on a matter of opinion? Yes, *Ferguson* v. *Wilson*, June 4, 1904, 6 F. 779, 41 S.L.R. 601.]

On the conclusion of the first speech for the reclaimer the Court intimated that they did not require to hear further argument upon the question of reduction with the alternative claim for damages, and adjourned the hearing to enable the pursuer and reclaimer to make more specific, if he thought fit, his averments in Cond. 10 as to the landlord's failure to implement the obligation on him as to fencing. The amendments given *supra in italics* were then made.

At the continued hearing it was argued for the defender—Though the fences alleged to be in disrepair had now been specified there was no averment that the landlord's attention had been called to these specific fences. There was still want of specification as to the periods when damage was sustained, and as to the amounts of money paid out for extra food. There was no averment that at the end of each year, or as each half-year's rent fell due, specific damage had been tabled before the landlord. In a proof the landlord would be prejudiced (1) by the claim not having been made year by year so as to enable him to check the damage and keep evidence regarding it, and (2) by want of specification as to what he had to meet. A claim for damage by a tenant on the ground that his landlord had not done what in his lease he contracted to do ought to be tabled each half-year when paying rent. The averments were still irrelevant—*Broadwood* v. *Hunter*, February 2, 1855, 17 D. 340; *Hardie* v. *Duke of Hamilton*, February 2, 1878, 15 S.L.R. 329; *Emslie* v. *Young's Trustees*, March 16, 1894, 21 R. 710, 31 S.L.R. 559; *Eliott's Trustees* v. *Eliott*, June 7, 1894, 21 R. 858, 31 S.L.R. 753. Here there was an obligation in the lease to put the fences in repair and this the landlord thought he had done. There was no specific promise that would cause pursuer to put off his claim as in *Johnstone* (*cit. infra*). LORD KYLLACHY asked for a reference to *Callander* v. *Smith*, June 29, 1900, 8 S.L.T. 109, and *Baird* v. *Mount*, November 19, 1874, 2 R. 101, 12 S.L.R. 88.

Argued for the pursuer—He averred that the two fences now specified had not been put in order although complaints had been made. The landlord would not suffer prejudice if the averments in Cond. 10 went to proof. There was a positive obligation in the lease to put the fences in repair. That was equivalent to the specific promise of the factor in *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777, 31 S.L.R. 655, to do the operations the tenant required. The paying of rent under protest and under compulsion (Cond. 6) distinguished this case from *Broadwood* and *Emslie*, as did also the fact that loss of particular winter grazing was, unlike damage done by game or failure to burn heather, capable of ascertainment at a subsequent date.

LORD JUSTICE-CLERK—There is no doubt or difficulty about the first question. We did not ask any further debate after the opening speech. I think it is quite clear that the statements of the pursuer are irrelevant to enable him to proceed. The only question now before us is the question regarding the conclusion for £200 damages. I agree entirely with the view of the Lord Ordinary—and that view is not at all modified by anything that has been done in the way of attempting the amendment of the record—that there is no relevant averment of specific damage suffered by the pursuer in each year of the lease or any definite claim of damage. It appears that the tenant in this case paid his rent, no doubt under protest and reservation, but paid his rent and paid interest on his

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rent when he was in arrear and took no proceedings. I cannot hold that where such a claim as this is to be made, depending necessarily for the ascertainment of the facts upon what happens in each of several successive years, a party is entitled to take no steps whatever to make good any claim that he has, and thereby to place the opposite party in a position in which he has no means of leading evidence in regard to the state of matters subsisting at the times when the alleged successive claims arose. Here for a period of years there is not a word of indication to the landlord as to the actual claim that is proposed to be made; and now, even at the last, when you come to look at it you find that it is still just a claim in general terms for a sum of not less than £200, which it is said was incurred from loss by giving special food stuffs to the stock upon the farm in respect of the low ground pasture having been eaten up at the wrong season. I cannot hold that to be a relevant averment, as proper specification ought to be given in such a case. Therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD KYLLACHY—I am of the same opinion. I do not think it necessary to add anything to what the Lord Ordinary has said as regards the first ground of action. I think it clear that there is no relevant case for reduction on any of the grounds suggested. As regards the conclusion for damages—damages claimed in respect of the defender's alleged failure to put the fences on the farm into proper repair—it was, I think, quite right to give the pursuer, as we did, an opportunity of making his averments more specific. He has now to some extent done so, but I think that the result of his amendment, and of to-day's discussion, has been to make it fairly clear that the kind of damage which is alleged is one which ought, on the principle of the decided cases, to have been distinctly tabled—and tabled not generally but specifically—in each year of the lease, so that, as each year's damage occurred the landlord should have had the opportunity of checking the claim each year as made and preserving the necessary evidence in connection with it. I am therefore of opinion with your Lordship that the conclusion for damages should be dismissed.

LORD STORMONTH DARLING—With regard to the reductive conclusion I entirely agree with the Lord Ordinary on the grounds which he has stated. On the other branch of the case the pursuer has done his best by proposing an amendment to make his case relevant, but I agree with your Lordships that he has failed to do so. I think that he has not stated the nature of his claim with sufficient specification to enable the landlord to meet it. Accordingly I think that his whole claim should be dismissed as irrelevant.

LORD LOW—I am of the same opinion. In regard to the question which was raised upon the alleged misrepresentation in the advertisement, I agree with your Lordships that the view taken by the Lord Ordinary is right and that he has based his judgment upon the proper grounds, so that it is not necessary to add anything to what his Lordship has said.

In regard to the claim which the pursuer makes for damages in respect that the landlord's obligation in the lease to put the fences in proper condition was not implemented, I agree with your Lordships that the pursuer has not stated a relevant case. The only specific claim, and the only claim that could possibly be remitted to proof, is confined to one matter. The pursuer alleges that by reason of two fences not being put in order he could not keep the sheep on the higher ground of the farm during the summer months, but that they strayed on to the lower ground which it is usual to keep for winter grazing, and that in consequence the winter grazing was diminished and he had to spend more money upon artificial food for his stock in winter than he would otherwise have required to do. He says in general terms that he repeatedly called upon the defender to put the fences in order, but he does not say that he ever gave the defender any notice of the particular claim which he now makes, or ever called his attention to the fact that by reason of the insufficiency of the fences in question his winter feeding was being destroyed. That being the case it seems to me that the claim is one against which the defender cannot be compelled to defend himself, because it is impossible for him to get information which is necessary to test what the real facts were. In that respect the pursuer's claim is very much like a claim for damages done to crops by rabbits, the extent of which can only be estimated while the crops alleged to be injured are still upon the ground. To that extent the present case resembles that of *Broadwood* (17 D. 340) where it was held that if a tenant intended to claim damages for injury done by game he was bound to intimate the claim while it was yet possible for the landlord to check it by inspecting the damaged crops. I am not satisfied however that what was said in *Broadwood's* case, to the effect that a tenant loses his right to claim damages if he does not make a specific claim year by year and pays his rent without deduction, applies in the general case to a claim for damages in respect that the landlord has failed to implement obligations undertaken by him in the lease.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Pursuer (Reclaimer)—Hunter, K.C.—Scott Brown. Agents—Lister, Shand & Lindsay, S.S.C.

Counsel for Defender (Respondent)—Blackburn—Hon. Wm. Watson. Agents—Dundas & Wilson, C.S.

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Saturday, July 7.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ADDIE'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Bridge—Undertaking to Build a Bridge—Approaches.

A railway company by agreement acquired land for an intended branch railway and undertook to construct at their own expense an accommodation bridge over the branch railway, "plans and sections of the bridge . . . and of the approaches to the said bridge" to be submitted to the proprietors' engineers before the construction was commenced. The railway company maintained that they were not bound to construct the approaches to the bridge.

Held that in the absence of excluding words an obligation to construct a bridge included the obligation to construct its approaches.

On 26th January 1905 Miss Janet Addie, Braidhirst, Motherwell, and others, the testamentary trustees of the late Alexander Addie of Braidhirst and Milton, in the county of Lanark, brought an action against the Caledonian Railway Company to have the company ordained to implement an obligation undertaken by it under a disposition granted by the pursuers in its favour, dated 9th and recorded 10th November 1900, of certain pieces of land in the parish of Dalziel, Lanarkshire, which obligation was in the following terms:—"But these presents are granted and the said three pieces of ground and others above disponed are so disponed always with and under the burdens, conditions, declarations, obligations, reservations, and others following, namely—(1) the said company shall construct and maintain in all time coming, at their own expense, one accommodation bridge over or under the branch railway intended to be formed by the said company on the said portions of land above disponed, at a point shown on the plan signed as relative hereto, marked A, or at such other point as may be arranged between . . . acting for us, whom failing . . . and the said company's engineer, said accommodation bridge, if over the said intended branch railway, to have a clear width of 40 feet between the parapets, and if under to have a span of not less than 40 feet and a height of not less than 15 feet. Plans and sections of the bridge to be constructed by the said company, and of the approaches to said bridge, shall be submitted to our engineers before the construction thereof is commenced, and if there shall be any difference between us and the said company with reference to design, character, or construction of said bridge, or as to the gradients or inclination of the approaches thereto, or otherwise in relation to said bridge or approaches, the same shall be determined by . . ."

On 6th July 1905 the Lord Ordinary (Low) gave decree, and on 14th March 1906 the First Division adhered and remitted to the Lord Ordinary to proceed. The pursuers thereafter moved the Lord Ordinary (SALVESEN) in the Motion Roll to ordain the defenders to commence building the bridge and its approaches. The defenders, however, maintained that they were not bound to do more than build the bridge, and that the pursuers were bound to make the approaches at their own expense.

On 5th June 1906 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary . . . decerns and ordains the defenders to commence the construction of the accommodation bridge referred to in the summons, including the approaches thereto . . . , and that within the period of one month from this date, and thereafter to proceed with the same continuously, and complete the same within the space of nine months from the date of commencement. . . . ."

"*Opinion.*—The merits of this case have already been disposed of, and the only point which still remains undetermined is whether the defenders are bound to pay the cost of the approaches to the accommodation bridge which they have been held bound forthwith to construct. The defenders maintain that they have satisfied their contractual obligation when they have constructed the bridge itself, and that the pursuers must at their own expense make the approaches.

"The decision of this important question depends, in the first place, on the terms of the obligation on which the action is founded. The leading provision of the clause is that the defenders are to 'construct and maintain in all time coming at their own expense one accommodation bridge over or under the branch railway intended to be formed on the portions of land disponed.' There follows a provision as to the site of the bridge and the width and height of the span. Then occurs a clause which was strongly founded on by the defenders and which is in these terms—'Plans and sections of the bridge to be constructed by the said company and of the approaches to said bridge, shall be submitted to our (that is, the pursuers') engineers before the construction thereof is commenced.' It was argued that here a sharp distinction is drawn between the bridge to be constructed by the company and the approaches to the bridge, which are not said to be constructed by the company. In my opinion this is too critical a construction of the clause. I think the bridge must be held to include its approaches, and that these are only referred to in the quoted clause in order to make it plain that the pursuers shall have an opportunity of submitting the question as to the gradients or inclination of the approaches to arbitration, in the event of their being dissatisfied with the plans submitted by the company. If the company have nothing to do with the erection, it is not easy to understand why their engineer should be at the

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trouble of making plans of the approaches.

"The pursuers' interpretation of the clause is further aided by a consideration of the circumstances under which the disposition came to be granted. The defenders wished to construct a branch railway, and for that purpose they needed to acquire land belonging to the pursuers. The construction of the railway could not fail to cause damage by severance, and it was obviously to minimise such damage by affording a connection between the different portions of the pursuers' land that the obligation to construct the accommodation bridge was undertaken. Now it was left in the hands of the Railway Company to decide whether the bridge should be on the level of the land, as it might well be if the railway were constructed in a cutting, or be carried over or under it. The height of the bridge (above a fixed minimum) fell also to be determined by the company. It is therefore obvious that the cost of construction of the approaches might vary indefinitely according to the method that the Railway Company adopted of making their line. I think it could scarcely have been the intention of the pursuers that in this respect they were to be left at the mercy of the defenders when they took them bound to construct the accommodation bridge. Further, I do not think that a bridge can be properly described as an accommodation bridge which does not afford a complete connection between the portions of ground severed by the line. It was conceded that an accommodation bridge which a railway company are compelled to construct under the Railways Clauses Act includes the approaches to it, and I do not doubt that the agreement embodied in the disposition, and which was intended to obviate the Railway Company having recourse to compulsory powers, was not intended to be less effective in safeguarding the landowner's interests.

"There was some discussion as to the time within which the bridge should be constructed, the pursuers pressing for a period of six months, and the defenders asking that it should be extended to twelve. Mr Guthrie satisfied me that six months was on the short side, but I think that the bridge with its approaches might quite well be completed within nine months from the date of commencement."

The Railway Company (leave having been given) reclaimed, and argued—The Lord Ordinary was wrong. His Lordship had disposed of a serious and important question in the Motion Roll, and the matter had not been sufficiently discussed. There was a clear distinction in the clause in question between the bridge and the approaches. The construction of the latter was more important for the company than the construction of the bridge, for it might involve their having to buy the necessary ground. The agreement implied that the company were to build the bridge and the landowner to make the approaches.—Railway Clauses Act 1845 (8 and 9 Vict. c. 33), sec. 14, was referred to.

Argued for the pursuers (respondents)—The Lord Ordinary was right. An accommodation bridge meant bridge and approaches. That was the meaning of "accommodation bridge" in the Railway Clauses Act 1845, sec. 60. Reference was also made to the following cases—*Rex* v. *West Riding of York* (1806), 7 East. 588; *Reg.* v. *Mayor of Lincoln* (1838), 8 A. and E. 65; *Nottingham County Council* v. *Manchester Railway Company*, August 7, 1894, 71 L.T. 430.

LORD M'LAREN—This is a sequel to a case which came before us on 14th March on the more general question of whether the Railway Company were under obligation to build a bridge for the accommodation of the pursuers and irrespective of the company's intention to construct a railway. I just mention—as it may have a bearing on a question raised about expenses—that according to my recollection of the case, which I understand is confirmed by counsel on both sides, neither party sought on that occasion to raise the question whether an obligation to build a bridge would include an obligation to build the approaches to the bridge. No doubt both parties were perfectly aware that such a question had to be approached, but whether they thought they would settle it by agreement, or whether they thought it would be more conveniently settled at a future stage of the case, we do not know. The point is that neither party sought to raise it at the previous discussion, and the case accordingly went back to the Lord Ordinary.

The case is now before us on the Lord Ordinary's final judgment, and the question is whether in this agreement the obligation which we have already held to be established to construct a bridge includes as an integral part of it, or as a consequence, an obligation to form the approaches to the bridge. The Lord Ordinary has referred to the Railway Clauses Consolidation Act as giving a clue to the meaning of the words "accommodation bridge" or "accommodation works," and for that purpose—I mean as a guide to the interpretation of the language used—I think a reference to the statute is admissible. Now, when your Lordships refer to the Railway Clauses Consolidation Act I think it is quite plain that under the general heading of "accommodation works" which are there provided for, bridges to and from the railway are among the things which the company is bound to make in pursuance of their obligation to give communication to proprietors whose lands are scheduled. That, however, does not carry us very far, for it is possible the parties to this agreement may have intended a different obligation to what the Legislature has imposed on railway companies where they proceed to enter on lands independently of agreement.

Now, the thing which the Railway Company undertook to do was "to construct

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and maintain in all time coming at their own expense one accommodation bridge over or under the branch railway intended to be formed," and there is a provision that "plans and sections of the bridge to be constructed by the said company, and of the approaches to the said bridge, shall be submitted to our engineers before the construction thereof is commenced." The words which I have last read prove to my mind that under the obligation to provide an accommodation bridge it was in the contemplation of both parties that this bridge was to include approaches. Because if there were to be no approaches, or if the formation of approaches were to be left to the proprietor himself, then I could see no object in requiring the company to provide for plans of approaches which they were not to construct, and for submitting these to the parties who are in this case to construct them at their own expense or not to construct them at all.

I agree with the Lord Ordinary also in thinking that in the absence of excluding words the obligation to construct a bridge means a completed bridge—not a bridge with piers and girders at a different level from the roadway, or an arch with abutments at a different level from the roadway —and for this good reason, that the motive of the obligation is to give a passage where the continuity of the road is interrupted. Where that interruption of continuity exists, whether caused by a river crossing the road or by a railway (which of course cannot be traversed in safety by passengers), the motive of the construction of a bridge is just the same—to give a passage and to restore the continuity of a road which is interrupted by the river or railway. Now that object would not be obtained unless the necessary approaches were superadded to what in the more restricted sense may be called a bridge. And if one may appeal to the ordinary use of language (though that is always subject to the observation that people do not always understand the same words in the same sense), I think according to the ordinary use of language the word "bridge" would not be limited merely to the arch or girders and their supports, but would include all that was necessary to effect a safe passage from one side to the other of the obstacle to be surmounted. I am therefore of opinion that the Lord Ordinary's interlocutor is right on the merits.

With regard to the question of time, if your Lordships agree with me I should be disposed to give a slight extension of time to the Railway Company on this ground, that the agreement does not specify any time, and therefore the law will imply a reasonable time. Now I do not profess to have such practical knowledge of bridge construction as to know for myself what would be a reasonable time. But when we are dealing with a corporation like the Caledonian Railway Company, though we do not take their arguments for more than they are worth, yet if they assure us that their engineers cannot undertake to complete the bridge within the time proposed I feel bound to accept that statement, and to give them the necessary extension of time. Of course that would not be very great—I think three months is asked for.

LORD PEARSON—I entirely agree with all your Lordship has said.

LORD JOHNSTON concurred.

The Court pronounced this interlocutor:—"... Vary said interlocutor [of 5th June 1906] by deleting therefrom the words 'and that within the period of one month from this date,' and substituting therefor the words 'and that within the period of three months from the date of this interlocutor of the Inner House': *Quoad ultra* adhere to the said interlocutor and decern."

Counsel for Pursuers and Respondents—M'Clure, K.C.—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defenders and Reclaimers—Guthrie, K.C.—Blackburn. Agents—Hope, Todd, & Kirk, W.S.

Saturday, July 14.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

ABERDEEN CITY PARISH *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Poor Rates — Deductions from Annual Value—"Repairs, &c."—Deductions to be Calculated as on Whole Railway and not as on Subjects in Parish—Poor Law (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *secs.* 37 *and* 45—*Lands Valuation (Scotland) Act* 1854 (17 *and* 18 *Vict, c.* 91), *sec* 22.

Held that the deductions from the yearly value in the parish, as entered in the valuation roll, for repairs, &c., which a railway company is entitled to under section 37 of the Poor Law (Scotland) Act 1845, are to be calculated "at the same percentage as the repairs, &c., over the whole undertaking bear to its *cumulo* valuation," and do not depend on the character of the railway property, *e.g.*, stations or permanent way, within the parish.

The Poor Law (Scotland) Act 1845 (8 and 9 Vict. c. 83) enacts—section 37—"And be it enacted that in estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and the expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same. . . ."

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Section 45—"And be it enacted that in cases where any canal or railway shall pass through or be situate in more than one parish or combination, the proportion of the annual value thereof on which such assessment shall be made for each such parish or combination shall be according to the number of miles or distance which such canal or railway passes through or is situated in each parish or combination in proportion to the whole length."

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. c. 91), section 22, enacts—"The yearly rent or value, in terms of this Act, of the lands and heritages in any parish, county, or burgh, belonging to or leased by any railway or canal company, and forming part of the undertaking of such company, shall be ascertained as follows—that is to say, there shall be deducted in the first place from the *cumulo* yearly rent or value of the whole lands and heritages in Scotland as aforesaid of each such railway or canal company a sum equal to three pounds per centum of the whole cost as aforesaid of the stations . . . and other houses and places of business in Scotland of and connected with the undertaking . . . and the proportion of such diminished *cumulo* rent or value corresponding to the lineal measurement of the portion of the line . . . of such railway or canal company situated in such parish, county, or burgh, as compared with the lineal measurement of the entire line . . . with the addition of a sum equal to three pounds per centum of the cost as aforesaid of any station . . . or other house or place of business within such parish, county, and burgh, of or connected with the undertaking . . . shall be deemed and taken to be the yearly rent or value, in terms of this Act, of the lands and heritages in such parish, county, or burgh, belonging to or leased by such railway or canal company and forming part of its undertaking."

The Lands Valuation (Scotland) Amendment Act 1867 (30 and 31 Vict. c. 80), sec. 4, alters three per centum in the above-quoted section to five per centum.

On 30th May 1905 the Parish Council of the City Parish of Aberdeen presented a petition in the Sheriff Court at Aberdeen, in which they sought to recover from the Caledonian Railway Company the sum of £452, 13s. 8d. as the poor and other parochial rates due by the defenders, as assessed on their undertaking within the parish. The sum on which the assessment had been made had been arrived at by allowing, under section 37 of the Poor Law Amendment (Scotland) Act 1845, a deduction of 30 per cent. from the yearly value appearing in the valuation roll. The company claimed a larger deduction, and had offered to accept a deduction of 35 per cent., while maintaining that they were really entitled to 41·71 per cent. The company's undertaking within Aberdeen City Parish consisted of a terminus station, offices, and a small portion of permanent way.

The pursuers, *inter alia*, pleaded—"(3) The deductions claimed by the defenders in respect of repairs, insurance, and other expenses, so far as regards stations and other erections, being based on the *cumulo* cost of such repairs, &c., over their whole undertaking, and the defenders being only entitled to a deduction of the probable average cost of such repairs, &c., applicable to the stations and other erections lying within the pursuers' parish, the defences are irrelevant and should be repelled."

The facts of the case are given in the Sheriff-Substitute's note (*infra*).

On 28th October 1905 the Sheriff-Substitute (ROBERTSON) found that the deduction of 30 per cent. allowed by the pursuers upon the gross value of the defenders' undertaking within the City Parish was as much as the defenders were entitled to, and granted decree as craved.

"*Note.*—The question to be decided in this case is the amount of deduction the defenders are entitled to have taken from their valued rent before poor and school rates are imposed.

"The deductions are fixed by section 37 of the Poor Law Act of 1845, and are stated to be the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same. The manner of dividing up the *cumulo* value of the railway into the different parishes is provided by section 45 of the above Act, as modified by the Lands Valuation (Scotland) Act of 1854, sections 21 and 22, and subsequent Acts. It is described in Deas on Railways (Ferguson), p. 854.

"In the present case the Railway Company produces a statement showing the cost of repairs, &c., over *its whole system* for six years, by which it appears that taking these six years the average cost of repairs, &c., over the whole system is 41·71 per cent., and they claim this deduction from the valued rent of the Aberdeen City Parish. The Parish Council offered 25 per cent., and subsequently 30 per cent., and the Railway Company have offered to accept 35 per cent., but the parties cannot get nearer each other. The point of principle at issue is shortly this. The Railway, as I have stated, claim a deduction of 41·71 from the proportion of their total valuation effeiring to the Aberdeen City Parish, *i.e.*, £5217. The pursuers argue, in the first place, that six years is too short a period, but secondly, and chiefly, they point out that the value of the Railway Company's property in the parish consists mainly of the value of station buildings, &c., the value of the line being only £612, while that of the station, &c., is £4605. Further, that it appears from the statement lodged by the Railway Company themselves that the cost of repairs, &c., upon stations does not constitute anything like so serious a yearly burden as the maintenance of the permanent way, nor does it amount to anything like the same percentage of the original cost, and further, that it is not an increasing burden. That by section 34 of the Act of 1845 it is clear that it is the lands and heritages within the parish that

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must be assessed, and similarly it is argued that the deduction under section 37 must be the deduction applicable to the lands and heritages within the parish. If this is sound, pursuers argue that obviously it would be unfair to allow the average deduction over the whole system to this parish, because in point of fact, taking the average deduction (*a*) from £612 worth of permanent way, and (*b*) £4605 worth of station buildings, &c., and adding them together, they would amount to a much less proportion of the total sum than 41 per cent.

"I must say I see difficulties in carrying out pursuers' contention here, and I dare say in some parishes it may result in anomalous results. In many respects it would save trouble and come to pretty much the same thing in the end to adopt the Railway Company's contention. But if it is to be strictly construed, I think the pursuers are right. It is the lands and heritages within the parish that are assessable, and I think it should be the deductions properly falling to these lands and heritages that should be made.

"I therefore adopt pursuers' contention, and in respect of their offer fix 30 per cent. as the amount of the deduction to be allowed."

The Railway Company appealed, and argued—The method of arriving at the valuation of the railway within a parish was prescribed by the Poor Law Act of 1845. The *cumulo* value of the whole undertaking was to be taken and divided among the parishes in proportion to the mileage therein. It followed that the proper deduction for repairs was the average cost thereof over the whole undertaking. The Lands Valuation Act of 1854 did not alter the *cumulo* basis although it provided for the deduction, before division by mileage, of 3 per cent. on the cost of stations; nor did subsequent Acts, although the 3 per cent. on the cost of stations provided by sec. 22 of the 1854 Act was altered to 5 per cent. by sec. 4 of the Lands Valuation (Scotland) Amendment Act of 1867 (30 and 31 Vict. c. 80). Division of the undertaking as a whole still remained the method for obtaining the annual value in the parish, and the repairs must also be on the undertaking as a whole. The parish was not entitled to get the benefit of the profits over the whole system and yet limit the deductions for repairs to the actual expenditure thereon within the parish. The following cases were referred to:—*Edinburgh and Glasgow Railway Company* v. *Adamson*, March 10, 1853, 15 D. 537 (at p. 542); and Sequel, June 28, 1855, 17 D. 1007, *aff.* June 7, 1855, 2 Macq. 331; *Edinburgh and Glasgow Railway Company* v. *Meek*, December 10, 1864, 3 Macph. 229, at p. 236; *Edinburgh and Glasgow Railway Company* v. *Hall*, January 19, 1866, 4 Macph. 301, 1 S.L.R. 113; and 2 S.L.R. 159; *Inspector of Poor of St Vigeans* v. *Scottish North Eastern Railway Company*, May 9, 1870, 8 Macph. (H.L.) 53, 7 S.L.R. 459; *Magistrates of Glasgow* v. *Hall*, January 14, 1887, 14 R. 319, 24 S.L.R. 241.

Argued for the respondents—Section 45 of the Act of 1845 and sections 21 and 22 of the 1854 Act were to be read together. The same method should be followed in fixing the amount to be deducted as in fixing the value of the railway within the parish, *i.e.*, the actual amount of the permanent way therein should be taken and the amount representing stations, offices, &c., and the deduction for repairs should be calculated as on the subjects within the parish, *i.e.*, stations on which the cost of repairs was small, or permanent way on which it was large. Any other method would be unfair. The real question was what was the amount of average cost of maintaining the lands and heritages *in the parish* in their actual state. The Act of 1854, by providing for an allowance for stations, offices, &c., altered the method of assessment laid down in sections 34, 37, and 45 of the Act of 1845, and the words, "under deduction of the probable annual average cost of repairs," &c., in section 37 of the 1845 Act meant repairs "within the parish." These words were implied in the section. Reference was made to *Edinburgh District Railway Company* v. *Arthur*, February 24, 1858, 20 D. 677.

At advising—

LORD PRESIDENT—[*His Lordship's opinion was read by Lord M'Laren, and was as follows*]—The point to be decided is as to what deduction a railway company is entitled to have taken from its valuation in respect of sec. 37 of the Act of 1845; and the point of controversy lies in whether the "repairs, &c."—the cost of which form a deduction under that section—are to be a proportional part of the repairs of the railway as a whole, or are to be the repairs of the particular portions of the railway property which lie within the particular parish.

The Sheriff-Substitute has decided in favour of the latter contention, and the key to his judgment may be found in a single sentence of the pursuers' contention which he subsequently adopts. He says "that by sec. 34 of the Act of 1845 it is clear that it is the lands and heritages *within* the parish that must be assessed, and similarly it is argued that the deduction under sec. 37 must be the deduction applicable to the lands and heritages *within* the parish."

I think that the Sheriff-Substitute has here overlooked the fact that whereas his description of the valuation under sec. 34 is obviously true of ordinary lands and heritages, it does not apply to railways, which are separately dealt with by sec. 45. Now that section provides that in all cases where any canal or railway passes through or is situate in more than one parish or combination, the proportion of the annual value thereof on which such assessment shall be made shall be according to the number of miles or distance which such canal or railway passes through such parish or combination in proportion to the whole length.

It is quite clear from this section that

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the valuation is the *valuation* of the railway as a whole—the *assessment* is on a proportional part of that valuation. If authority for this were needed it is to be found in the judgment of Lord Colonsay in the case of *Edinburgh and Glasgow Railway Company* v. *Adamson*, quoted with approval by the Lord Chancellor in *Inspector of Poor of St Vigeans* v. *Scottish North-Eastern Railway Company*, who says (8 M. (H.L.) 58), "the actual value, positive or relative, of the part of the railway situated within each parish is excluded from the inquiry. The railway is to be taken as a whole, and the annual value thereof is to be ascertained, and when the annual value as a whole shall have been ascertained, then that annual value is to be apportioned according to the enactment of the statute."

It seems to me, therefore, that the Sheriff's argument that the deduction must square with the valuation goes to exactly the opposite result from which he has arrived at, and I am of opinion that under the Act of 1845 the deduction under sec. 37 must be a deduction applicable to the valuation, *i.e.*, in the case of railways to the valuation as a *unum quid;* after which, the net value being settled, the proportion of length will fix the amount of the assessable subject for each parish.

It was, however, argued before your Lordships that however that might be under the Act of 1845, the Valuation Act of 1854 made a difference. I need not repeat the provisions of this familiar Act. By it valuation was transferred to the assessor, deduction under sec. 37 being left with the poor law authority, who must take the valuation as they find it given them. All that has been settled by a series of cases, of which *Edinburgh and Glasgow Railway Company* v. *Meek* (3 Macph. 229), and *Magistrates of Glasgow* v. *Hall* (14 R. 319) may be taken as examples. Further, a special assessor was created for railways, and special directions were given to him under sec. 22. But when sec. 22 is scanned it will be seen, I think, that the initial proceeding, and indeed the only proceeding of valuation, is just as it was under sec. 45 of the Act of 1845, *i.e.*, a valuation of the railway as a *unum quid*. The subsequent provision is not one of valuation but is a prescribed arithmetical operation, depending not on valuation but on cost of certain things. It seems to me therefore that in this matter we are left just where we were under the Act of 1845, and the deduction is a deduction from the whole valuation of the railway, which is subsequently applied to the particular parish by the proportional method.

I am therefore for recalling the judgment, and I think justice will be done by fixing the percentage at what the railway company extrajudicially offered to agree to, viz., 35 per cent., and finding the railway Company entitled to expenses in both Courts.

LORD KINNEAR—I agree.

LORD PEARSON—I am of the same opinion.

LORD M'LAREN—I did not take part in the hearing, and therefore give no opinion.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 28th October 1905: Find that the deductions which the defenders and appellants are entitled to have made from the valuation in respect of the probable average annual cost of repairs, insurance, and other expenses under section 37 of the Poor Law (Scotland) Act 1845 are to be calculated by deducting from the rental of the undertaking within the parish an amount for repairs, &c., at the same percentage as the repairs, &c., over the whole undertaking bear to its *cumulo* valuation: And in respect of the offer on record by the defenders and appellants to restrict their claim for deductions to 35 per cent., Find that the defenders and appellants are entitled to a deduction of 35 per cent. from the valuation of their lands and heritages within the City Parish of Aberdeen as fixed by the Assessor of Railways: Find that the amount of assessment due to the pursuers by the defenders and appellants for the period in question is £420, 6s. 10½d., with interest thereon at the rate of 2½ per cent. per annum from 15th October 1904 till payment, for which decern against defenders: Find the defenders and appellants entitled to expenses both in the Sheriff Court and in this Court, and remit," &c.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders and Appellants—Cooper, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 19.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

MURRAY'S TRUSTEES *v.* TRUSTEES OF ST MARGARET'S CONVENT AND ANOTHER.

Superior and Vassal — Restriction on Building — Feuars with a Common Superior—Reference to Feuing Plan—Mutuality of Rights and Obligations—Enforcement of Restriction by One Feuar against Another.

A proprietor feued out to two feuars two different portions of his estate, placing them under similar building restrictions, and referring to a plan of the estate, but in the first charter it was stated that "the superiors shall not be bound by the plan in feuing out the remaining portion of the estate further than by a general conformity thereto," and in the second that "the feuing plan is referred to for no other

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purpose whatever than as showing the portion of the ground feued."

Held (*sust.* Lord Ordinary Ardwall) that there was no mutuality of rights and obligations, and consequently that the building restrictions were not enforceable by the owners of the one feu against the owners of the other—*Hislop v. MacRitchie's Trustees*, January 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, *commented on and followed.*

Property—Servitude—Constitution—Building Restriction—Restriction Imposed by Recorded Deed — Prohibition of "Any Building of an Unseemly Description"—Erection of Tenement near Villas.

Proprietors of adjoining feus made an agreement whereby it was provided that the proprietor of the one feu should not be entitled to erect on a portion of his feu "any building of an unseemly description," and a deed giving effect to this agreement was duly recorded in terms of the Titles to Land (Scotland) Act 1868. Singular successors in the other feu, on which there was a large villa, subsequently brought an action to obtain declarator that the restriction was valid and interdict against the erection of tenements.

Held (*rev.* Lord Ordinary Ardwall) that "whether it enters the title or not, a condition against the erection of buildings that are unseemly is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors."

Opinion (*per* Lord Kinnear) that it was not "unseemly that four-storeyed tenements should be erected in the neighbourhood of a handsome villa."

Question (*per* Lord Kinnear) whether the registration of a written instrument, which forms no part of the title to land, will serve the same purpose as infeftment following upon the conveyance of the land with regard to the imposition of restrictions. *Coutts v. Tailors of Aberdeen*, August 3, 1840, 1 Rob. 296; Bell's Prin. 979; and dictum of Lord President Inglis in *Bankes & Company v. Walker*, June 5, 1874, 1 R. 981, 11 S.L.R. 566, *commented on.*

On February 15, 1905, Mrs Catherine Isabella Murray, St Margaret's Tower, Strathearn Road, Edinburgh, and Patrick Blair, Writer to the Signet, Edinburgh, testamentary trustees of the late David Murray, Deputy-Controller of Excise for Scotland, raised an action against Agnes Dunn, St Margaret's Convent, Edinburgh and others, trustees for St Margaret's Convent, Edinburgh, and George Alexander Wilson, 3 Hope Park Crescent, Edinburgh. In it the pursuers, *inter alia*, sought that "(1) it ought and should be found and declared, by decree of the Lords of our Council and Session, that the unbuilt-on area of ground situated on the east of the pursuers' property of St Margaret's Tower, Strathearn Road, Edinburgh, which unbuilt-on area forms the westmost portion of the subjects feued to the Right Reverend James Gillis, Doctor of Divinity, Bishop of Limyra, residing at Greenhill Cottage, Edinburgh, by the trustees of Mrs Ann Grant, widow of Francis Grant, of Kilgraston, conform to feu charter, dated 23rd, 27th, and 29th January and 1st February 1858, and instrument of sasine following thereon, recorded in the Particular Register of Sasines for the sheriffdom of Edinburgh, &c., 17th February 1858, is subject to valid and binding restrictions enforceable by the pursuers against the erection of any buildings other than villas or self-contained dwelling-houses, and against the erection of any buildings otherwise than in general conformity with the feuing plan of the estate of Whitehouse referred to in the said feu-charter and instrument of sasine and also in the pursuers' titles; and that the defenders the trustees of St Margaret's Convent are bound to insert or validly refer to the said restrictions in all feus, dispositions, or other deeds to be granted of or affecting the said unbuilt-on area, and that the said unbuilt-on area is also subject to a servitude constituted in favour of the pursuers' said property of St Margaret's Tower against the erection of any building of an unseemly description or within 30 feet of the boundary of the pursuers' said property; (2) it ought and should be found and declared by decree foresaid that the buildings delineated on certain plans lodged by the defender George Alexander Wilson in the Dean of Guild Court, Edinburgh, relative to an application by him now depending before the said Court for warrant to erect the buildings delineated on the said plans, are in contravention of the said restrictions or one or other of them, or of the said servitude, and that the defenders are not entitled to erect the buildings delineated on the said plans, or to erect on any part of the unbuilt-on area of ground situated to the east of the pursuers' property flatted tenements of any description. . . ."

The pursuers were proprietors of St Margaret's Tower, a large villa residence, which was bounded on the north and west by St Margaret's Convent and grounds, the property of the first-named defenders. Both properties were originally parts of the estate of Whitehouse. The second named defender was, in virtue of certain missives of feu between him and the first-named defenders, proposing to erect on the latter's ground, immediately adjoining the pursuers' property, a block of tenements with regard to which the pursuers averred —"The tenements are to be four storeys in height, and the end of one of them and the back of the other will face the pursuers' property, which will thus be directly overlooked at a distance varying from 30 to about 46 feet by about 60 windows, mostly from kitchen sculleries and closets, with

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the usual accompaniments of external pipes, larders, and clothes-lines. The proposed buildings will utterly destroy the amenity of the pursuers' property and seriously depreciate its value."

The pursuers' property had been feued out in 1855 to Mr David Murray, their author, by feu charter granted by the trustees of Mrs Grant as proprietors of the estate of Whitehouse, which was followed by instrument of sasine recorded in the same year. The feu charter described the property as bounded in certain ways, "and on the east by the unfeued portion of the lot of ground marked No. 2 on the feuing plan of said lands of Whitehouse, but declaring that the superiors shall not be bound by the said plan in feuing out the remaining portions of the estate further than by a general conformity thereto," consisting of "the lot delineated on said feuing plan and marked No. 1 thereon, and a portion of the lot also delineated and marked No. 2 thereon," and the feuar was taken bound "to erect upon the said plot or piece of ground hereby disponed a good and substantial dwelling-house or houses of the value in all of Eight hundred pounds at the least, a plan and elevation of such erections being previously exhibited and approved of by us or by our successors or by an architect to be employed by us or them for that purpose before any such building is commenced, in order that the buildings to be erected may be built in a neat and substantial manner, without prejudice to the said David Murray or his foresaids thereafter erecting one or more dwelling-houses and suitable offices in addition to those above mentioned on the said grounds, the plans being in like manner previously submitted to and approved of by us and our foresaids; . . . and in the event of the said building or buildings or any part thereof being burnt down, the said David Murray shall be bound to rebuild the same in the same style or according to a new plan to be submitted to and approved of by us or our foresaids, and such new building or buildings shall not be of a less expensive description than those which he is hereby bound originally to erect; and it is also hereby provided and declared that the said David Murray shall be bound and obliged to enclose the plot or piece of ground hereby disponed in so far as this is not already done with a substantial stone dyke of at least five feet in height and neatly coped, excepting that along that portion of the ground which lays contiguous to or adjoins the public street or road, and to the extent of the front of the house or houses to be erected thereon, the enclosure may be by a parapet of dressed stone not exceeding three feet in height, having an iron railing on the top of it, the said David Murray and his foresaids being bound to uphold the said enclosures when erected in good and substantial repair: . . . And it is further provided and declared that the ground hereby disponed lying around the house or houses to be built by the said David Murray shall be formed into a garden or shrubbery, which shall be kept and maintained as such or in grass in a neat and proper manner, and shall be put or diverted to no other purpose except with the consent of us or our foresaids first had and obtained; and in the event of the said David Murray or his foresaids being at any time desirous of erecting stables on the piece of ground hereby disponed, they shall be entitled to do so only by building them adjoining to and in connection with the dwelling-house or houses to be erected by him or them, or if they are desirous of building them detached therefrom they shall be bound to place and construct the same according to a plan to be submitted to and approved of by us or our foresaids or by any architect to be named by us, and which stables shall in either case be built in such a manner as shall not interfere with the view or amenity of any of the adjoining feus: Declaring, as it is hereby expressly provided and declared, that in feuing out the grounds lying on the south side of the foresaid street or road bounding the subjects hereby disponed on the south, we and our foresaids shall, in addition to an obligation to enclose with a parapet wall and railing in front of the dwelling-houses, insert in the feu-charter or other feu rights to be granted in favour of the vassals in the lots marked Nos. 13, 15, and 16 on the foresaid feuing plan a clause expressly binding the feuars in the said lots to place the fronts of the dwelling-houses to be built thereon facing towards the said street or road, and prohibiting the feuars from placing the fronts of the dwelling-houses in any other direction, and also prohibiting them from erecting any offices or outhouses betwixt the dwelling-houses to be built on the said lots and the said street or road: And it is also hereby provided and declared that no distilleries, manufactories, breweries, candleworks, tanworks, kilns, or steam-engines, shall be erected, allowed, or carried on either by us or our successors or assignees or by the said David Murray and his foresaids upon or adjacent to the piece or plot of ground hereby disponed or on any other part of the said lands of Whitehouse, or any other work or manufactory which can be reckoned a nuisance to the public or to the neighbouring feuars or proprietors; nor shall any dunghills be collected for sale or for any other purpose than the improvement of the foresaid plot or piece of ground. . . ."

The property of the first-named defenders had been feued out in 1858 by feu-charter granted by the same superiors to the Right Reverend Doctor James Gillis, which was followed by instrument of sasine duly recorded in the same year. The feu-charter described the ground as bounded in certain ways, "and on the west by the ground feued to David Murray, which forms part of the plot of ground marked Number Two on the feuing-plan after mentioned . . . which piece of ground is marked or delineated on a feuing-plan of the said lands of Whitehouse, made out by George Smith, Esquire, architect in Edinburgh, and is

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composed of the eastmost portion of plot marked Number Two on said plan, the whole of plots marked Numbers Three, Four, and Five on the said plan, and the triangular piece of ground, not numbered, lying immediately to the east of the said plot of ground marked Number Five on said plan, the said feuing-plan being hereby referred to for no other purpose whatever than as showing the position of the ground hereby feued: Provided always, as it is hereby provided and declared, that no more than four dwelling-houses or villas shall be erected on the said piece of ground, and that a plan and elevation of such erections shall be exhibited to and approved of by us or by our successors, or by an architect to be employed by us or them for that purpose before any such buildings are commenced: And it is also hereby provided and declared that the said James Gillis and his foresaids shall be bound and obliged, before commencing any operations, to enclose the piece of ground hereby disponed, in so far as not already enclosed, with a substantial stone dyke at least five feet in height and neatly coped, except along that portion of the ground which lies contiguous to or adjoins the public street or road on the south side of the said ground hereby disponed, along which street or road there shall be built by the said James Gillis and his foresaids a parapet of dressed stone not exceeding three feet in height, having an iron railing on the top of it, or a stone wall having a neatly droved cope, the said James Gillis and his foresaids being bound to uphold the said enclosures, when erected, in good and substantial repair . . . And in the event of the said James Gillis or his foresaids being at any time desirous of erecting stables or other offices on the piece of ground hereby disponed they shall be bound to place and construct the same according to a plan to be submitted to and approved of by us or our foresaids or by any architect to be named by us, and which stables or other offices shall in either case be built in such a manner as not to interfere with the view or amenity of any of the adjoining feus: And it is also hereby provided and declared that there shall be no distilleries, manufactories, breweries, candle works, tanworks, kilns, or steam-engines erected, allowed, or carried on either by us or our disponees upon or adjacent to the piece or plot of ground hereby disponed, or any other work or manufactory which can be reckoned a nuisance to the public or to the neighbouring feuars or proprietors, nor shall any dunghills be collected for sale or for any other purpose than the improvement of the foresaid piece of ground. . . ."

In 1858 an agreement was entered into between Bishop Gillis and Mr Murray whereby Mr Murray agreed to convey to the Bishop a piece of his ground and to come under certain obligations, and the Bishop also undertook certain obligations and to convey to Mr Murray a piece of his ground. The eighth head of agreement was—"The Bishop to engage that he will not erect on the said ground belonging to him on the east of Mr Murray's property any building of an unseemly description or nearer than thirty feet from Mr Murray's eastern boundary wall." Both parties agreed when required to grant any deeds which might be necessary to carry out the agreement and in fulfilment of this certain deeds were subsequently executed.

The disposition granted by Mr Murray was dated in 1863, and proceeded on the narrative that it was granted, *inter alia*, in consideration ". . . that the said Right Reverend Doctor James Gillis has also implemented the other obligations incumbent on him by the foresaid memorandum of agreement, and in particular has delivered to me in exchange for these presents a disposition by the trustees hereinafter mentioned in my favour of part of the ground formerly occupied by him as a tool-house, and also a bond of servitude of same date by the said trustees in my favour over certain subjects now belonging to them."

The bond of servitude dated 21st and recorded in the Particular Register of Sasines 30th September 1863, granted in favour of Mr Murray by Bishop Gillis and others as trustees and heritable proprietors of the subjects acquired in feu by Bishop Gillis in 1858, *inter alia*, provided—"And in the second place we hereby bind and oblige ourselves and our successors in all and whole that triangular piece of ground, part of the lands of Whitehouse, lying in the parish of St Cuthbert's and sheriffdom of Edinburgh, bounded as follows—. . . and on the west by the ground feued to the said David Murray, which forms part of the plot of ground marked Number Two on the feuing plan of the said lands of Whitehouse, made out by George Smith, Esquire, architect in Edinburgh, as the said subjects are more particularly specified and described in an instrument of sasine therein in favour of me, the said Right Reverend Doctor James Gillis, recorded in the said Particular Register of Sasines, &c., the seventeenth day of February Eighteen hundred and fifty-eight: That we and our foresaids shall not erect on any part of the said triangular piece of ground any building of an unseemly description, or nearer than thirty feet from the said David Murray's eastern boundary wall: And we declare that the said servitudes and obligations shall be perpetual on us and our foresaids, and shall be real burdens upon our lands affected by the same respectively: And in order to make these servitudes and obligations more effectual against the subjects before described, so far as they are respectively affected thereby, and without prejudice to the before-written grant of servitudes and obligations, but in corroboration thereof, we bind and oblige ourselves and our foresaids to cause the said servitudes and obligations to be inserted or validly referred to in all future investitures, dispositions, and other conveyances of the said subjects, or any part or portion thereof, so far as they are respectively thereby affected; otherwise such investitures, dispositions, or conveyances shall be null and void: And we grant absolute warrandice: And we consent to regis-

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tration for preservation and execution, and in the General or Particular Register of Sasines, &c., for publication."

The pursuers pleaded—"(1) The defenders' property mentioned on record being subject to the restrictions and servitude also therein mentioned, the pursuers are entitled to decree in terms of the first conclusion of the summons. (2) The buildings proposed to be erected by the defenders on the property in question being in contravention of the said restrictions, *et separatim* of the said servitude, decree should be granted in terms of the second, third, and fourth conclusions, with expenses. (4) The defender Wilson has no title to enable him to resist the conclusions of the action."

The defenders pleaded—"(1) As regards the restrictions in the charter of 1858, no title to sue. (3) The erection of the proposed tenements not being struck at by either the restrictions in the charter of 1858 or the bond of servitude, the defenders are entitled to absolvitor."

On 10th November 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor—"Finds and declares (*First*) that the unbuilt-on area of ground situated on the east of the pursuers' property of St Margaret's Tower, Strathearn Road, Edinburgh, which unbuilt-on area forms the westmost portion of the subjects feued to the Right Reverend James Gillis, Doctor of Divinity, Bishop of Limyra, residing at Greenhill Cottage, Edinburgh, by the trustees of Mrs Ann Grant, widow of Francis Grant of Kilgraston . . . is subject to a servitude constituted in favour of the pursuers' said property of St Margaret's Tower against the erection of any building of an unseemly description or within 30 feet of the boundary of the pursuers' said property: *Quoad ultra* assoilzies the defenders from the first conclusion of the summons: (*Second*) Finds that the buildings delineated on certain plans lodged by the defender George Alexander Wilson in the Dean of Guild Court, Edinburgh, relative to an application by him now depending before the said Court for warrant to erect the buildings delineated on the said plans, are in contravention of the said servitude, and that the defenders are not entitled to erect the buildings delineated on the said plans or to erect on any part of the unbuilt-on area of ground situated to the east of the pursuers' property aforesaid flatted tenements of any description: (*Third*) Interdicts, prohibits, and discharges the defenders from erecting the buildings for which warrant has been craved as aforesaid. . . ."

Opinion.—"In this case the representatives of the late David Murray, a feuar on the Whitehouse estate, Edinburgh, seek to prevent the trustees of St Margaret's Convent, who are the representatives of the late Bishop Gillis, another feuar on the Whitehouse estate, from erecting on feus belonging to them a number of tenements. They seek to do so upon two grounds. In the first place, the pursuers maintain that under the titles of their feu and the titles of the defenders' feu immediately to the east, a mutual obligation was laid upon the feuars (*a*) to adhere to the feuing plan of 1852, and (*b*) not to erect buildings on their feus other than villas or self-contained dwelling-houses. I am of opinion that upon this ground the pursuers have failed on the titles to establish their case. In the first place, in the pursuers' feu-charter it is declared 'that the superior shall not be bound by the said plan in feuing out the remaining portion of the estate further than by a general conformity thereto;' further, there is no obligation undertaken by the superior to insert a reference to the feuing-plan in the titles of any other feus that might be given off by him; and in the feu-charter granted to the defenders in 1858 of the ground lying immediately to the east of the feu granted to Mr Murray the feuing-plan is not referred to in any way as obligatory either upon the superior or vassal. In this state of the title I do not think it can be held that the feuing-plan binds either of the parties to erect nothing but villas on their feus. It is noticeable that the pursuers' feus, Nos. 1 and 2, are represented on the feuing-plan as altogether free of buildings, whereas there are villas of various shapes, sizes, and designs delineated on all the other feus, and as appears from the record a continuous range of dwelling-houses has been erected on the feus opposite the pursuers' feu. It is, however, only right to say that these houses resemble villas in their character and height, and have plots of garden ground in front and behind.

"Coming now to the conditions in the feu-charters, it appears from the pursuers' feu-charter that while the feuar is taken bound to erect on the ground a certain good and substantial dwelling-house or houses of the value of £800 at least upon a plan to be approved of by the superior, that obligation is to be without prejudice to the feuar thereafter erecting one or more dwelling-houses and suitable offices in addition to those before mentioned, the plans thereof to be similarly approved of by the superior. Then again, while it is provided that the ground lying round the house or houses to be built by the pursuers should be formed into a garden or shrubbery, the deed goes on to say that the said ground shall be 'kept and maintained as such or in grass in a neat and proper manner, and shall be put or diverted to no other purpose except with the consent of the superiors.' Under both of these clauses it must be noticed that the conditions of the feu which alone seem to limit the use of it to the site of a villa residence surrounded by garden ground can be dispensed with by the superior, and if he can dispense with it in the case of the pursuers it is clear that other feuars on the estate could not enforce it, so the idea of mutuality of obligation seems to be altogether out of the question in the present case (see *Turner* v. *Hamilton*, 17 R. 494), and it does not affect this question of mutuality that the feuars in a question with the superior are bound to have the conditions inserted in future investitures. In the defenders' feu-charter of 1858 the

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conditions are not exactly similar, but there is nothing in it to shew mutuality of agreement between the different feuars. On the contrary, all the obligations seem to be in favour of the superior alone. The only clauses in the respective feu-charters which can in any way be said to establish a mutuality of obligation are the clauses in each feu-charter with regard to stables, which provides in nearly identical words as follows:—'And which stables shall in either case be built in such a manner as shall not interfere with the view or amenity of any of the adjoining feus.' There is, however, no question here as to the building of stables, and apart from that I think it is impossible to maintain that there is any mutuality of obligation between the feuars in respect that under their own title the pursuers are not bound in a question with the defenders to erect nothing but villas on their feus, but may erect what dwelling-houses they please, provided they obtain the consent of the superior, and if they are thus under no binding obligation to the defenders I think it follows that the defenders are under no mutual obligation to them. If under the feu-charters there is no mutuality of obligation imposed, it seems to be unnecessary to inquire whether the defenders, as now superiors of the piece of ground which they have disponed or intend to dispone to the defender Wilson, who intends to build tenements thereon, are under any liability in consequence of their failure to insert clauses in Wilson's charter similar to these in their own charter, for in the view I have taken the provisions in the defenders' feu-charter are of no avail to hinder the defenders or their disponee erecting what tenements they please on the ground belonging to them.

"The second ground, however, on which the pursuers ask declarator and interdict against the erection of the proposed tenements on the ground to the east of their feu is a memorandum of agreement and deeds following thereon. That agreement was entered into under the following circumstances:—The pursuers' author, Mr Murray, having a long frontage to Strathearn Road, was proceeding to build a villa on lot No. 1 of his ground, which adjoins St Margaret's Convent, and on the other hand apparently Bishop Gillis was proposing to erect a verandah or other building adjoining the west wall of Mr Murray's property and exceeding the height thereof. In this way the privacy of the convent on the one hand and the amenity of Mr Murray's feu on the other were being endangered, and by this time Bishop Gillis had acquired all the ground on the Whitehouse estate to the north of Strathearn Road and to the east of the pursuers' feu. In this state of matters the memorandum of agreement was entered into, under which Mr Murray surrendered the south-west portion of his feu, with the house in course of erection thereon, and the Bishop undertook to remove a circular building to the south-east corner of the convent grounds, and to convey the site to Mr Murray. It further provided that no buildings were to be re-erected on the ground conveyed to the Bishop of more than one storey in height, that no buildings or erections of any kind of the character of a cottage or dwelling-house were to be placed on the adjoining bowling-green belonging to Mr Murray, and further, that no building of an unseemly description or nearer than thirty feet from Mr Murray's eastern boundary wall was to be erected on the ground to the east of Mr Murray's property. This agreement was formally implemented in 1863 by the various deeds granted respectively by Mr Murray and Bishop Gillis' successors as owners of the subjects on both sides of Mr Murray's feu. . . . It is sufficient to say that the whole deeds carried out the said agreement, and the object of that agreement was to secure in all time coming the amenity of the respective parties' properties for their mutual benefit. The deed which is applicable to the present question is a bond of servitude, dated 21st and recorded 30th September 1863, under which, *inter alia*, the defenders bound and obliged themselves and their successors in the triangular piece of ground acquired in feu in 1858 lying to the east of Mr Murray's subjects in the following terms:—'That we and our foresaids shall not erect on any part of the said triangular piece of ground any building of an unseemly description, or nearer than thirty feet from the said David Murray's eastern boundary wall,' and the question for decision now is whether the buildings, the plans of which form No. 21 of process, and which are described in the condescendence, are unseemly buildings within the meaning of the said bond of servitude. I am of opinion that they are. The phrase 'unseemly building' must be construed with reference to the position and surroundings of the building, and (in a question of servitude) in view of the effect of its erection upon the dominant tenement. Now, the pursuer's house is a large and ornamental villa named St Margaret's Tower. It stands nearly in the centre of a garden, shrubbery, and policies considerably larger than are generally found in connection with a villa. It has a bowling-green attached to it, and altogether may be described as a small *rus in urbe*. Now, it appears to me that to erect tenements such as those shown on the plans No. 21 of process up to within ten yards or thirty feet of the pursuers' boundary wall would have the effect of completely destroying the amenity of the pursuers' house and grounds. These tenements are aptly described as follows:—'. . . [*quotes averment as to tenements given supra . . .*],' and I am of opinion that, having regard to the locality where they are to be erected, viz., a villa locality, and their proximity to the pursuers' handsome villa residence and grounds, they must be regarded as unseemly buildings within the meaning of the bond of servitude.

"Even if I had any serious doubt on the question as to the meaning and application of the word 'unseemly' in the circumstances under consideration, I should hold *in dubio*

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that the word and the clause in which it occurs must be so interpreted as best to carry out the intention and meaning of the parties in entering into the agreement and deeds following thereon. That intention undoubtedly was to preserve the amenity of the pursuers' residence, and that intention would be frustrated were the tenements in question to be erected on the site proposed.

"I am accordingly of opinion that the pursuers are entitled to interdict against the erection of the said buildings.

"I was referred to the following cases:—*Hislop* v. *MacRitchie's Trustees*, January 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571; *Johnstone* v. *The Walker Trustees*, July 10, 1897, 24 R. 1061, 34 S.L.R. 791; *Spottiswoode* v. *Seymer*, March 2, 1853, 15 D. 458; *Duke of Montrose* v. *Stewart*, March 27, 1863, 4 M'Q. 499; *Hope* v. *Hope*, March 20, 1864, 2 Macph. 670; *Fraser* v. *Downie*, June 22, 1877, 4 R. 942; *Thomson* v. *Alley & Maclellan*, December 22, 1882, 10 R. 433; *Walker & Dick* v. *Park*, February 22, 1888, 15 R. 477, 25 S.L.R. 346; *Turner* v. *Hamilton*, February 21, 1890, 17 R. 494, 27 S.L.R. 378."

The defenders reclaimed, and argued—There was no restriction as to building flatted tenements on any part of their ground, or, alternatively, the area to which it was sought to apply such restriction, if there was one, was too wide. The Lord Ordinary was right as to there being no restriction enforceable by the pursuers in the titles, but had held that any tenement, no matter of what structure, was an unseemly building in contravention of the servitude. An interdict based on this finding and applied to the whole 3½ acres possessed by the defenders was too wide. This was a restriction upon the use of land, and such restrictions must be in very precise terms, whereas the present was vague and general, falling to be construed *contra proferentem*—*Middleton* v. *Leslie*, May 23, 1894, 21 R. 781 (*per* Lord Kinnear, 786), 31 S.L.R. 658. Persons under obligation to erect "a good and substantial dwelling-house" had been held entitled to build tenements—*Assets Company, Limited* v. *Ogilvie*, December 8, 1896, 24 R. 400, 34 S.L.R. 195. The restriction in the servitude should be construed strictly, the presumption always being in favour of the freedom of the ground. The Lord Ordinary's interlocutor should be recalled and the defenders assoilzied.

Argued for the pursuers and respondents — The ground in question here was restricted, if not under the original titles, at least under the bond of servitude as the Lord Ordinary had held. "Unseemly" was not an absolute but a relative term and fell to be construed with reference to the context and surrounding circumstances. The buildings first erected had been put up under titles which made express provision for securing their amenity as between superior and vassal. In the present case the agreement between Mr Murray and Bishop Gillis in 1858, followed by the deeds implementing it in 1863, showed a clear intention to preserve the amenity of the style of house then existing on the subjects, viz., villa property, as between conterminous feuars. The question as to what class of building was struck at by the servitude was truly a jury question, and no jury sitting at the time of the constitution of the servitude could have come to any other conclusion than that the tenements of the sort now proposed were a breach thereof.

At advising—

LORD KINNEAR—The pursuers are proprietors of a house called St Margaret's Tower, and they bring this action for declarator that a certain unbuilt-on area of ground situated to the east of their property is subject, in the *first* place, to valid and binding restrictions enforceable by them against the erection of any buildings other than villas or self-contained dwelling-houses, and against the erection of any buildings which are not in conformity with a certain feuing-plan of the estate of Whitehouse, and *secondly* to a servitude constituted in favour of their property of St Margaret's Tower, against the erection of any building of an unseemly description, or within 30 feet of their boundary, and these declaratory conclusions are followed by corresponding conclusions for interdict. The action is directed against the trustees of St Margaret's Convent, who are the feudal proprietors of the ground said to be burdened, and also against George Alexander Wilson, who is said to have applied to the Dean of Guild Court for a warrant for the erection of buildings in contravention of the restrictions alleged by the pursuers. But while they have called this second defender into Court they have stated at the same time a novel and illogical plea-in-law, that he has no title to resist the conclusions of the action. If this plea were sustained the action must be dismissed in so far as regards him. A denial of the defender's title to defend is, in other words, a denial of the pursuer's interest to bring an action against him. But their case against him is perfectly relevant, for they complain that on the face of missives of feu from the Convent trustees he is about to build in contravention of their right, and if the granters of the proposed feu recognise his right and therefore do not interfere with his operations it is of no consequence to the pursuers that he has not made up a feudal title. They cannot obtain an effective interdict without calling him, nor without allowing him to show cause, if he can, why he should not be interdicted.

The two restrictions which the pursuers seek to enforce are maintained on different grounds. That alleged in the first branch of their declarator is said to be contained in the titles of the defenders first called, the trustees of St Margaret's Convent, and it is the case that such restrictions are expressed in their title to the *dominium utile*. The parties derive right from the same superior, the trustees of the late Mrs Grant of Kilgraston, who feued out their estate of Whitehouse, granting a feu-charter of one portion of that estate to the pursuers' author in 1855, and of another

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portion to the predecessors of the defenders in 1858. The pursuers' contention is that since they and the defenders are feuars of a common superior, who feued out his lands according to a general plan, each is entitled to the benefit of conditions on the charter of the other. As matter of fact, the defenders are no longer in the position of feuars, because they acquired the superiority of these subjects in 1903, and consolidated the superiority with the property in the same year, but while the obligations of their charter as between superior and vassal may have been discharged *confusione* in consequence of their acquisition of the *plenum dominium*, it can hardly be maintained that rights effectually constituted in favour of third persons could be prejudiced by that transaction. The question, therefore, whether the pursuers have a title and interest to enforce restrictions contained in the defenders' feu-charter of 1858 must be determined in the same way as if the *dominium utile* and the superiority were still separate rights, and as if the defenders still held their property under that feu-charter. On that hypothesis, however, I agree with the Lord Ordinary that no such mutuality of rights and obligations was created by the feu-charters of 1855 and 1858 as will enable the pursuers to enforce the restrictions in question. The conditions on which alone such mutuality of rights between the feuars of a common superior arises are stated with precision by Lord Chancellor Selborne in *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95—"This can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves." Now here there are none of these things. There is no express stipulation by the superior that the building restrictions shall be mutually enforceable, and his silence on this point is the more marked because there is a condition with reference to a different matter, which one feuar might be well entitled to enforce against another, since they are both prohibited from erecting tan-works and candle-works and "other manufactories which can be reckoned a nuisance to neighbouring proprietors." It is not pretended that there is an agreement between the feuars themselves, and although there is a reference in both charters to a plan, it is in such terms as to exclude any implication of the kind described by the Lord Chancellor. In the pursuer's charter it is declared that the superiors shall not be bound by the plan in feuing out the remaining portion of the estate further than by general conformity thereto, and in the defenders that "the feuing plan is referred to for no other purpose whatever than as showing the position of the ground feued." In the face of this express declaration it is out of the question to suggest that any obligation is laid upon the defenders which is to be measured by reference to the plan, whatever may have been meant by the mention of it in the pursuer's charter. There remains nothing except a certain similarity in the conditions as to building, but these are conditions of tenure between superior and vassal, and according to the rule established by *Hislop* v. *MacRitchie*, and the previous cases which that decision confirmed, the superior alone has a title to enforce them.

The right claimed in the second branch of the declarator is rested on the totally different ground of an express contract between the pursuer's author and the late Bishop Gillis, a predecessor of the defenders, which was carried into effect by a so-called bond of servitude whereby the Bishop and others, trustees of St Margaret's Convent, bound themselves not to erect on the ground in question "any building of an unseemly description." It is said that the tenements which the defender Wilson proposes to build will contravene this servitude. According to the pursuers' statement they "are to be four storeys in height, and the end of one of them and the back of the other will face the pursuers' property, which will thus be directly overlooked at a distance varying from 30 to about 46 feet by about 60 windows, mostly from kitchens, sculleries and closets, with the usual accompaniment of external pipes, larders, and clothes lines." The Lord Ordinary has held that "having regard to the locality in which they are to be erected, viz., a villa locality, and their proximity to the pursuers' handsome villa residence and grounds," these tenements must be regarded as unseemly buildings within the meaning of the bond of servitude. With great respect I am unable to concur in this opinion. I agree that the tenements described may very probably detract something from what is called the amenity of the pursuers' villa, and one must sympathise with their feeling of annoyance on finding that their prospect of trees and gardens is to be displaced by houses four storeys high. But these are disadvantages that are incident to residence in the outskirts of a growing city, and I am not prepared to say that, however vexatious, it is according to the ordinary use of language "unseemly" that a row of tenements should be erected in the neighbourhood of a villa. If that is a point on which, as the Lord Ordinary's judgment shows, opinions may differ, it follows that the phrase is too ambiguous for the exact definition of a right of servitude. It is not an absolute but a relative term, which has no substantial meaning except in connection with some object, purpose, or character with reference to which something else is characterised as unbecoming or unseemly, and the bond of servitude provides no standard for the specific application of the term, unless it is to be found, as the Lord Ordinary finds it, in the character of the locality which he describes as a villa locality or in the handsome character of the pursuers' house. But the character of the locality is not fixed and unalterable, and we know that as matter of fact there are now a number of streets

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and tenements in the neighbourhood of the Whitehouse estate which were not foreseen in 1858. So shifting a standard is not sufficient for the exact definition of a permanent servitude, and we are thus brought back to the question whether it is unseemly that four-storeyed tenements should be built in the neighbourhood of a handsome villa. So far as my own opinion goes I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude. I am not sure that the Lord Ordinary would have reached his conclusion but for his adoption of a principle of construction which with deference appears to me to be altogether inapposite. His Lordship says that "*in dubio* the word and the clause in which it occurs must be so interpreted as best to carry out the intention" of the parties to the contract. But this is not a personal action upon a contract. It is a real action, and its purpose is to establish a permanent burden upon one piece of land in favour of another irrespective altogether of the relation on which the proprietor of either may stand towards the persons who made the contract. It is to restrain in perpetuity the exercise of the ordinary rights of property by successive proprietors who may in no way represent the contracting parties. The law as to the constitution of such permanent restrictions on the use of property is clearly expressed in the classical judgment of Lord Corehouse in *Coutts* v. *The Tailors of Aberdeen*, 1 Rob. 296—"It is a familiar and long-established rule that the law of Scotland does not admit of any indefinite burden attaching to lands." It is true that in the application of the rule Lord Corehouse distinguishes between indefinite money payments and servitudes, but that is because he selects the servitude as the best type of burdens that are definite and specific. The case of *Coutts*, however, was concerned with burdens which enter the title of the burdened land as conditions of the grant. The rule as to restrictions constructed by deed or contract extrinsic to the grant is more rigorous. It is stated by Professor Bell (Prin. 979) in a passage supported by many authorities, when, after distinguishing between burdens or privileges which may be the subject of personal contracts, and the restrictions which the law will recognise as servitudes affecting singular successors, he says with reference to the latter it is "essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements." It may be said that the condition which, in the author's view, was essential is infeftment, and that the pursuers have the benefit of infeftment, because their bond has been recorded in the Register of Sasines in terms of the Titles Act of 1868. But the infeftment contemplated by Professor Bell was infeftment following upon a conveyance of land. I am not aware of any authority establishing that the registration of a written instrument which forms no part of the title to land will serve the same purpose, and I think that a dictum of Lord President Inglis in *Banks & Co.* v. *Walker* (June 5, 1874, 1 R. 981) is a high authority to the contrary. For his Lordship, rejecting a certain construction which it was proposed to put upon a contract, goes on to say—"If such a restriction is to be found in the contract, there is no known servitude that puts such a restriction on the use of property, and no such restriction on the use of property can affect singular successors unless it enters their titles." However that may be, and whether it enters the title or not, I am of opinion that a condition against the erection of buildings that are "unseemly" is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors. It is unnecessary to inquire whether the Convent trustees are personally bound by the contract, because the other defender is certainly a singular successor, and also because the declarator asked is to establish a permanent burden which will affect the land and its proprietors in all time coming.

The LORD PRESIDENT, LORD M'LAREN, and LORD PEARSON concurred.

The Court assoilzied the defenders from the whole conclusions of the summons.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—Constable. Agents—Blair & Cadell, W.S.

Counsel for the Defenders and Reclaimers—The Dean of Faculty (Campbell, K.C.)—Chree. Agent—Wm. Considine, S.S.C.

Friday, July 20.

SECOND DIVISION.

CANT *v.* PIRNIE'S TRUSTEES.

Poor's Roll—Application for Admission—Precognitions Obtained by Reporters—Names and Addresses of Witnesses—Rights of Opposing Party.

The reporters *probabilis causa litigandi* are bound to show to an opposing party any precognitions which they may have obtained from an applicant for the benefit of the poor's roll in so far as they contain statements of fact. The reporters, however, have a discretion to withhold the names and addresses of the applicant's witnesses.

The procedure connected with applications for admission to the poor's roll is regulated by Act of Sederunt of 21st December 1842.

Section 5 provides as follows:—[After certain preliminary proceedings]—"The party's agent shall box a note to the Lord Presi-

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dent of the Division, simply stating the names and designations of the parties, and craving a remit to the reporters on the *probabilis causa*, on moving which the Court may, on hearing any objections, either refuse the application *de plano* or remit to the reporters, who, on considering the party's case and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi* and otherwise merits the benefit of the poor's roll—said report not to be made sooner than six days from and after the date of the remit except with consent of the adverse party."

Section 11 provides—"That when the Court shall remit an application for the poor's roll to the advocates and agents appointed to consider and report on the *probabilis causa litigandi* as above, it shall be the duty of the Writer to the Signet or solicitor presenting the application to procure from the applicant, or his former agent, information as to the circumstances of the case, and to draw out a memorial thereof and lay the same before the reporters for enabling them to make their report thereon, and shall at the same time intimate the lodgment thereof to the adverse party or his agent by letter post paid; and if further evidence or explanation appear to be necessary either as to the property or character of the applicant, or circumstances of the case, the agent presenting the application shall direct and assist the applicant in procuring the same."

Mrs Cant applied for admission to the poor's roll in order to prosecute an action against Pirnie's Trustees for reduction of a trust-disposition and settlement on the ground, *inter alia*, of fraud. Her application was remitted to the reporters on 4th July 1906, who on 13th July 1906 reported as follows:—"We, the reporters on the *probabilis causa litigandi* of applicants for the benefit of the poor's roll, having, in virtue of the preceding remit, considered the application, beg humbly to report that in our opinion the applicant has not a *probabilis causa litigandi*."

The reporters appended the following note:—"In this case the applicant lodged a memorial for the consideration of the reporters, but did not lodge precognitions. It has been for a long time the practice, in cases turning on questions of fact, to require in addition to, or in place of, a memorial, such precognitions of witnesses as will establish a *probabilis causa litigandi*. The reporters were of opinion that in this case, in addition to a memorial, further evidence appeared to be necessary as to the circumstances of the case (Act of Sederunt, 21st December, 1842, sec. 11), and requested that further evidence should be procured. The agent for the applicant thereupon tendered precognitions of a considerable number of witnesses, but subject to the condition that they should not be shown to the other side. It has for long been the practice of the reporters to allow any party interested, who desired to oppose the admission of the applicant to the benefit of the poor's-roll, to see the memorial and other evidence tendered to the reporters by the applicant, and consequently the reporters were of opinion that they were not entitled to consider precognitions tendered subject to the condition of being seen only by the reporters. They were also of opinion that without the precognitions the applicant had not shown a *probabilis causa litigandi*. They have reported accordingly, but wish to explain that they have done so for the reasons stated in this note."

Thereafter Mrs Cant presented a note to the Lord Justice-Clerk craving him "to move the Court of new to remit the case to the reporters to inquire and report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's-roll."

In the note she submitted "that the reporters, if they called for precognitions, were either bound or entitled to consider the same although their tender was subject to the condition that the defenders should not see them. In refusing to consider the said precognitions as aforesaid the reporters were not acting in accordance with the provisions of the said Act of Sederunt."

When the note appeared in the Single Bills counsel for Mrs Cant, the applicant, submitted the above contention.

Counsel for the objectors, Pirnie's Trustees, were not called on for a reply.

LORD JUSTICE-CLERK—It seems to be the established practice for the reporters on the *probabilis causa*, in cases where questions of fact are involved, to ask for the applicant's precognitions in order to determine whether or not the applicant has a *prima facie* good case, and that such precognitions are shown to the other side. Now, in so far as the precognitions contain statements of fact, I am clear that they cannot be handed to the reporters on the footing that the reporters are to withhold them from the other side. It is quite plain that the other party are entitled to know the statements of fact on which the applicant founds in support of his application to enable objections to be taken if the other party sees fit to do so. Therefore in so far as this application has for its object to obtain a finding from the Court to the effect that the reporters are either bound or entitled to withhold the information contained in the precognitions I think it must be refused.

On the other hand it appears to me quite unnecessary that the names and addresses of the witnesses should be disclosed to the other side. In the ordinary case, in civil actions, one party is not entitled to know the names and addresses of the persons whom his opponent proposes to adduce as witnesses, and I therefore suggest to your Lordships to intimate that the reporters may be held to have a discretion to withhold the names and addresses of the applicant's witnesses. It may be quite right that these names and addresses should be given to the reporters themselves, but I cannot see any reason for giving the information to the other side. But as regards the contents of the pre-

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cognitions I do not think that the reporters have any other or larger discretion which should entitle them to decide the question of *probabilis causa* with the aid of precognitions without the opposite party having the opportunity of seeing the precognitions and being heard on their effect.

LORDS KYLLACHY, STORMONTH DARLING, and LOW concurred.

The Court pronounced the following interlocutor:—"... of new remit as craved...."

Counsel for the Applicant—MacRobert. Agent—W. H. Hamilton, S.S.C.

Counsel for the Objectors—Paton. Agents—Davidson & Macnaughton, S.S.C.

Friday, July 20.

SECOND DIVISION.

[Lord Dundas, Ordinary.

THE DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* THE DUNLOP MOTOR COMPANY, LIMITED.

Trade Name—Personal Name—Infringement—Fraud—Deception—Personal Name already Associated with One Trade or Branch of Trade Applied by Persons of Same Name to Other Trade or Branch of Trade.

Robert Dunlop and John Fisher Dunlop, partners in a cycle and, to a limited extent, a motor repairing business in Kilmarnock, under the name of "R. & J. F. Dunlop," separated the motor and cycle branches of their business and formed of the former a company with a capital of £500, called the "Dunlop Motor Company Limited," of which they and a few friends and relatives were the shareholders. Under the memorandum and articles of association, which were very wide in their scope, they had power to deal in and manufacture, *inter alia*, motors and motoring "accessories." The company had neither the capital nor plant to manufacture motors, but had reasonable prospects of doing good business in repairs and "accessories." The Dunlop Pneumatic Tyre Company, Limited, famous as makers of the "Dunlop" tyre for cycles and motors, the patent for which had recently expired, but who also were makers of cycling and motoring "accessories" of every description, and who also had power under their memorandum and articles of association to manufacture motors, sought to interdict the Dunlop Motor Company, Limited, from carrying on the proposed business under that name or any name comprising the word "Dunlop." There was no evidence to show that the complainers had acquired a special right to the name "Dunlop" in connection with accessories as they had with tyres, or that the respondents had been actuated by any fraudulent motive in the selection of their name, or that any members of the public had really been misled by the name.

The Court *refused to grant* interdict.

Per Lord Kyllachy—"The law ... has never yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been in addition to the mere use of that name some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another."

The Dunlop Pneumatic Tyre Company, Limited, having their registered office at 14 Regent Street, Glasgow, brought an action against the Dunlop Motor Company, Limited, having their registered office at 39 John Finnie Street, Kilmarnock, in which they sought to interdict the respondents "(1) from carrying on business under the style or title of 'The Dunlop Motor Company, Limited,' or under any other or similar style or title comprising the word 'Dunlop,' or any style or title calculated to deceive or mislead the public into the belief that the respondents' company is the same company as the complainers' company, or is in connection therewith, or that the business of the respondents' company is the same or in any way connected with the business of the complainers' company, and (2) from passing off or attempting to pass off the respondents' company's goods as and for the goods of the complainers' company, and also from issuing or publishing any catalogues, labels, circulars, showcards, advertisements, or billheads, or from using any trade name comprising the word 'Dunlop' in connection with any goods not being goods manufactured or sold by the complainers' company...."

They averred, *inter alia*—"(Stat. 1) The complainers are a limited company, incorporated on 6th May 1896. The objects for which the said company was established are, *inter alia*, as follows:—'(*a*) To acquire and take over as a going concern the undertaking of the Pneumatic Tyre Company, Limited (incorporated in 1894), and all or any of the assets and liabilities of that company, and also certain patents, and with a view thereto to enter into and carry into effect, with or without modification, the three several agreements in the terms of the drafts referred to in clause 3 of the articles of association of this company.' '(*b*) To carry on the business of manufacturers and of dealers in and letters to hire of pneumatic and all other tyres and wheels of cycles, bicycles, velocipedes, and carriages and vehicles of all kinds, and all machinery, implements, utensils, appliances, apparatus, and things capable of being used therewith, or in the manufacture, maintenance, and working thereof respectively, or in the construction of any track or surface adapted for the use of any

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such tyres and wheels.' '(c) To carry on the business of manufacturers of, dealers in, and letters to hire of cycles, bicycles, tricycles, velocipedes, perambulators, bathchairs, horse-carriages, motor or horseless carriages, and carriages and vehicles of every description, and all component parts thereof respectively, and also all apparatus and implements and things for use in sports or games' (Stat. 2) The patents known as the Dunlop patents, which were owned and worked by the complainers and their predecessors, caused an unprecedented development in the cycle, motor, and carriage industry, in which the complainers and their predecessors have taken a leading part. The complainers do a large business in every part of the United Kingdom, particularly in the manufacture and sale of tyres, pumps, inflators, and other parts and accessories for motors and cycles. They are also manufacturers of motor tyres and wheels and other motor accessories, such as rugs and motor clothing generally. (Stat. 3) In 1888 the word 'Dunlop' was first used by the predecessors in title of the complainers' company to designate the goods manufactured by them. Since that time the word has been in continuous commercial use as designating generally the goods manfactured by them. The complainers do a large business not only in the manufacture and sale of tyres but also in the manufacture of all accessories used in relation to motor cars and bicycles, and in numerous other goods, rubber and otherwise, used in and about motoring and cycling. These include tyres of all kinds, wheels for motor cars, valves, pumps or inflators for motors, repairing outfits for motor car tyres, indiarubber matting, waterproof clothing, and indiarubber goods of all kinds. All these goods are associated with the name 'Dunlop.' The word 'Dunlop' is stamped on all or most of them. In the case of tyres there is also impressed a bust of the inventor J. B. Dunlop, which forms the trade-mark. The name is associated by the public and in the cycle and motor industry with the complainers' company and their goods. It is of great value to the complainers, many prizes have been awarded for 'Dunlop' motor tyres, and they have repeatedly restrained its use by other companies and firms in the cycle and motor trade. The Dunlop Rubber Company, Limited, referred to in the answer, is a subsidiary company of the complainers, and is owned and controlled by them. (Stat. 4) The respondents are a limited company, incorporated on 1st July 1904. Their purposes as defined by their memorandum of association are, *inter alia*, as follows—'(1) To acquire the motor branch of the business of R. & J. F. Dunlop, cycle and motor merchants and manufacturers, Kilmarnock, and with that object to execute and carry into effect a minute of agreement between R. & J. F. Dunlop, cycle and motor merchants and manufacturers, Kilmarnock, and Robert Dunlop and John Fisher Dunlop, the individual partners of the firm, of the first part, and this company of the second part, a draft whereof has been approved by the subscribers hereto.' '(2) To carry on the business of motor manufacturers' agents and dealers, and all or any other trades or businesses of any kind which can be conveniently carried on by the company in connection with such business or any part thereof, or the carrying on of which may, in the opinion of the directors, be likely to be beneficial to the company.' '(3) To manufacture, buy, sell, repair, convert, let on hire, or otherwise deal in motors, cycles, cars, carriages, carts, waggons, vans, and vehicles, and their component parts and accessories, and fittings and conveniencies of all kinds which can be conveniently dealt in by the company, and to carry on any other businesses, whether manufacturing or otherwise, which can be conveniently carried on in connection with any of the company's objects.' The respondents carry on business in terms of these purposes, and deal, *inter alia*, in tyres, pumps, inflators, wheels, rugs, and other parts and accessories of cycles and moters. They are registered and carry on business under the style and title of the 'Dunlop Motor Company, Limited.' (Stat. 5) The adoption by the respondents of the style or title 'Dunlop Motor Company' is calculated to deceive the public into purchasing the goods of the respondents in the belief that such goods are the goods of the complainers' manufacture, or that the respondents and their goods are associated with the complainers' company. (Stat. 6) The complainers believe and aver that the respondents have adopted said style and title for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, and that they are so passing off their goods as goods of the complainers' manufacture. . . ."

They pleaded, *inter alia*—"(1) The adoption by the respondents in their business of the style or title of 'The Dunlop Motor Company, Limited,' being an infringement of the complainers' rights, interdict should be granted as craved. (2) The adoption of said style or title being calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are the goods of the complainers, interdict ought to be granted as craved. (3) The respondents having adopted said style or title for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, interdict ought to be granted as craved."

The respondents in a statement of facts averred, *inter alia*—"(Stat. 1) The respondents' company was incorporated on 1st July 1904. As the respondents' memorandum of association bears, the respondents' company was formed and incorporated for the purpose, *inter alia*, of acquiring the motor branch of the business of R. & J. F. Dunlop, cycle and motor merchants, Kil-

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marnock. (Stat. 2) Of the seven shareholders who form the respondents' company four of them are Mr Robert Dunlop, Mr John Fisher Dunlop, Mr Alexander Dunlop, and Mr David Dunlop. These four gentlemen are all engaged in the business of the respondents' company, and they hold among them four-fifths of the shares of the respondents' company. (Stat. 3) The name 'Dunlop' has been used by the respondents' predecessors (Messrs R. & J. F. Dunlop) for eight years in connection with the cycle and motor business carried on by them. That firm commenced business in 1897 in premises situated in Bank Place, Kilmarnock, and removed to their present premises at 39 John Finnie Street in November 1898, where the firm still continues to carry on the business so far as not acquired by the respondents' company. The respondents' predecessors have been engaged in the motor business (that is, in the dealing in complete motors, cycles, tricycles, and cars, and the repairing of these things) for seven years, and have during that time peaceably enjoyed the free use of the name 'Dunlop' under the firm name of R. & J. F. Dunlop. The partners of that firm were and still are the said Robert Dunlop and John Fisher Dunlop. (Stat. 4) The said Mr Robert Dunlop and Mr John Fisher Dunlop are the directors of the respondents' company. (Stat. 5) The respondents and their predecessors have become identified with the manufacture, sale, and repair of motors and motor vehicles, and the name is of great value to them in this respect. The respondents, as matter of fact, have never used any trade name comprising the word 'Dunlop' in connection with any goods manufactured or sold by them where that name has been applied to any like goods advertised as manufactured or sold by the complainers. (Stat. 6) The complainers have never dealt in or manufactured motors or motor cars complete, or the engines or bodies of such cars, or even repaired such cars. . . . (Stat. 10) The adoption of the name 'Dunlop' in connection with the respondents' company was in order to retain the goodwill of the business in connection with the manufacture, repair, and sale of motors, which their predecessors had built up during the seven years they had been engaged in the business, and also in order to preserve the name in connection with a new system of transmission gear for motors, which is believed and reported upon to be a very valuable one. This system is the invention of the said Mr John Fisher Dunlop, who, as already stated, was a partner of the respondents' predecessors, and is one of the two directors of the respondents' company. The complainers do not manufacture or deal in the principal part of the respondents' business, viz., the manufacture and sale and repair of motors of all descriptions, whether moving or stationary. The sale of tyres and accessories such as are dealt in by the complainers' company is only incidental to the business of motor manufacturers, and the respondents are not limited to the complainers' goods for such accessories. . . ."

They pleaded, *inter alia*—"The complainers' averments are neither relevant nor sufficient to support the prayer of the note."

A proof was taken by the Lord Ordinary (DUNDAS), the result of which is indicated at length in his opinion and those of the Judges of the Second Division *infra*.

The material facts proved were that the complainers were chiefly known to the public as manufacturers of the famous "Dunlop" tyres for bicycles and motors, the patent for which had recently expired: that under their memorandum and articles of association they had the widest powers of manufacturing everything connected with motors and motors themselves; that they had never manufactured motors, but did a considerable trade in motoring accessories such as wheels, pumps, valves, &c., for none of which, however, had they established an exclusive right to the name of "Dunlop." The respondents on the other hand had not sufficient plant or capital to manufacture motors, but had good prospects of establishing a business in repairing motors, selling motors on commission, and in particular selling all kinds of motoring accessories. There was no suggestion in the proof that they had ever represented that goods of their manufacture were goods manufactured by the complainers, and no proof that their motive in choosing the name of their company had been to obtain a fraudulent advantage from the reputation of the complainers. There was also practically no evidence that any member of the public had been misled by the name.

On August 1, 1905, the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Finds that the adoption by the respondents in their business of the style or title of 'The Dunlop Motor Company, Limited' is an infringement of the complainers' rights, and that such adoption is calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are the goods of the complainers, and into confounding the respondents' business with that of the complainers: Therefore interdicts, prohibits, and discharges the respondents, their servants and agents, from carrying on business under the style or title of 'The Dunlop Motor Company, Limited,' or under any style or title calculated to deceive or mislead the public into the belief that the respondents' company is the same company as the complainers' company, or is in connection therewith, or that the business of the respondents' company is the same as, or in any way connected with, the business of the complainers' company, and from passing off or attempting to pass off the respondents' company's goods as and for the goods of the complainers' company: *Quoad ultra* refuses the prayer of the note . . . and decerns."

"*Opinion.*—In this case interdict is sought by the Dunlop Pneumatic Tyre Company, Limited, against the Dunlop

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Motor Company, Limited. The complainer company was incorporated in 1896. Its memorandum and articles of association are No. 43 of process, and the objects of its formation are, sufficiently for the purposes of the case, summarised in Statement I. The complainers aver (Statement III) that 'in 1888 the word "Dunlop" was first used by the predecessors in title of the complainers' company to designate the goods manufactured by them. Since that time the word has been in continuous commercial use as designating generally the goods manufactured by them. The complainers do a large business not only in the manufacture and sale of tyres but also in the manufacture of all accessories used in relation to motor cars and bicycles, and in numerous other goods, rubber and otherwise, used in and about motoring and cycling.' They enumerate certain classes of goods which they say are associated with the name 'Dunlop,' and add that 'the name is associated by the public and in the cycle and motor industry with the complainers' company and their goods.' The respondent company was incorporated on 1st July 1904. Its memorandum and articles of association form No. 28 of process, and the objects of its formation are, sufficiently for present purposes, recited in Statement IV. The company's registered title is 'The Dunlop Motor Company, Limited.' In Statement VI the complainers 'believe and aver that the respondents have adopted said style and title for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired, and for the purpose of associating their business with the business of the complainers, and that they are so passing off their goods as goods of the complainers' manufacture,' and interdict is craved accordingly.

"Before proceeding to consider the contents of the proof it will I think tend to clearness if I endeavour in the first place to summarise what I believe to be the legal principles and rules applicable to such cases as the present, and then, when that has been done, to apply the law to the facts which have been proved. The fundamental principle underlying the whole matter is 'that nobody has any right to represent his goods as the goods of somebody else'—(*per* Lord Halsbury, L.C., in *Reddaway*, 1896, A.C. 199-204, followed by Lord Alverstone, M.R., in *Valentine Meat Juice Company*, 1900, 17 R. P. C. 673-679. See also *per* Lord Langdale, M.R., in *Croft*, 1843, 7 Beav. 84). It has been deduced as a corollary from this that if a complainer can show that a name—whether his own or a fancy name or other name—has become identified by the public user with his goods in the market, and that it is being used by another under such circumstances or in such manner as to suggest that the goods which that other is selling are in fact the goods of the complainer, the latter will be entitled to interdict, the Court protecting him against any attempt to trade on or take benefit from the reputation which he has built up for himself—*Valentine Meat Juice Company* (*sup. cit.*); *Reddaway* (*sup. cit.*). But in order to obtain relief it is not, as I understand, necessary for the complainer to prove that the respondent is trading in specific articles in which he also deals; it may be enough if the result of the respondent's use of the name, which has acquired a secondary signification in the trade in connection with the complainer's business and his goods, is such as would in the ordinary course of human affairs be likely to result in the confounding of the respondent's business with that of the complainer, or the belief that the one is connected with the other. And it has been decided that this rule will apply to cases where the general character of the business carried on by the respondent is not identical with but materially different from that of the complainer. Thus in *Eastman Photographic Materials Company, Limited*, 1898, 15 R. P. C. 105, the plaintiffs obtained an injunction restraining a cycle company from using in its cycle business the name 'Kodak,' which had become identified in the market with the complainers' photographic business. In *Dunlop Pneumatic Tyre Company, Limited* v. *Dunlop Lubricant Company*, 1898, 16 R. P. C. 12, the present complainers successfully restrained the defendant company from using the name 'Dunlop,' in spite of the fact that they (the plaintiff company) did not in fact sell oil or lubricants, though they had power under their constitution to do so. I may refer also on this matter to *Valentine Meat Juice Company*, *sup. cit.*, especially p. 682; *Eno* v. *Dunn*, 15 A.C. 252 (a trade-mark case); *Dunlop Pneumatic Tyre Company, Limited* v. *Dunlop-Truffault Cycle and Tube Manufacturing Company, Limited*, 1896, 12 T.L.R. 434. It has further, I think, been settled that it is no conclusive answer upon the part of a respondent to say, and say truly, that the name he is using is his own name; and that case does not differ in principle from those where another—perhaps a fancy—name is in dispute. Thus, in *Valentine Meat Juice Company* the then Master of the Rolls, in dealing with the rights of parties where the name of an individual is being used, observes (17 R.P.C., at p. 680), that 'although it is of course more abundantly necessary in that case that it should be clearly established that the name has come to designate in the market the plaintiff's goods, when that is established I do not think there is any difference between the rule of the law that ought to be applied or the remedy that ought to be granted where such a right has been infringed.' In *Reddaway* Lord Herschell (1896, A.C., at p. 211) quotes with approval the language of James, L.J., in *Massam* v. *Thorley's Cattle Food Company*, 14 Ch. Div. 748, where his Lordship said—'*Burgess* v. *Burgess* (3 D. M. and G. 896) has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article,

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whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it.'—(See also the recent case of *Abel Morral, Limited*, 1903, 20 R. P. C. 429, affirming 19 R. P. C. 557). Lastly, it has been laid down that in order to a complainer obtaining interdict it is not necessary to prove a fraudulent intention on the part of the respondent—*Cellular Clothing Company*, 1899, A.C. 326, Lord Chancellor, 334, 335. Fact rather than intention must be regarded, and it is sufficient for the complainer if he can show that the result of the respondent's actings or projected actings does, or may be reasonably expected to, result in a confusion between his goods and those of the complainer, or in a supposed connection between the respondent's business and that of the complainer, owing to the manner in which the respondent is using a name to which the complainer has succeeded in attaching a secondary signification in the trade, as indicating his goods or his business. The modes, honest or dishonest, by which such results may be achieved or sought to be achieved are of course manifold—as witnessed by the number and variety of reported cases, especially in England—but the general principles or rules of law applicable to cases like the present are, I conceive, those which I have endeavoured to sketch in outline.

"Coming now to the facts, I am of opinion, in the first place, that the complainer company has fully established that it has succeeded in impressing upon the word 'Dunlop,' as known and used in the cycle and motor industry, a secondary and well-recognised meaning, as being identified with that company and its goods. No doubt the chief item of the company's business is tyres, but it also makes and sells under the name 'Dunlop' many other things accessory to the motor as well as to the cycle trade, as described by the manager Mr Baisley, and in this it has had the assistance of the Dunlop Rubber Company, and other companies subsidiary to and entirely constituted by the parent Company. The complainers have expended enormous sums in advertising in the name of 'Dunlop,' and I do not doubt that that name is an asset of the highest value to them—all the more so because the Dunlop patents are all now expired. Upon this first point therefore I am in favour of the complainers.

"In order to a proper understanding of the remaining matters it is necessary to give a succinct account of the circumstances which preceded and attended the formation of the respondent company. In 1898 two brothers, Robert and John Fisher Dunlop, entered into partnership under the firm of R. & J. F. Dunlop. Their office was, and is, at 39 John Finnie Street, Kilmarnock. Their business was that of cycle agents and cycle repairers, and to some extent cycle manufacturers, and they also sold tyres, tubes, and other accessories of the cycle trade. They had also a motor tricycle, and did something in the way of repairing motor cycles, and occasionally motor cars, but they did not make or sell motor cars.

On 1st July 1904 'The Dunlop Motor Company, Limited,' was incorporated. Its memorandum and articles of association are No. 28 of process. The capital of the company was 500 shares of £1 each. The principal shareholders are the two Messrs Dunlop, already referred to, and the others are their brother Alexander, a builder, their brother David, a mechanic, their aunt Mrs Fisher, the Rev. W. S. Reid, and their solicitor, Mr Barnett. The directors of the company are Mr Robert Dunlop and Mr John Fisher Dunlop. Its office is 39 John Finnie Street, Kilmarnock. The primary objects of the company were to acquire the motor branch of the business of R. & J. F. Dunlop, in terms of an agreement, and, shortly put, to carry on the business of motor manufacturers, agents, and dealers. By the said agreement, which is a somewhat strange document, the partners of the firm agreed to sell to the company the motor branch of the said business, including goodwill and whole property belonging to it, its motor machinery and plant, fittings, utensils, and stock-in-trade, as per inventory annexed, and also the sum of £150 in cash. The 'price' was to be £500, payable by the allotment 'to the first parties and their under-mentioned nominees' of 500 shares in the company, 'which shares shall be deemed for all purposes to be fully paid up' in the proportions stated in the agreement. An advertisement, conceived in terms of preposterous exaggeration, which was drawn up by the Messrs Dunlop without the advice or knowledge of their solicitor, was published immediately after the formation of the limited company. I refrain from further comment upon this document. Now the professed objects for the attainment of which this technical severance of the motor branch of the business of Messrs R. & J. F. Dunlop was effected by the creation of The Dunlop Motor Company, Limited, were three in number, viz., (*a*) to obtain fresh capital; (*b*) to obtain adequate premises for the motor business; and (*c*) to exploit an invention by Mr J. F. Dunlop in relation to transmission gear for motors. But the strange thing is that no one of these objects has to any material extent been achieved. (*a*) The amount of 'fresh capital' obtained was no more than £150. It appears by the way that the Rev. Mr Reid failed to pay his £50, and Messrs R. & J. F. Dunlop had to find that money for the company. (*b*) The only working premises of this company are certain subjects in Kilmarnock, which are held upon a verbal sub-let of a lease which had but four years to run, and upon such premises it would be manifestly absurd to lay down extensive plant and appliances. (*c*) The invention was not in fact assigned to the company, and it appears now to be of doubtful value. The brothers Dunlop explain that they desired to start the limited company upon a modest scale, but that they had it in view if all went well to increase their capital as they had taken power to do under the constitution of the company by the aid of friends. The whole history of the company is of a

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nebulous and unsubstantial quality. It is not at present in a position to manufacture one motor car, and has not attempted to do so. The business it carries on is scarcely if at all different from the old sort of business done by the firm before the creation of the company. I am bound to say that the impression left upon my mind is that there must or at least may have been objects in view other than those which have been stated as inducing the inception of the company, and there are traces in the evidence that there was at all events an idea that it was destined to fall into the hands and under the control of outside 'friends' of one sort or another. The impression to which I have alluded is not lessened by the fact that a company named the Dunlop Maritime Motor Company, Limited, has still more recently been floated by the Messrs Dunlop and certain nominees nearly but not precisely identical with those who make up the registered members of the Dunlop Motor Company, Limited—that the Dunlop Maritime Motor Company, Limited, has a capital of £1000, not paid up, and that no very substantial reason so far as I gather has been stated for its existence. But I do not desire to pursue this topic further, because, as I have already pointed out, the case can be decided, if the grounds upon which I proceed are well founded, apart from any considerations as to *bona fides*, or the reverse, upon the part of the Dunlops.

"The respondents deny that the complainers have succeeded in establishing that the name 'Dunlop' has acquired any special or exclusive significance in connection with their goods or business; and upon this point, as I have already stated, I am against them; but they further maintain that even if such a signification had been proved to exist as regards the complainers' tyres, no interdict should pass against the respondents, because, as they allege, their business is a motor business proper and not a business principally dealing with tyres, and the classes of customers to which the parties respectively appeal are quite separate and distinct. A rough comparison of Nos. 43 and 28 of process shows that, as regards the powers taken by the two companies there is no very striking or substantial difference, but that, in the case of the complainers' company tyres are put in the forefront and motor business proper rather in the background, while in the respondents' constitution the position is practically reversed. The more important comparison, however, is between the things actually done by the companies respectively. The complainers, as already pointed out, have many branches of business besides the matter of tyres. The respondents on the other hand, despite their title, cannot truly be described as a motor manufacturing company—they have neither money, plant, nor premises to enable them to make a single car—and they do at present deal in certain classes of goods and carry on certain lines of business in common with the complainers. In my opinion the titles of the two companies bear such a similarity to one another that the one would 'in the ordinary course of human affairs' be 'likely to be confounded with the other'—(see *per* James, L.J., in *Hendriks*, 17 Ch. Div. 638, 645). I think that the general character of the businesses is not less similar but much more similar than was the case in several of the decisions to which I have already referred upon this point. But the respondents further argued that they were entitled to use the word 'Dunlop' in the name or title of their limited company because it is in fact their own name. I have already dealt generally with the law upon this matter. I think that if they had chosen to call their new company 'The R. & J. F. Dunlop Motor Company, Limited,' they would probably have been entitled to do so, because the company's name would then have been practically the same as that of the firm under which they had for years previously been in use to trade—(see *Tussaud*, 44 Ch. Div. 678, *per* Stirling, J., 687-8; *Burgess*, 3 D. M. & G. 896; *Turton*, 42 Ch. Div. 128). It is not easy to see why, if the respondents really desire to avoid all possible confusion with the complainers' goods, they should not be willing to use the other name. But they have declined to do so, and I think that 'The Dunlop Motor Company, Limited,' is a name to which the complainers are entitled to object.

"For these reasons I shall grant interdict substantially in the terms craved in the prayer of the note, and find the complainers entitled to expenses."

The respondents reclaimed, and argued—The respondents' business was different from the complainers, the former being a motor and motoring "accessories" and the latter a tyre business. It was true the complainers manufactured "accessories," but the name of "Dunlop" had not become associated with these. The name used by the respondents was their own name and not some special trade name acquired by the complainers. Accordingly on both of these grounds it was well settled law that the complainers could only be successful in obtaining interdict if they proved, which they had failed to do, that the respondents' object in adopting the name they had adopted was to obtain a fraudulent advantage from the complainers' name by passing off goods manufactured by them as goods of the complainers—*Burgess* v. *Burgess*, 1853, 3 D. M. & G. 896; *Eastman Photographic Materials Company, Limited, and Another* v. *John Griffiths Cycle Corporation, Limited, and Another*, 1898, 15 R.P.C. 105; *Eno* v. *Dunn*, 1890, 15 A.C. 252; *Dunlop Pneumatic Tyre Company, Limited*, v. *Dunlop-Truffault Cycle and Tube Manufacturing Company, Limited*, 1896, 12 T.L.R. 434; *Lucas, Limited*, v. *Fabry Automobile Company, Limited*, 1906, 23 R.P.C. 33; *Massam* v. *Thorley's Cattle Food Company*, 14 Ch. Div. 748; *Jamieson & Company* v. *Jamieson*, 1898, 15 R.P.C. 169, at 181; *Cellular Clothing Company, Limited* v. *Maxton & Murray*, April 27, 1899, 1 F. (H.L.) 29, 36

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S.L.R. 605 (1899), A.C. 326. Further, in trade-name cases the onus of proving fraud lay upon the complainers, and this onus they had entirely failed to discharge. It was also noticeable that no evidence of any material importance had been adduced to prove that the public had been deceived, and the Court would not readily grant interdict *ab ante*.

Argued for the complainers—Their business was not confined to tyres, but extended to all classes of cycling and motoring accessories, the very things which would be dealt in by the respondents. With regard to these accessories, the word "Dunlop" had already attained a special meaning, viz., manufactured by the complainers, and they had therefore already acquired an exclusive right in connection with such accessories to that name, extending not only to such accessories as they were already manufacturing, but to those of a similar class which they might in the future manufacture under the powers contained in their memorandum and articles of association. The only question accordingly was—Was it likely that the public would be deceived?—*Brinsmead & Sons* v. *Brinsmead & Sons*, 1896, 13 T.L.R. 3; *Abel Morrall, Limited* v. *T. Hessin & Company*, 1903, 20 R.P.C. 429. It was unnecessary to prove that they actually had been deceived—*Bayer* v. *Baird*, July 12, 1898, 25 R. 1142, 35 S.L.R. 913; *Eno, cit. sup.*; *Singer Manufacturing Company* v. *Kimball & Morton*, January 14, 1873, 11 Macph. 267, 10 S.L.R. 173. It was not necessary to prove fraud—*Singer Machine Manufacturing Company* v. *Wilson*, 3 A.C. 376; *Cellular Clothing Company, Limited* v. *Maxton & Murray, cit. supra*; but fraud was sufficiently proved by the fact that the respondents really had no business, and had only floated the company on the chance of selling it at a profit at some future period on the strength of its famous name. Interdict would be granted even against a person using his own name if the public would be deceived thereby—*Valentine Meat Juice Company* v. *Valentine Extract Company, Limited, and Others*, 1900, 17 R.P.C. 673.

Lord Kyllachy—The complainers' leading proposition and the leading proposition also of the Lord Ordinary's judgment appears to be this—that the adoption by the respondents as their trade designation of the name of the "Dunlop Motor Company" was, as against the complainers, a legal wrong, being so as calculated to deceive the public into the belief that the goods sold by the respondents were the goods of the complainers' company. That is, I apprehend, the theory of the interdict which the Lord Ordinary has granted—an interdict which, it will be observed, strikes generally against the respondents "carrying on business" under the name in question, and which assumes—if it does not indeed express—that the complainers have in some way acquired the exclusive right to the use of the name "Dunlop," not only with respect to goods in which they themselves deal, but with respect (if not to all goods) at all events to all goods which are within the scope of the respondents' business, including of course particularly the class of goods denoted by their (the respondents') trade name, viz., motor vehicles. It is not, I apprehend, doubtful that the interdict under review would strike at the manufacture, sale, hire, or repair by the respondents' company of such vehicles; and perhaps therefore it may be convenient to take as the first question in the case whether, assuming (for the sake of clearness) that the respondents were to confine their business strictly within the department of motor vehicles, they would by using their company name in connection with it commit a legal wrong as against the complainers.

Now the broad fact which confronts the complainers is of course this—that they, the complainers, do not deal or profess to deal in motor cars or other vehicles; and have therefore, *prima facie* at least, no interest in the name or names by which that business is carried on by others. How, it falls to be asked, do the complainers propose to get over that difficulty?

To begin with, they do not now contend—although at first they seemed by implication to do so—that they have an exclusive right to the use of the name Dunlop in connection with all departments of commerce. In other words, they do not now suggest that because they have made, as they say, the name Dunlop famous in connection, for instance, with pneumatic tyres, they have thereby acquired the exclusive use of the name in connection with (to put extreme cases) the manufacture or sale, say, of steam engines or railway waggons, or golf clubs or golf balls, or other articles in which they have never dealt.

Neither, again, was it, ultimately at least, contended that they have acquired such a right with respect to all articles in which by their memorandum of association they are empowered to deal. As is not uncommon, the complainers' memorandum of association (aiming of course at giving the company as far as possible all the powers of an individual trader) covers a great variety of possible businesses and departments of industry. It is printed in the appendix; and apart from pneumatic tyres it covers, *inter alia*, the manufacture of "cycles, bicycles, tricycles, velocipedes, perambulators, bath chairs, horse carriages, motor or horseless carriages, and carriages and vehicles of every description, and all component parts thereof respectively, and also all apparatus and implements and things for use in sports or games." But it is of course obvious that the possession by an incorporated company of even unlimited powers of extending its business cannot at best put it in a better position than that of an individual trader, who has such powers always and as a matter of course. And if, as is not disputed, an individual trader can only acquire an exclusive right to the use of a trade name in connection with classes of goods in which he actually deals, it seems too plain for argument that the appellant company cannot in this matter be in a different position.

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Accordingly the complainers did not, as I have said, ultimately contend that if they have not a case founded on the nature and scope of their actual business, they have or can have a case founded on the terms of their memorandum of association. But what (dealing still with the question as one relating only to motor vehicles) they did contend was this, that although they never did and do not now deal in motor vehicles, or in fact in vehicles of any kind, they yet deal in certain things which are or may be parts or accessories of such vehicles, viz., pneumatic tyres, pumps, waterproof aprons, and other furnishings. These things they say are so "akin" to motor vehicles that the selling of motor vehicles by a company bearing the name of "Dunlop" would be apt to produce what they call "confusion"--people (of whom they produce specimens) being as they say apt to conclude that a company calling itself the "Dunlop Motor Company" is some new branch of the complainers' business—some branch belonging to them or with which they are in some way connected.

Now, although I listened to it I hope with all attention, I find it difficult to treat quite seriously an argument of this kind. I do not at all doubt that there are people capable of drawing such extreme and fanciful inferences, and that there are other people capable of persuading themselves that they would or might draw them, and of going into the witness-box and so deponing. I have more than once had occasion to express my opinion upon the value of that class of evidence, and also upon the abundance of it which seems always available. But the question really is, whether the average citizen of Kilmarnock, or perhaps rather such average citizen proposing to purchase or hire a motor car, would be likely to be deceived or even confused in the way supposed. As to that, all I can say is, that given the supposed conditions I do not hold it proved, and do not believe, that anything of the kind could happen. It would, it seems to me, be just as feasible for the respondents to contend as against the complainers that the latter were not entitled to set up under their (the complainers') company name an establishment say in Ayr for the sale of pneumatic tyres, because the respondents had for some years carried on in Kilmarnock under their company name an establishment for the sale of motor cars. So far as I can see, there would just be as much risk of the so-called "confusion" in the one case as in the other.

On the question, therefore, which is the main question in the case, and probably also the only question of much importance to either party—I mean the question as to the respondents' right to continue under their company name the business which that name denotes—I am of opinion that the complainers' case fails, and that they are not therefore entitled to retain the interdict which they hold. I have said that the motor business is for both parties the really important matter. And I say so for this reason. I gathered at the discussion, and indeed it was, I think, avowed, that the complainers' real apprehension is that the respondents, if their motor business extends and prospers, and they obtain the command of capital, may bye-and-bye be in a position to acquire or claim an exclusive right to the use of the name "Dunlop" in connection with motor vehicles, and may thus be in a position to forestall the complainers when at some future time they may desire to take up that business. I do not say whether or not that is possible. But if it did happen the result would, on the principles for which the complainers in this case contend, be, in my opinion, entirely just.

It remains, however, to consider whether the complainers have any right to protection against the respondents' use of the name "Dunlop" in connection with the sale of articles—pneumatic tyres, &c., and the like—in which the complainers actually deal. And it is no doubt true that to some extent both parties appear to deal in tyres and other accessories of motor vehicles, the complainers doing so as they did during the subsistence of the Dunlop patents, and the respondents doing so as they did from 1898 to 1904, when they dealt both in cycles and motors under the name of R. & J. F. Dunlop. As to this, however, it has in the first place to be kept in mind (at least as regards tyres, the articles mainly in question) that tyres, whether pneumatic or solid, are always or almost always what are called proprietary goods—goods, that is to say, sold under the name of the makers or patentees, and as a rule stamped with a trade-mark, or at least with some name or device. There are, for example, as most of us know, "Dunlop Tyres," "Continental Tyres," "Clincher Tyres," and several others. And in selling such goods or their accessories the name of the actual seller is in general quite unimportant. In other words, the conditions of the tyre trade sufficiently exclude the idea of misrepresentation or personation, or passing off the goods of one trader as the goods of another.

Further, and in the next place, even if that were otherwise, it would be quite impossible to grant the complainers an interdict against the respondents selling, for example, "Dunlop tyres," or even Dunlop tyres made or put on the market by the respondents themselves. For up to 1902, when the complainers' patent expired, the name "Dunlop tyres" was the proper and usual name of certain patented articles —articles which, so soon as the patents expired, might be made by anybody and sold under their proper and usual name. In point of fact the reclaimers do not—so far as appears—make such articles, but supposing they did so, the complainers at least would have no title to complain of their doing so, or even, I apprehend, to inquire whether in doing so they strictly followed the patent specifications or departed from them to a greater or less extent.

Finally, and this is an observation which applies to all the minor accessories in which

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both parties (the respondents mainly in connection with their repairing business) to a certain extent deal. The complainers have not proved that they any more than the respondents have acquired an exclusive right in connection with the sale of those articles to the use of the name Dunlop. Nor have they proved that the name in question has any special reputation or special value in connection with such articles. In point of fact the articles in question are, as appears from the list of the respondents' sales, articles of a quite common description which are sold by everybody in the trade and as to which the name of the seller is so far as appears unimportant. Certainly no materials exist in the evidence for any limited interdict directed exclusively to this not very important matter.

So far it will be observed I have considered the case apart from the special consideration that the respondents here are using as the name of their company the name of its founders and leading shareholders, that is to say, a name which would have been proper and natural for them to give to their company although the complainers' company was not in existence. It is, however, manifest that this is an element which makes the complainers' case *a fortiori* difficult—difficult, that is to say, even if contrary to the fact it were assumed that their (the complainers') business included the making or selling of motor carriages, or that the complainers' business was thus or otherwise in competition with the respondents' business. For with respect to the element referred to two observations occur and are I think justified.

The one is that, far as the law may have gone in its justifiable anxiety to prevent imposition upon the unwary purchaser, and content as it has sometimes been to pursue that object at the expense of encouraging the acquisition of virtual monopolies by traders and companies prepared to spend largely in systematic advertising and litigation, it has never as yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been, in addition to the use of that name, some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another. The authorities—beginning with the case of *Burgess* and other cases not yet overruled—appear to me to make that proposition fairly clear. I myself so held after full consideration in the case of *Dewar*, 7 S.L.T. 462—a case which was not carried further, and if the case of *Valentine*, 17 P.C. App. 673, or the opinions there expressed should be held—which I greatly doubt—to affirm or imply any broader proposition, all I can say is that, with the greatest respect, I am unable to agree with that judgment.

That is an observation as to the law. The other observation is as to the fact, and it is this, that with great respect I am not myself able to accept the Lord Ordinary's strictures upon what he terms the inception of the respondents' company. It appears to me that in starting their company—in assigning to it the motor part of their former business, and in giving to it the name they did—the respondents did nothing which would not have been quite natural, and entirely in common course, although they had never heard of the complainers' company, or although that company had never existed. Their capital may have been small—their ambitions may have been disproportionate to their existing resources—they may have had exaggerated views of their position, and issued, I am afraid like other people, some exaggerated advertisements; but I see no sufficient grounds for imputing to them fraudulent conduct, or for holding that they have done anything injurious to the complainers or in excess of their legal rights. They may, as the Lord Ordinary plainly suspects, have had in view that once started they might, following the complainers' example, extend their business, obtain the command of capital, and associate their name with the motor industry, as the complainers have associated theirs with the manufacture of pneumatic tyres. But how the complainers, who do not deal in motors should have right to complain of that I fail to see. Nor can I imagine what right the complainers had to pry into their (the respondents') whole financial position and to subject them on that subject to a prolonged and, if I am right, quite irrelevant cross-examination.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and that the interdict should be refused.

LORD STORMONTH DARLING—If the decision of this case depended to any material extent on the motives of the brothers Dunlop in getting up the respondent company and calling it the Dunlop Motor Company, Limited, I should be slow to differ from the Lord Ordinary on what is after all an inference of fact, or more properly perhaps an impression, from the conduct of witnesses whom he saw and heard. But the Lord Ordinary really decides the case on a view of the law which is independent of all questions of good faith. His view comes to this, that where one trader has acquired for his goods a reputation under a certain name, he is entitled to prevent another trader in all time coming from using that or any similar name for selling goods of a similar class provided a certain number of members of the public say in the witness-box that there is a risk of confusion between the names, so as to lead to the goods of the trader complained against being probably mistaken for the goods of the trader complaining. I cannot assent to a doctrine so wide and sweeping, which seems to me to convert what is intended to be a protection of the public against "passing-off" into an illegitimate monopoly. When witnesses come forward and speak of the risk of confusion, I think they must make sure that the risk does not arise from their own carelessness

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and inattention. Here there is no instance of any single article being actually sold by the respondent company under the belief that it was made by the complaining company, or of any person being actually misled. The one business is a large one, concerned mainly with tyres. The other business is a small one, connected, in so far as it is not merely embryonic, mainly with the making and repairing of motor-cars. And the one point where the risk of confusion is said to come in is the use of "Dunlop" in the name of both. The Lord Ordinary concedes that if the respondents had called their new company the R. & J. F. Dunlop Motor Company, Limited, they "would probably have been entitled to do so, because the company's name would have been practically the same as that of the firm under which they had for years previously been in" use to trade. And it is because they have declined to do so that his Lordship thinks the complainers entitled to object to their carrying on business at all on the ground that it may lead to possible confusion. But I take leave to doubt whether the unobservant people who jumped to the conclusion that because they saw the name "Dunlop Motor Company" over a door in Kilmarnock, the Dunlop Pneumatic Tyre Company had opened a branch in that town, would have been less apt to confound the two businesses by the mere insertion of the letters "R. & J. F." I am disposed to think that the confusion was subjective and not objective.

I therefore agree with Lord Kyllachy, and, I understand, the rest of your Lordships, that the respondents, in incorporating their own surname into the title of their new company, committed no legal wrong against the complainers, and that the note must be refused.

Lord Low—The complainers are the Dunlop Pneumatic Tyre Company, Limited, and they seek to interdict the respondents, the Dunlop Motor Company, Limited, from carrying on business under that name, and from passing off their goods as and for the goods of the complainers' company.

The chief article sold by the complainers is the well-known pneumatic tyre, which was first invented and patented by a gentleman of the name of Dunlop. The complainers subsequently acquired other patents relating to pneumatic tyres, and no one disputes that the tyres which they made under these patents were generally known as "Dunlop" tyres.

The patents have now expired, although I understand only a few years ago, and I suppose that anyone could now make tyres of the Dunlop type. It is not necessary to consider whether a person doing so would be entitled to sell them as "Dunlop" tyres, because it is not suggested that there is the least risk, or indeed possibility, of the respondents manufacturing tyres, or passing off as "Dunlop" tyres, tyres of a different type.

The complainers, however, also do a large business in what they call accessories to the motor and cycle trade, namely, such articles as tyre pumps, wheels, rims, valves, clothing, rugs, repairing outfits, and the like. They aver that "all these articles are associated with the name of Dunlop," and "that the name is associated by the public, and in the cycle and motor industry, with the complainers' company and their goods." They also aver that the adoption by the respondents of the name "'Dunlop Motor Company' is calculated to deceive the public into purchasing the goods of the respondents in the belief that such goods are goods of the complainers' manufacture."

The Dunlop Motor Company was got up by two brothers, Robert Dunlop and John Fisher Dunlop, who for some years had carried on a cycle shop in Kilmarnock under the partnership name of R. & J. F. Dunlop. They also did a little in the way of repairing motors, and they appear to have got an agency for the sale of a motor tricycle, which, however, did not lead to much if any business. In 1904 they resolved to separate their motor business from their cycle business, and accordingly they formed the Dunlop Motor Company. It is a small company, the capital being only £500 in 500 shares of £1 each. The principal shareholders are the brothers Dunlop, the others being two brothers and an aunt, their law-agent, and a friend. There is not the least chance, I imagine, that the company will ever make a motor car, as they have neither the capital nor the machinery to enable them to do so, but I see no reason why they should not get together a fair local business in the way of repairing motors, and they may also make something by selling motors on commission. So far I do not think that the complainers can object, because they neither make nor sell nor repair motors, and it is of no moment, in my judgment, that they have power in their memorandum of association to engage in the motor business.

There remain the accessories to the motor trade. What the complainers seek, and what the Lord Ordinary has granted, is interdict against the respondents selling anything which can be regarded as an accessory to a motor vehicle, so long at all events as they carry on business as the "Dunlop Motor Company." The complainers' case is that such articles of their manufacture are known to the public as "Dunlop"—for example, a "Dunlop" tyre pump or a "Dunlop" repairing outfit—and they allege that persons seeing the name "Dunlop Motor Company" upon the respondents' premises would assume that that company was a branch of their (the complainers') business and would buy articles from the respondents—such as a tyre pump or a repairing outfit—under the belief that they were getting articles manufactured by the complainers.

Even assuming (what I think doubtful) that the complainers could acquire such a right as they claim in regard to articles of the kind which I have described, and which are in no way specialities of their business, but are made by a number of wholesale firms, I am of opinion that their

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case fails upon the facts. As I have said, there is no dispute that the tyres made by the complainers under their patents were known as "Dunlop" tyres, but in my judgment there is no sufficient evidence that, as regards accessories, the name "Dunlop" has come to mean articles made by the complainers.

The bulk of the evidence amounts to no more than this, that a person who required some article connected with a motor or cycle, and who noticed that the word "Dunlop" formed part of the respondents' title, might jump to the conclusion that the respondents' company was a branch of or was in some way connected with the complainers' company, and under that erroneous impression might buy the article which he required at the respondents' shop in the belief that he was getting an article manufactured by the complainers.

I do not think that any of the evidence which goes beyond that is of importance, and I may quote a few sentences from the examination-in-chief of the witness Dempsey, whom the complainers put into the witness-box as their first skilled witness. Mr Dempsey deals in motors and cycles, and seems to have had large experience of that industry. He said—"I am familiar with the use of the name 'Dunlop' as designating certain goods. The most important of these are 'Dunlop tyres.' (Q) Were there other things such as bicycle pumps and motor pumps called 'Dunlop'? (A) To a limited extent. (Q) And valves? (A) Indirectly. They were known as 'Dunlop' valves and 'Dunlop' pumps. (Q) Do you think the name 'Dunlop' Motor Company is a name likely to mislead those in the trade and members of the public? (A) I would not like to use the word 'mislead,' but it might make people think that it was connected with those we know as 'Dunlop.'"

In face of such evidence I think that it is impossible for the complainers to maintain that the name "Dunlop" has, as regards practically every article which can be used as an accessory to a motor or cycle, acquired the secondary signification which they aver.

Further, the complainers stamp every article made and sold by them with the word "Dunlop," and it may be presumed that persons who are in the habit of buying articles made by the complainers are aware that that is the case. If it had appeared that the respondents were stamping articles sold by them and not manufactured by the complainers with the word "Dunlop," the case would have been very different; but there is no suggestion of anything of that kind.

In regard to the evidence that the word "Dunlop" might lead people to conclude that the respondents' company was in some way connected with the complainers' company, I think that that might happen in the case of a person whose eye was caught by the word "Dunlop," and who did not pay much attention to the matter. Anyone, however, who took the trouble to think about the matter would see that the respondents' company was a *motor* company and the complainers' a *tyre* company, and would not be likely to think himself safe in assuming without inquiry that the two companies were identical. Now, I do not think that the respondents are liable to have their business practically stopped (unless they change their name) simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers. It would at all events be necessary to prove that a person acting with reasonable care and observation would arrive at that conclusion, and the evidence seems to me to fall far short of establishing any such case.

The complainers further aver that the respondents adopted "the said style and title" (the Dunlop Motor Company) "for the purpose of passing off their goods as and for the goods of the complainers, and for the purpose of taking advantage of the reputation which the goods manufactured and sold by the complainers have acquired."

That, I think, amounts to a charge of fraud, and apparently the Lord Ordinary would have been prepared to hold it proved if he had not thought that there were sufficient grounds for his judgment apart from the question of *mala fides*.

Now, having carefully considered the whole evidence and circumstances I have come to the conclusion that it is not proved that the Messrs Dunlop introduced the name "Dunlop" into the title of their company for the purpose of passing off their goods as the complainers' goods, or of trading upon the complainers' reputation.

It may be that the knowledge that the name "Dunlop" was well known in connection with the manufacture of tyres may have suggested to the Messrs Dunlop the introduction of their own patronymic in the title of the motor company which they were forming, but I see no sufficient reason to infer that it occurred to them that by so doing they would attract custom intended for the complainers, much less that it was their intention and purpose to do so.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and interdict refused.

LORD JUSTICE-CLERK—I had an opportunity of reading Lord Kyllachy's opinion, in which I entirely concur. The only difficulty I felt in coming to the conclusion that the complainers were not entitled to succeed was caused by the very strong views expressed by the Lord Ordinary. I think he was misled by the very decided opinion he formed as to the question of the purposes and aims of the Messrs Dunlop in Kilmarnock in forming the limited company which they did. I do not share his views on that matter, but holding these views, I think he has been led to grant an interdict in this case on grounds which do not appear to me to justify his having done so. My views have been clearly expressed by Lord Kyllachy, and I do not think it necessary to add anything to what has been already so fully expressed.

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The Court recalled the Lord Ordinary's interlocutor and refused interdict.

Counsel for the Reclaimers (Respondents)—Craigie, K.C.—Hon. W. Watson. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents (Complainers)—Scott Dickson, K.C.—Orr Deas. Agents—Deas & Co., W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

SIM AND OTHERS *v.* FERGUSSON AND OTHERS (MUIR'S TRUSTEES).

Trust—Investment—"Personal Security"—Power to Invest on Heritable or Good Personal Security—Mere Personal Obligation—Deposit-Receipt of Colonial Bank—Ultra Vires.

By an antenuptial contract of marriage trustees were authorised "to invest the trust funds on heritable or good personal security." They invested in deposit-receipts of colonial banks. There was no suggestion that these were not in good credit or that the investments were not sufficiently good of their class.

Held, affirming the Lord Ordinary (Salvesen), that "personal security" covered security depending on personal obligation only, and that the trustees had acted within their powers.

Process—All Parties not Called—Trust—Liability of Trustees—One Trustee Called—Delict.

The representatives of one of several trustees having been sued for an accounting, they pleaded that the action should be dismissed, as all the trustees or their representatives had not been called.

Opinion, per Lord Ordinary (Salvesen), that the rule established by *Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490, that where a defender is liable *in solidum* in respect of a delict or *quasi* delict the pursuer is entitled to proceed against him alone, even although there may have been others who acted along with the defender and against whom the defender might have a right of relief, might well be reconsidered in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible.

On 7th October 1905 Alexander Sim, residing at Contlee, Nicola Valley, British Columbia, and others, the children of the marriage between John Sim, bank-teller at Arbroath, and Christina Jane Mackay or Sim (both of whom were dead), brought an action of count, reckoning, and payment against David Scott Fergusson and others, trustees of the deceased James Muir, merchant in Arbroath, one of the trustees under the antenuptial marriage contract of their parents, dated 24th and 26th September 1864 and registered 11th September 1866. In it they sought an accounting of the intromissions of Muir, who died on 16th March 1903, and his trustees with the trust estate constituted by the said antenuptial marriage contract, to the fee of which they were entitled, and to recover £1000 or such sum as should be found to be the balance due on such accounting.

The defenders, *inter alia*, pleaded—"All parties interested not having been called, the action should be dismissed."

Certain accounts were produced by the defenders and objections to these were stated by the pursuers. Of these objections the following alone came to be of importance:—"(Objection III) The account produced shows that the trustees under the said marriage contract lent certain of the trust funds on deposit-receipts with the following colonial banks, viz., The City of Melbourne Bank (now the Melbourne Assets Company), the Australian Joint Stock Bank, and the New Oriental Bank. The said loans were not such as the trustees were entitled or authorised to make either at common law or under the Trusts (Scotland) Amendment Act 1884, neither were they within the powers conferred by the investment clause in the said marriage contract. Persons who lent money to the said colonial banks received no security for repayment of their advances, and the said trustees, including in particular the late James Muir, in so lending out the funds of the trust estate committed a breach of trust. The sums so invested have been partially lost through the failure of the said banks to meet the said deposits as they fell due, and the pursuers claim that they are entitled to have the accounts re-stated so as to credit the trust estate as at the date of Mr Sim's death, viz., 10th January 1897, with the face value of the amount of the deposits. . . ."

The power of investment conferred by the marriage contract was in the following terms:—"And they authorise the beforenamed trustees, if they see cause, to invest the trust funds on heritable or good personal security for the purposes foresaid, declaring that in so investing and lending the trust funds the trustees shall not incur any personal responsibilities."

On 29th March 1906 the Lord Ordinary (SALVESEN) pronounced the following interlocutor:—"Repels *in hoc statu* the first and . . pleas-in-law stated for the defenders: Repels the third objection for the pursuers to the accounts of the late James Muir as trustee under the marriage contract between Mr and Mrs Sim, libelled in the summons: Appoints the case to be enrolled for further procedure: Grants leave to reclaim."

Opinion.—"The pursuers of this action are the children of the marriage between John Sim and his wife Mrs Christina Sim, and are the flars of certain estate settled under a contract of marriage entered into by their parents. The income of the property so settled was payable to Mrs Sim

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during her lifetime, and on her death to her husband, and the capital was directed to be paid for behoof of the children of the marriage equally on their severally attaining twenty-one years of age. They are now all major.

"The defenders are the trustees of the late Mr James Muir, who was one of the trustees appointed by the marriage-contract. The pursuers aver that from 1892 he acted as sole trustee. The other trustees accepted office under the contract, but there is no information in the pleadings as to when they died or resigned or otherwise ceased to act.

"The defenders have lodged accounts of the intromissions of Mr James Muir from 20th January 1897 until 11th November 1905. They explain that prior to that date Mr John Sim, the pursuers' father, managed the whole estates as the factor on the trust, and that they have no materials from which to make up any account during that period. This would not be a sufficient answer but for the fact that no question is raised as regards revenue (to the whole of which Mr John Sim was entitled), and that the only loss of capital on which the pursuers condescend amounts to £139, 10s. 8d., which is all accounted for by the objection which they raise to the investment of trust money on deposit-receipts of certain Australian banks. This objection seems, accordingly, to be the only substantial matter in dispute between the parties, and I gather that on its being decided all other matters may readily be adjusted.

"Before I deal with the merits of the case I must notice two arguments which were addressed to me by the defenders. The first was in support of their plea of all parties not called. This is an equitable plea which it may be proper to sustain in cases where a defender suffers a plain disadvantage by other defenders not being called who know more of the transaction out of which the dispute arises, and therefore may be able to state defences which are unknown to the actual defender. Here no circumstances of that kind are averred. It does not even appear that there were any other trustees than Mr Muir who authorised the investment of the trust money in the deposit-receipts challenged, and it is certain that Mr Muir was at all events one of the trustees who did so. Even if I had thought there was a *prima facie* reason why the representatives of the co-trustees should be called along with the present defender, the case of *Croskery* v. *Gilmour's Trustees*, 17 R. 697, would form a serious obstacle to my giving effect to the plea. As I read the decision in that case it proceeds upon the footing that in all cases where a defender is liable *in solidum* in respect of a delict or *quasi* delict the pursuer is entitled to proceed against him alone even although there may have been others who acted along with the defender and against whom the defender might have a right of relief. The law so laid down may sometimes operate very harshly, and in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible I think it might well be reconsidered. The averments of parties in this case, however, disclose no such state of matters.

". . . [*His Lordship here dealt with another plea.*] . . .

"The pursuers' case with regard to the deposit-receipts is that they were loans upon personal credit without security, and that they were *ultra vires* of the trustees. The defenders admit that they were not such investments as the trustees were entitled to make, either at common law or under the Trusts Act 1884, but they say that they were within the powers conferred by the investment clause of the marriage contract. There is no averment of negligence, and therefore the sole question for decision is whether the trustees in lending money to the banks mentioned on deposit-receipt were guilty of a breach of trust.

"The investment clause in the marriage-contract is in these terms:— . . . [*quote clause supra*] . . . The question is thus whether a loan to a bank on deposit-receipt at a time when the bank was in good repute could be described as an investment on good personal security.

If the question were open I think much might be said for the view that such a loan was not a loan on security at all. In reality it is a loan on the personal credit of the borrower. But the same might be said of a loan by a bank on a cash-credit bond where several persons are joined with the principal debtor to guarantee payment of the debt. Such a loan would properly be described as one on personal security, but it is simply a loan on the personal credit of those who subscribed the bond, and it does not alter the quality of the investment that the persons who are bound for the debt are more than one. The pursuers made the further suggestion that a loan of money was not a loan on personal security unless personal property had been pledged in security. I do not think so. A loan on security of moveable property is not a loan on personal security in the common acceptation of that phrase, although it would no doubt be so if the borrower was also personally bound for repayment of the loan.

"In my opinion, however, the question is no longer open so far as the Outer House is concerned. It was carefully considered and decided by Lord Fraser in the case of *Lamb* v. *Cochrane*, 20 S.L.R. 575. The trustees there were directed to invest the trust estate 'on such security, heritable or personal, or in such stocks as they shall think fit.' They invested it by taking an assignation to a bond granted by a heritable security company of limited liability which was in good credit at the date of investment, but which afterwards went into liquidation. After a full argument Lord Fraser held 'that trustees authorised to lend on personal security are entitled to lend on personal bond to a person reputed solvent at the time of the transaction.' In the note to his interlocutor Lord Fraser reviewed the prior authorities, including an opinion

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to the contrary expressed by Lord M'Laren in the Treatise on Wills and Succession, and he concludes as follows:—'The word "security," in short, has obtained a meaning when coupled with the word "personal" different from its common acceptation, and a clause, therefore, authorising a loan upon real or personal security may mean upon the security of real estate or upon the security of personal obligation.'

"Further on the same Lord Ordinary says—'A deposit with a bank which undertakes to repay money on demand or after a certain interval is a loan upon personal security, the creditor having the limited or unlimited liability of the shareholders in the bank for repayment of their money. Now it can hardly be contended that trustees commit a breach of trust when they deposit the trust funds (which they are authorised to lend on personal security) with the banks; and if this be the case, wherein is the difference between a deposit with any of the Scottish banks and a deposit with a property investment company.' What holds good with Scottish banks must apply to Australian banks, the only possible difference being as to the credit of the respective institutions, a question which is not raised in this case.

"The next case in point of time which was cited was that of *Morrison* v. *Allan*, 23 S.L.R. 846. The investment clause there was as follows—'Our trustees shall, with all convenient speed, invest the said sum of £1500 sterling on bond, heritable or personal, railway debentures, bank stock, or otherwise.' In commenting on this clause Lord Shand said—'It is to be noticed that this clause does give very wide powers of investment, which may be even on personal security alone.' The actual loan was on heritable security, which proved insufficient, but the lender stated that he relied upon the personal obligation as being of considerable value. After narrating the facts, Lord Shand continued—'Now, under all the circumstances, was the trustee who was able to lend upon personal bond not entitled to lend on heritable security?' The inference from that passage is that Lord Shand's opinion concurred with that of Lord Fraser as to the meaning to be put on a power to invest on personal security. It was, however, unnecessary to pronounce a decision to that effect in that case.

"In *Ritchie* v. *Ritchie*, 15 R. 1086, the matter was expressly decided in the Inner House. The trustees were empowered to invest the trust funds 'in any of the Government securities, or upon heritable security in Scotland, or in such other way or in such other securities as my trustees shall think proper.' The trustees lent a sum of money to the Scottish Amicable Heritable Securities Company, Limited. There was no security for repayment except the personal obligation of the borrower, and Lord M'Laren held that this investment was within their powers. His judgment was unanimously affirmed by the Second Division on this poiut. The argument which was submitted to the Inner House with regard to this investment was that it was a mere loan at interest, which the creditor was obliged to leave three years with the debtor. It could not even be called a loan on personal security, for that expression involved not the mere personal obligation to the debtor but his personal obligation fortified by some security. This argument was one of those rejected by the Court.

"The question arose again in the case of *MacKinnon* (*Miller's Factor*) v. *Knox*, 14 R. 22, 15 R. (H.L.) 83. The decision did not touch the point in either Court, the finding of the Lord Ordinary being to the effect that the loan was made on unsubstantial and insufficient security according to the law and practice of trusts administration. If, however, the loan had been *ultra vires* it would not have been necessary to have considered the sufficiency of the security. In the House of Lords, Lord Watson, after quoting the investment clause which empowered the trustees to lend out the funds of the trust 'on such security, heritable or personal, as they may think proper,' said—'Power to lend on personal security has been held in Scotland to include lending on personal credit.' If he had been of opinion that that was not so, nothing more would have been required for the decision of the case, as the loan in question was one, as Lord Watson himself said, 'upon no further security than the personal guarantee of two individuals, whose ability to repay was dependent upon the vicissitudes of trade.' The true ground of the decision in that case, however, I take to be that the transaction complained of was not a *bona fide* investment of the trust funds, but an accommodation to the borrower to enable him to buy certain property belonging to the trust. In other words, the loan was not upon personal security, which the trustees had reason to believe was good and sufficient at the time when the loan was made, and they were thus liable to replace the lost money upon the ground of negligent administration of their office.

"On these authorities I have come to the conclusion that the trustees here acted within their powers. But another argument was maintained by the pursuers, founded upon the opinion of Lord Watson in *Knox's* case, to the effect that the trustees were not entitled to lend money on personal obligation so long as it was possible for them to obtain a pledge of heritable or moveable property. Lord Watson's dicta on this subject are, however, obiter, and I find that Lord Fitzgerald guards himself against being held to concur in certain of the propositions which Lord Watson had laid down, and which in his judgment were not necessary for the decision of the case. Nor do I find that these dicta received any countenance from the reported opinions of the Lord Chancellor and Lord Macnaghten, who based their judgment on the same grounds as the Lord Ordinary. I think, therefore, that the dicta in question must be considered with reference to the facts of the particular case under considera-

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tion, and are not capable of general application. I do not suppose that it would ever be affirmed that trustees could not get money lent on heritable security if they were to take a slightly lower rate of interest than the market rate. There would therefore be no object in giving trustees the power to lend upon heritable or personal security, nor do I think there is any authority for holding that such words are to be read, not as giving alternative powers of investment, but as if the word 'heritable' was followed by 'or failing their being able to obtain heritable security, then they shall be authorised to lend on personal security.' There is no suggestion of such a limitation in the older authorities, which I think I must follow."

The pursuers reclaimed, and argued—The Lord Ordinary had held that personal security was equivalent to personal obligation; but any money lent implied an obligation to repay, and therefore, according to the Lord Ordinary, was lent on personal security. Personal security meant something more than mere personal obligation or credit, a right by preference or diligence, an assignation to personal property; at lowest it implied one or more persons to fall back on as debtor if the original debtor failed to meet his obligation. Thus a promissory-note was not a security but a voucher—*Bow* v. *Spankie*, June 1, 1811, F.C. There were dicta to the effect that a personal obligation was not a security—*Clark and Others* v. *West Calder Oil Company and Others*, June 30, 1882, 9 R. 1017, L.-P. Inglis, at p. 1024, 19 S.L.R. 757; and in *Graham & Company* v. *Raeburn & Verel*, November 7, 1895, 23 R. 84, Lord M'Laren, at p. 89, 33 S.L.R. 61. As to the cases referred to by the Lord Ordinary—*Lamb* v. *Cochran and Others*, March 23, 1883, 20 S.L.R. 575—the decision of Lord Fraser that authority to trustees to lend on personal security entitled them to lend on personal bond to a person reputed solvent was not necessary to decide that case. Moreover, it proceeded on a misunderstanding of a dictum of Lord Moncreiff in *Seton* v. *Dawson*, December 18, 1841, 4 D. 310, at p. 328. In *Morrison and Others* v. *Allan (Gerrard's Trustee)*, July 14, 1886, 23 S.L.R. 846, no question as to the meaning of personal security was raised. A mere inference had been drawn by the Lord Ordinary from a dictum of Lord Shand. The power to the trustees in *Ritchies* v. *Ritchie's Trustees*, July 20, 1888, 15 R. 1086, 25 S.L.R. 514, included the words "or in other such way," which did not occur here. In *Millar's Factor* v. *Millar's Trustees*, November 2, 1886, 14 R. 22, 24 S.L.R. 355, reported in House of Lords *sub nomine Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 572, no question was raised or decided as to a personal security, and the dictum of Lord Watson had no foundation other than *Lamb* (*cit. supra*). (2) Even if personal security meant mere personal obligation, "trustees who make a permanent loan on that footing," *i.e.*, personal security, "must in my opinion, if any loss results from it, justify their action by showing that no safer investment was open to them"—*Knox* v. *Mackinnon* (*cit. supra*), Lord Watson, at p. 86 of 15 R. (H.L.). The trustees here could not show that.

Argued for the defenders (respondents)—Authority to invest on "personal security" included the deposit-receipts in question. If the phrase used had been "moveable security" it might have given colour to the idea that there should be corporeal moveables as security, but the phrase used was "personal security." Personal security meant personal obligation—*Lamb* v. *Cochran* (*cit. supra*) and other cases cited by the Lord Ordinary. Reference was also made to *Breatcliff and Others* v. *Bransby's Trustees*, January 11, 1887, 14 R. 307, 24 S.L.R. 233. This seemed to be beyond dispute in England—*Forbes* v. *Ross*, 1788, 2 Cox 113 and 2 Bro. C.C. 430; *Pickard* v. *Anderson*, L.R. 13 Eq. 608; *in re Rayner*, [1904] 1 Ch. 176; Lewin on Trusts (11th edition), p. 343-4; Williams on Executors (10th edition), vol. 2, p. 1447. (2) Even if the construction put upon their power of investment by the trustees were wrong they had acted in *bona fide*, and in the circumstances were not responsible for any loss—*Warren's Judicial Factor* v. *Warren's Executrix*, June 4, 1903, 5 F. 890, 40 S.L.R. 653.

At advising—

LORD KYLLACHY—In this case the question is whether the defenders, who are testamentary trustees and have power to invest the trust funds "on heritable or good personal security," are personally liable for loss sustained on deposits made by them with certain colonial banks, incorporated, as it appears, under certain colonial statutes, but which were sometime ago forced to compound with their creditors.

There is no doubt that the deposits in question were "investments" in the sense of the power. That is not disputed, and was indeed expressly decided in the case of *Ritchie* (15 R. 1086) referred to by the Lord Ordinary. Neither are the investments impeached as improvident. It is not suggested that the banking companies were otherwise than in good credit, or that the investments were not sufficiently good of their class. The question is one entirely of power, and depends on the meaning of the expression "personal security" as used in the settlement.

It is clear that if that expression covers only investments made on the security of personal property the deposit was *ultra vires*. On the other hand, if the expression means or covers security depending on personal obligation the deposit is clearly enough good, for it at least involved the personal obligation of the borrower, which was in each case the banking company, and no distinction is possible between the personal obligation of one person and the personal obligation of several. The addition of other obligants, directly or indirectly, may affect the value of the security but not its character. The security constituted by the personal bond of A is just of the same charac-

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ter as that constituted by the personal bond or bonds of A, B, and C. Nor is it of a different character although it should be also fortified, say, by assignations, duly intimated, to debts or obligations due to A by B, C, or D.

The question therefore is, whether "personal security" means and covers only a security constituted by way of real right over moveable property? And to that question an affirmative answer does not appear to me to be possible.

For one thing I do not quite follow how a security can be called "personal" which, as regards the nature of the right conferred by it, is real, and which is only personal in the sense that the subject of it consists of moveable property. Further, it seems to me that if from the category of "personal securities" there are to be excluded all securities depending on personal obligation as distinguished from real right, two things would follow, each of which would be contrary to all received ideas. In the first place, the category would be confined to a very limited class of securities, viz., pledges of corporeal moveables—a class of securities which are *hardly* in practice within the range of investment at all. In the next place it would, on the other hand, fail to cover a class of securities its extension to which has never been questioned, viz., loans, say, upon assigned policies of insurance, or upon collateral obligations by third parties bound as co-principals with, or as cautioners for, the primary debtor.

Apart therefore from authority, I should be quite prepared to concur with the Lord Ordinary's judgment; but I may add that I think it is clear that the point in question is settled in England in the defenders' favour, and has long been so, and that it is also so settled in Scotland, if not quite expressly, at least by necessary implication. I refer in particular to the Scotch cases cited by the Lord Ordinary, and as regards the English rule to Lewin on Trusts, p. 317 (8th edition), and to the cases there cited, which seem fairly conclusive.

LORD STORMONTH DARLING, LORD LOW, and the LORD JUSTICE-CLERK concurred.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for the Pursuers (Reclaimers)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Chapel. Agents—Bruce & Black, W.S.

Thursday, July 19.

FIRST DIVISION.

[Sheriff Court at Inverness.

WARRAND *v.* WATSON AND OTHERS.

(*See ante* December 14, 1905, 42 S.L.R. 252, 7 F. 253).

Fishings — Salmon-Fishing — Trespass — Parties Nominally Fishing for Trout—Facts Held Sufficient to Warrant Interdict.

A *pro indiviso* proprietor of salmon-fishing having the exclusive right on seven out of every eight week days, raised an action of interdict against certain persons, the townsmen of a town which was the other *pro indiviso* proprietor of the salmon-fishing having the exclusive right on the eighth day and which exercised its right by leaving it open to the townsmen, to have them prohibited from unlawfully trespassing on his fishing. The defenders averred that they were fishing for brown trout, which class of fishing was in fact open to them.

Interdict *granted* where it was established, though no salmon had actually been taken, that the defenders (1) had made no difference in their method of fishing on the days when they were not entitled to fish for salmon, and (2) had used minnow-tackle or large sized flies (though not technically salmon flies), and (3) had fished in the months of August and September, months when, broadly speaking, only salmon and sea trout are taken with the rod.

This case is reported *ante ut supra.*

Captain Redmond Bewley Warrand of Bught, residing at Ryefield House, Conon-bridge, *pro indiviso* proprietor of the salmon-fishings on the river Ness from the Stone of Clachnahagaig to the sea, with exclusive right on seven out of every eight week days, having brought an action to interdict Donald Watson, fishing tackle maker, Inglis Street, Inverness, and others, indwellers of Inverness, the other *pro indiviso* proprietor having exclusive right on the eighth day, which right it left open to its indwellers, from unlawfully trespassing on his fishing, the defenders averred, *inter alia*, that they were not unlawfully trespassing on the fishing but were fishing for brown trout, which fishing it was not questioned was open to them.

On 14th December 1905, the case having been appealed from the Sheriff, the First Division allowed a proof, which was led before Lord M'Laren on 21st March 1906. The nature of the evidence adduced appears from his Lordship's opinion *infra.*

At a hearing on the evidence, argued for the pursuer—Trout-fishing was not an independent right—Rankine on Landownership, p. 508—and must be exercised subordinately to the higher right of salmon-fishing. Any reasonable apprehension of an invasion of the pursuer's rights justified an application

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for interdict. The proof established that the right was likely to be, if indeed it had not actually been infringed, for the trout-fishing was merely an excuse. That was shown by the same method of fishing being always used, the tackle employed, and the season of the year.

Argued for the defenders—In only one of the cases referred to on record had a salmon been actually caught. Therefore the onus lay on the pursuer to prove that each respondent had been endeavouring though unsuccessfully to take fish of the salmon kind. This he had failed to do, for the bulk of the evidence established the fact that brown trout of large size and in numbers sufficient to attract anglers were taken in the river throughout the season. The evidence as to tackle was extremely vague, owing to the fact admitted by the pursuer's chief witness that he had regarded all fishing whether for trout or salmon on any other day than that "eighth lawful day" on which the townsmen had right to fish for salmon, as unlawful. The respective rights of salmon and trout-fishing were defined in *Somerville* v. *Smith*, December 22, 1859, 22 Dunlop 279, *per* Lord Colonsay 287. The pursuer had failed to establish a case for granting interdict as sought.

At advising—

LORD M'LAREN—In this action the complainer claims to interdict the respondents from interfering with his rights as heritable proprietor of fishings in the Ness. The Town Council of Inverness hold a *pro indiviso* right of salmon-fishing along with the complainer, but as their right is limited to one-eighth of the salmon fishing estate, by an arrangement which is still in force the Town Council have the exclusive right of fishing within the territorial limits of the fishing right on every lawful eighth day, while the complainer by the agreement has the exclusive right of fishing on the remaining seven out of each period of eight lawful days. It is in evidence that so far as regards the action of the complainer and his tenants this agreement has been faithfully observed.

The Town Council of Inverness has not made use of its right of salmon-fishing for purposes of profit, but has left the fishing open to the townsmen for their amusement. In so doing I cannot doubt that the Town Council was entirely within its rights, although the effect of what they have done may be to lessen the value of the other seven-eighths of the fishing estate to the other *pro indiviso* proprietor. Captain Warrand does not dispute the right of the inhabitants of Inverness to fish for salmon on each eighth day which has been appropriated to the use of the town. The ground of action is that the respondents have fished for salmon on the days in which the exclusive right is vested in the complainer.

The respondents give a general denial to the allegations against them, but the substance of their defence is that on the occasions when they are proved to have fished on the Ness in apparent contravention of the complainer's rights they were only fishing for trout.

I may here observe that the law does not take cognisance of anything in the nature of a right of trout-fishing apart from the ownership of lands, but if the respondents were in a position to prove that they had in good faith fished only for trout, and with trouting tackle, from the the bank lying within the burgh of Inverness, their defence would be established, because it does not appear that the Corporation of Inverness has taken any action to restrain the exercise of the right of trout-fishing from their banks. Whether they should in the future attempt to put a restriction on their right during the salmon-fishing season is a matter for their own consideration, and it is evident that such a restriction would not be very easily enforced.

The immediate question is, what is the value of the respondent's defence as to trout-fishing? On this subject two observations are suggested by the evidence. First, if the parties complained of are proved to have fished in the manner and by the means usually employed by salmon-fishers in the locality, they do not displace the allegation of infringement of the complainer's rights by saying that they were only fishing for trout. Secondly, it is in evidence that during the salmon-fishing season, and particularly in the months of August and September, when the complainer's tenants come to the Ness for sport, there has been a practice of indiscriminate fishing on all week days without distinction, to the injury of the complainer's rights. This has been carried to such an extent that the complainer's tenants have demanded and received from him a substantial abatement of rent on the ground that their sporting rights were rendered comparatively valueless through the action of a section of the inhabitants of Inverness who persist in the practice of indiscriminate fishing.

On the evidence before us I cannot doubt that the complainer was fully justified in resorting to legal measures for the protection of his rights against the persons who can be proved to have fished in his waters for salmon without a title.

The application for interdict is directed against fifteen individuals. After a preliminary hearing of the case a proof was allowed by the Court and taken by myself, and was thereafter reported to the Court. At the hearing on the evidence the complainer withdrew the complaint against two of the parties and moved for interdict against the others.

I may here observe that in order to support an application for interdict, the complainer has to establish such action on the part of the respondents as will justify a reasonable apprehension that they are going to interfere with his rights. The best evidence of this is proof that the respondents have exercised the art of salmon-fishing in the near past, and in a case of this kind I should be unwilling to

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proceed on anything short of the best evidence. But it is not necessary to prove in each case that salmon were actually taken; if this were the law it would be very difficult ever to prove a case for interdict against infringers.

As regards each of the respondents, I have examined all the passages in the evidence to which we were referred by counsel, and have also considered the bearing of the evidence as a whole on each case, and the excuses which were offered by the respondents who gave evidence on their own behalf. The general body of the evidence is to this effect—(first), as regards these respondents who are proved to have been in the practice of fishing the Ness, that they made no difference in their mode of fishing on the days when they were not entitled to fish for salmon; (second), that minnow tackle or flies of large size (though not technically salmon flies) were used; (third), that while the early summer months are the months in which trout are taken, these respondents fished in the months of August and September, when, broadly speaking, only salmon and sea-trout are taken with the rod.

I do not think there would be any advantage in examining the evidence as to each separate act of fishing which has been proved against individual respondents, but I may say that in my examination of the evidence I have given the benefit of a doubt to those respondents against whom I think the three points just mentioned have not been all established. All the persons to whom I propose that the interdict should be made to apply have fished in the months of August and September on days that are not open to the public. They have fished in a manner adapted for the taking of salmon, and so far as I am able to judge have fished with the same tackle and lines which they were in the habit of using on days when salmon-fishing was open.

The respondents against whom I propose that interdict should be granted are nine in number, viz., . . .

The LORD PRESIDENT, LORD KINNEAR, and LORD PEARSON concurred.

The Court granted interdict against the respondents named by Lord M'Laren.

Counsel for the Pursuer—Johnston, K.C. —D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders—Hunter, K.C. — Constable. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 20.

FIRST DIVISION.

SMITH (LIQUIDATOR OF THE UNION CLUB, LIMITED) *v.* EDINBURGH LIFE ASSURANCE COMPANY.

Lease—Renunciation—Hypothec—Lease at a Yearly Rent for a Period Beginning at a Martinmas and Terminating at a Whitsunday—Year of Lease Current—Whether Lease runs from Martinmas to Martinmas or from Whitsunday to Whitsunday.

A let certain premises to B "for the period from the term of Martinmas 1903 to the term of Whitsunday 1913." B undertook to pay a yearly rent of £1000 "at two terms in the year, by equal portions, beginning the first term's payment . . . at the term of Whitsunday 1904, when the sum of £500 will be payable for the half-year preceding, and the next term's payment of £500 at Martinmas thereafter, and so forth half-yearly and termly during the currency" of the lease. B having renounced the lease as at Whitsunday 1906, a question arose in connection with A's right of hypothec, whether the year of the lease current at the date of renunciation was from Martinmas 1905 to Martinmas 1906 or from Whitsunday 1905 to Whitsunday 1906.

Held that the lease was a Martinmas to Martinmas lease, and that A's hypothec covered the rent for the year from Martinmas 1905 to Martinmas 1906.

Assignation — Company — Bankruptcy — Assignation of Uncalled Capital—Intimation of Assignation—Statement by Committee of Management Made at General Meeting that Uncalled Capital had been Assigned in Security—Sufficiency of Intimation—Club.

A club incorporated under the Companies Acts assigned in security the uncalled capital on its shares, issued and to be issued. A statement that this had been done, contained in a report by the committee of management, was read by the secretary at a general meeting of the club, but no other intimation was given. The club having thereafter gone into voluntary liquidation, the assignee claimed a preference *quoad* the capital assigned. *Held* that the assignation had not been validly completed, and that no preference had been thereby constituted in the assignee.

On 28th June 1906 Adam Davidson Smith, C.A., Edinburgh, liquidator of the Union Club, Limited, registered under the Companies Acts 1862 to 1890, presented under section 138 of the Companies Act 1862 a petition praying the Court to determine certain questions which had arisen in the voluntary liquidation of the said Union Club, Limited.

The petition set forth—". . . The liability

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of the shareholders was limited, and the capital of the Club was £10,000 divided into 10,000 shares of £1 each. Prior to the date of the resolution to wind up, hereinafter referred to, 15s. per share had been paid up on the shares issued up to that date. . . . The petitioner entered upon the duties of his office, and has sold, subject to the landlord's hypothec, as the same may be determined as after mentioned, the whole furnishings, &c., in the Club, which have realised a sum of about £1100 subject to expenses. He also, on 5th June 1906, made a call of 5s. per share upon the contributories of the said Club, payable on 29th June 1906, and he anticipates that the proceeds of this call will amount to between £600 and £700. There are practically no other assets. That the debts of the Club, exclusive of the claims of the landlords of the premises occupied by the Club hereinafter referred to, may be estimated at £1420. Questions have been raised by the Edinburgh Life Assurance Company, the landlords of the premises occupied by the Club, claiming a preference over the ordinary creditors in the distribution of the assets of the Club. . . .

"The following is a statement of the *facts out of which the questions arise*:—By lease (1) dated 17th and 18th February 1896 the Club leased from the Assurance Company, from the term of Martinmas 1895 as regards a portion of the premises, and from the term of Whitsunday 1896 as regards another portion, to the term of Whitsunday 1906 in each case, the premises No. 45 Hanover Street, Edinburgh. The rent under the lease was £1000, payable half-yearly, and the landlords were also bound to expend a sum of £2500 on structural alterations and repairs necessary for the occupation of the premises as a club. By minute of agreement between the Club and the Assurance Company, dated 25th February and 4th and 6th March 1896 . . . the Assurance Company agreed to advance a further sum of £1500 to the Club to be expended on these alterations. . . . By lease (2), dated 18th and 25th November 1903, proceeding on the narrative of the foregoing lease (1) and minute of agreement, and that 'it has now been arranged between the parties that upon implement and performance of all the prestations of the said lease and minute of agreement up to and including the term of Martinmas 1903, the said lease and minute of agreement should be held to be cancelled and rescinded in all the terms and provisions thereof as at the said term, and that these presents should be entered into in substitution thereof,' the said Edinburgh Life Assurance Company let to the said Union Club Limited the same premises, 'and that for the period from the term of Martinmas 1903 to the term of Whitsunday 1913.' On the other hand the Club bound themselves 'to pay to the said Edinburgh Life Assurance Company and the said company's assignees the yearly rent of £1000 for the said premises, and that at two terms in the year by equal portions, beginning the first term's payment of the said rent of £1000 at the term of Whitsunday 1904, when the sum of £500 will be payable for the half year preceding, and the next term's payment of £500 at Martinmas thereafter, and so forth half-yearly and termly during the currency of this lease, with a fifth part more of each term's payment of said rent of liquidate penalty in case of failure, and the interest of the said rent at the rate of five per centum per annum from each of the said terms of payment during the not payment.' By this lease (2) it is, *inter alia*, declared 'that in the event of the said Union Club Limited for any reason renouncing their tenancy of the premises hereby let at any time before the term of Whitsunday 1911, they shall be bound to pay to the said Edinburgh Life Assurance Company a sum of £500 in name of penalty, with interest thereon at the rate of five per centum per annum from the date of such renunciation until payment.' It is also declared by the said lease that 'in security of the obligations hereby undertaken by them the said Union Club Limited hereby assign to the said Edinburgh Life Assurance Company the uncalled capital of 5s. per share, payable by the shareholders of said Club, not only in respect of the shares of £1 each already issued and upon which the sum of 15s. has been paid or has become payable, but also in respect of shares which may yet be issued.' This assignation the petitioner avers has never been intimated to the shareholders of the Club . . .

"On 14th March 1906 the secretary of the Club wrote the manager of the Assurance Company intimating that the Club would give up at Whitsunday 1906 the premises leased by them under the lease (2). On 16th March 1906 the law-agents of the Assurance Company wrote to the secretary of the Club in reply pointing out that by such renunciation the Club became liable for the above penalty of £500, and intimating to him the rights and claims which the company had against the Club under the lease (2), as follows:—'(1) The furniture and all moveables on the premises fall under the landlords' hypothec in security of the whole of the current year's rent from Martinmas 1905 to Martinmas 1906. (2) The Club is liable for payment of the sum of £500 mentioned above. (3) The company has a claim for all loss of rent in respect of the unexpired period of the lease. (4) In security of the tenant's obligations under the lease, the uncalled capital of the Club of 5s. per share is assigned to the company. The amount of such uncalled capital is, it is understood, over £600, and the company claims a preferable right thereto.'

"The following *questions* have accordingly arisen between the petitioner and the Edinburgh Life Assurance Company:—(1) Whether the Club was, under the terms of the lease, entitled to renounce the lease at any time subject only to the obligation for payment of the penalty of £500, and of rent up to the date of renunciation; or on payment of the penalty and the rent for the year current at the

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date of renunciation? (2) Whether the current year of the lease is from Whitsunday to Whitsunday or from Martinmas to Martinmas? (3) To what extent the Assurance Company's hypothec is available to them? (4) Whether the assignation in favour of the Assurance Company of the uncalled capital of the Club has been validly completed, and a preference thereto constituted in favour of the Assurance Company to the exclusion of the general body of creditors? (5) Whether the Assurance Company has a claim for all loss of rent in respect of the unexpired period of the lease?

"The petitioner *maintains* that the clause in the lease (2) above quoted in regard to renunciation had the effect of conferring upon the Club a right to terminate the lease at any time, subject to payment of the rent up to the date of such renunciation, together with the amount of the penalty, or in any event limited their liability in the event of renunciation rendered necessary by liquidation or otherwise to the above-mentioned rent and penalty, and that all that the Assurance Company can claim as being covered by their hypothec is the half-year's rent due at Whitsunday 1906. Moreover, looking to the terms of the original and subsequent leases so far as the period of occupation is concerned, the petitioner maintains that the subsequent lease was a Whitsunday to Whitsunday lease, and that therefore the current year of the lease expired at Whitsunday 1906.

"The petitioner also maintains that the assignation never having been intimated to the shareholders, no preference to the uncalled capital of 5s. per share has been acquired by the Assurance Company over the general body of creditors."

The Edinburgh Life Assurance Company, 22 George Street, Edinburgh, the landlords of the premises at one time occupied by the said Union Club, Limited, lodged *answers*, in which they stated—"(4) The said Club was incorporated under the Companies Acts 1862–1893, as a company limited by shares. No one but a member of the Club could hold shares in the company, and all shareholders in the company were members of the Club. The directors of the company are throughout the articles of association called the committee of management. . . . (5) Following upon the said assignation of the uncalled capital to the respondents in security of the Club's obligations under the original lease and the said minute, formal intimation of the said assignation was duly made to the shareholders liable at the time for the payment thereof by the report of the said committee of management to the first annual general meeting of the members of the club held on 8th April 1896. An excerpt from the said report is herewith produced. [The excerpt was as follows:—'. . . In security of these obligations the committee has assigned to the Edinburgh Life Assurance Company the uncalled capital of 5s. per share. . . .'] (6) In these circumstances the respondents contend (1) that the Club had no right to determine its tenancy of the subjects let as at Whitsunday 1906, and remains liable for the whole rents due and to become due up to Whitsunday 1913; (2) that in the event of it being held that the Club had a right to determine its tenancy at Whitsunday 1906, it is liable in payment to the respondents of (*a*) the rent for the year then current, viz., from Martinmas 1905 to Martinmas 1906, and (*b*) the sum of £500 agreed on as penalty in the lease; (3) that the landlord's hypothec is available to the respondents to secure the rent for the said year from Martinmas 1905 to Martinmas 1906; (4) that the respondents have a preferable right to the uncalled capital."

Argued for petitioner—(1) This was an ordinary lease from Whitsunday to Whitsunday. Under the former lease the termination of the tenancy was at Whitsunday. There was no prohibition against renunciation. All that the Club was bound to do was to pay the rent up to Whitsunday *plus* the £500. (2) The intimation of uncalled capital was invalid. Intimation had not been properly made to the debtors—there was nothing more than an intimation by the committee of management to the members present at the general meeting. That was not enough to complete the assignation. Reference was made to Bell's Com., vol ii, pp. 14, 16, and to *Clark* v. *West Calder Oil Company*, June 30, 1882, 9 R. 1017, 19 S.L.R. 757.

Argued for respondents—(1) The Club had no right to determine the tenancy on payment of £500. The stipulation was in the landlords' favour—*Mackenzie* v. *Craigies*, June 18, 1811, F.C.; *Mackenzie* v. *Gilchrist*, December 13, 1811, F.C.; *Gold* v. *Houldsworth*, July 16, 1870, 8 Macph. 1006, 7 S.L.R. 646. The lease in question was one from Martinmas 1905 to Martinmas 1906, and the whole year's rent was therefore due—*Fraser* v. *Robertson*, January 7, 1881, 8 R. 347, 18 S.L.R. 224. The respondents were entitled to that *plus* the £500; more was not asked for. The lease was unambiguous in its terms. The entry was at Martinmas, and it was to be for nine and a-half years. It was not a renewal of the former lease, for that lease had been expressly cancelled. [Counsel for the respondent stated that they did not ask for more than the rent for the current year *plus* the £500, and did not insist in their claims *quoad* the unexpired period of the lease.] (2) The assignation of uncalled capital was a good mortgage. Intimation had been validly made. Bell's Prin. 1462; *Turnbull* v. *Stewart*, June 12, 1751, Mor. 868; *Paul* v. *Boyd's Trustees*, May 22, 1835, 13 S. 818. The report to the shareholders was sufficient intimation. The fact that the committee of management were parties to the deed was sufficient.

At advising—

LORD PRESIDENT—In this case certain questions were submitted to us to determine in the voluntary liquidation of the Union Club, but they have really been narrowed down to two. The learned counsel on both sides forebore, and I think very wisely, to insist on what might have been their

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extreme position, and at the end of the argument they had practically come to this agreement, namely, that the clause in the lease providing for a penalty of £500 in the event of a renunciation of the lease before its ish really meant this, that the parties were to be allowed to renounce at any proper term of the lease and were then to be quit of further liability by paying the current rent and the payment of £500. Where they differed was that while admitting that they were allowed to renounce at any proper term on payment of the current rent, the one party said that they were entitled to break the lease at Whitsunday, whereas the other said it was a Martinmas to Martinmas lease and they must at least pay the whole rent for the currency of the year from Martinmas to Martinmas. Upon that point I think we must take the lease as we find it, and inasmuch as the lease is a lease which stipulates that there is to be a payment of £1000 a-year, and that the first payment is to be made at Whitsunday for the period from Martinmas to Whitsunday, and the second for the period from Whitsunday to Martinmas, I think that that shows that for the purposes of paction between the parties this was a Martinmas to Martinmas lease, and that that is not disturbed by the fact that at the end the ish is not at Martinmas but that there is an extra period of six months added on at the end, bringing it to another Whitsunday. Therefore I think that that first question should be answered in this way, that the party having renounced and gone away, he is due, and consequently the hypothec is good for, the rent for the period from Martinmas to Martinmas.

The other question is this. In security of the obligation of the lease the Club convey and assign to the landlord the uncalled capital which they still had on certain shares and all uncalled capital on other shares that should come into existence. That they had power to do that is not doubtful, because there is a special power taken to that effect in the memorandum. But it is trite law in Scotland that an assignation, in order to make it a perfected security, must not only be an assignation but must be an assignation intimated. There was a somewhat heroic attempt on the part of Mr Watson to show that there had been intimation here, but all he could show was that there had been a general meeting at which some gentleman read out a manuscript report in which he said this thing had been done. There might or might not be a question as to how far that would be a proper intimation to a gentleman who was there and heard it, but to put it, as it was necessary to put it for the purposes of this case, as an intimation to the whole of the shareholders of the Club, many of whom were not there, is, I think, a sheer impossibility. And therefore I think we should answer that question by saying that there has been no good security constituted, and consequently the landlord by this assignation of the uncalled capital has obtained no preference over the general body of creditors.

LORD M'LAREN—I am of the same opinion, and on the question of the amount of the liability of the Club to the Insurance Company, who are the landlords, I think the argument for the Club really resolves itself into a new mode of computing time. It involves the necessity of reckoning the period backwards from the end of the lease and then arriving at a fractional part at the beginning. Such a mode of reckoning is contrary to the rules of arithmetic and receives no support from any rule of law that I am acquainted with.

On the other question of the validity of the assignment of the company's uncalled capital it is perhaps unfortunate that our decision may introduce a difference of practice into the laws of England and Scotland, but then that difference is the necessary and unavoidable result of the common law of the two countries. Under our law intimation is not only necessary to put the debtor in good faith to pay to the assignee and in bad faith if he pays to the original creditor, but it is necessary to transfer the right in a question of legal competition. Now, I agree with your Lordship that it is impossible to say that there was in this case anything which we can recognise as equivalent to intimation. The law does recognise equivalents to the more formal intimation—which I think has almost disappeared in practice—I mean intimation by a notary and witnesses—but it must amount to substantial intimation, so that every one of the debtors, or his agent having authority to act for him, shall be notified that the creditor has assigned his right to another person. I therefore agree that the question should be answered as your Lordship proposes.

LORD KINNEAR and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"Answer the questions in the petition as follows, viz., (first) that the Union Club, Limited, having renounced the lease as from Whitsunday 1906, payment of the current year's rent is due and also the penalty of £500 stipulated for in the lease: (second) that the current year of the lease is from Martinmas to Martinmas; (third) that the Assurance Company's hypothec is available to them for the year's rent of £1000 due for the period from Martinmas 1905 to Martinmas 1906; (fourth) that the assignation in favour of the Assurance Company of the uncalled capital of the Club has not been validly completed, and that no preference has been thereby constituted in favour of the Assurance Company: and (fifth) that the Assurance Company has no claim for any loss of rent in respect of the unexpired period of the lease; and decern."

Counsel for Petitioner—Hunter, K.C.—Scott Brown. Agent—W. C. L. Stark, S.S.C.

Counsel for Respondents—Macphail—Hon. W. Watson. Agents—Mackenzie & Kermack, W.S.

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Friday, July 20.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LANARKSHIRE COUNTY COUNCIL *v.* EADIE AND CALEDONIAN RAILWAY COMPANY.

Road—Railway—Substitution of New Road for Old—Right of Local Authority in the Old Road—Building by Adjoining Owner on Old Road where it Forms Cul-de-sac—Interdict—The Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 46 *and* 49—*Turnpike Roads (Scotland) Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 70—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 42 *and* 43.

A railway company in the exercise of statutory powers interfered with a public road, occupying the site of part of it with their railway line and station platforms, and provided a substituted road to the satisfaction of the local authority in terms of the 49th section of the Railways Clauses Consolidation (Scotland) Act 1845, which was incorporated with their Special Act. The new road ran to the north of the old and formed a cord to the arc which the old road had described. A portion of the old road near the east end of the arc about 88 feet in length was not actually used by the railway company, and formed a cul-de-sac affording access to property fronting it on the south belonging to A but affording access to no other property. A having acquired from the railway company the ground which lay *ex adverso* of his property, on the other side of the old road and between it and the new, proposed to build over the said portion of the old road. No steps had at any time been taken under the Turnpike Roads (Scotland) Act 1831, section 70, or later under the Roads and Bridges (Scotland) Act 1878, sections 42 and 43, to have the old road closed. *Held*, on an application by the county council as county road trustees for interdict, that no right in the portion of the old road in question remained in the complainers.

Lord Low—"Now, it seems to me that when a road has been interfered with by a railway company, acting under statutory powers, in such a way that it cannot be restored, and the company provide a substituted road, in terms of the 49th section" of the Railway Clauses Consolidation (Scotland) Act 1845, "to the satisfaction of the local authority, the General Road Acts have no application."

Campbell v. *Walker*, May 29, 1863, 1 Macph. 825, *distinguished.*

By section 1 of the Clydesdale Junction Railway Act 1845 (8 and 9 Vict. cap. clx) it is, *inter alia*, provided— . . . "And be it enacted . . . that the several Acts of Parliament following (that is to say) the Companies Clauses Consolidation (Scotland) Act 1845, the Lands Clauses Consolidation (Scotland) Act 1845, and the Railway Clauses Consolidation (Scotland) Act 1845, shall be incorporated with and form part of this Act."

By section 6 of the Caledonian Railway (Clydesdale Junction Railway Deviations) Act 1846 (9 and 10 Vict. cap. cccxcv) it is, *inter alia*, provided— . . . "Be it enacted that, subject to the provisions contained in the said recited Act relating to the Clydesdale Junction Railway, and the Acts thereby incorporated therewith, it shall be lawful for the Caledonian Railway Company to make and maintain the said deviations of the said railway and branch, and all necessary works and conveniences connected therewith, in the lines and upon the lands delineated on the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purposes."

The general heading to sections 6-24 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) is as follows:—"*Construction of Railway.*—And with respect to the construction of the railway, and the works connected therewith, be it enacted as follows":—By section 16 it is, *inter alia*, provided—"*Works to be executed.*—Subject to the provisions and restrictions in this and the Special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works—(that is to say), *Inclined planes, &c.*—They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, . . . within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper. *Alteration of course of rivers, &c.*—They may alter the course of any rivers not navigable, . . . within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper. . . . *General power.*—They may do all other acts necessary for making, maintaining, altering, or repairing and using the railway. . . ."

The general heading to sections 39 to 54 of the same Act is as follows:—"*Crossing of roads and construction of bridges.*—And with respect to the crossing of roads or other interference therewith be it enacted

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as follows:— . . ." By section 46 it is provided—"*Before roads interfered with others to be substituted.*—If in the exercise of the powers by this or the Special Act granted it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tramroad, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be."

By section 49 of the same Act it is, *inter alia*, provided—"*Period for restoration of roads interfered with.*—If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored or the substituted road put into such condition as aforesaid as the case may be within the following periods. . . ."

On 21st December 1904 the County Council of the County of Lanark, as the County Road Trustees, presented a note of suspension and interdict against William Eadie, spirit merchant, Cambuslang, praying the Court to interdict, prohibit, and discharge him "(*primo*) from erecting buildings, hoardings, or other structures, excavating foundations, depositing building materials on that portion of the old Glasgow and Hamilton highway which crosses from the Branch (Coats) highway westwards, that area of ground known as 'The Square,' Cambuslang, lying opposite to and northwards of the premises in Cambuslang occupied by the respondent as a spirit shop called 'Railway Tavern,' and dwelling-houses adjoining, and between said premises and the present Glasgow and Hamilton highway. . . ." [The note also contained a prayer (*secundo*) to interdict him from obstructing an alleged right-of-way across the 'The Square,' but the Lord Ordinary held that the existence of this right-of-way had not been established, and the question was not raised in the Inner House.] Answers were lodged to the note for Eadie, and also for the Caledonian Railway Company.

The complainers pleaded—"(2) The proceedings of the respondent Eadie complained of *quoad* his intended operations on the portion of the old road specified under head (*primo*) of the prayer of the note, being illegal and in violation of the rights of the complainers in said portion of the old road, the complainers are entitled to suspension and interdict as craved under said head, . . . (4) The Caledonian Railway Company's Acts not having vested in the said Railway Company the *solum* of the portion of road in question, and no steps having been taken either under the Roads Act of 1831 or that of 1878 to close it and dispose of it in terms of these Acts, the complainers are entitled to suspension and interdict as craved under head (*primo*) of the note, . . . (5) *Separatim*—The alleged action of the respondents the Caledonian Railway Company in appropriating part of the old road in question was *ultra vires* of their powers under statute or at common law."

The respondent Eadie pleaded—"(1) The right of highway over that portion of the old Glasgow and Hamilton highway, so far as it crossed the piece of ground known as 'The Square,' having been abandoned by the pursuers and their authors and the public for more than forty years, the complainers have no title or interest to insist on the interdict craved in the first place. (2) (*a*) The complainers having no right or title to the site of the old Glasgow and Hamilton highway, so far as it crossed the piece of ground known as 'The Square,' or (*b*), *separatim*, the complainers having lost by prescription any right or title to said site, the interdict first craved should be refused with expenses."

The respondents the Caledonian Railway Company pleaded—"(2) The respondents having interfered with the old road under statutory powers, and having substituted a new road for the portion of the old road interfered with, the *solum* of the said portion of the old road is thereby freed and relieved of any rights by the public to use the same as a public road. (3) In respect that the right to use the old road as a public road was abandoned in 1846, and has not since been insisted on, the complainers, as representing the Road Trustees, have no title or interest to insist on interdict as claimed. (4) The respondents having right under their title to the *solum* of the said area of ground, and the right to use the same as a public road having been abandoned and lost, . . . interdict as craved should be refused with expenses."

The facts of the case appear from the opinions of the Lord Ordinary (Pearson) and Lord Low *infra*.

On 18th August 1905 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—". . . Interdicts, prohibits, and discharges the respondents in terms of the first head of the prayer of the note as amended; . . . and decern: Appoints the cause to be enrolled for such further procedure as may be necessary, and that parties may be heard on the question of expenses; and grants leave to reclaim."

Opinion.—"The purpose of this note of suspension and interdict is to try certain questions as to the right of the public in and over an unenclosed space of ground in Cambuslang, which has for a number of years been known as The Square. It is of

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quite small extent, measuring about 88 feet from east to west, and on an average about 78 feet from north to south. It is bounded on the north by Main Street; on the east by Coats Road; on the south by a tenement including nine small houses and a tavern belonging to the respondent Mr Eadie; and on the west by the station precincts of the respondents the Caledonian Railway Company, from which it is divided by a wall with gates. The two respondents, on the assumption that the Square was their own property, recently put up hoardings on it with a view to building up and otherwise appropriating the open space, and it is against these proceedings that the interdict is directed.

"The complainers maintain two distinct and separate public rights over the open space. In the first place they claim, as being still vested in them as successors of the old Turnpike Road Trustees, a strip of about 40 feet wide, which traverses the Square from east to west, and which is proved to have been part of the old Glasgow and Hamilton turnpike road before its diversion in 1846-47 . . . In the second place they claim that there has been constituted, by prescriptive use, a public right-of-way for foot-passengers between the south-east and north-west corners of the Square, as marked red on the plan. Abstracting for the moment the right-of-way coloured red, there remain two almost triangular spaces, one to the north coloured yellow, and the other to the south coloured purple, on that plan. The former belongs in property to the Railway Company, and the latter to Mr Eadie. Save as to the question of right-of-way, these are, as I understand it, both now outside the prayer of the note as amended. After a long proof I think it appears that the parties are substantially at one upon all the material facts, and that by far the greater part of the evidence might have been made matter of admission.

"I consider first the claim as to the old turnpike road where it runs through the Square. It appears that the railway at this part was constructed under powers contained in two Special Acts of 1845 and 1846, in which was incorporated the Railways Clauses Act 1845. The railway at and near Cambuslang Station was in cutting, and according to the parliamentary plans the turnpike road would have had to be carried over it at such an angle as to involve the building of a long skew bridge. To avoid this and to enable the road to be carried over at an easier angle, it was desirable to deviate part of the turnpike road and to carry it further to the north. This was done, the new part being now a portion of the main street of Cambuslang, and the part of the old road now in question being quite near the eastern end of the deviation. Before the deviation was made by the Railway Company they approached the Road Trustees on the subject, and submitted a sketch of it to them on 2nd December 1846. The Trustees' committee of management remitted to a sub-committee of three to visit the ground, 'and if satisfied that the deviation line proposed will not be injurious to the public, to acquiesce in the same on the part of the trust,' the Railway Company taking upon them any claims of damage or other claims at the instance of proprietors of property on the line of the present road or others on account of the operations. The sub-committee inspected the ground on 5th December as staked off to show the diversion, and they 'gave their consent thereto on the condition that the work should be executed, so far as the Trust road is affected, at the sight and to the satisfaction of the Trustees' surveyor,' and on a further condition as to raising 'the present road' where it crossed the Culloch Burn. To these conditions the Railway Company's engineer assented. Nothing further appears to have taken place between the parties, except that in March thereafter the Trustees made a demand on the Railway Company to make and keep the new road passable; and in October 1849 it seems to have been taken over by the Trustees on their receiving £23, 11s. 8d. as a settlement of their claims for the deviation.

"One other circumstance must be noticed as explaining the position of the parties concerned. Both the old road and the new ran through the lands and estate of Rosebank; and the Railway Company had purchased that estate by private agreement in December 1844. It was described as consisting of 99 acres, with reference to a plan which has been lost; but a plan is produced which is said to represent the original, and which might, in some aspects of the case, have been of importance. But at any rate Rosebank comprised the ground between the old road and the new, and also the solum of the new road, which therefore the Railway Company themselves furnished from their own estate. The part of the old road which was superseded by the new was left open to the public, without either fence or building, from the east end of it as far west as the wall I have already mentioned which separates the Square on its west side from the station precincts. But from that wall westwards, for its whole length, the old road was enclosed by the Railway Company and others and used as private property, except certain parts of it further west, which appear to be portions of the public street.

"There can be no question that the old road was never shut up under the powers conferred by the General Turnpike Act 1831. This being so, the Road Trustees and their successors remain possessed of all the public rights which were vested in them as Trustees of the old road, unless some other statutory right can be pleaded by the Railway Company. I think this is clear on the authorities; and although it was urged for the Railway Company that the decisions on section 70 of the Turnpike Act had to do mainly with the rights of neighbours and other persons having private interests in the road, the same principle was affirmed with reference to an older statute as regards the assertion of a public right-of-way in the opinions delivered in *Murray* (1870, 9 M. 198), though in one view it was not

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necessary to the judgment. It is true that in their third plea-in-law the Railway Company maintain, as they also did in their original statement on record, that the right to use the old road as a public road was 'abandoned' in 1846 and has not since been insisted on. But by an amendment of their averments the Railway Company have deleted all reference to the alleged abandonment, and have substituted the word 'discontinuance,' which seems to me an expression of fact (and therefore perhaps more appropriate to a condescendence), but without any legal implication. Their real case I take to be as expressed in the second plea-in-law, namely, that the Railway Company having interfered with the old road under statutory powers, and substituted a new road for the old one, the *solum* of the old road was thereby freed from public rights and vested unburdened in the Railway Company as owners of the lands of Rosebank. This result, as the language used in the plea suggests, is supposed to follow not from anything in the parliamentary plans or in the Special Acts, but from the provisions of the Railway Clauses Act, and more particularly section 16 and section 46, taken in connection with the consent or acquiescence of the Road Trustees as expressed in the documents to which I have already referred. The 16th section will hardly serve the company's purpose. It confers power indeed, for the purpose of constructing the railway, to divert or alter the course of roads. But the argument demands more than a mere power to divert a road, and, moreover (what is still more important), the section has been construed by high authority as determined and limited by the words of the last particular clause, namely, 'they may do all other acts necessary for making, etc., the railway'; and it has been laid down that necessity is not made out where it is a mere question of cost, as the difference between a bridge on the skew and on the square appears to be. See the cases of *The Queen* v. *Wycombe Railway Company* (L.R. 2 Q.B. 310); *Pugh* (L.R. 15 Ch. Div. 330). The wording of the plea rather suggests the language of section 46 of the Act, which deals with the case of interference with a road, and the substitution of another road for it. I have some doubt on the facts, and specially in view of the cause assigned by the Railway Company's witnesses for casting about the road, whether this was an interference and substitution at all within the meaning of the group of sections from section 46 to section 50, as these are expounded in the case of *Carruthers* (15 D. 591). Moreover, section 46 is conditioned, as is section 16, upon its being 'found necessary' to do certain things; and I do not see that any case of necessity was made out. But in any view I do not read the section as including in the idea of 'substitution' the transfer of the whole of the original subject interfered with to the Railway Company. I am not aware that it has ever been so construed in any decision, and the suggestion seems to me to go far beyond the necessity or the reason of the enactment. Indeed, the Railway Company do not rest their case wholly upon the statutory enactment, for they call in aid the consent (such as it was), or perhaps one ought to say the acquiescence, of the Road Trustees in the changed state of matters, as barring the complainers as the trustees' successors from now vindicating the public right. But then what was the change in the state of matters? It is not as if the Railway Company had gone into occupation of the whole length of the old road. They did occupy a part, which is included in their station premises, and their right to which is not here disputed. But as regards the part of the old road to the east of the station ground, things simply remained as they were, and the old road has remained to this day open to all, and substantially in the same condition as it was in 1846. If there was a transaction by which (the Trustees assenting, or at least not objecting) the Railway Company got a *quid pro quo* for the land they were dedicating to the line of the new road, I am unable to see any reason for extending that beyond the part of the old road they were then put in possession of. So far as they have possessed and enclosed it, it may be assumed that this was deemed consistent with the public interest; but I have heard no good reason why the concession should go further, or rather should be now deemed to have gone further at the time. Nor is it a sufficient answer to say that this part of the old road was kept open for the benefit and in the interest of the Railway Company as an access to their station, and of Mr Eadie as an access to his tenements and his public-house. They will get the full benefit of this consideration in the second part of the case, namely, as to the right of footpath; but so far as the old road now in question is concerned, it simply remained as it was, open for all purposes, including public purposes, so far as these could be served by it in the altered circumstances. Nor, in the view I take, does any question arise as to the property in the *solum* of the old road. That property remains where it was.

"On these grounds I hold that the complainers are entitled to interdict in terms of the first part of the prayer as amended.

"The second claim is for a right-of-way for foot-passengers extending diagonally across the Square in the line marked red on the plan. . . ." [*His Lordship then proceeded to deal with the right-of-way claimed, which he held had not been established.*]

The respondents reclaimed, and argued—The statutory method of shutting up a public road provided by the Turnpike Roads (Scotland) Act 1831, section 70, and by the Roads and Bridges Act 1878, sections 42 and 43, was not the only way in which a part of a public road could be shut up or cease to be a road. A company might obtain statutory authority to shut up a road—*Hay* v. *City of Glasgow Union Railway Company*, July 14, 1871, 1 R. 1191, 11 S.L.R. 700; *Marquis of Salisbury* v. *The Great Northern Railway Company*, 1858, 5 C.B., N.S. (Scott's C.B.) 174; and *Melksham Urban District Council* v. *Gay*, 1902, 18

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T.L.R. 358; and in the present case the effect of the statutory authority obtained, under which the old road had been interfered with and a substitute road provided, had been to make the whole of that part of the road for which the substitute had been provided cease to exist as a road. A portion of the old road had been used for the railway line and station premises; that portion certainly was no longer a road; and as to the portion here in question, though not actually used by the Railway Company, it had been interfered with in the sense that it no longer afforded a way of passage to the public, for it formed a cul-de-sac, and the only person (Eadie) to whose property it served as an access desired to shut it up. This distinguished the case from *Campbell* v. *Walker*, May 29, 1863, 1 Macph. 825. The *solum* of a public road belonged to the adjoining proprietors and the only right of the public to a road was a right of passage—*Galbreath* v. *Armour*, July 11, 1845, 4 Bell's Ap. 374, esp. Lord Campbell at p. 380-1 and Lord Brougham at p. 390; and *Harrison* v. *The Duke of Rutland*, [1893] 1 Q.B. 142. It was preposterous 60 years after the new road had, with the Road Trustees' consent, been substituted for the old, to say that it must be shown that the diversion was "necessary" for the purposes of the railway. The Road Trustees had done nothing to keep up the ground in question as a road, nor had it been nor could it be used by the public as a road, and hence any right the Road Trustees or the public might once have had they had lost by dereliction—*Winans* v. *Lord Tweedmouth*, March 10, 1888, 15 R. 540, 25 S.L.R. 405; and *Melksham Urban District Council* (*cit. supra*).

Argued for the complainers—(1) "Such lands" in the portion of section 16 of the Railways Clauses Act headed "*Alteration of course of rivers, &c.*" referred back to "the lands described in the said plans" which occurred in the previous portion of the same section headed "*Inclined planes, &c.*" The railway company had not in their deposited plans drawn any line across the old road to show how much of it was to be taken, and accordingly the ground in question was not delineated or "described in the said plans"—*Protheroe* v. *Tottenham and Forest Gate Railway Company*, 1891, 3 Ch. 278; *Place* v. *The West Highland Railway Company*, December 12, 1894, 32 S.L.R. 145—and the Railway Company therefore could not found on section 16, nor could they benefit from section 46, for "any road" in that section meant any of the roads to which section 16 applied. (2) Apart from special legislation a turnpike road could not be closed to any extent or effect except by procedure under the Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV, cap. 43), section 70, and the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sections 42 and 43. This procedure had not been followed, and the rights of the public remained now vested in the complainers as successors of the Road Trustees—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 11. The rule was that once a highway always a highway—*Murray and Others* v. *Arbuthnot*, November 29, 1870, 9 Macph. 198, 8 S.L.R. 152; *Walker* v. *Weir*, March 26, 1817, 6 Pat. Ap. 281—and the rule applied even where a substituted turnpike road had been provided—*Lang* v. *Morton*, February 2, 1893, 20 R. 345, 30 S.L.R. 395. The case of *Campbell* v. *Walker* (*cit. supra*) was very similar to the present, and the grounds of judgment of three of the judges in that case were sufficient to decide the present in the complainers' favour, Lord Cowan being the only judge who laid stress on the cul-de-sac being an access for the frontagers there. It was not *Campbell's* right that was there vindicated but the public's. The public still retained their rights to the ground here in question—Pratt on Highways, 15th ed. p. 6—*Gwyn* v. *Hardwicke*, 1856, 25 L.J. Mag. Cases 97. *Winans* (*cit. supra*) had no application. In *Hay* (*cit. supra*), just because they wanted to shut up the road, the words "shut up," and not merely divert or substitute, were used. In *Marquis of Salisbury* (*cit. supra*) the railway company had actually enclosed the ground, and the public did not use it. The rights of the public to the road vested in the Road Trustees were not lost by acquiescence—Pratt on Highways, 15th ed. p. 129. As to the word "substituted" in sections 46 and 49, the Railway Company had not substituted the new road for the old except in so far as they had "interfered with it." The part in question still existed and had not been "interfered with." As to the words "divert or alter" in section 16 the same argument applied. Here there was no legislation warranting taking away of the public's rights in the road, for the reclaimers had failed to prove that the diversion or substitution was "necessary," and that was required not only by section 46 but also by section 16—*London and North-Western Railway Company* v. *Ogwen District Council*, 1899, 80 L.T. 401; *Attorney-General* v. *The Dorset Central Railway Company*, 1861, 3 L.T. 608; *The Queen* v. *Wycombe Railway Company*, 1867, L.R., 2 Q.B. 310; *Pugh* v. *Golden Valley Railway Company*, 1880, L.R., 15 Ch. D. 330.

At advising—

LORD LOW—The question which has to be determined in this case seems to me to depend chiefly upon the meaning and effect of the 46th and 49th sections of the Railway Clauses Act 1845, and especially of the latter section.

These sections form part of the group of sections beginning with the 39th, which are brought together under the general heading of "Interference with Roads." From the 39th to the 45th section the case of a railway merely crossing a road is dealt with, and provisions are made in regard to level crossings, bridges carrying the line over the road, or carrying the road over the line, and kindred matters, such as gradients. Section 46, however, passes to another kind of interference with roads, and deals with cases in which "in the exer-

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cise of powers by this or the Special Act granted, it is found necessary to cross, cut through, raise, sink, or use any part of any road . . . so as to render it impassable for or dangerous to passengers or carriages." In such a case it is made imperative upon the company before commencing operations "to cause a sufficient road to be made instead of the road to be interfered with," and to maintain "such substituted road" in as convenient a state for traffic, as nearly as may be, as the road interfered with.

That section is plainly limited to the period during which the works by which the road is interfered with are in course of execution, but the 49th section provides what is to be done when the works are completed. It enacts that if the road interfered with can be restored "compatibly with the formation and use of the railway" it shall be restored, but "if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow."

Now under their Special Act the Caledonian Railway Company were authorised to use part of the old turnpike road in question, and they did so by laying their railway for some distance in a cutting actually upon the line of the old road, and they also used other parts of the road for station platforms and other necessary works. I did not understand it to be contended, nor, in my judgment, could it have been successfully contended, that the Railway Company were not justified in making the use of the road which they did. Further, I do not think it could be suggested (nor did I understand it to be suggested) that this was not a case for a substituted road. It is plain that the old road could not have been restored compatibly with the formation and use of the railway, because, as I have said, the railway ran for some distance in a deep cutting upon the very line of the road. The choice, therefore, seems to have been between a long skew bridge over the railway and a new road. The Railway Company offered the substitute road which is now in use, and the Road Trustees approved of and accepted that road, it being clearly in the interest of the public to do so.

Now, in so far as the ground upon which the old road ran has been actually used by the Railway Company, it has, as matter of fact, ceased to exist, and the complainers cannot claim any right to a road which is non-existent, and therefore so far as that part of the old road is concerned the substituted road has come in its place for every purpose.

There is, however, a part of the old road lying to the east of the railway works which the Railway Company have not used. That part of the old road is intersected by the West Coats Road which crosses it at right angles, and no question is raised in regard to the portion which lies to the east of West Coats Road. It is still capable of being used, and is in fact used, as a public road, and nobody proposes to interfere with it. The portion of the old road, however, which lies to the west of West Coats Road is in a different position, and is the subject of the present litigation. Its length is about eighty-eight feet, and it is bounded on the west by the wall enclosing the ground (which includes part of the old road) upon which the railway station and its adjuncts are erected; on the north by a piece of ground belonging to the Railway Company; on the south by ground the property of the respondent Eadie; and on the east by West Coats Road.

The piece of the old road in question (that is, the piece lying to the west of West Coats Road) is therefore a cul-de-sac, and since the completion of the railway works it has been incapable of any use whatever as a public road except in so far as it was required to give access to the property now belonging to Eadie.

After the completion of the railway works in 1848 the Railway Company granted a letter to the then proprietors of Eadie's ground, in which they bound themselves "to level the ground in front of said property and between it and the new line of the turnpike road" (that is, the substituted road), "and to leave the said space open and common in all time coming." That obligation was carried out, and since its date access has been allowed to Eadie's property not only by the old road but over the piece of ground belonging to the Railway Company intervening between it and the substituted road. It appears, however, that recently an agreement has been entered into between the Railway Company and Eadie for the acquisition by the latter of the piece of ground belonging to the Railway Company upon the north side of the old road, Eadie's intention being to build upon the ground between the substituted road and his property, including the piece of the old road in question. If it be the case that that piece of the old road has ceased to be a road, and if in consequence the incorporeal right of passage with which the ground occupied by the road was burdened has flown off, I do not think that it can be doubted that Eadie, as owner of the ground on both sides of the road, and therefore of the *solum* under the road, is entitled to build upon it.

The complainers, however, maintain that the only way in which any part of a public road can be shut up and cease to be a public road is by following the statutory procedure for shutting up a road (that procedure being, at the time when the railway was made, regulated by the General Turnpike Act 1831, and now by the 42nd and 43rd sections of the Roads and Bridges Act 1878), and that, accordingly, unless and until that procedure is adopted, the piece of road in question remains a public road vested in them as the local authority.

Now, it seems to me that when a road has been interfered with by a railway company, acting under statutory powers, in such a way that it cannot be restored, and

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the company provide a substituted road in terms of the 49th section to the satisfaction of the local authority, the General Road Acts have no application.

I do not think that that proposition can be disputed in cases where a road or part of a road has actually been used for the construction of railway works. The present case furnishes an example of such a use of a road, because, as I have already pointed out, the cutting in which the line is laid occupies the site of part of the road. The complainers admitted that they could not maintain that that part of the road was still vested in them for the public interest, and that amounts to an admission that a public road may, under the Railway Acts, cease to exist, although it has not been shut up in the manner provided by the Road Acts. The complainers, however, maintain that if a piece of the road, however small, and however useless for the purposes of a road, is not actually used by the Railway Company, that piece remains a road vested in the Road Trustees, and cannot be used for any purpose whatever unless the statutory procedure for shutting up a public road is adopted. Accordingly, although the acquisition by Eadie of the ground upon the north side of the road has put an end to the only interest in the road which remained after the substituted road was provided, and although there is now no human being by whom the road can be used for the purposes of a road, the complainers maintain that it is still vested in them, and that they are entitled to demand that it shall remain open, unless they choose to set in motion the statutory procedure for having it shut up.

I am of opinion that not even a technical right to the piece of road in question remains in the complainers, although, even if there were such a right it would not, in my judgment, entitle them to the interdict which they seek, because, as their counsel frankly admitted, they have no interest whatever to enforce the right. My reasons for holding that no right to the piece of road in question remains in the complainers are these—Although the Railway Company have not actually used it for railway works, they have interfered with it so that it cannot be restored—that is to say (as I understand the expression) it cannot be made fit for the purposes which it formerly served. The Railway Company were therefore bound in terms of the 49th section to supply as a substitute for the piece of road in question an equally convenient road, and they have done so. It therefore follows, in my judgment, that the "substituted road" came in place (as the very expression implies) of the road for which it was substituted, and that the latter ceased technically, as it had ceased in fact, to be a road at all.

I do not think that that view is in any way inconsistent with the case of *Campbell* v. *Walker* (1 Macph. 825), upon which the complainers founded. It seems to me that in that case the road, in so far it lay between Mr Campbell's property and Helensburgh, had not been interfered with, and that no new road had been substituted for that part of it. The present case would indeed have been somewhat analogous to *Campbell's* case if the Railway Company had tried to shut up the old road while it was still required as an access to Eadie's property. They did not however do so, and Eadie's interest being out of the way, and no other interest being suggested, and a new road having in fact been supplied and accepted as a substitute for the old road, the decision in *Campbell's* case has in my judgment no application.

I am therefore of opinion that the Lord Ordinary's interlocutor, in so far as it grants interdict in terms of the first head of the prayer of the note, should be recalled.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Kyllachy, Lord Stormonth Darling, and Lord Low).

The Court pronounced this interlocutor—

"... Recal the said interlocutor [dated 18th August 1905]: Repel the reasons of suspension: Refuse the interdict craved, and decern. ..."

Counsel for Complainers (Respondents)—Wilson, K.C.—Cullen, K.C.—MacRobert. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for Respondent (Reclaimer) Eadie, and for the Respondents (Reclaimers) The Caledonian Railway Company—Cooper, K.C.—Blackburn. Agents for Eadie—Campbell & Smith, S.S.C. Agents for the Caledonian Railway Company—Hope, Todd, & Kirk, W.S.

Friday, July 20.

FIRST DIVISION.

[Exchequer Cause.

MOORE (SURVEYOR OF TAXES) *v.* STEWARTS & LLOYDS, LIMITED.

Revenue — Income-Tax — Profits — Deductions—Payment Made to Rival Company for Commanding Interest in its Management—"Money wholly Expended for the Purpose of Such Trade"—Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 53), *sec.* 100, *Schedule D, Rules Applying to First and Second Cases, No. I.*

A company having made an agreement with another company carrying on a similar business, whereby it obtained, in return for an undertaking to make up the yearly profits of the second company to a certain amount, a commanding interest in its management, claimed to deduct from its yearly profits for the purposes of income-tax assessment the sum paid to the other company. The Income-Tax Commissioners allowed the deduction, holding that the payment had been made by the company "for the purpose of its trade, and that it might sell its goods at

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a better price." The Surveyor appealed. *Held* (1) that the question was one of fact rather than of law, and (2) that the deduction had rightly been allowed.

The Income-Tax Act 1842 (5 and 6 Vict. cap. 35), section 100, enacts—"And be it enacted that the duties hereby granted, contained in the Schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

Schedule (D).....

Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

First Case.....

Rules.....

Second Case.....

Rules.....

Rules applying to both the preceding cases. First, in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from . . . such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purpose of such trade, manufacture, adventure, or concern . . . . . ."

This was a stated case taken at the instance of the Surveyor of Taxes for the City of Glasgow.

The case set forth—"At a meeting of the Commissioners for the General Purposes of the Income-Tax Acts, and for executing the Acts relating to Inhabited House Duties for the city of Glasgow, held at Glasgow on the 4th Day of December 1905,

"Stewarts & Lloyds, Limited (hereinafter referred to as 'the company'), appealed against an assessment for the year ending 5th April 1906 on the sum of £172,770 (duty £8638, 10s.) made upon it under Schedule D of the Income-Tax Acts, in respect of the profits of the business carried on by it, after allowing a deduction of £14,760 for wear and tear of machinery.

"The assessment was made under 5 and 6 Vict. c. 35, sec. 100, Schedule D, First Case; 16 and 17 Vict. c. 34, sec. 2, Schedule D; and 5 Edw. VII, c. 4, sec. 6.

"I. The following facts were admitted or proved—1. . . .

"2. The objects of the company, as set forth in the third article of its memorandum of association, are, *inter alia*, as follows:—'. . . . . (*h*) To enter into partnership, or into any arrangement for sharing profits, union of interests, reciprocal concession, or co-operation with any person or company carrying on or about to carry on any business which this company is authorised to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take, or otherwise acquire and hold, shares or stocks in, or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with, such shares or securities.'

"3. The liability of the company falls to be adjusted by reference to the profits of the three years ended 31st December 1902, 31st December 1903, and 31st December 1904.

"4. Wilsons and Union Tube Company, Limited (hereinafter referred to as the Wilsons Company), incorporated under the Companies Acts 1862 to 1898, and having its registered office at No. 5 Wellington Street, Glasgow, carry on a business similar to that of the company.

"5. In arriving at the profits for the year ending 31st December 1904, the company claimed deduction of a sum of £841 paid to the Wilsons Company under minute of agreement, dated the 26th day of October and the 3rd day of November 1903, entered into and executed by and between the Wilsons Company and the company. . . . .

"6. The Wilsons Company was not assessed to, and did not pay income-tax on, said sum of £841.

"II. The company contended—(1) That the agreement was entered into and the payment of £841 was made solely for the purposes of its own trade, and that it might sell its goods at a better price, and that therefore the deduction claimed was a proper one to be made from gross profits: (2) That as the arrangement made with the Wilsons Company enabled the company to make larger profits, and to an extent exceeding the payment made to the Wilsons Company, it is unreasonable to assess the larger profits to the income tax, and not allow as a deduction the sum expended by the company to earn them; and (3) That the Wilsons Company had paid dividend to their shareholders from which they deducted income tax—partly with the £841.

"III. The Surveyor of Taxes maintained—(1) That the payment of £841 was not expenditure incurred in *earning* the profits of the company, but was a payment made in consideration of the company being allowed to nominate a majority of the board of the directors of the Wilsons Company; (2) That it was not money wholly and exclusively laid out or expended for the purposes of the trade of the company, within the meaning of the first rule, applying to both the first and second cases of Schedule D, section 100, 5 and 6 Vict. c. 35 (*Rhymney Iron Company, Limited* v. *Fowler* [1896], 2 Q.B. 79, 3 Tax Cases 476); and (3) That the payment of £841 was merely an appropriation of profits earned by the company, which is required by the Income Tax Acts to pay income tax on the whole of its business profits irrespective of their destination (*Mersey Docks and Harbour Board* v. *Lucas*, 1883, 8 A.C. 891, 49 L.T.R. 781, 2 Tax Cases 25).

"IV. The Commissioners, on a consideration of the evidence and arguments submitted to them, held that the payment of £841 by the company having been made for the purpose of its trade and that it might sell its goods at a better price was a proper deduction, and, accordingly, they allowed the deduction of £841 claimed by the company . . ."

The minute of agreement between Wilsons and Union Tube Company, Limited

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(first parties), and Stewarts & Lloyds, Limited (second parties), referred to in the stated case, under which the payment of £841 was made to the first parties, provided, *inter alia*:—"(*First*) The first parties agree to elect to their board of directors, and to continue to elect from time to time, and to retain as directors, such persons as may be nominated by the second parties greater in number than the other directors of the first parties. It shall be optional to the first parties at any time to decline to elect or re-elect or retain the nominees of the second parties, but in the event of their doing so, all obligations incumbent on the second parties under this agreement shall immediately cease. The second parties may from time to time change their nominees, in which case those previously nominated, one or more, so changed, shall retire, and the new nominees take their place. (*Second*) So long as, and if when required, the requisite number of nominees of the second parties are elected to the board of the first parties, and retained members thereof, the second parties agree to pay to the first parties, half-yearly on 1st March and 1st September, whatever sum is required to pay or make up a half-year's dividend on the preference shares of the first parties, according to the balance at credit or debit as shown by their balance sheets, to be made up as at thirtieth June and thirty-first December, half-yearly, and duly audited, *i.e.*, if the profit shown by the balance sheet is less than two thousand five hundred pounds, the second parties shall make up the deficiency to the first parties, and if there be no profit at the credit of profit and loss account, or if there be a debit, the second parties shall pay to the first parties the sum of two thousand five hundred pounds. But declaring that in ascertaining such credit or debit there shall not be taken into account any loss carried forward from a preceding half-year, but merely the loss, if any, arising on the half-year's trading taken by itself. The first payment shall, if required, be made on the first day of March nineteen hundred and four. The balance at debit or credit of profit and loss account shall, for the purpose of this agreement, be ascertained by the auditors of the first parties. It is hereby expressly declared that the liability of the second parties in each half-year shall not exceed the sum of two thousand five hundred pounds. . . ."

The case came before the First Division.

Argued for the appellant (the Surveyor of Taxes)—The sum in respect of which deduction was claimed did not fall under Rule 1 applying to both the First and Second Cases under Schedule D, sec. 100, of the Income Tax Act, 1842 — Dowell's Income Tax Laws, 5th ed., p. 152 — but under Rule 3 applying to the First Case—Dowell, *ut supra*, p. 145—and it was therein enacted that such payments were not to be deductible. But taking Rule 1 applying to both First and Second Cases, deduction was claimed here in respect of a disbursement not wholly or exclusively incurred for Stewarts & Lloyds' benefit, and necessary to the earning of their trade profits. Disbursements to be deductible must be directly concerned with the production of the article manufactured or its distribution, and not mere indirect aids to trading facilities—*Watney* v. *Musgrave*, L.R., 5 Ex. D. 241, 1 Tax Cases, 272—or must be for the purposes of carrying on a business, not an insurance against loss in the event of its profits ceasing or diminishing—*Rhymney Iron Company Limited* v. *Fowler*, [1896] 2 Q.B. 79, 3 Tax Cases, 476; *Brickwood & Company* v. *Reynolds*, [1898] 1 Q.B. 95, 3 Tax Cases, 600, *per* Pollock (B), 604. The expenditure under consideration was not of a character for which deduction could be claimed in view of these decisions. Further disbursements necessary to earn profits might be deducted, but this was an application of profits already earned—*Strong & Company, Limited* v. *Woodifield*, [1905] 2 K.B. 350, *per* Collins (M.R.), 356. Nor was the result of the expenditure necessarily to earn a profit; the company might have to recoup Wilsons Company for loss owing to general depression of business or imprudent trading. It was in their power to have specially arranged only to pay when loss was the result of keeping up prices for their mutual benefit, but they had not done so. In certain circumstances the agreement might even be against the company's earning increased profits. There was no case where a payment of this character, which was not for making or putting on the market the goods manufactured, but was for preventing a loss, or for creating a state of the market through the transactions of a rival business, had been held deductible.

Argued for the respondents—The finding of the Commissioners showed that in fact the expenditure in respect of which deduction was claimed was made for the purposes of profit-earning in their trade, and it was wholly and exclusively for these purposes in the meaning of Rule 1 applying to First and Second Cases under Schedule D, sec. 100, of the Income Tax Act 1842. It was to be noted that the rule did not use the word "necessary" in prescribing the nature of deductible expenses, but merely observed a distinction between outlay to earn profit and the application of profit earned — *Mersey Docks* v. *Lucas*, L.R., 8 A.C. 891, *per* Lord Selborne (L.C.), 903, In the present case the earning of increased profit was the only possible motive for the expenditure, so the rule laid down by Collins (M.R.) in *Strong & Company, Limited* v. *Woodifield*, *ut supra*, p. 356, was in their favour. The true meaning of the words "profits or gains" in commercial trading was laid down in *The Gresham Life Assurance Society* v. *Styles*, [1892], A.C. 309, *per* Lord Halsbury (L.C.), 316, and that of the "profit of trade" was defined in *Russell* v. *Town and County Bank*, April 26, 1888, 15 R. (H.L.) 51, Lord Herschell, 52, 25 S.L.R. 451. These definitions showed that the expenditure here was deductible, and that the amount was not assessable to income tax. As to the cases quoted for the appellants, the *Rhymney Iron Company, Limited* v. *Fowler*, *ut*

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supra, was distinguished, for in the present case a working agreement was of importance to the company. Pollock (B) laid it down in *Reid's Brewery Company* v. *Male*, [1891], 2 Q.B. 1, p. 8, 3 Tax Cases, 279, that the case of *Watney* v. *Musgrave*, *ut supra*, went too far, and that argument had been accepted by the Bench in the case of *Southwell* v. *Savill Brothers, Limited*, [1901] 2 K.B. 349. Every authority supported the proposition that any expenditure necessary for earning profit, or without which profit would not have been gained, falls to be deducted before assessing profits for income tax, and that was the character of the payment in question. The whole question was indeed primarily one of fact, the agreement could not be considered *per se*, and the finding of the Commissioners who had considered the full facts was conclusive since there was no error in law proved. The agreement was to further the trading interests of the company, though benefit might accrue to the Tube Company thereby, and consequently the sum paid thereunder should be deductible in calculating income tax.

At advising—

LORD M'LAREN—This case raises a question under the Income Tax Acts, which may or may not be of frequent occurrence, but which to my thinking has much more the complexion of an issue of fact than of a question of law.

The question is, whether a payment of £841 made by the respondent company to another company in the same line of business is to be held to be a payment out of profits, or is in fact a payment of the nature of current expenditure, which was made with a view to the earning of profits. In the former view of its character the payment would be subject to taxation, in the latter view it would not.

I observe in the first place that this was a payment made in fulfilment of an agreement. The respondent company by agreement with the Wilsons and Union Tube Company obtained the right to nominate a majority of the members of their board of directors, and in consideration of this privilege they undertook to make an annual payment, which was equivalent to the guarantee of a dividend to the affiliated company. *Prima facie*, a payment made in fulfilment of an agreement and for the purposes of business is a part of the commercial expenditure of the company making the payment, and in a profit and loss account would be set against gross profits, the assessable profit or income being the difference between the gross profits and the expenditure incurred for the purpose of earning profits.

If the payment made to the affiliated company could be regarded as charity my opinion would be that it was a payment out of income, and that it was subject to income-tax. But mercantile companies are not in the habit of subsidising competing companies from motives of benevolence. Such a payment would not be a legal application of the shareholders' money, and in the absence of evidence or an admission to the contrary effect I think it is a just legal inference that the payment in question was a payment made for the advancement of the respondent's business, and with a view to augmenting its capital or its income. As this is an annual payment, it would, as a matter of accounting, be regarded as a payment made with a view to the increase of income, and would be properly entered in the annual accounts. The Commissioners have found in fact that the payment was with a view to earning larger profits.

The consideration appearing on the face of the agreement is the right of nominating a majority of the directors of the affiliated company. I do not think we are much concerned with the question in what precise way this nomination operated for the benefit of the respondent company. But it is easy to see that the trade of the respondent company would be promoted by such an arrangement. It would certainly have this effect, that the two companies would co-operate in their trade instead of competing for business against one another. Then it would naturally tend to the fixation of a common system of remunerative prices, which would be preferable to having the prices liable to be cut down by competition. Or, again, the management might result in a distribution of the different branches of their manufacture between the two affiliated companies under which their industrial work would be more economically carried on.

In these and other ways that may be imagined what is called a working agreement may be profitable to one or both of the companies concerned, and if such a working agreement can only be arrived at by mutual concessions, or by a payment on on one side, and the concession of privileges on the other, I see no reason why the pecuniary consideration should not be treated as an item of proper business expenditure.

I may add that in my opinion the question whether the expectation under which the agreement was made was fulfilled does not in any way affect the ground of judgment. The arrangement may or may not have been a prudent speculation on the part of the respondent company; it may or may not have resulted in the expected increase of profit. But if the agreement was entered into with a view to profit, as I think it was for the reasons which I have stated, then the annual charge to the respondent company is in my view a part of their business outlay or expenditure and is not subject to assessment. I am accordingly of opinion that the decision of the Income-tax Commissioners ought to be affirmed.

LORD PEARSON—The question is whether in making this payment to Wilsons Limited the company was expending money wholly and exclusively for the purposes of their trade. That is mainly, though not entirely, a question of fact, and I hold that it must be answered in the affirmative. It was contended that the money was not laid out by the company for the purposes of their trade at all, but

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that it was an application of profits already earned, which resulted in a definite benefit to the shareholders of Wilsons Limited, but not necessarily in any profit or benefit to the other company. I think that is much too narrow a view of the case. The real question is not where the money came from, nor whether any and what profit in fact resulted to Stewarts & Lloyds from its application, but to what purpose Stewarts & Lloyds applied it. Now, the agreement under which the money was paid is a mutual agreement, obviously intended to prevent the cutting down of prices by competition. It was for that purpose that the agreement was entered into and the money paid. It may be impossible to ascribe any particular items of the profits earned by Stewarts & Lloyds to the operation of that agreement. But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question. It is enough that it shall have been laid out for the purposes of his trade, as this expenditure clearly was. But then it must be laid out wholly and exclusively for those purposes; and it was argued that the agreement was, at least in part, for the benefit of Wilsons, Limited. It may have operated to their benefit. But we have to do only with Stewarts & Lloyds' part of it; and even with that, not as a definite source of ascertainable profit, but as inferring the expenditure of the sum of money here in question for the purposes of their trade. I think it clear that from their point of view the expenditure was made for those purposes and for no other.

LORD PRESIDENT—I am bound to say that I have found this case, as far as I am concerned, attended with considerable difficulty, but in the end I have come to the same conclusion as that expressed by your Lordships; and I have done so because I agree entirely with what your Lordships have, I think, all said, that the determination of this question really depends upon a determination of a question of fact and not a question of law at all. The law, I think, is not doubtful, and I do not think it could have been better put than it was put by Mr Macmillan, the junior counsel for Stewart & Lloyds, when he said that it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned. Well, that is a question of fact, and it is a question of fact which is not solved by a mere perusal of the document under which the money is claimed. If it could be so solved it might be one of those sort of mixed questions which, although fact in one case, yet depending on construction or what construction comes to, might be said to be law in another; but, as I say, I do not think it depends upon that. One cannot tell from the mere perusal of the document. You have to know something more. Now, I find that the Commissioners, who are the first judges on this matter, and who are chosen because they are business men, and who have the right to get before them such evidence as they like, and which we have not before us, say that on a consideration of the evidence they held that this payment was made for the purpose of trade and that the company might sell its goods at a better price. That seems to me equivalent to being really what would be the finding of a jury as between those two alternatives, namely, that this was an outlay *bona fide* made to earn profit and not an application of profit earned; and accordingly I think this case falls on that finding of fact on the one side of the line, just as the case quoted to us, the *Rhymney Iron Company*, [1896] 2 Q.B. 79, fell on the other, where it was held that a payment which was made really not for earning profits during the year but for an insurance in bad times, when there came a time when low profits would be earned, was not an outlay to earn profit but an application of profits earned. On the whole matter I agree with the opinions that your Lordships have expressed and think that the determination of the Commissioners should be affirmed.

LORD KINNEAR concurred.

The Court affirmed the finding of the Commissioners.

Counsel for the Appellant (the Surveyor)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents (the Company)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—J. & J. Ross, W.S.

Friday, July 20.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

MACTAGGART & COMPANY *v.* HARROWER AND OTHERS.

Property — Real Burden — Restriction on Building—Restriction Imposed in Disposition of Portion of Disponer's Lands—Enforcement of Restriction by Subsequent Disponees of the Other Portions of the Lands with Special Assignations—Restriction not Stated to be in Favour of any Particular Lands — Validity — "Tenements of First-Class Self-Contained Dwelling-Houses."

An association owning lands, in 1879 sold and conveyed, by disposition subsequently recorded, a portion of these lands to A under the restriction "that no buildings shall be erected upon the said plot of ground other than tenements of first-class self-contained dwelling-houses." This restriction was declared to be a real burden affecting the lands, but was not declared to be in favour of any lands. The association continued to hold the remainder of

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the lands, which lay on the opposite side of the street, till 1885–1887, when they conveyed them to a firm of builders by contracts of ground annual, subsequently recorded, which contained special assignations of the disposition to A with the obligations therein contained. These builders in turn transmitted the lands and the rights to B, C, and D. The singular successors of A having proposed to erect tenements to be occupied in flats, B, C, and D objected on the ground that this was a violation of the restriction. The singular successors of A claimed (1) that B, C, and D were not entitled to enforce the restriction, inasmuch as (*a*) it was too vague, not being in favour of any lands, and (*b*) was at least not enforceable by them; and (2) (not maintained on appeal) that the proposed buildings were not a violation, the restriction allowing "tenements" and being to be read in favour of freedom.

Held (*aff.* Dean of Guild) that B, C, and D were entitled to enforce the restriction.

Opinion reserved as to whether without the assignation B, C, and D would have been so entitled.

This was an appeal against an interlocutor of the Dean of Guild of Glasgow refusing a lining to J. A. Mactaggart & Company, builders, Bath Street, Glasgow, who had presented a petition craving authority to erect certain buildings, consisting of tenements of dwelling-houses to be occupied in flats, on a steading of ground belonging to them and situated in Bute Gardens, Hillhead, Glasgow. Objections to the lining being granted had been lodged by (1) Mrs Isabella M'Callum or Harrower, wife of Peter Harrower, East India merchant, Glasgow, and others, the proprietors of the steadings of ground on which Nos. 9 to 11 and 14 to 22 Bute Gardens were erected, which steadings were bounded on the west by the central line of the street on the opposite side of which the petitioners proposed to erect their buildings; and (2) The National Heritable Property Association, Limited, the original owners, now divested, of the whole ground.

The facts in the case appear from the following interlocutor pronounced on 18th May 1906 by the Dean of Guild (KING):—"The Dean of Guild finds in fact (1) That the petitioners are proprietors of subjects situated on the west side of the street known as Bute Gardens, Glasgow, bounded on the south by ground belonging to J. B. Macbrayne's trustees, on the north by ground belonging to Robert Miller's trustees, and on the west partly by ground belonging to Robert Wyllie Hill, and partly by the centre line of a lane; (2) that the petitioners ask authority to erect on the said subjects two tenements of dwelling-houses, the tenements to be of four storeys in height, and the houses in the tenements to be of five, six, and seven apartments, all as shown on the plans; (3) that on the east side of the street called Bute Gardens, along the whole length thereof, and opposite to the subjects belonging to the petitioners, there are situated self-contained houses belonging to the objectors Mrs Harrower and others; (4) that the ground on which these self-contained houses are built, and the subjects on which the petitioners propose to erect the said tenements, belonged at one time to the National Heritable Property Association, Limited, the said ground and the said subjects being parts of that portion of the estate of Lilybank acquired by the Association in or about the year 1873; (5) that in 1879 the Association sold and conveyed the subjects now belonging to the petitioners to George M'Lellan Blair and Robert MacBrayne, retaining the ground now belonging to the objectors Mrs Harrower and others until 1885-1887, when the Association sold and conveyed it to trustees for the firm of Lindsay & Benzie, builders, Glasgow; (6) that it is averred by the petitioners, and not denied by the objectors, that the Association have disposed of the whole ground originally held by them, and have now no interest in the neighbourhood; (7) that in the disposition granted by the Association to George M'Lellan Blair, dated 26th September 1879 and subsequent dates, and recorded G.R. (barony and regality of Glasgow) 15th October 1879, and in the disposition granted by the Association to Robert Macbrayne, dated 8th October 1879, and recorded as aforesaid on 15th October 1879, the subjects now belonging to the petitioners were conveyed under the restriction 'that no buildings shall be erected on the said plot of ground other than tenements of first-class self-contained dwelling-houses, and stables and offices in connection therewith, or a stable and offices containing suitable accommodation for one private dwelling-house, and to be occupied exclusively in connection with a private dwelling-house and not as a livery stable'; and the said restriction was declared to be a real burden affecting the lands now belonging to the petitioners, and that these deeds were duly recorded for infeftment in the Register of Sasines; (8) that in the conveyances by the Association of the ground now belonging to the objectors Mrs Harrower and others—these conveyances being three contracts of ground annual between the Association on the one part and trustees for the firm of Lindsay & Benzie on the other part, the first of which is dated 14th, 16th, and 17th November 1885, and recorded G.R. (barony and regality) for publication, and as also in the Books of Council and Session for preservation and execution 20th November 1885, the second of which is dated 29th April, and recorded as aforesaid on 1st May 1886, and the third of which is dated 18th, 26th, and 28th May, and recorded as aforesaid on 1st June 1887—the ground was conveyed under the declaration that no buildings of any kind whatever, other than the self-contained lodging or dwelling-house and relative office therein described should be erected on that ground (the declaration being thereby made a real burden upon and affecting the ground), and in the conveyances the Association specially

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assigned to the trustees for Lindsay & Benzie, *inter alia*, the foresaid dispositions in favour of Blair and Macbrayne, to the extent and effect of conferring on the trustees for Lindsay & Benzie and their assignees the right to insist on the implement and performance of, *inter alia*, the real burden quoted in the seventh finding; (9) that the said dispositions and right assigned to the trustees for Lindsay & Benzie have been duly transmitted by and from them to the objector Mrs Harrower and others, with the exception of the objectors, the trustees of William Cumming; (10) that the buildings proposed to be erected by the petitioners are not 'tenements of first-class self-contained dwelling-houses'; and (11) that the objectors Mrs Harrower and others have an interest to maintain and enforce the restriction and real burden in the titles of the petitioners: And with these findings in fact, the Dean finds in law—(1) that the restriction above quoted was validly created a real burden upon and affecting the subjects now belonging to the petitioners, and is not void from ambiguity, uncertainty, or indefiniteness; (2) that as the National Heritable Property Association, Limited, have disposed of all the ground originally held by them in the neighbourhood of the subjects now belonging to the petitioners, and as the Association stand in no feudal relationship to the petitioners, the Association are not now *in titulo* to maintain or enforce the observance of the said restriction and real burden; (3) that the objectors Mrs Harrower and others (excepting William Cumming's trustees) having now a real right to the lands or parts of the lands which, at the time the real burden upon the petitioner's subjects was constituted, belonged to the Association which imposed that real burden, and having also an express assignation of the right to enforce, and having an interest to enforce the said real burden, are entitled to enforce it; (4) that the objectors the trustees of William Cumming, having no such assignation, are not *in titulo* to enforce the said real burden; (5) that the tenements proposed to be erected are, or if authorised would be, a contravention of the before-mentioned restriction and real burden: Therefore repels the objections stated for the National Heritable Property Association, Limited, and for the trustees of William Cumming; sustains the objections of the said Mrs Harrower and others (with the exception of the trustees of William Cumming), and refuses the lining craved; finds the objectors the said Association liable to the petitioners in the expenses caused by their opposition; and finds the petitioners liable in expenses to the objectors Mrs Harrower and others (excepting the trustees of William Cumming); and *quoad ultra* finds no expenses due to or by either party: Allows accounts of the expenses awarded to be lodged, and remits," &c.

Note.—"This case raises one or two legal questions of interest, and the importance of it to the parties, especially to the objectors Mrs Harrower and others, is plain. The facts as they appear to the Dean are stated in the foregoing findings. The street called Bute Gardens has hitherto contained only self-contained houses, these being all situated on the east side of the street. The petitioners now propose to erect on the west side of the street what are not self-contained houses, but buildings of flats, each building to be let to several tenants. The proprietors of the self-contained houses object to this as being a contravention of the restriction in the petitioners' title quoted in the findings, and in reply the petitioners attack the restriction on its merits and maintain that at all events it is not enforceable by the objectors. The attack on the restriction is twofold. It is in the first place said that in respect the deed imposing the restriction does not set forth or identify the lands for the benefit of which it was imposed—the creditor area as these may conveniently be called—there is such uncertainty or indefiniteness in the creation of the restriction or real burden as to make it void and of no effect. A well-drawn conveyance—particularly a conveyance which does not bring about any feudal relationship between granter and grantee—would undoubtedly, after imposing the restriction, set forth or indicate the creditor area. But whether the law of real burden makes that a necessity is another matter. The law of Scotland, it is true, does not admit an indefinite burden upon land. But, so far as the Dean has found, that statement has hitherto been used only when the burdened area was in question, and the indefiniteness of the creditor area has not been the subject of judicial decision. Taking the matter on principle, the Dean does not think that the want of an express specification of the creditor area makes a real burden, otherwise well imposed, invalid. A real burden of the kind in question is praedial in its character; it is for the benefit of some lands or the owners thereof, as owners, and not as individuals; and, considering the nature of the grant under which the burden in question was imposed, it must be taken to have been imposed for the benefit of the lands remaining in the person of those who imposed it, or at all events, of so much of these remaining lands as might be injuriously affected by operations or buildings on the ground restricted. That would, the Dean takes it, be the position as regards the dominant tenement under the law of servitude proper, and he thinks the same rule holds in the case of real burden. In both branches the matter of intention is important. If the Dean be right in the views just expressed, there is no doubt the lands now belonging to Mrs Harrower and others were, at the time the real burden was imposed, vested in the Association who imposed it, and being situated directly opposite to the burdened area, there is the element of vicinity and the possibility of injurious affection referred to. The restriction is attacked in the second place on the terms employed. It is contended that the terms are ambiguous; that 'tenements of first class self-contained dwelling-houses' are a contradiction in terms. It was stated that the word tene-

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ment had acquired a secondary meaning, and now meant a building consisting of several flats and let to several tenants. However that may be, it is plain that the ruling idea in the restriction is the idea of self-contained houses, and anything at variance with that plain intention must give way. But the Dean may add that, in his opinion, there is no ambiguity in the expression nor any contradiction in its terms. The petitioners further maintain that, even granting that the restriction is valid and not void from uncertainty or ambiguity, the objectors are not entitled to plead it or enforce it. As regards the Association, the petitioners contend that, being no longer in right of any part of the land for the benefit of which the restriction was imposed, the Association are not now in a position to enforce it. The Dean heard no satisfactory answer to that. The Association in disposing of the ground, and in assigning the benefit of the restriction to those who bought it, attempted to retain a joint right of enforcement, and gave an undertaking to enforce the restriction in the petitioners' title. But that undertaking, whatever other questions it may raise, does not improve the position of the Association in a question with the petitioners. A real burden of the nature of the one here in question is for the benefit of persons *qua* owners of land and not *qua* individuals, and unless the Association can show that they come forward as such owners, and not simply as individuals burdened with personal undertakings, they are not, in the Dean's judgment, entitled to enforce the restrictions which they imposed. The petitioners also maintain that the objectors, Mrs Harrower and others, are not entitled to enforce the restrictions. They argue that, as between them and the objectors, there is not that mutuality and community of rights and obligations which entitle these objectors to plead the restriction; that there is no notice on the face of their title, either expressly or by implication, that anyone other than the parties to the deeds containing the restrictive covenant was to be entitled to enforce the covenant; that there is here no *jus quæsitum tertio*. In support of this contention they refer, among other cases, to *M'Ritchie's Trustees*, 1881, 8 R. (H. L.) 95, and *Bannerman's Trustees*, 1902, 39 S.L.R. 445. For the legal propositions involved in the contention these cases suffice, but both cases are distinguishable from the present case. The objectors here do not need to found or rely on a case of mutuality and community of rights and obligations. This is not a case of restrictions being imposed upon a feuar by a superior, and being pleaded by another feuar not a party to the deed imposing the restrictions. In such a case the right of the superior to enforce the restriction rests upon contract, and, unless by an appeal to the doctrine of mutuality or *jus quæsitum tertio*, nobody but the superior, or those who follow him in the superiority and come to be in right of the contract, can enforce it. But the present question arises as to a real burden imposed for the benefit of the estate retained or reserved by the party imposing it, and the parties seeking to enforce it are now in right of the reserved estate, with an express assignation to the real burden incorporated in the conveyance of the reserved estate. They are not *tertii*. They are in reality the continuation of the *persona* at whose instance and for the benefit of whose reserved estate the burden was imposed. These considerations seem to the Dean to distinguish the case from *M'Ritchie's Trustees*. In the case of *Bannerman's Trustees* the objectors were in right of ground disponed by the common author before he had imposed the restrictions upon the burdened tenement; indeed, it appeared that Scott's property — the burdened property—was the last portion of the original ground to be alienated by Grierson, the common author, and that so far as Scott had notice or any reason to suppose, the only reserved estate for the benefit of which the restrictions in his title could be said to be imposed was the ground annual constituted by the contract of ground annual under which the ground was conveyed to Scott. In the present case there was clearly adjoining lands retained or reserved, and the lands now belonging to the objectors Mrs Harrower and others were and are parts of the reserved lands. The point was not taken, but the Dean sees it could be argued that restrictions in favour of a reserved estate belonging to one person become much more burdensome when the reserved estate is split up and comes to be held by several persons—that by conveying the reserved estate, otherwise than as a whole, the burden has been increased. But the Dean does not think that this argument is conclusive in any case, and particularly so in a case like the present, where everything pointed to the development of the estate and the splitting of it up into lots. If the Dean is wrong in the view he takes, then the restrictions in the petitioners' titles have ceased to exist, or at any rate there is now no one entitled to enforce them, and the benefit they were intended to afford has been completely lost. The objectors Mrs Harrower and others (excepting Cumming's trustees) are not only in right of the estate which remained in the person of the Association after it imposed the restriction, but they have an express assignation of the right to enforce it. Cumming's trustees have no such assignation. An assignation apart from the conveyance of the reserved estate—in other words, an assignation to one not a disponee of the reserved estate—would not give the assignee a right to enforce the restriction. But it is a fair question whether a disponee of the reserved estate or a part of it requires an express assignation of such a right. It is a stateable argument that the conveyance of the reserved estate, with or without a clause of parts, privileges, and pertinents, will carry all such incidental rights as the right to enforce real burdens imposed for the benefit of that estate. But the restriction here is not a proper servitude. It belongs rather to the class of real burden.

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and the Dean is disposed to say that an assignation is required. The objectors state a plea of no title, but it was not maintained or mentioned at the debate. They did not take any point upon the fact that the petitioners hold on a personal title, and of necessity have to found upon the dispositions to Blair and Macbrayne which they, the petitioners, are here in part repudiating. The petitioners state a plea of no interest in the objectors Mrs Harrower and others, but this plea also was not maintained or mentioned at the debate. It would, in the Dean's opinion, be difficult for the petitioners to maintain it. It appears to him that the interest is obvious. As the case will no doubt be appealed, the petitioners should put in the principal missive, and the parties should agree upon and put in a sheet of the Ordnance Survey, marked to show the properties concerned."

The petitioners appealed to the Court of Session, and argued—The buildings proposed fulfilled the conditions; they were "tenements of first-class self-contained dwelling-houses." [This was not seriously argued.] There was no real burden effectually imposed. There were two classes of real burdens—a condition inherent in the grant, and a real burden in the narrower sense—between these a distinction must be drawn—Lord Kinnear in *Campbell's Trustees* v. *Corporation of Glasgow*, March 20, 1902, 4 F. 752, 39 S.L.R. 461; and Lord Deas, at p. 803, in *Stewart* v. *Duke of Montrose*, February 15, 1860, 22 D. 755. Here there could be no condition inherent, for there was no feudal relation, nor a relation nearly equivalent thereto, as there had been in *Coutts* v. *Tailors of Aberdeen*, August 3, 1840, 1 Rob. Ap. 296. The conveyance had been bungled because it proceeded as if the relation of superior and vassal were being constituted. Nor had a real burden in the narrower sense been effectually created; this required more precise and specific words than a condition inherent—Lord Corehouse in *Coutts*, *cit. sup.*—but here there was great indefiniteness, since it could not be discovered for what purpose or for the benefit of whom the obligation was made. There was no mention of the lands for whose benefit the restriction was imposed, and it was not to be assumed, as the Dean of Guild had, that it was for the benefit of the remaining lands of the Association; it could not be discovered from the conveyance that the Association had lands remaining. There was here no interest in the persons seeking to enforce the obligation; a disponer who was parting with his lands could have no interest to enforce the restriction; nor did there exist here any mutuality of rights and obligations to give an interest to co-disponees—*Gardyne* v. *The Royal Bank of Scotland*, March 8, 1851, 13 D. 912, *rev.* May 13, 1853, 1 Macq. 358; *Marshall's Trustee* v. *Macneill & Company*, June 19, 1888, 15 R. 762, Lord Shand, 770, 25 S.L.R. 581; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, 19 S.L.R. 571, esp. Lord Watson's opinion. Where lands were conveyed by a contract of ground annual, and a restriction was contracted for, it was personal to the disponer and disponee, it could not be enforced against singular successors, and it could not be transmitted even by special assignation unless mutuality of rights and obligations existed; and here there was no mutuality—*Marshall*, *cit. sup.*; *Hislop*, *cit. sup.* The exclusion of the right of assigning a restriction to a case where there was mutuality applied to disponees as well as to co-feuars—*Bannerman's Trustees* v. *Howard & Wyndham*, March 18, 1902, 39 S.L.R. 445. This was not a servitude—certainly not a servitude of an ordinary kind—Bell's Principles, section 979, quoted with approval by Lord Watson in the *North British Railway Company* v. *Park Yard Company*, June 20, 1898, 25 R. (H.L.) 47, at pp. 52 and 53, 35 S.L.R. 950. Accordingly, it was not effectual against, nor available to, singular successors. Restrictions on property were to be construed strictly—*Fraser* v. *Downie*, June 22, 1877, 4 R. 942; *Buchanan and Others* v. *Marr*, June 7, 1883, 10 R. 936, 20 S.L.R. 635, and it was not lightly to be assumed that it was intended to subsist for all time, or involved a tract of future time. The right to enforce such a restriction was not assignable, for if assigned, as here, to several it would become more burdensome. That was not intended to be and could not be, the effect of the obligation—*Moore and Others* v. *Paterson*, December 16, 1881, 9 R. 337, Lord Shand, at 350, 19 S.L.R. 236.

Argued for the objectors (respondents)—A real condition had been effectually created in favour of the disponer. This was transmissible, at least to those who held the lands for whose benefit it was imposed. It made no difference that no relation of superior and vassal was constituted; that had not existed in *Coutts*, *cit. sup.* This case was the same as *Coutts*, except that the person seeking to enforce the restriction was not the original disponer but a disponee of his with a special assignation. Such assignee, however, was in the same position as the original disponer. There was no necessity for mutuality here, because they were not *tertii*, and did not invoke the doctrine of *jus quæsitum tertio*. They were assignees of creditors. The conveyances of the lands, even without the special assignation therein, operated as conveyances or assignations of such lesser rights as the restriction in question—Lord Watson, at p. 94, in *Stevenson* v. *Steel Company of Scotland*, July 24, 1899, 1 F. (H.L.) 91, 36 S.L.R. 946; Lord Watson, at p. 102-3, of *Hislop*, *cit. sup.*; *Stewart* v. *Duke of Montrose*, March 27, 1863, 4 Macq. 499. In any case special assignations existed here, and accordingly they stood in the shoes of the original disponer. If it were not a real burden it was effectual as a servitude which had entered the record. It was not necessary that the deed constituting the restriction should specify the dominant tenement; and there was an instance of a servitude in favour of a dominant tenement not in existence but to be created in the *North British Railway Company* v. *Park Yard Company*, *cit. sup.*

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[LORD KYLLACHY—But a negative servitude cannot give notice by possession.] In the present case notice was given on record. Where there was no reference to the lands for whose benefit a restriction was imposed all the then unfeued lands of the superior had the right to enforce it—*Governors of Muirhead College* v. *Millar*, May 29, 1901, 38 S.L.R. 835.

At advising—

LORD KYLLACHY—In this case I am, as I understand in common with both your Lordships, entirely satisfied with the judgment of the Dean of Guild. And I do not think that I could with advantage add anything to the very clear and able exposition both of the facts and law which we find in the note appended to his interlocutor.

I desire, however, to make one observation, which, in view of part of the argument lately submitted to us, it is perhaps right to make. The Dean of Guild has, it will be observed, decided the case upon a quite sufficient but perhaps in one view special ground, viz., that the National Heritable Property Association, Limited (the common authors of all the parties), possessing plainly a contractual right to enforce as against the appellants the building conditions expressed in their (the appellants) title, have by special assignation transmitted that contractual right to the respondents, doing so by express clauses contained in the several dispositions granted by them, which form the respondents' titles. So deciding it was not of course necessary for the Dean of Guild to decide or consider how far the result would have been the same if in place of special assignations the respondents had to rely simply on the force of their several dispositions—that is to say, on the alleged legal presumption that every disposition of heritage includes impliedly a disposition or assignation of all lesser rights which pertain to the disponer, or which he has the right to convey. On that question, which he describes as fair and arguable, the Dean of Guild has reserved his opinion; and I do not doubt that your Lordships in affirming his interlocutor will take the same course. At the same time, having regard to the argument which was as I have said lately submitted to us, I for myself should like to say this, that I fully appreciate the importance and force of that argument, and have fully in view that when the question reserved comes up—as it some day may—and has to be decided, it will be necessary to consider carefully the important views expressed in certain passages of Lord Watson's opinions in the cases of *Hislop* v. *MacRitchie*, 8 R. (H.L.) 103, and *Stevenson* v. *Steel Company of Scotland*, 1 F. (H.L.) 194, and also the passages in Stair and Erskine, viz., Stair, iii, 2, 1, and Erskine, ii, 7, 2, to which in the later case Lord Watson refers.

LORD STORMONTH DARLING and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal and affirm the said interlocutor [of 18th May 1906]: Find in terms of the findings in the said interlocutor, and of new refuse the lining craved: Find the objectors Mrs Harrower and others (except the trustees of William Cumming) entitled to additional expenses, and remit the account thereof along with the expenses found due to them in the Dean of Guild Court, and the account of the expenses for which the objectors The National Heritable Association, Limited, were found liable to the petitioners in the said Court, to the Auditor to tax and report."

Counsel for the Petitioners (Appellants)—M'Lennan, K.C.—Hunter, K.C.—Ralston. Agent—John N. Rae, S.S.C.

Counsel for Objectors (Respondents)—Dean of Faculty (Campbell, K.C.)—D. Anderson. Agents—J. W. & J. Mackenzie, W.S.

Friday, July 20.

FIRST DIVISION.

BALMENACH-GLENLIVET DISTILLERY, LIMITED *v.* CROALL AND OTHERS.

Company—Reduction of Capital—Memorandum of Association—Reduction to Meet Losses Partially Laid on Shareholders Preferential by Memorandum—Power of Court to Confirm—Fair and Equitable Scheme—Companies Acts 1867 (30 *and* 31 *Vict. cap.* 131); 1877 (40 *and* 41 *Vict. cap.* 26).

The memorandum of association of a company provided that the capital should consist of 6000 preference shares and 6000 ordinary shares, all of £10 each, with power to increase or reduce the capital, and ("without prejudice to existing rights") to divide the shares into classes, and that the preference shares should be entitled to a cumulative preferential 5 per cent. dividend, and in the event of a winding-up to priority in repayment.

The company's business having greatly depreciated, resolutions were passed approving of a scheme for reduction of capital whereby the preference shares were to become £5, 10s. shares instead of £10 shares, and the ordinary shares £1 shares instead of £10 shares, thus making one-third of the loss fall on the preference shareholders. No alteration was made on the voting power of a share. The ordinary shares had been taken and were held by the vendors and their representatives, and they were still continuing to manage the business.

A petition for confirmation having been presented, a small number of preference shareholders opposed, on the ground (1) that it was *ultra vires* of the

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Court to sanction a scheme, like the one proposed, inconsistent with the memorandum of association, and (2) that the scheme was not in character fair and equitable, such as should be confirmed.

Held (1) that confirmation of the scheme was *intra vires* of the Court—*British and American Trustee and Finance Corporation* v. *Couper* [1894], A.C. 399, *followed*; *Ashbury* v. *Watson*, L.R., 30 Ch. Div. 376, *distinguished*—and (2) that the scheme was fair and equitable and should be confirmed. *In re Allsopp & Sons, Limited*, July, 1903, 51 W.R. 644, *followed*.

Per Lord President—"I cannot read that case" (*British and American Trustee and Finance Corporation* v. *Couper*) "without coming to the conclusion that it really has settled, in a way that we must certainly follow, that, so far as the question of *intra vires* is concerned, there really is no limit to what the Court can do. They may confirm any resolution however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement."

On 28th October 1905 the Balmenach-Glenlivet Distillery Company, Limited, incorporated under the Companies Acts 1862 to 1893, presented a petition under the Companies Acts 1862 to 1900 and particularly the Companies Act 1867, sections 9 and 10, and 1877, sections 3 and 4, in which it craved the Court, *inter alia*, "to pronounce an order confirming the reduction of capital resolved on by the special resolution set forth in the petition, approving of the minute set forth in the petition, directing the registration of such confirmation order and minute by the Registrar of Joint Stock Companies, and . . . and dispense altogether with the words 'and reduced' as part of the name of the company . . . ." Answers were lodged by John Croall, 21 Broughton Street, Edinburgh, and others, holders of preference shares in the company of the *cumulo* value of £5890.

The company which was formed to take over the old established distillery, &c., business of John M'Gregor & Son was incorporated in February 1897. Its memorandum of association in clause 5 provided—"The capital of the company is one hundred and twenty thousand pounds sterling, divided into six thousand preference shares of ten pounds each, which shall be entitled to receive out of profits a cumulative preferential dividend of five per centum per annum (in the manner after stated), and six thousand ordinary shares of ten pounds each, held as fully paid up, with power to increase and reduce the capital, and (without prejudice to existing rights) to divide the shares for the time being into several classes, and to attach thereto respectively such preferential, deferred, or special rights, privileges, or conditions with regard to repayment of capital or payment of dividends, or both, or voting, as may be determined by or be in accordance with the regulations of the company; provided always that no shares having rights, privileges, or conditions of any kind, preferential to or *pari passu* with those of the said preference shares shall be created or issued unless said creation and issue shall have been previously agreed to by an extraordinary resolution of the holders of said preference shares, passed in terms of the articles of association. The preference shares shall rank on the net profits of the company (including any balance at the credit of profit and loss account brought forward from previous years, and any sum at the credit of reserve applicable for equalisation of dividend) for a dividend of 5 per centum per annum in preference to any dividend on the ordinary shares; and in the event of the net profits in any year not being sufficient to pay such dividend in full for that period, the shortcoming shall be made good out of the net profits of the subsequent year or years, such arrears of dividend being also paid in preference to any divdend on the ordinary shares. In the event of a winding-up of the company being followed by a distribution of its surplus assets among its members, such distribution shall be regulated as follows, viz.—*First*, in repaying to the holders of the preference shares mentioned in this memorandum, *pari passu*, and to the holders of any other issue of stock or shares having priority to the ordinary shares, *pari passu*, according to their respective priorities and privileges, the amount paid up thereon, and any arrears of dividend thereon; thereafter in repaying to the holders of the ordinary shares *pari passu* the amount paid thereon; and the residue (if any) shall be paid to the holders of ordinary shares."

The articles of association contained provisions in accordance with the above clause of the memorandum, and in particular clause 14 provided—"The company may from time to time, by special resolution, reduce its capital by paying off capital, or cancelling capital which has been lost, or is unrepresented by available assets, or reducing the liability on the shares or otherwise, as may seem expedient, and capital may be paid of upon the footing that it may be called up again or otherwise. The company may also subdivide or consolidate its shares, or any of them."

The petition stated, *inter alia*—"The whole share capital of the company was issued. The 6000 preference shares were offered for subscription at £11 per share (being £1 premium), and were allotted to members of the public and issued for cash. The whole ordinary shares were, in terms of the purchase agreement, issued to the vendors as fully paid up. On its formation the company took over the business of distillers, maltsters, merchants, and farmers, formerly carried on by the vendors at Balmenach Distillery as at 1st February 1897, and has since carried on business as distillers, maltsters, merchants, and farmers

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at that distillery. The company does not carry on any other business. . . . . The reports and balance-sheets which have been submitted to the shareholders show that the net profits earned by the company since its formation have been:—

For the period from 1st February 1897 to 31st August 1898 . .	£11,754	1	4
For the year to 31st August 1899	7,111	0	1
do do 1900	8,185	16	2
do do 1901	6,680	18	9
do do 1902	5,685	6	5
do do 1903	2,299	9	0
do do 1904	2,150	16	4
	£43,867	8	1

. . . . . .

Having in view the changes which have taken place in the liquor trade since 1897, and the long depression which has existed and is continuing to exist, and the greater cost of production brought about by the difficulty and expense of so disposing of the distillery effluents as to avoid all cause of complaint by the riparian proprietors, the directors of the company, after careful consideration, came to be of opinion that the capital as stated in the balance-sheet as at 31st August 1904 was no longer fully represented by available assets, and that a considerable portion of the capital of the company had been permanently lost, and that it was advisable that the capital should be reduced so that the value of the assets as appearing in the books should be written down to a figure more nearly approximating to actual value. The directors obtained from Mr James Maitland, distillery architect and valuator, Tain, managing director of the Glenmorangie Distillery Company, Limited, a report on and valuation of the whole buildings, machinery, and plant belonging to the company. Mr Maitland in his report dated 7th April 1905, valued the business properties, including lands, buildings, machinery, plant, distiller's residence, excise officers' residences, brewers' and workmen's houses, offices, water pipes, farm steading, railway from distillery to Cromdale, drainage, wheel pit, mill lade, and tail drains at the sum of £28,000, and he reports that 'in the present depressed condition of the distillery industry, with immense stocks of whisky accumulated in duty free warehouses, and with distilleries capable of producing supplies far in excess of the demand, and consequently very keen competition for all orders, I am strongly of opinion that it would not be safe in present circumstances to calculate anything for goodwill, as it has now no marketable value.' In the balance-sheet at 31st August 1904 the distillery buildings, railway, machinery, plant, water rights, and goodwill are stated as of the value of £108,406, 18s. 9d., and there is entered an item, 'purification works, suspense account, expended during last year, £677, 9s. 1d.'; together making £109,084 7 10

Deducting therefrom Mr Maitland's valuation amounting to 28,000 0 0

Leaves a difference of £81,084 7 10

The directors are accordingly of opinion that under no circumstances that can be foreseen can the value of the distillery with machinery and plant be stated at a sum exceeding £28,084, 7s. 10d. The directors are satisfied that the other assets of the company are of the value stated in the balance sheet, and accordingly the petitioners believe that there has been a depreciation in the value of the company's assets to an extent considerably exceeding £81,000. In these circumstances the directors after careful consideration came to be of opinion that in order to put the capital of the company on a sound basis and to improve its position, a reasonable scheme, having regard to the legal rights of both classes of shareholders, would be to reduce the preference shares from £10 each to £5, 10s. each and the ordinary shares from £10 each to £1 each, and that the preference dividend for the period from 31st August 1904 to 31st August 1905 should be cancelled. Such reduction would reduce the amount of outstanding capital to the extent of £81,000, and that amount would be written off the book values of the distillery and other assets. The directors were further of opinion that in order to compensate the preference shareholders for the reduction it was fair and equitable that the preference shares in addition to being entitled to a cumulative preference dividend and to a preference as to repayment of capital in the event of a winding-up should also have conferred upon them a right to share rateably in any surplus profits and capital with the ordinary shareholders. Accordingly at an extraordinary general meeting of the company duly held . . . on 16th June 1905 the following resolution was passed by a majority of 8379, there having been 8653 votes given for the resolution and 274 against it:—'That the capital of the company be reduced from £120,000, divided into 6000 preference shares of £10 each and 6000 ordinary shares of £10 each, to £39,000, divided into 6000 preference shares of £5, 10s. each and 6000 ordinary shares of £1 each, and that such reduction be effected as follows—(1) by cancelling capital which has been lost or is unrepresented by available assets to the extent of £4, 10s. per share on each of the said 6000 preference shares and of £9 per share on each of the said 6000 ordinary shares, and (2) by reducing (*a*) the nominal amount of each of the said 6000 preference shares from £10 to £5, 10s., and (*b*) the nominal amount of each of the said 6000 ordinary shares from £10 to £1.'"

The petition further stated that at the said general meeting separate special resolutions dealing with the arrears of dividend on the preference shares, and giving effect by amendments in the articles of association to the alterations on the rights of the preference and ordinary shareholders, were submitted and carried by the same majorities; that at a separate meeting of the preference shareholders held on the same day a resolution consenting to the special resolutions and to the rights attached to the preference shares being abandoned or altered was carried by 2738 votes for to 1374 against, and that at an

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extraordinary general meeting of the company held on 12th July 1905 the resolutions were confirmed by a majority of 7343, votes to the number of 8567 being for and 1224 against.

The minute proposed to be registered was—"The capital of the Balmenach-Glenlivet Distillery, Limited, is £39,000, divided into 6000 preference shares of £5, 10s. each and 6000 ordinary shares of £1 each, all of which shares have been issued and are fully paid."

The answers, which did not deny that a reduction of capital was necessary, stated, *inter alia*:—"In both the memorandum and articles of association of the company it is specially provided that the preference shares are preferential both as regards dividend and capital, and in the prospectus issued to the public and on the faith of which the preference shares were applied for it is set forth that these shares are 'entitled to a cumulative dividend of 5 per cent. per annum preferential as regards both dividend and capital.' Said shares were issued at a premium of £1 per share, or in other words of 10 per cent. . . . The respondents do not admit that Mr Maitland's said valuation is at all adequate. Further, Mr Maitland has reported that the goodwill for which . . . . £68,800 or thereby was paid is now valueless. The respondents submit that the goodwill still possesses a substantial value and that Mr Maitland's valuation of £28,000 for the distillery, adjuncts, and goodwill is very greatly underestimated. . . . Under the resolutions which the Court are now asked to confirm it is proposed to throw one-third part of the alleged loss of capital on the preference shareholders and the remaining two-thirds thereof on the ordinary shareholders, whereas under the memorandum and articles of association the whole of the loss fell to be borne *primo loco* by the ordinary shareholders. It is further proposed that while in the original articles of association each class of shareholders has the same voting power according to the value of the shares held by them—that is to say, one vote for each £10 of capital—an ordinary shareholder holding only a £1 share shall in future have the same voting power as a preference shareholder holding a £5, 10s. share. The respondents accordingly crave the Court to refuse the prayer of the petition, because . . . (2) it is not proved and it is not the case that capital has been lost to the extent represented by the proposed reduction of capital; (3) the resolutions in question are incompetent as being in breach of the fundamental provisions of the memorandum and articles of association; and (4) the resolutions in question even if competent are inequitable and ought not to be confirmed by the Court."

It appeared that practically the whole of the ordinary shares still belonged to the M'Gregor family, the vendors, and that the directors were virtually their representatives.

The Court on 17th November 1905 remitted to Mr G. M. Paul, D.K.S., to inquire as to whether the proceedings had been regular and proper, and as to the reasons for the proposed reduction of capital, and to report.

Mr Paul in his report stated—". . . It seems impossible to ascertain with arithmetical certainty the precise amount of depreciation. A conclusion can only be reached on a consideration of the independent opinions of reliable experts formed, in a minor degree, on their estimate of the value of the properties as such, but mainly on the effect which what they imagine will be the future of the whisky trade will have upon the particular distillery. . . . It is clear that the share capital ought to be written down very considerably; it is the extent only of the reduction which is in question. It would be somewhat less than £75,000 if Mr Doig's valuation were accepted, £79,400 if Mr Spence's were accepted, and £81,000 if Mr Maitland's were accepted. The company has by large majorities passed a special resolution for reduction based on Mr Maitland's valuation, and the objection of the minorities was not to the amount of reduction. . . ."

The reporter discussed at length the question whether it was not *ultra vires* of the company to deal with the preference shares as proposed in view of the terms of the memorandum of association, on which point he referred to Buckley on Companies Acts, 8th ed., pp. 517, 616, 7th ed. p. 493; Palmer's Company Law, 5th ed., pp. 76, 77; *Floating Dock of St Thomas*, [1895] 1 Ch. 691; *London and New York Investment Corporation*, [1895] 2 Ch. 860; *British and American Trustee and Finance Corporation v. Couper*, [1894] A.C. 399; *Ashbury v. Watson*, L.R. 30 Ch. D. 376; Rawlins and Macnaghten on Companies, p. 478. He then went on to consider the scheme, assuming its competency, and stated:—"If the proposed alteration be not *ultra vires*, then, while the legal rights of shareholders ought not, in the general case, to be departed from, it may nevertheless be that the proposed scheme of reduction should be allowed if it forms part of a fair and equitable general arrangement for keeping the distillery alive as a going concern and avoiding liquidation. As matters stand, the profits of the last three years have fallen considerably short of the amount (£3000) required for payment of the dividends on the preference shares, and as these dividends are cumulative, the arrears must, unless something is done, speedily become a charge of considerable amount upon the profits of the company, with little prospect of such an increase, in the near future at least, as will be sufficient for clearing them off. The profits for the year to 31st August 1904, after allowing £1000 for depreciation, amounted to £1155, 2s. 4d. Those for the year to 31st August last, without making any allowance for depreciation, amounted to £1847, 12s. 1d. Moreover, the voting power attached to the ordinary shares being equal to that of the preference shareholders, and the ordinary shares being in the hands of a very few individuals closely connected with the management, and therefore readily available in full strength for voting purposes, the control

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of the company by the ordinary shareholders is virtually absolute, and no scheme of reduction proposed by the preference shareholders having for its object the cancelling of the whole of the ordinary share capital would have any chance of being carried with the requisite majority. If so minded, the ordinary shareholders might make a voluntary winding-up or a voluntary scheme for reconstruction impossible, and they might give much trouble in case of an attempt on the part of the others to have the company wound up under a compulsory order. Even in a winding-up a sale of the concern might, in the present depressed state of the industry, be impossible or only possible at a considerable sacrifice. The reporter understands that distilleries which have only been a comparatively short time in existence are practically unsaleable. In respect of its name a purchaser might be found for Balmenach, but, on the other hand, the uncertainty as to the future of the pollution difficulty, added to the depression in the trade, would have a prejudicial effect. Therefore an arrangement calculated to keep the company alive as a going concern, although involving (for a consideration) a departure from the legal rights of the shareholders, might nevertheless be one which, on the terms proposed, should be accepted as fair and equitable in the circumstances."

In connection with the proposed cancelling of the preference dividend for the year August 1904 to August 1905, reference was made to *Oban & Aultmore Glenlivet Distilleries, Limited*, July 15, 1903, 5 F. 1140, 40 S.L.R. 817. Assuming the competency and fairness of the scheme the reporter said—"If your Lordships shall be pleased to confirm the special resolution for reduction of the company's capital, the reporter begs respectfully to submit for consideration whether it should not be made a condition that, in view of the changed circumstances, the articles of association should be altered in some respects. Section 11 of the Act of 1867 enacts that the Court may make the confirmation order 'on such terms and subject to such conditions as it deems fit.' Article 70 of the articles of association provides as follows:—'On a show of hands every member shall have one vote only. In case of a poll he shall have one vote for every share, whether preference or ordinary, held by him.' So long as all the shares had the same nominal value, the provision of a vote for every share was fair towards all the shareholders. But if the proposed reduction receives effect, and article 70 above quoted remains unaltered, there will be 6000 ordinary shares of £1 each, and the like number of preference shares of £5, 10s. each, and the holder of a number of £1 shares will have as many votes as the holder of a like number of £5, 10s. shares. The holders of the ordinary capital, with a stake of £6000 in the concern, will have equal voting power, and therefore equal powers in the management of the affairs of the company, with the holders of the preference capital, whose stake in the concern is £33,000. It seems to the reporter that article 70 should be altered so as to give the two classes of shareholders respectively voting rights corresponding to the amount of capital which, when the reduction takes effect, will belong to each class. Mr Justice Kekewich (*Pinkney Steamship Company*, (1892) 3 Ch. 125), who had occasion to consider this point, directed the petition to stand over to give the company the opportunity of altering its articles. Failing its doing so he intimated that he would dismiss the petition. In a previous case (*Continental Union Gas Company*, 7 T.L.R. 476) Mr Justice Chitty had dismissed the petition because the proposed reduction would bring about this inequality of voting power. Subsequently to both these cases Mr Justice Romer (*James Colmer, Limited*, (1897) 1 Ch. 524) held that this was not necessarily a fatal objection, but that in a proper case the Court had power to confirm notwithstanding that voting powers were affected. The case was, however, a special one. The articles of association empowered the holders of any one class of shares by a specified majority to consent on behalf of all the holders of shares of that class to (among other things) any scheme for the reduction of capital affecting prejudicially such class of shares. Meetings of shareholders were accordingly held consenting to the proposed scheme of reduction. Mr Justice Romer was much influenced by these specialities . . ."

Argued for petitioners—The case of the *British and American Trustee and Finance Corporation* v. *Couper*, [1894] A.C. 399, and that of *in re Credit Assurance and Guarantee Corporation, Limited*, [1902] 2 Ch. 601, supported the view that it was competent for the Court to confirm the proposed scheme. It was within the power of the Court to confirm although changes in the position of different classes of shareholders were brought about—*British and American, &c., Corporation* (*ut sup.*); Palmer's Company Law (5th ed.), pp. 66-7, and cases there cited; *in re Welsbach Incandescent Gas Light Company, Limited*, [1904] 1 Ch. 87; *in re Allsopp & Sons, Limited*, July 1903, 51 W. R. 644. The memorandum (clause 5) gave power to the company to reduce the capital and also to divide the shares into classes with such privileges as it liked. The power so conferred was not derogated from by the provisions relative to repayment on a winding-up. These provisions only referred to a winding-up, and that being so the present case fell within the rule of *Welsbach* (*ut sup.*). No doubt the preference shareholders were to be considered, but the Court had power to alter their position provided the alteration was as slight as possible, and the transaction as a whole was fair and equitable—Palmer's Company Law (5th ed.), p. 77. The proposal was fair and equitable, as it was impossible to reduce the ordinary shares more without abolishing them, in which case the management of the company would also go.

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Argued for respondents—The proposed scheme was incompetent. It interfered with the right of the preference shareholders as declared in the memorandum—Companies Act 1862, sections 12 and 50. The proposed application of the assets on dissolution of the company was contrary to clause 5 of the memorandum. Tacking on a reduction of capital did not alter the fact that the course proposed was incompetent — *Liquidator of Milford Haven Fishing Company, Limited* v. *Jones*, March 20, 1895, 22 R. 577, 32 S.L.R. 449; *City Property Investment Trust Corporation, Limited* v. *Thorburn*, January 17, 1896, 23 R. 400, 33 S.L.R. 309; *Ashbury* v. *Watson*, July 23, 1885, L.R., 30 C. D. 376. The petitioners proposed to cut down the amount out of the company's income which the preference shareholders were entitled to, to about one-half, for they were at present entitled to £3000, *i.e.*, 5 per cent. on £60,000. Such alteration was inconsistent with the memorandum. In the event of a winding-up the rights of the respondents would be very prejudicially affected. The preference shareholders would only receive out of what was available about one-half of what they would at present. The ordinary shareholders were unduly benefitted at the expense of the respondents. The loss ought to fall on the ordinary shareholders—*In re Floating Dock Company of St Thomas, Limited*, [1895] 1 Ch. 691; *In re London and New York Investment Corporation*, [1895] 2 Ch. 860; Buckley on Companies Acts (8th ed.), p. 616; Companies Act 1867, section 9. The memorandum provided that the preference shareholders were to be paid in full on the company ceasing, and that before any of the other shareholders got anything. The powers given to alter the memorandum did not apply to that right, which was saved from the power to modify under the term "existing rights." The memorandum was not a "flexible" one, such as the memorandum in *Allsopp* (*ut sup.*) and *Welsbach* (*ut sup.*). That being so, no change could be made on the relative right of the preference and ordinary shareholders. Apart, however, from its legality the proposed reduction was most inequitable. It was proposed to cut down the preference shares by £4, 10s. a share, and there were no circumstances to justify such a proceeding. Further, it was proposed to permit an ordinary shareholder holding only a £1 share to have the same voting power as a preference shareholder holding a £5, 10s. share. The Court would not sanction a reduction if the transaction were, as here, inequitable—*In re Barrow Hæmatite Steel Company*, [1900] 2 Ch. 846.

At advising—

Lord President—This is a petition at the instance of the Balmenach-Glenlivet Distillery Company, Limited, asking the Court, under the powers given in the Companies Act, to confirm certain resolutions of the company by which they have resolved to reduce their capital. We have had a very full and very clear report from Mr Paul, to whom the petition was remitted. Several points are raised in that report, but the argument before your Lordships turned upon one point and one point alone; and in order to explain that point it is necessary that I should very briefly indicate what has been the fate of this company.

The company was formed to take over an old established distillery of high character, and it was formed at the time when, as a matter of common knowledge, the Scottish Highland whisky trade was in an exceedingly flourishing condition. This flourishing condition, for reasons which I need not particularise, has not continued. It is equally common knowledge that the state of the trade is very different now from what it was when this company was formed. The result has been that the company has not maintained the course of prosperity which it had at its inception, and it is perfectly evident that there is no likelihood at all of its being in the near future, if indeed ever, able to pay an adequate return on the nominal capital of the company. Now, the nominal capital of the company was divided into two sets of shares, preference shares and ordinary shares, the preference shares having preferential rights as regards cumulative dividends and also as regards capital. The ordinary shares were held by the vendors of the business, and the holders of the ordinary shares represented the practical working staff of the business. There has been an investigation, and the result of that investigation as set forth in Mr Paul's report shows, and I think shows very clearly, that the capital of the company is to a very large extent gone. It is gone for two reasons; it is gone because in one sense it never existed. That is to say, I think it is clearly shown that the valuation at which the business was taken over by the company was too high. But it has also gone, because undoubtedly the effect of the diminishing trade has been that the goodwill of this business represents nothing like what it represented before. Under these circumstances the company went through the appropriate steps, and they came to a resolution by which a large amount of capital was to be written off, and their scheme, passed by considerable majorities, by which this amount of capital was to be written off, was a scheme by which one third of the loss was to be written off the preference shares, and two thirds of the loss was to be written of the ordinary shares.

Now, the practical point that has been raised before your Lordships is this. It was argued by counsel for a certain minority of the preference shareholders, who appeared before your Lordships, that it was not really *intra vires* of the Court to sanction such a scheme, because to do so would be to go contrary to the memorandum of association. There is no doubt, of course, that the memorandum of the company here contemplated that there should be, and should remain, these preference shares, taking priority not only in the dividend but in the capital over the ordinary shares, and the argument put before your Lordships was

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that anything inconsistent with that was *ultra vires* of the Court to confirm. The authority on which the learned counsel relied was *Ashbury* v. *Watson*, L.R. 30 Ch. D. 376. It is sufficient to say that *Ashbury* v. *Watson*, though a very good authority on the proposition that a company cannot by resolution alter its memorandum, was not a case which had to do with reduction of capital at all, and accordingly I think that *Ashbury* v. *Watson* has nothing to do with the question here. The real authority on the matter is, I think, the case in which the last word has been said—the *British and American Finance Corporation* v. *Couper*, decided in the House of Lords, and reported in [1894] Appeal Cases, 399. I cannot read that case without coming to the conclusion that it really has settled in a way that we must certainly follow, that, so far as the question of *intra vires* is concerned, there really is no limit to what the Court can do. They may confirm any resolution, however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard, that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement. If what was proposed to be done by a company was, under cover of a so-called reduction of capital, really to change the rights of the shareholders in a way inconsistent with the memorandum, I do not think the Court in that case could say on the whole that it was a just and equitable arrangement, and accordingly any attempt of that sort would be struck at. But, assuming that the new arrangement is a just and equitable one, I am bound to say the result of that case is that there could remain no question of *ultra vires*, but that anything is open for the Court's sanction, and after all the case itself is about as good an instance of a thorough interference with the memorandum as could well be. What was done in that case was to sweep a certain set of shareholders out of existence—and I say a set of shareholders, not a class in the sense of holders of a certain class of shares, such as, for instance, cutting out the first one or two classes of preference shareholders or ordinary shareholders as the case might be—but it was simply taking certain shareholders who were called the American shareholders, but who in reality were only the individual holders of shares from No. 1 to No. so and so, and sweeping them out of existence. Now it cannot be doubted that when you had, as there, a memorandum in which it is said that the shares should consist of so many preference shares and so many ordinary shares, it was clearly meant that all these shares—be they preference or be they ordinary—should remain on equal terms *inter se*, and there could have been nothing more grossly against the memorandum than to take the holders of the shares from 1 to 100 and say to them "We will buy your shares and you must go out," and to say to the holders of shares from 100 to 200 "You on the other hand may stay." And yet that was what was practically done in that case. The matter is put in a single sentence by Lord Macnaghten in his judgment, when after going through the various safeguards there are in the provisions of the Act he goes on to say this—"With these safeguards the Act apparently leaves the company to determine the extent, the mode and the incidence of the reduction." Now it all turns upon that word "incidence," because the question which is raised here—the question whether you are entitled to extinguish any preference shares while you leave ordinary shares still alive—is really a question as to the incidence of the reduction. I have therefore come to the conclusion that on this branch of the argument the objectors have entirely failed and that there is no question that this transaction was *intra vires*.

But, of course, in all I have said I have hitherto assumed that the transaction is a just and equitable transaction, and we must be satisfied of that before we give our sanction to it. Now I am not wishing to throw the slightest doubt upon the view that in ordinary circumstances where there is a preference on capital in liquidation in favour of one set of shares against another, and where capital is lost, you should make the loss fall first of all on those who come last in the liquidation. But there are obviously cases where a desolating logic would defeat itself, and I am bound to say I think this is one of them. As I have already said, the ordinary shareholders here represent the managing persons of the company, and it is not in human nature to suppose that if by arrangement the ordinary shareholders were wiped out of existence they would go on working to make the company prosperous for the preference shareholders. And that, of course, must be the view of those who brought this about, for after all the majority of the preference shareholders want this thing. I need scarcely remind your Lordships that it is not the Court that want it; it is only the Court seeing if they ought to give their confirmation to the scheme the company itself proposes. I have come to the conclusion that the arrangement proposed is a just and equitable one as being in the true interests of the shareholders of the company and as being the only thing that stands between them and utter ruin. Accordingly I think we should be quite right in doing here what seems to have been done in almost exactly the same terms in the case of *Allsopp* (51 Weekly Reporter, p. 644). Mr Cooper had to admit the similarity of *Allsopp's* case but strove to draw a distinction by saying the cases were not in the same position, for it did not appear from the report that the provisions in question in *Allsopp's* case were in the memorandum. I took the opportunity when in England to obtain a memorandum of *Allsopps*, and I found that that was so. I mean that though the report does not show it the provisions in *Allsopp's* case were provisions in the articles and not in the memorandum.

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But for the reasons I have stated I do not think that makes any difference, and accordingly although *Allsopps* is not an authority on the legal part of the question, at the same time I think it is a good authority as to what is a just and equitable arrangement, and that it is a case which is a safe one to follow.

On the whole matter I am of opinion that this resolution ought to be confirmed.

[Counsel here referred to the question of voting power.]

I do not propose to touch that, because I think the proposal is equitable. I do not share the views of the reporter there. It merely leaves the shareholders as a whole exactly as they were in the old days with regard to voting power, though their capital interest in the company will now be different.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Younger, K.C.—Hunter, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Counsel for the Respondents—Cooper, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 20.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

BILE BEAN MANUFACTURING COMPANY *v.* DAVIDSON.

Trade Name—Misrepresentation—Fraud—False Statements in Advertising—Fraud whereby Trade Established Disentitling to Protection of Trade Name.

A company established a large business for certain pills, called "Bile Beans," by extensive advertising through which ran the story that the pills were compounded, with other ingredients, of a vegetable substance of marvellous health-giving properties which had been long known and used by the natives of Australia but only recently, after great research, discovered by C. F., a scientist. The labels and wrappers of the pill-boxes did not contain distinct references to this discovery, but the pills were called C. F.'s. The company having raised an action of interdict for the protection of the "trade name" of the pills it was proved that the story was a fabrication, the pills being compounded of ingredients known to all chemists.

Held that the false and fraudulent misrepresentations of the complainers, by which they had built up their business and were deceiving the public, disentitled them to have that business protected by the Court.

Process—Equitable Remedy—Fraud—Protection of Trade Name—Fraud by Complainers Seeking an Equitable Remedy not Pleaded on Record but Disclosed at Proof.

In an action of interdict for the protection of a trade name, where in the proof it was disclosed, though not pleaded on record, that the business had been established by a fraud on the public, the Lord Ordinary (Ardwall), the point having been taken by counsel but without amendment, proceeded to dispose of the case on this ground, and his judgment was subsequently sustained by the Division.

Trade Name—"Passing Off"—Name Descriptive or Fancy?—Secondary Meaning of Words Used—"Bile Beans"—Right to Exclusive Use of Trade Name because of Association in Mind of Public—Sufficiently Distinguishing—Interdict.

In 1899 a company started to sell pills in the United Kingdom. The pills were sold in boxes on which were labels bearing, *inter alia*, the words "Charles Forde's Bile Beans for Biliousness." In 1904 one Davidson began to sell liver pills in boxes on which were labels bearing, *inter alia*, the words "Davidson's Bile Beans." His pill-boxes differed from the company's in size and price, and the colouring, printing, and general appearance of the respective labels were different. The company raised an action to interdict him from selling as bile beans pills not made or supplied by them.

The words "Bile Beans" had formed part of a trade-mark taken out in this country by J. F. Smith & Company, of St Louis, U.S.A., in 1887, who, however, did not appear to have sold any of their bile beans in this country, and the complainers had in 1902 obtained an assignment of this trade-mark. Since 1887, in America, the word "bean" had been applied to oviform pills, and appeared in drug catalogues, but pills of that shape were not in common use in England. In certain of their advertisements the complainers referred to bile beans as "a title given to express exactly what the preparation is, a Bean for the Bile."

Opinions (*per* the Lord Justice-Clerk, and Lords Kyllachy and Stormonth Darling affirming the Lord Ordinary, Ardwall) that complainers had failed to prove that "Bile Beans" was a "fancy name" of their invention.

Opinions (*per* Lord Justice-Clerk and Lord Kyllachy, affirming the Lord Ordinary, Ardwall) (1) that the complainers had failed to prove that the term "Bile Beans" was so associated in the public mind with their pills that they were entitled to the exclusive use of the term, and (2) if that were to be held otherwise, that they had failed to prove that the respondent's pills had not been sufficiently distinguished.

Opinion of Lord Low on these matters *reserved.*

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In February 1905 the Bile Bean Manufacturing Company, Greek Street, Leeds, and Charles Edward Fulford and Ernest Albert Gilbert, manufacturing chemists, both of Greek Street, Leeds, the individual and only partners of the said company, brought a note of suspension and interdict against George Graham Davidson, wholesale and retail chemist, Polwarth Place, Edinburgh. The complainers in their note prayed the Court "to suspend the proceedings complained of and to interdict, prohibit, and discharge the respondent from in any way advertising, exposing, or offering for sale or selling, or in any way causing to be advertised or exposed or offered for sale or sold, as bile beans pills or other articles not made or supplied by the complainers, and from stamping or otherwise marking for sale, exposing, selling, or supplying as in implement of orders for bile beans pills or other articles made by the respondent, or pills or other articles not made by the complainers, and from representing in any way that pills manufactured by the respondent or pills or other articles not made by the complainers are bile beans of the complainers' manufacture."

The complainers pleaded—"(1) The words 'bile beans' having acquired a secondary signification, designating solely the article manufactured and sold by the complainers, the complainers are entitled to interdict the respondent from manufacturing, supplying, and selling any medicine or articles under the name of 'bile beans' not manufactured and supplied by the complainers. (2) The words 'bile beans' having acquired a secondary signification, designating solely the article manufactured and sold by the complainers, and the respondent having no right or title to manufacture and sell pills or other articles under the name of or to represent them as 'bile beans,' the respondent should be interdicted as concluded for. (3) The respondent having represented goods manufactured by him to be those of the complainers' manufacture, the complainers are entitled to interdict as craved."

The respondent pleaded—"(2) The pursuers not having the right to the exclusive use of the words 'bile beans,' the prayer of the note ought to be refused. (3) The complainers' statements, so far as material, being unfounded in fact, the respondent is entitled to absolvitor. (4) The respondent never having sold his own goods as in implement of orders for those of the complainers' manufacture, he is entitled to be assoilzied. (5) The prayer of the note ought to be refused, with expenses, in respect (*a*) that in describing his goods the respondent made use of words of the common stock of the English language, and (*b*) that the respondent clearly distinguishes goods of his own manufacture from those of the complainers."

The respondent had no plea, and made no averment, of fraud on the part of the complainers.

The labels on the pill-boxes of the complainers and the respondent were of different colours and designs, and the letterpress on them was as follows—

The facts established are given in the opinion of the Lord Ordinary (Ardwall), *infra*.

The note was passed on 15th March, the record closed on 12th May 1905, and the case put on the Procedure Roll, but on 18th May this last order was discharged and parties allowed a proof of their respective averments.

On 5th September 1905 the Lord Ordinary (ARDWALL), after hearing counsel and considering the proof, refused the note and found the respondent entitled to expenses.

Opinion.—"This is a note of suspension and interdict brought by the Bile Bean Manufacturing Company, Leeds, and Charles Edward Fulford and Ernest Albert Gilbert, the partners of that company, asking to have the respondent Mr Davidson, who is a wholesale and retail chemist in Edinburgh, prohibited from selling under the name of 'bile beans' any pills or other articles not made or supplied by the complainers. It is not a proceeding for the protection of a registered trade-mark, but for the protection of the complainers' trade and of a trade name at common law.

"At the debate following on the proof the counsel for the respondent, in addition to the contentions put forward by him on the record, submitted that on the facts brought out in the evidence it appeared that the complainers' business was not a *bona fide* trade; that no trade name had been acquired by them by legitimate and *bona fide* trading; that their whole business was founded on and is still being carried on by means of a gross fraud; and that accordingly they did not come into the Court with clean hands, and therefore are not entitled to the equitable remedy which the Court will give to a *bona fide* trader in order to protect a trade name used in a legitimate and honest trade. It is true that no notice of this contention is stated on record, but the respondent maintained, and I think with reason, that the fraud perpetrated by the complainers was divulged to him for the first time in the evidence of Mr Gilbert, one of the complainers, himself, and therefore he had not been in a position to place any pleas regarding it on record. In the next place he maintained that it was *pars judicis* to take notice of any fraud appearing at a proof on the part of an applicant for the protection of the Court to a trade name and to refuse the protection asked where such fraud was proved. I therefore take up this question first because (first) if the respondent's contention is sound there is an end of the case apart from the other questions raised, and (second

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because the consideration of it conveniently introduces the history of the trade and trade name which form the subject of the present proceedings.

"In 1896 the complainer Mr Gilbert (who must then have been only twenty-one years of age), who had been born in England, was in business in New South Wales in connection with a stationery or printing business. He had no knowledge whatever of chemistry or medicine, but he happened to get introduced to the other complainer Charles Edward Fulford, who was a Canadian by birth, who is not a qualified chemist, but who had served five years as a shopman in a chemist's shop in Canada, and who further had been connected with the business of the Dr Williams Medicine Company, a firm who deal in what are known generally as proprietary medicines. One of their medicines is called 'Pink Pills for Pale People,' and Fulford, as will afterwards be seen, sought like them 'Apt Alliteration's Artful Aid,' by calling his medicine 'Bile Beans for Biliousness.' It occurred to Fulford that it might be a good thing to carry on business as medicine and pill manufacturers or agents, and he and Gilbert agreed to go into partnership for that purpose. They first started the preparation of Gould's Tiny Tonic Pills, but they did not have such success in that business as they expected. In the early part of November 1897 Fulford one morning told his partner that at four o'clock in the morning he had hit upon a title for a new pill that was to be put upon the market, namely—'Bile Beans for Biliousness.' It was agreed that this would be a very good name to apply to a pill, and accordingly Mr Fulford prescribed a formula for the pill they were going to put upon the market. It does not appear whether this formula was drawn up by Fulford from the smattering of knowledge of *materia medica* which he had picked up in the chemist's shop in Canada, or whether it was a formula which he had copied out while in service in that shop, or which he had got a medical man in Australia to draw up for him. Mr Fulford was absent at the time of the trial at Carlsbad in Germany—it was said in ill health (although no medical certificate was produced). At all events he did not appear as a witness for himself and his firm. I must therefore be content with the evidence of his partner. The pill took in Australia, and in 1899 Fulford proceeded to this country to open a market in England. Neither the company nor the partners manufactured pills—even their name is misleading—they merely sent the formula to Messrs Park, Davies, & Company, or other manufacturing chemists to manufacture the pills in millions according to the formula sent them. The firm appointed a firm of wholesale chemists in England as their agents, and they themselves opened premises in Leeds and commenced to advertise on a most extensive scale. Since 1899 their business has spread over the whole of the country, and Mr Gilbert has gone a tour of the world with the view of studying the conditions and finding out the possibilities of the trade in various places, and he has established agencies in Cape Colony and all the British Colonies in Africa, in the Philippine Islands, Hong Kong, Shanghai, Japan, India, and other places, and also in Egypt, Malta, Gibraltar, France, the Gold Coast, and the West Indies, and the only places in the English speaking world where they have not set up business are Canada and the United States of America. They have spent £300,000 Mr Gilbert states in the building up of this business in the United Kingdom, and in the period during which they have done business there they have issued 83,000,000 of small pamphlet books, mostly illustrated, which have been distributed from house to house by a large gang of men and inspectors. They have also published a number of musical advertisements, such as the 'Bile Bean March,' the 'Coronation March,' and the 'Bile Bean Budget,' and, in short, have flooded the English-speaking world with their advertisements. But if one may judge from the way in which it is perpetually put forth in the forefront of their advertisements, the foundation stone of their success has been the false and fraudulent statement that their bile beans are for the most part composed of a natural vegetable substance which Fulford discovered in Australia, which for ages had brought health and vigour to the natives of that island continent, and which was being now introduced for the benefit of civilised nations. This story is repeated in almost every one of the pamphlets which have been published, and is referred to in nearly the same language in the shorter advertisements. One of their latest publications is entitled 'Strange Japanese Customs,' to which is prefixed the following passage:—'The secret of the natives. More important than the whereabouts of hidden gold was the secret of the ancient natives of Australia. For untold ages they had handed down to them the great secret of how certain native herbs cured the diseases to which they were subject, and thus preserved them in excellent health. When Captain Cook made his great Australian discoveries the amazing health of the natives was one of the chief things which impressed him. Writing on this very subject he afterwards said—"I did not observe (amongst the natives) any appearance of disease or bodily complaint, or eruption of the skin, or marks of any, and the most severe wounds healed most rapidly. Very old men without hair and teeth showed no signs of decrepitude, and were full of cheerfulness and vivacity." Not only from the writings and observations of Captain Cook, but from their own experiments also, scientists have long been impressed with the superiority of vegetable medicines. Some years back Charles Forde, an eminent scientist, thoroughly investigated the healing extracts and essences of Australian roots and herbs, and after long research he found himself the discoverer of a natural vegetable substance which had the power of acting in the human system

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in the same way as nature's own animal substance bile, and which was beyond all doubt the finest remedy yet discovered for all liver and digestive disorders. This substance was specially compounded with other ingredients, and so concentrated and refined that a suitable dose could be contained in the space offered by a small bean. Put up into this convenient form these beans for the liver or bile became widely known and used as "Charles Forde's Bile Beans"—a name now known throughout the civilised world.'

"This statement is both false and fraudulent. There was no such person as Charles Forde, his true name being Fulford; he was not an 'eminent scientist,' having had no scientific training and no standing whatever as a chemist or anything else; he never investigated the healing extracts and essences of Australian roots and herbs; he never made any research; he never was the discoverer of a natural vegetable substance which had the power of acting in the same way as animal bile; in fact, no such substance exists, and no such substance forms the basis along with other ingredients of bile beans, these beans being compounded by wholesale chemists in America out of the drugs which they have in stock, and no one of which has anything specially to do with Australia.

"In another pamphlet—'Australia in London'—the complainers say—'Many eminent scientists set about the discovery of the secret, and one of them, Charles Forde, devoted himself to an exhaustive investigation of the native Australian herbs and fruits. Armed with the implements of modern scientific research he was able to make progress where others, not similarly equipped and fitted for the investigation, had failed. After years of research, he found himself the happy discoverer of a vegetable substance which acted on the liver and digestive organs differently and in superior manner to any medicine known. The best laboratories, the most modern plant, all that science dictated as being best for the purpose, was requisitioned in the compounding of this substance into convenient medicinal form; and the result of it all was the production a few years back of Charles Forde's Bile Beans—the most perfect medicine of modern times.' And so the changes are rung upon this wonderful discovery in every pamphlet and advertisement of the complainers. There is therefore no doubt in my mind that their business is one founded entirely upon fraud, impudence, and advertisement, although it may be that the pill is as effective as any ordinary pill so compounded as to act as a cholagogue or as an ordinary laxative medicine, but it seems certain that these beans would never have taken the hold of the public they have done except for the foundation fiction of their being the product of a great discovery of an ancient Australian medicine by an eminent scientist using the most advanced scientific methods and apparatus.

"The next question, however, is—do these frauds constitute a relevant ground for refusing to the complainers the remedy they seek in the present action? I am of opinion that they do, and I may refer to some decided cases as authorities for that opinion.

"In the case of *The Leather Cloth Company* v. *The American Leather Cloth Company*, 11 H.L. (Clark's 523), it was held that where the advertisement or trade-mark states what is not true, it cannot be made the subject of protection in the Court of Chancery. In that case the label which it was sought to protect was so framed as to lead the public to believe that certain goods were tanned, whereas they were not tanned, and were made in the United States of America, whereas they were made in England. It was held *in re Fuente's Trade Marks*, [1891] 2 Ch. 166, that the former fraudulent use of marks representing that certain cigars were made in Havana, whereas they were made in Mexico, disentitled the applicant to have them registered as new marks, even though the dishonest portions of the old marks were omitted, for that would in effect have been to enable the applicant to benefit by his former fraudulent conduct. A similar decision was given in the case of *Newman* v. *Pinto*, 4 Patent Reports, 508. The plaintiff was refused protection against an alleged infringement of his rights in a trade-mark and label used in connection with cigars, because the cigar boxes and labels conveyed a representation that the cigars were manufactured in Havana, which was untrue. In these cases the misrepresentation seems to have been actually contained in the trade-mark, but in the case of *Ford* v. *Foster*, 1872, L.R., 7 Ch. App. 611, several cases were quoted by Lord Justice Mellish on page 631 in support of the proposition that 'the same reasoning would apply if the trade was a fraudulent trade,' and he refers to *Perry* v. *Truefitt*, 6 Beav. 66, where the use of the trade name was to sell under the name of Mexican Balm some composition which never came from Mexico, but which was said to be composed from some wonderful herbs to be got only in Mexico, and in the case of *Pidding* v. *How*, 8 Sim. 477, there was evidence that the object was to persuade the public that the tea, which was called 'Howqua's Mixture,' was an extraordinary mixture made up by some great man in China, when in point of fact it was made in England. These two cases bear a striking resemblance to the present, for the objects of the complainers' trade are to represent that Charles Forde's Bile Beans are composed principally of a wonderful vegetable product got only in Australia, and which had for ages brought health and vigour to the natives of that island, which is now admitted to be untrue: and another object of the complainers was to persuade the public that these bile beans were the product of the long and laborious research of a eminent scientist, with the aid of the most advanced chemical apparatus, whereas in point of fact they are made of common drugs by a firm of manufacturing chemists in America. The case

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of *Ford* v. *Foster* is founded on by the complainers as showing that a collateral misrepresentation regarding a trade-mark or trade name will not disentitle the owner of the name to relief at law or in equity, provided it do not appear as part of the trade name, and they maintained that here the frauds which I have already alluded to are collateral to the trade name of bile beans, and therefore cannot be held to have the effect of disentitling them to the remedy they now ask. I cannot assent to this view of the case. The name 'bile beans' was used as a trade-mark so far back as 1887, and the trade-mark and trade name 'J. F. Smith's Bile Beans' was registered as a trade-mark in June 1888, as appears from the *Trade-Marks Journal* of 13th June 1888. The complainers' real trade name, as appears from the passages above quoted, and under which their medicine has become known, is 'Charles Forde's Bile Beans,' regarding which they say in one of their latest publications that it is a name now known throughout the civilised world. Passing by the fact that Forde is what may be called a fictitious name itself, yet it is pertinent to inquire what is represented by the name 'Charles Forde's Bile Beans.' Now what was intended to be conveyed by that name was all the false and fraudulent representations attached to Forde's name in the complainers' published statements to the effect that Forde was an eminent scientist, and the discoverer in Australia of a 'natural vegetable substance,' possessed of all the extraordinary characteristics and effects already alluded to, and the benefit of which he was giving to the world in his bile beans. It seems to me, accordingly, that the name of Charles Forde and all the fraudulent statements regarding that person and his discovery are indissolubly connected with the term 'bile beans,' so far as used by the complainers, and that in considering whether the complainers are entitled to the remedy they now ask, this Court is bound to take notice of the fact that the complainers' trade, in connection with which the name 'Charles Forde's Bile Beans,' and as part of that name the two words 'bile beans,' have been used, is a fraudulent trade, and that according to the dicta of Lord Justice Mellish in *Ford* v. *Foster* no action ought to be entertained by a Court of Equity to protect it or the name which has been used in connection with it. On these grounds I think that the complainers' application ought to be refused.

"2. It is right, however, that I should exhaust the case by dealing with the questions which were raised on the merits, and as if the complainers' trade was untainted by fraud. The complainers here maintained that they are entitled to the exclusive use of the words 'bile beans,' because these words have acquired a secondary signification designating solely the article offered to the public by them, and that they are entitled to have the respondent interdicted from using the name in any of the ways set forth in the prayer of the note.

"In support of this proposition it was maintained in the first place by the complainers that the words 'bile beans' was a fancy name of their invention. I hold that this has not been proved in point of fact. The word 'bean' apparently has been applied, at all events since 1887, in America to an oval or oviform form of pill which, it seems, has become a favourite in that country owing, as is suggested in the evidence, to its being an easier pill to swallow than the globular form. While these pills are not exactly the shape of any bean I have ever seen, yet perhaps the word 'bean' is intrinsically a more appropriate word for the form of medicine which it is used to describe than a pill, which means a little ball or round object, whereas a vegetable bean is to some extent of an oval shape. It is proved that in the Chas. N. Crittenton Company's Catalogue—a well-known American catalogue of drugs and medicines—no less than five different kinds of beans for various ailments are in the list of medicines, including 'Bright's Kidney Beans,' 'Candy Regulating Beans,' 'Lyon Drug Company's Female Beans,' 'Nerve Beans,' and 'Smith's Bile Beans,' and accordingly at present 'bean' is apparently the only word in the English language which has been specificially appropriated to an oval pill, although it is true that it has not hitherto been largely applied in this country to medicines of that kind except by the complainers, for the obvious reason that such oval pills have not been used here except by the complainers and J. F. Smith & Company till quite recently. But as already pointed out, on 7th November 1887, J. F. Smith & Company, manufacturers at St Louis, United States of America, applied for and obtained in England a registration of a trade-mark on which, *inter alia*, was inscribed these words,—'J. F. Smith's Bile Beans,' and below that 'cure biliousness, sick headache, malaria, and all diseases arising from a disordered liver. Dose, one Bean.' I have very little doubt that we have here the origin of the name which Mr Fulford would have us believe was revealed to him in a vision of the night. Two boxes of Smith's Bile Beans have been produced in the present process, and the complainers evidently thought the matter of some importance, for they acquired a right to this trade-mark by assignment. But the best evidence regarding the question whether bile beans is a descriptive word or a fancy name is to be found in the complainers' own advertisements in the *Daily News* of Tuesday, 3rd September 1901, and the *Daily Chronicle* of 27th December 1901. In the first of these the following sentence occurs:—'The result of this experimenting was the addition of some eight other ingredients, the whole being called Bile Beans, a title given to express exactly what the preparation is—a bean for the bile. The expense and care in perfecting and compressing this preparation to the size of a small bean was very great, but the result is a small oval bean that the youngest child can take with ease, and a medicine the consumption of which last

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year reached some thirty million doses in Australia alone, the rich and poor alike being the friends of this marvellous specific;' and this statement is repeated again and again in the complainers' advertisements. They can therefore hardly maintain that the words 'bile beans' are not a descriptive name. And the two words of which it is composed are certainly ordinary English words, although, as I have said, the application of the word 'bean' to a medicine is of recent introduction. It is proved, however, that it has been applied to confectionery, whether manufactured so as exactly to resemble an ordinary vegetable bean or possessing only a general oval form.

"I am therefore of opinion, on the authority of the *Cellular Clothing Company*, A.C. 1899, 326; *Parsons* v. *Gillespie*, A.C. 1898, 239; *Fels* v. *Hedley & Company*, 20 Patent Reports, 437, and 21 Patent Reports, 85, that this is a name which the complainers are not entitled to the exclusive use of as a fancy name which they have made their own. It was not invented by them, nor had they the exclusive use of it at any time.

"III. A third question, however, arises upon the views expressed in *Reddaway* v. *Bannerman*, A.C. 1896, 199. In that case it was held that a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers into the belief that they are buying the goods of that other trader, although in its primary meaning the name is merely a true description of the goods. The goods in that case were machinery belting, the making and selling of which is a trade which a large number of manufacturers are engaged in, and for about seventeen years before the case was tried the plaintiff had called the belting which he manufactured 'Camel Hair Belting' in order to distinguish it from the belting of other manufacturers, and many other manufacturers had different names for their belting taken from other animals. Originally it was not known that the belting in question was made from camels' hair, but afterwards it was discovered that it really consisted of the hair of the camel. It was proved in that case that the name 'Camel Hair Belting' had come to mean in the trade the plaintiff's belting and nothing else, and accordingly when the defendant began to sell belting made of yarn of camel hair and stamped it 'Camel Hair Belting,' the plaintiff was held entitled to an injunction against him using these words descriptive of or in connection with belting made by him without clearly distinguishing such belting from the plaintiff's belting. That case differs from the present in this important particular that all along there had been in the market belting of the same material as the plaintiff's belting, and which never had got the name of camel hair belting, and there were therefore good grounds for holding that the plaintiff was entitled to exclude others from using the name, at all events without distinguishing it clearly from his goods. In the present case, however, as in the *Fels Naptha* case, little weight can be attached to the use by the complainers as against the general public of the term 'bile beans', because up to the time of the respondent selling other pills as a cure for biliousness no one had occasion to use the words bile beans except the Smiths to a very limited extent, and therefore all the evidence of persons who say that the name is associated by them with the complainers' goods is of little importance, for the reason that the complainers were the only sellers of such goods, and nobody could get goods of that name from anybody but them. I would refer on this subject to the observation of Lord Shand in the *Cellular Clothing Company* case, A.C. 1899, page 339, at the foot of the page, and to Lord Davey's opinion in the same case, page 343. The present resembles very much the *Fels Naptha* cases, 20 Patent Reports, 437, and 21 Patent Reports, 85, where the complainer had had for a considerable time the monopoly of selling soap into the composition of which naptha entered, and which had become known as 'Naptha Soap,' or simply 'Naptha,' yet he was refused an injunction against other persons who had commenced to sell naptha soap under that name, it being held that they were within their rights in doing so. I accordingly do not think that the evidence led by the complainers is sufficient to show that as in a question with all other vendors of medicines they have established such a right to the words 'bile beans' as representing their manufacture alone, as to exclude the use of these words by other traders selling oval pills as a cure for biliousness.

"But even assuming that the name 'bile beans' has come to be understood by the public to mean the complainers' manufacture and no others, that will not preclude other traders from using the name provided they distinguish their bile beans from those of the complainers. This, I think, has been sufficiently done by the respondent. The respondent's boxes are different in size, price, label, and general appearance from the complainers', as is shown by those produced in process. In all cases of alleged infringement of the complainers' rights which are proved, there are none in which the parties asked for the complainers' bile beans. They simply asked for bile beans, and were offered boxes at different prices, including the complainers' boxes, and generally selected the respondent's bile beans, it being for the purpose of getting these boxes that they were sent to ask for bile beans at all. I am accordingly of opinion that, even if the words 'bile beans' have come to have the secondary meaning attached to them which the complainers claim, the respondent has shown that he sufficiently distinguishes his own bile beans (which, it may be noticed, are a bean manufactured by Park, Davies, & Company, who formerly manufactured for the complainers) from the complainers' bile beans. But the complainers ask in their note that the respondent be interdicted from the use of the name 'bile beans' altogether, and this, I think, they are not entitled to for the the reasons above stated.

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"The difficulty I have in this case arises from the conduct of the respondent, who from the outset apparently endeavoured to appropriate to his own goods the notoriety which the complainers by their extensive advertisements have procured for the medicine known as bile beans or Charles Forde's Bile Beans. It is clear from the somewhat humiliating confessions which he had to make when under cross-examination, that the respondent, having determined to secure the benefits of the catching alliterative name 'bile beans,' set about considering how he might keep within the letter of the law. He first thought of calling his bile beans 'Dr Scott's Bile Beans,' a name as fictitious as Charles Forde, and he then studiously sat down to eliminate from the various drafts of his advertisements anything he thought might implicate him in legal difficulties. That he intended to take advantage of the reputation of Charles Forde's Bile Beans is plain from the commencement of his circular, where he says—'These pills are held in the highest repute throughout the United Kingdom as a tried and established remedy for bile, indigestion, &c.,' and he admits that what he wanted to do was to sell something which would be good for biliousness, and which he would call bile beans. He at one time, apparently, thought of selling under that name beans made after the formula 1120 of the *Pharmaceutical Journal*, and he finally resolved to sell an oval pill known as Park, Davies, & Company's Cathartic Compound No. 160, being induced to do so apparently by the belief which he divulges in his evidence that these beans were the beans which all along the complainers had been selling, which was not the case, as was clearly proved by the evidence of Dr J. Lewkowitch.

"I cannot therefore approve of the respondent's proceedings, but whatever his intentions I think he has acted within his legal rights, and that it has not been proved that he ever to any member of the public attempted to represent that his beans were the complainers' beans, although he has certainly attempted to secure for his own beans the advantages of the publicity which the complainers have acquired for a medicine named bile beans, and I may observe that in the record the respondent offers to advertise that he no longer sells the complainers' bile beans, and that he has ceased to have any business relations with them.

"On the whole matter, and for the various reasons I have above set forth, I am of opinion that the complainers' application for interdict should be refused."

The complainers reclaimed, and argued—(1) The words "bile beans" had acquired a secondary signification denoting pills of their manufacture or supplying. They had introduced into this country the use of the word bean as a synonym for pill. Though a trade-mark had been registered by one Smith in 1887, which included the words "bile beans," neither he nor his successors J. F. Smith & Company had sold pills in this country as bile beans, and in any case the complainers had acquired from J. F. Smith & Company any rights to the name they might have had. In the trade their pills were known and listed as "Bile Beans." The name was a fancy, not a descriptive name. What were sold were not beans but pills, and pills not bean shaped but oviform; "beans" described neither their genus nor their shape. This distinguished it from *The Cellular Clothing Company* (*cit. infra*). That words were ordinary English words, *e.g.*, the words "Silverpan Jam" in *Faulder* (*cit. infra*), did not prevent them, if used in a strained sense, acquiring a secondary signification denoting a particular manufacture. Even if the words were descriptive, the application of them to their goods only had been sufficiently universal and long continued to give them a secondary meaning denoting their pills and no one else's—*Reddaway* (*cit. infra*). (2) There was evidence of fraud on the part of the respondent and of his "passing off" his pills as theirs. The evidence of "passing off" was sufficient, especially in view of the fact that his intention of so doing was manifested in the successive drafts of one of his advertisements, and, *inter alia*, in the fact that this advertisement in draft and as issued referred to "these pills" as a "tried and established remedy" although their composition had not, as the draft disclosed, been determined on when the advertisements were in draft. The fraud was the more marked in that the respondent had acted as their agent. The use of the respondent's name on the labels, on the boxes, and certain differences in printing did not disprove the respondents "passing off" or the intention of so doing; he was well aware the public looked chiefly to the words "bile beans." It was not necessary to show an exact resemblance between the pills or the labels. On (1) and (2) the following cases were cited—*Cellular Clothing Company* v. *Maxton & Murray*, July 12, 1898, 25 R. 1098, 35 S.L.R. 869, April 27, 1899, 1 F. (H.L.) 29, [1899] A.C. 326, 36 S.L.R. 605; *Reddaway* v. *Banham*, [1896] A.C. 199; *Montgomery* v. *Thompson*, [1891] A.C. 217; *Wotherspoon* v. *Currie*, 1872, L.R., H.L., 5 E. & I. Ap. 508; *Powell* v. *Birmingham Vinegar Brewery Company*, [1896] 2 Ch. 54, [1897] A.C. 710; *Massam* v. *Thorley's Cattle Food Company*, 1880, L.R., 14 Ch. D. 748; *Faulder & Company, Limited* v. *O. & G. Rushton, Limited*, 1903, 20 R.P.C. 477; *Valentine Meat Juice Company* v. *Valentine Extract Company, Limited*, 1900, 17 R.P.C. 673; *Singer Manufacturing Company* v. *British Empire Manufacturing Company, Limited*, 1903, 20 R.P.C. 313; *Eastman Photographic Materials Company* v. *Comptroller-General*, 1898, 15 R.P.C. 476, [1898] A.C. 571; *Hommel* v. *Gebruder Bauer & Company* (*in the matter of the trade-mark Hæmatogen*), 1904, 21 R.P.C. 576. (3) The verdict of the Lord Ordinary on the facts that "the name of Charles Forde and all the fraudulent statements regarding that person and his discovery are indissolubly connected with the term 'bile beans,' so far as used by the complainers" was a finding

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on fact on an issue that was not before him, for there was no case on record against them of fraud. (4) That finding was not justified by the evidence, which did not establish that their whole business was fraudulent or that the misrepresentations were not collateral. The name Charles Forde did not occur on by any means all, even of their earlier, and in few of their later, advertisements. The advertisement about Captain Cook and the great discovery was never used by them in Australia, and occurred in only about one-twelfth of the advertisements in this country. They were really only puffing advertisements with picturesque stories to draw the public's attention to them—*Holloway* (*cit. infra*). They did not make the whole business unlawful or taint it with fraud so as to make the complainers "outlaws" and disentitle them, for instance, to sue for the price of goods supplied and not paid for, or to the remedy now sought; they could not be "outlaws" in the one case and not in the other. Even if the erroneous statements could be called misrepresentations, they were collateral, for they occurred neither in the name of the article, nor on the label, nor in any wrapper round the box; collateral misrepresentations did not disentitle them to the protection of the Court. On (4) the following cases were cited:—*Forde* v. *Foster*, 1872, L.R., 7 Ch. Ap. 611; *Perry* v. *Truefitt*, 1842, 6 Beav. 66, 63 Rev. Rep. 11; *Pidding* v. *How*, 1837, 8 Sim. 477, 6 L.J. (N.S.) Ch. 345, 42 Rev. Rep. 231; *Sykes* v. *Sykes*, 1824, 3 B. & C. 541, 27 Rev. Rep. 420; *Marshall* v. *Ross*, 1869, L.R., 8 Eq. 651; *Holloway* v. *Holloway*, 1850, 13 Beav. 209.

Argued for the respondent—(1) The complainers had made many material misrepresentations regarding their business and the goods they sold. They had deceived the public as to the maker of the pills (which were manufactured for them in America), the country from which they came, and the nature, substance, and quality of the pills (which could be made from the ordinary stock of a wholesale chemist, and contained no herb or root peculiar to Australia, or which complainers obtained from there). The misrepresentations occurred in a larger proportion of the advertisements than stated by the complainers; it was not merely the advertisements that referred to the pills as made from specific roots in Australia that must be taken into account, but in many others there was some allusion or other to the wonderful discovery, and the numbers of these lying advertisements circulated were enormous. In fact, complainers boasted they had spent £300,000 on their advertisements, pamphlets, &c., and had distributed 83,000,000 pamphlets. The complainers' whole business depended on its advertisements, and the lying stories in them were indissolubly connected with the name of Charles Forde which appeared on the pill boxes. The "verdict" of the Lord Ordinary on the facts was fully justified by the evidence. In the circumstances the misrepresentations were not collateral, and in any case the distinction between collateral and non-collateral misrepresentation was not recognised in Scotland. The scheme by which the complainers had tried to appropriate the use of the words "bile beans" was fraudulent. They had put "trade-mark" on the labels of their pill boxes, whereas they had no trade-mark at any rate in this country (they probably could not have got one—Patents, Designs, and Trade-marks Act 1888 (51 and 52 Vict. cap. 50) section 10), and gradually had tried to eliminate the name Charles Forde from their advertisements. Their obtaining from J. F. Smith & Company an assignment of their trade-mark containing the words "bile beans" was, in view of the fact that Smith had no business and no goodwill, a fraud on the Patents, Designs, and Trade Marks Act 1883 (46 and 47 Vict. cap. 57), sec. 70. Those who sought the protection of the Court must do so with "clean hands"—*ex turpi causa non oritur actio*. On (1) the following cases were cited—*Pidding* v. *How* (*cit. sup.*); *Perry* v. *Truefitt* (*cit. sup.*); *The Leather Cloth Company, Limited* v. *The American Leather Cloth Company, Limited*, 1863, 4 De G. J. & S. 137, esp. Lord Westbury, at p. 143, 11 H.L. (Clarks) 523, at p. 546; *In re Wood's Trade Mark* (*Wood* v. *Lambert & Butler*), 1886, L.R. 32 Ch. D. 247, at p. 264; *Newman* v. *Pinto*, 1887, 4 R.P.C. 508; *Worden* v. *Californian Fig Syrup Company*, 1902 (decided 1903), 187 U.S. Rep. 516, at 528; *Cheavin* v. *Walker*, 1877, L.R. 5 Ch. D. 850. (2) Where there was a *turpis causa* it was *pars judicis* to refuse the protection of the Court—*Morgan* v. *M'Adam*, 1867, 36 L.J. Ch. 228, at p. 229; *Lee* v. *Haley*, 1869, L.R. 5 Ch. Ap. 155; *The Leather Cloth Company, Limited* v. *The American Leather Cloth Company, Limited*, 1863, 11 H.L. (Clark's), 523, Lord Cranworth, at p. 532-533. The fraud was not disclosed till the proof, and the plea to relevancy was sufficient to cover it. (3) The words "bile beans" had not acquired a secondary meaning denoting solely the complainers' pills. They were descriptive words. Beans described sufficiently accurately the pills. The complainers' own advertisements referred to the words as a good description. Words developed their meaning by derivative use, *e.g.*, a coffee bean was not strictly a bean but a berry, and in Latin *phaselus*, a bean or bean-cod, came to mean a boat or pinnace. For the various meanings of bean they referred to Murray's dictionary. "Bile beans" was not a fancy term. The words were not meaningless as applied to the article in question, nor inappropriate. For a definition of a fancy term they referred to that of Lopez (J.) *in re Van Duser's Trade-Mark*, 1887, 56 L.J. Ch. D. 370, 34 Ch. D. 623. "Beans," moreover, could not be separated from its context. The name that the complainers gave to their pills (apart from the fact that they were called Charles Forde's) was not beans or even bile beans, but Bile Beans for Biliousness, and on the labels one big B sufficed for the three words. Common English words as these were incapable of acquiring a secon-

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dary meaning, in the sense that the mere use of them involved a representation that the goods were those of a certain manufacturer. *Faulder & Company, Limited* (*cit. supra*) (Silverpan Jam) proceeded on the fraud of the infringer. The evidence of the complainers was insufficient in law to establish a secondary meaning for descriptive words. On (3) the following cases were cited—*Montgomerie* v. *Donald & Company*, February 1, 1884, 11 R. 506, 21 S.L.R. 338; *Stuart & Company* v. *Scottish Val de Travers Paving Company, Limited*, October 16 1885, 13 R.1, 23 S.L.R. 11; *J. H. Dewar* v. *John Dewar & Sons, Limited*, March 29, 1900, 7 S.L.T. 462; *Cellular Clothing Company* (*cit. supra*), Lord Davey's opinion; *Parsons* v. *Gillespie* [1898], A.C. 239; *Ripley* v. *Griffiths*, 1902, 19 R.P.C. 590; *Fels* v. *Hedley & Company, Limited*, 1903, 20 R.P.C. 437; *Fels* v. *Christopher Thomas & Brothers, Limited*, 1904, 21 R.P.C. 85; *Hommel* (*Hæmatogen*) (*cit. supra*); *King & Company, Limited* v. *Gillard & Company, Limited*, 1904, 21 R.P.C. 589, *aff.* 1905, 22 R.P.C. 327; *Weingarten Brothers* v. *Charles Bayer & Company*, 1905, 22 R.P.C. 341; *Faulder & Company, Limited* (*cit. sup.*); *Wotherspoon & Company* v. *Gray & Company*, November 10, 1863, 2 Macph. 38.

At advising—

LORD JUSTICE-CLERK—The evidence in this case discloses the history of a gigantic and too successful fraud. The two complainers who ask an interdict against others do so to protect a business which they have brought to enormous proportions by a course of lying which has been persisted in for years. The scheme they formed was to delude the public into the belief that a valuable discovery had been made of a medical remedy hitherto known only to certain savage tribes in a distant part of the world but known to them for ages, and that the medicine had been prepared by the aid of "the implements of modern scientific research," and that "the best laboratories and most modern plant" had been requisitioned for compounding this wonderful Australian vegetable substance. The place of the discovery, the mode of the discovery, the discovery itself, the instruments of research, the laboratories, were all deliberate inventions, without any foundation in fact. The story was that a certain Charles Forde, who was declared to be a skilled scientist, had, while in Australia, noted the fact that the aborigines were markedly free from certain bodily ailments, and that by patient research and exhaustive investigation he had ascertained that this immunity was obtained by the use of a natural vegetable substance whose properties for cure of such ailments were extraordinary, and that as the result of his research this wonderful remedy was now given to the world. All this was in every particular undiluted falsehood. There was no such person as Charles Forde, no eminent scientist had been engaged in researches, no one had gone to Australia and learned of a time-proved native cure. The truth was that the complainers had formed a scheme to palm off upon the public a medicine obtained from drug manufacturers in America as being the embodiment of the imaginary Australian discovery by the eminent scientist Charles Forde. Accordingly, having got their supplies from the American drug dealer they proceeded to create a public demand by flooding this country and other countries with advertisements in the press, and by placards, leaflets, and pamphlets, in which the lying tale was repeated, often embellished with pictorial representations of the healthy savage and with pictures of the imaginary scientist duly bearded and begoggled, having the precious root pointed out to him by the Australian native.

It was of importance in exploiting a fraud of this kind to get a catching name, and the only trace of discovery in the whole proceedings was that the complainer Fulford thought out the alliterative name of Bile Beans for Biliousness. Even this was not in a true sense original, the word beans having been in several cases applied to boluses in an oval form, and the words "bile beans" having formed part of a trademark taken out so early as 1887 by one Smith. This descriptive name has proved so valuable a possession that it is desired now to establish a monopoly of these words in combination, and to interdict anyone else from using them, upon the footing that these words are not merely a descriptive name but have come to designate the goods sold by the Bile Bean Company formed by the complainers, and that any use of the name by others is a fraud upon that company. The claim is not for right in a trade-mark. The claim is made at common law for protection of a trade by preventing a name appropriated to it being used by others.

Now this name which the complainers desire to have protection for was the name chosen to designate the article about which all these lying statements were put forward in order to make a trade by inducing the public to buy the article as being what the complainers said it was, the article being one to which the description given and the historical statements made in regard to it were wholly inapplicable. And it is to be observed that these statements were not of the mere puffing order, not of the "never failing," the "incomparable," the "unique," or the "worth a guinea a box" order, but were statements of alleged facts carefully elaborated and intended to be accepted as facts from which the public might draw a sound inference that the article sold would effect to the buyers what it had done for ages to another race in another part of the world. The purpose was not to catch those who listen to mere assertion about a thing, but to convince them that they were buying a drug which incontestable facts had demonstrated to be a valuable remedy.

I agree with the Lord Ordinary in holding that the complainers being engaged in perpetrating a deliberate fraud upon the public in describing and selling an article

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as being what it is not, cannot be listened to when they apply to a court of justice for protection. It is their own case as brought out in the evidence which stamps their whole business with falsity. In bringing forward their case they were compelled to disclose what otherwise might never have been known, and was not known to the respondent, that the business they sought to protect was tainted with fraudulent misrepresentation. I should have no hesitation in so holding on general principles. No man is entitled to obtain the aid of the law to protect him in carrying on a fraudulent trade. But the cases quoted at the debate and by the Lord Ordinary establish as I think very clearly that the courts have in the past given effect to the principle which allows nothing to the man who comes before the seat of justice with a *turpis causa*. I do not enlarge upon the precedents, as I have had an opportunity of seeing an opinion prepared by Lord Stormonth Darling in which they are more fully gone into, and the Lord Ordinary has in his opinion very fully quoted the cases. I therefore agree with the Lord Ordinary that the demand of the complainers must fail.

This view is sufficient for the disposal of the case. The complainers cannot succeed in obtaining assistance from the law for a business based on unblushing falsehood for the purpose of defrauding the public into a totally false belief as to the origin and material of the goods they sell.

It is not necessary in these circumstances to refer to the other matters alluded to in the Lord Ordinary's opinion, but I may say shortly that I entirely concur in the Lord Ordinary's view that the name used by the complainers "bile beans" was not a fancy name invented by them but was a descriptive name, the word "bean" as applied to drugs made up in oval form having been in frequent use for many years, and the words "bile beans" having formed part of a trade-mark obtained so far back as 1887, and the complainers went to the expense of buying out the company holding it. There is, I think, no ground for holding that it was a fancy name invented by the complainers and they had not the original and never had the sole use of it.

I am also of opinion upon the evidence that the respondent has not sold his bile beans under any such form of package or advertisement so that any person exercising ordinary observation could suppose he was getting the complainers' bile beans. I was much struck by the appearance of the labels. They are as unlike as can be. The only resemblance consists in the words bile beans. The colours are different. The arrangement of the colours is different. The one bears "trade-mark," which was untrue, the other does not. The one bears in small letters "Charles Forde's," which forms a marked part of the falsehood, the other is headed in strong letters "Davidson." The one has an alliterative "Bile Beans for Biliousness," there being only one large B for the whole three words. The other states 'Bile Beans" only with the name "Davidson" again below it in brackets in type as large as the "Charles Forde" in the complainers, and further the boxes in which the beans are sold are of different sizes and of different material and of different price. In short, there is no practical resemblance except in so far as the words "bile beans" are concerned. To these words the complainers have plainly no exclusive title.

Whatever strictures may be made upon the motives of the respondent, I am of opinion that he has not infringed any right of the complainers, and has not been proved to have passed off his goods as those of another.

I am on these grounds in favour of adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY — I agree with your Lordship, and I also agree with the Lord Ordinary's judgment upon all its grounds. I do not think it necessary to say more.

LORD STORMONTH DARLING—I am perfectly satisfied with the first and leading ground of the Lord Ordinary's judgment in this case, and I would have contented myself with expressing my concurrence in the reasons he assigns so clearly for coming to that conclusion were it not that some points in the argument have probably been developed more fully before us than they were in the Outer House.

The pursuers are vendors of an antibilious pill, which is manufactured for them in America from a private and undisclosed formula prescribed by Mr C. E. Fulford, the senior partner of the pursuers' firm. The pills are sent over from America to the pursuers' premises in Leeds, from which, after being packed in boxes, they are distributed in enormous numbers to wholesale chemists all over the world. Each box contains a label bearing the words "Charles Forde's Bile Beans for Biliousness," and a list of ailments for which the pills are said to be a cure. "Charles Forde" is a fictitious name, or rather is an *alias* for C. E. Fulford. The business in the United Kingdom was started in 1899, and quickly attained very large proportions, having been fostered by an elaborate system of advertisement, not only in newspapers and magazines but by pamphlets distributed from house to house, and even by the publication of pieces of music such as the "Bile Bean March." In the summer of 1904 the complainers discovered that the respondent, a wholesale and retail chemist in Edinburgh, was beginning to sell an antibilious pill of his own under the name of "bile beans," and they immediately raised this action, in which they ask that he should be interdicted from selling as bile beans pills or other articles not made or supplied by themselves.

This therefore is a pure case of passing-off, not complicated by the existence of any patent, and the only connection that it has even with a trade-mark is that in 1902 the complainers obtained an assignment from J. F. Smith & Company, a New York firm, of a certain trade-mark bearing the words "J. F. Smith's Bile Beans," which their

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predecessors had registered in this country so far back as 1887. But the complainers do not found upon J. F. Smith's trade-mark, While therefore the case must be taken on the footing that the complainers have no registered trade-mark applying to their pill, it is clear that even where there is no trade-mark the law will not allow one trader to pass-off his goods as the goods of another, unless that other be guilty of some fraud upon the public disentitling him to the protection of the law.

Here the Lord Ordinary has found that there *is* fraud upon the public which strikes at the whole trade of the complainers, and therefore disentitles them to the protection of the law. "Nobody doubts," said Lord Kingsdown in *The Leather Cloth Co.* case cited by the Lord Ordinary at p. 542 of 11 Clark's House of Lords cases, "that a trader may be guilty of such misrepresentations with respect to his goods as to amount to a fraud upon the public, and to disentitle him on that ground, as against a rival trader, to the relief in a court of equity which he might otherwise claim. What would constitute a misrepresentation of this description may in particular cases be a reasonable subject of doubt, and it was in the present case the ground of the difference between the two judgments under consideration. The general rule seems to be that the misstatement of any material fact calculated to deceive the public will be sufficient for the purpose. This was the foundation of the judgment in *Perry* v. *Truefitt*, and in the case of *Howqua's Mixture* and several other cases, as well as of the Lord Chancellor's judgment in the case before us." What Lord Kingsdown, with the assent of Lord Westbury, here states as the general rule is "the misstatement of any material fact calculated to deceive the public." It is true that he states it as disentitling the trader to relief in a court of equity. But I cannot imagine a principle of so general a nature, and intended to protect the public against fraud, as turning on any mere question of procedure as between courts of law and courts of equity, particularly when applied in a country like Scotland where no such distinction exists. And if the principle applies I agree with the Lord Ordinary that the facts of the present case are amply sufficient to raise it. Mere puffing will not do. Exaggeration, however gross, of the merits and virtues of a remedy will not do. In the case of *Holloway's Pills*, in 13 Beavan, 209, it was held that the description of the inventor as "Professor," and the statement in advertisements that the pills were adapted to cure all diseases, did not amount to misrepresentations disentitling him to have an injunction against a piratical brother. But here what the Lord Ordinary well calls the "foundation fiction" of the discovery by an eminent scientist of a vegetable substance growing in Australia which had long ago enabled the natives of that country to defy disease and had at last been reproduced in the most convenient medicinal form as "bile beans"—this flagrant piece of invention was no casual lapse into hyperbolical language, but was circulated systematically from the very inception of the trade, and plainly formed the basis on which the whole superstructure rested. It is said that to have the effect of disentitling the trade to the protection of the law, the misrepresentation must not be collateral, but must be contained in the trade-mark (where it exists) or the trade name itself. But there was nothing collateral in this misrepresentation. It affected the very essence of the article offered for sale, and was plainly implied in the name "Charles Forde," that being the name of the so-called "eminent scientist" who had made the "valuable discovery."

If so, it does not matter that the rival trader, viz., the respondent Davidson, may have been actuated by a motive to secure for his own bile beans a certain advantage from the reputation which the complainers had acquired for theirs by advertisements which were as extensive as they were mendacious. The Lord Ordinary intimates that he cannot approve of all the respondent's proceedings and neither do I. It is true that the respondent sold his pills in boxes of a different size, and marked by a label of a different colour, on which his own name and not the complainers appeared. To the customer, therefore, who was reasonably wary there was not much risk of the respondent's goods being successfully passed off as the complainers, and I am not sure that the law is bound to concern itself with the interests of the unwary customer. Certainly it appears that the actual purchasers of the respondent's pills got exactly what they wanted. But, on the other hand, it is plain that the respondent was prepared to sell his own pills to anybody who simply asked for "bile beans" without specifying that they must be "Charles Forde's." Now, the two articles were necessarily different, for the complainers' pills were made from a secret formula (albeit containing no ingredient which had been discovered in Australia), while the respondent's were made from a well-known and probably effective enough formula for a cathartic mixture to be found in the ordinary list of the manufacturing chemists who compounded it. If he had made this plain to purchasers, no possible exception could have been taken to his proceedings. But he left it dark for no better reason than that he knew the complainers' pills to have acquired a great vogue, and he did not know of what they were compounded. He therefore took his chance of their carefully propagated story of the "great Australian discovery" turning out to be a fabrication. Perhaps it may be fortunate for him that it did turn out to be so, but as it did—and that could only be found out in the course of the investigation to which the complainers' proceedings were exposed in this case—the fraud of the complainers makes it unnecessary, as I think, to consider the respondent's conduct at all.

A great deal of argument was directed to the question whether, assuming the complainers' trade to be untainted by

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fraud, they had succeeded in proving that the phrase "bile beans" was a "fancy name" of their own invention. The Lord Ordinary holds that this has not been proved in point of fact, and I am rather inclined to agree with him. I do not lay much stress on the old registration of bile beans as a trade-mark by J. F. Smith & Company, for their trade seems to have been insignificant. But the complainers can hardly be heard to say that the name is not descriptive when they advertised extensively that the title was given "to express exactly what the preparation was—a bean for the bile." Anybody who read that knew precisely that the article offered for sale was an antibilious pill; and, in face of such an intimation from the complainers themselves, no amount of evidence that "bean" is a novel and fanciful name for a pill can go very far. But it is unnecessary, in my view, to pursue this topic for the reasons I have stated. I am therefore for adhering.

LORD LOW—I agree with the result at which your Lordships have arrived. I am of opinion that the false and fraudulent misrepresentation by which the complainers have built up their extensive business disentitles them to have that business protected by the Court. I therefore think the application should be refused.

On the question whether if there had been no fraud the complainers would have been entitled to interdict I desire to offer no opinion. The question is not necessary for the disposal of the case, and seems to me to be attended with great difficulty.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Complainers (Reclaimers)—Dean of Faculty (Campbell, K.C.)—Clyde, K.C. — Cooper, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent—T. B. Morison — Gillon. Agents—Kirk Mackie, & Elliot, S.S.C.

HOUSE OF LORDS.

Monday, July 16.

(Before the Lord Chancellor (Loreburn), Lord Davey, Lord Robertson, and Lord Atkinson.)

EARL OF KINTORE AND OTHERS *v.* ALEXANDER PIRIE & SONS, LIMITED.

(In the Court of Session June 6, 1905, 42 S.L.R. 607, and December 18, 1902, 40 S.L.R. 210, 5 F. 818.)

Fishings—Salmon-Fishing—River—Rights of Upper Salmon-Fishing Proprietor—Rights of Lower Riparian Millowner.

The proprietors of salmon-fishing in the upper reaches of a river are not entitled, as against a lower riparian millowner, to insist upon having the condition and flow of the river left in their natural state, save in so far as affected by rights acquired by prescription; their right is limited to seeing that there is no obstruction or abstraction of such a character as materially to impede the free passage of salmon.

Question whether, in cases where water is abstracted, it is necessary that at least an equal amount of water to that abstracted be sent down the stream of the river on the ground that salmon always follow the main stream.

Prescription—River—Abstraction of Water from River—Prescriptive Right to Abstract Water at One Place — Right to Abstract the Same Amount of Water at Another Place—Right to Abstract at One Place Amount of Water Formerly Abstracted at Two Places.

"The effect of forty years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction."

Interdict — Competency — Form — Salmon-Fishing—Proprietors of Salmon-Fishing in Upper Reaches of River—Obstruction to Passage of Salmon by Lower Riparian Millowner—Rigidity of Interdict.

Where the proprietors of salmon-fishings in the upper reaches of a river allege obstruction to the passage of salmon up the river on the part of a lower riparian millowner, interdict at their instance is the appropriate remedy.

Where an interdict had been granted by the Court of Session defining the respective rights of the salmon-fishing proprietors of the upper reaches of a river and a lower riparian millowner in a question as to obstruction by the latter, the House of Lords in affirming the order added a declaration "that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy."

Process — Remit — Remit Subsequent to Proof—Terms of Remit—Competency of Remit.

In an action of declarator and interdict at the instance of the salmon-fishing proprietors of the upper reaches of a river against a lower riparian millowner, with the object of terminating or reducing his abstraction of water, a proof was taken, by which it was established that there was illegal obstruction to the passage of salmon on the part of the millowner. Thereafter a remit to men of skill was made "to

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report (1) what depth or volume of water, measured by inches or otherwise, flowing over the S. dyke and thence downwards over the W. dyke to the foot of the said W. tail-race, would be in their opinion sufficient to secure the free passage of salmon in said part of the river; and (2) whether any, and if so what, arrangements are possible which would automatically or otherwise insure the observance by the defenders of the limitations attaching, as above expressed" (*i.e.*, in previous portion of interlocutor), "to their right to abstract water from the river at S. dyke." Objection was taken to the remit on the ground that it was submitting to the arbitrament of the men of skill after a proof the whole substance of the case.

Held that the remit was rightly made.

The case is reported *ante ut supra.*

Alexander Pirie & Sons, Limited, the defenders, appealed to the House of Lords, submitting the whole case to review. The Earl of Kintore and others, the pursuers, lodged a cross appeal seeking to have the defenders restricted to their prescriptive rights of abstraction.

At delivering judgment—

LORD CHANCELLOR—I have had the advantage of reading in print the opinion of my noble and learned friend Lord Robertson, and I so fully concur in it that it will not be necessary for me to enter upon the merits of this appeal.

I desire to add that my only difficulty in this case has been in regard to the terms in which the decree should be framed. In England the ordinary course is to grant an injunction in general terms prohibiting any invasion of the rights declared by the Court. It works well in practice and leaves those against whom the injunction is directed as much freedom as is compatible with a due observance of the rights of their adversary. In the course of the argument a suggestion was made to the counsel on both sides that this course might with advantage be adopted in the exceptional circumstances of the present case. On both sides, however, counsel were disinclined to accept this course, and alleged that it is the custom in Scotland to prescribe in the decree with particularity both what is permitted and what is prohibited. I do not presume to question the wisdom of the course they prefer or the propriety of the rule usually followed in Scotland, but in those circumstances I feel that no alteration of the decree appealed from is possible beyond that suggested by my noble and learned friend Lord Robertson.

LORD DAVEY—I think that both parties to this appeal have put their case too high. The appellants contended that the respondents had no right to any interdict, and that their only remedy was an order either from the Court or from the Fishery Board for a new salmon ladder. Of what use this would be to the respondents in a case like the present where the appellants for six days in the week leave the bed of the river dry but for a few disconnected pools I do not know. I am of opinion that it is established by two cases which were referred to that to interfere with the free passage of the salmon up the river is a wrong against the proprietors of the upper fisheries for which interdict is the appropriate remedy. But what should be the nature and extent of the interdict? The respondents say their right is to have the river maintained in its natural condition, and any interference however slight to the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only that no interference shall be made which materially obstructs the passage of the fish.

Having said this much I can find nothing else in this case which has been placed before your Lordships with such copiousness of material and such a wealth of illustration. There is no other question of law and there is no question of fact in dispute, and the only real question is as to the form of the interlocutor. In substance I agree with my noble and learned friend Lord Robertson. The interdict and mandatory part of the order are in a form which is not common in England but is preferred by Scotch lawyers. It is, however, said that the order is inelastic, and a change of circumstances may arise to which it is not adapted. In order to meet this objection my noble and learned friend Lord Robertson proposes to add some words which I think will have the desired effect. But in substance your Lordships confirm the interlocutor, and I think that the amendment should not affect the costs of the appeal, which should be paid by the appellants, and the cross appeal should also be dismissed with costs.

LORD ROBERTSON—The record in this case is extremely voluminous, and your Lordships heard a very long and anxious argument for the appellants. In the result, however, the question before the House lies in comparatively narrow compass.

The Don is a salmon river; and the respondents own salmon fishings in some of its upper reaches. They have therefore clear right to insist that the appellants, who are lower proprietors of lands on the banks of the river, shall not obstruct the free passage of salmon up the river. The present action, although the summons contains a great many conclusions, is strictly confined to the enforcement of this one right, the right to secure the free passage of the salmon against artificial obstruction or denudation of the channel.

What the appellants have done is to divert the water of the Don from its natural channel into artificial channels serving the uses of their paper mills. This has been done to such an extent as to leave the natural channel opposite the mills at times bare of water, and therefore necessarily impossible of passage to salmon.

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It is superfluous to add that the artificial channels do not furnish a safe passage for salmon.

What, then, are the rights of the appellants which can be opposed to those of the respondents? They come from two sources. First of all, as riparian proprietors having right (for this I shall assume) to both banks in this part, they are entitled within their own boundaries to divert the water of the river. The condition of this right is that the water must be returned, and this condition is merely one of the consequences of the general principle that the water of a running stream can only be dealt with by anyone so far forth as is consistent with the rights of the other proprietors interested in it.

Second, the appellants have by prescriptive use acquired right to abstract from the river for a certain part of its course a quantity of water, stated at 7000 cubic feet per minute.

The operations complained of, however, cannot possibly be justified by this prescriptive use, for the abstraction of 7000 cubic feet per minute was for practical purposes harmless to the salmon; and this second of the appellants' rights is therefore immaterial to the controversy. The appellants have indeed attempted to piece on to their prescriptive use of the water in question, which was 7000 feet, the use had of the river for another part of its course by themselves or by persons whose rights they have acquired. I do not think that this argument requires any elaborate refutation. The effect of forty years' use of water of a river is to give the person so using right to continue that use, *modo et forma*, at the place where the use has taken place. It is not to give him a general right to encroach on the common subject, viz., the river, to the gross amount of his prescriptive abstraction.

Accordingly the true position of the appellants must be found in harmonising their right to divert water, such as it is, derived from the two sources specified, with the respondents' right to the free passage of the salmon. *Primâ facie*, on the facts found and not now disputed, the appellants are wrongdoers; they have exceeded their rights to the injury of the respondents. The logical result would be a general interdict against encroachment. In the practice of the Scotch Courts, however, it has been usual to avoid the controversies which might arise as to the effect of general interdicts by proceeding to practically harmonise the contending rights by prescribing remedial works or restrictions on use. This is what the Court of Session has done in the present instance. Such procedure generally, and what has been done here in particular, is subject to the criticism that the decree which ultimately is pronounced is apt to appear as rigid as the general interdict appears to be vague. Subject, however, to one safeguard, which I am to suggest, I think the Court have well performed this difficult administrative work.

I am bound to add that in the performance of this task the Court did not receive due assistance from the appellants, and if, in the sequel, they should suffer from the rigidity of the system established, they may impute it to themselves. When the appellants were found to be wrongdoers (and that they were exceeding their rights to the respondents' injury was manifest all along), their proper attitude was that of deprecating interdict, which was the strict legal consequence, and pointing out to the Court means which would in future safeguard the interests which they had injured. The initiative in this stage, strictly speaking, lay with them, to be allowed to propose remedial measures. This was not the course taken by the appellants; they have acted as critics of the action of the Court, and of the practical recommendations of the Court's skilled advisers. Now I am not disposed too readily to accept such criticism.

Lord Kyllachy, in my opinion, accurately stated the conditions on which the Court entered on this inquiry about remedial works, when in his interlocutor of 20th March 1903 he laid it down that "when the defenders' (appellants') operations at Stoneywood do by themselves or in conjunction with similar operations or other causes affect the flow of the river between the point of abstraction and the point of return so as to impede the free passage of salmon between the said points, the defenders are limited, both with respect to the amount of abstraction and the point of return, to the usage existing prior to 1882, and are only entitled to innovate upon that usage when and so long as the river flows and continues to flow over Stoneywood Dyke and thence downwards to the actual point of return, in such volume as to ensure the free passage of salmon between the point of abstraction and the point of return." I think also that the men of skill were properly directed to report "(1) what depth or volume of water, measured by inches or otherwise, would be, in their opinion, sufficient to secure the free passage of salmon in said part of the river; and (2) whether any, and if so what, arrangements are possible which would automatically or otherwise ensure the observance by the defenders of the limitations attaching, as above expressed, to their right to abstract water from the river at Stoneywood Dyke."

Now, it is not my intention to examine minutely the report of the men of skill or the final Order of the Court. That Order prohibits the abstraction of more than the prescriptive quantity, 7000 cubic feet per minute, except when 9 inches of water are flowing over the crest of the upper dyke and thence to the Green Burn, and lays it down that even on these excepted occasions they are not to withdraw a larger quantity than 31,850 cubic feet per minute, except when and so long as there shall be left to flow over the said dyke to the Green Burn at least one-half of the whole water flowing down the river at the time. There follow detailed conditions about the return of the water and about gauges and marks. All this is enforced by interdict against

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abstracting more than the prescriptive quantity, except on the occasions and under the conditions specified, and against deviating from the prescribed place and conditions of return of the water.

Now, having carefully considered this scheme, I think that it is as well adapted to the difficult problem to be solved as any that could be constructed; and, as I have said, it rests on sound principles. The learned Judges who considered it have had much and successful experience in this branch of administrative justice. Lord M'Laren in his interesting judgment has made one criticism which, for safety's sake, may well be referred to. I do not understand the Court in requiring one-half of the whole water of the river to flow down the old channel, to proceed upon or to assert any general principle of law, but to adopt that formula as an appropriate additional guarantee in the present case. Whether it has not a more general application as founded on physical laws, has at least not been examined or decided in this action, and is a question which may recur in similar cases.

In the result I am satisfied that this case has been dealt with in accordance with the rights and interests involved. I have, however, been unable to divest myself of the apprehension that, occurring as it does in a final decree which terminates the litigation, this order might prove inconveniently rigid. The flow of rivers is subject to inscrutable change, and it may be well to make it clear that the system now set up is calculated with reference to the existing condition of things, and might, in unforeseen contingencies, prove inadequate or in appropriate. Not, then, as inviting future litigation, but for preventing possible technical embarrassment, I suggest that with our affirmance of these judgments, there should be coupled a declaration that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy.

I wish that I could say that I have any definite understanding of the theory of the cross appeal. As I consider the judgments impugned by it to be right, I think that it ought to be dismissed. It may be allowed to the cross appellants that Lord Kyllachy's later judgment purports, or at least may be read as purporting, to modify what had previously been done. But the ultimate decision was right, and, in my opinion, gives effect to the cross appellants' rights. The best that can be said of the cross appeal is that it has not substantially added to the costs of these elaborate proceedings.

Lord Atkinson—I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Robertson. I entirely concur in it and have nothing to add.

The decision of their Lordships was—"That the order appealed from be affirmed, with a declaration that in the event of any future substantial change in the river affecting the interests of parties, neither party shall be held precluded by anything in the judgments affirmed from applying to the Court of Session in any competent process for remedy."

The appeal and cross appeal were both dismissed with expenses.

Counsel for the Appellants (Defenders)—Clyde, K.C.—Nicolson. Agents—Davidson & Garden, Advocates, Aberdeen—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents (Pursuers)—Dean of Faculty (Campbell, K.C.)—Lord Kinross. Agents—Wilsone & Duffus, Advocates, Aberdeen—Alexander Morison & Company, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Friday, July 20.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten and Lord Robertson.)

VAN EIJCK & ZOON (OWNERS OF THE "ANGLIA'S" CARGO) *v.* SOMERVILLE AND ANOTHER (OWNERS OF THE "ANGLIA").

(*Ante sub nomine Owners of s.s. "Olga" v. Owners of s.s. "Anglia" and Owners of the Cargo on board s.s. "Anglia,"* March 16, 1905, 42 S.L.R. 439, and 7 F. 739.)

Ship — Collision — Decree in Favour of Owners of One Ship Obtained in Conjoined Actions for Damages—Petition by Owners of the Other Ship for Limitation of Liability and Distribution — Opening up in the Petition at the Instance of Claimants not Represented in Conjoined Actions the Decree Obtained therein — Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504.

In conjoined actions for damages for collision in which both ships were found to be to blame, the owners of the "Anglia" obtained against the owners of the "Olga" decree for a sum which exceeded their total liability as limited by section 503 of the Merchant Shipping Act 1894. The owners of the "Olga" having presented under that Act a petition for limitation of liability and for distribution, the owners of the "Anglia" claimed to rank for the sum in their decree; the owners of the "Anglia's" cargo, however, having appeared and put in a claim, sought to have such decree opened up, maintaining that the value of the "Anglia" had been overstated and had not been contested by the owners of the "Olga" because they had had little or no interest to do so, but that the finding of such value could not be binding on them when they were not represented in the actions.

Held that the owners of the "Anglia" were bound to try again

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in the petition the amount of their claim.

This case is reported *ante ut supra.*

Van Eijck & Zoon (owners of the cargo on board the "Anglia"), claimants in the petition presented by the owners of the "Olga" for limitation of liability and distribution, appealed to the House of Lords. Somerville and another (the owners of the "Anglia"), the other claimants in the petition, were respondents. The question at issue was whether the decree, obtained by the owners of the "Anglia" against the owners of the "Olga," in the conjoined actions of damages for collision, was to be opened up in the petition as was claimed by the owners of the "Anglia's" cargo, who had not been parties to the conjoined actions.

At delivering judgment—

LORD CHANCELLOR—This is an appeal against the decision of the Court of Session in a proceeding under sections 503 and 504 of the Merchant Shipping Act 1894.

A collision took place between the "Olga" and the "Anglia," and the Court held both ships to blame. It was found in the collision actions (for there were cross actions) that the loss of the owners of the "Anglia" was £14,687, and that of the owners of the "Olga" £387, 10s. 11d., amounting together to the sum of £15,074, 10s. 11d. Each ship was debited with half that sum, and after crediting the "Olga" with £387, 10s. 11d., the amount of her loss, the Court decerned against the "Olga" and in favour of the owners of the "Anglia" for the balance, viz., £7149, 14s. 7d. This decree was sustained on appeal.

Thereupon the owners of the "Olga" petitioned in terms of sections 503 and 504 of the Merchant Shipping Act 1894 for a limitation of their liability to the sum of £6215, 4s., and in the proceedings that ensued the owners of the "Anglia" claimed to be ranked and preferred on the fund for the full amount of the decree obtained by them against the "Olga." Then the present appellants, C. A. Van Eijck & Zoon, owners of cargo on the "Anglia" at the time of the collision, claimed to be ranked and preferred on the fund to the extent of one-half of the value of the cargo belonging to them which was lost by reason of the collision.

In this claim the appellants, the cargo owners, disputed the value of the "Anglia." They said that although in the collision action the Court had found that value to be £14,687, yet they were not parties to that action and were not bound thereby. They alleged that the true value of the "Anglia" was about £7000, and suggested that though not collusive in a dishonest sense the owners of the "Olga" had failed from error or indifference to prove the excessive valuation put on the "Anglia" by her owners. Manifestly the appellants had a great interest in reducing the valuation of the "Anglia," because if it were reduced there would be more of the fund left to satisfy their claims for damages.

The short question therefore is whether the finding of value in the collision proceedings between owners of the two ships is conclusive on owners of cargo in ulterior proceedings. With all respect to the learned Judges of the Court of Session I cannot think that it is. I do not enter upon the rule applicable to sequestration or the analogous rules of bankruptcy law in England. There is no authority either in Scotland or in England to show that an owner of cargo in proceedings under the Merchant Shipping Act is foreclosed as to the value of ship by findings in an action to which he was no party, and in which no one could be heard who was in the least concerned to protect his interest. I am not prepared to concur in initiating any such doctrine. I do not in the least suppose that there was any collusion or impropriety of that kind in the present case. But it would be a dangerous thing to lay down that a man may be precluded from showing the truth to the Court in regard to a matter directly affecting his own pocket merely because in an action between other people a decree had been obtained on such evidence and argument as they thought proper to adduce. It seems to me illusory to justify such a contention by saying that if there were fraud or collusion the decree could be set aside. It is very difficult to prove collusion, and I cannot see why as regards third parties a decree should be set aside on that ground and yet be allowed to stand, however unreasonable it may be, when the error is due to carelessness or incompetence or indifference. The innocent third party is equally injured whatever be the cause of error. I have the less hesitation in coming to this conclusion because I am satisfied that values ascertained as in this case will rarely be disputed without just cause. The power of effectively awarding expenses when a complaint is unfounded will prove a sufficient deterrent.

I have to add that my noble and learned friend Lord Macnaghten concurs in the conclusion at which I have arrived.

LORD ROBERTSON—The question in this appeal is solely of the effect of the 503rd and 504th sections of the Merchant Shipping Act 1894, and I have come to the conclusion that the appeal must be allowed.

The key to the question seems to me to lie in realising the time at which the section operates, and the effect of the non-liability which it declares. Now in the long sentence, of which the relevant part of the section consists, the main proposition is that the owners indicated shall not be liable beyond the specified amounts. The time at which this state of the law is created is, in each case, the occurrence of the loss.

The 504th section is one of procedure, but it is correlative to section 503. The normal procedure is for the owner at once to petition the Court to determine the amount of his liability (which clearly means merely the sum to which his limited liability amounts), and to distribute the amount

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rateably among the claimants; and it is significant that the Court petitioned has power to stay any proceedings in any other Court. The Court petitioned, be it observed, does not create the immunity which the 503rd section has done already. and the power to stay proceedings is given to effect the immunity declared in the 503rd section.

In the present case, when the owner was attacked, he judged it well to dispute liability absolutely, joined issue, and was beaten. Now this may have been good policy or bad, but the question is whether his electing to adopt it can alter the rights of third parties. It seems to me that in the scheme of the statute it is a correlative of the limitation of liability that the rights of participants in the limited fund shall be determined in presence of those truly concerned.

My judgment is rested on the construction of the statute and not on any general notion of the impossibility of a decree obtained against A by B availing against C, D, or E in the event of a deficiency. *Vigilantibus non dormientibus jura subveniunt* is good bankruptcy law, and so long as A is allowed by C, D, or E to stand on his legs as a solvent man, a decree obtained against him by B for £100 is conclusive in a subsequent bankruptcy against C D and E (I speak, of course, of decrees which are not collusive either in fact or by statutory presumption). On the other hand, the moment bankruptcy is declared the bankrupt ceases to be the proper defender of his estate, and a decree against him will not conclude other creditors. Now the decree founded on in the present case was pronounced after the defending shipowner had become immune from absolute liability, and the same principle as rules in bankruptcy points to that decree being inconclusive against competing creditors.

Their Lordships reversed the order appealed from, with expenses, and made a declaration that the owners of the "Anglia" were bound to try again in this process the amount of their claim against the petitioners.

Counsel for the Appellants—The Solicitor-General for Scotland (Ure, K.C.)—Spens. Agents—Boyd, Jameson, & Young, W.S., Leith—Waltons, Johnson, Bubb, & Whatton, London.

Counsel for the Respondents—Pickford, K.C.—Rankin. Agents—Beveridge, Sutherland, & Smith, S.S.C., Leith — Thomas Cooper, & Co., London.

Monday, July 23.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Lord Atkinson.)

SOMERVILLE & SON, LIMITED *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

(In the Court of Session March 10, 1905, 42 S.L.R. 410, and 7 F. 1060.)

River—Pollution—Waterworks—Compensation Water—Riparian Millowners—Compensation Water so Turbid as to Render Stream Unfit for Millowners' Use—Statutory Duty—Negligence.

The waters of a stream were under statutory authority impounded in a reservoir by water trustees for the purpose of supplying a town with water and of giving compensation water. The trustees were under obligation to pass down the stream a certain amount of compensation water but nothing was said as to its quality. Owing to a dry season the reservoir became very low, with the result that the silt in it was exposed and was carried into and mixed with the water, but it had been as low on previous occasions and only once had there been complaint. During the period now in question, however, there were exceptional climatic conditions. Millowners on the stream, who had for long used its water in their manufacture, having brought an action of damages against the trustees on the ground that during a certain period the compensation water was so turbid and polluted as not only itself to be unfit but also to have rendered the water of the stream unfit for use, the trustees denied liability, and also denied that they were responsible for the quality of the compensation water but only for the quantity.

Held (*per* Lord Chancellor, Lords Macnaghten, Davey, and Atkinson, *diss.* Lords James and Robertson, *rev.* Second Division) (1) that the millowners' right to the waters of the stream had been impaired by the statutes to the extent of the reasonable exercise of the statutory powers conferred on the trustees; (2) that it was for them to show affirmatively and clearly that the powers had not been exercised with reasonable precaution; and (3) that in the absence of such proof the trustees were entitled to be assoilzied in the action for damages.

Opinions contra (*per* Lord James of Hereford) (1) that the statutes contemplated the giving as compensation water of water fit for use unless that was impracticable; (2) that it fell to the trustees to show that in the circumstances of the case to do so had been impracticable; and (3) that, having failed to adduce such proof, they were

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liable in damages; and (*per* Lord Robertson) (1) that the reservoir was primarily to give fit compensation water; (2) that a duty towards the pursuers was thereby imposed on the trustees; and (3) that owing to their view of the statutes the trustees had not attempted to fulfil such duty and were therefore liable in damages.

This case is reported *ante ut supra.*

The Edinburgh and District Water Trustees (defenders and respondents) appealed to the House of Lords from the judgment of the Second Division (the Lord Justice-Clerk and Lord Kyllachy, *diss.* Lord Young) which reversed that of the Lord Ordinary (Low).

At delivering judgment—

LORD CHANCELLOR—This is an appeal against an interlocutor pronounced by the Second Division of the Court of Session which recalled an interlocutor of Lord Low and found the defenders liable to the pursuers in damages. One of the three Judges in the Second Division agreed with Lord Low's conclusions. The difficulty of the case is reflected in this even balance of judicial opinion.

The pursuers own paper mills on the Glencorse Burn and use its water, mixed with other of their own, for their manufacture. In December 1902 the water of the burn became contaminated and unfit for the pursuers' manufacturing purposes, and so remained for four or five months with much ensuing damage to their trade.

There can be no doubt that this contamination commenced and, in part at all events, continued by reason of the condition of Glencorse Reservoir in December 1902. That reservoir is situated on the same burn, a little way above pursuers' mills, and catches its water and that of other tributaries. Yet higher up is Loganlea Reservoir, which collects o her streams as well and sends their water down to Glencorse. From Glencorse 220 cubic feet per minute must be discharged into the Glencorse Burn, and flows to the pursuers' mills. The remainder is utilised for the supply of Edinburgh.

During the latter half of 1902 there was a drought of quite unusual duration, the most severe that had been known for sixty years. Accordingly, the resources of all the reservoirs that supply Edinburgh were heavily taxed. Glencorse itself was deplenished all through October and November, so that much of its bottom surface was exposed. In the number of years, nearly eighty, since it had been constructed great quantities of silt had inevitably accumulated, and when the level is much lowered the streams entering it cut channels through the exposed surface and churn up the material deposited in the bottom. Wind and heavy rain and frost greatly increase the turbidity. In the beginning of December 1902 Glencorse was still further depleted. By 12th December contamination had set in, and was aggravated by violent wind and rain. In these circumstances the pursuers claimed that the defenders, who own Glencorse, and are responsible for its administration, were liable in damages for the loss they had sustained.

Glencorse Reservoir was constructed and subsequently enlarged under powers conferred by a series of private Acts of which the first was passed in 1819. These private Acts require that 220 cubic feet per minute shall be discharged down the stream for the benefit of riparian proprietors, and authorise the remainder of the water to be impounded in the reservoir and used for the supply of Edinburgh. No provision is to be found in regard to the quality of the water to be discharged into the stream, but I do not think there can be any doubt upon that subject. It depends, in my opinion, upon general principles applicable alike in Scotland and to England.

Riparian proprietors are entitled, except so far as their rights are varied by statute or by special circumstances absent in the present case, to claim that nothing shall be done to affect to their prejudice either the quantity or quality of the stream as it flows in a natural state. When an Act or Acts of Parliament authorise interference with this natural flow, the original right of the riparian proprietors is impaired so far as and not farther than the reasonable exercise of rights created by the statute impairs them. In the present case the private Acts do not obliterate the original right of the riparian proprietor to the natural quality of the water, but they impose upon it a qualification, viz., that if the proper construction of the works authorised, or the reasonable use of those works for the purposes specified by Parliament, leads to a deterioration in the quality of the water, the riparian proprietors have no remedy.

When the pursuers first shaped their case in the record they asserted that a duty lay upon the defenders to supply the 220 cubic feet of water per minute in one or other of three standards of purity. They claimed that it must be either in a state fit for all primary purposes, or in a state not inferior to what it was before it entered either of the two reservoirs named, or in a state not inferior to what it was when it entered the Glencorse Reservoir.

I agree in the opinion of all the Judges in the Court of Session that it would not be proper to affirm the pursuers' declaratory conclusion in any of its alternatives. I think the only duty upon the defenders is to confine their acts within the limits prescribed by Parliament, and in so doing to use reasonable skill and care so as not to damage, if they can by such skill and care avoid it, the quality of the water supplied to the riparian proprietors.

It was argued before your Lordships that the defenders had failed to use that reasonable skill and care. That was the main point relied upon by the pursuers, and the only point upon which in law they could rely.

Accordingly, what comes under review is really the defenders' administration of their water supply. Was there, or was there not, what may be called negligence on their part which caused the damage

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omplained of? On this point as I have aid, the four Judges who have already ieard this case were equally divided in pinion.

It is not necessary to enter in detail upon he mass of evidence given at the trial, onsisting largely of statistics, and of conlusions drawn by skilled witnesses. The tatistics, and indeed the facts as a whole, vere hardly in dispute; but, as usual, the killed witnesses arrived at diametrically pposite results from the same materials.

There are certain considerations which ught to be borne in mind in approaching his difficult question.

The Lord Ordinary who heard the witiesses and had an opportunity of following he course of the trial with a degree of ninuteness difficult to attain in any Court f Appeal, thought that no negligence had een established. This has great weight vith me, especially where the evidence, as iere, is very complicated.

Again, it must be borne in mind that the upply of Edinburgh with water is a ormidable business. There are about hirteen reservoirs which supply the city. n some the water is so pure that no filtering is needed. With others the water equires filtration. Now, the filtering ower is limited, and the obligations to upply compensation water are not confined o the Glencorse Reservoir. Obviously it s no easy task in these conditions to determine in the event of a drought what ources of supply should be drawn upon nd in what order and in what degree. The difficulty is, of course, that no one can oresee whether and when such agents as rost and wind and heavy rain may come o augment any pollution that may be aused by the depleted condition of any particular reservoir, nor how long a drought nay continue. It is a proverbially simple natter to be wise after the event, and the lischarge of duties such as I have described ffers unusual facilities for criticisms of ngineers who had responsibility by those vho had none. In such circumstances I hink that those who impugn the administration must show affirmatively and clearly hat the men in charge of the administraion ought to have foreseen what was oming, and could have taken some specied step or steps which would have averted t. If this cannot be shown the damage nust lie where it falls.

Now, the pursuers did allege at the trial, nd still rely, upon particular acts or missions on the part of the defenders, onstituting, as they said, actionable negience. I take them in the order of conenience.

The first charge is that the defenders nade a greater draft on Glencorse in roportion to its capacity than they did on heir other reservoirs. None of the Judges ely upon this contention. The North entlands were in fact utilised to the full, nd Gladhouse was used so far as filtering ower allowed.

The second charge is that the defenders ailed to warn the inhabitants of Edinburgh ot to waste water, and failed to restrict the supply to Edinburgh. It was said that they ought to have done in 1902 what they did in 1901, viz., restrict the supply. For six weeks or thereabouts in the autumn of 1901 the supply to Edinburgh was restricted and the supply to Edinburgh was not restricted from the end of September to the middle of December in 1902, during the latter part of which time Glencorse Reservoir was much depleted.

I am not satisfied, however, that the defenders were guilty of negligence in allowing this to occur. They had more water stored in that period of 1902 than they had when they restricted the supply in 1901. The restriction in 1901 was due to the fact that the stored water was dangerously low, not to any fear for the riparian proprietors. They did not foresee the consequences in 1902. It was argued that what occurred in 1901, when the water in the Glencorse Reservoir sank to 36 feet or more below the sill of the weir, and the water became turbid, was a warning that 36 feet was a danger limit below which it would be unsafe to lower the water. I do not think that is so. Mr Tait proved that in 1850, 1852, 1859, 1864, 1870, and 1871, the water had been below this level without causing danger, and I agree with Lord Low that it is impossible to fix any precise limit of safety, as so much must depend upon climatic conditions, which were exceptionally and unexpectedly unfavourable in December 1902.

The third complaint was that the defenders wasted the water of the Glencorse Reservoir by discharging too large a quantity down the burn. This point was only faintly relied upon in argument, and it is sufficient to say that, in my opinion, it was disproved.

The last and most important of the charges was that the defenders ought to have let down ten or fifteen millions of gallons from the Loganlea Reservoir when the water of the Glencorse Reservoir became dangerously low, and that had they done this the pollution would have been averted. Upon this important point of fact I am content to adopt, without repeating, the luminous reasoning of Lord Low. It has not been answered, and I do not think it admits of an answer. If what followed could have been foreseen this precaution might perhaps have been taken with advantage, though it appears to me doubtful whether it would have prevented, and possible that it even might have increased, the contamination. When the result of such a course is a matter of conjecture, even after the event, the failure to adopt it at the time cannot be regarded as proof of negligence.

The only other matter that requires notice is the contention, strongly urged by Mr Scott Dickson, that Mr Tait, the defenders' principal engineer, acted solely in the interests of the City of Edinburgh, and did not so much as consider the quality of the water to be supplied to the pursuers. I think the fair result of his evidence is that he did not consider the mill owner singly, but did try to save the water in Glencorse

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Reservoir as far as he could in intent for the benefit of Edinburgh, and in fact for the pursuers' benefit also. He did not consider that the pursuers were to be treated to the exclusion of Edinburgh, and therein I think he was right. If the passage is to be read as indicating a complete indifference on Mr Tait's part to the pursuers' interests, it would still be necessary for them to show that an administrator, acting with reasonable care and skill, ought to have taken a different course. I think, for the reasons already given, that they have failed to show this.

In these circumstances I am of opinion that the defenders must be assoilzied.

LORD MACNAGHTEN—The appellants are a body of public trustees incorporated by Act of Parliament and charged with the duty of supplying Edinburgh and the adjoining district with good and wholesome water. In this undertaking they are the successors and representatives of a joint stock company established many years ago to take over the city waterworks such as they were then, and supply a public want by private enterprise. In course of time, as the population of Edinburgh increased, and sanitary science became better understood, the undertakers were compelled to acquire all the available sources of supply in the neighbourhood, large and small, wherever they were to be found. They constructed reservoirs, now thirteen in number, with filter beds, aqueducts, conduits, and other necessary works for connecting the supply with the city. Differing in character and quality, as well as in volume and capacity of output, and at the same time subject to different restrictions and conditions of compensation, the waters under the control of the company and their successors had to be administered as one system. The management of such a service, requiring at all times constant supervision and nice adjustment, became, in a period of exceptional stress due to climatic conditions altogether unprecedented, a matter of extreme difficulty, however simple the problem may seem in the view of experts untroubled by responsibility and wise after the event.

The respondents, who were pursuers in the action, are the owners of paper mills known as Dalmore Mill, situated on the Glencorse Burn, a tributary of the river Esk, and there they have long made paper of a superior quality. They complain that the Edinburgh and District Water Trustees, who are under a statutory obligation to send down into the burn from their Glencorse Reservoir 220 cubic feet of water per minute, sent down during a period of about three months, commencing at the end of the year 1902, water so turbid and polluted as to be unfit for the purposes of their business. They sought a declarator that in discharging the prescribed quantity the Trustees were bound to furnish water of one or other of three several degrees or standards of purity which they specified in their summons. Their case was that either by reason of the failure of the Trustees to perform this obligation, or in consequence of illegal actings and neglect on the part of the Trustees, loss had been sustained which entitled them to damages.

There can be no doubt that the water sent down from the Glencorse Reservoir during the period in question was turbid and polluted, nor can there be any doubt as to the serious injury which resulted in consequence to the business of the respondents. The only question is, whether, under the circumstances, the millowners have a remedy in damages against the Trustees.

The Lord Ordinary assoilzied the Trustees. In the Second Division of the Court of Session, Lord Young dissenting, the interlocutor of the Lord Ordinary was recalled, the Trustees were found guilty of negligence, and the damages were fixed at £2000.

The two learned Judges of the Court of Session who differed from the Lord Ordinary did not see their way to make a declaration as to the particular standard or quality of the water to which the riparian proprietors were entitled. The Act of Parliament fixing quantity is silent as to quality. The respondents' claim on this head cannot, I think, be sustained. On the other hand, the appellants' view, as put forward at the trial, was that if the full quantity was furnished quality was of no moment, and they argued that the respondents must be content with any liquid coming from the reservoir, whatever its impurity may be. That claim, I think, must fail too. Though the Act of Parliament is silent as to quality, the contention of the appellants pushed to its logical consequence is, I think, absurd. In fact, both parties put their case much too high.

The question, as it seems to me, is reduced to the question of negligence. If it can be shown that by reasonable precautions—such precautions as men skilled in the management of waterworks acting prudently but not possessing supernatural fore-knowledge might be expected to take—the appellants could have prevented injury to the respondents, they must, I think, be held liable. That proposition was not disputed on the part of the appellants. But they said, and said I think rightly, that it was for the respondents to make out a case of negligence, and they maintained that negligence on their part was not proved.

The learned Judges of the Court of Session did not question the competence or skill of Mr Tait, who was the manager of the waterworks. In that respect they were kinder than some of his professional brethren. But their view was that he had a single eye to the interests of the Water Trustees. They held that the Trustees themselves created the mischief by disregarding their obligations to the millowners. It was not Mr Tait's fault; he served his employers only too well. This point was pressed at the bar before your Lordships. And another point was made which at first sight seems a plausible one. It was pointed out that much the same difficulty had occurred once before in the

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year 1901 at a time when the water in the Glencorse Reservoir was lowered to a depth of 36 feet below the sill of the weir. It was argued that the experience of that time showed that 36 feet was the limit of safety and that the Trustees ought not to have allowed the water in the reservoir to fall below that limit under any circumstances. It would have been better, it was said, or at any rate more in accordance with the intention of Parliament, that the people of Edinburgh should have gone scant or subsisted for a while as best they could on water of inferior quality—though it is only fair to add that in the opinion of expert witnesses for the millowners both those alternatives might have been avoided by good management. Although no doubt in 1901 there was trouble or the beginning of trouble when the water was lowered 36 feet, yet it is to be observed that on no less than five occasions before 1901 the water had been below that limit without any trouble or any complaint.

I cannot see any evidence tending to show that the Water Trustees or their engineer Mr Tait sacrificed the interests of the millowners to the interests of the inhabitants of Edinburgh. It is quite true that Mr Tait admitted that he did not consider the rights of the respondents "singly" and as distinguished from the rights of the Trustees. But why should he have done so? As far as I can see it never was contemplated that in the administration of this system of water supply there would be any conflict in interest between the wants of the people of Edinburgh and the millowners. As regards the Glencorse Burn the scheme was that one large reservoir, which was afterwards supplemented by Loganlea, should be constructed, and that out of it there should be taken in due course of administration a supply for Edinburgh and compensation for the millowners. It seems to have been assumed that what was good enough for the one purpose would be good enough for the other. So long as the undertakers poured into the burn the prescribed quantity of water minute by minute the contents of the reservoir remained theirs and at their disposal. If the supply to the burn fell short the riparian proprietors were to have their remedy by application to the Sheriff. It seems to me that this state of things, artificial as it was and due to statutory provisions, is not controlled or qualified by any condition of preference or priority to be found in the language of any of the Acts of Parliament, or to be evolved from a consideration of the original or natural rights of lower riparian proprietors. But this conclusion does not of course absolve the Water Trustees from the consequence of negligence in the performance of their statutory duties.

I cannot help thinking that in condemning the administration of the Trustees the learned Judges of the Court of Session were influenced perhaps unconsciously by the extravagant argument advanced on behalf of the Trustees that quality as regards compensation to the millowners was of no moment whatever, an argument which some of the expert witnesses on behalf of the Trustees, who were certainly not experts in law, were only too ready under skilful cross-examination to adopt and develop.

The real question, however, is not what Mr Tait said in cross-examination, or what any expert witness may have laid down as the law. The question is, what did the Trustees actually do? Was their conduct wrong under the circumstances? There, no doubt, there is a direct conflict of opinion between civil engineers of the highest position in their profession—a circumstance which of itself I think shows what a very difficult task was imposed upon those who had to administer the trust.

The first and one of the principal witnesses on behalf of the millowners was Mr Carter. He visited the spot on the 24th December 1902 when the mischief had begun. He had no doubt that those in charge must have been to blame. "There is nothing" he says "that could not have been prevented here with ordinary care. . . ." The action of the Trustees "in filling up Loganlea at the very time they were depleting Glencorse was quite indefensible." But then he admitted that he never had in his own hands the administration of a water supply system—an admission which, as it seems to me, detracts something from the weight of his evidence. Mr Wilson, the next witness, was in Mr Carter's employment, but he adds nothing I think to what Mr Carter said. He only made one visit to the place. Then there is the evidence of Mr Deacon, whose eminence as a civil engineer is beyond question. He projected the Vyrnwy scheme for the supply of Liverpool, which took 11 years to carry out. For six years he acted as engineer-in-chief of that great work. He maintained stoutly, with all the zeal of an original inventor, the theory of a special danger limit. He was quite positive on that point. It was absolutely necessary he said to avoid going below that limit. But there was another matter on which he was equally positive. He would not have allowed the water under any circumstances to reach the danger limit, but if the danger limit had been reached he would have gone on filtering the water as was begun for the pursuers. "You could easily do it," he said. His reason for being so positive on that head was that when he saw the filters a few days before the trial—when the water was clean, long after the critical period had passed—they were not working to half their capacity. Now, if there is anything clear upon the evidence it is that it was impossible for the Trustees during the period of disturbance to filter the Glencorse water for Edinburgh and at the same time to filter water for the millowners.

The filtration theory was finally exploded by Mr Bennett, the fourth and last of the expert witnesses for the pursuers. In answer to the Court he said there was a flow over the waste weir on the 27th January 1903. "It continued flowing over the weir," he said, "till the expiry of the three months complained of." "All that over-

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flow," he added, "would go down the burn. After it overflowed there are no appliances which would purify it going down to the mills by filtration."

Of course if the Trustees could without difficulty have filtered the water for the millowners the omission of so obvious an expedient would at once have convicted them of negligence. But Mr Deacon's view about filtering the water was so questionable that it was not put forward in argument before this House, nor, as far as would appear, in either of the Courts below. It is not alluded to in any of the judgments. And I must say, speaking for myself, it seems to me that if Mr Deacon is wrong about the filtering, which was a matter capable of ascertainment, it may be permissible to doubt his infallibility as regards a danger limit, which, after all, is a matter of theory and speculation.

On the other hand Mr Tait thought the notion of a danger limit "absurd." Mr Hill thought it "an assumption" to say that 36 feet was the level at which danger began. "To fix 36 feet and call it a danger limit," said Mr Blyth, who was "intimately acquainted with the Glencorse and Loganlea reservoirs," "is, to my mind, a purely imaginary figure." Mr Stevenson, another witness for the defenders, a gentleman of great experience in connection with water questions, said he did not understand "this point of danger." He attributed what occurred to wind and rain. The rain he thought the most important factor in the disturbance, the wind next, and the frost next.

The year 1902 was a year of exceptional drought. The total rainfall was 27·25 inches. So far as records go there is no year in which the rainfall was so low, except the year 1842, when the total rainfall was 25·675. The drought was followed by frost and thaw, and then by wind and rain of exceptional violence. "There was not a single calm day," says Mr Stevenson, "between the 12th of December 1902 and the 7th of March 1903, . . . there was a succession of southerly and south-westerly gales of unusual violence . . . they were recurrent and continuous." "Having regard to the climatic conditions that existed during the period in question I cannot see," said Mr Stevenson, "there was any mismanagement of the reservoir. I think it was properly managed." "I think," said Mr Mansergh, "Mr Tait was justified in keeping up the water in Loganlea. He did not know when the rain was coming or the wind either."

In this conflict of opinion, happily, your Lordships have not to determine how the reservoirs ought to have been managed or how the administration of the water supply for Edinburgh ought to have been conducted, or to determine whether some different course might not perhaps have been better if Mr Tait had only known beforehand the exact duration of the drought, the length of the rainy season, the violence and direction of the wind, and all those other matters, now past history, which enable some of the expert witnesses to speak with such admirable confidence. The simple question is, Have the pursuers proved a case of negligence against the Water Trustees? I do not think they have. I adopt the judgment of the Lord Ordinary, with whose very careful opinion I concur.

I think the appeal ought to be allowed and the judgment of the Lord Ordinary restored.

LORD DAVEY—I express my opinion in this case with some diffidence on account as well of the intrinsic difficulty of it as of the difference of opinion both in the Courts below and in this House. The point for decision is whether the appellants are liable to the respondents for the damage suffered by the latter in their business by reason of the turbid condition of the water flowing from the Glencorse Reservoir in the winter of 1902-3.

Now, the general proposition of law is not in dispute. It was thus stated by Lord Blackburn in this House in a passage which has frequently been cited—"No action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damages to anyone, but an action does lie for doing that which the Legislature has authorised if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented, it is within this rule 'negligence' not to make such reasonable exercise of their powers"—*Geddis* v. *Proprietors of Bann Reservoir* (3 A.C. 430, at p. 455). The respondents must therefore show that the appellants either by commission or omission have failed in the performance of some duty which they owe to the respondents either by statute or common law. The conclusions of the summons are plain enough. The respondents thereby ask for declarator of their title to water in a state of purity, measured by three alternative standards, and for an interdict founded on such declarator, and damages for infringement of their rights. The learned Judges who formed the majority in the Inner House, however, agreed with the Lord Ordinary and with Lord Young in their inability to make any such declarator. And the learned counsel for the respondents in this House did not maintain their right to it. In other words, they declined to condescend on any definite standard or test of purity in the water to which the respondents are entitled. I do not dwell on this circumstance as a mere pleading objection, but because it illustrates the indefinite and (as I think) untenable character of the claim which is made. It is said that the appellants managed their reservoirs solely in the interest of the inhabitants of Edinburgh, without regard to the interests of the respondents. It is not pretended that there is any express condition binding the appellants to deliver water of a particular purity, but the plaintiff's case, as stated by Lord Kyllachy, is that there is an implied condition binding on the defenders, "that it shall be at least as free from injurious impurities

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as is compatible with the existence and use of the reservoir, that is to say, with its existence and use managed fairly and reasonably, and with due regard not merely to the interests of Edinburgh but also (co-ordinately if not primarily) with regard to" the interests of the respondents.

It is apparent that in this passage which I have quoted from his judgment the learned Judge was not referring to any common law liability of the appellants arising out of negligence in the use of their statutory powers, but to some special regard which it is alleged the appellants are bound by their statutes to pay to the interests of the respondents. It is necessary, therefore, to inquire what obligations towards the respondents their statutes have imposed upon the appellants, or (in other words) what interests of the respondents the appellants are bound by their statutes to have regard to in performing their duties.

The statutory relations between the predecessors of the appellants and the millowners with regard to the supply of water commenced in 1819. The arrangement made by the statute of that year has been altered from time to time, and the enactment by which the present relations of the parties are regulated is to be found in section 85 of the Act of 1856. The appellants are thereby bound to allow to flow through the gauge on the Glencorse Burn near the Crawley Cistern 220 cubic feet of water per minute for ever thereafter, as a full compensation for the right conferred on the company to stop, dam up, store, and use the whole of the waters draining by the Glencorse Burn and its tributaries above the Crawley Cistern. And provision is made in event of the Glencorse Reservoir and the Loganlea Reservoir proving inadequate to afford the required quantities of water, for the burn and Crawley Spring to be turned into their original channel, and to continue to flow therein and through the gauge for the use of the millowners. The only provision as to the quality of the water is contained in section 89 of the same statute, whereby the appellants are prohibited from cleansing their filter beds by flushing or sending the impurities therein collected down the burn.

It may be that the millowners thought chiefly of the use of the water for the purpose of power, or they were satisfied that the water stored in the reservoir and passing thence by the Glencorse Burn to the gauge would be of at least as good quality as the water flowing in the burn in its natural state. But whatever the reason may have been, the millowners appear not to have made any stipulation (other than that as to the cleansing of the filter beds) respecting the quality of the water, or if they made any they did not succeed in inducing the Legislature to insert it in the Act. I am therefore of opinion that no duty is imposed by their statutes on the appellants towards the respondents respecting the quality of the water (except, of course, as to the cleansing of the filter-beds), and I can see no sufficient grounds from which such a duty can be implied. In short, the appellants are bound to supply from the Glencorse Reservoir the stipulated quantity at the gauge, and they have the right to use all the rest of the water for the purpose of supplying the city of Edinburgh.

I cannot therefore agree with the judgment of Lord Kyllachy, whose judgment appears to me to be founded exclusively on a failure by the appellants to perform to the respondents their statutory obligation. For I understand the learned Judge to have been of opinion that there is no room, properly speaking, for any question of alleged negligent exercise of statutory powers.

On the other hand, I understand the Lord Justice-Clerk to have found that the appellants were guilty of negligence in the use of their statutory powers, and thereby came under a common law liability for damages to the respondents. And I think this was the most formidable way of putting the case against the appellants.

I will not trouble you by a discussion of the matters in respect to which the appellants are said to have been negligent. They have been fully stated and discussed by the Lord Chancellor, and the evidence by which the charge is supported has been analysed with great care by the Lord Ordinary and your Lordships who have preceded me, and I agree in the result at which they have arrived. I desire only to make one brief observation on what I think is the chief item in the charge of negligence. It is said that the appellants ought not to have allowed the water to fall so low as it did in the Glencorse Reservoir, and ought to have drawn water off from the Loganlea Reservoir to replenish it. The expert witnesses called by the respondents are, I doubt not, gentlemen of the highest professional eminence and entitled to speak with weight and authority on this subject. But after all they were speaking after the event and were expressing only their own opinions as to what Mr Tait ought to have done or not to have done under the circumstances. On the other hand the appellants were charged with the anxious duty of supplying the city of Edinburgh with pure water at a time of prolonged drought, such as had not been known since the year 1842. Their engineer did not know when the drought might end, or by what climatic conditions it might be succeeded, and he was responsible for taking such measures as would in his judgment best secure the maintenance of the supply to the city come what might. All questions as to which source of supply they should draw from, or which reservoir they should deplete, or in which they should store the water, and the like, are within the province of the appellants acting on the advice of their responsible engineer. And I should be extremely slow to impute negligence to the appellants acting *bona fide* in the performance of their duties, even if I thought (which I am not convinced of) that the judgment of other gentlemen was more sound than that of their own professional adviser.

I am of opinion that the appeal should be allowed.

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LORD JAMES OF HEREFORD—In this case the pursuers are an incorporated firm of papermakers. Since 1835 paper mills had been worked by the firm, their works being situated on the Glencorse Burn, the water of which was used in the manufacture of papers at the pursuers' mill. The defenders are a water company having in view the meritorious object of supplying the citizens of Edinburgh with water. Various Acts of Parliament conferred powers on the defenders' company, but the 19 and 20 Vict. c. 92, sec. 85, contains the provisions most materially affecting the questions submitted to your Lordships for decision. The general effect of this enactment is to confer benefits and impose obligations upon the defenders' company. Power was conferred to appropriate certain flowing water to the objects they had in view, but the rights of riparian owners and millowners who had previously enjoyed the use of this water had to be protected and provisions for that purpose were inserted in the Act. A quantity of water representing a flow of 220 cubic feet per minute had to flow through a certain gauge on its way down stream to the millowners including the pursuers "as a full compensation for the rights conferred upon the company to stop, store, and use the waters draining into the Glencorse Burn."

The waters so passed through the gauge mingled with pure spring water were used by the pursuers in the manufacture of a class of paper which required the employment of pure water. Such water had been used before and after the passing of the 19 and 20 Vict. Save on one or two exceptional occasions no complaint was made as to the quality of the water passing from the reservoirs constructed under the Act through the gauge until the year 1902. But on December 12, 1902, the water flowing down the Glencorse Burn to the pursuers' mill was contaminated with silt and was unfit to be used for the purpose of paper making and so continued for several weeks. The cause of the foul condition of the water seems to have been the existence of large quantities of silt and sand in the Glencorse reservoirs, and this silt and sand in consequence of the lowness of the water became mixed with it and so occasioned the foulness and impurity complained of. Now there are apparently two questions that have necessarily to be determined. First, what was the obligation imposed upon the defenders in respect of the delivery of the compensation water; and secondly, have the conditions of such obligation been fulfilled.

As to the quantity of the compensation water no question arises, and substantially the question of the quality of the water to be supplied is the one that must determine the rights of the parties to this suit.

The pursuers' allegation is that the obligation imposed on the defenders by the 19 and 20 Vict. was to deliver water of a quality fit for use by the pursuers as paper makers or fit for what is termed primary use. They say that the water to be delivered under the statute was intended to compensate them for the abstraction of water hitherto employed by them in paper making. No actual compensation is found in the delivery of foul water mixed with silt in such quantities that it is unfit to be consumed or used in the manufacture of paper.

On the other hand the defenders' case is that no duty was cast upon them in respect of the quality of the water supplied, so that if 220 cubic feet of water from the reservoirs passes through the gauges to the stream below during each minute the obligation is fulfilled, be the quality of the water what it may.

Now the difficulty of determining this broad question is certainly great. The statutes are silent on the subject of quality and their intention must be found from the general effects of the enactments. It certainly was intended that the water passed through the gauge should compensate the pursuers for the water rights they had previously enjoyed. I cannot suppose that the Legislature intended, even for the purpose of sending the supply of good water to the citizens of Edinburgh, to deprive the pursuers of an enjoyment which amounted to a right of property.

It may be that the obligation is not absolutely positive in its character. Excuse for the non-performance of it might be suggested. For instance, if the water became foul from causes beyond the control of the defenders, they may say we have done our best, it was impossible for us to deliver pure water, and we are not liable for not having accomplished the impossible.

Regarding the obligation to deliver reasonably pure water as primarily binding, it seems to me that if relief from it is to be obtained by showing excuse for non-performance, the burthen of clearly establishing such excuse must be borne by the defenders. But they do not so shape their case. Their view is that no duty was cast upon them to see to the purity of the water. In their answer to the 11th condescendence the defenders say that "they refuse to recognise any responsibility for the quality of the compensation water."

Mr Tait, the engineer of the defenders' company, in giving evidence, supported this contention. When he was asked on cross-examination—"Is it, or is it not, your view that you had to attend to the quality of water leaving Glencorse Reservoir and passing down as compensation to the pursuers?" he replied—"No, because I simply discharged the water which was at my disposal in Glencorse Reservoir."

The result of this conduct was that Edinburgh obtained pure and the pursuers foul water. Much evidence was given at the trial to show that the cause of the impurity was clearly traceable and could have been avoided. The deduction I draw from such evidence is favourable to the pursuers, but I am very clearly of opinion that the defenders have failed to establish that they did their best to avert the impurity of the compensation water. They did nothing to avert the impurity, because they thought it was not their business to do so, and

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therefore impure water in relation to compensation was to them the same as if it had been pure.

The Lord Ordinary dealt with the case as if it were one of alleged negligence, without proof of which the pursuers could not succeed, and he further held that such negligence had not been established. As I have said, I do not think that the pursuers' case need be based on negligence. The view expressed by Lord Kyllachy sets forth very clearly the nature of the duty cast upon the defenders and the reason for saying they had not fulfilled it.

I also agree that the delivery of polluted water was not protected by the provisions of the statutes. The principles laid down in the cases of which *Brand* v. *Hammersmith Railway* is one of the earliest and most prominent do not apply to the present issues. Those cases hold that a statute authorising the execution of certain works which would constitute a cause of action if not so authorised, protects anyone not acting negligently from liability for injury caused by the execution of the authorised works. But here the action is so framed that the defenders need not be treated as tort feasors in the execution of statutory powers. The allegation that a statutory duty has been imposed and has not been fulfilled, removes this case from the application of the principle of the cases I have referred to.

Accepting as I do the judgments delivered by the Lord Justice-Clerk and Lord Kyllachy, I submit to your Lordships that such judgments should be affirmed.

LORD ROBERTSON—In my opinion the judgment appealed against is right. I adopt entirely the reasoning of Lord Kyllachy; and I shall only state in a few words of my own the considerations which I find decisive.

I hold that the appellants were bound to administer the Glencorse Reservoir and the Loganlea Reservoir in the interest primarily of the respondents, with a view to their receiving water suitable for primary purposes to the amount specified in the Act of 1856. That during the period complained of they did not administer those reservoirs in that interest and with that view is proved on two pages of their own engineer's evidence, for, speaking of the time during which the water was palpably bad, and getting worse, he says that in his view he had not "specifically to deal with the quality," and that he did not bring before the appellants any question of the pollution of the respondents' water. This being so, it is not surprising if, no pains being taken, the respondents' interests suffered. They did suffer, and, in my opinion, it is clearly proved that if the Loganlea Reservoir had been used with a view to the respondents' supply as one of the purposes of administration, the results now complained of would not have occurred, while nobody else would have been the worse. In law it follows that the appellants are liable.

To me it appears paradoxical to speak as if you provide compensation for clean water by giving dirty water. I do not, of course, suggest that the appellants are under a guarantee that the 220 cubic feet shall be of any given quality, or even shall be up to the standard of the old Glencorse Burn. The theory of the statutes is that the water of the reservoirs which the undertakers proposed to construct, and have constructed, will serve the same purposes as did the water of the Glencorse Burn. But once you get into the region of artificial works, it is impossible to escape from the ideas of control and administration. Now, the Lord Ordinary has dealt upon some of the risks to purity which are necessarily incident to any reservoir and to this reservoir. But the appellants were distinctly apprised by the Legislature that the primary purpose of both these reservoirs was the compensation of the respondents (see sections 38 and 44 of the Act of 1819, and section 85 of the Act of 1856), and they had a free hand in the construction of the reservoirs. (The only external check on their plans and methods was that the embankment must be safe against bursting. See sections 47, 48, and 49 of the Act of 1819.) Accordingly, if, as turned out to be the case, these reservoirs, like most if not all reservoirs, required watching lest the water should become foul—watching was the appellants' duty to the respondents. Now of watching in this regard there was none. There was therefore neglect of a duty owed to the respondents, this neglect arising not from carelessness or inefficiency on the part of the officers in charge, but from a misconception on the part of the appellants as to their relations to the respondents in the important matter of the quality of the water. But not the less does this neglect present a clear ground of legal liability.

LORD CHANCELLOR — My noble and learned friend Lord Atkinson unfortunately is unable to be present this morning, but his conclusions are the same as those of the majority of your Lordships.

Their Lordships sustained the appeal with expenses and restored the interlocutor of the Lord Ordinary.

Counsel for the Appellants—Cripps, K.C. —Clyde, K.C.—Cooper, K.C. Agents—Millar, Robson, & M'Lean, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Counsel for the Respondents — Scott Dickson, K.C.—Blackburn. Agents—MacAndrew, Wright, & Murray, W.S., Edinburgh—Batten, Profflitt, & Scott, Westminster.

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Tuesday, May 15.

(Before the Lord Chancellor (Loreburn), and Lords Davey, James of Hereford, Robertson, and Atkinson.)

CROSSAN *v.* CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(In the Court of Session March 18, 1905.)

Misrepresentation—Essential Error—Contract—Discharge—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37).

A workman who had been injured and was in receipt of compensation under the Workmen's Compensation Act 1897 with a registered agreement, received a call from an officer of the Insurance Company which was paying the compensation. The officer desired to obtain a final discharge, and in the course of the conversation with the workman, who was still very weak, referred to the recent report of their medical man on an examination as suggesting that the workman would be well again in some months. He did not read the report or give it to the workman to read. As matter of fact the report stated that the probable duration of disability would be some months, but that progress had been so slow no prediction could be made. The workman granted a discharge on what were, inasmuch as he did not recover, very favourable terms for the Insurance Company, and subsequently brought a reduction on the ground of misrepresentation and essential error.

Held that there had been misrepresentation inducing to the granting of the discharge, and that the discharge must be reduced.

On 28th April 1904 Peter Sangster Crossan, rivetter, Kinghorn, brought an action against the Caledon Shipbuilding and Engineering Company, Limited, Dundee, in which he sought to have reduced a receipt and discharge granted by him on 4th September 1903, whereby for the sum of £20 he had discharged all claims competent to him against the defenders under the Workmen's Compensation Act 1897, or otherwise, in respect of injuries sustained on 20th December 1902.

Crossan had been in the defenders' employment, had been injured by an accident, and had been paid compensation at the rate of 18s. per week under a minute of agreement recorded in the Sheriff Court Books of Fife. While still very weak he was one day called upon by an officer of the Insurance Company liable for the compensation, Sutherland, to whom he granted the discharge now sought to be reduced. He pleaded—"(2) The said pretended receipt and discharge having been signed by the pursuer under essential error as to its nature and import, induced by the misrepresentations libelled, decree of reduction should be granted as concluded for. (3) The pursuer having been induced to sign the said pretended receipt and discharge by the misrepresentations of the defenders, or those for whom they are responsible, and without being allowed to obtain the advice of his law-agents thereanent, in the circumstances condescended on, is entitled to have the same reduced with expenses."

Shortly before Sutherland's call, Crossan had been examined by the doctor to whom he had been sent, Dr Mill of Leith, who had reported to the defenders as follows:—"... Probable duration of disability *from this date*:—Some months yet, but his progress has been so disappointing and slow that I cannot give a prediction. Remarks as to present condition, progress since last report, or generally:—Except that he can walk better, and has less pain over spine, I can report very little improvement since my last report. He travelled from Kinghorn to Leith by train, and on arriving at my house was decidedly exhausted. His improvement is much more tedious than I hoped."

In his evidence the pursuer stated—"... In July 1903 Dr Mill examined me again at Leith. I went to him on that occasion. He wrote to me to come over to him if I was able, and I would only have about five minutes' walk from the station to his house. When I got to Dr Mill's house I was quite done up. Dr Mill said it would take me some time as I was making very slow progress, or something to that effect. He said it would be a few months before I would require another inspection. [*With regard to interview on 3rd September with Sutherland*]—When I came in my wife said that there had been a gentleman from Dundee looking for me. I asked her if he had not waited, and she said no, and I said 'Well it is nothing very particular or else he would have waited on me.' Shortly after that Sutherland came back. When he came in he said 'How are you?' and I told him I did not feel very well. He said that could not be, as according to his doctor's report I would be fit for my employment by the end of October. Sutherland asked me to walk about the floor. After that he offered me £10, and I told him I could not take £10, and could not settle on any condition. ... He then offered me £15, but I still would not settle, and then he repeated that it was all nonsense. He then offered me £20, and after he offered me that sum he asked me for pen and ink and I gave them to him. I got the pen and ink off the dresser. I signed the paper according to Sutherland's statement, namely, that I would be fit for my employment by the end of October or else I would never have signed the paper. On that day that Sutherland called I was feeling very bad and weak and nervous. I was not fit for anything after that and I took to my bed for about a week. The bargaining with Sutherland lasted for about an hour, but I could not exactly say to the minute. I was not fit to argue with him, and Sutherland took advantage of me because of the state I was in. I was in bed

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the day after he called and was in bed for a week, I was so upset by Sutherland getting me to sign that paper. I did not consult my wife before signing the receipt. There was nobody in the house but Sutherland and myself. My wife was not present at the interview at all, and she was at her work in the room. It is not the case that I considered the terms of the document and consulted with my wife about it. I signed the document myself, and on Sutherland's statement that I would be fit for my work by the end of October. . . . I did not know the terms of Dr Mill's report upon me. (Q) I read to you No. 28 of process, Dr Mill's report, 'Probable duration of disability from this date. —Some months yet but his progress has been so disappointing and slow that I cannot give a prediction'?—(A) If he had read that to me, and if I had known these terms, neither him nor all the Sutherlands would have ever got me to put my name on that bit of paper. If I had seen the other passages in the doctor's report or had them read to me I would never have signed the document. . . ."

Sutherland's evidence so far as necessary is given in the opinion of the Lord Ordinary (STORMONTH DARLING).

On 27th January 1905 the Lord Ordinary pronounced an interlocutor in terms of the conclusions for reduction in the summons.

Opinion.—"In this action the pursuer seeks to reduce a discharge dated 3rd September 1903, by which in consideration of a payment of £20 he discharged all claims competent to him in respect of personal injury which he had sustained on 20th December 1902 in the course of his employment as a boilermaker with the defenders.

"The material facts, so far as undisputed, are these:—The accident was caused by the pursuer falling into the hold of a ship, and it resulted in serious injuries to his spine and nervous system. The defenders admitted liability under the Workmen's Compensation Act 1897. The payment which they agreed to make was at the rate of 18s. a-week during incapacity, and a memorandum of agreement to that effect was recorded under the Act in the Sheriff Court Books of Fifeshire on 17th July 1903. Compensation at the agreed-on rate was paid from a fortnight after the accident until 3rd September 1903, and these payments were made weekly, except that on 7th August 1903 a sum of £7, 3s. 8d. was paid in the lump, being the compensation due for eight weeks, about which there had been some dispute as to whether the pursuer was bound to go to Dundee for a medical examination at his own expense. On 1st July 1903 the defenders—or rather the Iron Trades Employers' Association, with which they were insured—obtained a medical report from Dr James Mill of Leith, to the effect that he had re-examined the pursuer, his immediately preceding examination having been on 25th April 1903.—[*Quotes report given supra.*]

"On 3rd September 1903 Mr Sutherland, who was then assistant secretary of the Insurance Association, visited the pursuer at his house in Kinghorn, and after some negotiation settled his whole claims for a sum of £20, which was then and there paid to him. The visit was made entirely on Sutherland's own initiative, and without previous intimation to the pursuer, who had no adviser, legal or other, with whom he could consult.

"Some weeks after the settlement the pursuer was certified by three medical men as permanently unfit for the work of a boilermaker, and on that footing he received a bonus from the society of which he was a member. He still suffers from the effects of the accident, and in the opinion of doctors who have examined him, including Sir Henry Littlejohn, it is doubtful if he ever will recover from these entirely. So far there is no dispute.

"When we come to what passed at the interview we enter the region of controversy. But before dealing with the evidence I may state what I understood to be the legal position of the pursuer and the defenders' representative when they met. The pursuer had a duly registered agreement, enforceable as a Sheriff Court judgment under the second schedule to the Act (8), entitling him to 18s. a-week until such payment should be brought to an end or varied by any of the methods provided by the first schedule (12) and (13). One of these statutory methods is redemption by the payment of a lump sum, and this may be settled either by agreement or arbitration at any time after the weekly payment has continued for not less than six months. In this case the weekly payment had gone on for eight months, and there was nothing to prevent the parties agreeing to its redemption according to the ordinary rules which govern the making of agreements. Now, it is settled by the case of *Wood* v. *North British Railway Company* in the House of Lords, 18 R. (H.L.) 27, and the numerous cases which have followed it, that a man who accepts a sum down in settlement of a claim for personal injury, and discharges all claims competent to him in respect of that injury, cannot be allowed to go back upon the settlement which he has thus made merely upon averments that he was ill at the time, or that he did not understand that he was discharging all claims, or that he had not the benefit of legal advice when he did so, or even that the sum which he accepted, looking to the subsequent course of his injuries, had turned out to be quite inadequate. It is true that the pursuer in *Wood's* case was a commercial traveller, and therefore described by Lord Selborne as 'a man of business,' which cannot be said of the present pursuer, but the principle has been applied in subsequent cases to ordinary labouring men. It is also true that some stress was laid in *Wood's* case on the payment there having been made to obviate the risks of litigation, while here the pursuer had already obtained the equivalent of a judgment in his favour. But it was open to the pursuer to commute the weekly payment for which he held his *quasi* judgment into a lump sum, and if he did not do

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so he ran the risk of a statutory arbitration at the instance of his employer. Accordingly, it seems to me that the principle of *Wood's* case would apply, if it could be said here, as it was said there, that there had been 'no attempt to mislead the pursuer.' If that cannot fairly be said, then the agreement is reducible on the ground that the pursuer was induced to enter into it by a misrepresentation of fact, for which the other contracting party is responsible.

"The pursuer's case on misrepresentation is that he was told by the defenders' representative that Dr Mill had reported that the pursuer would be able for his work by the end of October, and that he never would have signed the discharge if he had known the real terms of Dr Mill's report. I do not believe that Sutherland's representation of what Dr Mill had reported was as definite as that. Nor do I believe that the pursuer could have reconciled such a statement, if it had been made, with so large an offer as £20, which was practically full compensation, not for eight weeks, but for twenty-two weeks. I cannot, I am sorry to say, rely with implicit confidence upon the evidence either of the pursuer or Sutherland with regard to what took place at the interview. But the leading considerations, I think, are these—Sutherland was not bound to refer to Dr Mill's report at all, but he had it in his pocket, and if he did refer to it (instead of showing or reading it to the pursuer, which would have been the candid and safe thing to do), he was bound to be very careful that his account of its tenor was correct. Now, the report as a whole was undoubtedly very discouraging, all the more that previous reports had anticipated early recovery. On 24th February, when Dr Mill first saw the pursuer, he expected that total disablement would only last till about the end of March. When he saw him again on 25th April his opinion was that the pursuer would not be fit for at least six weeks. And then when he saw him in July Dr Mill had learned to be more cautious, and declined to give any prediction at all as to the probable duration of disability. It is true that he prefaced this by the words, 'some months yet,' and Sutherland chose to read these words as meaning that the pursuer 'would be fit to work long before six months.' It is also true that Dr Mill in his evidence to a certain extent supports that interpretation of his report, for he says, 'It was my expectation that in something under six months the man would be fit for work.' But the question is not what Dr Mill thought or expected, but what he said in his report. If he expected on 1st July that the pursuer would be fit for work in something under six months, he was undoubtedly wrong. But I think that in his evidence as a witness he hardly does justice to his report as a doctor, for, whatever his thoughts may have been, he certainly did not say in his report that the pursuer would be fit for work at any given time. On the contrary, the leading words of the report are—'His progress has been so disappointing and slow that I cannot give a prediction.' There seems to me to be a great difference between saying 'a man will be well in less than six months,' and saying 'a man will probably be ill for some months yet, and I cannot tell when he will be well.'

"I am content to take Sutherland's representation of what the report contained from his own evidence. I have shown what he understood the report to mean, *i.e.*, recovery long before six months from 1st July. Now, what did he tell the pursuer about this? He first says that the pursuer took quite a hopeful view of his case, and said, in answer to a question, that he expected to be fit for work a good deal before the New Year. That I do not believe, not merely because the pursuer denies it, but because it is not proved that he had any reason to think so from what any doctor had told him. Then in cross-examination Sutherland says—'I had Dr Mill's report with me when I visited Kinghorn. I did not show it to the pursuer. I do not think I was asked to do so. I told him the purport of the report. (Q) Did you think it was a matter of great interest to this man to know what the doctor's view about him was?—(A) No. As far as I was concerned at any time, I always took the doctor's report for my own information, and not for the man's; and as a rule I paid very little attention to the doctor's report, and I took my own judgment as regards the man's condition. I did not consider it any part of my duty to let the man know what Dr Mill's view about his condition was. (Q) Do not you think that when a man is settling for his injuries it is important that he should have the information given to him which is given to you by your medical man about him?—(A) I do not know; if you go into a shop and make a purchase, you are making the best bargain you possibly can, and the shopkeeper is making the best bargain he possibly can; if I go to a man, you do not expect I am going to tell him everything. In this case I certainly told the man that the doctor took a more serious view of the case than he himself did. (Q) In these circumstances can you explain why you did not just read him out what the doctor said about him?—(A) I told him what the doctor said, but I did not put the period, because the doctor did not put the period for his recovery. The doctor said "some months." (Q) Did you lead the man to understand that it would be some months before he recovered?—(A) I took the man's own word for it. I asked him if he would be fit for work by the New Year, and he said long before that, as he was sick of this. (Q) Did you lead the man to understand that in all probability he would recover in some months?—(A) I led the man to understand he would be longer off work than he expected, according to the doctor's report. (Question repeated)—(A) I would certainly give him to understand in some months.' And a little later on he says—'I do not suppose I told the man that in Dr Mill's opinion his progress had been so disappointing and slow that the doctor could not predict when he would get well.'

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"Now, the long and the short of all this is that Sutherland did convey to the pursuer the impression that Dr Mill expected him to recover in some months, and that he failed to disclose the rest of the report. Sutherland may think very little of doctors' opinions, and may greatly prefer his own, but a man suffering from an obscure injury may be excused for attaching more importance to the doctor's view. When, therefore, the pursuer says that he was materially induced to settle for £20 by receiving an erroneous version of Dr Mill's report, I cannot refuse to believe him. Other things may have influenced him—perhaps the sight of twenty crisp bank notes most of all. But if Sutherland's gloss on the report was misleading, as I think it was, I cannot say that the error was immaterial, or that the defenders are any the less responsible for it because Sutherland himself believed that recovery would take place within a few months. If he had confined himself to stating his own belief, there would have been no responsibility, because the pursuer would have had himself to blame for acting upon it. Equally, of course, the defenders would not have been responsible for Dr Mill's opinion turning out to be wrong if the report had been shown to the pursuer, or its purport had been correctly represented. That was the case in *Dornan* v. *Allan & Sons*, 3 F. 112, where the settlement was upheld. But a representation as to the tenor of a report is not the expression of an opinion, but the representation of a fact; and it seems to me of vital importance to fair dealing that persons who make contracts of this kind should know that the validity of the contract depends on the substantial accuracy of every material fact which they represent, so far, at least, as it is—or ought to be—within their knowledge. Even if it should be thought, contrary to my opinion, that Dr Mill's reference to 'some months yet' was capable of the meaning which Sutherland put upon it, I think that Sutherland was bound to state the qualifying words which followed. It is always dangerous for one party to a contract to conceal facts; it is fatal if the non-disclosure has the effect of making the disclosed facts false or misleading. And this is especially the case when the thing about which the representation is made is a written report. It may or may not be necessary to refer to it at all, but if it is referred to, the other contracting party ought surely to have an opportunity of considering it as a whole.

"I am therefore of opinion that this discharge cannot stand. I proceed entirely on the grounds which I have explained, and not at all on the pursuer's mental or physical condition at the time, or on the fact that he was without advice. Indeed, I think that the attempt to show that Sutherland, when he went to Kinghorn, knew that the pursuer had a law-agent, broke down. The effect of reduction of the discharge will simply be to restore the operative effect of the registered agreement for a weekly payment, unless and until it may be ended or varied under the provisions of the Act. Meanwhile, of course, the sum paid on 3rd September 1903 will form a set off, *pro tanto*, against the weekly payments that are due."

The defenders reclaimed, and argued—The Lord Ordinary had erred through giving undue weight to the pursuer's evidence. He was not a reliable witness. Taking the evidence as a whole there was no misrepresentation made out, and the case was the common one of a man trying to get out of a bargain he had duly made, with averments similar to those which had repeatedly been held irrelevant or insufficient to justify reduction—*North British Railway Company* v. *Wood*, July 2, 1891, 18 R. (H.L.) 27, 28 S.L.R. 921; *Mackie* v. *Strachan, Kinmond, & Company*, July 15, 1896, 23 R. 1030, 33 S.L.R. 764; *Mathieson* v. *Hawthorns & Company, Limited*, January 27, 1899, 1 F. 468, 36 S.L.R. 356; *Welsh* v. *Cousin*, December 8, 1899, 2 F. 277, 37 S.L.R. 199; *Dornan* v. *Allan & Son*, November 22, 1900, 3 F. 112, 38 S.L.R. 70.

Argued for the pursuer and respondent—The Lord Ordinary was right. The pursuer had, on the evidence, been induced to grant the discharge by a misrepresentation on the part of the defenders. The respective positions of the two parties in the negotiations must be considered, and in that the case differed from *Wood* (*cit. sup.*).

At advising on March 18, 1905, their Lordships of the Second Division (the Lord Justice-Clerk, Lord Kyllachy, and Lord Kincairney) pronounced an interlocutor recalling that of the Lord Ordinary and assoilzieing the defenders, and gave the following opinions:—

LORD JUSTICE-CLERK—I have found this case a most difficult one, and would have been glad had I been able to bring myself into accord with the Lord Ordinary in the view which he has taken of it, but regret that I have found myself unable to do so. At the close of the debate I had been unable to satisfy myself that the judgment could be supported, and I have since gone back over the case again and again, and am still unable to arrive at any other conclusion than that to which I had been led at first. The case is one in which, if the defenders are to be found in the wrong, their representative must be held to have concealed facts which he was bound to disclose, and to have thus wilfully misled the pursuer. Such a case demands clear and unambiguous proof, and that I am unable to find in the case.

It has been settled by an authoritative decision in the House of Lords (*Wood* v. *North British Railway*) that a person who settles a claim of compensation for personal injury cannot be allowed to go back upon the settlement, on the ground that being ill at the time he did not understand what he was doing, that he had no adviser, and that it has proved to be the fact that his injuries were much more serious and lasting than was expected, so that the compensation he accepted was in fact inadequate. The pursuer therefore, having signed a discharge in full of his claims, must establish by proof some other ground for

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cutting down the discharge. The question here is, Has the pursuer discharged the *onus* of proof which lay upon him? Now, it appears to me to be quite clear that had the case been closed upon the evidence led by the pursuer, he could not have been held to have proved a case against the defenders. The case as the pursuer presents it is a most extraordinary one. In his condescendence he avers that Mr Sutherland, the servant of the defenders, came to him and made him an offer of settlement. He says that Sutherland told him that Dr Mill, who had examined him, had said that he would be able to resume work about the end of October, and offered him "£10 in settlement of his claim against the defenders"; that pursuer refused to entertain any offer "to settle his said claims," and that Sutherland pressed him to do so, and increased his offer to £15, and afterwards to £20, "for that purpose"; that although the pursuer protested, Sutherland wrote out a "receipt for £20 in discharge of the pursuer's claims, and ultimately succeeded in inducing pursuer to sign the same, and to accept payment of the £20." He then proceeds to aver that it was obtained by fraud, and sets forth his ground for so maintaining. Now these latter statements are certainly not proved. The pursuer's evidence is most unsatisfactory, and much of it is plainly untrue. He roundly asserts that it was not a settlement, that if he had known it was a settlement he would not have signed it, and goes the length of saying, "I thought it was maybe two or three weeks' compensation I was getting"; and at another place he says, "I thought it was a lump sum he was laying down, so that I would not be bothered every two or three weeks." I cannot do otherwise than say that I consider this evidence of the pursuer to be untruthful evidence, and that I feel it quite impossible after reading it to attach any weight to his testimony, which I consider to be wholly discredited. His wife, who is brought to corroborate him, gives evidence which is equally unsatisfactory with his own. This is made very clear by examining what she says as to the time within which Sutherland represented that her husband would be well. She first says that Sutherland declared that her husband would, according to Dr Mill, be well in two months. Then she says, when asked — "(Q) Was what Sutherland said as to the doctor's report that it would be some months yet?—(A) Some months yet." And then when an attempt is made to set her up again in re-examination she says—"It was Mr Sutherland who had mentioned the two months to him. He did so in my presence. (Q) You said several months?—(A) Dr Mill's report said that, but Mr Sutherland said it would be two months. By the way Sutherland spoke my husband was to be better at the end of several months." Can it be said that any confidence is to be placed in evidence such as that?—I feel called upon to reject it as wholly untrustworthy. And in this I think that I am in accord with the Lord Ordinary. It is plain, therefore, that, as I said before, the case against the defenders is not proved by the pursuer.

But then the Lord Ordinary proceeds to consider the evidence of Sutherland, and he finds in it what he considers sufficient to require him to grant decree to the pursuer. I must say it seems to me to be a very strong thing so to decide. The whole question turns not upon what Sutherland said to the pursuer, for what he said, and what the pursuer's wife says that he said, was quite true, viz., that Dr Mill did not believe he would be able for his work for some months yet. I may add here parenthetically that I do not believe that Sutherland said he would be well in two months. The pursuer says that he went to Dr Mill and told him that he had been told he had reported that he would be well by the end of October, and that the doctor said he had not said that in his reports, and that the doctor got his report and showed it to him. All this the doctor declares never occurred, and that no reference was made to a report. What the Lord Ordinary proceeds upon is this, that Sutherland does not say that he communicated to the pursuer a rider which the doctor had added to his report, viz., "But his progress has been so disappointing and slow that I cannot give a prediction." If it were the fact that Sutherland had referred to a report, and had professed to tell the pursuer what was in it, there might have been much to say for that view. But I am unable to find any evidence to prove that this was done, unless it be in the wife's evidence, to which I shall refer later. Sutherland says—and I see no reason for disbelieving him—that the pursuer expressed his belief that he would be fit for work again soon, and that he told him that "according to the doctor's report it did not seem to be so favourable." I think what he says must be taken in fairness in the connection in which it was said, and that it was not a giving of the details of the report but a general statement in answer to the too sanguine view expressed to him. If that was so, I can see no act of fraud in what he did. Had he said that that was all that was in the doctor's report, or anything of that kind, the case would be quite different. But I am unable to hold that the statement he makes in evidence establishes a fraudulent act on his part. Had he been telling deliberate untruths it is not easy to say why he did not assert that he had quoted the doctor's rider at the end of his report. But all he says is that he cannot tell whether he did or not. And here comes in a very remarkable circumstance in the case for the pursuer, that upon the question of the doctor's report being referred to by Sutherland at the interview, the pursuer and his wife are absolutely at variance. For the pursuer says that Sutherland "did not refer to any report." But the wife says—"I knew that Dr Mill of Leith had reported on my husband's condition, to the effect that his progress had been so disappointing and slow that he could not give any prediction about it. (Q) When did you know that?—(A) By

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Mr Sutherland telling me. He told me that when he was in the house." No doubt she immediately turns round and says the exact opposite by saying "no" to a leading question by the pursuer's counsel. But the remarkable thing is this, that she is able to quote the very words which it is said Mr Sutherland concealed, as having been said by him when he was in her house. And it becomes a difficult question to answer—how otherwise could she have known of these words being in the doctor's report unless it was from a statement by Sutherland? This makes it almost a certainty, that although he does not recollect saying the words, that they were said, she being able to quote them as having been said in her presence at the interview.

As I said at the outset, this is a perplexing and difficult case. Had it been tried by a jury, and the jury had returned a verdict favourable to the pursuer, it is possible that the Court would not have interfered. But we are not in the position of a Court hearing cause shewn on a rule. We have to consider the evidence and form our own opinion upon it. In doing so weight must of course be given to the views of the Judge who saw the witnesses and heard them give their testimony. But here that consideration is of much less importance than is usually the case. For it is impossible not to agree with him as to the extremely unsatisfactory and untrustworthy character of the evidence for the pursuer.

My verdict is that the pursuer has not made out his case, and that therefore the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

LORD KYLLACHY—I concur.

LORD KINCAIRNEY—I have had considerable doubt in this case, but not enough to lead me to dissent from the proposed judgment. I do not think the defenders were bound to disclose Dr Mill's report had they said nothing about it. But had it been proved that Sutherland read the report to the pursuer, omitting the passage about the doctor's inability to make a prediction, or had he professed to quote the report making that omission, I should have been disposed to think that misrepresention had been made out. It would have been much more satisfactory had the report been read which he had in his pocket. But I do not think it proved that he made any untrue assertion about the terms of the report. I do not consider that there is any ground for charging Sutherland with fraud. But in any case I should have doubted the pursuer's right to a decree, because I cannot hold it proved that the pursuer was induced to sign the discharge by Sutherland's statements or mis-statements. The pursuer has thought fit to state that he did not think the discharge a final settlement, but only a receipt for two or three weeks' compensation, and if that were so nothing that Sutherland could have said could have had any tendency to induce him to sign it. That idea, however, is confuted by the unambiguous terms of the receipt, and I rather think the assertion is fatal to the pursuer's case. The evidence of the pursuer and his wife is highly unsatisfactory, and, as I think, insufficient to support the case of fraud and misrepresentation which the pursuer has endeavoured to make.

LORD YOUNG was not present.

Crossan (pursuer and respondent) appealed to the House of Lords.

LORD CHANCELLOR—In this case I have come to the conclusion that the Lord Ordinary arrived at a right decision. This is the case of a man who had a right to 18s. a-week and who was induced to sign a discharge when he was very feeble in health on a surprise visit and on the terms of a most favourable settlement for the insurance company. The point which has been raised here is whether there was a material representation inducing him to sign that discharge which was in point of fact erroneous. I must say that the evidence, so far as one can discern the tenor and effect and weight of evidence by reading it on paper, was not wholly satisfactory, but some facts sufficient to decide this case seem to me to be perfectly clear.

The Lord Ordinary has found—and I think there was ample evidence to justify him in that conclusion—that "Sutherland did convey to the pursuer the impression that Dr Mill expected him to recover in some months and that he failed to disclose the rest of the report." The Lord Ordinary adds—"When therefore the pursuer says that he was materially induced to settle for £20 by receiving an erroneous version of Dr Mill's report, I cannot refuse to believe him." To my mind one of the most important considerations is that although the Lord Ordinary did scrutinise the evidence and express his dissatisfaction with portions of it, nevertheless he believed this, and he had opportunities of judging of its value which are necessarily denied to us and which were necessarily denied to the Inner House.

When I look at the judgments of the Inner House I find that some mistake of fact seems to have crept into the judgments of two of the learned Judges. The Lord Justice-Clerk was under the impression that Sutherland had not referred to a medical report at all, and he says—"If it were the fact that Sutherland had referred to a report, and had professed to tell the pursuer what was in it, there might have been much to say for that view." Now it is agreed that that is a fair description of what did actually take place. In the same way Lord Kincairney, who expressed considerable doubt, said—"Had it been proved that Sutherland read the report to the pursuer, omitting the passage about the doctor's inability to make a prediction, or had he professed to quote the report, making that omission, I should have been disposed to think that misrepresentation had been made out." I therefore have come to the opinion that by some oversight a very material point of fact upon

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which the Lord Ordinary relied was not present before the minds of two of their Lordships in the Court of Session. That diminishes the hesitation which I should at all times feel in dissenting from conclusions at which they have arrived.

I have formed the opinion that in this case there was such a misrepresentation, and I think that when a man is without advice and is in broken health and does under those conditions sign a discharge, courts of justice should watch with care the circumstances of such a settlement, and that if there has been any misrepresentation inducing a contract the court ought not to hesitate to act. I therefore move your Lordships that the interlocutor be reversed.

LORD DAVEY—I am of the same opinion. As the case is now presented to your Lordships we are relieved from one difficulty in dealing with the judgments of the Lord Justice-Clerk and Lord Kincairney, because those learned Judges, if I understand their judgments correctly, proceeded in the reasons which they gave for finding in the defenders' favour upon the fact that on the evidence Mr Sutherland was not proved to have referred to Dr Mill's report at all. That is how I understand the Lord Justice-Clerk's judgment, because he says—"If it were the fact that Sutherland had referred to a report, and had professed to tell the pursuer what was in it, there might have been much to say for that view. But I am unable to find any evidence to prove that this was done, unless it be in the wife's evidence," to which he refers later. And Lord Kincairney says expressly that "had it been proved that Sutherland read the report to the pursuer, omitting the passage about the doctor's inability to make a prediction, or had he professed to quote the report, making that omission, I should have been disposed to think that misrepresentation had been made out."

As the case now comes before your Lordships the learned Solicitor-General very fairly admits that he cannot maintain that Sutherland did not refer to the report, but he seeks to show that although the report was referred to it was not referred to in such a way as to amount to a misrepresentation. I have listened with great attention to the argument of the learned Solicitor-General on that point which, as his arguments always are, was deserving of great consideration, but he failed to convince my mind that there was a true representation of the facts disclosed by the evidence. If there be any doubt or any difficulty as to the exact effect of what was done I think we ought to place great reliance upon the impression made on the mind of the Lord Ordinary, who had the advantage of hearing the witnesses give their evidence. He says —"The long and the short of all this is that Sutherland did convey to the pursuer the impression that Dr Mill expected him to recover in some months, and that he failed to disclose the rest of the report." Now that is a very different thing from what we are asked to say that Sutherland told him. What is suggested is that Sutherland told him, not that he would recover in some months but that it would be some months before he would recover, and that it was doubtful whether he would recover at all. But that is not what the Lord Ordinary says, and that is confirmed by Sutherland's own evidence where he says—"I told him the purport of the report." Now what he thinks the purport of the report is perfectly plain from this—he says—"I gave the information on which the statement in answer 4 was made. That statement is perfectly true." Now the statement in answer 4 was this—"Explained that on 1st July 1903 Dr Mill . . . reported to the defenders that the pursuer would be recovered in some months." Therefore I take it to mean that that representation was made to the pursuer, and without the qualification and addition which Dr Mill made in his report which has been so much canvassed.

The next question which the learned Solicitor-General raised was whether on the evidence the pursuer relied on that statement. I cannot bring myself to doubt that there is abundant evidence upon which the Lord Ordinary could find, and that he did properly find, that the pursuer did rely upon that statement in accepting the offer that was made to him. And I do not understand for what purpose the statement can have been made to the pursuer unless it was for the purpose of inducing him to accept the settlement, and I cannot understand, unless he was led to believe that Dr Mill had reported that he would be able to return to work within a limited time, why he should have accepted the settlement.

A great deal has been said, and very properly said, about the unsatisfactory state of the evidence both of the pursuer and of his wife, and the occasional inconsistencies and sometimes contradictions which are to be found in the course of that evidence. I agree with my noble and learned friend on the woolsack that on that point you are entitled to take into consideration the situation of this man. Consider in the first place who he was—he was a labourer, apparently not a man of very great education, or of more than average intellectual powers. He was at that time weakened by a long illness from which he was still suffering, an illness, I may remark, of a particularly painful and exhausting character—in fact we are told that the interview with Sutherland so exhausted him that he was in bed for several days afterwards. Sutherland on the other hand was a man apparently of some ability, and at any rate he had had great experience in settling claims of this description—it was his business—he had had considerable experience of it. And it is not wonderful, I think, that the impression upon this man of what took place at that interview, and the exact state of his own mind at and after the interview, should have been somewhat blurred and confused when he comes to give evidence about it at a subsequent date.

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There is one other point which the learned Solicitor-General made. He said that the misrepresentation charged in the pleadings and stated in the pursuer's evidence was that Dr Mill had reported that the man would be able to go to work in the month of October, and that the evidence as found by the learned Lord Ordinary is that he was told only that Dr Mill had said he would be able to return in some months, which is approximately put at three months. I cannot say that I attach the slightest importance to that. I do not think that it is such a variation from the pleadings, or that the difference whether he said that he would return at the end of October (that would be in two months) or that he would return to work three months hence, or in some months, would be such a variation as would justify the Court in rejecting the man's suit altogether.

I am therefore of opinion that the appeal should be allowed.

LORD ROBERTSON—I entirely agree in all that has been said by my noble and learned friends. The exposition of the facts given by the Lord Ordinary is so entirely in accordance with the conclusions which I have arrived at that I do not think it necessary further to develop that subject.

I only desire to add one word, because, on the face of the judgment of the Lord Justice-Clerk, there is what I conceive to be an entire mis-statement of the law applicable to this case. That learned Judge has in plain terms treated the case on the footing that the defenders to the action would only be held to be wrong if there was brought home to their agent wilful mis-statement, or as he expresses it in another part of his judgment, fraud or fraudulent acts. I take it that that is not the law. It is not in accordance with the highest authorities which have developed this branch of the law. On the contrary, I think the Lord Ordinary accurately stated the question, when he said that the question was whether "the pursuer was induced to enter into this agreement by a misrepresentation of fact for which the other contracting party is responsible." I do not dwell upon this, and have only made mention of it, because I do not think that an error of that kind should be allowed to glide into the records of the Court without rectification.

LORD JAMES OF HEREFORD and LORD ATKINSON concurred.

Their Lordships reversed the interlocutor appealed from, with expenses.

Counsel for the Appellant—The Lord Advocate (Shaw, K.C.)—Wark. Agents—J. & J. Galletly, S.S.C., Edinburgh—William Robertson & Company, Westminster.

Counsel for the Respondents — The Solicitor-General for Scotland (Ure, K.C.)—C. D. Murray. Agents—Biggart, Lumsden, & Company, Glasgow — Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—Leslie, Field, Brownjohn & Company, London.

HIGH COURT OF JUSTICIARY.

Tuesday, July 10.

(Before the Lord Justice-Clerk, Lords M'Laren and Pearson.)

ROWLAND *v.* DEAS.

Justiciary Cases — Licensing Acts — Procedure—Licensing (Scotland) Act 1903 (3 *Edw. VII, cap.* 25), *sec.* 91, (2) *and* (3)—*Complaint Brought under Burgh Police Act* 1892 (55 *and* 56 *Vict. cap.* 55), *and not under Summary Jurisdiction Acts — Competency.*

The Licensing (Scotland) Act 1903, section 91, provides—"(1) Every person who shall commit any breach of certificate, or who shall in any other manner offend against this Act, shall be prosecuted . . . (2) Breaches of certificate and other offences in this section referred to, may, unless by this Act otherwise specially directed or authorised, be prosecuted and tried as police offences before and by any magistrate or magistrates of any royal, parliamentary, or police burgh, officiating in any Court for the trial of police offences under the provisions of any local or general Police Act, in the same way and manner, in all respects, as may be provided for the trial of police offences by any such local or general Police Act in force in the county, district, or burgh, where the defender shall reside or the offence shall have been committed . . . (3) Every offence committed against this Act shall, except where inconsistent with the provisions and conditions of this Act, be tried and determined under the provisions of the Summary Jurisdiction Acts. . . ."

Held in a suspension that in spite of the terms of subsection (3) of section 91 it was competent to bring a complaint charging an offence against the Act, proceeding under the Burgh Police (Scotland) Act 1892 and not under the Summary Jurisdiction Acts, an option having been given by subsection (2).

Justiciary Cases — Licensing Acts — Complaint—Relevancy—Licensing (Scotland) Act 1903 (3 *Edw. IV, cap.* 25) *sec.* 70 (1)—*Using Obscene Language while Drunk —Omission of "to the Annoyance of" Any Person.*

The Licensing (Scotland) Act 1903, section 70 (1), *inter alia*, provides—"Every person who in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises, behaves when drunk in a riotous or disorderly manner, or while drunk uses obscene or indecent language to the annoyance of any person, shall be liable on summary conviction to" a penalty.

Held in a suspension that a complaint in which it was charged that the accused did "behave while drunk in a riotous

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and disorderly manner, swear, shout aloud, and use obscene language," but which omitted "to the annoyance of" any person, was irrelevant.

The Licensing (Scotland) Act 1903 (3 Edw. IV, cap. 25), secs. 70 (1) and 91 (2) (3), so far as required, are quoted *supra* in rubric.

John Rowland, carter, residing at New Road, Coldstream, was charged in the Police Court at Coldstream with a contravention of the Licensing (Scotland) Act 1903, section 70 (1). The complaint against him, dated 18th December 1905, was in these terms—"Under the Burgh Police (Scotland) Act 1892, and the Licensing (Scotland) Act 1903. Unto the Magistrates of the Burgh of Coldstream. The complaint of William Alexander Deas, burgh prosecutor, *Humbly Sheweth*,—That John Rowland, carter, residing in New Road, Coldstream, did, on Thursday, 14th December 1905, in New Road, and in the lane leading to the river Leet, within the burgh of Coldstream, behave while drunk in a riotous and disorderly manner, swear, shout aloud, and use obscene language, and has thereby been guilty of an offence contrary to section 70 (1) of The Licensing (Scotland) Act 1903, whereby the said accused is liable to a fine not exceeding forty shillings, and failing payment to imprisonment for a period not exceeding thirty days, or, in the discretion of the Court, to imprisonment for a period not exceeding thirty days, and the said John Rowland was convicted of similar offences under this Act before the Police Court at Coldstream on 25th March, 24th October, and 4th December 1905. May it therefore please your Honours to grant warrant to officers of law to summon and bring the said accused before the Magistrate officiating in the Police Court of the said burgh to answer to this complaint; to cite witnesses for both parties; to convict the accused of the aforesaid offence; and to adjudge said accused to suffer the penalties provided by the said Licensing Act."

On 22nd December there had been served upon Rowland a notice or "service copy summons" in the following terms:—"Under the Burgh Police (Scotland) Act, 1892. Burgh of Coldstream. To John Rowland, carter, New Road, Coldstream. You are hereby summoned to appear personally in the hall of the Mechanics' Institution, before the magistrate officiating in the Police Court of the burgh of Coldstream, upon the 27th day of December 1905, at 11 a.m. o'clock, to answer a complaint at the instance of the burgh prosecutor, charging you with, on Thursday 14th December 1905, in New Road, and in the lane leading to the river Leet, within the burgh of Coldstream, being drunk and behaving in a riotous and disorderly manner, swearing, shouting aloud, and using obscene language: and you have been previously convicted of similar offences before the Police Court, Coldstream, on 25th March, 24th October, and 4th December, all in the year 1905 . . ."

On 27th December the Magistrates found the accused guilty of the offence charged and sentenced him to ten days' imprisonment. A further sentence under the Inebriates Act 1898 was also passed on him.

Rowland brought a bill of suspension, in which, after narrating the service on him of the notice or "service copy summons" bearing to be brought under the Burgh Police (Scotland) Act 1892, he stated:—"2. When the complaint itself, however, was read in the Police Court of the burgh of Coldstream on the 27th December 1905, it was found to be brought under the Burgh Police (Scotland) Act 1892, and the Licensing (Scotland) Act 1903, whereupon the complainer's agent objected (1) to the competency and relevancy of the complaint, in respect that the service copy does not charge the complainer with having committed a common law crime or a statutory offence, and (2) that the complaint should have been brought under the Summary Jurisdiction Acts as provided for by section 91 of the Licensing (Scotland) Act 1903, which objections were repelled. 3. In the summons or notice served upon the complainer he is not there charged with any crime or offence, although it is therein stated that he has been previously convicted of 'similar offences.' 4. As disclosed by the principal complaint, the charge made against the complainer was for contravening sub-section 1 of section 70 of the Licensing (Scotland) Act 1903, and should therefore, as provided for by Part VI—Legal Proceedings—sub-section 3 of section 91 of that Act, been brought under the Summary Jurisdiction Acts. The ignoring of this statutory provision was to the prejudice of the complainer, as he could not discover from the summons or notice served upon him what the charge really was, as no crime *per se*, or statutory offence, was libelled, whereas had the complaint been brought under the Summary Jurisdiction Acts, as provided for, a full copy of the complaint and warrant to cite would have, along with the citation, been served upon the complainer . . . 6. The said conviction and sentences, or warrants or orders, or one or other of them, are illegal and unwarrantable, in respect that the complaint was not brought under the provisions of the Summary Jurisdiction Acts, in terms of sub-section 3 of section 91 of the 'Licensing (Scotland) Act 1903 . . ."

The complainer pleaded, *inter alia*—"The conviction, sentences, warrants, or orders complained of should be suspended as craved, with expenses, in respect (1) that the offence charged contravening sub-section 1 of section 70 of the Licensing (Scotland) Act 1903, should, in terms of sub-section 3 of section 91 of that Act, have been tried and determined under the Summary Jurisdiction Acts; (2) that the complainer was not served with a copy of the complaint and warrant as provided for by these Acts. . . ."

Argued for the complainer—(1) The terms of the Licensing (Scotland) Act, section 91 (3), were imperative, and directed that all offences committed against the Act should be tried under the provisions of the Summary Jurisdiction Acts. The prosecution had not conformed to these provisions.

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This had prejudiced the complainer, for he had not received the notice of the offence charged which he would have, and so was unable to meet it. (2) The complaint did not contain a relevant averment of an offence either at common law or under the statute. The use of obscene language was no offence unless in so far as it was made so by section 70 (1) of the Licensing Act 1903, and that was only when done "to the annoyance of any person." There was no averment here that it was "to the annoyance of any person."

Argued for the respondent—(1) The offence could competently be charged under the Burgh Police Act. The terms of section 91 (3) were not imperative, as an option was given in section 91 (2) of proceeding under the Burgh Police Act—*Lambie* v. *Mearns*, March 20, 1903, 4 A. 207, 5 F. (J.) 82, 40 S.L.R. 574. The interpretation sought to be set upon sub-sec. (3) by the complainer would render sub-sec. (2) nugatory. Section 3 of the Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), provided that in police prosecutions it should be optional to use either the forms of the Summary Jurisdiction Acts or of General or Local Police Acts. (2) The complaint was relevant. It charged the accused with behaving while drunk in a riotous and disorderly manner, which was an offence under the section. The words, "swear, shout aloud, and use obscene language" were only explanatory of the riotous and disorderly conduct. The complaint would have been relevant without the addition of these words.

LORD JUSTICE-CLERK—There is no doubt whatever that branches (2) and (3) of section 91 of the Licensing (Scotland) Act 1903 are extremely awkwardly expressed, but I think that sub-sec. (2) of the section makes it competent to proceed under the Burgh Police Act 1892, and I would not be for setting aside the conviction on that ground.

But it seems to me that the conviction is certainly bad on the simple ground that the qualification of the statute, "to the annoyance of any person," has not been met by any statement in the complaint that there was such annoyance. To use obscene or indecent language is not an offence under the statute unless it is done "to the annoyance of any person," and the omission of these words is fatal to the complaint, and the conviction therefore cannot stand.

LORD M'LAREN—I am of opinion that the 91st section of the Licensing (Scotland) Act 1903 gives alternative modes of proceeding, viz., either under the Burgh Police Act 1892, or under the Summary Jurisdiction Acts. Unless it is meant to give such an alternative I could not attach any meaning to the sub-sections (2) and (3), for unless read in this way they are mutually destructive.

On the question of the relevancy of the complaint, whenever an act may be criminal or not criminal according to the circumstances under which the act is done, it is necessary in the complaint to express the conditions which make the act criminal. In this case the act charged is criminal only when done "to the annoyance of any person," and in the absence of these necessary words the complaint is not relevant.

LORD PEARSON—I agree, but I desire to guard myself against appearing to hold that the notice of the nature of the complaint given by what is called the "Service Copy Summons" is sufficient.

The Court quashed the conviction.

Counsel for the Complainer — D. M. Wilson. Agents—Bryson & Grant, S.S.C.

Counsel for the Respondent — Pringle. Agents — Nisbet, Mathison, & Oliphant, S.S.C.

Tuesday, July 10.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Pearson.)

PRITECA *v.* H. M. ADVOCATE.

Justiciary Cases—Complaint—Relevancy—Writing Threatening Letters with View to Extort Money—Demand for Money on Separate Slip not Specifically Stated to have been Attached to Letter.

An indictment charged the accused "that you did write or cause to be written a threatening letter . . . of which the following is the English translation '. . . .' on slip 'I will await your cheque for £50 by to-morrow Thursday morning, not later,' and did put said letter into an envelope addressed to . . . And all this you did (1) with intent to put said . . . in a state of alarm and of apprehension of injury to his fortune and reputation; and (2) for the purpose of extorting money from him."

Objection was taken to the relevancy on the ground that the first head set forth no crime and no circumstances were set forth to support the second inasmuch as nothing was said of the "slip" having been written, posted, or received.

Held in a suspension that the indictment set forth a relevant charge of an attempt to extort money by threats.

Justiciary Cases—Jurisdiction—Suspension—Competency—Trial by Sheriff and Jury—Suspension on Ground that Competent Evidence was Excluded by Sheriff.

The High Court of Justiciary can entertain a suspension of a sentence pronounced by a Sheriff on the verdict of a jury, taken on the ground that the Sheriff had excluded competent evidence.

Burns & Hart v. *Young*, December 19, 1856, 2 Irv. 571, and *Quarns* v. *Hart*, June 4, 1866, 5 Irv. 251, *commented on.*

Justiciary Cases—Evidence—Competency—Charge of Attempt to Extort Money by Threatening Letters—Evidence to Show

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Previous Letter to which Slip Containing Demand Alleged to Belong Contained Legitimate Request.

In the trial before a Sheriff and jury of a person charged with sending a threatening letter with a view to extort money, the demand having been on a slip separate from but attached to the letter, the accused sought to establish that the slip was attached not to the letter libelled but to a previous one legitimately asking for money. On his further attempting to prove that the sum asked in such previous letter was due him objection was taken and sustained.

Held in a suspension that the proposed evidence was rightly excluded and suspension *refused*.

On 23rd March 1906 Charles Priteca, general merchant, 14 Roxburgh Street, Edinburgh, having been found guilty by a majority of a jury under a criminal libel in the Sheriff Court at Edinburgh, was sentenced to three months' imprisonment. He brought a bill of suspension.

The charge in the indictment was "that on 1st November 1905, at 14 Roxburgh Street aforesaid or elsewhere in Edinburgh or Leith, you did write or cause to be written a threatening letter in the Yiddish language, of which the following is the English translation—'Solomon, I have received your ultimatum. You have made a fool of me and you have decided that I shall not exist. I will fight for my existence. However I will try something else and hope that I will manage before Saturday to paralyse you so far as Leith is concerned. Up to now you have fought a woman but now it is a man. You have given information against an honest man, a Mr Davidson, and you have nearly ruined him, a shame and a disgrace. Of course the Liverpool priest is at the bottom of everything and him you will have to thank. We remain enemies from to-day.' 'Ezekiel'—on slip—'I will await your cheque for £50 by to-morrow Thursday morning not later;' and did put said letter into an envelope addressed 'Mr S. Phillip, 14 Tolbooth Wynd, Leith,' which letter was meant and intended by you for Solomon Phillips, 14 Tolbooth Wynd, Leith, and time above libelled, at the General Post Office or at some other Post Office or letter box in Edinburgh, did send said letter to him by posting it enclosed in said envelope addressed as aforesaid, and said letter was thereafter duly delivered through the Post Office to the said Solomon Phillips, and the said letter and envelope are Nos. 12 and 13 of the list of productions lodged herewith; and further, time and place first above libelled, in pursuance of the threat contained in said letter, you did write or cause to be written a circular in the following terms—'*Leith, 1st November* 1905. Fellow Workers and Friends. The sender of this circular begs to ask all respectable Citizen and Working Men of Leith and Surrounding districts to keep their wives and daughters from calling at the Remnant Shop No. 14 Tolbooth Wynd, Leith, owned by S. Phillips, as this man has been and is taking immoral liberties with a good number of his customers, including sender's own friend, whose family lives are utterly ruined. Yours respectfully A Victim. Please note the address No. 14 Tolbooth Wynd, Leith,'—and did put said circular into an envelope addressed 'Mr S. Phillips, 14 Tolbooth Wynd, Leith,' and on 1st or 2nd November 1905, place second above libelled, did send said circular to the said Solomon Phillips by posting it enclosed in said envelope addressed as aforesaid, and the said circular was thereafter duly delivered through the Post Office to him and was meant and intended by you to induce the belief on his part that unless the demand by you for £50 made as above libelled was complied with, said circular would be issued in Leith and surrounding districts and his business paralysed, and the said circular and envelope are Nos. 15 and 16 of the list of productions lodged herewith. And all this you did (1) with intent to put the said Solomon Phillips in a state of alarm and of apprehension of injury to his fortune and reputation; and (2) for the purpose of extorting money from him."

In the bill of suspension the complainer stated, *inter alia*, as follows:—"(2) At the first diet, which was held on Monday 12th March 1906, counsel for the complainer objected to the relevancy of the libel, *inter alia*, on the following grounds, viz.—(1) That the complainer was not charged under the first head of the libel with any crime known to the law of Scotland; and (2) that no facts and circumstances relevant to infer the complainer's guilt under the second head of the libel had been set forth, in respect it was not averred that the slip libelled on was written by or on behalf of the complainer, nor that it was ever sent at any time or in any manner by the complainer to the said Solomon Phillips, nor that it was ever received by the latter. The Sheriff (Maconochie) repelled the objections and found the libel relevant; and the complainer thereafter pleaded not guilty. . . . (4) During the cross-examination of Solomon Phillips, the first witness for the prosecution, counsel for the complainer, with the view of laying the foundation for evidence to prove that the words libelled as 'on slip' were not sent with the letter libelled to Solomon Phillips, but on a separate piece of paper enclosed with an earlier letter containing a proper and legitimate request for a sum of £50 due by him to the complainer, asked the witness whether the said piece of paper was not received by him in another and earlier letter of the same date, in which the complainer urged him to make payment of the foresaid sum of £50. Objection was taken to the question so far as it related to the contents of the letter, and the Sheriff, although he was informed of the purpose of the question as aforesaid, sustained the objection and intimated that no evidence would be admitted to prove that the said piece of paper had been sent in a letter to the effect above mentioned, making a request for the said sum of

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money. (5) The complainer was gravely prejudiced by the said exclusion of evidence. He offered, and was able to prove, that a piece of paper containing words somewhat similar to those libelled as 'on slip,' and which he admitted to have written, was sent by him to Solomon Phillips with a letter which properly and legitimately requested payment of a sum of £50 due to him by Solomon Phillips, but that no such piece of paper was sent with the letter libelled. Owing to the exclusion of the said evidence, the jury, by a majority, returned a verdict of guilty as libelled. (6) In further cross-examination of the same witness counsel for complainer, with the view of leading evidence to remove the ambiguity in the opening sentences of the letter libelled, and explain the meaning thereof, asked whether there had previously been a disagreement and quarrel between the witness and complainer. The question was objected to, and, notwithstanding that the purpose of the question was explained as after mentioned, the objection was sustained, and the Sheriff intimated that no questions following on that line would be allowed. The complainer was thereby prevented from proving that no such threat to paralyse the business of Solomon Phillips as is alleged in the libel was made or intended by him, but that the letter libelled was solely directed against what the complainer believed was a nefarious scheme contrived by the said Solomon Phillips, and partly executed, for the purpose of driving the complainer out of business in Leith. The complainer was thus seriously prejudiced in his defence."

The respondent in his answers, *inter alia*, stated — "(4) Admitted that, during the cross-examination of the said Solomon Phillips, counsel for the complainer asked the witness whether the said slip had not been received by him as part of another and earlier letter from the complainer than that of 1st November 1905, mentioned in the indictment, said earlier letter being of same date, and containing a request for a sum of £50; and also whether the sum of £50 mentioned in the said earlier letter was a sum due by the witness to the complainer. Admitted that this respondent objected to the second part of the question, on the ground that if, as was proposed to be proved by the complainer, the said slip formed part of an earlier letter to the witness, not libelled, and not a part of the letter of 1st November 1905 libelled, it was irrelevant to the issue to inquire whether the sum of money of which the complainer asked payment in the earlier letter was a sum due to him by the witness or not. Admitted that this objection to the question was sustained by the Sheriff. The complainer's counsel was allowed to ask, and did ask, the witness whether the said slip, instead of being received by him as a part of the letter of 1st November 1905 mentioned in the indictment, was in fact received by him as part of an earlier letter of same date from the complainer asking for money; and the witness in answer deponed that he had received an earlier letter from the complainer asking for money, but that the said slip was not received by him as part of said earlier letter, but was received by him as part of the letter of 1st November 1905 mentioned in the indictment, having been enclosed along with and attached to the sheet of paper forming the remainder of the production, No. 12 of the said list. Admitted that the Sheriff, in sustaining the objection as above mentioned, intimated that no evidence would be admitted to prove that the money referred to in the earlier letter was money due by the witness to the complainer."

The complainer pleaded—"1. The sentence complained of should be suspended and liberation granted, with expenses, in respect (1) that the libel is irrelevant. . . . 2. The complainer is entitled to suspension and liberation in respect that evidence competent to rebut the charge in the libel was tendered at the trial and refused as above set forth."

Argued for the complainer—(1) The indictment contained no relevant averment of a crime known to the law of Scotland. There was no averment that the words libelled as being "on slip" were part of the letter complained of, or that the "slip" had been put in an envelope and posted to Phillips. These words were the only words which could found a charge of an attempt to extort money. The sending of the letter could not be made the foundation of a criminal charge apart from the attempt to extort money. (2) Legitimate evidence had been excluded. The complainer had attempted to prove that the "slip" formed part of an earlier letter in which he properly and legitimately claimed payment of £50 due by Phillips to himself. The Sheriff had refused to admit the evidence. (3) Such refusal was a good ground for review —*Burns & Hart* v. *Young*, December 19, 1856, 2 Irv. 571; *Quarns* v. *Hart*, June 4, 1866, 5 Irv. 251.

Argued for the respondent—(1) The indictment read as a whole stated a relevant case of an attempt to extort money by threats—*H. M. Advocate* v. *Miller*, November 24, 1862, 4 Irv. 238. The indictment would have been perfectly good without the words "on slip;" these were merely explanatory of the form in which the communication was made. (2) It was not competent to review the decision of the Sheriff on a matter of law, and the complainer had failed to bring his case up to one of oppression—*Burns; Quarns*, above cited. There was no provision for a note of objections to questions in a trial by sheriff and jury—9 Geo. IV, cap. 29, sec. 17. (3) In any case the Sheriff had rightly excluded the evidence in question.

LORD JUSTICE-CLERK—I cannot say that this indictment is very happily drawn. It contains in some respects unnecessary amplifications and alternatives, and it is somewhat loose in its description of this document, which is referred to as the "slip." Still the words are sufficient to indicate what is meant, viz., that the letter set forth in the indictment was written on two sepa-

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rate pieces of paper. Accordingly I have no difficulty in holding that the libel is relevant.

The only remaining point is that the Sheriff fell into such error in refusing competent evidence as to furnish ground for suspension by this Court. It has been decided that the admission of incompetent evidence is a ground for suspension, and I cannot doubt that the rejection of competent evidence would equally be a ground for suspension. But the question is, whether on the statement before us there was a rejection of competent evidence. I have no doubt that the Sheriff was right in rejecting the question in the form in which it was proposed to be put, because I am satisfied that it was not competent to prove that a sum of £50 was resting-owing to the complainer by Solomon Phillips. The Sheriff did allow another question as to the receipt of a previous letter from the complainer. In allowing that evidence the Sheriff went as far as he could competently go. I think therefore that the suspension should be refused and a warrant granted for commitment of the complainer.

LORD M'LAREN—I agree with all the Lord Justice-Clerk has said regarding the particular objections in this case, and if I add anything it is only as to the limits of the jurisdiction of this Court in a suspension following on a verdict in a sheriff and jury case. The question is not a new one, and the subject is fully treated in Hume's Commentaries, vol. ii, p. 514, as follows—"In judging of suspensions the question may sometimes arise concerning the power of the Court of Justiciary to set aside a sentence which proceeds on the verdict of an assize. And here, as in the case of a verdict returned in any trial before themselves, there seems to be room for a distinction. If the verdict is challenged on this ground only that it is not warranted by the evidence in the trial, certainly the Lords can pay no regard to such a plea. To settle the fact is the peculiar province of every assize, in what court soever the trial be; and in the process of review, equally as in receiving a verdict of assize in their own Court, the Lords of Justiciary must in that respect take the face of the verdict for their rule and hold it to be the truth." Then proceeding to consider the case of objections to the admissibility of evidence and the like, the author says—"In moving such a challenge the suspender does not impeach the conclusion which the assize have come to on the proof, such as it was; he impeaches the skill and the proceedings of the judge, who has not laid the lawful and proper materials before the assize for enabling them to form a sound judgment on the case."

This passage has reference to the proceedings in a Sheriff and jury trial under the common law when the evidence was preserved and entered in the Sheriff Court Books. This procedure has been shortened by the Act 9 Geo. IV, cap. 29, section 17 of which provides—"That it shall and may be lawful for the High Court of Admiralty and for the Court of the Sheriff respectively to proceed in, try, and determine all causes and prosecutions for crimes before them, where the trial is by jury, by verdict of such jury, upon examining and hearing the evidence of the witness or witnesses in in any such cause or prosecution *viva voce*, without reducing into writing the testimony of any such witness or witnesses in same manner and according to the same rules as are observed in trials before the Court of Justiciary; and it is hereby provided that the judge trying such causes or prosecutions shall preserve and duly authenticate the notes of the evidence taken by him in such trial, and shall exhibit the same, or a certified copy thereof, in case the same should be called for by the Court of Justiciary."

The fact that notes of evidence are required to be taken, and that provision is made for their production to the Court of Justiciary, shows that the right of review by this Court remains.

The two cases quoted in argument—*Burns & Hart* v. *Young*, December 19, 1856, 2 Irvine 571, and *Quarns* v. *Hart*, June 4, 1886, 5 Irvine 251—are both consistent with the law laid down by Hume. In *Quarns'* case, while the Court rejected the ground of suspension, namely, that the Sheriff in his charge to the jury had laid down bad law, both the Lord Justice-General (M'Neill) and the Lord Justice-Clerk (Inglis) took pains to point out the distinction between what was said by the Judge to the jury and a question as to the admissibility of evidence or objections of a like nature stated in the course of the proof, on the ground that in the first case there is no provision made for notes being taken of the charge, and therefore no material for this Court to proceed on, while in the second case notes must be taken and may be made available for the use of this Court.

While we should be entitled to deal with the question of refusal of evidence in this case, I am of opinion that the complainer can take no benefit from this power, because I think that the Sheriff has rightly decided the question.

LORD PEARSON—I agree.

The Court refused the suspension.

Counsel for the Complainer—Guthrie, K.C. —Mercer. Agent—D. Maclean, Solicitor.

Counsel for the Respondent—Orr, K.C.—T. B. Morison. Agent—W. S. Haldane, W.S., Crown Agent.

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Monday, July 16.

(Before Lord M'Laren, Lord Pearson, and Lord Mackenzie.)

BLACK *v.* CLAXTON

Justiciary Cases—Conviction and Sentence—Validity—Statute Enacting Liability to Fine or Imprisonment on Conviction—Dismissal with Admonition—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 70.

A statute provided that an accused should, on conviction of an offence, be liable to a penalty not exceeding a certain amount or to imprisonment not exceeding a certain period. An accused was convicted and admonished.

Held, on a suspension, that the conviction and sentence was not conform to statute, and conviction *quashed*.

Fraser v. *Neilson*, February 6, 1903, 4 A. 139, 5 F. (J.) 51, 40 S.L.R. 534, and *Gardner* v. *Dymock*, January 9, 1865, 5 Irv. 13, *followed*.

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), section 70, makes provision that parents failing to provide their children with elementary education may be proceeded against by the procurator-fiscal, "and on conviction the parent shall be liable to a penalty not exceeding twenty shillings or to imprisonment not exceeding fourteen days."

Duncan Black, clothier, Tarbert, Lochfyne, was charged in the Justice of the Peace Court at Lochgilphead with a contravention of the Education Acts. The complaint against him was as follows:—"That Duncan Black, clothier, Tarbert, Lochfyne, has contravened the Education (Scotland) Acts 1872 to 1893, and the Education (Scotland) Act 1901, particularly section 1 of the Education (Scotland) Act 1901, in so far as the said Duncan Black has been for a period of at least one month immediately preceding the seventeenth day of February 1906, without reasonable excuse, failing to discharge the duty of providing, as required by said Acts, efficient elementary education in reading, writing, and arithmetic for Annie Black and Natalie Black, his children, residing with him, and who are both between five and fourteen years of age: Whereby, in terms of sections 70 and 71 of the Education (Scotland) Act 1872, the said Duncan Black is liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days, and is further liable to have expenses not exceeding twenty shillings awarded against him." He was convicted, the conviction and sentence being in the following terms:—"The Justices, in respect of the evidence adduced, convict the said Duncan Black of the contravention charged, and dismiss him with an admonition."

Black brought a suspension and pleaded—"The pretended warrant or sentence complained of being illegal and *ultra vires* ought to be suspended."

Argued for the complainer—Under section 70 of the Education (Scotland) 1872 it was necessary that a penalty should be imposed of fine or imprisonment. The admonition did not satisfy the terms of the Act, and therefore the conviction was bad—*Fraser* v. *Neilson*, February 6, 1903, 4 A. 139, 5 F. (J.) 51, 40 S.L.R. 543; *Gardner* v. *Dymock*, January 9, 1865, 5 Irv. 13; *Ferguson* v. *Thow*, June 30, 1862, 4 Irv. 196; *M'Callum* v. *Barrowman*, November 3, 1896, 2 A. 196, 24 R (J.) 15, 34 S.L.R. 58.

Argued for the respondent—The case of *Fraser*, cited for the complainer, was decided on a special provision of the statute under consideration with regard to the mitigation of penalties. In *Dymock's* case the Bench had been divided. The terms of the statute here in question did not make the imposition of a penalty essential. In any case the imposition of an admonition was equivalent to a penalty—*Brunfaut* v. *Neilson*, May 23, 1893, 3 W. 501, 20 R. (J.) 68, 30 S.L.R. 644.

LORD M'LAREN—The first objection stated against the conviction is that no sentence has followed the conviction in terms of the statute. The justices find the suspender guilty but dismiss him with an admonition. The statute founded on says that "on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days." If the point had been new I would have had great difficulty in deciding whether there was anything so substantial in an admonition by the justices as to amount to a sentence at all. The two leading decisions quoted do not seem to establish any distinction between a conviction followed by no punishment and one followed merely by an admonition. In my judgment there is no distinction, for if the statute prescribes a penalty of a definite nature, then to impose an admonition is not complying with the terms of the statute. It may well be that it is the policy of the Legislature in such cases to guard against the lieges being annoyed by frivolous prosecutions, by imposing substantial penalties which the prosecutor must be prepared to move for in case of conviction. But this is not a new question, and we have two decisions—*Fraser* v. *Neilson*, 4 Adam, 139, and *Gardner* v. *Dymock*, 5 Irvine 13, which are concurring decisions. *Gardner*, the earlier case, went to a court of Seven Judges, and although there was a dissent, it is the decision of a Court of great authority, and is binding on us. In that case the Judges were of opinion that a sentence not followed by imprisonment or fine was not a sentence under the statute founded on. In the case of *Fraser* the same view was taken, and while an attempt was made to distinguish between the two cases on the ground of the difference of expression in the two statutes, it does not appear that any of the Judges attached importance to that distinction, and Lord Adam clearly expresses the view that the objection in both cases was the same—namely, that "there was a con-

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viction of an offence, but neither penalty nor imprisonment was awarded." On the authority of these cases I am of opinion that this is not a sentence in terms of the Education Act 1872, section 70, because the conviction was not followed by a sentence of fine or imprisonment. Admonition is not a serious punishment, and at any rate it is not the punishment prescribed by the Legislature.

LORD PEARSON—I agree. For my own part I should have had some doubt on the point in question, but I think we should follow the decisions to which we were referred.

LORD MACKENZIE—I concur in deference to the two cases quoted, though I share the doubt expressed by Lord Pearson.

The Court quashed the conviction.

Counsel for the Complainer—MacRobert. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for the Respondent—Guthrie, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Monday, July 16.

(Before Lord M'Laren, Lord Pearson, and Lord Mackenzie.)

STRATHMORE AUCTION COMPANY, LIMITED *v.* MILLAR.

Justiciary Cases—Small Debt Appeal—Relevancy—"Malice and Oppression"—"Deviations in Point of Form from the Statutory Enactments"—Capricious and Unjustifiable Exercise of Jurisdiction—Small Debt (Scotland) Act 1837 (7 *Will. IV and* 1 *Vict. cap.* 41), *sec.* 31.

In a debts recovery action at the instance of A against B, arrestments were used on the dependence of the action. B raised a small debt action against A claiming damages for the wrongous, nimious, and oppressive use of the said arrestments, but in it he made no averment of malice. Leaving the debts recovery action still pending, the Sheriff-Substitute proceeded to consider the small debt action and gave judgment therein for B. He further continued the debts recovery action, although the debt of which that action was the subject was admitted and a sum of money had been consigned to meet it. *Held* upon appeal that though there had been capricious and unjustifiable exercise of jurisdiction, there was not such unjustifiable or unwarrantable abuse of process as would amount to the grounds of review under the Small Debt (Scotland) Act 1837, section 31.

The Small Debt (Scotland) Act 1837, section 31, which provides for an appeal to the High Court of Justiciary, enacts—"Provided always that such appeal shall be competent only when founded on the ground of corruption, or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff. . . ."

This was an appeal by the defenders from a judgment of the Sheriff-Substitute (CAMPBELL SMITH) at Dundee, in an action in the Small Debt Court there at the instance of James Miller, cattle dealer, Back Street, Dundee, against the Strathmore Auction Company, Limited, Forfar. The circumstances of the case as set forth in the appeal were as follows:—"On 5th December 1905 the respondent took out a summons against the appellants (who were therein stated to be subject to the jurisdiction of the Court *ex reconventione*) in the Small Debt Court at Dundee, craving decree for the sum of £12, conform to account prefixed to the summons. The said account is in the following terms:—'1905, Dec. 5.—To loss and damage sustained by the pursuer in consequence of arrestments on the dependence having been used wrongously, nimiously, and oppressively by the defenders on 20th November 1905 against pursuer in the hands of the North British Railway Company, Dundee, upon a debts recovery action in this Court at the instance of the defenders against the pursuer for £29, whereby cattle, sheep, and bestial belonging to the pursuer to the value of £80 were detained in the yard of the said railway company during the whole of the night of the 20th and the morning and afternoon of the 21st November 1905, in severe weather, in consequence of which the said cattle, sheep, and bestial lost the market in Dundee on 21st November 1905, and their value was deteriorated by the treatment received. Damages restricted to £12.' The summons, with copy of said account, was served by post addressed to the appellants at Forfar. At the calling of the case on 12th December 1905, the appellants, by their agent, appeared and pled that the action was incompetent, the appellants, who were within the Forfar district of the county, not being subject or amenable to the jurisdiction of the Small Debt Court at Dundee. The Sheriff-Substitute (John Campbell Smith) continued the case to 19th January 1906 for proof. The debts recovery action referred to in said account was raised at Dundee for £29, 14s. 2d., conform to the said account. An arrestment in security was, in virtue of a warrant contained in that summons, used in the hands of the North British Railway Company. The sheriff officer's execution of his arrestment, which is written on the summons, bears that he arrested in the hands of the railway company, *inter alia*, 'all goods, cattle, and effects in the custody of the said arrestees belonging to the said defender, and that to an amount or extent not exceeding the value of £35, all to remain under sure fence and arrestment at the aforesaid complainers' instance until due consignation be made, or until sufficient

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caution be found as accords of law.' The schedules of arrestment correspond with the terms of the said execution. The debts recovery action was called in Court on 29th November 1905, when the respondent, by his agent, appeared and moved for a continuation for a week to enable pleas to be stated for the defence. On or about 6th December 1905 the following note of plea was lodged by the agent of the respondent:—'Without prejudice the defender tenders £16, 13s. 8d. in full settlement of the pursuer's claim. *Quoad ultra*, the claim is denied.' No counter claim was lodged for the respondent. The appellants by their agent pled that 'the plea for the defender is irrelevant and wanting in specification,' and called upon the respondent to specify the items in the account sued for which he disputed. Although the correctness of that account was practically admitted at the bar, the Sheriff-Substitute, on 13th December 1905, continued the case to 19th January 1906 for proof. On 17th January 1906 Messrs Reid, Johnston, & Co., solicitors, Dundee, the agents for the respondent, wrote Messrs Pollock & Smith, solicitors, Dundee, the agents for the appellants, stating 'it will be unnecessary for you to lead proof on Friday first in this case, as, in order to save expense, our client admits each item of the account sued for, under reservation and without prejudice to his counter claims.' At the Court on 19th January 1906 said letter was produced and lodged in the process, and the appellants' agent moved for decree and warrant to uplift on account thereof the sum of £25, consigned as after mentioned. The Sheriff-Substitute refused that motion *in hoc statu*, and proceeded with the small debt case now under appeal, and another small debt case for £1, 0s. 6d. between the same parties.

"After proof in these cases he repelled the plea of no jurisdiction, and granted decree against the appellants for £1, with £1, 10s. expenses, in the case under appeal, and for 12s., with 7s. expenses, in the case for £1, 0s. 6d.

"The appellants' agent then duly moved the Sheriff-Substitute, in terms of the Small Debt Act of 1837, section 31, to mark the documents produced, and to note the names of witnesses on the summons. The Sheriff-Substitute at first declined to do so, but has since marked some of the documents and signed a separate note (lodged in the process at his suggestion) of the witnesses.

"The appellants' agents, immediately after decrees had been given in the small debt actions, again moved the Sheriff-Substitute for decree in the debts recovery case. That motion was not granted, and (although there was no reason whatever for delay) the case was continued till 24th January. On that date the appellants' agent again moved for decree, but decree was still not granted, and the case was continued till 31st January.

"The arrestment in the debts recovery case was laid on between four and five o'clock afternoon on 20th November 1905, and on the forenoon of the following day it was loosed in the Sheriff Clerk's Office on consignation of only £25, although the debt amounts to £29, 14s. 2d. The loosing was entirely incompetent and groundless, and in direct breach of the provisions of section 5 of the Debts Recovery Act (incorporating section 8 of the Small Debt Act), but the Sheriff Clerk pleads the authority of the Sheriff-Substitute for what was done. The Sheriff-Substitute from the bench, at the verbal request of the defender's agent, stated that the arrestment would be loosed on consignation of £25, notwithstanding the protest of the appellants' agent, who had got no notice that the case was to be mentioned, but happened to be in the Small Debt Court at the time.

"The appellants conceive themselves aggrieved by the said judgment for £1, with £1, 10s. of expenses, in said action for £12, and now complain thereof, and they seek relief against the same for the following among other reasons, to be stated at the hearing of the appeal:—(1) The action is incompetent, the appellants not being subject to the jurisdiction of the Small Debt Court at Dundee. See 1 Vict. cap. 41, section 26. (2) The judgment complained of is malicious and oppressive on the part of the Sheriff-Substitute. The evidence adduced with reference to the use of the arrestment consisted of the schedules of arrestment, and the execution of arrestment annexed to the debts recovery summons. These were duly produced, and are unexceptionable. The procedure was quite regular, the debt was due, and the extent of the arrestment was reasonable. There was no evidence whatever submitted in proof or support of the statement that the arrestments were wrongously, nimiously, and oppressively used."

On the hearing of the appeal the first ground of complaint on the question of jurisdiction was departed from, and the second only was insisted on.

Argued for appellants—The action of the Sheriff-Substitute amounted to such a failure in duty occasioning substantial injustice as to make his judgment open to review—*Gordon* v. *Mulholland*, January 26, 1891, 2 Wh. 576, 18 R. (J.) 18, 28 S.L.R. 333; *Bell* v. *Maxwell*, August 27, 1886, 1 Wh. 229, 24 S.L.R. 12. In the debts recovery action the arrestments could not have been oppressively used because the debt was due. The Sheriff-Substitute was not in a position to decide upon the question whether the arrestments were oppressive until the decision of the action in which they were used. He had, however, refused to grant decree in that action, but had decided the small debt action in favour of the respondent. Further, the small debt action was plainly irrelevant as there was no averment of malice. Such irregularity of procedure amounted to oppression—*Reid & Son* v. *Sinclair Brothers*, November 23, 1894, 1 A. 500, 22 R. (J.) 12, 32 S.L.R. 69.

Argued for respondent—The appeal did not fall under the statutory grounds of review. The Sheriff-Substitute had applied his mind to and decided the points raised

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in the small debt action. If he decided wrongly, this was an error of judgment, and his decision was not open to review—*Philip* v. *Forfar Building Co.*, September 16, 1868, 1 Coup. 87; *Allison* v. *Balmain*, October 25, 1882, 5 Coup. 137, 10 R. (J.) 12, 20 S.L.R. 24.

LORD M'LAREN—The course taken by the Sheriff-Substitute in this action of damages is open to grave objection. In the first place he sustains an action of damages for the wrongful use of arrestments, in which the element of malice does not appear. Now, it is perfectly well settled that no action of damages for the wrongous use of arrestments will lie unless the arrestments were used maliciously.

In the next place he proceeds to dispose of this action of damages for the wrongous use of arrestments while the action of debt in which the arrestments were used was pending. It is possible that there might be a case in which such an inversion of the ordinary procedure might be allowable, but this is not such a case. If the Sheriff-Substitute had allowed the action of damages to lie over until the decision of the action of debt, then if it appeared that the debt was due, and that the arrestments were *ex facie* regular, there could be no action for wrongous use of diligence. But by taking up the action of damages while the original case was still unsettled, the Sheriff-Substitute had to proceed to the consideration of the claim of damages upon an imperfect case—upon a case in which it was not yet ascertained whether the arrestments were used to secure a good debt or the contrary.

Then again we cannot help seeing that in this case there was no substantial ground for the action of damages, and if it were open to us to review the Sheriff-Substitute's judgment, either upon the merits or on defects of form and substance, I can have little doubt that we should reverse this decision. But the Small Debt Act is apparently framed on the assumption that an inferior judge might be capable of corruption or of oppression, but it was not to be supposed that he would act from mere caprice, and no remedy is provided against a decision or mode of proceedings which is dictated by caprice. I cannot help thinking that the case against the decree amounts to no more than that there has been a capricious and unjustifiable exercise of jurisdiction, and while there might be such an unjustifiable or unwarrantable abuse of process as would amount to the grounds of review under the statute I am not prepared to say that this is such a case. Accordingly, and with some regret, I move your Lordships to dismiss this appeal.

LORD PEARSON—This is certainly a very narrow case. There are grave reasons for thinking that there has been a miscarriage of justice; but I am unable to say that this case falls under any one of the statutory grounds of review.

LORD MACKENZIE—I share the regret expressed by your Lordship in the chair, and I agree with Lord Pearson in thinking that substantial injustice has been done. The arrestment was executed in a regular manner upon a proper warrant. In such a case malice must be averred and proved. The Sheriff-Substitute awarded damages for wrongous use of arrestments where the necessary averment of malice was awanting. But that at most leads to the conclusion that the Sheriff-Substitute has taken a wrong view on a point of law, and that is not a ground of review under section 31 of the Small Debt Act 1837.

The Court dismissed the appeal.

Counsel for Appellants—Graham Stewart—Hon. W. Watson. Agents—Guild & Shepherd, W.S.

Counsel for Respondent—Lippe. Agent—J. Pearson Walker, S.S.C.

Tuesday, July 17.

(Before Lord M'Laren, Lord Pearson, and Lord Mackenzie.)

ADAMS *v.* MACKENNA.

Justiciary Cases — Suspension — Mora — Acquiescence—Objection to Relevancy Not Taken in Court Below—Sentence Obtempered, and Delay of Eleven Weeks—Expenses.

An accused was charged in a Sheriff Court with a statutory offence. He took no objection to the relevancy, was convicted, and sentenced to pay a fine, which he did. Eleven weeks thereafter he raised a suspension based on an objection to relevancy, which went to the essence of the charge.

Held that the accused was not barred by *mora* and acquiescence, and that the suspension was competent, but *expenses* allowed to neither party.

Justiciary Cases—Complaint—Relevancy—Suspension—Essential Defect—Prevention of Crimes Act 1871 (34 *and* 35 *Vict. c.* 112), *sec.* 13—*Purchasing Old Metals in Less than Statutory Quantities—Omission to State Accused a "Dealer in Old Metals."*

By section 13 of the Prevention of Crimes Act 1871 a penalty is imposed upon "any dealer in old metals" who purchases certain metals in quantities less than those prescribed by the Act. A, described as "general dealer," was charged with an offence under the section in a complaint which did not aver that he was a "dealer in old metals."

Held in a suspension that the charge was irrelevant, and that the defect was essential, not merely in the *modus*, allowing of objection being taken in the High Court though not taken in the inferior Court.

The Prevention of Crimes Act 1871 (34 and 35 Vict. c. 112) enacts—section 13—"Any dealer in old metals who either personally or by any servant or agent purchases, receives, or bargains for any metal mentioned

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in the first column of the schedule annexed hereto, whether new or old, in any quantity at one time of less weight than the quantity set opposite each such metal in the second column of the schedule annexed hereto, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding £5. For the purposes of this Act 'dealer in old metals' shall mean any person dealing in, buying and selling old metal, scrap-metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only or together with second-hand goods or marine stores."

Schedule—

"Column 1.	Column 2.
List of Metals.	
. . . . .	
Copper, or any composite the principal ingredient of which is copper	56 lbs.
Brass, or any composite the principal ingredient of which is brass	56 lbs.
. . . . .	."

On the 20th of March 1906 Robert Adams junior, general dealer, Fullarton Street, Irvine, was charged in the Sheriff Court at Ayr with a breach of the Prevention of Crimes Act 1871. The complaint against him was in the following terms:—"That Robert Adams junior, general dealer, Fullarton Street, Irvine, did, on 12th February 1906, in Portland Street, in the burgh of Troon, or in Templehill, in said burgh, or in the premises in Union Street, in said burgh, occupied by Alexander Hamilton, dealer, purchase and receive from John Saul, labourer, residing at Loans, in the parish of Dundonald, Ayrshire, and Robert Davidson, labourer, residing in Templehill aforesaid, both now prisoners in the prison of Ayr, fourteen pounds of mixed brass and copper scrap-metal, being a quantity of less weight than the quantity—namely, fifty-six pounds—set opposite the metals brass and copper in the second column of the Schedule annexed to the Prevention of Crimes Act 1871, contrary to section 13 of that Act, whereby the said Robert Adams junior is liable to a penalty not exceeding £5, and in default of payment to imprisonment, in terms of the Summary Jurisdiction (Scotland) Act 1881, section 6."

The accused was on the same day found guilty and fined the sum of £4, which fine was thereupon paid.

On the 7th June, about eleven weeks after, Adams obtained warrant for serving a bill of suspension.

In the bill of suspension the complainer, *inter alia*, stated—"(4) Under the provisions of the section . . . only a person who is a 'dealer in old metals' in the sense of the statute is liable to conviction for purchasing or receiving the metals specified in the schedule annexed to the Act in quantities less than those specified in the said schedule. Nevertheless the complaint against the complainer did not describe the complainer as 'a dealer in old metals,' or charge him as such with having committed the offence in question. The complaint does not contain a charge of any offence under the statute, and the conviction following thereon is accordingly invalid."

Peter Fraser Mackenna, solicitor in Ayr, procurator-fiscal of Court, the respondent, lodged answers in which he, *inter alia*, stated—"Explained that the complainer was represented by an agent at the trial, who made no objection to the relevancy of the said complaint. Explained further that the fine imposed was paid without protest on the date of the conviction, and that the present bill of suspension is raised only after a lapse of eleven weeks from said date. . . . . Explained that the designation of the complainer as a 'general dealer,' and the libel of the said sale of old metal as contrary to section 13 of the said Act necessarily implied or involved an averment of the fact that the complainer was a 'dealer in old metals,' and this was clearly understood by the complainer and his agent, as they took no objection to the complaint on the ground that this fact was not expressly averred. Further, the complainer did not object to the evidence led for the respondent, which clearly proved that the complainer was a dealer in old metals. Explained that the complainer's defence, which the Sheriff held to be unfounded, was that he had purchased the said metal as part of a greater weight than 56 pounds. Had the complainer desired that his designation as 'general dealer' should be amplified into a statement that the complainer was a dealer in particular 'in old metals,' the prosecutor would at once have moved the Court to allow the complaint to be amended in that respect."

The complainer pleaded—"(1) The complainer not having been charged with any offence under the statute the conviction complained of should be suspended. (2) The complaint upon which the conviction followed having been irrelevant, suspension should be granted as craved."

The respondent pleaded—"The bill of suspension should be refused, in respect (*a*) The complaint relevantly alleges a contravention of the section of the statute libelled; (*b*) That no objection to the relevancy of the complaint was stated before the Sheriff; (*c*) The complainer is barred by his actings from founding upon the alleged defects in the specification of the complaint; (*d*) The said bill has not been timeously presented."

Argued for complainer—(1) The complaint was irrelevant in that it did not set forth an offence under the statute. The act charged was only an offence when committed by a "dealer in old metals," and there was no averment in the complaint that the complainer was such a person—*Eastburn* v. *Robertson*, November 16, 1898, 2 A. 607, 1 F. (J.) 14, 36 S.L.R. 67. This objection might competently be taken here though it was not taken in the court below; it was an objection not to specification of the *modus*, but one which went to the essence of the charge—*Zaino* v. *Malloch*, July 17, 1902, 3 A. 660, 4 F. (J.) 94, 39 S.L.R. 778; *Gladstone* v. *Stevenson*, June 2, 1902,

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3 A. 628, 4 F. (J.) 66, 39 S.L.R. 643. (2) There had been no undue delay in bringing the suspension. A suspension had been allowed after intervals varying from ten weeks to four years—*French* v. *Renton*, June 25, 1855, 2 Irv. 198; *Bonthorne* v. *Renton*, November 19, 1886, 1 White 279, 24 S.L.R. 75; *Jameson*, v. *Plimer*, June 2, 1849, J. Shaw 238.

Argued for the respondent—(1) The complaint was relevant; it gave the accused notice that he was a dealer, and that he was charged under the section. It was incompetent to take the objection here which had not been stated in the Court below. This objection if stated at the time could have been remedied—*Bolton* v. *Murdoch*, January 23, 1890, 2 White 410, 17 R. (J.) 22, 27 S.L.R. 269; *White* v. *Robertson*, July 17, 1891, 3 W. 245, 18 R. (J.) 56, 28 S.L.R. 894; *Stewart* v. *M'Niven*, February 2, 1891, 2 W. 627, 18 R. (J.) 36, 28 S.L.R. 352. (2) It must be held that the objection not having been taken at the time, was passed from when the sentence had been obtempered and there had been so long delay—*M'Farlane* v. *Pringle*, July 20, 1904, 4 A. 403, 6 F. (J.) 60, 41 S.L.R. 862; *M'Lure* v. *Douglas*, January 31, 1872, 2 Coup. 177, 9 S.L.R. 270.

LORD M'LAREN—I believe your Lordships are all of opinion that this suspension is not too late. No doubt it has always been expected as evidence of good faith on the part of the suspender that he should bring his suspension as soon as possible. The decisions as to the time within which a suspension may be brought discover a wide latitude, varying from ten weeks in the shortest period up to three or even four years in the longest. The present suspension has been brought after an interval of about eleven weeks, and is therefore very near the inferior limit of this somewhat elastic rule as to time. Considering that this conviction is one not of a crime but of a statutory offence which may be committed without moral fault, the suspender has a strong interest to clear it away, and we think it would be hard to dismiss the suspension on the ground of delay.

Next it is argued that objection cannot be taken in this Court to the relevancy of the complaint, as it was not taken in the Court below. There are many decisions as to whether an objection to relevancy can be offered here for the first time; the guiding rule seems to be that where the objection to the complaint is that it depends upon an irrelevant major premise—that is to say, that the complaint does not charge an offence known to the law—the objection may be taken at any time. But where the indictment or complaint is only imperfect in its statement of facts, or is incomplete, and its lack of relevancy consists in an omission to specify fully the mode or circumstances of what is admittedly an offence, then the objection must be taken in the Court below, where in general it may be cured by amendment of the libel. Where the objection is that the accused is not charged with an offence at all, it would be hard to put upon him the onus of making relevant the charge against himself.

Now my opinion is that this complaint does not amount to a relevant charge of any known offence. The fault which it charges is the purchase of a definite quantity of metal. Now this fault can only be an offence under the statute when committed by one who is a "dealer in old metals." To say that a man bought a certain quantity of metal is not to charge an offence, but only to set out a contract of sale. It is necessary in order to complete the sense to add the words "he (the defender) being a dealer in old metals," just as in charging an offence under the Medical Acts it is necessary to state in the complaint that the accused was or was not, as the case might be, a medical practitioner in terms of these Acts, or in the case of an offence under the Licensing Acts that he was not the holder of a licence—the status or occupation of the accused comes to be a condition of the alleged offence, and is of the essence of the charge.

I am therefore of the opinion that this suspension should be sustained.

LORD PEARSON and LORD MACKENZIE concurred.

The complainer moved for expenses.

LORD M'LAREN—Although we did not sustain the plea of *mora*, we think this suspension comes rather late, and that the objection stated might have been taken in the Court below. We therefore allow expenses to neither party.

The Court quashed the conviction.

Counsel for Complainer — Macmillan. Agents—Alex. Morison & Co., W.S.

Counsel for Respondent—Orr, K.C.—T. B. Morison. Agent—W. S. Haldane, Crown Agent.

Tuesday, July 17.

(Before Lord M'Laren, Lord Pearson, and Lord Mackenzie.)

TAYLOR *v.* SEMPILL.

Justiciary Cases—Process—Adjournment of Diet—Minute of Procedure not Specifically Adjourning Diet—Suspension—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 10, *and Sched. E* (2).

At the diet for the trial of a complaint charging an offence under the Licensing Acts, the witnesses for the prosecution, though cited, not appearing, the magistrates granted warrant to apprehend them and bring them up to give evidence on a certain date. The minute of procedure, however, had no record that the diet was adjourned to such date, but the accused was present and knew. The accused having been convicted and sentenced, brought a suspension.

Held that the adjournment not having been duly recorded the complaint fell, and conviction *quashed*.

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On 16th April 1906 Archibald Geddes Taylor, spirit merchant, Talbot Street, Grangemouth, was convicted in the Police Court of the said burgh under a complaint charging him with an offence under the Licensing Acts, and was sentenced to pay a fine of three guineas, and, in default of payment within fourteen days, to be imprisoned for twenty-one days. He brought a bill of suspension.

In the bill of suspension the complainer, *inter alia*, stated — "(Stat. 4) On 2nd April 1906 the complainer was served with a . . complaint at the instance of the respondent . . . The substance of the said complaint was that the complainer did on 13th February 1906, within his licensed premises in South Bridge Street, Grangemouth, in breach of his certificate, sell or supply one half-gill of rum to John M'Grady, canal boatman, who was alleged to have been then and there in a state of intoxication, contrary to his certificate and to the recited sections of the Licensing Act. . . . (Stat. 5) On 10th April 1906 the complainer appeared in court in answer to the said complaint and pleaded not guilty. The respondent then moved for warrant to apprehend three witnesses for the prosecution, to which the complainer objected. The Magistrates thereupon granted warrant to officers of law to search for and apprehend these witnesses, and bring 'said accused' before the Magistrate officiating in the Police Court of the burgh on 16th April 1906, but no interlocutor adjourning the diet was pronounced."

John Howard Sempill, procurator-fiscal under the Licensing (Scotland) Act 1903 for the burgh of Grangemouth, the respondent, lodged answers in which he, *inter alia*, stated—"(5) Admitted that on 10th April 1906 the complainer appeared in court in answer to the said complaint and pleaded not guilty. Admitted that at the said diet the respondent moved for warrant to apprehend three witnesses for the prosecution in the circumstances after mentioned, and that despite objection taken by the complainer's agent the motion was granted. *Quoad ultra* denied. Explained that as the witnesses aforesaid, who had been duly cited by the prosecutor, failed to appear, the respondent moved the Court to adjourn the diet and to grant warrant to apprehend the said witnesses. The complainer thereupon objected to the adjournment, but the Magistrates repelled his objection and granted warrant to apprehend the witnesses and bring them to the Police Court on Monday 16th April 1906 to give evidence in the said complaint. The said adjournment and warrant to apprehend were duly minuted and signed by the Magistrates. No objection was taken by the complainer's agent to the relevancy of the complaint at this diet. (6) Admitted that on the 16th April 1906 the complainer appeared in Court and adhered to his plea of not guilty, and that thereupon certain witnesses were examined in support of the complaint and certain other witnesses in exculpation. Explained that the complainer tendered evidence to show that he had taken steps to prevent drunkenness in his premises. . . . At this diet no objection was taken by the complainer's agent to the validity or sufficiency of the minute of adjournment. . . ."

The minute of procedure was as follows: —"*Grangemouth, 10th April* 1906.—Appeared Sergeant J. D. Fernie, police officer, Grangemouth, who, being sworn, produced certificate of citation of John M'Grady, James M'Grady, and Henry M'Cann. Their names having been called and no appearance being made, the procurator-fiscal moved for warrant to apprehend, whereupon Hunter" (accused's agent) "objected to the adjournment, and the Magistrates having repelled the objection, the Magistrates grant warrant to officers of law to search for and apprehend the said John M'Grady, canal boatman, 44 Castlebank Street, Partick, James M'Grady, canal boatman, 9 Sawmill Field Street, Port Dundas, Henry M'Cann, canal boatman, Water Street, Port Dundas, and if necessary for that purpose to open all shut or lockfast places and to bring said accused before the Magistrate officiating in the Police Court of the Burgh of Grangemouth on Monday 16th April 1906 at eleven o'clock forenoon to give evidence for the prosecutor in the foregoing complaint, and in the meantime, if necessary, to detain said accused in a police station-house or other convenient place."

The complainer, *inter alia*, pleaded—"(1) The diet held on 10th April 1906 not having been duly adjourned, the complaint fell, and the conviction which followed thereon is invalid and should be suspended."

Argued for the complainer—When a trial is adjourned an interlocutor must be recorded adjourning the diet to a particular day, otherwise the diet falls—Macdonald's Criminal Law, 3rd ed., pp. 440, 514; *M'Lean* v. *Falconer*, June 28, 1895, 1 A. 564, 22 R. (J.) 39, 32 S.L.R. 609; *Macarthur* v. *Campbell*, March 18, 1896, 2 A. 157, 23 R. (J.) 81, 33 S.L.R. 550; *Craig* v. *Tarras*, July 16, 1897, 2 A. 344, 24 R. (J.) 88, 35 S.L.R. 9. There was no such interlocutor in the present case. That of 10th April was one in the form of Schedule E of the Summary Procedure Act 1864, and was clearly one only dealing with the attendance of witnesses under section 10 of the Act to which that schedule referred.

Argued for the respondent—On a fair reading the interlocutor of 10th April must be held to be one adjourning the diet. There was no doubt as to the date to which the diet was adjourned, and the complainer had suffered no prejudice — *Smith* v. *Graham*, July 16, 1873, 2 Coup. 479. The objection was technical and on a matter of form. It was provided by the Summary Procedure Act 1864, section 34, that no conviction should be quashed for want of form.

LORD M'LAREN—I am of opinion that the first plea of the complainer must be sustained. The plea sets forth that "the diet held on 10th April not having been duly adjourned, the complaint fell, and the

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conviction which followed thereon is invalid and should be suspended." That statement quite accurately sets forth the consequences of a failure to record the adjournment of the diet. There is a well-known case (*Fraser*, 1 Irv. 1) where, in the course of a trial on circuit, a case was certified to the High Court for opinion. The case proceeded and the prisoners were convicted; the case was certified to the High Court, the diet being continued in general terms and no precise day being fixed for the adjourned diet. It was held that in consequence of the generality of the certification the diet had fallen. Now, when we consider whether there actually was an adjournment in this case from the 10th to the 16th we can see from the proceedings that it was in contemplation to do so, because in consequence of the absence of certain witnesses a warrant was granted for their apprehension with a view to their attendance on the 16th. It would not have been incompetent to add words to this warrant adjourning the diet. This might have been done, but the necessary words were not in fact added. I think it is no answer to this plea to say that the agent for the complainer was present, and that he knew as a matter of fact that an adjourned diet was appointed. The agent may have known that such was the case, but he also knew that the proceedings had been continued from a previous day until the 10th, and that the prosecution must fall at midnight on the 10th unless it were regularly adjourned to a specified day.

On these grounds I think that this conviction cannot be sustained.

LORD PEARSON—I am of the same opinion. It is well settled that in such a case as the present an interlocutor must be signed adjourning the diet to a definite day. The question here is, Can it be held that this interlocutor does in fact import such an adjournment? Mr Munro has argued that we ought to come to that conclusion on a fair reading of the interlocutor. That is perhaps too favourable a test to apply to the proceedings in a prosecution. But even if that test be adopted, it would be an undue stretch of any canon of construction to hold this as an interlocutor adjourning the diet. It is primarily an interlocutor dealing with the attendance of witnesses; and its effect as an adjournment of the diet is at best a matter of obscure and remote inference.

LORD MACKENZIE—I think there was no legal adjournment. The interlocutor in question was obviously framed on Schedule E (2) of the Summary Procedure Act of 1864. This refers to section 10 of the Act, and that section deals only with compelling the attendance of witnesses. It is clear that the interlocutor does not in terms adjourn the diet. I am unable to come to the conclusion that an adjournment of the diet can be implied.

The Court quashed the conviction.

Counsel for the Complainer — Dickson, K.C. — J. B. Young. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondent—Munro. Agents —Macpherson & Mackay, S.S.C.

Thursday, July 19.

(Full Bench—Lord Justice-General, Lord Justice-Clerk, Lords M'Laren, Kyllachy, Stormonth Darling, Low, Pearson, Ardwall, Dundas, Johnston, Mackenzie, and Salvesen.)

MORTENSEN *v.* PETERS.

Justiciary Cases—Jurisdiction—Territorial Waters — Waters Outside Three Mile Limit but within Scope of Statutory Bye-Law—Otter Trawling by Foreigner on Foreign Vessel—Herring Fishery (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7—*Herring Fisheries (Scotland) Act Amendment Act* 1890 (53 *and* 54 *Vict. cap.* 10)—*Sea Fisheries Regulation (Scotland) Act* 1895 (58 *and* 59 *Vict. cap.* 42), *sec.* 10.

The master of a trawler registered in Norway, a Dane residing in Grimsby, being charged in the Sheriff Court with a contravention of the Fisheries Acts by the use of the otter trawl in a part of the Moray Firth outside the three mile limit but within an area closed against trawlers by Bye-laws of the Scottish Fishery Board in virtue of the provisions of the Herring Fisheries (Scotland) Acts, objected to the relevancy of the complaint on the ground of no jurisdiction. He was convicted and sentenced.

On a case stated to the High Court, *held* by the Whole Court unanimously that the appellant was subject to the jurisdiction of the Court and that the conviction and sentence were legal and competent.

The Herring Fishery (Scotland) Act 1889 (52 and 53 Vict. cap. 23) enacts in section 7 —"(1) The Fishery Board may, by bye-law or byelaws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, in any area or areas to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section, but no such bye-law shall be of any validity until it has been confirmed by the Secretary for Scotland." In sub-section (2) of the said section certain penalties are prescribed for the breach of any bye-laws passed in virtue of said section. This sub-section is repealed by the Sea Fisheries Regulation (Scotland) Act 1895 (58 and 59 Vict. cap. 42), which enacts as follows in section 10—"(4) Any person who uses any such method of fishing in contravention of any such bye-law, shall be liable on conviction under the Summary Jurisdiction (Scotland) Acts to a fine not

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exceeding one hundred pounds, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction; and every net set or attempted to be set in contravention of any such bye-law may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts: Provided always that if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure. (5) Sub-section 2 of section 7 of the Herring Fishery (Scotland) Act 1889 is hereby repealed, and the provisions of the foregoing sub-section shall be and are hereby substituted therefor."

Under the power so conferred bye-law No. 10 of the Fishery Board for Scotland was passed, dated 27th September, and duly confirmed by the Secretary for Scotland 22nd November 1892. The said bye-law enacted, *inter alia*—"(2) Whereas by the Act 52 and 53 Vict. cap. 23, being the aforesaid Herring Fishery (Scotland) Act 1889, it is enacted that the Fishery Board for Scotland may by bye-law or bye-laws direct that the method of fishing known as beam trawling or otter trawling shall not be used within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, in any area or areas to be defined 'in such bye-law,' it is hereby declared that the foregoing provision shall apply to the whole of the area above specified. (3) Within the aforesaid area, as above defined, no person unless in the service or possessing the written authority of the said Fishery Board for Scotland under the hand of the Secretary thereof, shall at any time from the date when this bye-law shall come into force use any beam trawl or otter trawl for taking sea fish. . . . ."

The latter part of this bye-law, not here quoted, which set forth the penalties as given in the Act of 1889, was repealed by bye-law No. 14 of the Fishery Board for Scotland dated 17th April, and duly confirmed by the Secretary for Scotland 6th August 1896, on the narrative that the penalties had been increased by section 10, sub-section 4, of the Sea Fisheries Regulation (Scotland) Act 1895.

Emmanuel Mortensen, a Dane residing in Grimsby, master of the steam trawler "Niobe," registered in Norway, was charged in the Sheriff Court at Dornoch, at the instance of David Peters, procurator-fiscal, with a contravention of the above-mentioned statutes and bye-laws. The complaint against him was as follows:—"That Emmanuel Mortensen, residing at 24 Montague Street, Grimsby, has been guilty of a contravention of the Sea Fisheries Acts and the Herring Fisheries (Scotland) Acts, in so far as on 30th November 1905 he, being the master of the Norwegian steam trawler 'Niobe,' S.D. 5, of Sandefiord, Norway, did, contrary to the bye-laws and sections of the statutes after mentioned, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire, and is within the area specified in the bye-law No. 10 made by the Fishery Board for Scotland, under the powers conferred by the Sea Fisheries (Scotland) Amendment Act 1885, the Herring Fisheries (Scotland) Act 1889 (particularly section 7 (1) thereof), and the Herring Fisheries (Scotland) Act Amendment Act 1890, dated said bye-law at Edinburgh on 27th September 1892, confirmed by Her late Majesty's Secretary for Scotland on 22nd November 1892, and published in the *Edinburgh Gazette* on 25th November 1892, as amended by bye-law No. 14, made by the said Fishery Board under the powers conferred by the Herring Fishery (Scotland) Act 1889, section 7 (1), dated said bye-law at Edinburgh on 17th April 1896, confirmed by Her late Majesty's Secretary for Scotland on 6th August 1896, and published in the *Edinburgh Gazette* on 18th August 1896, a copy of which bye-laws, certified by the Secretary of said Fishery Board, is produced herewith, whereby the said Emmanuel Mortensen is, on conviction, liable in terms of the Sea Fisheries Regulation (Scotland) Act 1895, section 10 (particularly subsection 4 thereof), to . . . [*for penalties vide supra*] . . . That by virtue of the powers conferred by section 7 of the Sea Fisheries (Scotland) Act Amendment Act 1885 the said Fishery Board have declared that the Sheriff Court at Dornoch is the most convenient Court for the trial of the charge above libelled, conform to notice under the hand of the secretary to said Board, dated 5th January 1906, herewith produced."

The accused was brought up for trial before the Sheriff-Depute (GUTHRIE) on 13th February 1906. A preliminary objection to jurisdiction was repelled; a plea of not guilty being tendered, evidence was led, and the accused was convicted and sentenced to pay a fine of £50 or in default of payment be imprisoned for fifteen days.

The accused took a stated case for the opinion of the High Court.

The case, *inter alia*, set forth—"The appellant stated as a preliminary objection that said steam trawler being registered in Norway and the locus of the offence being as alleged, the appellant was not subject to the jurisdiction of Dornoch Sheriff Court. Under reservation of the said objection, the appellant pleaded not guilty.

"It was proved that said steam trawler was registered in Sandefiord, Norway, and that the appellant is a Dane.

"It was further proved that the appellant did on 30th November 1905, being the master of said steam trawler, use the method of fishing known as otter trawling in a part of the Moray Firth five miles or thereby east by north from Lossiemouth, which lies within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; and there was produced and proved the accompanying

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Admiralty chart, having marked thereon the foresaid position of said steam trawler, which position is outwith a line drawn at a distance of one marine league from low-water mark on the adjacent coast and within ten miles of the coast.

"There were produced by witnesses for the prosecution the accompanying documents, which were duly proved, viz., . . .

"The Sheriff repelled the appellant's said preliminary objection . . . The appellant paid the fine."

The questions of law submitted for the opinion of the High Court of Justiciary were—"(1) Whether, in view of the facts stated as proved, and having regard to the bye-laws and the enactments of the sections of the statutes above mentioned, the appellant was subject to the jurisdiction of Dornoch Sheriff Court? (2) Whether, having regard to the provisions of the Sea Fisheries Regulation (Scotland) Act 1895, and in particular to the provisions of section 10, sub-sections 4 and 6 thereof, the conviction and sentence imposed on the appellant are legal and competent."

The case came before the Justiciary Appeal Court on 16th March 1906, when, in view of the importance of the case and of the questions involved, the Lord Justice-General intimated that the case would be heard by the full Bench.

At the hearing on 29th May 1906 it was argued for the appellant—There was no jurisdiction to try this offence. The expression "any person" in the statute under construction must be confined to any person under the jurisdiction of the Court. British municipal statutes conferred jurisdiction only over (1) British subjects; (2) foreigners when on British territory. The appellant was admittedly a foreign subject, and the locus of this offence was outwith British territory. The statute was to be construed under the presumption that the Legislature did not intend to exceed its jurisdiction or to violate the accepted principles of international law—Maxwell, Interpretation of Statutes, 4th ed., pp. 211, 218, 226. The interpretation of the statute asked by the respondent would involve a decision that the Legislature had exceeded its jurisdiction—Story, Conflict of Laws, 8th ed., p. 8, sec. 7; Hardcastle on Statutory Law, 3rd ed., p. 413, 414; Hall, Foreign Jurisdiction of British Crown (1894), 242, 246; Wharton, International Law Digest, cap. 1, sec. 9; "*Zolverein*," 1856, Swa. 96; *in re A. B. & Co.*, [1900] 1 Q.B. 541, at p. 544; *Rose* v. *Himely*, 2 Curtis (U.S.A.) 87, pp. 95, 96; "*Franconia*" (*Queen* v. *Keyn*), 1876, L.R., 2 Ex. Div. 63, at p. 210; *Niboyet* v. *Niboyet*, 1878, L.R., 4 P.D. 1, *per* L.J. Brett, at pp. 19, 20; "*Annapolis*," 1 Lush. 295, at p. 306; *Poll* v. *Lord Advocate*, November 5, 1897, 1 F. 823, 35 S.L.R. 637. This view was taken of the section of the statute under interpretation by the British representatives at the Behring Sea Convention 1893—see Behring Sea Arbitration, U.S. No. 6 (1893), case for United States, p. 232, and U.S. No. 4 (1893), case for H.M. Government, p. 51. British municipal courts would apply a principle of international law that had been acted upon by the Courts and received general support amongst nations—*Triquet* v. *Bath*, 1764, 3 Bur. 1478, *per* Lord Mansfield; *Heathfield* v. *Chilton*, 1767, 4 Bur. 2016, *per* Lord Mansfield; *West Rand Co.* v. *Rex*, [1905] 2 K.B. 391, at p. 406. The rule that the territorial jurisdiction of a State ended at the three mile limit with the exception of bays *intra fauces terræ* was such a principle of international law—*Lord Advocate* v. *Clyde Navigation Trustees*, November 25, 1891, 19 R. 174, 29 S.L.R. 153. Waters *intra fauces terræ* were such as were narrow and land-locked—*Twee Gebröders*, 1801, 3 Ch. Rob. 336; Vattel, Droit des Gens, bk. 1, sec. 291: Stair ii, 1, 5; Moore on the Foreshore, p. 376; Westlake, International Law, p. 187: Nys, Le Droit International, vol. i, p. 446. The general result of these authorities was that jurisdiction could only be claimed in the case of bays capable of effective control at the mouth, though there were certain exceptions to the criterion of effective control—*Direct Cable Co.* v. *Anglo-American Cable Co.*, 1877, L.R., 2 App. Cas. 394: *Cunningham's* case, 1859, Bell's C. C., R. 72. In no case had an area enclosed within headlands so far apart as in the present case, 80 miles, been considered *intra fauces terræ*. The limits of jurisdiction of the courts of this country in regard to foreigners were to be read from the provisions of our Fisheries Acts. The Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22) conferred jurisdiction within the "exclusive fishing limits of the British Islands," as defined in section 28 of the Act. This Act carried out the provisions of the North Sea Convention of 1882, and regulated jurisdiction as regarded the subjects of signatories to that convention. *Quoad* all such signatories, the place in question was outside our territorial waters. This public agreement was evidence of our position with regard to all foreign powers. The same view was accepted in the convention with France of 1868 scheduled to the Sea Fisheries Act 1868 (31 and 32 Vict. cap. 45). The locus of this offence would be extra territorial as regards a Frenchman. Though Norway was not a signatory to the convention the Legislature could not construe the statute differently according to the nationality of the person infringing it. The doctrine of the "King's Chambers" was obsolete and not supported by any authority quoted for the respondent with the exception of Halleck. The cases of the Bristol Channel and of Conception Bay were not analogous to the present case, and were decided on circumstances peculiar to these cases. *Peters* v. *Olsen*, July 13, 1905, 7 F. (J) 86, 42 S.L.R. 735, had no bearing on this case. It was decided under another bye-law, and on the ground that the locus of the offence was territorial under the Convention.

Argued for the respondent—The statute was universal and its terms were unambiguous. The Court having explicit municipal law to apply had not to consider questions of international law. Section 7 of the Herring Fishery Act 1889 was an express prohibition, and that section was directly referred to and under considera-

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tion in the Sea Fisheries Regulation Act, section 10 (4) and (5), under which the penalties were imposed. The term "any person" was to be taken as referring to persons of all nationalities—*Jorgensen* v. *Neptune Company*, July 11, 1902, 4 F. 992, 39 S.L.R. 765; "*The Pacific*," [1898] L.R. Prob. 170; *Queen* v. *Stewart*, [1899] 1 Q.B. 964; *Hart* v. *Alexander*, November 19, 1898, 1 F. (J.) 27, 36 S.L.R. 64; *Cope* v. *Doherty*, 1858, 4 Kay & Johnson 367, *rev.* 2 De G. & Jones, 614. A foreigner had no right to apply the presumption in the interpretation of the statute founded on by the appellant. But applying that presumption the locus of the contravention in question was within territorial waters. On a sound construction of international law it was *intra fauces terræ*. The courts of this country claimed jurisdiction over all waters within headlands as the "King's Chambers" —*Halleck*, International Law (1893), i, 165; *Westlake*, International Law, 187, 188; also *per* Lord Chancellor Cairns in debate on Territorial Waters Jurisdiction Act (41 and 42 Vict. cap. 73), Hansard, vol. 237, column 1607; *Orr Ewing's Trustees* v. *Orr Ewing*, July 24, 1885, 13 R. (H.L.) 1, *per* Lord Chancellor Halsbury, at page 12, 22 S.L.R. 911. By the common law of Scotland all waters enclosed within headlands were territorial —Stair, ii, 1, 5; Erskine, ii, 1, 6; Bell's Prin., sec. 639. The Scottish Fisheries Acts were drawn in accordance with the dicta of these jurists. The Herring Fisheries (Scotland) Act 1860 (23 and 24 Vict. cap. 92), sec. 2, defined the coasts of Scotland "as including all bays, estuaries, arms of the sea", &c. The Sea Fisheries Act (1883) merely defined the exclusive Fishery jurisdiction of the British Isles for the purposes of that Act which were to apply the Convention of 1882, and to impose its rules to the fishing-boats of the various signatory powers. It had no application to methods of fishing. Every subsequent Scottish Fishery Act applied to "Scotland and the parts of the sea adjoining Scotland" (Sea Fisheries (Scotland) Amendment Act 1885, sec. 2; Herring Fisheries (Scotland) Amendment Act 1889, sec. 2; Sea Fisheries (Scotland) Regulation Act 1895, sec. 2). There were many instances in which jurisdiction had been exercised over large areas of sea enclosed between headlands—*Cunningham's* case, *cit. sup.*; "*The Alleganean*," 1885, 32 Albany Law Journal, 484; *Direct Cable Company*, *cit. sup.*, *per* Lord Blackburn at p. 421; Hall's International Law, 5th ed., p. 155, *et seq.* Further, the Act under consideration was a protective Act. A sovereign state was entitled to take all necessary measures to protect its fishings and to enforce all penalties instituted for breaches of such laws—"*Franconia*," *cit. sup.*, at pp. 92, 188-9, 210, 213-4; Hall's Foreign Jurisdiction of the British Crown, p. 233; *Wilson* v. *M'Kenzie*, February 29, 1896, 23 R. (J.) 56, 33 S.L.R. 421. Jurisdiction had been claimed and exercised for protective purposes up to distances far outside the 3 mile limit, *e.g.*, in the Act for Policing St Helena in 1816 (56 Geo. III, cap. 23); in Quarantine Act (6 Geo. IV, cap. 78), secs. 7, 8; in the Public Health Act 1875 (38 and 39 Vict. cap. 55), sec. 134; Hardcastle on Statutory Law, p. 412; *M'Leod* v. *Attorney-General of New South Wales*, [1891] A.C. 455, at p. 458. The Herring Fishery Act 1808 (48 Geo. III. c. 110), sec. 60, expressly extended the jurisdiction of the sheriff for the purpose of regulating fishing to within 10 miles of the coast.

At advising—

LORD JUSTICE-GENERAL — The facts of this case are that the appellant being a foreign subject and master of a vessel registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the Sheriff Court at Dornoch to answer to a complaint against him for having contravened the 7th section of the Herring Fishery Act 1889, and the bye-law of the Fishery Board thereunder made, and was convicted.

It is not disputed that if the appellant had been a British subject in a British ship he would have been rightly convicted. Further, in the case of *Peters* v. *Olsen*, when the person convicted, as here, was a foreigner in a foreign ship, the conviction was held good. The only difference in the facts in that case was that the locus there was, upon a certain view of the evidence, within three miles of a line measured across the mouth of a bay, where the bay was not more than ten miles wide, which cannot be said here. But the conviction proceeded on no such consideration, but simply on the fact that the locus was within the limit expressly defined by the schedule to the 6th section of the Herring Fishery Act; and the three learned Judges in that case did, I think, undoubtedly consider and decide the question whether the 6th section of the Herring Fishery Act (which in this intention is the same as the 7th) was or was not intended to strike at foreigners as well as British subjects. But as this is a full Bench we are at liberty to reconsider that decision.

I apprehend that the question is one of construction and of construction only. In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply (1) to British subjects, and (2) to foreign subjects in British territory, but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further

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argued that the *locus delicti* being in the sea beyond the three-mile limit was not within British territory, and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a Legislature—using words of admitted generality, "It shall not be lawful," &c., "Every person who," &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purposes specified, assuming a right to legislate for that territory against all persons whatsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whatsoever were not affected by the enactment. It is obvious that the latter consideration applied in the present case. Whatever may be the views of anyone as to the propriety or expediency of stopping trawling, the enactment shows on the face of it that it contemplates such stopping, and it would be most clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that international law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty, and that consequently it is not to be thought that in such a place the Legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland. Now can it be said to be clear by the law of Scotland that the locus here is beyond what the Legislature may assert right to affect by legislation against all whatsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The locus although outside the three-mile limit is within the bay known as the Moray Firth, and the Moray Firth, say the respondents, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to show that this spot might be considered as lying therein.

1st. The dicta of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus Stair, ii, 1, 5—"The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds, but when the sea is inclosed in bays, creeks, *or otherwise is capable of any bounds or meiths as within the points of such lands*, or within the view of such shores then it may become proper, but with the reservation of passage for commerce as in the land." And Bell, Prin., 639—"The sovereign . . . is proprietor of the narrow seas within cannon shot of the land, and the *firths*, gulfs, and bays around the kingdom."

2nd. The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to section 6, many places will be found far beyond the three-mile limit—*e.g.*, the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

3rd. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced although beyond the three-mile limit has been admitted. They will be found collected in the case of the *Direct United States Cable Company* v. *Anglo-American Telegraph Company*, L.R. 2 App. Cas. 394, the bay there in question being Conception Bay, which has a width at the mouth of rather more than 20 miles.

It seems to me, therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British Legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated, which, as a matter of construction, make me think that it did so legislate.

An argument was based on the terms of the North Sea Convention, which had been concluded a few years before this Act was passed, and which defines "exclusive fishery limits" in a manner which excludes this part of the Moray Firth. But I do not think any argument can be drawn from that definition, for the simple reason that the Convention as a whole does not deal with the subject-matter here in question, viz., mode of fishing.

It it had been attempted to infer from the terms of the Act a prohibition of which the effect was to give to subjects and deny to foreigners the right to fish, then the Con-

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vention might be apt to suggest an argument against such a construction. But that is not so. Subjects and foreigners are *ex hypothesi* in this matter treated alike.

I am therefore of opinion that the conviction was right, that both questions should be answered in the affirmative, and that the appeal should be dismissed.

LORD KYLLACHY—This appeal is directed against a conviction of the appellant—who is a foreigner—of having contravened a certain bye-law of the Scottish Fishery Board made, it is not disputed, with the authority and in terms of a certain section of the Herring Fishery (Scotland) Act of 1889.

The statute in question enacts (section 7)—"The Fishery Board may by bye-law or bye-laws direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire in any area or areas to be defined in said bye-law." The bye-law in question (No. 10) enacts, *inter alia*, that the foregoing provision shall apply to the whole area specified in the statute. It also provides penalties for contraventions of the enactment.

It is not disputed that if this statutory enactment falls, on its just construction, to be read literally and without qualification, the appellant was rightly convicted. This Court is, of course, not entitled to canvass the power of the Legislature to make the enactment. The only question open is as to its just construction. Nor can there be any doubt as to that construction if the language is to be read literally, or on ordinary principles of construction, and apart from implications sought to be deduced from outside.

The appellant, however, contends that the statute cannot be read literally, but must be read with reference to certain alleged rules of international law, and that in that view it does not, on its just construction, apply *as regards foreigners* to such part of the area specified as according to international law lies outside the territory or at least the territorial jurisdiction of the British Crown. He further contends that the larger part of the area specified, including the part in which his alleged offence was committed, is, on the principles of international law, outside the limits.

Now, dealing first with the point of construction — the question as to what the statutory enactment means—it may probably be conceded that there is always a certain presumption against the Legislature of a country asserting or assuming the existence of a territorial jurisdiction going clearly beyond limits established by the common consent of nations—that is to say, by international law. Such assertion or assumption is, of course, not impossible. The legislature of a country is not *quoad hoc* quite in the same position as its courts of law exercising, or claiming to exercise, a jurisdiction *ex proprio motu*. A legislature may quite conceivably, by oversight or even design, exceed what an international tribunal (if such existed) might hold to be its international rights. Still, there is always a presumption against its intending to do so. I think that is acknowledged. But then it is only a presumption, and as such it must always give way to the language used if it is clear, and also to all counter presumptions which may legitimately be had in view in determining, on ordinary principles, the true meaning and intent of the legislature. Express words will, of course, be conclusive, and so also will plain implication.

Now it must, I think, be conceded that the language of the enactment here in question is fairly express—express, that is to say, to the effect of making an unlimited and unqualified prohibition, applying to the whole area specified and affecting everybody, whether British subjects or foreigners. The primary enactment, it will be observed, is directed, not against persons or classes of persons; it is directed against certain things—the commission of certain acts—within a precisely defined area. It contains no elastic expressions—no indefinite terms. It declares simply that within a precisely defined area a certain method of fishing known as beam or otter trawling shall not be practised. That is the primary enactment, and its scope is not, I think, affected by the association of ancillary provisions for the enforcement of the prohibition by penalties. *Prima facie*, therefore, it seems difficult to read such an enactment otherwise than as expressly providing that in no part of the area mentioned shall the method of fishing in question be practised by anybody. Any other meaning can only be reached by the interpolation of words which are not used, and which, if interpolated, would materially alter the sense. And no case has yet occurred—certainly none has been cited—where the presumption on which the appellant founds has been held adequate to limit or qualify the terms of an enactment thus definite—expressed in quite definite language—and applied to a quite definite area.

The difficulty, however, of the appellant's construction—the difficulty, that is to say, of applying his presumption—is accentuated by several other considerations.

In the first place, the scheme and object of the enactment have to be considered. Plainly that object was to protect the area—the whole area in question—as against a mode of fishing assumed to be injurious. And it need hardly be said that that object would not be attained, but would on the contrary be frustrated, by a construction of the enactment which, while it restrained British subjects from trawling within any part of the protected area, yet permitted foreigners to trawl as they pleased over the greater part of it. It is plain that under such conditions the mischief to be redressed would not be redressed, but might even be aggravated. Accordingly it would be, I think, easier to suppose that the Legislature had reached even an erroneous conclusion as to the extent of its jurisdiction, and had legislated accordingly, than that it had

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resolved deliberately to impose a futile restriction upon its own countrymen, and at the same time to create a hurtful monopoly in favour of foreigners. It would also, I think, be easier to accept almost any reasonable alternative than to assume that the Legislature contemplated a practically unworkable enactment — an enactment which would in every prosecution under it leave the issue to depend upon the result of an investigation by the local judge of perhaps large and difficult questions of international law.

There are, it seems to me, at least serious difficulties in the way of reading into this statute and bye-law qualifying words which are not expressed. And other difficulties might, I think, be figured. But assuming all these to be overcome, one conclusive consideration I venture to think remains, viz., this—that the presumption on which the appellant founds has never, so far as known, been applied or proposed to be applied except where the excess of jurisdiction was clear. In other words, the whole ratio of the presumption fails if it appears that the area which is in controversy is at best only in the position of debateable ground, being in fact within a category as to which different nations have always taken more or less different views, and maintained different contentions.

This last observation, however, involves the consideration, not substantively, but as bearing on the point of construction, of the appellant's second proposition, which, as I understand it, is really this—that outside of the line where the protected area—that is to say, the Moray Firth—narrows to a width of ten (or perhaps rather thirteen) miles, its whole waters are simply parts of the open sea, being so (1) according to established rules of international law, and (2) according to alleged special rules applicable, as it is said, to the Moray Firth, introduced by the North Sea Convention of 1883, as scheduled to the Sea Fisheries Act of that year. And if all this were made out, I acknowledge that on the point of construction the appellant would have a perhaps formidable case.

It, however, seems to me vain to suggest that according to international law there is *any part* of the Moray Firth which is simply an area of open sea, and thus in the same position as if it were situated, say, in the middle of the German Ocean. For *prima facie*, at least, the whole Firth is, as its name bears, a "bay" or "estuary," formed by two well-marked headlands, and stretching inwards for many miles into the heart of the country. All that can be said *contra* is only this—that at its outer end the Firth is very wide, and is of a size, if not also of a configuration, somewhat beyond what is usually characteristic of bays and estuaries. That may or may not be so. The cases of the Bristol Channel, the Firth of Clyde, and the Firth of Forth would have to be considered before that proposition could be affirmed. But, be that as it may, the real question I apprehend is—whether by international law there is any recognised and established rule on the subject, particularly a rule so arbitrary and artificial as that of the ten-mile limit measure, for which the appellant contends.

Now as to that, it is, I think, enough to say that no such rule exists, or (which is the same thing) that we have not had presented to us any evidence of its existence. But I may add that, if negative authority may be invoked, there seems to me to be no better authority as to the existing position than the passage quoted at the discussion from Lord Blackburn's, or rather the Privy Council's, judgment in the *Conception Bay* case, in which, after reviewing existing authorities, their Lordships sum up the result thus—"It does not appear to their Lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not part of the territory of the State possessing the adjoining coasts, and it has never, that they can find, been made the ground of any judicial determination." It seems difficult in face of this (the, I think, latest deliverance on the subject) to affirm that the statute and bye-law here in question are (if construed in their natural sense) in breach of plain and established rules of international law.

It remains, however, to consider as to the supposed bearing of the Convention of 1883. And no doubt if the question were one of *exclusive fishing privileges*, the Convention might have an important bearing. For it defines, quite in terms of the appellant's contention, the extent to which, *inter alia*, in the Moray Firth, British subjects shall have the exclusive right of fishing. But exclusive fishing privileges—or, at all events, exclusive fishing privileges as defined by Convention—are one thing. Territorial jurisdiction, proprietary or protective, is a different thing. And, as I read the Convention of 1883, it is only with respect to exclusive fishing privileges that its terms and provisions have any relevancy. There is certainly nothing in the Convention—at least nothing was brought under our notice—which in the least conflicts with the right of the several contracting nations to impose, each of them within its territorial limits (whatever these are), restrictions universally applicable against injurious practices or modes of fishing, such as are by this statute and bye-law imposed here. In other words, there is nothing in the statute and bye-law in question which at all interferes with the exclusive fishing privileges of the several nations. I cannot assent to the argument that the Convention really introduces a new chapter into general international law—a chapter establishing, with respect to the definition of bays and estuaries, or at all events bays and estuaries of the North Sea, new and artificial rules. That appears to me to be a somewhat extreme proposition. I may add that I have not found it necessary to consider the effect of the appellant's vessel belonging to Norway—a country which was not a party to the Convention, and had probably good reasons for not being so. I assume, for the purposes of our judg-

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ment, that the appellant is in no worse position than if he had been the master of a German or Danish fishing vessel.

The result on the whole, therefore, is that without deciding substantively whether or not the whole area of the Moray Firth would or should be recognised by an international tribunal (if such existed) as within the jurisdiction of the British Crown, I am prepared and consider myself bound to hold — what is sufficient to support this conviction—that upon its just construction the Act of 1889 *asserts* the existence, for the protective purposes to which it relates, of the jurisdiction in question, and that that is enough for us sitting here as one of His Majesty' Courts.

LORD JOHNSTON—The offence charged is created by the Herring Fishery (Scotland) Act 1889, sec. 7, which empowers the Fishery Board by bye-law to direct that beam trawling shall not be used in the Moray Firth within a line drawn from Duncansby Head to Rattray Point, and imposes penalties, superseded by those of the Act 1895, section 10 (4) and (5), on any person contravening such bye-law.

The enactment is not operative till the Fishery Board speaks by its bye-law. This it did in 1892.

The question raised by this appeal is, did the Legislature intend the above enactment to be of universal application, or to be confined in its prohibition and its penalties to British fishermen? The language is absolute and general. But notwithstanding this absoluteness and generality, it would, I think, have been necessary to determine some of the larger questions of international law, with which Lord Kyllachy has dealt, were it not for the following considerations, viz., first, that the enactment and its relative bye-law are no assertion of exclusive right of fishing, but only of right of regulation of fisheries. But second, and more particularly, that the course of Scottish Fishery legislation leads to a conclusion which precludes those wider questions above referred to.

I find that Parliament, before the Union and since, has been in use to provide for the regulation of fisheries round the coasts of Scotland, without confining itself to territorial waters in the narrower significance.

For instance, before the Union the Act of Anne 1705, cap. 48, was passed for the advancement and establishment of the fishing trade in and about the kingdom, and authorised Her Majesty's subjects to take herring and white fish in all and sundry seas, channels, bays, &c., of this kingdom "wheresoever herring or white fish may be taken," and then proceeds to protect and regulate their trade.

The Treaty of Union itself, section 15, provided for the application of a portion of the "equivalent" to encouraging and promoting the fisheries of Scotland. This grant permitted the first establishment in 1727, by 13 Geo. I, cap. 30, of the Board of Commissioners, which, after various changes in its constitution, was in 1882 superseded by the present Fishery Board.

A survey of the Acts between 1727 and 1882, and they are numerous, discloses that the functions of these Commissioners and their officers were not confined to inshore or strictly territorial waters. And it is consistent with the prior history of the matter that in 1882, by the Act 45 and 46 Vict. cap. 78, section 5, the present Fishery Board, having had conferred on them the whole powers and duties of the former Board of British White Herring Fishery, are directed to "take cognisance of everything relating to the coast and deep-sea fisheries of Scotland," and to "take such measures for their improvement" as the funds under their administration may admit of.

When I read the enactment under consideration in the light of previous legislation, I have no doubt that the Legislature intended it to be of general application. I therefore agree in the conclusion at which your Lordships have arrived.

LORD SALVESEN—The facts of this case have been already fully narrated. I note, however, that the appellant does not found on his nationality as a Dane. The preliminary objection which he stated to the jurisdiction of Dornoch Sheriff Court was on the footing that he was the foreign master of a steam trawler registered in Norway; and his counsel admitted that his case falls to be treated as if his own nationality had been the same as that of the ship he commanded.

It was conceded for the Crown, and I think rightly, that if an offence is created by a statute of the British Parliament, it will, in the ordinary case, be presumed to have no application beyond territorial waters. But as this presumption must yield to an express clause that the Act shall apply to Foreigners and British subjects alike, so I think it will yield to a clear implication to the like effect. Where a British statute prohibits a certain thing to be done within a definite geographical area, it seems to me that there is no presumption that such a prohibition shall be confined only to British subjects. Still more if, on examining the subject-matter of the prohibition, it is found that it will be futile or ineffectual unless its operation is general, then I think its generality is not capable of any limitation in favour of persons who do not ordinarily owe obedience to the British Parliament. These considerations are applicable to the present case. The statutes and bye-laws contravened have for their objects the protection of line fishermen and the preservation of the spawning beds of fish in the interests or supposed interests of the whole fishing community. If they were to be construed as impliedly excepting from their scope all Foreigners fishing from Foreign vessels, such a construction would not merely defeat the object of the Legislature, but would confer a privilege upon Foreigners which was denied to British subjects. It can scarcely be supposed that a British Parliament should pass legislation which would neither have the effect of protecting line fishermen from the competition of trawlers nor of preserving the

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spawning beds, but would simply place British subjects under a disability which did not extend to Foreigners—in other words, create in favour of Foreigners a monopoly of trawl fishing in the Moray Firth. I think it was a just observation of the Solicitor-General that if legislation of this nature had been proposed, and the words inserted which the Dean of Faculty maintained were implied, it would never have been submitted by a responsible Minister or have received the approval of Parliament.

The view which I have expressed is strengthened by a consideration of the area within which the operation of the bye-law is confined. The stretch of water known as the Moray Firth and defined by the bye-law is undoubtedly geographically *inter fauces terræ;* and there are many examples of states asserting exclusive jurisdiction within such areas, and of such assertion being acquiesced in by other nations. In these circumstances I think the Act, under the authority of which the bye-law in question was passed, must be treated as an assertion by the British Parliament of their right to regulate the fishing in this area, and to treat it as within the territory over which the jurisdiction of the Scottish Courts extends. The right so claimed may or may not be conceded by other Powers, but that is a matter with which this Court has no concern. We were told that the result of upholding the conviction would be to provoke reprisals by other Powers. If so, that is a matter for the Foreign Office. But it is difficult to suppose that foreign nations should object to a regulation designed for the protection of fisheries in which they all share, and which confers no exclusive privileges on British subjects.

Perhaps the strongest point urged by the appellant was that based upon the Sea Fisheries Convention of 1883, where the exclusive privileges of the fishermen-subjects of the high contracting parties were geographically defined; and it was said that it can never be assumed that Parliament would legislate in violation of a Treaty with Foreign Powers. If it were clear that the Act of 1889, as now construed, is in direct violation of the Convention, the argument would be of the greatest weight. But I find no sufficient reason for holding that a regulation which confers no exclusive fishing rights on British subjects is inconsistent with the Convention. Moreover, in my opinion, the appellant cannot found upon the Convention at all. Norway declined to become a party to the Convention, and a Norwegian subject cannot therefore appeal to the Convention as conferring upon him any treaty rights. It was said that the Convention might nevertheless be treated as evidence, and it was even contended as conclusive evidence of the limits of the claim over territorial waters which this country maintains. I do not think so. I see no reason why, even if Great Britain's territorial rights were limited, as by contract, in a question with certain Powers, she should not assert, as against Norway, rights of a much more extensive nature.

On these grounds I have come to the conclusion that the Sheriff Court of Dornoch had jurisdiction to try the offence charged, and that the conviction must therefore stand.

The LORD JUSTICE-CLERK, LORDS M'LAREN, STORMONTH DARLING, LOW, PEARSON, ARDWALL, DUNDAS, and MACKENZIE concurred.

LORD KINNEAR was not present.

The Court answered the questions in affirmative, dismissing the appeal.

Counsel for Appellant—Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Alex. Morison & Co., W.S.

Counsel for Respondent—Solicitor-General (Ure, K.C.)—Morison—Munro. Agent—W. S. Haldane, Crown Agent.

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REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW. *(Continued from page 588 ante).*

HOUSE OF LORDS.

Tuesday, March 20.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Davey, Robertson, and Atkinson.)

WILLIAMS AND OTHERS *v.* NORTH'S NAVIGATION COLLIERIES, LIMITED.

Master and Servant—Wages—Deductions—Deduction of Fine Due by Workman—Truck Act 1831 (1 *and* 2 *Will. IV, c.* 37), *sec.* 3.

Held that under the Truck Act 1831 an employer was not entitled to deduct from a workman's wages the amount of a fine due by the workman to the master under an order of a court of summary jurisdiction. The only deductions he can make are those expressly sanctioned by the statute (see sections 23 and 24).

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., ROMER and MATHEW, L.JJ.), who had reversed a decision of BUCKNILL, J.

The facts of the case are narrated in the judgments of their Lordships *infra*.

Section 3 of the Truck Act 1831 provides as follows—"And be it further enacted that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of the realm and not otherwise, and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid except as hereinafter mentioned, shall be and is hereby declared illegal, null and void."

At delivering judgment—

LORD CHANCELLOR (LOREBURN)—I do not propose to enter upon a consideration of the authorities that were cited to us in the course of argument or dealt with in the Court of Appeal, as I understand that Lord Davey intends to refer to them, but I have come to the conclusion that the judgment appealed from ought to be reversed and a declaration given in the sense asked for by the plaintiffs. The facts lie in narrowest compass. Certain workmen in the service of the defendant company were entitled to wages payable on the 30th January 1904. A fortnight earlier each of them had been ordered by magistrates in petty sessions to pay a fine to the defendant company, of which 10s. was due on the 30th January. On that date the defendant company made out an account with each of them, in which, apart from other items which were not complained of, the sum of 10s. for fines was deducted from the wages and the balance alone was paid. In the case of the plaintiff Jacob Williams, whose case is typical of the rest, he had earned £3, 13s. 2d. and received £3, 2s.; the difference consisted of an agreed deduction of 1s. 2d. for doctor and the 10s. fine which was not agreed. Upon this the workman commenced an action for damages and an injunction and a declaration that the deduction of 10s. was illegal. It was agreed in the Court of Appeal that the relief sought should be limited to a declaration, and on that footing the case came here. The question is whether the employers when they paid the wages on the 30th January were in law bound to pay in coin the total sum due for wages, or were entitled in law to deduct 10s. due from the workmen to the employers and pay merely the balance in coin. This turns upon the true construction of sec. 3 of the Truck Act 1831. Now I find in that section an explicit enactment that "the entire amount of the wages earned by or payable to a workman" shall be "actually paid" to him in the current coin of this realm, "and not otherwise." The section does not say when it is to be paid, for the common law will settle that as soon as the agreement of service is ascertained. The section does say that when paid it shall be paid in coin of the realm and not otherwise. I cannot think that this means that it shall be paid as to part in coin and as to the remainder in account. Our attention was directed in argument to the word "payable"; we were invited to hold that the obligation to pay in coin applied only to the entire amount of wages payable after deducting cross claims. In this case it was argued that only £3, 2s. was payable, because on striking an account that was the balance due. A reference to sec. 23 shows to my mind that this would be a wrong interpretation even

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if the language of the Act admitted of it. Sec. 23 provides with elaborate care and under strict safeguards the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorised by sec. 3 to deduct anything that the workman owed him and to pay in coin merely the balance. The word "payable" may have been inserted because otherwise the law could have been evaded by making wages payable in advance before they had been earned. Or it may have been inserted because there might be deductions authorised by sec. 23 which would not diminish the wages earned but would diminish the sum payable for wages. However that may be, it appears to me that an obligation rests upon the employer under the Truck Act 1831, sec. 3, to pay in coin (for we are not concerned with bank notes in this case) all the money payable as wages, and that in ascertaining how much is payable as wages he can subtract nothing except the deductions expressly sanctioned by sec. 23. The deduction of 10s. for fines was therefore in the present case illegal. Mr Lush argued that this construction would be very anomalous. He urged that if the employer did not pay the wages at all and were sued, he would be entitled then to set off in the action anything due to him except such sums as fall within the prohibition of section 4. It would be strange, said Mr Lush, if an employer could by breaking his contract and forcing litigation obtain an advantage denied to him if he fulfilled his contract. No doubt this would be an anomaly, as are the Truck Acts themselves, and some other Acts which interfere in a limited degree with freedom of contract. It is necessary to distinguish between the clauses of the Act relating to set-off in an action and those relating to stoppage or deduction when the wages are paid. Possibly the Legislature thought that a court might be trusted to strike a balance in the rare cases where the dispute came into court, but that the vast multitude of weekly or other payments which never come near a court ought to be regulated by a simple and wholesome rule, namely, that they should be paid wholly in coin save for certain carefully specified exceptions. This is, however, a mere conjecture. It is enough to say that, assuming that the Act of Parliament has so provided, the fact that the provision is anomalous does not permit us to disregard the plain meaning of the words used. Accordingly I move your Lordships to reverse the judgment of the Court of Appeal and to enter judgment for the appellants, with a declaration in the sense prayed.

LORD MACNAGHTEN—I have had an opportunity of reading the judgment which has just been delivered by the Lord Chancellor, and I entirely agree with it.

LORD DAVEY—I agree with the judgment of the Lord Chancellor, and with the reasons which he has given for his judgment. The learned Judges in the Court of Appeal rested their decision mainly on the ground that it was neither an offence nor a violation of the statute to give effect to a legal right of set-off. Set-off in an action I understand. It is a right given by statute to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued. But set-off outside the Court means nothing more than a claim of deduction and retention, and the question comes to be whether the deduction of a cross debt which might be the subject of a set-off in an action is a legitimate deduction, or whether the express enactment that the entire amount of the wages shall be actually paid in current coin can be so qualified. I agree with my noble and learned friend that there can be but one answer to that question. By section 23 certain deductions are permitted to be made, or, to use the language of the marginal note, "particular exceptions to the generality of the law" are made under strictly defined conditions, and no other deductions or particular exceptions are, in my opinion, authorised. The learned counsel for the respondents argued that the employer was not bound by the Act to pay in full, and non-payment was not an offence under the Act. Be it so; but this was not a case of non-payment or repudiation by the master of his debt, but of retention of a part of the workman's admitted wages in payment of a debt to himself, and was intended to be payment or satisfaction *pro tanto* of the workman's wages. Bowen, L.J., stated the exact point in *Hewlett* v. *Allen*, [1894] A.C. 383, [1892] 2 Q.B. 662, when, commenting on the third section, he said that payment in account will not do, and that the employer cannot for the purpose of compliance with the statute be both payer and payee, while, on the other hand, he held that set-off in an action was only prohibited in the cases mentioned in sec. 5. It is sufficient to look at the account which was handed to one of the appellants to see that this is nothing more than payment in account, which I agree with the Lord Justice will not do. I will only add that I can see very good reasons why the Legislature should not allow a deduction to be made by the employer himself, although it might be the subject of set-off in an action where the amount and propriety of it could be impartially investigated. Mr Lush boldly said that there was a clear and consistent course of authority in favour of the respondents, and that it was too late for this House to revert to the views of the appellants. The exact contrary of this statement appears to me to be nearer the truth. Not a single one of the numerous cases which were cited, in my opinion, supports the argument of the respondents, and a good deal is to be found in the judgments of the learned Judges which is against them. In *Chawner* v. *Cummings*, L.R. 8 Q.B. 311, the plaintiff was presumed to have contracted upon the usual and well-known terms in

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the trade, and certain customary deductions which had been made from his nominal wages were held not to be in the nature of payment at all, but the mode of calculating and ascertaining the actual amount of his wages. *Archer* v. *James* 2 B. & S. 67, was a similar case, and was decided, in the first instance, on the authority of *Chawner* v. *Cummings*. In the Exchequer Chamber three Judges held that *Chawner* v. *Cummings* was wrongly decided, and three other Judges, on the other hand, approved the decision, and held that the deductions in question on the case before them were in the same category, and were an element only in calculating the true amount of the workman's wages. But there is not a word in any of the judgments which supports the contention that where the amount of the wages is ascertained the employer can discharge himself by set-off or payment in account. In *Pillar* v. *Llynvi Coal and Iron Company*, L.R., 4 C.P. 752, it was only decided that deductions of the character authorised by sec. 23 could not be made unless there was a contract in writing, as required by the section. In *Smith* v. *Walton*, L.R., 3 C.P.D. 109, the workman having damaged a piece of cloth through negligent workmanship, the employer delivered to him the damaged cloth and deducted from his wages the value placed by the employer on the cloth. The question was raised on an information against the employer for making an illegal payment. The Court reversed the decision of the magistrates, who refused to convict, Lindley, J., saying that, whether there was a payment in goods or a set-off, the respondent had infringed the Act. The decision in *ex parte Cooper*, L.R., 26 Ch.D. 693, has no bearing on the case before the House. *Lamb* v. *Great Northern Railway Company*, [1891] 2 Q.B. 281, was a decision on the amending Act 1887, but the judgment of Smith, J., contains dicta on the construction of secs. 2, 3, 4, and 23 of the Act of Will. IV which are in the appellants' favour. The judgment of Bowen, L.J., in *Hewlett* v. *Allen* has already been referred to. That case, however, was decided on the ground that the plaintiff had authorised and directed certain payments to be made by the employer on her behalf, and was confirmed in this House on the same ground. The writ in this action claimed payment to each of the appellants of the sum of 10s. deducted by the respondents. In the Court of Appeal, by some arrangement between the parties, the appellants confined their claim to a declaration that such deduction was illegal. Collins, M.R., expressed some doubt whether the Court ought to entertain a suit for a declaration not ancillary to the putting in suit of any legal right. I share that doubt; but as the case has been fully argued and both parties appear to desire the decision of the House upon it, I am not disposed to say more. I am of opinion that the order appealed from should be reversed, and the appellants and respondents having consented to the hearing in the Court of Appeal being taken as the trial of the action, it be declared that the deduction by the defendants on the 30th January 1904 of the sum of 10s. from the wages due to the appellants respectively from the respondents at that date, was unauthorised and illegal, and it be ordered that the respondents pay to the plaintiffs their costs of this suit, including the costs of the appeal to the Court of Appeal, and also the costs of this appeal.

LORD ROBERTSON—I have had an opportunity of reading the judgment which Lord Atkinson is about to deliver, and I concur in it.

LORD ATKINSON—In this case, in which, by the agreement of the parties arrived at in the Court of Appeal, the relief claimed is limited to a declaration that a sum of 10s. was improperly deducted by the respondents from the wages of certain workmen employed in their service, the question for decision turns upon the construction of sec. 3 of the Truck Act 1831 (1 and 2 Will. IV, c. 37). The case of the appellant Jacob Williams is typical of the others. It is admitted that he had, on the 23rd January 1904, in respect of the fortnight ending on that day, earned wages amounting to £3, 13s. 2d. This sum, according to the practice prevailing in the respondents' colliery, would be payable on the 30th January. On the 22nd December 1903 the appellant had wrongfully absented himself from his duty, and in respect of that misconduct had, on the 16th January 1904, been fined 30s., payable in three instalments of 10s. each, on the 30th January, the 13th February, and the 27th February respectively. The respondents claim a right to deduct the sum of 10s., the instalment payable on the 30th January 1904, from the aforesaid sum of £3, 13s. 2d. The appellant disputes that right. The third section of the Truck Act 1831 runs as follows:—". . . [*Quotes section v. supra.*] . . ." Some comment was made on the use in this section of the words "or payable to any artificer." I think that these words are introduced for the purpose of meeting a case where some deduction or stoppage authorised by sections 23 and 24 of the statute has in fact been made, and the workman is only entitled to receive the balance of his wages remaining due after such deduction. It has been urged on behalf of the respondents that such a deduction as this does not come within the mischief aimed at by the Truck Acts; that those statutes were merely designed to prevent the payment of workmen's wages in equivalents for cash as distinguished from cash itself. It may well be that this was the main purpose and object of this legislation, and that in this section the Legislature has used language which extends beyond the mischief aimed at and reaches harmless transactions or practices not within its spirit. Still there is no ambiguity in the words used in the section. They are precise and clear, and require that the entire amount of the wages earned

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shall be "actually paid to such artificer in the current coin of this realm, and not otherwise." It cannot, I think, be contended that the withholding by the master from the workman of a portion of the wages earned by the latter against his consent is, or could be held to be, a payment by the master to the workman of that very same portion. It is, in fact, the very opposite of payment. It is a refusal to pay, for the not unnatural reason that an equivalent sum is due to the master from the workman. The requirements of the statutes have therefore not been observed in this case. The wages earned have not been paid. The drawback, or stoppage, or deduction, or whatever it may be termed, is not one of those authorised by section 23 or 24, yet it is sought to justify the course taken on this ground, that inasmuch as in any action brought by the workman to recover his wages the master would be entitled to set off the debt due to him in reduction of the workman's claim, it is absurd and anomalous to hold that the master cannot, before action brought, make a deduction in respect of the claim which, after action brought, he can successfully rely upon by way of set-off. No doubt at first sight there would seem to be much force in this argument, but a little reflection will show that there may be good reason even for this anomaly. The whole principle upon which this legislation is based is that the workman requires protection, that if not protected he may be overreached; and it is quite consistent with that principle to hold that in any such action brought by him to recover his wages he may be liable to have the sum found on investigation before the legal tribunal to be due to him by his master diminished by the sum found by the same tribunal on the same occasion to be due by him to his master, and yet at the same time prohibit the master from, as it were, substituting himself for the legal tribunal, investigating his own claim against his workman in his own office and deciding in his own favour. In this particular case, no doubt, the sum which it is sought to deduct is the amount of a judgment debt, and the danger referred to could not arise; but the argument as to the anomaly which I have mentioned dealt with the general scheme and machinery of the statute, and it is in respect of its general application that I consider it open to criticism. The several authorities cited appear to me to support rather than refute the contention of the appellants. They may, I think, be roughly divided into two classes—namely, those cases like *Chawner* v. *Cummings* (*ubi sup.*), in which charges were made by the employer for the use of the instruments by which the workman did his work and earned his wage; and those like *Hewlett* v. *Allen* (*ubi sup.*), in which payments were in effect made by the master out of the wages by the authority of the workman for certain purposes not prohibited by the Truck Acts. In none of those cases was it contended that the master had the right to deduct which is relied upon here. On the contrary, the effort of the master in each of these cases was to justify the drawback on grounds entirely different from, and inconsistent with, those relied upon in this case. In the first class of cases it was successfully contended that the charges made by the master were not deductions properly so-called from sums due for wages earned, but were sums to be taken into account in ascertaining the amount of wages actually earned; and in the second class of cases the so-called drawbacks or deductions were justified on the ground that these sums in truth and in fact represented portions of the wages earned, paid in current coin of the realm, at the request of the workman, to his duly appointed agent. All the reasoning upon which the several tribunals in the cases cited based their respective decisions would have been unnecessary, and, indeed, beside the point, if the Truck Act had conferred upon the master the right here contended for—namely, the right to deduct from the workman's wages whatever the master could set off in a suit brought by the workman against him to recover those wages. It may well be that the appellant has no merits; that a decision in his favour will enable him to violate his duty with impunity, and evade the payment of his just and legally established liabilities: but if that be so, the fault must lie on that "tutelary shelter," to use the words of Bowen, L.J., which the Legislature has thrown around him, without, possibly, taking sufficient care so to mould and fashion it that it could not be open to abuse. I think that this appeal must be allowed with the declaration in the sense prayed for.

Judgment appealed from reversed.

Counsel for the Appellants—Evans, K.C. —Bailhache—J. Sankey. Agents—Smith, Rundell, & Dods, Solicitors.

Counsel for the Respondents — Eldon Bankes, K.C.—M. Lush, K.C.—A. J. Ashton. Agents—Bell, Brodrick, & Gray, Solicitors.

HOUSE OF LORDS.

Tuesday, May 15.

(Before the Lord Chancellor (Loreburn), Lords Davey, James of Hereford, Robertson, and Atkinson.)

BACK *v.* DICK, KERR, & COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant— Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37)— *Employment "on or in or about" an "Engineering Work"—Sec.* 7, *sub-sec.* 1.

A firm of contractors who were engaged in substituting electric for horse tramway lines in the streets of a town stored the new rails when unloaded from the railway trucks in

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the railway company's yard by arrangement with the railway company. An employee of the contractors was injured while stacking the rails. The yard abutted upon a street through which the electric tramway would ultimately run, but at the time of the accident operations had not extended beyond a point distant over a quarter of a mile from the yard.

Held (*aff.* the judgment of the Court of Appeal, *diss.* Lord Loreburn, L.C., and Lord James of Hereford) that the injured man was not at the time of the accident employed on or in or about an engineering work within the meaning of section 7 of the Workmen's Compensation Act 1897.

This was an appeal from a judgment of the Court of Appeal (COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.), who had reversed a decision of the County Court Judge at Exeter.

The appellant, a labourer in the respondents' employment, on the 17th August 1904 was injured whilst engaged in unloading and stacking certain rails.

The respondents were contractors engaged in taking up horse tramway lines and laying down electric tramway lines in certain streets and roads of the city of Exeter, including the road from St David's Station to the Clock Tower and along Queen Street. The rails in question were brought to Exeter for the purpose of the respondents' contract, and were by arrangement between the respondents and the London and South-Western Railway Company stacked and stored when unloaded from the trucks at Exeter in the London and South-Western Railway yard situated in Queen Street, at a distance of fifty yards or thereabouts from the Clock Tower. The yard abutted on Queen Street and was separated from it only by a gateway, and the rails stacked and stored in the yard were taken directly on to the tramway lines by the respondents in the performance of their contract. At the time of the accident the respondents were engaged in taking up the old horse tramway lines, at a distance of about 700 yards from the scene of the accident on the St David's Station side of the Clock Tower.

The County Court Judge found that the site upon which the rails were stacked in the yard was "on or in or about an engineering work," and he accordingly made an award in favour of the appellant.

At delivering judgment—

LORD CHANCELLOR (LOREBURN)—I have always some misgivings in differing from the opinions of the Court of Appeal, and these misgivings are doubled when I find myself differing also from the majority of your Lordships' House. But I must say that the argument of the learned counsel for the appellant—which was an argument of conspicuous ability—has led me to the opinion that this appeal ought to be allowed. There was in this case a horse tramway which was being converted into an electric system. That is, I think, an engineering work within the meaning of the Workmen's Compensation Act. Within a few yards of the line of rail of this tramway is a railway yard, part of which, by arrangement, was appropriated for stacking rails for the use of this work. In unloading there some rails the appellant was injured. The learned County Court Judge found that he was injured "on or in or about" the engineering work referred to. The Court of Appeal thought that there was no evidence of that. I cannot myself think as a matter of law that this stacking ground was not a part of an engineering work. The County Court Judge found that it was so as a matter of fact upon which he was entitled so to find. That is the ground upon which my view is based. I will only say two things therefore. One of them is that I agree that when in the 7th section of the Act the section speaks of the employment as being "on or in or about" an engineering work, it means, as in the case of a factory, "in, on, or about" some place, that is, the place or places where the engineering work is carried on. The other observation which I have to make is that in my view the 7th section prescribes the character of the employment in which the man must be employed if he is to come within the Act. When that is ascertained then you must ascertain whether the accident arises "out of and in the course of such" employment, as is pointed out by the 1st section of the Act. I am myself of opinion that this judgment ought to be reversed, but inasmuch as I believe that the majority of your Lordships think otherwise the appeal will be dismissed.

LORD DAVEY—It has been decided by a series of cases in the Court of Appeal, with some support in this House, that the words "engineering work" in sec. 7, sub-sec. 11, of the Workmen's Compensation Act 1897 are to be construed as defining the locality within which the workman must be employed in order to give him a right to compensation under the Act as well as the character of the employment. This construction receives some support from the provisions of sec. 7, sub-sec. 3, and I am not prepared to say that it is wrong. The question therefore is whether the appellant was employed on or in or about an area in which an engineering work as defined by sub-sec. 2 was being carried on when he met with his accident. There is no doubt that the conversion or extension of the tramways on which his employers were engaged was an "engineering work" within the definition, "railroad" having been decided to include "tramway." And the question divides itself into two branches —(1) Was the station yard within which the rails were being stacked for the time being made part of the area on or in which the engineering work was carried on; or (2) was the station yard within such proximity to the engineering work that the employment there may properly be said to be "about" the engineering work within the meaning of the section? In answer to the first question I am of opinion that the

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work of stacking the rails cannot properly be described as engineering work within the definition. It may be said to be preparatory or ancillary to it but not, I think, a part of it. The appellant was employed in unloading the truck and stacking the rails in the station yard by the licence of the railway company, but the rails might as well have been loaded in a cart and hauled to the "work," or they might have been stacked at the ironworks where they were made until they were required for use. Nor do I think that the employment can properly be said to be "about" an engineering work. I do not think that this is a mere question of comparative proximity. It is difficult to give any very definite meaning to this word, and I doubt whether it adds anything to the description which the Court would not have included by construction. I can, however, imagine a case where the man might actually be outside the ambit of the railway, factory, mine, quarry, engineering work, or building, but assisting in an operation carried on within the ambit. The case where the man fell from the tower waggon when engaged in repairing the overhead wires was perhaps such a case—*Rogers* v. *Corporation of Cardiff*, [1905] 2 K.B. 832. At any rate I do not think that in this case a County Court judge could properly find that the accident took place in the course of an employment about the locality of the engineering work. The decisions of the Court on this Act inevitably lead to results which must appear arbitrary and capricious. It is hard for those who suffer to understand why some accidents give a right to compensation and others do not. The Act does not pretend to logical consistency, and perhaps it was too much to expect that a tentative experiment should attain it. I am of opinion, though I confess that I express it with some regret, that the appeal fails and should be dismissed, and I move your Lordships accordingly.

Lord James of Hereford—I concur in the judgment of the Lord Chancellor and in the reasons which he has given in support of that judgment. It seems to me that upon these facts it was well within the competency of the learned County Court Judge as a matter of law to find that the accident occurred "on or in or about" an "engineering work." I do not think that the "engineering work" need be, if I may use the term, the headquarters of the undertaker; it may be, no doubt, a work with a limited physical area, but apart from the work of his factory, or apart from the place where he carries on the main part of his business. If that construction be right, it then becomes a question of fact whether, in the circumstances of this case, this was an accident occurring "on or in or about" an "engineering work." The learned County Court Judge has so found, and I do not think that there is material enough here to cause your Lordships to differ from that finding. I would add that I do not quite follow the view which the Lord Chancellor has expressed in relation to limiting "engineering work" to the definition of a physical area, as in the case of a factory. There has been, so far as I know, no direct authority, at all events not in this House, for saying that an "engineering work" means a physical area. Of course I am aware that there have been many decisions of the Court of Appeal to that effect in relation to factories, and there is a direct judgment too binding upon your Lordships in the case of *Wrigley* v. *Whittaker*, [1902] A.C. 299, decided in the year 1902, which was also with reference to a factory. It may be that that judgment was intended to cover an engineering work, but it does not say so in terms. It would have been more satisfactory if the noble and learned Lords who took part in that carefully considered judgment had said whether it was so or not. That judgment does not decide whether the statute when it speaks of "engineering work" means a physical area. I think that there is a great deal to be said to show that it does not, and that the case of an "engineering work" differs from that of a factory, which was undoubtedly considered to be an undertaking within a physical area. The reason of that difference is that "engineering work" has a definition which leads us away from the physical area and does not apply to the case of a factory or to the other works mentioned in sec. 7. But if this case is to be determined on the ground that the County Court Judge was not entitled to find that where the injury occurred was "on or in or about" an "engineering work" as a matter of fact then the consideration of the second point becomes somewhat academic. I only express my doubt whether the view which the Lord Chancellor has stated has yet been determined to be correct.

Lord Robertson—I hold that when the statute uses the words "on or in or about" an "engineering work" the "work" spoken of is something having geographical boundaries. It was not in the end disputed at the bar that this is so in the case of a factory and the other things mentioned side by side with factory and "engineering work," to which in common with "engineering work" the prepositions of locality "in, on, or about" are made to apply. How, then, the word for instance "about" can apply to the words "engineering work" unless those words connote some place I do not see, unless indeed the word "about" were used in a shifting sense and when applied to engineering work is turned into the sense of "concerning" or "relating to." This is clearly untenable. I think that the decision of this House on a case about a factory is equally applicable to that now before your Lordships on the associated term "engineering work"—*Wrigley* v. *Whittaker*, [1902] A.C. 299. It must, however, I think, be conceded to the appellant that ascertaining the geographical limits of an engineering work is not nearly so easy as ascertaining the geographical limits of a factory. In the case of an engineering work such as the

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repairing a tramway you deal, not with a place set apart for the particular business like a factory, but with, to begin with, some part or parts of an open street, and it is only by the user actually made by the undertakers that you find out the "engineering work." Accordingly, I accede to the appellant's argument thus far that it is a question of fact whether the use made of it by the undertaker has by use constituted the place in dispute a part of the engineering work. Again, I think it quite fallacious to say that because one particular place is ascertained to be a locus of engineering work, no other place can be held to be also such a locus of the same work. The view of the learned Judge seems to me sound enough in so far as he proceeds to consider whether this part of the railway ground was not part of the engineering work as well as the street where operations were proceeding. But where I think he goes wrong is in holding that in fact this place at the railway was one where this engineering work was being carried on. I think that he has exaggerated the importance of the "stacking" at the railway station. This place, *primâ facie*, is the seat of railway and not of engineering operations, and therefore we require some distinctively engineering operations as distinguished from work incident to transit. If this man had simply carted the rails from the station, an accident in the station would not have been an accident in or on the engineering work. How does the mere circumstance that instead of the rails being taken cartload by cartload from station to street, it was found convenient to stack them, make the railway station the locus of engineering work? I think that it does not. The undertakers of the engineering work were at the railway station as customers of the railway company, and the stacking was merely an operation similar to leaving smaller articles at the left luggage office. It was not in any sense distinctively engineering work. What the County Court Judge says about the operation being essential is accurate in the same sense in which the operation of simply taking delivery of the rails is essential, the essentiality being that of the rails. If, then, the railway yard was not part of the engineering work, the appellant fails, for the seat of the work in the street is too remote to admit of the application of the word "about." I think that the judgment appealed from should be affirmed.

Lord Atkinson—As I find that I differ from some of my noble and learned friends, I naturally entertain the opinion which I have formed with considerable doubt. The question for discussion in this appeal is whether there was evidence before the County Court Judge on which he could legitimately find that the appellant was at the time of the accident in respect of which he claims compensation employed "on or in or about" an "engineering work" within the meaning of section 7 of the Workmen's Compensation Act 1897. The appellant was, when the accident occurred, engaged for the respondents, his employers, in stacking in the yard of the South-Western Railway Company at Exeter certain rails consigned to those employers, and there delivered to them. These rails were obtained in order that they might be used in certain work which the employers had contracted to execute, and were actually engaged in executing, namely, the tearing up of the rails of an old tramway laid in Exeter worked by horse power, and replacing them by rails to be used for an electric tramway to be laid down from St David's Station to the Clock Tower and along Queen Street. The place where the accident occurred was fifty yards distant from the Clock Tower, and 700 yards distant from the nearest point at which the tearing up of the old line of rails was then being carried on. But the yard abutted upon Queen Street, and was only separated from it by a gateway, and the projected works, if carried out completely as proposed, would at some portion of their progress have been actually carried on in close proximity to this yard. Our attention has been called to numerous authorities, including *Wrigley* v. *Whittaker*, [1902] A.C. 299, decided in this House. The view of the statute apparently taken in all the cases was that the Legislature had intended to select certain fields of operation in which, owing to the nature of the work done there, danger to the workman employed in doing it might be supposed to exist, and to confine the benefits conferred by the statute to injuries sustained in those physical areas or in close proximity to them. And accordingly these cases seem to have established that it is necessary in order to satisfy the words of section 7, sub-section 1, to hold that the employment in which the workman must be engaged in order to entitle him to recover must be carried on in some defined or ascertainable physical area, and that at the time of the accident he must have been working "on or in or about" that area, the word "about" being held to be equivalent at best to "in close proximity to." In *Wrigley* v. *Whittaker* the workman was admittedly at the time of the accident engaged in doing his employer's business, namely, erecting in the factory of a certain company a wheel forged in his employer's factory, and by his employer contracted to be put up in the factory in which it was being placed when the accident occurred. Yet the workman was held not to be entitled to compensation, though it was not questioned that if a similar accident had happened to him before the wheel had left his employer's factory he would have been so entitled. I think that these cases were properly decided. Whether the decisions are sound or unsound, whether they lead or do not lead to irrational results, it is, I think, almost too late to inquire. The principle underlying them must now, I think, be taken to be firmly established, and the test laid down by them must be applied. To disturb them would cause the utmost confusion and perplexity, and, moreover, the Act is so worded that if the test thus stated were rejected it would

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be difficult to see what other could be adopted. I assume, therefore, for the purposes of this case, that the "engineering work" in which the appellant must have been engaged if he is to recover must be work confined to some physical area, and that he must when injured have been working "on or in or about" that area. It is obvious, however, that there is a difficulty in ascertaining what is the extent and what are the limits of an "engineering work" which does not occur in the case of factories, docks, &c. In these latter causes the walls or fences built round the factory or dock, as the case may be, fix the boundaries and determine the area. In the case of an "engineering work" there is no structural boundary. The area cannot, I think, be confined to the soil on which the rails are actually laid, nor, in all cases, to the street through which the tramway runs, nor even to places immediately abutting on that street. The area must, I think, in the case of a railroad or tramway, or other undertakings of that sort, be fixed by user —that is to say, by the carrying on of some portion of the general operation of construction, alteration, or repair which the employer is engaged in carrying out. In the construction of such a huge undertaking as the Tay Bridge, for instance, various difficult and dangerous operations, all in character "engineering work," and each leading up to the accomplishment of the ultimate object, the construction of the bridge, must be carried on over a widely extended area. It would, in my opinion, be irrational to hold that the entire area so occupied, whether it be continuous or composed of several separated smaller areas, was not an area of "engineering work," and if I could come to the conclusion that the stacking of the rails in the railway yard in this case could in any sense be regarded as part or portion of the general engineering operation which the respondents were employed to carry out, I should be inclined to hold that the appellant was at the time of the accident employed "on or in or about" an "engineering work," and that the yard of the railway company was an area of "engineering work." But in my opinion the stacking of the rails in the yard was only a mode of accepting delivery of them, and was no more a part or portion of the engineering operations than was the dispatch of the rails from the place at which they were loaded. I think, therefore, that the appellant was not engaged in an "engineering work," and that the railway yard was not the area of an "engineering work," or a portion of that area, or about or in close proximity to such an area. I think, therefore, that the decision of the Court of Appeal was right and that the appeal should be dismissed.

Appeal dismissed.

Counsel for the Appellant—Gutteridge—Hemmant. Agents—Baylis, Pearce, & Company, Solicitors.

Counsel for the Respondents—Ruegg, K.C.—W. Shakespeare. Agents—William Hurd & Son, Solicitors.

HOUSE OF LORDS.

Wednesday, May 17.

(Before the Lord Chancellor (Loreburn), Lords James of Hereford, Robertson, and Atkinson.)

JOHNSON *v.* MARSHALL, SONS, & COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—"*Serious and Wilful Misconduct*"—*Workman Using Hoist in Violation of Rules—Sec.* 1 (2) (*c*).

The rules of a workshop provided that workmen were only to use a certain hoist when they were in charge of a load. There was nothing particularly mysterious or dangerous about the working of the hoist, and, unknown to their employers, the workmen often used it when not in charge of any load. A workman was injured while thus using it. *Held* that he had not been guilty of "serious and wilful misconduct" in the sense of the Act.

Opinions that "wilful" imports that the misconduct was deliberate and not merely thoughtless, and that "serious" applies to the misconduct itself and not to its consequences.

On the morning of the 20th August 1904 Johnson was working as a joiner in the gallery of the erecting shop in the respondents' works. The gallery ran round all four sides of the erecting shop, and a large number of men were employed there. Access to the gallery from the floor below was gained by two wide and convenient staircases in the south and east sides thereof. At or about the centre of the east side of the gallery there was a lift and two steep and narrow spiral staircases communicating with the floor above. On the lift was a notice as follows:—"No one is allowed to use this hoist except in charge of a load." The breakfast hour was eight o'clock, and shortly before eight o'clock Johnson was seen at work with his coat off. At a minute or two before eight o'clock Johnson was found in the lift with his coat on and without a load. The lift had descended below the floor of the gallery, and Johnson was crushed between the floor of the lift and the top of the doorway by which the lift was reached from the floor below. He died from his injuries on the 23rd August 1904. His widow claimed compensation under the Workmen's Compensation Act 1897. This was refused by the County Court Judge of Lincolnshire and by the Court of Appeal, who ordered a new trial.

Johnson's widow appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR (LOREBURN)—I agree with the Court of Appeal that the result

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of the hearing in the County Court was unsatisfactory. Mathew, L.J., went further and held that judgment ought to be entered for the appellant. That is also my own opinion. The facts, so far as they are material, have not been disputed. A workman was found fatally injured in a lift in the respondents' (his employers) workshop without a load, and no one was allowed to use the lift unless he was in charge of a load. That is all we know. It was an accident, and the widow, now appellant, must have compensation under the Act of 1897 unless the employers can prove that the injury was "attributable to the serious and wilful misconduct" of the workman. That the burden of proving this was on the employers is beyond question. We are not dealing with negligence, but with something far beyond it, and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct. No doubt it was misconduct to enter the lift when not in charge of a load, for that was a disobedience of orders lawfully given. It was "wilful" in the sense that the man presumably entered of his own accord, but the word "wilful," I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says that it must be "serious," meaning not that the actual consequences were serious but that the misconduct itself was so. If a servant was found once using the front door instead of the back door contrary to orders, it would be misconduct, no doubt. Could anyone say that it was serious misconduct? So here the lift was intended for use by workmen in charge of a load, forbidden to workmen not in charge of a load. The offence was not that the man used it, but that he used it without a load. I cannot agree that a lift is an appliance so dangerous that the use of it, when believed to be in proper condition and intended for use, does of itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact; but when there is no evidence it is for the Court to interpose. Accordingly, I am of opinion that an order should be made declaring the appellant entitled to compensation, and directing the County Court Judge to assess the amount.

Lord James of Hereford—In order to determine this case it is necessary to bear in mind the scope and object of the Workmen's Compensation Act. The main object was to entitle the workman who sustained injury whilst engaged in certain employments to recover compensation from the employer although he was guilty of no default. The intention was to make "the business" bear the burden of the accidents that happened in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act. But it was thought that if no check was placed on the workmen they might be induced recklessly to induce accidents of a serious character affecting many lives and much property, and so the Act of 1897 contains the provision that if the workman be guilty of "serious and wilful misconduct" he will be disentitled from recovering compensation. Now it is impossible to give any general definition of the words "serious and wilful misconduct;" application of them must be made to each case as it arises. But the use of the word "serious" shows that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman whilst working in a mine in certain seams of coal struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course these are but instances illustrating conditions of absolute disregard of the lives and safety of many. But, on the other hand, misconduct may well exist that is not "serious" in its nature, and therefore does not destroy the right to compensation. The circumstances of the case before your Lordships may be dealt with by way of illustration. A lift is provided in a factory—the object of the employer is that it shall be used by men when in charge of loads—and notices forbidding other use are placed in the factory. I will assume that, without the fact being brought to the knowledge of the employer or his representatives, the workmen generally and the deceased man on the occasion in question used this lift although they were not in charge of any loads, but from the nature of things no danger could be anticipated from the use of the lift. It was intended to be used by men ascending and descending. If there was a load in the lift the danger of its use could not be diminished—possibly it might be increased. No result producing injury to anyone could be anticipated by the use of the lift by the individual workmen. The misconduct, therefore, is reduced to the bare breach of a rule, from which breach no injuries, actionable or otherwise, could reasonably be anticipated. Does this amount to serious misconduct. In my opinion it does not. I think that there is a test which may fairly be applied. Supposing that the employer, on learning that a workman had travelled in the lift without a load, had dismissed him without notice, and that in consequence an action had been brought by the workman. The question whether the misconduct was sufficient to justify the dismissal without the notice contracted for would be for the jury to determine. I feel sure that most juries would certainly hold that no ground for dismissal had been shown. Yet I think that the words of the statute "serious misconduct" represent a higher standard of misconduct than that which would justify immediate dismissal. I think it worthy of observation that although it ought—under the circumstances that occurred at the hearing before the County Court Judge—to be assumed that there was no acquiescence in the user by the employer, yet the fact that the

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deceased man and other workmen openly used the lift—for they could not do so secretly—shows that they at least did not think that their conduct would be regarded as liable to much penalty. I would also add that serious misconduct cannot be construed by the consequences of any act. A man may be told not to walk on the grass. He does so, slips up, and breaks his leg. The consequences are serious, but the misconduct is not so. If the case were sent down for a further hearing, the only material fact which could be added to those already proved would be that the employer had no notice of the user of the lift. In giving this judgment I have assumed that such was the case. I therefore think that all the facts are sufficiently before your Lordships to enable you to form a final judgment in the case, and mine is that the plaintiff is entitled to recover.

LORD ROBERTSON—The question whether two adjectives and a substantive involving censure are appropriately applied to a particular act clearly ascertained would be one which might well cause difference of opinion. I own that I take a somewhat stricter view than appears to prevail in the House to-day, and think that a breach of the regulation directly relating to personal safety might well come within the language of the section if committed intentionally and of choice, even although the thing done did not involve anything morally censurable. But the question being one of conduct is one of circumstances; and I justify my acquiescence in this reversal on the ground that I am not confident that we really know how or why this man came to enter the lift.

LORD ATKINSON—I concur, though not without considerable doubt, in the opinion that, while there was evidence before the County Court Judge upon which he might legitimately have found that the deceased man had been guilty of wilful misconduct on the occasion of the happening of the accident which caused his death, yet that this evidence did not amount to proof that his misconduct, though wilful, was in addition serious within the meaning of the first section of the Workmen's Compensation Act. In none of the authorities to which we have been referred has it been attempted to define serious misconduct. It is scarcely susceptible of precise definition. What amounts to serious misconduct in any given case is a question of fact to be determined by the judge of first instance on the facts of that case, and the function of the Court of Appeal and of your Lordships' House is confined to deciding the question of law whether there was any evidence to sustain this finding. In the present case the misconduct of the deceased consisted wholly and entirely in his having deliberately and in disregard of the express prohibition in writing of his employers, of which he must be taken to have been aware, used for his own purposes as a passenger lift a certain hoist erected by his employers in their factory, and designed and intended by them to be used only for the carriage of goods, the workmen in the factory being forbidden to use it except when bringing up or down the loads of goods of which they were in charge. It was proved in evidence that the men frequently disregarded the notice and used the lift as a passenger lift; but it was found as a fact by the judge that this illegitimate user was unknown to the defendants. No evidence whatever was given to show that there was any difficulty in using the lift, or that the deceased was unacquainted with the proper method of managing and controlling it, or that any accident had ever resulted from the use of it, authorised or unauthorised. There was no person in exclusive charge of the lift, and it appeared to have been managed and controlled on each occasion of its use by the man or men who required to use it. Under these circumstances one must, I think, come to the conclusion on the evidence that there was no reason to apprehend any immediate or proximate danger in the unauthorised use of the lift, or that the deceased knew or believed that there was any risk, or, if risk at all, any but a very remote risk of injury or accident to himself, his fellow workmen, or to the machine itself. The necessity which undoubtedly exists for the strict maintenance of discipline amongst the hands engaged in factories and other establishments where machinery is used and the grave dangers which might result if any general laxity of discipline were permitted to prevail, tend to render important breaches of rules adopted for the conduct of business which in other places and under other circumstances might fairly be regarded as trivial; and it is the consideration of this secondary effect of the disobedience to orders or of violation of rules which causes me to entertain great doubt as to the correctness of the conclusion to which I have come. I do not find, however, that much reliance was placed upon these considerations in the authorities to which we have been referred. The danger that if men engaged in mines or factories are permitted without risk of loss to transgress in small things they may be tempted to transgress in great things was not insisted upon, and indeed if by reason of this secondary effect of the violation of rules unimportant in themselves the wilful misconduct of a workman has always to be regarded as serious, the word "serious" might be regarded as surplusage and the position of the workman would be rendered worse than it was before the Act was passed. In *Rumboll* v. *Nunnery Colliery Company* (80 L.T. Rep. 42), *Reeks* v. *Kynock* (18 Times L. Rep. 34), and *Smith* v. *South Normanton Colliery Company* (88 L.T. Rep. 5; (1903) 1 K.B. 204) the Court of Appeal apparently considered that it was not every violation by a workman of a rule, general or special, framed for the regulation of the industry in which he was engaged, or every deviation from or disobedience to the orders of a manager or superior, however wilful, which could be regarded as necessarily

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amounting to serious misconduct. Indeed, if the word "serious" used in this connection is to have any force or weight given to it at all, it must, I think, mean at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where that loss or injury, even if probable, would be trivial in its nature and character, the doing of that act, however wilful, does not amount to "serious misconduct" within the meaning of this statute, sufficient to deprive an injured workman of the benefits conferred upon him by the statute, unless the indirect influence of the act upon the discipline of the factory is to make every transgression serious. In *Rumboll* v. *Nunnery Colliery Company* the rule deliberately violated by the men—a rule which they had shortly before the happening of the accident been directed by the deputy-manager to carry out in a particular way—namely, a rule requiring that the roof of the mine should be adequately propped—was one of those rules the neglect of which amounted to an offence against the Coal Mines Regulation Act 1887, subjecting the offender to a penalty of £2 at the least, to be recovered summarily. The breach of that rule was deliberate. There was no question about that. The danger caused by the neglect of it was grave, immediate, and well recognised, and its violation therefore less excusable than the disregard in this case of the requirements of the notice, yet Smith, L.J., in giving judgment said that he could not regard the violation of these general rules so punishable and so necessary to be observed for the safety of the work as in itself and as a matter of law to amount to serious and wilful misconduct within the Workmen's Compensation Act 1897. In the present case there was no evidence that the danger of loss or injury resulting to anyone from the use of the lift was immediate or probable. Nor was any evidence given by the respondents on many points on which one would suppose that it might have been given, such as the nature of the mechanism of this lift, the mode in which it was worked, regulated, and controlled—whether there was any means of communication between the interior of the lift and the upper floor, so that the person actually using the lift might give some warning to those on the upper floor and so prevent any attempt by the use of the lever on the upper floor to cause the lift to ascend or descend. For all that appears, it may well be that this unfortunate accident was caused by the lift being, by the use of this lever on the top floor, suddenly made to ascend just as the deceased had brought it to a standstill and was in the very act of getting out of it. And, speaking for myself, I may say that, had it been proved that such means of communication as I have indicated existed, that these means of communication were used by those legitimately using the lift, that the deceased had refrained from giving any warning, and that the accident had occurred in the way supposed owing to the absence of that warning, I should have held that there was abundant evidence of wilful and serious misconduct on the part of the deceased. The respondents, however, preferred to stand upon the letter of this notice and to rely exclusively on the infraction of their rule. They have not therefore, in my opinion, given any evidence to sustain the onus of proof thrown upon them by the statute; and I accordingly think the appeal should be allowed.

Judgment appealed from reversed.

Counsel for the Appellant—W. H. Owen—E. H. Chapman. Agents—C. J. Smith & Hudson, Solicitors.

Counsel for the Respondents—C. A. Russell, K.C.—T. Hollis Walker. Agents—R. F. & C. L. Smith, Solicitors.

PRIVY COUNCIL.

Thursday, May 17.

(Present—the Right Hons. the Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.)

M'LAUGHLIN *v.* WESTGARTH AND ANOTHER.

(On Appeal from the Supreme Court of New South Wales.)

Statute—Interpretation—Clause of Protection—Special Enumeration of Persons Protected—Person Not so Included Not Necessarily Excluded from Protection.

When a statute contains a special enumeration of protected persons it does not necessarily follow that a person not included in the enumeration is excluded from the protection afforded by the statute.

This was an appeal from a rule or order of the full Court of New South Wales (Darley, C.J., Owen and Pring, JJ.), dated 27th October 1904, which had dismissed an action of damages for wrongous confinement brought by an alleged lunatic against his committee.

The Australian Lunacy Act of 1898 contains clauses of protection specifically protecting various persons, &c., in their dealings with lunatics. The committee of a lunatic is not included in the enumeration, and the only point of interest in the present case, was whether the committee were, owing to that omission, *ipso facto* excluded from the protection of the Act.

The Earl of Halsbury—Their Lordships are of opinion that this is an extremely clear case. The construction of the particular section of the New South Wales Lunacy Act is not a very important point for their Lordships to determine. It may be that modern statutes are drawn with greater particularity and minuteness. The misfortune in the framing of those statutes is that any body of persons, seeing a possi-

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bility of liability on their part, apply to Parliament to have special provisions inserted for their protection. That application is occasionally complied with, and then the argument is raised which their Lordships have heard to-day—namely that anybody who is not included in the enumeration of the particular persons so inserted must be taken to be excluded by the operation of the statute from protection just because they are not included and others are. The doctrine applicable to all such cases is that a great many things are put into a statute *ex abundanti cautelâ*, and it is not to be assumed that anybody not specifically included is for that reason alone excluded from the protection of the statute. Their Lordships, however, state this general position rather in view of the construction of statutes in general than as being specially relevant to this particular case. . . .

Appeal dismissed.

Counsel for the Appellant—W. Wills. Agents—Burton, Yeates, & Hart, Solicitors.

Counsel for the Respondents—C. M. Bailhache. Agents—Lowless & Co., Solicitors.

HOUSE OF LORDS.

Monday, May 21.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, and Atkinson.)

BOSTON FRUIT COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

(On Appeal from the Court of Appeal in England.)

Insurance — Marine Insurance — Policy Effected by Owner of Ship—Right of Charterer to Benefit of Policy—Demise of Ship.

The owners of a vessel effected a policy of insurance on her, the policy being in common form and purporting to be made on the proposal of certain insurance brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The policy contained a collision clause. The vessel was chartered under a charter-party amounting to a demise of the ship during the currency of the charter to the charterers. Owing to her fault a collision took place with another vessel, the damages for which were paid by the charterers, who afterwards brought this action to recover them from the insurance company under the policy effected by the owners. There was no evidence of intention on the part of the owners to protect the charterers by insurance unless such intention could be inferred from the mere fact of the existence of the policy taken in connection with the language of the charter of which only the following clauses bore on the question, viz., clause 3, which declared that the charterers should pay for certain specified charges "and all other charges whatsoever" except repairs to hull and machinery and anything appertaining to keep the ship in working order; clause 17—"It is understood in event of steamer from above causes (stress of weather, etc.) putting into any port or ports other than those to which she is bound that the charterers are covered as to expenses as the owners are by their insurance"; clause 22—"That the owners shall pay for the insurance of the vessel."

Held that the charterers could not recover from the insurance company, there being no evidence that their interest was covered by the policy.

This was an appeal from a judgment of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.) affirming a judgment of Bigham, J.

The facts of the case appear sufficiently from the opinions of their Lordships *infra*, and in particular from the narrative at the commencement of the opinion of Lord Macnaghten.

Lord Chancellor (Loreburn)—In this case the charterers of the steamship "Barnstable," who navigated her under a charter-party amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which the "Barnstaple" had come into collision. The question now is whether the charterers can recover against the defendant underwriters on a policy, not effected by themselves but effected by brokers, instructed by the owners, which includes risk of having to pay damages arising from collision, and contains a description of the assured wide enough to cover the plaintiffs or any others concerned in interest. I have come to the same conclusion as did the Court of Appeal that this question must be answered in the negative. The substantial contentions of the plaintiffs are as follows—They say that being within the description they are entitled to the benefit of the policy because the owners were bound to insure and so must be taken to have insured charterers' risks by virtue of clause 22 of the charter-party. That clause provides "that the owners shall pay for the insurance on the vessel." In my opinion these words do not so bind the owners, and if an action were brought on such a clause for breach of a contract to insure it must fail. If what is suggested had been meant nothing would have been easier than to say it. Next the plaintiffs urge that they are entitled to the benefit of the policy because it must be taken to mean what it says, viz., that all "to whom the subject-matter of this policy does, may, or shall appertain in part or in

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all" are insured. Now I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, the courts have disallowed his claim though he might be within the description. In the present case the plaintiffs and the assignees of the owners agreed in the course of the American litigation that the former had no insurance on the "Barnstaple," and the litigation was for a long time conducted by the plaintiffs on the footing that the owners intended to insure their own interest and no other. In reality this is the only evidence which we have in regard to intention. It appears conclusive to show that this appeal must fail.

Lord Macnaghten—In this case an American corporation, who were the charterers of the British steamship "Barnstaple" under a time charter, claim the benefit of a policy effected by the owners in England on the hull and machinery of the vessel. The policy was in a common form and purported to be made on the proposal of certain insurance brokers "as well in their own names as for and in the name and names of all and every other person or persons" to whom the subject-matter of the policy did, might, or should appertain in part or in all. There was a running-down clause attached to the policy. The "Barnstaple," owing to the fault of the persons in charge of the navigation, who were the servants of the charterers, ran down and sank another vessel. This disaster gave rise to protracted litigation in America. The "Barnstaple" was condemned in damages, and ultimately it was decided that as between the charterers and the owners the loss must fall on the charterers. Having discharged their liability in respect of the collision, the charterers sue the insurance company in this country. Their contention is that the charter imposed upon the owners an obligation to insure on behalf of the charterers as well as on their own behalf, or, in the alternative, that the owners were authorised to insure, and did in fact insure, on behalf of the charterers, or at least in terms wide enough to cover them, and that they had duly ratified and adopted the contract. There is not the slightest evidence of intention on the part of the owners to protect the charterers by insurance, unless such intention can be inferred from the mere fact of the existence of the policy in question taken in connection with the language of the charter. The main part of the argument was addressed to the construction of the charter. There are only three clauses which can have any bearing upon the question. They are clause 3, clause 17, and clause 22. Clause 3 declares that the charterers shall provide and pay for certain specified charges "and all other charges whatsoever" except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 17, after declaring among other things that should the vessel be driven into port or to anchorage by stress of weather the detention or loss of time should fall on the charterers, ends with this statement—"It is understood in event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." Up to this point there is no reference to insurance to be found in the charter. The next and only other mention of insurance is in clause 22, in the following words—"That the owners shall pay for the insurance on the vessel." Clause 3, if unexplained or unqualified, might possibly have given occasion for an argument to the effect that the expense of insurance was to be borne by the charterers. But clause 22 leaves no room for such a contention. And indeed, as was suggested in the course of the argument, the clause may have been inserted in order to put that matter beyond question. It will be observed that clause 22 does not indicate the amount to be insured or specify the risks to be covered. It merely says that the owners shall pay for the insurance on the vessel. It imposes no obligation on the owners which the charterers could enforce. The meaning, therefore, I think, must be simply this—that if the owners choose to insure they must pay the premiums without recourse to the charterers. The owners are not to trouble themselves about the charterers at all. The insurance contemplated, if effected, is no concern of the charterers. Now, if the matter rested there, it seems to me that the conclusion must be that when the owners proposed to insure, acting as they did without any communication with the charterers, the charterers cannot be regarded as persons within the contemplation of the proposal. They were not persons intended to be covered by the policy or persons for whose benefit the insurance was proposed. They were strangers to the contract altogether. Clause 17 is obscure. Vaughan Williams (L.J.) seems to think that under certain circumstances it might give the charterers the benefit of an insurance made by the owners. I cannot think that that can be the meaning. I prefer the suggestion of Mr Hamilton, that what was meant was only this—that if the charterers should desire protection against the risks contemplated they were to look out for themselves and themselves alone, just as the owners were to do by their insurance on the vessel. If this be the true meaning it would strengthen the view which I have already indicated as the result of clause 22, that the insurance on the vessel was intended to be for the benefit of the insuring owners and not in any event or under any circumstances for the benefit of the charterers. I am therefore of opinion, notwithstanding the very able argument of Mr Carver and Mr Llewelyn Davies, that the order appealed from is right, and that the appeal should be dismissed with costs.

Lord Robertson—I concur.

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LORD ATKINSON—I concur in the conclusion that the judgment of the Court of Appeal should be upheld and this appeal dismissed with costs. I think that clauses 17 and 22 of the charter-party, taken singly or together, do not on their true construction amount to a contract between the owners and charterers that the former should insure the ship, nor do they, in my opinion, impose any duty or obligation on the owners so to do, or constitute or appoint them the agents of the charterers for that purpose. I am further of opinion that whether Messrs Craggs & Son intended to insure on behalf of the appellants or not, or whether or not Messrs I. Holman & Son professed or intended to insure on their (the appellants) behalf and as their agents, the appellants with full knowledge of the facts repudiated in the American proceedings the authority of the persons who, as they now contend, acted as their agents, and disclaimed the contract those alleged agents entered into. In the American proceedings a statement of facts was agreed upon between the appellants and the owners. Par. 8 of this statement contains the following allegation:—"The appellants had no insurance on the said steamship." The excuse now given for this allegation is that at the time at which it was made the appellants were contesting their liability for the damages caused to another vessel by the negligent navigation of the "Barnstaple," but if their present contention be well founded they were interested in other risks different from and in addition to the risk of having to pay damages for injury caused to other vessels by the negligent navigation of the vessel which they had chartered. And the contention that unless they were held liable in damages for this collision they had no interest in the policy of assurance, and that while that liability was undetermined this allegation in par. 8 could not be treated as a repudiation of the authority of their agents, or a reprobation of the contract of assurance which prevents them now from approbating it, cannot, in my opinion, be sustained. At the time at which this statement of facts was agreed upon the appellants knew all the facts. They insisted, no doubt, upon a construction of the charter party which would have protected them from liability for the damages then sued for; but the fact that the question of construction was still *sub judice*, and that they did not know that their contention would fail, or that they would be held liable to pay these damages, may show a want of appreciation of the soundness of a legal argument or the correctness of a legal opinion, but does not, in my opinion, amount to such ignorance of fact as will entitle a party to escape from the consequences of an election between two remedies made by him while that ignorance continued. I think that the allegation in this par. 8 must be treated as an unequivocal expression on the part of the appellants of their determination not to adopt or ratify or be bound by the contract of insurance which had been entered into, and that though made in a suit between the appellant and a third party it is upon the authority of *Clough* v. *London and North-Western Railway Company* (25 L. T. Rep. 708; L. Rep. 7 Ex. 26) binding in the present case upon those who made it. Upon the true construction of the general clause in the policy of marine insurance so much discussed, I express no opinion. Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify the contract contained in it and take advantage of that contract, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured, though that intention was never communicated to the underwriter. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted, & Company* v. *Durant* (84 L. T. Rep. 777, (1901) A.C. 240) or whether the rule of construction which was adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract. Having come to the conclusion which I have mentioned on other points of the case, it is unnecessary for the purposes of this appeal that I should express any opinion upon this point, and I wish to hold myself entirely free, should the necessity arise to reconsider it upon a future occasion.

Appeal dismissed.

Counsel for the Appellants—Carver, K.C.—A. Llewelyn Davies. Agents—Biddle, Thorne, Welsford, & Sidgwick, Solicitors.

Counsel for the Respondents—Scrutton, K.C.—J. A. Hamilton, K.C.—Maurice Hill. Agents—Waltons, Johnson, Bubb, & Whatton, Solicitors.

PRIVY COUNCIL.

Thursday, May 24.

(Present—The Lord Chancellor (Loreburn), Lords Davey, Dunedin, and Atkinson, and Sir Arthur Wilson.)

COMMISSIONER OF PUBLIC WORKS *v.* HILLS.

(ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.)

Contract—Breach—Penalty or Liquidated Damages—Criterion.

"The criterion of whether a sum, be it called penalty or damages, is truly liquidated damages, and as such not to

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be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made."

Contract — Interpretation — "Actual Cost" of Constructing Railway Line — Interest.

A contract between a colonial government and a contractor provided that in the event of the latter failing to complete the construction of a railway by a given date the former should take over and pay "the actual cost" of the work in so far as completed. *Held* that the contractor was not entitled under the contract to interest on the amount.

Cross appeals from a judgment of the Supreme Court of the Cape Colony (DE VILLIERS, C.J., and BUCHANAN, J.).

The facts appear fully from the considered judgment of their Lordships *infra*.

LORD DUNEDIN — The present appeals come out of three contracts which were made between the Government of the Cape of Good Hope and the Thames Ironworks and Shipbuilding Company, Limited. Arnold Frank Hills, the respondent in the principal appeal and appellant in the cross appeal, has had assigned to him the rights of the company. These three contracts were all made on the same day, the 4th July 1900, and were subsequently confirmed by Act of Parliament of the Cape of Good Hope, where they appeared as Schedules G, H, and I of Act 19 of 1900. They had to do with the construction of three railways, viz., No. 1, Oudtshoorn-Klipplaat; No. 2, Somerset East-King William's Town; and No. 3, Mossel Bay-Oudtshoorn. The first two were contracts for the construction of the lines by the company and the handing over of them to the Government. They were constructed and handed over, and no question in one sense is raised on them. But moneys payable under them are partly the subject of this litigation for the following reason. In each of them there was a clause providing that 10 per cent. should be retained by the Government from the payments falling due as the lines were constructed, and each of them also contained clauses dealing with the ultimate fate of the 10 per cent. so retained. By these clauses the 10 per cent. retained from each instalment was to form a guarantee fund, which fund was to be primarily applied to making good any defects of construction, and then "the guarantee fund or the balance thereof shall be dealt with in terms of the agreement entered into for the construction of the Mossel Bay-Oudtshoorn line" (section 49). Under these clauses sums amounting, *in cumulo*, to £61,233, 16s. 2d. have been retained. The third contract, which related to the Mossel Bay line, was rather different. This line was to remain the property of the contractors, but in respect of their engaging to construct the line the Government was to pay them a subsidy at the rate of £2000 per mile of completed railway, not to exceed £150,000 in all. Provision was made for the payment of this subsidy as the work went on, but subject to the retention of 10 per cent. of it by the Government. A sum of £50,000 had been lodged as security by the company in the hands of the Cape Agent-General, and section 15 of Schedule I provides that this sum and the sums retained by way of 10 per cent. of the instalments out of the payments on lines (1) and (2) should be handed over to the company as follows—viz., one-third when the Mossel Bay line had been completed to a certain geographical point, one-third when to a certain further point, and one-third on final completion. Then comes section 17, on which the controversies in these appeals directly turn. It is in the following terms:—"17. The concessionary undertakes to push forward the construction of the line with all possible speed and to complete the same within two years of the date of the approval of this agreement by Parliament. In the event of the non-completion of the line within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the act of God, war, insurrection, rebellion, strikes, lockouts, or combination of workmen, or other extraordinary or unforeseen circumstances beyond the control of the concessionary, or from or on the part of the railway department, the security referred to in this agreement, to wit, the ten per cent. (10%) retention money under this agreement, together with the ten per cent. retention money under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines, dated 4th July 1900, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said Government for the non-completion of the said line, and thereupon the agreement between the government and the said concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such incomplete line of railway as has been constructed by the said concessionary, and the Government shall thereafter as soon as the amount of the actual cost of such incomplete line shall have been ascertained pay to the said concessionary the amount so ascertained, less such amount as shall have been paid on account of subsidy, and less the amount of retention money and security hereinbefore referred to."

The company failed to complete the line within the two years, or within a period to which the two years had been by mutual consent extended. They did not even

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advance with it so far as to be able to claim any of the partial payments under section 15. Accordingly, on the 15th June 1903, the Government applied to the Court to get a declaration of the failure of the company to complete the line, and for leave to enter upon and take possession of the line in terms of section 17. The Court gave judgment accordingly. Against that judgment an appeal was brought, but subsequently abandoned, and the judgment now stands as final between the parties. The company, who by this time were represented by the present appellant Hills, then brought the present action against the Government, asking for payment of the value of their line, and the handing over of the sums retained and of the sum of £50,000 above mentioned, as also of a sum of £4913, 2s. 5d., being 10 per cent. of the instalments of the subsidy retained on railway No. 3. The Court gave judgment in favour of the plaintiff for a sum of £73,500, 12s. 7d., being the actual cost of the works as found by referees to whom it had remitted the question (but with no allowance for interest on capital), under deduction of the said sum of £4913, 2s. 5d., and also gave judgment for the plaintiff for the sums of £66,146, 18s. 7d. (made up of the said sums of £4913, 2s. 5d. and £61,233, 16s. 2d.) and £50,000. The parties in the principal appeal do not raise any question as to the sum of £73,500, 12s. 7d. but in the cross appeal the appellant Hills prays for a further addition in name of interest on capital. On this point their Lordships entirely agree with the remarks of the learned Chief-Justice. To add interest would seem to them to disregard the plain meaning of the word "actual" as applied to costs. The referees have here, as practical men, found the cost of works—in other words, they have said that so much money was expended in order to make them. To add something more in the name of interest would be to add something which never could be actual cost, for it would either be a sum calculated on an assumed general rate of interest, or it would be a sum which varied according to the financial position of the particular contractor. That "actual cost" in this contract is used in no such fanciful sense is clearly shown by the use of the words in section 7 of Schedule I, where provision is made for its ascertainment as regards each instalment by the certificate of an engineer. This disposes of the cross appeal. In the principal appeal the Government has complained of the judgment in so far as it gives the respondent Hills the sums of £66,146, 18s. 7d. and £50,000, and claims these in terms of section 17 as being theirs in name of liquidated damages for non-completion of the line within the specified time. Their Lordships have no doubt that the case of the non-completion of a railway would be a natural and proper case in which to make such a stipulation. But the question comes up in each particular case whether such a stipulation has been made, and it is well settled law that the mere form of expression "penalty" or "liquidated damages" does not conclude the matter. Indeed, the form of expression here "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being particularly appropriate to penalty and not to liquidated damages. The House of Lords had occasion to review the law in the matter in the recent case of the *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda* (91 L. T. Rep. 666; (1905) A. C. 6). It is perhaps worthy of remark, in view of certain observations of the learned Chief-Justice in the court below, that that was a Scotch case—that is to say, decided accordingly to the rules of a system of law where contract law is based directly on the civil law, and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity. The general principle to be deduced from that judgment seems to be this—that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. The *indicia* of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made. Applying this principle to the present case, their Lordships are unable to come to the conclusion that the sum here can be taken as a genuine pre-estimate of loss. The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money under contracts 1 and 2 depended entirely on the progress of those contracts, and that, further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available to be dealt with under the provisions of section 17 of this contract could not in any way be estimated as a fixed sum. Their Lordships therefore hold that the sums are not liquidated damages under section 17. So far as a claim is made under section 16 for £10,000, there seems no ground for argument that the sum is liquidated damages, as the expression used points to forfeiture pure and simple. Their Lordships are not, however, satisfied that the Government has been given a proper opportunity of proving such damages, not exceeding the sums in the penalties, as they can make out. In the Court below the whole contention seems to have turned upon the question of liquidated damages, yea or nay. The judgment of the learned Chief Justice which decides—as their Lordships think, rightly

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—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view. That the Government had a true and valuable interest in getting a line constructed, even although when constructed it was not to be their property, seems to be sufficiently established by the fact that they were content to pay a subsidy of £2000 a mile. They have not got that line completed, but, on the contrary, have got on their hands an incomplete line, incapable of yielding profit in its present state, for which they have been obliged to pay a considerable sum of money. It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money. Their Lordships will therefore humbly advise His Majesty to declare that before the plaintiff (the respondent in the principal appeal) obtains judgment for the sums of £66,146, 18s. 7d. and £50,000 awarded to him by the judgment of the Supreme Court dated the 29th February 1904, the defendant (the principal appellant) is entitled to prove such damage as he may have actually suffered through the plaintiff's breach of contract, and to obtain judgment in reconvention for such amount to be deducted from the sums awarded to him by the judgment of the Supreme Court, and that subject to such declaration the defendant's appeal ought to be dismissed, and further, that the plaintiff's cross appeal ought to be dismissed. The parties will pay their own costs of the appeal and cross appeal respectively.

Counsel for the Appellant in the principal appeal and the Respondent in the cross appeal—Neville, K.C.—Mackarness. Agents—Wilson, Bristows, & Carpmael, Solicitors.

Counsel for the Respondent in the principal appeal and the Appellant in the cross appeal—Upjohn, K.C.—Jenkins, K.C.—W. H. Cozens-Hardy. Agents—Cox & Lafone, Solicitors.

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PROVISIONAL ORDERS COMMITTEES.

NOTICES TO AGENTS.

Proofs.

All persons acting as Agents under the Private Legislation Procedure (Scotland) Act are requested to take note that they are responsible for the accuracy of the statements contained in the formal proofs of compliance with the General Orders. It is the duty of the agent in every case to call the Examiner's attention to any instance in which the requirements of the General Orders have not been fully complied with, and he will be held responsible for any neglect of this duty and for the consequences thereof.

In proving compliance with General Orders, agents are requested in every case to use the printed statements of proofs, which may be obtained from the usual agents for the sale of Government publications.

Fees.

All Fees under General Orders must be paid to the Secretary for Scotland's Office.

Fees should be remitted to the Scottish Office by letter addressed to the Under Secretary for Scotland. Bank drafts and cheques should be made payable to His Majesty's Paymaster General and crossed to the account of that officer at the Bank of England. As regards fees in respect of proceedings before the Examiner or Commissioners, it has been arranged that a daily note of these fees shall be handed or forwarded to each party appearing at such proceedings. As soon as the proceedings are closed, the total amount due should be remitted to the Scottish Office in the manner above mentioned.

In remitting fees by bank draft or cheque, agents are requested not to add any sum in respect of anticipated bank charges. If such charges are actually made, agents will be notified and the amounts will be collected from them in due course.

Applications for fresh Borrowing Powers.

Parties applying for Provisional Orders and their respective agents are requested to note that where new borrowing powers are applied for by town councils or other bodies possessing power to levy rates which will form the security for the repayment of the loans, it will save time and correspondence if the application to the Secretary for Scotland, or the estimate required under General Order 36, is accompanied by full statements showing the existing borrowing powers and conditions of repayment, the amounts which have been annually repaid or paid into sinking fund since the loans under existing borrowing powers were incurred, and the outstanding debt. Such statements should be supported by copies of annual accounts for three years preceding date of application.

Variations from Model Bill Clauses.

It is also desired that in three of the prints of Draft Provisional Orders deposited in the Scottish Office for the use of the Secretary for Scotland and his Counsel, extracts from and variations of the Model Bill Clauses should be marked so as to show whether they are adopted with or without variation. It is suggested that where the whole or part of a model clause has been adopted, a marginal note "Model" would suffice, and that where a model clause is intentionally altered, it should be either underlined or sidescored, and marked "Model Varied." Where clauses of an unusual character are inserted, especially in the case of Improvement Orders, a marginal reference to precedents would in many instances facilitate business.

General Orders.

The General Orders under the Procedure Act, reprinted as amended up to December 1903, are issued as a Stationery Office publication, and may be obtained from the usual agents for the sale of Government publications, price one shilling. No alterations have been made since this edition was issued.

Warrants under the Parliamentary Deposits Act 1846.

A form of requisition for warrant, and a form of warrant, under the Parliamentary Deposits Act 1846, as read with General Order 145, may be obtained on application to the Scottish Office.

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SUMMARY.

During the Session 1905-6 applications were made for 26 Provisional Orders, 16 applications in December 1905 and 10 applications in April 1906.

In terms of the Chairmen's decisions five of the Draft Orders were required to proceed as Private Bills. These Orders were—

1. The Edinburgh Corporation Order.
2. The Highland and Great North of Scotland Railways Amalgamation Order.
3. The Scottish Union and National Insurance Company Order.
4. The Buckhaven, Methil, and Innerleven Burgh Extension Order.
5. The North British Railway Order.

The following eleven Orders were unopposed, or opposition to them was withdrawn:—

1. The Cathcart District Railway (Superfluous Lands) Order.
2. The County of Aberdeen (Monymusk Bridge and Road) Order.
3. The Forfar Corporation Water Order.
4. The North Berwick Corporation Order.
5. The Perth Corporation Gas Order.
6. The Edinburgh Corporation (Superannuation) Order.
7. The Inverclyde Bequest Order.
8. The Newburgh and North Fife Railway (Extension of Time) Order.
9. The Paisley Roads Order.
10. The Portobello and Musselburgh Tramways (Port Seton Deviation) Order.
11. The Ure Elder Fund Order.

Ten Orders were opposed and were the subject of local inquiry. These Orders, reported below, were—

1. The Falkirk and District Tramways (Extension) Order.
2. The Dunfermline and District Tramways Order.
3. The Ardrossan, Saltcoats, and District Tramways Order.
4. The Dumbarton Waterworks and Burgh Extension Order.
5. The Dumbartonshire (Duntocher and Dalmuir) Water Order.
6. The Dumbartonshire Tramways Order.
7. The Rutherglen Burgh Order.
8. The Glasgow and South Western Railway Order.
9. The Blairgowrie and Rattray District Water Order.
10. The Clydebank and District Water and Burgh Extension Order.

Thursday and Friday, April 5 and 6.

(Before Lord Killanin, *Chairman*, Lord Sinclair, Viscount Dalrymple, M.P., Mr Alexander Findlay, M.P.—at Edinburgh.)

FALKIRK AND DISTRICT TRAMWAYS (EXTENSIONS) PROVISIONAL ORDER.

Provisional Order—Tramways—Competition with Railway Company—Carriage of Goods, Animals, and Minerals—Supply by Tramway Company of Electric Power—National Telephone Company—Protection of Overhead Wires—Tramway Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 30—*Omnibuses in Connection with Tramway.*

This Order was promoted by the Falkirk and District Tramways Company, which was incorporated in 1901 under Provisional Order. The main object of the Order was to make certain extensions of the system authorised in 1901, which had since been constructed and was now in working order. The proposed extensions were two in number, the first being one of about two miles in length running partly through the burgh of Falkirk and partly into the county of Stirling, the second, considerably longer, running from the burgh of Falkirk through part of the county to the burgh of Grangemouth.

The Order was opposed by the Caledonian and North British Railway Companies, the National Telephone Company, and the Scottish Central Electric Power Company.

The main opposition to the preamble was that of the railway companies upon the ground of competition. The Scottish Central Power Company also opposed the preamble in so far as it was proposed to convert the Tramway Company into a Power Company.

The Caledonian Railway Company owned the line from Falkirk to Grangemouth, and the North British Company had running powers over that line, and also owned a line from Falkirk in the direction of Laurieston. These companies contended that the wants of the district were sufficiently supplied by the existing railway service. They further objected to the proposal to include in the Order powers (1) to carry goods, animals, and minerals, and (2) to run omnibuses in connection with the tramway.

The Scottish Central Electric Power Company objected to a proposal to authorise the Tramway Company to supply electric power to other companies, local authorities, or persons. The promoters had obtained authority under their Order of 1901 to erect a generating station of their own and to make agreements to supply electric power. They had not as yet exercised these powers but obtained their electric energy from the Scottish Electric Power Company, who had obtained an Act in 1903 authorising them to supply a large part of the counties of Stirling, Fife, and Clackmannan. An agreement had been entered

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into in 1905 between the promoters and the Scottish Electric Supply Company under which the latter contracted to supply the power for the tramways for an initial period of 25 years, which might be extended by agreement for 7 or 12 years.

Proof was led for the promoters. The Commissioners then intimated that they would not allow the clause dealing with goods, animals, and minerals to be part of the Order.

Subject to this restriction they passed the preamble, reserving the question raised by the Central Power Company to the discussion upon clauses. By agreement the clause giving the power objected to by that Company was subsequently dropped from the Order.

On the adjustment of clauses the National Telephone Company claimed the insertion of a clause to the effect that "Section 30 of the Tramways Act 1870 shall have effect as if wires or apparatus laid in a road included wires or apparatus erected or carried over a road, footpath, or place."

Argued for the objectors—Section 30 of the Tramways Act 1870 gave protection only to underground wires. It did not contemplate that the protection of overhead wires would become necessary. Such protection was as necessary in the one case as in the other. This clause had been inserted by Parliament in the *Paisley District Tramway Order* 1905, 42 S.L.R. 888, and in the *Glasgow Order* 1905, in nine separate English Acts by agreement, and in six different Tramway Orders by the Board of Trade.

Argued for the promoters—The objectors had no title to this provision. The National Company had no statutory right in their overhead wires and apparatus and could not insist upon statutory protection. In no case had this Tribunal sanctioned the clause. In the *Glasgow* and *Paisley* cases cited the clause had only been inserted when the Bills were before the House as a concession to opposition which threatened to prevent their passing the House.

The Commissioners *allowed* the clause.

The Tramway Company obtained authority to run omnibuses within 5 miles of any point upon their system.

Counsel for the Promoters—Cooper, K.C. —D. M. Wilson. Agents—E. & I. Findlay, S.S.C.

Counsel for the North British Railway Company (*Objecting*)—C. Scott Dickson, K.C.—Grierson. Agent—James Watson, S.S.C.

Counsel for the Caledonian Railway Company (*Objecting*)—M'Clure, K.C. Agent—H. B. Neave, Solicitor.

Counsel for the National Telephone Company (*Objecting*)—Wilson, K.C. Agent—James Andrew, Solicitor.

Counsel for the Scottish Central Electric Power Company (*Objecting*)—Lyon Mackenzie. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday, Saturday, and Monday, 6th, 7th, and 9th April.

(Before Lord Killanin, *Chairman*, Lord Sinclair, Viscount Dalrymple, M.P., and Mr Alexander Findlay, M.P.—at Edinburgh.)

DUNFERMLINE AND DISTRICT TRAMWAYS PROVISIONAL ORDER.

Provisional Order—Locus Standi—Tramway—Preamble—Locus of Railway Company Opposing Tramway—Competition—Acquisition of a Tramway by Local Authorities where Many Interested—Supply by Tramway Company of Electrical Energy.

The object of this Order was to incorporate a company to construct and work tramways of about 18 miles in length in the Western District of the county of Fife. The proposed tramways, which had the town of Dunfermline for their centre, extended in the first place from the burgh of Inverkeithing northwards for about five miles through the town of Dunfermline, then diverged eastward through several small mining villages to Cowdenbeath, thence proceeded northward and ended in two branches at Lochgelly and Kelty. The promoters had the support of all the local authorities concerned, the County Council of Fife and the Dunfermline District Committee appearing only upon clauses. Agreements between the promoters and the leading local authorities, viz., the County Council of Fife and the Royal Burgh of Dunfermline, provided terms of purchase of the tramways in substitution for the terms of the Tramways Act 1870. The other local authorities, viz., the Burghs of Cowdenbeath and Lochgelly, did not stipulate for separate purchase rights. It was provided, however, by the said agreements that all the local authorities might by mutual assent acquire the whole undertaking on certain terms, and also that the said leading local authorities might acquire on the same agreed terms the parts of the undertaking within their own district, and also the parts beyond their district, with the consent in the latter case of the other local authorities concerned.

The preamble was opposed by the North British Railway Company. The County Council of Fife and the Dunfermline District Committee, certain frontagers in the High Street of Dunfermline, the Fife Electric Power Company, and the National Telephone Company objected upon clauses.

On the preamble proof was led by the promoters and by the North British Railway Company. Counsel for the North British Railway objected upon the ground that the scheme could not be financially successful. The construction of this tramway competing with the Railway Company, as it did through its whole course of eighteen miles, and crossing the railway some thirteen or fourteen times, could only result in failure. The portion between Dunfermline

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and Inverkeithing was neither required by the public nor was it such as would serve any necessities of the public; it would take away traffic from the Railway Company and give no corresponding advantage to the travelling public.

Argued for the promoters—The locus of the objectors was upon the limited ground of competition. They had no right to object upon points which did not affect competition. In this case there was a unanimous desire of all the local authorities concerned for the tramways. In the *South Lanarkshire Tramways* 1903, 40 S.L.R. 895 sixteen miles of tramways had been authorised, running on the same route as and in competition with the Railway Company, and in the *Rhondda Valley Tramways* thirty miles of tramways in similar circumstances.

The Commissioners were unanimously of opinion that the preamble had been proved with reference to the whole line, except the portion outside the Burgh of Dunfermline going southwards. The Chairman added—"I may say we came to our conclusion wholly apart from financial considerations. We practically came to that conclusion on the promotors' evidence."

On the adjustment of clauses the Fife Electric Power Company objected to a clause authorising the supply by the Tramway Company to any local authority, company, or person, of electric energy. Proof was led for the Fife Power Company, which showed that at that date there were only two authorities who had power to supply electric energy in Fifeshire, viz., the Burgh of Kirkcaldy within its own limits and the objecting Company. The objecting Company was only authorised to supply under the conditions of the Electric Lighting Acts.

Argued for the objectors—The objecting Company would be subject to unreasonable competition. Under the terms of their Act they were, *inter alia*, not entitled to give a preference or to unreasonably withhold a supply from any person. They were further bound to supply at certain rates which bore a relation to the dividend which the Company was earning. The promotors would be converted by this clause into a Power Company without any such disabilities. The clause had been previously rejected in the *Edinburgh Suburban Tramways Order* 1905, 42 S.L.R. 894; *Nottingshire and Derbyshire Tramways* 1903; and *South Lanarkshire Tramways* 1903 (*cit.*).

Argued for the promoters—The opposition was an attempt to maintain a monopoly. Looking at the circumstances here the clause was reasonable—*Wemyss Tramways Order* 1905, 42 S.L.R. 886. In the *Nottingham Order* and *South Lanarkshire Order* cited the clause was deleted by agreement. The *Edinburgh Suburban* case was one for retail and not for bulk supply.

The Commissioners unanimously *refused* to grant the clause, but allowed a provision to the effect that "the Company may apply for, and if obtained carry into effect, Provisional Orders under the Electric Lighting Acts 1882 and 1888, the Electric Lighting (Scotland) Act 1890, and the Electric Lighting (Scotland) Act 1902."

Counsel for the Promoters—M'Clure, K.C.—Sandeman. Agent—E. I. Findlay, S.S.C.

Counsel for North British Railway Company (*Objecting*)—C. S. Dickson, K.C.—Grierson. Agent—James Watson, S.S.C.

Counsel for the County Council of Fife and the Dunfermline District Committee (*Objecting*)—T. B. Morison. Agent—V. A. Begg, W.S.

Counsel for the Fife Electric Power Company (*Objecting*)—Wilson, K.C. Agents—Davidson & Syme, W.S.

Counsel for National Telephone Company (*Objecting*)—Wilson, K.C. Agent—James Andrew, Solicitor.

Counsel for Frontagers (*Objecting*)—Macmillan. Agent—J. R. Stevenson, Solicitor, Dunfermline.

Thursday, Friday, Saturday, Monday, Tuesday, and Wednesday, 3rd, 4th, 5th, 7th, 8th, and 9th May.

(Before the Duke of Argyll, K.T., *Chairman*, the Earl of Ranfurly, Sir John Batty Tuke, M.P., Mr Alexander W. Black, M.P.—at Glasgow.)

ARDROSSAN, SALTCOATS, AND DISTRICT TRAMWAYS PROVISIONAL ORDER.

Provisional Order—Tramways—Railway Company — Level-Crossing of Railway Line by Tramway—National Telephone Company—Protection of Overhead Wires —Tramways Act 1870 (*33 and 34 Vict. cap.* 70, *sec.* 30)—*Power to Run Omnibuses by Tramway Company on a Route on which Tramway Refused.*

This was an Order to incorporate a company to construct and work certain tramways in the burghs of Ardrossan and Saltcoats and in the adjoining district of the County of Ayr. The proposed tramway was one of eleven and a-half miles in length, starting from the village of Portencross and running thence through a rural district by way of West Kilbride and Seamill to Ardrossan; thence its course lay through Saltcoats and Stevenston to Ardeer, at which latter place the presence of several large works called specially for tramway facilities. The Order also embraced powers to construct a pier at Portencross.

The principal opponents of the Order were the Glasgow and South-Western, Caledonian, and Lanarkshire and Ayrshire Railways, the County Council of the County of Ayr, the Northern District Committee of the County Council of Ayr, and the District Road Board. The Order was also opposed by certain proprietors and

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frontagers upon the proposed line of tramway and by the National Telephone Company.

The promoters had the support of the Parish Council of West Kilbride, the Parish Council and the Town Council of Ardrossan, the Town Council of Saltcoats, and the Parish Council of Stevenston.

The railway service in the district was provided by the Glasgow and South-Western Railway Company with stations at Stevenston, Saltcoats, South Beach, Ardrossan Harbour, and West Kilbride, and by the Lanarkshire and Ayrshire Railway Company, worked by the Caledonian Company, with stations at Stevenston, Saltcoats, and Ardrossan. The main opposition of the Railway Companies was on the ground of competition; they contended that there was not a sufficient public demand for a tramway service in the district, its wants being supplied by the existing railway service. More especially was this the case in the less populous portion of the proposed tramway route between Portencross and Ardrossan. As regards this latter portion the Railway Companies were supported in their opposition by the County Authorities and by certain proprietors in West Kilbride. The Railway Companies further objected on the ground of certain engineering difficulties, and especially to a proposal that the tramway should cross the Glasgow and South-Western Company's line on the level at a point close to the station at Stevenston.

After hearing evidence for the promoters, for the Glasgow and South-Western Railway Company, and for the owners and frontagers, the Commissioners found that the preamble of the Order had not been proved so far as regarded the tramway between the proposed terminus at Portencross and the northern boundary of the Burgh of Ardrossan, nor as regards so much of the tramway as consisted of a level-crossing over the line of the Glasgow and South-Western Railway at Stevenston.

On the adjustment of clauses the National Telephone Company claimed the insertion of a clause giving the same protection to overhead wires and apparatus of the company as was given to underground wires by section 30 of the Tramways Act 1870. The promoters opposed this proposal. Proof was led for the Telephone Company and for the promoters.

Argued for the promoters — The Telephone Company had no statutory authority for the erection of overhead wires and could not claim this provision. Section 30 of the Tramways Act had been incorporated with reference to overhead wires in Scottish Orders only where there had been an agreement, and there was no precedent binding upon this tribunal.

Argued for the National Telephone Company—The section was justly claimed, and had in any case been inserted by the Commissioners in the Falkirk Order of the present session (reported *sup.* p. 899).

The clause was made part of the Order.

Certain owners, lessees, and occupiers in Seamill and West Kilbride objected to the powers sought by the promoters to run omnibuses in connection with the proposed tramways within a distance of five miles of any terminus. It was argued that the insertion of this provision would enable the Tramway Company to run omnibuses to Portencross, which was within five miles of the Ardrossan terminus of the tramway, thus defeating the result at which the tribunal had arrived in disallowing the tramway over the same route. The objectors claimed the insertion of a proviso "that nothing herein contained shall authorise the company to run omnibuses between the western part of Ardrossan and Portencross." An exact precedent for what they claimed was in the Port Glasgow Tramways Extension Order Confirmation Act (the Order is reported 39 S.L.R. 880).

The Commissioners by a majority were in favour of allowing the clause to remain as it stood.

Counsel for the Promoters—Cooper, K.C. —Macmillan. Agent—E. I. Findlay, S.S.C., Edinburgh.

Counsel for Mr Cunninghame of Auchenharvie, The Glengarnock Iron and Steel Company, and the Ayrshire Coalowners (*Objecting*)—Dean of Faculty (Campbell, K.C.)—Constable. Agents—Holmes, MacTavish, & MacKillop, Writers, Glasgow.

Counsel for the Glasgow and South-Western Railway, the Caledonian Railway, and the Lanarkshire and Ayrshire Railway (*Objecting*)—Wilson, K.C. Agents—David Murray, Writer, Glasgow—H. B. Neave, Solicitor — Keydens, Strang, & Girvan, Writers, Glasgow.

Counsel for the National Telephone Company (*Objecting*)—Wilson, K.C. Agent—James Andrew, Writer, Glasgow.

Counsel for the County Council of Ayr, the Northern District Committee, and the County Road Board (*Objecting*)—M'Clure, K.C. — Cochran-Patrick. Agent—J. E. Shaw, County Clerk.

Counsel for Owners, &c., at West Kilbride (*Objecting*)—Hunter, K.C. Agent—A. Moncrieff Mitchell, Writer, Glasgow.

Counsel for Owners and Frontagers (*Objecting*)—A. M. Anderson. Agents—John Elmslie & Guthrie, Solicitors, Ardrossan.

Counsel for Brown's Trustees (*Objecting*) — Constable. Agents — Blair & Cadell, W.S.

Agent for Mr George Morton of Montfode, and Mr Alexander of Boydstone (*Objecting*)—William Barrie, Writer.

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Tuesday, Wednesday, Thursday, and Friday, 8th, 9th, 10th, and 11th May.

(The Duke of Argyll, K.T., *Chairman*, The Earl of Ranfurly, Sir John Batty Tuke, M.P., Mr Alexander Black, M.P.—at Glasgow.)

DUMBARTON WATER-WORKS AND BURGH EXTENSION ORDER.

Provisional Order — Burgh — Water — Acquisition by Burgh of Water Supply in Excess of its Requirements—Source of Water Supply Available for Large District Proposed to be Acquired by One Authority therein—Suggestion of Joint-Scheme by Commissioners—Extension of Burgh Based on Speculative Increase of Population.

(See also following report on *Dunbartonshire (Duntocher & Dalmuir) Water Order.*)

This Order was promoted by the Burgh of Dumbarton for two purposes — *first*, to obtain power to bring a new water supply into the burgh; and *second*, to obtain an extension of the burgh boundary towards the east. The present water supply of the burgh, obtained as the result of applications to Parliament in 1857, 1858, and 1883, was drawn from Loch Humphrey, Loch Fyn, and a reservoir at Blacklinn, all situated in the Kilpatrick Hills and within 6 or 7 miles of Dumbarton, in an area which drains into the Clyde at Dalmuir. These sources, it was contended, yielded a supply of 1,000,000 gallons per day. The present requirements of the burgh was 1,200,000 gallons per day. To meet present requirements and anticipated increase of the population of the burgh a largely increased supply was stated to be necessary. For this purpose it was proposed to impound the water of Loch Sloy, and to convey that water by means of metal pipes to Dumbarton. Loch Sloy, situated on the west side of Loch Lomond, near the head of the loch, some 27 miles distant from Dumbarton, drained into Loch Lomond. The proposed scheme would make some 5,000,000 gallons per day available for supply.

The principal opponents of the scheme were the County Council of Dunbartonshire, the Colquhoun Trustees, proprietors of the loch and adjoining land, and certain manufacturers who had works upon the river Leven, which runs from Loch Lomond to the Clyde at Dumbarton.

The part of the scheme relating to extension of the burgh was limited to an area to the south-east. This area, though not actually built upon, was in most part laid out for feuing, and the immediate growth of an urban population in that area, whose water, lighting, &c., would have to be supplied by the Burgh Authorities, was stated to be anticipated owing to the recent erection, not yet completed, of large industrial works at the east end of the burgh.

The main opposition to the preamble of the Order, apart from questions of compensation, &c., was on the ground of the magnitude of the water scheme, which it was contended was out of proportion to the requirements of the burgh, immediate or to be anticipated. The appropriation of this large source of supply would prejudice the other local authorities in the district, whose growing needs would shortly have to be provided for.

The opposition to the extension of the burgh was on the ground that it was asked merely in connection with the water scheme and was based entirely on a speculative vast growth of population, there being, as was proved, sufficient vacant ground within the burgh to meet all ordinary growth.

The Commissioners found the preamble not proved.

The report of the Commissioners upon this Order was in the following terms:—

"The inquiry into this Order was decided by three Commissioners, viz., the Duke of Argyll (Chairman), the Earl of Ranfurly and Mr Alexander Black, M.P., Sir John Batty Tuke, M.P., the fourth Commissioner appointed to inquire into this group of Provisional Orders, being unable to attend, and Sir James Low, appointed by the Secretary of Scotland to fill the vacancy so created, not having heard the evidence.

"The Commissioners heard counsel for the promoters, and evidence in their behalf, and also heard evidence in behalf of certain opponents, including the County Council of Dunbarton and the Trustees of the late Sir James Colquhoun of Luss, Baronet; and, after deliberation, by a majority of two to one (Mr Alexander Black, M.P., dissenting) found the preamble to the Order not proved.

"The Commissioners accordingly recommend that the Order should be refused.

"The Chairman further reported that, while the Commissioners had inquired into the Order as a measure by itself, and had considered the water-works part of the Order as a scheme for the supply of the Burgh of Dumbarton alone, they were impressed with the desirability of regarding the water supply of this district of Scotland from a wider point of view.

"In the County of Dunbarton, on the north bank of the Clyde, and in the Vale of Leven, an industrial population, already large, is growing rapidly. An ample water supply is essential, not only for domestic and sanitary use, but also for the service of the manufactories upon which the livelihood of this population depends. Immediately to the north there fortunately lies an area of high land and copious rainfall; to the east, the catchment areas of the Glasgow and other water-works are situated, and the southern slope of the Kilpatrick Hills is already utilised. The natural gathering ground, therefore, consists practically of the drainage area of Loch Lomond.

"Within this area certain sources of supply are already appropriated to individual communities; but the greater part still remain available.

"The Commissioners, while recognising

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that it is not for them to make any recommendation on this matter, desire nevertheless to record their unanimous opinion that the appropriation of the sources of supply in this area cannot satisfactorily be left to competition between the various communities; and that a scheme for the common good of the whole population, resulting either from further public inquiry or from conference and co-operation between the local authorities concerned, would be of the utmost public local advantage."

Counsel for the Promoters — Younger, K.C. — C. D. Murray — A. M. Mackay. Agent — Alexander Roberts, Town Clerk, Dumbarton.

Counsel for the Dunbartonshire County Council (*Objecting*)—The Dean of Faculty (Campbell, K.C.)—Horne. Agent—William Craig, County Clerk.

Counsel for the United Turkey Red Company (*Objecting*) — The Dean of Faculty (Campbell, K.C.)—King. Agents —M'Grigor, Donald, & Company, Writers, Glasgow — Moncrieff, Barr, Paterson, & Company, Writers, Glasgow.

Counsel for the Calico Printers' Association (*Objecting*)—The Dean of Faculty (Campbell, K.C.)—King. Agents—M'Grigor, Donald, & Company, Writers, Glasgow —Moncrieff, Barr, Paterson, & Company, Writers, Glasgow.

Counsel for the Colquhoun Trustees (*Objecting*) — Scott Dickson, K.C. — Constable. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Tarbet (Loch Lomond) Hotel Company, Limited, and Others (*Objecting*) — Scott Dickson, K.C. — Constable. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Loch Lomond Angling Improvement Association (*Objecting*) — Scott Dickson, K.C. — Horne. Agents — R. P. Lamond & Son, Writers, Glasgow.

Counsel for Baron Overtoun (*Objecting*) —C. H. Brown. Agents—M'Kenzie, Roberton, & Company, Writers, Glasgow.

Counsel for the Trustees of the Dumbuck Estate (*Objecting*)—C. H. Brown. Agents —Babtie & Craig, Solicitors, Dumbarton.

Counsel for the North British Railway Company, the West Highland Railway Company, and the Dumbarton and Balloch Joint Committee (*Objecting*) — Cooper, K.C. Agent—James Watson, S.S.C.

Counsel for the Caledonian Railway Company and the Lanarkshire and Dumbartonshire Railway Company (*Objecting*) — Cooper, K.C. Agent — H. B. Neave, Solicitor.

Agent for Alexander Crum Ewing of Strathleven (*Objecting*) — D. Cockburn, of Babtie & Craig, Solicitors, Dumbarton.

Agent for the Leven Gaslight Company, (*Objecting*) — D. Cockburn, of Babtie & Craig, Solicitors, Dumbarton.

Counsel for D. M. Dodds and Others (*Objecting*) — Scott Dickson, K.C. — Constable. Agent — William B. Thomson, Solicitor, Dumbarton.

Friday and Saturday, 11th and 12th May.

(Before the Duke of Argyll, K.T., *Chairman*, the Earl of Ranfurly, Sir James Low, and Mr Alexander Black, M.P.— at Glasgow.)

DUNBARTONSHIRE (DUNTOCHER AND DALMUIR) WATER ORDER.

Provisional Order—Locus Standi—Burgh —Extension of Water-works by a County Local Authority—Opposition by Burgh Lying within Water District.

Provisional Order—Water—Water Scheme to Meet Immediate Wants only—Water Scheme to Exhaust Present Sources—Scheme Refused on Ground of Insufficiency—Suggestion by Committee of a Large Scheme to Meet Requirements of Water District and Adjoining Districts.

(See also preceding report on *Dumbarton Water-works and Burgh Extension Order.*)

This Order was promoted by the County Council of Dunbartonshire and the Eastern District Committee of that County, being in their respective capacity the local authority for the County charged with the supervision of water supplies under the Local Government Act 1889. The Order was to provide an additional supply of water for the Duntocher and Dalmuir Water Supply District. The district included the Burgh of Clydebank and the villages of Duntocher, Faifley, Hardgate, and Radnor Park. The present water supply for the district was obtained under Parliamentary powers granted in 1874, 1881, and 1897. Under these powers certain reservoirs were constructed in the Kilpatrick Hills immediately to the north-west of Clydebank, and the water brought thence through the district. The present scheme proposed to increase the supply from the source already available, by the construction of certain works on or about the existing reservoirs, and would exhaust that source of supply.

The Order was opposed by the Town Council of Clydebank, by the Caledonian and North British Railway Companies, and by certain local proprietors.

The promoters contended that the present supply was insufficient for the needs of the district. Owing to the storage capacity of the existing reservoirs no shortage had as yet been felt, but there was immediate danger of a shortage. They had to face this situation, that if the prosperity of the district went on increasing in the future as it had done in the past, it would shortly be necessary for all parties concerned, not only in that special district but also in the neighbouring district, either severally or in combination, to make provision for a supply for the next fifty years or so. The present scheme was intended to meet immediate needs only, pending the consideration of the larger question, and to use up the present source of supply.

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The principal opposition on the preamble was that of the Town Council of Clydebank. Their main contention was that the scheme was a makeshift scheme, which even in the opinion of the promoters would not provide an adequate supply for more than two years, and that the contemplated expenditure, estimated by the promoters at £30,000 for an increased supply of 660,000 gallons per day, was excessive and should not be sanctioned.

The promoters objected to the locus of the Town Council of Clydebank on the ground that they had no power with regard to water supply. The local authority in matters of water supply in the district concerned was the County Council. The Town Council were the local authority within the burgh in ordinary matters of public health, but matters of water supply were expressly excluded from their powers —Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), secs. 11 and 81; also *County Council of Dumbarton* v. *Police Commissioners of Clydebank*, 16th November 1894, 32 S.L.R. 56. Further, the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 261, which governed Clydebank, prohibited any Commissioners of Police from supplying water in any district where there were already commissioners— Parliamentary Commissioners or a Water Company—authorised to supply water.

The Commissioners under the special circumstances of the case *granted* a *locus standi*.

Evidence was led for the promoters and for the Town Council of Clydebank.

The Commissioners found the preamble not proved.

The Chairman made the following report to the Secretary for Scotland—"That the Commissioners heard counsel for the promoters and evidence on their behalf, and also heard evidence for the Town Council of Clydebank opposing the Order, and after deliberation found the preamble to the Order not proved.

"The Commissioners accordingly recommend that the Order be refused.

"The Chairman further reported to the Secretary for Scotland that the Commissioners desired in this report to refer to the report upon the Dumbarton Water-works and Burgh Extension Order.

"The proposed scheme for the Duntocher and Dalmuir District was considered simply upon its own merits. But the Commissioners heard evidence which showed the growing need of the whole area described in the previous report, and frequent mention of another scheme (not before the Commissioners) which will apparently affect the Loch Lomond Watershed.

"The Commissioners therefore desire unanimously to emphasise the view expressed in the previous report."

Counsel for the Promoters—The Dean of Faculty (Campbell, K.C.)—Horne. Agents —James Hutcheson & Sons, Writers, Glasgow.

Counsel for the Corporation of Clydebank (*Objecting*)—Wilson, K.C.—Munro. Agent—John Hepburn, Town Clerk, Clydebank.

Counsel for the North British Railway Company (*Objecting*)—Cooper, K.C. Agent —James Watson, S.S.C.

Counsel for the Caledonian and Lanarkshire and Dumbartonshire Railway Companies (*Objecting*)—Cooper, K.C. Agent —H. B. Neave, Solicitor.

Counsel for David Gilmour, proprietor of Hardgate Mill (*Objecting*)—Macphail. Agent—A. R. Mackenzie, Writer, Paisley.

Agents for Arthur Baird, of Erskine— Dundas & Wilson, W.S., Edinburgh.

Agent for Trustees of late Claud Hamilton Hamilton of Barns and Cochno—Robert Mackenzie, Writer, Glasgow.

Wednesday and Thursday, May 16 *and* 17.

(Before the Duke of Argyll, K.T., *Chairman*, the Earl of Ranfurly, Sir James Low, and Mr Alexander W. Black, M.P. —at Glasgow.)

DUMBARTONSHIRE TRAMWAYS PROVISIONAL ORDER.

Provisional Order—Locus Standi—Tramway—Railway Company—Notice to Railway Company under General Orders, sec. 13 *— Electric Power Company — Power of Tramway Company to Supply Electric Energy.*

The object of this Order was to authorise the Electric Supply Corporation, Limited, to construct and work certain additional tramways, in all about 10 miles in length, situated in the county of Dumbarton, to connect with the same company's Dumbarton Burgh tramways, which were authorised in 1904. The Dumbarton Burgh tramways were in course of complétion and the present Order was for (1) a linking up of the Clydebank with the Dumbarton tramways, and (2) an extension of the tramway to Balloch.

The main opponents of the scheme were the Clyde Valley Electrical Power Company and the Caledonian and North British Railway Companies. The only opposition upon the preamble was that of the Railway Companies.

Proof was led for the promoters. In the course of the proof counsel for the Dumbarton and Balloch Joint-Line proposed to cross-examine upon the financial soundness of the scheme. The question was objected to on the ground that the Railway Company had no general locus, but only a limited locus on the ground of competition. (Lord Clifford's ruling in *Aberdeen Suburban Tramways Order* 1902, 39 S.L.R. 872).

Argued for the Railway Company—The company had a general locus as landowner. Notice had been served upon the company under section 13 of the General Orders, which bore, *inter alia*, that the company's property mentioned in the annexed schedule would "be liable to be taken or used com-

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pulsorily for the purposes of" the undertaking. The said schedule specified certain bridges and other property of the company upon which the promoters proposed to execute certain works.

The question was disallowed by the Commissioners upon the ground that the Railway Company, not being able to show any clause under which the promoters proposed to acquire land belonging to them, had no general locus as landowners, and thereupon counsel for the railways withdrew from the inquiry.

Pronouncement upon the preamble was postponed until after the clauses had been gone through.

On Clauses—The Clyde Valley Electoral Power Company objected to a proposed provision of the Order (clause 64 (*b*)) authorising a supply of electric energy by the Tramway Company to any local authority, company, body, or person.

Argued for the Clyde Valley Company—The clause would erect the promoters into an electric power company in competition with the Clyde Valley Company, but not subject to the restrictions of the Electric Lighting Acts under which the Clyde Valley Company were placed by their Act of 1901, which authorised them, *inter alia*, to supply with power the district covered by this tramway. The proper course for the promoters to pursue was to make an application through the Board of Trade for a Power Order or a Lighting Order. The Private Legislation Act conferred no power on the Secretary for Scotland to make such Orders, and this Tribunal had no authority to deal with them. The powers sought for in sub-section (*b*) had been granted by the Tribunal only where unopposed. In the South Lanarkshire Tramways, 1903, sub-section (*b*) was granted, but subject to the provision that "nothing in this Act shall empower the Tramway Company to supply electrical energy to any local authority, &c. . . . without the consent in writing of the Power Company." In the most recent cases, the *Falkirk and District Tramways* (reported *sup.* p. 899) and *Dunfermline District Tramways* (reported *sup.* p. 900), both of the current session, sub-section (*b*) had been struck out by the Commissioners.

Argued for the promoters—The present case was clearly distinguished from that of *Falkirk* or *Dunfermline*. The promoters here were not merely a tramway company as in these cases, but were an electric power corporation with similar undertakings in different parts of the country. The promoters were also bound by the terms of the present Order to light the streets of Dumbarton through which the tramway passed. They were thus in a position of local authority *qua* lighting in Dumbarton. In the case of the South Lanarkshire Tramways the company concerned obtained an Order in 1900 containing the powers asked for here. These powers were expressly contained in the Order of 1903.

The Commissioners disallowed clause 64 (*b*), and added, "In doing so the Committee, however, do not prejudice any application to the Board of Trade on the part of the Tramway Company for electric light or electric supply powers."

After the adjustment of clauses the Commissioners found the preamble proved, and reported the Order as amended.

Counsel for the Promoters—Crabb Watt, K.C.—A. M. Mackay. Agents—Wishart & Sanderson, W.S., and Macfarlane & Thomson, Writers, Dumbarton.

Counsel for the Clyde Valley Electric Power Company (*Objecting*)—Wilson, K.C. Agents—Wright, Johnston, & Mackenzie, Writers, Glasgow.

Counsel for the Caledonian and Lanarkshire and Dumbartonshire Railway Companies (*Objecting*)—Cooper, K.C. Agent—H. B. Neave, Solicitor.

Counsel for the North British and Forth and Clyde Junction Railway Companies and the Dumbarton and Balloch Joint-Line Committee (*Objecting*)—Cooper, K.C. Agent—James Watson, S.S.C.

Counsel for the Royal Burgh of Dumbarton (*Objecting*)—Kippen. Agent—Alex. Roberts, Town-Clerk, Dumbarton.

Counsel for the County Council of Dumbarton (*Objecting*)—Horne. Agent—William Craig, County Clerk.

Agent for Colonel Fergusson Buchanan of Auchentorlie (*Objecting*)—David Reid, Solicitor, Glasgow.

Thursday and Friday, 17th and 18th May.

(Before the Duke of Argyll, K.T., *Chairman*, the Earl of Ranfurly, Sir James Low, and Mr Alexander W. Black, M.P.—at Glasgow.)

RUTHERGLEN BURGH PROVISIONAL ORDER.

Provisional Order—Burgh—Extension—Inclusion of Public Works without Population—Extension to Include Whole of Royal Burgh and Parliamentary Burgh—Inclusion of Land to Round off Boundaries—Inclusion of Public Parks and Cemetery.

This Order was promoted by the Provost, Magistrates, and Councillors of the Royal Burgh of Rutherglen, and the purpose of the Order was to extend the boundaries of the Police Burgh to the limits of the Royal and Parliamentary Burghs, and also to include a district contiguous to the Royal Burgh on the east, and a small district contiguous to the Parliamentary Burgh on the west. Rutherglen was in the position of having three different burghal areas—(1) The Police Burgh containing 334 acres, alluded to herein as area E. (2) The Parliamentary Burgh, which embraced the whole of the Police Burgh, and in addition two areas situated to the north-

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west and north-east of the Police Burgh, and alluded to hereinafter as areas A and B—extending in all to 487 acres—*i.e.*, to 143 acres more than the Police Burgh. (3) The Royal Burgh, which embraced the Police Burgh, and in addition extended to the east, south, and west, containing in all 1422 acres, or 1078 acres more than the Police Burgh. (That portion of the Royal Burgh not included in the Police Burgh is alluded to hereinafter as area C.) The district not included in any of the burghal areas which the Order proposed to include (alluded to hereinafter as area D) lay immediately to the north-east, abutting upon areas B and C on its south-easterly border, and for the rest of its circumference almost entirely enclosed within a bend of the river Clyde. (A small area contiguous to the Parliamentary Burgh on the west (lettered A) was also included, but this area is so small it requires no further notice.)

The Order was opposed by the following:—The County Council of Lanark and the District Committee of the Lower Ward of that County, by the trustees of the late James Francis Watson, proprietors within area C, by Mrs Morgan and William Dixon, Limited, also proprietors in the western part of area C, by Messrs John and James White, chemical manufacturers, having their works within area A, by the trustees of the late Allan Farie of Farme, proprietors in B and D, by James Eadie & Sons and others, manufacturers in B and D, and by the Caledonian Railway.

As regards area D, it was agreed during the proceedings to limit the claim of the Burgh to a small portion only of that area which abutted on the Royal Burgh, and whose inclusion rounded off the boundary of that Burgh.

The circumstances of the application and the contention of the promoters were explained as follows:—The Royal Burgh was of very ancient origin, dating from a charter of King David I in 1126. For many centuries the whole lands therein had been and are still held burgage, and in the Burgh Register of Sasines are recorded all deeds relating to them. The Magistrates had been in the habit for hundreds of years of exercising criminal and civil jurisdiction within the whole Royal Burgh. They had also levied certain taxes, such as King's Maill, therein, and had exercised Dean of Guild jurisdiction as to all buildings in the Royal Burgh till within the past two or three years over a period of centuries. The Parliamentary Burgh was first created in 1832 under the Reform Act of that year. In 1885 an application was made to the Sheriff under the Municipal Elections Act 1868 (31 and 32 Vict. cap. 108), and the whole of the Royal and Parliamentary Burghs were divided into wards in terms of that Act. Prior to 1833 there was a close system of the election of magistrates, they practically nominating their successors. By the Municipal Elections Act of that year (3 and 4 Will. IV, cap. 76) it was provided that the burgh franchise should be exercised by the owners and occupiers who had property in the Royal Burgh and who voted for a Member of Parliament for the Burgh—that is to say, those in area E only—whilst by the same Act the powers of the Magistrates, Council, and office-bearers were continued over the whole of the Royal Burgh. This anomalous state of matters continued till 1868, when by the Municipal Elections Act of that year (31 and 32 Vict. cap. 108) the franchise was extended to owners and occupiers in the whole Royal Burgh.

The Police Burgh was formed in 1863. In that year, in terms of the Police Act of 1862 (25 and 26 Vict. cap. 101), sec. 16, the Magistrates resolved to adopt the said Act with regard to the whole of the Royal Burgh, and this resolution was duly confirmed by the Sheriff in terms of sec. 20 of the Act. The Magistrates, however, did not put the general powers so obtained into operation outside the area E. They continued, however, to exercise their common law powers of administration, civil, and criminal jurisdiction, within the whole area of the Royal Burgh. They recorded all deeds in the Burgh Register, and they acted as licensing authority down to 1903, and as Dean of Guild authority till 1902. An important date in the history of the Police Burgh was 1902, when by a decision of the House of Lords it was held that the jurisdiction for public health purposes, and inferentially for police and other purposes, of the Magistrates and Council of the Burgh was confined to the Police Burgh Area E—*Lower Ward of Lanarkshire District Committee* v. *The Provost, Magistrates, and Council of the Royal Burgh*, August 5, 1902, 4 F. (H.L.) 35, 39 S.L.R. 857. It was, to a considerable extent, on account of that decision that the Order was promoted.

As regards the present conditions, which made it expedient that the extension should be given, counsel argued as follows:—As regards areas A and B, these areas were for the greater part occupied by large works, and though the districts were not mainly residential, large numbers of those employed in the works lived in Rutherglen and benefited by its municipal administration. The Glasgow Boundaries Commission, 1888, had recommended that the areas should be annexed to Rutherglen. For many years past the burgh had practically administrated area A in the matter of police and lighting. These areas were isolated from and neglected by the county, and practical difficulties arose in dealing with criminal offences there by the county. It was objected to the annexation of these areas that the burgh had attempted to achieve this result under the provisions of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 12, and had failed. The promoters had appealed to the Sheriff for extension of the Police Burgh to the boundaries of the Parliamentary Burgh under sec. 12 of that Act. The Sheriff had decided in favour of the extension, but his decision had been reversed by the Court of Session. The Court held that the Sheriff was bound to inquire whether the extension was over an area satisfying the con-

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ditions laid down in sec. 11 of the Act, viz., that there must be density of population, &c., justifying the extension; that these conditions were not satisfied here—*White* v. *The Magistrates of Rutherglen*, January 28, 1897, 24 R. 446, 34 S.L.R. 387. It was in these circumstances that the promoters applied for the present Order. An exact precedent for such an application was in the Grangemouth Order. There an area admittedly not urban or densely populated had been added to the burgh after an elaborate argument to the Tribunal to the effect that sec. 11 provided a complete guide for the extension of Police Burghs, and that in cases where that section could not be applied there was no other means of obtaining extension.

As regards area C, the Burgh of Rutherglen was proprietor of large portions of the area. The common good amounted to at least £40,000. Under existing legislation, although it was owned by the whole burgesses of the Royal Burgh, it could only be applied by the Magistrates in relief of rates within the Police Burgh. There were also within the area various public parks and the public cemetery, all of which were maintained and administered by the promoters for the benefit of the whole inhabitants of the Royal Burgh. Feuing was proceeding and streets and roads being formed from year to year increasingly. The county administration of public health within the area was not satisfactory, and this annexation would be generally of advantage to the community. The long historical association was more than sentimental and should not be disregarded in a claim of the present kind.

Proof was led for the promoters, for the County Council of Lanark, for Messrs John and James White, for Mrs Morgan and William Dixon, Limited, for Watson's trustees, and for Messrs Eadie & Sons and Others.

Counsel for the objectors then addressed the Tribunal.

Argued for the County Council—With regard to what had taken place in the past, nothing that had occurred before 1889 could form a precedent. Since that year the Local Government Act 1889, the Local Government Act 1894, and the Public Health Act 1897 had given very large powers to the Public Health Authority in the County. The County Council of Lanark was a large and energetic body managing very large urban communities with perfect satisfaction. The proposal was to take into the burgh, whose acreage was 340 acres, a district of the County extending to over 1000 acres, with a valuation of about £55,000 and taking from the County an annual income from rates of £3500. This was a serious attack upon county administration which was not justified by the facts as shown in evidence. As regards the area C, the greater part of it was an agricultural and mining district, and not in any sense an urban district. It was settled by the Courts that in the existing general law Rutherglen could not get this extension, because the statute required certain conditions to be fulfilled before extension could be given, viz., density of the population and number of houses in the district. This had been decided even in the cases of areas A and B, much smaller in extent and more approximating to urban conditions than the bulk of area C. There was no precedent for an application to this Tribunal for an extension and nothing else, instead of going to the tribunal appointed by the general law for that purpose. The Grangemouth application quoted by the promoters was primarily a water scheme. Such a scheme could not be carried through by application to the Sheriff. As regarded the remainder of area C, there was a considerable villa population, but no evidence had been led to show that there was any general desire there to come into the burgh. There was no complaint of the administration of the County. This villa area was not the result of an exodus from Glasgow of persons who preferred to live in a country district. Many such communities were administered with perfect satisfaction and success by the County Council. On the whole matter it was without precedent that a burgh should come into a well-managed industrial county community and seek to take away such a large amount of rates.

Argued for Watson's Trustees, Mrs Morgan and William Dixon, Limited, and Messrs John & James White—As regards the western portion of area C, this was entirely unsuitable for annexation by the burgh. It was in no sense an urban district, being entirely mineral and agricultural. There had been no growth of the burgh in this direction, nor was such growth to be anticipated—at least 3,500,000 tons of minerals remained to be worked out before building could proceed. No evidence had been led of a desire for annexation on the part of the inhabitants. As regards area A, its annexation had been refused by the Court in 1894 (*White* v. *Magistrates of Rutherglen*, above cited), on the ground that it was not of an urban character, and according to the evidence no change in its character had taken place since that date or was likely to take place. The decision of the Glasgow Boundary Commissioners in 1888 was no authority to guide this tribunal. They were appointed only to decide what should be annexed to Glasgow. They held that the area in question should not be annexed to Glasgow, but any further recommendation was *ultra vires*. The Grangemouth Order, cited for the promoters, was not opposed by the population or the proprietors of the district proposed to be annexed by the Order; they were all in favour of the extension. The principle that Parliament will not sanction annexation schemes against the wish of the inhabitants of the district proposed to be annexed was firmly established. The Tribunal would be departing, not only from the decision of the Court of Session, but also from all parliamentary precedent, should they propose in face of the opposition here to annex the area A.

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Argued for James Eadie & Company and other manufacturers—The main ground upon which annexation was claimed, of the area including the works of these objectors, was that a certain proportion of the workmen employed in those works, resided in the burgh and benefited by the burgh administration without contributing substantially to the rates. Such a contention could not justify the inclusion in the burgh of an area essentially non-urban.

The Commissioners found the preamble proved.

On the adjustment of clauses certain proprietors in areas A and C claimed a clause whose effect would be to exclude from the areas annexed (1) the provisions of the Burgh Police Acts applicable to accumulations of manure and dung on farms, and (2) the jurisdiction of the Dean of Guild Court over farm buildings and over existing works. A similar provision had been made, it was contended, with regard to similar lands annexed to Edinburgh in the Edinburgh Corporation Act 1900, section 31. The clause was opposed by the promoters and the Commissioners disallowed it.

Counsel for the Promoters—Wilson, K.C. —Hunter, K.C.—D. P. Fleming. Agent—George Gray junior, Town Clerk, Rutherglen.

Counsel for the County Council of Lanark and the District Committee of the Lower Ward (*Objecting*) — Dickson, K.C.—C. D. Murray. Agents—Thomas Munro, County Clerk, Lanark—Dr W. H. Hill, District Clerk.

Counsel for (1) Watson's Trustees, (2) Mrs Morgan and William Dixon, Limited, and (3) John and James White & Company (*Objecting*)—Cooper, K.C. Agents—(1) R. & J. M. Hill, Brown, & Company, Writers, Glasgow—(2) Moncrieff, Barr, Paterson, & Company, Writers, Glasgow—(3) Mackenzie, Roberton, & Company, Writers, Glasgow.

Counsel for Farie's Trustees (*Objecting*)—T. B. Morison. Agents—Bannatyne, Kirkwood, France, & Company, Writers, Glasgow.

Counsel for James Eadie & Sons and Others (*Objecting*)—C. D. Murray. Agents—Mackenzie, Roberton, & Company, Writers, Glasgow.

Agent for the Caledonian Railway Company—H. B. Neave, Solicitor.

Provisional Order—Rehearing by Parliament — Confirmation Bill — Motion for Reference to a Joint-Committee—Private Legislation (Scotland) Act 1899 (62 *and* 63 *Vict. c.* 47), *sec.* 9.

When the Bill confirming the Order as issued (Rutherglen Burgh Order Confirmation Bill) was before the House of Commons on Tuesday July 17

Mr MENZIES (South Lanark) moved that the Rutherglen Burgh Order Confirmation Bill should be referred to a joint-committee of the Lords and Commons. Section 9 of the Private Legislation Procedure (Scotland) Act 1889 gave, he said, the House of Commons power of intervention in the case of legislation under it. There had been only one or two cases in which advantage had been taken of the power of appeal, and it was only granted upon good occasion and upon proper reasons being given. In this case he trusted he would be able to show that there was good reason for intervening and sending the Bill upstairs for rehearing. Many Scottish members believed that this Procedure Act was a first instalment of Home Rule for Scotland, but he could not understand how sending four men to a district about which they knew nothing to hear a case from counsel for the first time could be so construed. He had no fault to find with the good faith and impartiality of the Commissioners who heard this case, but he thought the reason for their decision after a hearing of seven or eight hours was due to the fact that the Commissioners were tired, having already sat for sixteen days hearing various cases. A small and unimportant body controlling 340 acres was to annex 1300 acres, and the reason given was that under the Royal charter granted by David I the inhabitants of the area proposed to be annexed had the right to vote in the municipality itself. That was a maliciously misleading statement. He had resided in the area for thirty years, and he had never had a vote for the Rutherglen municipality. This annexation was against the wishes of 70 per cent. of the electors in the area, and that fact should be sufficient to induce the House to grant a rehearing. If this Order were confirmed there was nothing to hinder Glasgow annexing Partick or Govan against the wishes of the people in those towns. The only advantage to the people of this area by annexation would be an increase in the taxation by 100 per cent.

Mr R. BALFOUR (Lanarkshire, Partick), in seconding, said it was true that burghs were entitled in certain circumstances to extend their boundaries, and that their interests should be protected, but counties had rights also which had to be regarded. The Bill should be committed to a joint-committee in order that the questions should be fully investigated.

Mr ROLLAND RAINY (Kilmarnock Burghs) said that to the people concerned the matter was of great importance. It was decided to send down that particular Bill to Scotland to have that particular matter looked into by a Commission of Scotsmen sitting on the spot. Was the House going to reverse the policy it had laid down that matters of that kind ought to be settled in Scotland simply because a particular decision had been given which was not accepted heartily by one of the parties to the dispute? The late Lord Advocate laid down in 1901 that unless material new facts were adduced or substantial injustice done, or a fault in procedure committed, there ought to be no rehearing. In the case before the House no new facts had been adduced, no allegation of substantial injustice could be proved,

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and there was no question of improper procedure.

Mr MITCHELL THOMSON (North-West Lanark) said the real question they had to consider was whether, in the particular case under the Scottish Private Bill Procedure Act, an appeal ought to be given to the joint-committee of both Houses of Parliament. He had no intention whatever of impugning either the zeal or the competence of the gentlemen who composed the Commission, but he demurred to the idea that any such procedure as that now proposed was unheard of or contrary to the spirit of the Act. In the Scottish Private Bill Procedure Act there was a special section—section 9—which expressly made provision for an appeal under conditions such as he submitted were present in this particular case. Lord Balfour of Burleigh and Lord Dunedin had expressed the opinion that there should be an appeal in a case where it was shown that injustice had been done, or in a case where new facts had arisen. He submitted that in this case an appeal should be granted in the first place on the ground of essential error; in the second place on the ground of a decision which was contrary to public policy; and in the third place on the ground that since the decision was given new facts had emerged. The essential error had reference to the way in which the question of the royalty of the Burgh of Rutherglen was put before the Commission. Royalty areas or Parliamentary boundaries had nothing to do with administrative purposes. The Bill would not unite the municipal and Police Burgh with the Royalty area or with the Parliamentary area. It would not unite the Royalty and the Parliamentary area with each other, and it would include areas which were outside the Royalty and Parliamentary areas. The proposed augmentation of the burgh by 1300 acres with a valuation equal to the existing valuation of the burgh could only be justified on very high grounds of public policy. The promoters themselves admitted that the conditions required in every case of extension under the present general statute were not present in this case. There was no density of population, there was no unanimous consent on behalf of the inhabitants, and there was no allegation whatever that the area had been maladministered by the County Council. The boundary as drawn by the Order was absolutely unworkable. As a matter of fact, the drainage and lighting area of the district had been worked in the most admirable manner. This boundary played absolute havoc with these drainage and lighting areas, and in one case it was actually carried through a large number of dwelling-houses. The real fact was that this boundary was not considered by the Commissioners, because the promoters had proposed to take in a considerable body of ground which formed the whole of a special drainage and lighting area, but at the end of the inquiry the promoters announced that they resolved to drop a portion of this area. It was impossible to produce witnesses at a moment's notice, and no opportunity was given to the County Council to consider the matter. They did not even know how the boundary was going to run. Another important fact was that far from being consenting parties, the inhabitants were in a state of violent dissent. This matter of the consent of the inhabitants had always been the determining factor in regard to extensions of the city of Edinburgh if any doubt existed.

Mr EUGENE WASON opposed the motion, holding that no new facts had been adduced, and that no injustice had been done by the Commissioners, against whom there was no suggestion that they did not act uprightly and to the best of their belief. The Scottish Private Bill Procedure Act had conferred great benefits on Scotland, and he hoped the House would not lightly reverse the decision of the Commissioners.

Mr CLAUDE HAY (Shoreditch, Hoxton) supported the motion.

THE SECRETARY FOR SCOTLAND (Mr Sinclair) reminded the Committee that the Private Bill Procedure Act was passed in consequence of the increasing volume of business at the House of Commons; secondly, because it was thought that in matters purely local it might be possible, subject to Parliamentary control, to come to local decisions; and in the third place, in order to obtain a simpler and cheaper procedure than that at Westminster. There was no doubt in the minds of Scottish members that the Act had been a success, and it had been placed on record by a Committee which two years ago considered the application of a similar procedure to Wales that this Scottish Act had on the whole been a success. Parliament had reserved to itself full and unqualified discretion to decide whether there should be a rehearing, and there had only been three cases in which such a rehearing had been asked for. In one—the *Arizona* case, the rehearing was refused; in the *Leith* case and the *Glasgow Police* case the decisions of the local inquiry were upheld after rehearing. Not only the intention of the Act, but the good working of the system as well as precedent, supported the plea that a rehearing should only be granted in special circumstances. Did these special circumstances exist in this case? Undoubtedly it had in it elements of difficulty, and no complaint could be made against the County Council exercising their statutory right and asking for a rehearing. That House was not a proper tribunal for the discussion of such questions. If it was proper at all that the case should be reheard, the place for that was upstairs. It appeared to him that the matter had a thorough fair hearing before the local tribunal, which not only gave it a fair hearing, but came to a unanimous decision. He saw no reason to urge the House to accept the motion of the member for South Lanarkshire. The Government would leave the matter in the hands of the House.

Mr COCHRANE (North Ayrshire) said the Government expressed no opinion.

THE SECRETARY FOR SCOTLAND—On the

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contrary, they have, but in their discretion they choose to leave the matter to the House.

Mr COCHRANE said they had become accustomed to that attitude.

THE SECRETARY FOR SCOTLAND said the Government was following precisely the course taken by the late Government.

Mr COCHRANE said he hoped the Government would continue to do so. He was one of those who had supported the Private Bill inquiries, but the idea was that there should be some form of an appeal. He had come to the conclusion that that was a case for a rehearing.

The House divided:—

For the motion	50
Against	202
Majority against	152

Note.—During the passage of the Rutherglen Burgh Order Corporation Bill through the House of Lords, the promoters, in view of threatened opposition on account of the large territory proposed to be included in the burgh, agreed to restrict their claim as regarded area C to a portion of that area extending to 340 acres and immediately adjoining the Police Burgh on the south and south-east. The said portion included the public cemetery, the public parks, the property of the Town Council, a residential district, and certain agricultural and other lands. The portion of area C excluded by this arrangement consisted for the most part of agricultural and mineral lands. Certain concessions as to taxation in the area included were made.

Saturday, May 19.

(Before the Duke of Argyll, K.T., *Chairman*, the Earl of Ranfurly, Sir James Low, and Mr Alex. W. Black, M.P.—at Glasgow.)

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY PROVISIONAL ORDER.

Provisional Order—Railway—Power to Run Omnibuses in Connection with Railway—Opposition of Urban Local Authorities Owning Tramways.

The purposes of this Order were to amend the Glasgow and Renfrew District Railway Transfer Act 1901, to empower the Glasgow and South-Western Railway Company to acquire additional lands, and to raise additional capital.

The Order was unopposed, except as regards clause 15, which proposed to give the company certain powers to provide and run omnibuses. The clause as originally framed was in the following terms:—"The company may provide in any district, or to or from any place situate on railways worked by the company, omnibuses to be drawn or moved by animal, electrical, or any mechanical power, and may therein convey passengers, luggage, parcels, merchandise, and goods." The promoters proposed to make the following addition—"In the exercise of the powers of this section in any city or burgh the following provision shall apply and have effect. . . . The local authority may from time to time prescribe the route within the city or burgh to be taken by any railway omnibus between the points of arrival and departure of such railway omnibus; secondly, nothing in this section shall authorise the company to run any railway omnibus in any city or burgh otherwise than to or from a station or hotel of the company without the consent in writing of the local authority for such period as may therein be specified."

It was explained by and contended for the company that the clause in question as amended was framed upon clause 55 of the North-Eastern Railway Act 1905, which had been adjusted by Parliament as a standard clause. This was no new departure. Practically the same powers had been granted in many previous applications, amongst others in the following cases:—*The Belfast and Northern Counties Railway* 1899, *The North Staffordshire Railway* 1894, *The Great Eastern Railway Act* 1904, *The Cambrian Railway Act* 1904, and *The Donegal Railway Act* 1904. In the North-Eastern Railway Act 1903, after a full discussion in Committee in both Houses, the clause had been passed. In the House of Commons a motion was made to the effect that the clause should not be allowed within burghs, and this motion was defeated. The proceedings in the Mersey Bill of the current session founded on by the objectors were of no weight as a precedent for this Tribunal. In that case the clause had again been inserted after full discussion in Committee. A motion was made in the House of Commons, after the Bill had passed the House of Lords, on May 15, 1906, that it be an instruction to the Committee to leave out clause 5 of the Bill (the clause in question), and this motion was carried. As a matter of Parliamentary practice the mind of the House, as expressed in its decision in Committee, must be taken as the ruling precedent, and not the vote, in which the House had been asked to act upon the question with no knowledge of the facts.

Proof was led for the promoters and for the Corporations of Glasgow, Kilmarnock, and Ayr. Counsel for the Corporations then addressed the Tribunal.

Argued for the Corporations—In the case of the *Belfast and Northern Counties Railway*, cited by the promoters, a provision was inserted protecting the Belfast Street Tramway Company. The use of vehicles by the Railway Company was limited to a traffic between termini, railway stations, or quays, and to pick up or set down between termini was prohibited. In the present case, subject to the limitation as to route, the company would have the power of running to or from any point upon their railway, and of taking, picking up, and setting down any as well as railway-borne traffic in direct competition with

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the local tramways. In the cases of the *Cambrian* and *Donegal Railways* there was no competing tramway system. As regarded the *North-Eastern* case, after a full debate the clause was only carried by a small majority. In the current session, in view of the Mersey and Wirral Bills before the House, a Municipal Tramways Conference was held in London on May 3—*i.e.*, in the interval between the hearing of the evidence upon the Mersey Bill and the vote in the House of Commons. A resolution was passed unanimously at this Conference to the effect that it was desirable that the clause in question should be deleted from Bills so far as dealing with urban districts in which local authorities owned and worked tramways. There was thus a material difference in the situation as presented to the House of Commons and as presented to the House of Lords in so far that this unanimous expression of corporate opinion in the matter had been made. Further, the granting of the section would enable the Railway Company to enter into a new business and to divert its capital to a purpose not authorised by its Acts.

Argued for the Greenock and Port-Glasgow Tramway Company—This was not a well-considered plan for running motor omnibuses, and the Committee should only grant these omnibus powers in well thought-out schemes—*Croydon Corporation case* 1905, *per* Mr Bell, Chairman of Committee. Further, there was no clear case made for the public necessity.

The Commissioners, after consultation, by a majority disallowed the clause.

Counsel for the Promoters—Wilson, K.C. Agent — David Murray, LL.D., Writer, Glasgow.

Counsel for the Corporations (*Objecting*)—Scott Dickson, K.C.—Hunter, K.C.—Orr Deas. Agents—For the Corporation of Glasgow—W. A. Myles, Town Clerk; for the Corporation of Ayr—P. A. Thompson, Town Clerk; for the Corporation of Kilmarnock—William Middlemas, Town Clerk.

Agent for the Greenock and Port-Glasgow Tramway Company—Vivian Morse, Solicitor, London.

Thursday and Friday, 19th and 20th July.

(Before Mr John Dewar, M.P., *Chairman*, Viscount Hill, Lord Torphichen, Mr Ernest Gardner, M.P.—at Edinburgh.)

BLAIRGOWRIE, RATTRAY, AND DISTRICT WATER PROVISIONAL ORDER.

Provisional Order—Water-works—Acquisition by Combined District—Opposition by Lower Riparian Proprietors — Proposed Water Authority should be Restricted to Taking Stated Amount — Proposal that Lower Riparian Proprietors be Represented on Water Board—Compensation Water — Repayment of Previous Outlays by Lower Millowner.

This Order was promoted by the Eastern District Committee of the County Council of Perth as the Local Authority of the two Special Water Supply Districts of Blairgowrie and of Rosemount, by the Town Council of the Burgh of Blairgowrie, and by the Town Council of the Burgh of Rattray. The objects of the Order were (1) to constitute a water trust, representative of the three different localities in whose interests the promoters appeared; (2) to vest in this Trust the existing works of the Blairgowrie Special Water Supply District; (3) to authorise the new trust to enlarge Loch Benachally, the reservoir from which the district was supplied, by raising the existing embankment by 3 feet, obtaining thereby an additional supply of water for the use of Blairgowrie, Rosemount, and Rattray.

The circumstances of the application as explained for the promoters and as shown in the evidence were as follows:—The Blairgowrie Special Water Supply District was formed in 1867. The Police Burgh of Blairgowrie was formed in 1876, entirely included within, but not extending over, the whole of the water district. Contiguous with the burgh of Blairgowrie were the burgh of Rattray and the village of Rosemount, not included in the Blairgowrie Water District. At the last census the population of the burgh of Blairgowrie was 3378, that of Rattray 2019, and that of Rosemount 400. It was shown that the population of Blairgowrie was not on the increase, but that the district was the centre of a large and increasing fruit industry, and that during the two months of the fruit harvest workers to the estimated number of 2800 were imported into the district with which the Order dealt. Further, a large number of summer visitors frequented the district, raising the resident population during July and August by an estimated 2000. The districts of Rosemount and Rattray had no guaranteed supply of water; they were dependent upon a precarious supply hitherto given by Blairgowrie but which was no longer available. The existing waterworks of the Blairgowrie District were dated from 1870, when the Board of Guardians, the then local authority for water supply, by agreement with the Duke of Atholl, the proprietor of Loch Benachally, obtained leave to raise the level of the loch by 5 feet and to take from it a supply of water for the use of the Blairgowrie District. Before the water was introduced certain agreements were made between the Local Authority and the riparian proprietors upon the Lornty Burn, which was fed from Loch Benachally. By these agreements it was stipulated that the Lornty Burn should be sent down to the lower proprietors undiminished in volume. One of these proprietors was Mr Campbell of Achallader, the father of Colonel Campbell, the petitioner objecting to the present Order. Another was Mr Grimond, the proprietor of two mills situated upon the said burn, now owned by his son Mr John Grimond, the only other objector to the present Order. A further agreement was entered into between the

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Local Authority and Mr David Grimond, which provided, *inter alia*, (1) that the Local Authority should not be entitled to take more than 300,000 gallons per day from the loch, and (2) that Mr Grimond should have control of the sluice at the loch. Following up this agreement Mr Grimond asked the Local Authority to raise the level of the loch up to the full 5 feet—it having been their intention to raise it only by 3 feet 4 inches—Mr Grimond undertaking to repay to the Local Authority the cost of the extra 1 foot 8 inches of embankment. This was accordingly done, and Mr Grimond repaid to the Local Authority a sum of £179 for the extra work. The Duke of Atholl was not a party to nor was he made aware of this agreement. The Local Authority then proceeded to draw the stipulated 300,000 gallons per day from the loch up till the year 1894. In that year the Rosemount Special Water Supply District, which had been formed under the provisions of the Public Health Acts, applied to Blairgowrie for a supply of water which the Blairgowrie District agreed to give. Subsequently the burgh of Rattray also made application to Blairgowrie for a water supply, and the Blairgowrie District had endeavoured to meet these demands as far as lay in its power, and for several years from 1894 drew an increased volume of some 400,000 gallons per day from the loch. In 1904 the petitioner Mr John Grimond raised an action in the Court of Session against the Eastern District Committee of the County Council of Perth, who had succeeded to the Parochial Board *qua* local authority for water supply in the Blairgowrie district; the result of this action was that interdict was granted against the withdrawal from the loch of more than the 300,000 gallons per day stipulated for in the agreement above mentioned. It was in these circumstances that the three districts concerned had combined under the provisions of the Public Health Act 1897, section 131, to procure this increased water supply for their common use, and promoted the present Order. The promoters had entered into the necessary agreement with the Duke of Atholl, whose support they had in the application. The only objectors were Colonel Campbell of Achallader and Mr John Grimond.

Evidence was led for the promoters and for Mr Grimond.

Colonel Campbell, a proprietor on the Lornty Burn for a distance of five miles on both sides of the water, receiving a rent from Mr Grimond in respect of certain water rights, objected to the principle on which it was proposed to deal with the volume of water supplied and with the compensation water. His contention was that the District should be allowed to draw only an ascertained quantity sufficient for its needs, allowing the remainder to flow into the stream as had been the practice under the existing arrangement. He further asked for representation of the riparian proprietors upon the new Water Trust. Mr Grimond supported the former contention, and further claimed money compensation for damage which he alleged would result to his mills from loss of water power and for outlays which his father had undertaken in respect of the agreement above set forth. In any case the compensation water offered in the Order was insufficient.

It was argued for the promoters that ample compensation water was provided. One-third of the estimated rainfall in the catchment area of the loch, the usual allowance to lower proprietors, amounted to between six and seven hundred thousand gallons, and the compensation water offered in the Order was 750,000 gallons per day in winter and 1,346,000 gallons per day in the summer months (the latter amount was subsequently increased to one and a half millions). Apart from this compensation water the objector had an ample supply in the Lornty Burn, which was fed by other streams, and by the time it reached his mills was supplied by a drainage area of 9000 acres independent of the loch. There was no precedent for granting a water supply on the principle supported by the objectors, and the agreement founded on by Mr Grimond could have no effect in influencing the decision of the Tribunal on the present question.

The Commissioners found the preamble proved, but they were of opinion that Mr Grimond should be repaid the £179 which was spent in raising the dam in 1871. They did not think that Colonel Campbell had made out a case to be specially represented as a riparian proprietor on the Board.

Counsel for Promoters—Wilson, K.C.—D. M. Wilson. Agents—J. B. Miller, solicitor, Blairgowrie—Robert Stewart, S.S.C., Edinburgh.

Counsel for Mr John Grimond, Lower Millowner (*Objecting*)—Craigie, K.C.—Smith Clark. Agents—Thomas Thornton, Son & Company, solicitors, Dundee.

Colonel John Colin Livingston Campbell of Achallader, Lower Proprietor (*Objecting*).

Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday, July 23, 24, 25, 26, 27, *and* 28.

(Before Mr John Dewar, M.P., *Chairman*, Viscount Hill, Lord Torphichen, and Mr Ernest Gardner, M.P.—at Glasgow.)

CLYDEBANK AND DISTRICT WATER-WORKS AND BURGH EXTENSION PROVISIONAL ORDER.

Provisional Order—Water-works—Burgh within a Special Water District—Acquisition of Control of Works by Burgh—Opposition of County Council, the Water Authority.

Provisional Order—Police Burgh—Extension—Opposition of County Council—Opposition of Inhabitants—Character of Area to be Annexed—Application Granted when Similar Application under the

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Burgh Police (Scotland) Act 1892, 55 and 56 Vict. cap. 55, not taken.

(See also report of Dunbartonshire Dunbarton and Dalmuir Provisional Order, *sup.*, p. 904.

This Order was promoted by the Provost, Magistrates, and Town Council of the Police Burgh of Clydebank. Its objects were twofold: 1) to take over the waterworks of the Special Water District which included the burgh of Clydebank and vest them in a trust consisting of the Town Council with one or two representatives of the district outside the burgh, and to erect certain additional works; (2) to extend the boundaries of the Police Burgh of Clydebank.

The water scheme dealt with the same Special Water District of the County of Dumbarton as was affected by the Dunbartonshire (Duntocher and Dalmuir) Water Order of the current session (reported *sup.*, p. 904). The promoters proposed that a trust should be constituted of eighteen members, consisting of the Town Council of Clydebank with the addition of certain representatives of the landward part of the district, and that the water-works should be vested in this trust for the behoof of Clydebank, and the remainder of the water district. They further asked for powers to obtain an increased supply of water by the construction of two additional reservoirs in the Kilpatrick Hills, in the vicinity of the existing reservoirs, but upon the opposite side of the watershed, and in an area draining by certain burns into the Finnich Water, and thence to Loch Lomond.

This part of the Order was opposed by the Town Council of Dumbarton and by the Eastern District Committee of the County, the present Local Authority for water in the district in question.

Evidence was led for the promoters and for the County Council. It was shown that the Water District was formed in 1873, and was now administered by the County Council, who succeeded the old Parochial Board as local authority *qua* public health and water supply in the county. There was also a Sub-Committee of maintenance and management of the water-works, made up of fourteen members, eight being representatives of the burgh of Clydebank and six representatives of the landward part of the district. Since the formation of the Water District its population had increased very considerably, having risen from a few hundreds in 1873 to about 38,000, at the present date, the population of Clydebank alone being about 26,000. The existing works were designed and constructed to yield 1,800,000 gallons per day, but the present consumpt had risen to 2,750,000 gallons per day. This surplus over the estimated yield had been available hitherto owing to the exceptional storage capacity of the reservoirs and to a succession of wet seasons, but could not be counted upon as a continued yield. The County Council had promoted the Duntocher and Dalmuir Order of the current session, thereby admitting the necessity of something being done. The new works proposed in the present Order were estimated to cost a sum of £15,000, and to provide an additional supply of 2,250,000 gallons per day.

It was argued for the promoters that it was an anomalous position for a burgh of the size and importance of Clydebank not to have control of its own water supply. The population of Clydebank was 38,000 out of the 38,000 comprised in the Water District, and contributed 5/8ths of the revenue of that district. The scheme was a well-considered scheme and would supply the immediate and prospective wants of the district. The promoters would not be justified in embarking upon a larger scheme upon the assumption that the recent abnormal increase in the population would be maintained.

The main argument of the County Council, apart from criticism of the engineering and financial arrangements, was to the effect that the scheme would hinder the general policy of the county as regards water supplies. The County Council were the authority responsible for the water supplies not only of this district but of the adjoining districts and of the rest of the county. There was no evidence that their duties had not been carefully and successfully performed. They were fully alive to the necessity of providing an increased supply for this district, and had promoted the Duntocher and Dalmuir Order for the purpose. The Commissioners who had considered and thrown out the Dumbarton Water Order (reported *sup.*, p. 905) and the Duntocher and Dalmuir Order had expressed their views upon the policy which should be followed in the district generally as regards water supplies. The County Council were prepared, in accordance with the recommendations of these Commissioners, to proceed at once to introduce an adequate supply, and were prepared, if the neighbouring authorities required it, to proceed by way of a joint-scheme. The present scheme was open to the objections which had succeeded against the Duntocher and Dalmuir Order. It would only provide for the wants of the district for a period of five years, assuming that the present increase of the population were maintained. A general scheme was required to meet the wants of this as well as of the adjoining districts, a scheme not necessarily large at the outset, but one which was capable of expansion. The present scheme was incapable of expansion, was inadequate for the immediate requirements of the district concerned, and was just such a competing scheme as the Commissioners had declared to be undesirable.

The Commissioners after consultation declared the preamble proved.

The circumstances of the extension part of the Order were explained by counsel for the promoters as follows:—The Special Water District was first formed in 1873, at which date the population was about 700. About that date the shipbuilding and engineering business of Messrs J. & G. Thomson appeared in the district, and by 1885 its population had risen to over 5000. In 1886, as the result of proceedings under the Burgh Police

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Act of 1862, the Burgh of Clydebank was formed within its existing boundaries, occupying an area of 882 acres. Since that date the increase in population and prosperity of the burgh had been abnormally rapid. Various large industries had been established, including those of Messrs Singer, John Brown & Company, Messrs Beardmore, &c., employing thousands of workers, and the population of the burgh now stood at over 23,000. On two previous occasions applications for an extension had been made. The first in 1890, when the population stood at 9000, had been refused by the Sheriff. The second was in 1899, when the population had risen to over 20,000. This application was made under section 11 of the Burgh Police Act 1892. It was granted by the Sheriff, but his decision was reversed by the Court of Session on the ground that the character of the area sought to be annexed did not conform to the requirements of that section as regards density of population, &c.—*County Council of Dumbartonshire* v. *Commissioners of Burgh of Clydebank*, November 14, 1901, 4 F. 111, 39 S.L.R. 57. It was in consequence of this decision that the promoters now applied for Parliamentary powers for extension. The area which it was sought to annex was one of 542 acres lying to the north of the burgh and separated therefrom by the line of the Glasgow, Dumbarton, and Helensburgh Railway, the present northern boundary of the burgh. The said area was entirely included within the Special Water District; it included the districts of Dalmuir, Kilbowie, and Radnor Park, and had a population of about 9000. There remained a portion of the Water District, including Duntocher and Dalmuir, with an acreage of 1336 and a population of 3000, which it was not sought to annex to the burgh.

This part of the Order was opposed by the County Council of Dumbartonshire, by Messrs Robert M'Alpine & Sons, builders, and certain Radnor Park householders and by certain proprietors.

Proof was led for the promoters and for the County Council.

It was argued for the County Council that the general principles upon which the Legislature would proceed in dealing with the extension of burgh boundaries were clearly laid down by statute, especially in the Burgh Police Act of 1892, and had been properly applied by the Court of Session to the case in question when the application of 1900 was refused. No change of circumstances had taken place since 1901, and there were no exceptional circumstances which would justify a departure from the general law of the land in the present case. There was no reason why the district should be annexed to the burgh except of its own consent, unless it could be demonstrably shown that the existing government was bad. The annexation was opposed by the inhabitants of the district, and it had been demonstrated that the county administration was good and efficient and in every way suited to the requirements of the district.

Proof was also led for Messrs Robert M'Alpine & Sons and for the Radnor Park householders. It was shown that Messrs M'Alpine had acquired certain lands in Radnor Park, upon which they had erected and were in course of erecting workmen's dwellings. These houses were largely occupied by workers in Messrs Singer's and other works in the burgh. These objectors argued that the dwellings did not represent the outgrowth of the burgh. They had been erected as the result of private enterprise to meet the demand of the workers for suitable houses in the neighbourhood of the works and at a moderate rent. The streets and buildings, though adjoining, were not continuous with Clydebank, being separated from the burgh by the railway line, and no practical objection existed to their separate administration. The whole district was satisfactorily administered by the County Council, and its annexation would result in an increase of taxation without any corresponding advantage to its inhabitants.

It was argued for the promoters that the annexation was in the interests both of the burgh and of the district sought to be annexed. The burgh should have in the interests of its inhabitants, *e.g.*, of their health, a fair area upon which to build houses. They founded upon the report of the Royal Commission on Scottish Municipal Corporations, where the view was expressed that it would be opposed to every principle of sound policy to make a division between those who possessed the same character of a town population, and had substantially the same common interests, into two classes, the one enjoying privileges and immunities because accident had placed them upon one side of an arbitrary line.

The Commissioners found the preamble proved.

Counsel for the Promoters—Wilson, K.C. — Munro — Harold Beveridge, Barrister. Agents—John Hepburn, Town Clerk, Clydebank — A. & W. Beveridge, Solicitors, London.

Counsel for the County Council of Dumbartonshire and the Eastern District Committee (*Objecting*)—Dean of Faculty (Campbell, K.C.) — Horne. Agents — William Craig, County Clerk, Dumbarton — Hugh Hutcheson, Clerk to the Eastern District Committee.

Counsel for Mr Black of Auchentoshan (*Objecting*)—Kippen. Agents—Jameson, Maclae, & Baird, Writers, Glasgow.

Agent for Mr Crum Ewing of Strathleven — David Cockburn of Babtie & Craig, Solicitors, Dumbarton.

Counsel for Messrs Robert M'Alpine & Sons and for Radnor Park Householders—C. D. Murray. Agents — Brown, Mair, Gemmill, & Hislop, Writers, Glasgow.

Agents for the Duke of Montrose — Dundas & Wilson, C.S.

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