PRACTICAL NOTES

ON

THE STRUCTURE OF ISSUES IN JURY CASES IN THE COURT OF SESSION;

WITH

FORMS OF ISSUES.

PARTS I TO VIII

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AND

PARTS IX TO XXVIII

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NOTE.

SINCE the First Part of the present Work was published by Mr M'FARLANE, the Professional Engagements of that Gentleman have precluded his carrying it on. It is now, with his approbation and valuable assistance, continued, in the hope that, when completed, which it will be as soon as circumstances permit, the Work may be found useful to the Profession.

T. C.

EDINBURGH, *25th May* 1848.

PART I.

GENERAL CONSIDERATIONS.

CHAPTER I.

OF THE NATURE AND OBJECT OF ISSUES.

As every judicial controversy, when analysed, and divested of the extraneous and incidental qualities with which it is generally at first exhibited by the parties, is found to resolve or issue into one or more comparatively short question or questions, the meaning of the term Issue in legal phraseology, is as obvious as it is appropriate. It has been introduced into the law and practice of Scotland on the analogy of the English system of pleading. In both countries it has the same meaning; and in both, it is intended

to embody and present in a concentrated form, the precise point or points to be tried and determined between the contending litigants. But, while the general meaning and design of an Issue are sufficiently manifest, and are the same in England and Scotland, the steps of procedure by which it is arrived at, and ultimately settled in the two countries, are materially different.

While the system of pleading, as it is called in England, and of preparing the Record, as it is expressed in Scotland, continues so dissimilar, so long will the mode of arriving at and settling the Issue or Issues be unavoidably very different. For, on the pleadings of the parties, or the Record of their averments, depend entirely the nature and the terms of the Issue or Issues which must regulate the judicial trial between them. In England* the parties are obliged so to plead, or in other words, so to prepare the Record, as to develope some question or Issue by the effect simply of their own allegations. The one party avers, and the other denies, till Issue is joined. The Record, or pleadings, when thus completed, presents at once, and without the interposition of any farther judicial act or form of procedure, the question or Issue, one or more as the case may require, for trial. And to such perfection has this system, aided and confirmed as it has been by a long course of usage and judicial regulation, arrived, that the objections to which it might, in the apprehension of persons imperfectly acquainted with the subject, be liable, are, it is believed, very little experienced in practice. In order to combine with the requisite certainty and precision, the greatest brevity and conciseness, there has been established in England a set of rules, of which a strict observance is in the general case sufficiently induced by the interests of the contending parties themselves. No immaterial, extraneous, or irrelevant matter, is allowed to be stated; all repugnancy,

* The views suggested of English practice, have been derived from Serjeant Stephen's Treatise on the principles of Pleading.

ambiguity and prolixity are anxiously excluded; the allegations of parties must not be argumentative, nor by way of recital, but must consist of pure averment, and be positive in form; what is merely matter of evidence, is not permitted to be stated; nor a variety of things of which the Court will always take judicial notice, whether averred on record or not; nor that which would come more properly from the opposite side. Neither is duplicity,—that is, double or alternative pleas—ever permitted, except in peculiar circumstances, and with the express leave of the Court on special cause shewn. When, in addition to all this, it is kept in view that pleadings in law are never allowed to be blended with pleadings in fact,* it can be readily understood how the parties themselves, by the mere effect of their own allegations, join Issue in such a way as to make it perfectly safe and practicable, simply to adopt the Record as evolving the question or questions for trial.

Such are the general features of the English system of pleading or joining issue, preparatory to trial. But, however well that system is found to work in the practice of the Common Law Courts in England,—completely separated as these Courts are from the Courts of Equity,—it is impossible that such a system could be of general application in Scotland, where the jurisdictions of Common Law and of Equity are combined and administered in the same Courts, by the same Judges, and under the same forms, without any settled or marked distinction.

Accordingly, the mode in which parties set forth, and record their respective allegations, is, in the practice of Scotland, essentially different from what it is in England.

* In England, when the object of parties is to go to trial on the facts of the case, they plead and make up the Record by declaration, plea, replication, &c. and the Issue joined betwixt them is called an Issue in fact; but when it is intended to rely on a principle of *law*, the Record is made up by declaration, rebutter, joinder in rebutter, &c. and the Issue joined is called an Issue in Law.

In Scotland* the parties at the same time, and in the same paper, set forth their averments in fact, and their pleas in law; and they are expressly enjoined by Statute† to do so with such an amplification, and accompanied by such a detail of incidental and relative circumstances, as unavoidably to lead in many, if not the greater number of cases, to a very considerable length and complexity of statement. As a necessary consequence of such a mode of pleading, something farther requires to be done before the parties can go to trial. It would never do, simply and at once, to adopt the record as exhibiting the points to be tried by the Jury; for, it is not unfrequently a difficult thing, after the parties have completed the record of their allegations, to determine whether the question in dispute turns on matter of law or matter of fact, or partly on both. It becomes necessary, therefore,—as preliminary to going before a Jury,—not only to ascertain whether there is any material difference between the contending parties on matter of fact, but also to settle, with certainty and precision, in what that difference consists. A preparatory consideration and analysis of the Record is therefore indispensable.

The various statements on either side must be reviewed and collated, in order to discover precisely their opposed effect; the points mutually admitted, and those, though disputed, which are immaterial, must be distinguished and thrown aside; and thus, by laying out of view all unnecessary matter, the real question or questions to be tried, stand out separately and disencumbered. It may, and does frequently happen, when a case is so analysed, that, contrary to the anticipations and views of both parties, there is truly no relevant matter for trial at all. When this occurs, no Issue can of course be granted,—the parties being either at once sent out of Court, or obliged to amend their plead-

* For a full exposition of the procedure and forms of process in Scotland, see the Author's treatise on the practice of the Court in Jury Causes.

† Judicature Act, 6. Geo. IV. cap. 120.

ings. Or, it may happen that, the parties being agreed on all the material facts, the hinging point is one purely and entirely of law: Neither, in such a case, is any Issue framed for trial by a Jury—the discussion being left to be raised by the parties, and disposed of by the Court, on the Record as it stands. But although this course may be perfectly safe and practicable in pure questions of law, which are taken cognisance of by the Judges alone, it would not answer in reference to questions of fact, which have to be determined by the aid of a Jury. The amplified form of the Record renders it indispensable, that the real point or points for trial, should be clearly ascertained, and precisely defined, before going to the Jury. If again this be frequently a matter of great nicety and difficulty, requiring the fullest consideration, and the most discriminating enquiry, it is obviously one which could not, with safety or expediency, be left for adjustment during the hurry and excitement of a public trial. As long, therefore, as the mode of pleading, or system of Records, continues in Scotland as it is at present, so long must the points for trial be embodied in the shape of Issues previously ascertained and settled. Accordingly, in all cases in Scotland where the determination of a Jury becomes necessary, or is deemed expedient, the disputed matter is, by the sifting process of analysis which has now been described, in the first place extracted and embodied by officers of Court appointed for that purpose, in a separate and specific form, as the Issue or Issues to be tried.

CHAPTER II.

OF ISSUES,—AS DISTINGUISHED INTO GENERAL AND SPECIAL.

SINCE the introduction of Jury Trial in Civil Causes into Scotland, considerable and important changes have gradually taken place in the form and structure of Issues.

At first, and during the earlier years of the Institution, the Issues sent to a Jury for trial were simply questions of specific fact. All the material allegations on which the parties were found to be opposed, being extracted from the Record, were embodied in the shape of a series of questions. Thus, in the noted case of the Earl of Fife,* which was among the earliest civil causes tried in Scotland by a Jury, there were no less than *seven* distinct questions or Issues, each separately embodying some allegation in respect of which the pursuer maintained his action, and sought to reduce the deeds of settlement which formed the subject of enquiry. But as all of these allegations had one object, and were intended to support one general proposition or ground of reduction, viz. that the deeds were not, or at least could not be held to be the deeds of the alleged granter, inasmuch as they had not been executed according to the rules and solemnities required by law, it is obvious that the whole matter might have been submitted to the Jury, and tried in a much more general and simple form. Accordingly, the case having afterwards come by Appeal before the House of Lords,† and a new trial ordered, it was, upon the suggestion of the Lord Chancellor (Eldon,) directed that *one* Issue to the effect of,—Whether the deeds sought to be reduced were not, or either of them, was

* Earl of Fife *v.* Earl of Fife's Trustees. Oct. 1816. Murray's Reports, vol. 1. p. 90.

† Shaw's Appeal Cases, vol. I. p. 498. New trial, 9th March 1825. Murray's Reports, vol. III. p. 497.

not, the deeds or deed of the granter? should be settled as the Issue for trial.

The Fife case illustrates very well the detailed or specific shape in which the Issues were constructed for some years at first; and it illustrates equally well the distinction between that mode of settling questions for trial, and what is usually called the General Issue. According to the former method, the various material facts alleged in support of the action were submitted in a distinct and articulate series of questions to the Jury, whose verdict would of course consist of a corresponding series of answers, which again might or might not, according to circumstances, prove decisive of the subject in dispute; for it might happen that to some of the questions a negative, while to others an affirmative answer was returned. The effect, therefore, of the whole verdict became always in such cases a matter of subsequent consideration and discussion before the Court. On the other hand, by the General Issue, the whole matter in controversy is concentrated into one short question, an answer to which must necessarily prove decisive in favour of one or other of the parties.

The tendency to generalize the Issues gradually strengthened, as being more consonant with the object and design of trial by Jury than Special Issues; and, it may be said, that in consequence of the decision of the House of Lords in the Fife case, and the subsequent acquisition of new and additional statutory powers,* the method of setting out, in a series of articulate questions, all the material allegations on which a case depends, has been entirely abandoned.

But a perfectly vague or general form of Issue is also liable to many and serious objections: While, on the one hand, it may be alleged in favour of such an Issue, that the simplicity of its structure would prevent discussion and difficulty in its settlement before the trial, it must, on the other hand,

* 59 Geo. III. c. 35, and 6 Geo. IV. c. 120.

be kept in view, that the discussion and difficulty thus apparently avoided, would only be postponed and transferred from one stage of the litigation to another. If the form of a General Issue were universally and in all cases adopted, there could of course be little or no difficulty in the adjustment before the trial. But then, in order to ascertain and determine the real and substantial object of such an Issue, in each particular case, the allegations and pleas of the parties, as set forth by them in the Record, would require in every case to be carefully examined, considered, and analysed, during the progress of the trial, when the publicity and excitement of the occasion would be any thing but conducive to an accurate result. Each party would of course maintain that view of the import of the Record which tallied best with his own particular interest; and, amidst the conflict of contending elements, the Judge and Jury would frequently, and in spite of every precaution, fall into error. It is manifest, therefore, that the General Issue would not, at least in the greater number of instances, afford any relief whatever, either from difficulty or trouble. On the contrary, it would most probably lead, in numerous cases, to much embarrassment, misapprehension, and error, which a previous settlement of the precise points in dispute would have entirely prevented. Indeed, as well might the Record be at once sent by itself to the Jury, as accompanied with an Issue which is perfectly vague and general in its terms, and which does not indicate, with more or less precision, the point or points on which the discussion is to turn. It has been already shewn, however, that the Record, made up according to the existing system of pleading in Scotland, would by itself be altogether unsuitable for trial.

A medium course, between the original form of Special Issues, and an Issue perfectly vague and general, has therefore been gradually introduced, and is now followed in practice. The distinguishing and peculiar feature of the

principle now observed in the adjustment of Issues, is, that while the real and leading points on which the litigation turns, is fairly brought out and indicated, this is done in as general and comprehensive a manner as possible. In illustration, let it be supposed that a case is to be tried by a Jury, in which a deed of settlement is challenged, on the various grounds, that it was subscribed by the granter when he was *non compos mentis*,—that at any rate it had been impetrated from him, while he was facile and easily imposed on, through fraud and circumvention,—and farther, that it was executed while the granter was on his death-bed, to the prejudice of the pursuer, as his heir-at-law. Now, in such a case, an Issue so vague and general as—Whether the deed challenged was not valid or effectual? might, no doubt, try the whole matter in dispute; but as such an Issue gives no indication whatever of the real grounds of contest, the parties, the Judge, and the Jury, would, by looking at the Issue alone, be left entirely in the dark, and could form no certain or precise idea of the matter in dispute till the Record came to be examined and the case fully explained at the trial; and then, after all, it might be found that some of the apparently leading grounds of action, were not to be insisted in. Besides, it might, as already explained, be frequently a difficult matter, and one susceptible of much altercation, and nicety of discussion, to ascertain and define with perfect accuracy, from a Record made up according to the existing system, and amidst the excitement and hurry of a public trial, the precise points as to which the parties were at issue.

It is manifestly, therefore, conducive to the due administration of justice, that the precise grounds of contest should, previous to the trial, be fixed down and settled, so that the defender may know how far, and in what respects, it is requisite for him to be prepared,—that the Judge may have an opportunity of considering the legal principles which are likely to be brought into discussion,—and that

the Jury may, from the first moment of their entering on their duties, have constantly before them in a distinct, intelligible, and concentrated form, the precise point or points which they are to try. But to meet these objects, the vague and general Issue suggested in the case above supposed, would be clearly inadequate. In order, then, at once to present in as short, simple, and concentrated a form and style as possible, the disputed points, and also fairly to indicate their general nature and description, three Issues would be requisite for trying the case, viz.—*first*—Whether the deed challenged was not the deed of the granter? *second*, Whether the granter was a person of a weak and facile mind and easily imposed on, and whether the defender, taking advantage of his facility and weakness, impetrated from him the deed in question? and *third*, Whether the deed was executed by the granter on deathbed? Such Issues as these, it will be observed,—while perfectly general on the various grounds of action, and in that respect different from the early style of Issues, which embodied in a series of questions the specific facts alleged by the party in support of his ground or grounds of action,—are yet sufficiently special, fairly to indicate and bring out the nature of the pleas which are to be maintained at the trial.

Other examples might be cited in order to illustrate the principle on which Issues are now usually constructed; but to enter farther into the subject at present, would be to anticipate what will more properly fall to be noticed afterwards in treating separately of the various classes into which Issues have been arranged. Enough, it is hoped, has at present been stated, to explain generally the views and objects in reference to which Issues are generally prepared and settled according to the existing system. In some cases the Issues may be more general or more special in their form than in others,—but in every case, the great object is to frame the Issue or

Issues in as short and concentrated a form as possible, consistently with a fair indication of the nature of the points in dispute, and the legal principles which are involved in the discussion of them.

How far that object is practically attainable under the existing system, can be best understood from a consideration of the numerous examples which are afterwards given of Issues applicable to almost every description of judicial controversy. It will be found, that very rarely indeed is the Issue so perfectly vague or general as not to give some indication, either in the terms in which it is expressed, or in the statement and admissions with which it is prefixed, of the nature of the question, or subject matter for trial.

CHAPTER III.

OF THE LEADING PRINCIPLES OR RULES TO BE ATTENDED TO IN FRAMING ISSUES.

As preliminary to the adjustment of the Issues, it must, of course, be ascertained from an examination of the Record, whether or not there is a proper and relevant case for trial by a Jury. It may happen, even after the parties have met before the proper officers for the purpose of settling the Issues, that the case is found not to be in a fit state for trial;—a preliminary question of relevancy or law may require to be first determined by the Court; there may truly be no material fact as to which the parties are at issue,—the whole matter turning on a question of law; or, the parties may have stated their allegations in so defective and irregular a manner, as to render it impracticable to frame a proper Issue. In none of these situations would an Issue be granted,—till at least the preliminary questions of law or relevancy have been determined by the Court, or till the parties have altered and amended their pleadings.

Supposing, however, that the Record presents a case fit and proper, both in form and substance, for trial by a Jury, and that there is no objection to the settlement of an Issue or Issues, the next consideration relates to the precise form and terms in which the Issue or Issues should be framed. As this, again, chiefly depends on the nature of the case to be tried, it follows that the terms of an Issue are, and must in some degree be as varied as questions of civil right are numerous and diversified. It is impossible, therefore, to predicate any universal or inflexible rules for the framing of an Issue. The analogy of examples which have stood the test of practical experience, must therefore be the main guide and criterion of form and style in the settlement of Issues. There are, however, some considerations which may here be noticed, as more or less bearing on the construction of Issues in all cases.

1. The point, how far Issues ought to be *special* or *general* in their structure and terms, has been already sufficiently adverted to.

2. When, and in what circumstances, ought there to be more than one Issue? This question depends very much on the same considerations which have been noticed, as affecting the speciality or generality of the Issue. In every case where two or more separate and independent claims or questions of right are in contest, an Issue should be framed applicable to each of them. For example, when a party maintains, in an action brought against the same defender, as he may competently do, and frequently does, several claims of right, one claim may be for damages on account of defamation, and another for assault; or, to suppose a different case—one claim of debt may be founded on an obligation for money borrowed, and another for goods sold and delivered; in these, and all such double or complex cases, a separate Issue is necessary for each independent claim or question of right, as each depends, or, at least, may depend on different circumstances, may require the application of diffe-

rent principles of law, and may be differently decided by the Jury, and differently ruled by the Court.

But it does not follow, on the other hand, that in every case where there is only one claim of right involved, one Issue only is to be adjusted for trial. In most of such cases one general Issue may be found sufficient. But exceptions frequently occur. The claim, though single, may depend on circumstances or grounds of action so essentially different, that to mix them up under one General Issue, might lead to very embarrassing, if not inextricable difficulty and confusion. This has been already illustrated in the case of a reduction of a deed of settlement, on the different and various grounds of total incapacity on the part of the granter, or of his having been imposed on, or on deathbed. In such a case it is necessary, with reference to ulterior consequences, that not only the validity or invalidity of the deed should be ascertained, but that, supposing it to be found invalid, the ground on which such a result is arrived at, should be likewise known. In every case, therefore, where, although the object generally of the action is single and the same, the consequences of the verdict may be different in degree, according to the ground on which the Jury have proceeded, it is proper that the various grounds of action should be made the subject of separate Issues. Even where the *ratio* of the verdict does not necessarily, or of itself, make any practical difference on the result, still separate Issues, applicable to each separate and independent ground of action, may, for many obvious reasons, be very desirable. In cases of damages, for example, founded on several alleged acts of defamation and assault, although only an aggregate sum is claimed in reparation, separate Issues, applicable to each individual act of wrong, may be of great importance in reference to the procedure which follows the verdict. Suppose that, in such a case, three separate Issues, applicable to three separate acts of defamation or assault, have been sent to the Jury, and a verdict returned for the pur-

suer on one of them only, and for the defender on the other two, the question of expenses would be regulated accordingly; but if one General Issue only, embracing the whole matter, had been settled for trying the case, the verdict would, of course, be equally general, and there would be no proper criteria for the guidance of the Court in the matter of expenses. Similar reasoning applies to the case of the Court deciding in questions of new trial, where it is frequently of essential importance to know the precise ground on which the Jury have proceeded.

3. Whether there be several Issues, or one only, the terms and phraseology employed should be free from all obscurity or ambiguity. No room should be left for doubt as to the true meaning of the Issue, or the real object proposed to be attained by it. That inattention to this rule may be productive of serious consequences, will be readily conceived, when it is recollected that, by the nature and terms of the Issue, the proof at the trial is regulated and controlled. Whatever may be truly the grounds of action, or the manner in which they are set forth and maintained in the Record, no proof or investigation can be gone into at the trial, which does not fall within the fair meaning and scope of the Issue.* Thus in an early case,† under the Issue, whether "it was understood and agreed," parole evidence was admitted at the trial, although it appeared from the Record that the bargain on which the question depended had been in writing, and ought therefore to have been supported by written evidence only. But the expressions in the Issue "understood and agreed," being so exceedingly general and comprehensive, it was held that the party maintaining the affirmative of the Issue, could not be precluded from establishing, by every kind of legal evidence, the understanding and agreement which formed the subject of dispute. If it

* On this subject, see Macfarlane's Practice, p. 230, and the Cases there cited.

† Stothart 13th Sept. 1821.—2. M. p. 542.

had been intended to confine the party to written evidence, the expressions in the Issue ought to have been more guarded and precise,—for example, the words " bound and obliged" in place of " understood and agreed," would have precluded the difficulty.

4. As the more concise and concentrated the Issue is the better, so is it a rule which tends greatly to promote that object, to exclude all redundancy, and every thing which is of the nature of evidence rather than of the essence of the point in dispute. Thus in an action of damages for breach of promise of marriage, it is enough to put it in Issue,—whether the defender made the promise, and wrongfully failed to perform it, without adding, as has been sometimes done,—whether, in violation of the promise, the defender did, of a particular date, marry another lady. Any such addition is clearly redundant, as putting in Issue not only the direct point itself, of whether there was a breach of promise, but also, whether that breach had been caused in a particular way.

5. The strictest accuracy ought likewise to be observed in referring to *names*, *dates*, *places*, and *other matters specially mentioned* in the Issues. An error in any of these particulars may prove fatal to the action, although otherwise, both in regard to its intrinsic merits, and the manner in which it has been presented in the Record, clearly well-founded. Accordingly, in a case in which the Issue put it to the Jury to say,—whether the defender, ' on or about the 18th ' day of November 1828, had lodged a paper in a certain ' process containing slanderous words,' &c. and it turning out that the paper had been lodged on the 18th of July 1828, the Court directed that there was no evidence to support a finding for the pursuer under the Issue, although the discrepancy in the dates was manifestly the result of unintentional and clerical error.*

6. Unless where a branch of the action is withdrawn or

* Cullen v. Ewing, 14th March 1832. 10 Sh. p. 497.

abandoned by the parties themselves,—which ought to be done by a Minute lodged in process to that effect; or where a particular Issue is directed by the Court to be settled for trying some isolated point in a cause, the Issue or Issues should be so constructed as to comprehend and exhaust the whole matter in dispute. But a distinction must be observed betwixt exhausting the subject matter in dispute, and including in the Issues all the incidental qualities founded on by the parties in their pleadings, whether essential or not. It is not uncommon for parties to set forth in their pleadings, a great variety of allegations, which, although not altogether irrelevant, may not be indispensable to the object in view. It is, therefore, always in the power of a pursuer, when the Issue comes to be settled, to insist that it shall not be more comprehensive, nor by its terms, shall throw a greater burden of proof on him, than what is essential and indispensable in support of the conclusions of the action; and it is of no consequence that, by his averments in the Record, a greater burden of proof has, *ex figura verborum*, been undertaken by him than necessary. Thus, although it is not unusual for the pursuer in actions of damages for slander, or for wrongous imprisonment and other wrongs, not only to set out the allegations of wrongous conduct on the part of the defender, necessary to support in a relevant manner the conclusion for damages, but also to state and aver that the things complained of were done maliciously or fraudulently, it is not incumbent on him, when the Issues come to be prepared, to adhere to the allegations of malice or fraud, even although they should have been made in the libel itself. At the sametime, as positive malice, if proved, might aggravate the damage, the pursuer may, if he pleases, expressly charge it not only in his pleadings forming the Record, but also in the Issue or Issues, and so undertake a proof of it. Yet, as already mentioned, it is not absolutely incumbent on him to take an Issue so framed; even where the charge is in the Record, provided the conclusions of the action can in law be rele-

vantly maintained without it.* In a recent case, also of judicial slander, in which the Pursuer libelled that the words complained of were not only false, malicious, and calumnious, but "without any probable cause," the Court held, in settling the Issue for trial, that it was not necessary to insert these words.† This principle is of general application, and not confined merely to cases of privilege. Thus in two recent cases, where the pursuer alleged in his summons and pleadings, that certain acts and conduct, forming the subject in dispute, were, in addition to other qualities, "fraudulent," it was found not to be necessary for, or incumbent on him, to take an Issue expressly charging fraud.‡ In short, it is now a rule established in practice, and confirmed by the Court, that although, on the one hand, a party is in no case entitled to an Issue on matter which is not within the Record, he is not, on the other hand, bound to take an Issue which embraces superfluous matter, whether in the Record or not. It is sufficient that the Issue be within the Record, and relevant to support the conclusions of the action.

Such are some of the leading principles or rules which require attention in the framing of Issues, and which have a very general application. Numerous considerations of a more special description will be noticed in their proper places, in reference to the various classes of Issues, of which examples are afterwards given.

* *Grant*, 1st Feby. 1834. 12. Sh. p. 385. Dauney, 29th June 1836. 14. Sh. p. 1037.

† *Marianski*, 17th June 1841. 3. D. B. M. & D. p. 1036.

‡ *Sprott*, 16th June 1838. 16. Sh. p. 1145.—And *Roxburgh*, 13th Feby. 1841. 3. D. B. M. & D. p. 556.

CHAPTER IV.

OF COUNTER OR SEPARATE ISSUES FOR THE DEFENDER.

It is necessary sometimes for the defender as well as the pursuer to take an Issue or Issues; and it is always a matter of serious consideration whether he should do so or not. Whatever may be the nature of his allegations in the Record, the defender is not in every case allowed to substantiate them by evidence at the trial, without an Issue taken by and for himself. On the other hand, by taking an Issue for himself, the defender is held to undertake a proof of it; and although it may not be absolutely and technically incumbent on him to enter upon such a proof till after the pursuer has, on his part, made out a *prima facie* case in support of his own Issue, still it will always be obviously for the interest of the defender to refrain from taking any Issue at all, except where, from the nature of the case, such a step is indispensable.

What, then, are the circumstances in which the defender must take an Issue or Issues? Although this is not the place for going into a detailed explanation on the subject, which indeed can be best collected from the varied and numerous examples of Issues which are afterwards given, there are some observations of a general description which may not inappropriately be noticed now. Usually the *onus probandi* lies entirely on the pursuer of a case. He is alone *in petitorio*, and on him the duty, in the first instance, devolves, of setting forth allegations relevant and sufficient to support his claim, whatever it may be, and also of substantiating these allegations by legal evidence. In by far the greater number of instances the defender contents himself with simply denying the claims asserted by the pursuer, and setting forth such facts and circumstances as he can render

available, to instruct that they are altogether groundless and unfounded. In all such cases there is no call on the defender to take any Issue whatever. He is not setting up any claim for himself. He merely and simply stands on a denial of the pursuer's alleged right. On the pursuer, therefore, in such cases, the whole burden of proof lies, and it is for him alone to take such an Issue, or such Issues, as the nature of his case requires.

But let it be supposed that the defender, in place of striking at the foundation of the pursuer's alleged claim, and maintaining its utter groundlessness, admits or assumes its existence, in so far as the facts on which it is made to rest are concerned, but at the same time pleads and avers other facts and circumstances relevant and sufficient to take off the legal effect which might otherwise have attached to the pursuer's case, a different course of procedure and different rules of law apply. In the case supposed, the *onus probandi* which would otherwise have lain on the pursuer, is by his own admission shifted and transferred to the defender, who, in his turn, must, in order to prevent a verdict passing against him on the Issues for the pursuer, substantiate his averments by legal evidence. Hence, in such a case, the necessity of an Issue or Issues for the defender, as well as for the pursuer. Each party is indeed both pursuer and defender in the same action, their relative positions being changed in reference to the different sets of Issues.

Whenever, therefore, the defender admits the facts on which the pursuer founds, and that these facts are relevant and sufficient, if looked at by themselves, to support the conclusions of the action, his defence, if he has a defence at all, must be of a nature which renders it incumbent on him to take an Issue or Issues for himself. Thus, in an action of damages for a libel, or for verbal slander, if the words complained of are admitted to have been uttered, and are likewise indisputably relevant in themselves to infer damages, the defender may nevertheless allege such facts

and circumstances, as in law would amount to a waiver or discharge of the pursuer's claim, or to *compensatio injuriæ*; but if he does so, and if the pursuer joins Issue with him, by denying these facts and circumstances, then he must take the suitable Issue or Issues for proving them before the Jury. In farther illustration of this, reference might also be made to actions of damages for libel or slander, where the *veritas convicii* is pleaded, to actions of assault where a justification is set up, and to actions of nuisance, where homologation or acquiescence is relied on in defence. In these cases,—and they, as well as others, will all be afterwards more particularly noticed in their proper places,—the defender is supposed to admit the relevancy and sufficiency of the pursuer's allegations standing by themselves, but he endeavours to avoid their legal effect by a new or different case presented by himself.

As a test of whether the defender must take an Issue or not, it has only to be considered, whether the point relied on by him is founded on matter collateral to the allegations which he opposes, or on matter which appears, or at least naturally and properly arises, on the face of these allegations themselves. If the point relied on by the defender is founded on matter which is clearly collateral to the pursuer's case, as, for example, a discharge or waiver, then he must take an Issue to prove it. But if the point is founded on matter which appears on the face of the pursuer's case, and forms a part of it, or naturally arises out of, or resolves into a denial of the pursuer's allegations, then the defender requires no separate Issue.

The Pleas, which are usually made the foundation of an Issue on the part of the defender, may be divided into two classes,—Pleas in justification and excuse, and Pleas in discharge. The former are resorted to where it is meant to be shewn that the acts charged were in the particular circumstances lawful; and such Pleas, accordingly, strike at the right of action, as where the Pleas of *veritas* or *privilege*

are set up. The latter, again, are resorted to where the right of action is not *funditus* denied, but where there is merely a counter case averred, to the effect that, by some subsequent act or acts, the pursuer's claim is barred or cut off. In cases, however, of privilege, it is not generally necessary for the defender to take an Issue, Thus, for example, in an Action of Damages against a Judge, a Clergyman, or other public functionary, where the defence is official duty or privilege, it may not, and is not generally necessary for the defender to take a separate or counter Issue, —it being competent for him, under the pursuer's Issue, and as negativing the ground of action, to prove his privileged situation. But this matter will be afterwards more particularly considered, in relation to the various forms of Issues in actions against persons standing in privileged situations.

Such, then, is generally the state of matters in reference to which the defender must take an Issue, in order to enable him to maintain his defence. But it will be kept in view, that as a defender may plead alternatively, so it is quite competent for him to set up several different pleas, one or more of which may require an Issue, while another or others do not require any. Thus a defender in an action for a nuisance may oppose it on the alternative grounds of a denial of the facts averred by the pursuer, or, supposing or assuming the nuisance to be *de facto* established, of acquiescence on the part of the pursuer. The defender, in such a case, will of course be entitled to maintain his denial of the nuisance without any Issue on his own part; but if he wishes also to reserve his right to prove at the trial the pursuer's acquiescence, in the event of the nuisance being *de facto* established, he must take a counter Issue to that effect.

It has only farther to be added at present on the subject, that whenever a defender requires, and has obtained an Issue or Issues for himself, they are distinguished from the

pursuer's Issue or Issues by the intervening monosyllable "Or," as will afterwards be found exemplified in numerous instances.

CHAPTER V.

OF ADMISSIONS PREFIXED TO THE ISSUES, AND SCHEDULES APPENDED TO THEM.

It frequently happens that, before the time arrives for settling the Issues, the parties have in their pleadings, forming the Record, greatly narrowed the points in dispute, by mutual admissions. When this occurs, and when a statement of the admissions, either in whole or in part, would tend to concentrate and explain the real question to be tried, such a statement is usually prefixed to the Issue or Issues. Not only does such a prefatory statement of admissions narrow the question for trial, but it also, in most cases, has the effect of rendering the announcement of the question itself more clear and intelligible. Thus, in the case of a Reduction of a Deed on the head of death-bed, the Issue is usually prefixed by an admission that the pursuer is heir-at-law of the granter, and this has the effect of making one Issue suffice in place of two;—for it is obvious, that were the title of the pursuer not expressly admitted, an Issue to try that question would be necessary, as leading to the other and remaining question of death-bed. This illustrates the advantage of an admission prefixed to the Issues, in the way of narrowing or limiting the subject matter for trial. Again, and in order to illustrate the advantage of admissions, as elucidating the matter for enquiry, reference may be made to that numerous class of cases where the Issue is simply one of resting-owing. In such cases it would frequently be difficult, without the aid of prefixed admissions, to exhibit, in clear and concise terms, the

nature of the subject in dispute. Thus, in the case of an action brought for recovery of an account incurred by the defender, on the employment of, and under a contract with the pursuer, a prefatory admission of the particular employment or contract, while it narrows, at the sametime indicates in a form the simplest and most satisfactory, the nature of the subject matter for trial.

It has been disputed however, whether any admission can be prefixed to the Issues without the express consent of both parties, even where the desired admission has been already made in the Record. In one case* where this point was agitated, the Court would appear to have had no doubt of the expediency of holding, that admissions made in the Record may be prefixed to the Issues, whether the parties consented to it or not, but they had no occasion authoritatively to settle the point, as the parties agreed that such a course should be followed. But why should there be any hesitation on the subject? The prefatory admissions are just as much part of the case for trial, as the question which follows them; and it is difficult to see how any party can justly complain of being held bound by his deliberate admissions on record. In practice, however, in the Issue Chamber, prefixed admissions are never inserted except with the consent of both parties.

Besides prefixing to the Issues matters of admission, it is, in certain cases, usual and expedient to append to the Issues other matters in the form of a schedule. Thus, in all actions of damages, where a round or random sum is concluded for, which falls to be assessed by the Jury, the amount demanded by the pursuer is appended to the Issue or Issues. In other cases, again, where the subject of enquiry relates to a variety of different documents or articles which require to be particularly founded on in the questions for the Jury, in place of embodying them in the Issues, and so lengthening

* Swayne, 27th June 1835. 13 Sh. p. 1003.

them out in an unusual degree, they are appended in the form of a schedule. Thus, in an action of damages for a libel, founded on a variety of lengthy passages in a book or newspaper, in place of quoting these passages *ad longum* in the Issues, it may be found to be more convenient to refer to them as in a schedule annexed. In short, wherever the form of a schedule appended to the Issues, would obviously tend to relieve them of obscurity or minute and lengthy detail, such an expedient may with propriety be resorted to.

CHAPTER VI.

OF THE CAUSES IN WHICH AN ISSUE OR ISSUES ARE SENT TO A JURY FOR TRIAL.

This is not a topic which requires to be enlarged on here. It has been fully treated of elsewhere.* At the sametime, and as the question is sometimes mooted in the course of the framing of the Issues—how far the case is one fitted for trial by a Jury, a few observations on the subject may not be misplaced.

Certain classes of actions must, by statutory enactment, be sent to a Jury for trial ;† and as no discretionary power in relation to such actions has been left with the Court, there is of course no room for discussion in so far as they are concerned. But it is also, under the statutes applicable to the institution of Jury trial, in the power of the Court, although not imperative on them, to appoint almost every case that is found to turn on disputed facts, to be submitted to a Jury; and the leaning, always strong, has been daily encreasing to resort to this mode of trial.

At one time, it would appear to have been thought advisable in reductions of services, where additional proof was

* Macfarlane's Practice of the Court in Jury Causes. Part I. Cap. II.

† 59 Geo. III. cap. 35, and 6 Geo. IV. cap. 120.

offered by both or either of the parties, to appoint it to be taken on commission rather than to remit the whole case for trial by a Jury.* But probably, there would be no hesitation now, even in such questions, at once to send the whole matter to a Jury, seeing that in a recent case of this description, the House of Lords remitted back to the Court of Session to direct the appropriate Issue or Issues, comprehending the whole points in dispute, to be sent to a Jury, and that, notwithstanding of a proof by commission having been previously allowed and adduced without objection on either side. The case referred to was accordingly afterwards tried by a Jury on Issues settled by the Court under the remit from the House of Lords.† A distinction however may be taken between reductions of services which have been carried through *ex parte*, and of services in which both the competing parties have appeared, and regularly maintained and contested their respective rights and interests. If additional evidence were allowed at all in cases of the latter description, it would probably be limited and directed to be taken on commission.

In some cases where the evidence was likely to be of an exclusive character, or closely connected with some particular science or art, the Court, in place of remitting to a Jury, have rather appeared to have been disposed to remit to a Commissioner to take the necessary proof, or to a person of skill to report on the disputed points.‡ But even in such cases the Court would probably now exhibit a different

* *Anderson*, 13th June 1834. 12 Sh. p. 729; and *Officers of State*, 4th July 1835. 13 Sh. p. 1044.

† *Watson*, 10th May 1836. 14 Sh. p. 734. Report of Appeal, 27th August 1835. Scottish Jurist, vol. vii. p. 94.

‡ *Crawfurd*, 3d February 1824. 2 Sh. p. 667. Affirmed 23d May 1826. 2 W. & S. p. 354. *Robertson*, 11th March 1834. 12 Sh. p. 544. *Buchanan*, 17th December 1836. 15 Sh. p. 286. *Kerr*, 10th March 1837. 15 Sh. p. 784. *Boswell*, 1st June 1838. 16 Sh. p. 1086. *Magistrates of Glasgow*, 16th November 1839. 2 D. B. & M. p. 61. *Clelland*, 18th January 1839. 2 D. B. & M. p. 344. *Barnet*, 16th January 1840. 2 D. B. & M. p. 337.

manifestation, in consequence of a recent judgment in the House of Lords, by which an interlocutor of the Court of Session, appointing a proof to be taken on commission, was reversed, and a trial by Jury ordered.*

The numerous examples of Issues in the following pages, arising, as they do, out of almost every class and description of action, demonstrate very forcibly, that Jury trial is now of very extensive application in this Country.

* *Boswell*, 23d April 1839. M'L. & R. App. Cases, p. 136.

PART II.

LIBEL AND DEFAMATION.

CHAPTER I.

OF THE STRUCTURE OF ISSUES IN ACTIONS FOR SLANDER GENERALLY.

THE points which require to be particularly attended to in framing an Issue or Issues for the trial of questions of this description are,—besides the relevancy and sufficiency in law of the averments on record, which in all classes of actions form the first consideration,—the following,—1. Admissions to be prefixed to the Issues. 2. Quotation of, or reference to the passages or words specially founded on as containing the libellous or defamatory matter. 3. Places, dates, and persons. 4. Mode of stating and interpreting the inuendoes under the form of which the libel or defamation

may have been conveyed. 5. Counter Issues for the defender.

1. *Admissions.* Some general observations have been already made on the subject of prefixing admissions to the Issues, and as to whether this can be done from the statements in the Record, independently of any special consent of the parties.* The advantage of admissions in questions of libel and defamation is obvious. In the ordinary case, for example, of an action for a libel in a Newspaper or Magazine, against the publisher, printer, and author, or any of these parties, unless the connection of the defender with the libel, and the particular position and character of the parties, be made matter of prefatory admission, these points would require to be sent to the Jury in the shape of Issues.

In general, there is no dispute about the identity of the printer, publisher, or author of a libel,—the substantial question turning on its application and effect; and accordingly, in most cases of this description, the Issue is prefixed with an admission of the defender's peculiar position, and his connection with the matter complained of. The peculiar position or status of the pursuer may also, with equal advantage, be made matter of admission, as illustrated by several of the examples which follow. Besides being conducive to the saving of expense and trouble at the trial, as well as in the preparation for the trial, prefatory admissions tend greatly to the clearness and concentration of the substantial question in dispute.

Where counter Issues are taken by the defender, they may also be prefixed by admissions, in the same way as the Issues for the pursuer.

2. *Quotation of, or reference to the Libellous or Defamatory Words.* In actions for defamation or verbal slander, the words complained of are always put in Issue with as much

* *Supra*, p. 22–3.

exactness and precision as possible. In actions again, for libel or written slander, the passages specially founded on by the pursuer, and in relation to which the Issues are framed, are always either quoted *verbatim et literatim* in the Issues themselves, or referred to as annexed. This is necessary in order to prevent any misconception or mistake as to the particular matter in regard to which the parties are contending. It frequently happens that the pursuer of an action for a libel or for defamation, founds in his summons, and also in his subsequent pleadings, on matter as libellous and defamatory, which afterwards, when the Issues come to be settled, is either given up, or ascertained not to be relevant.

3. *Places, dates, and persons.*—In order that the defender may have due notice, and be prepared at the trial, it is necessary to set forth in the Issues, with accuracy and precision, the places where, the dates when, and the persons to whom, the alleged slander has been uttered. Any mistake in these particulars may very materially affect the case, as no evidence will be allowed to be adduced at the trial which does not strictly apply to the matter set forth in the Issues. *Paterson*, 7th June 1830; 5. M. 281. *Cullen or Mackenzie*, 14th March 1832; 10. S. 497.

4. *Inuendoes.*—As slander seldom presents itself in the language of direct attack, it becomes necessary, where the form of inuendo or insinuation has been assumed, for the pursuer of an action for libel or defamation, to set out the precise nature of the charge which, he avers and undertakes to establish, was really and truly intended to be made against him. The Issue must in this, as in other respects, be in accordance with the averments on record. It therefore follows that no interpretation of an inuendo can be introduced into the former which is not warranted by the latter. And unless the inuendo, as appearing from the interpretation

averred on record, is of such a nature, and made in such a form, as to be relevant and sufficient in law to sustain the action, no Issue can be granted at all. Truly, therefore, the consideration of the inuendo, or rather its interpretation, applies to the Record and not to the Issues—for, assuming that the Record is in this respect unobjectionable, all that requires afterwards to be done, is to transfer the interpretation of the inuendo from the Record to the Issues. And, on the other hand, if the Record is in this respect irrelevant or defective, no Issue can be granted. A great variety of illustration of the interpretation of inuendoes is afforded by the examples of Issues which follow. It will be observed that the nature, interpretation, and effect of an inuendo, depends, more or less, on the character, status, and position of the party libelled or defamed, and the peculiar circumstances in which the libel or defamatory matter has made its appearance. It may, and does sometimes happen however, that the slanderous words are so plain and direct, and so clearly actionable, that it is unnecessary to set out in the Record any interpretation of them, and of course, in such cases, the slanderous words themselves form the Issue.

5. *Counter Issues for the Defender.*—There are four situations in which the defender in an action for slander may be entitled, and may find it adviseable, to take a Counter Issue. 1*st*, Where he justifies, or pleads the *veritas convicii*. 2*dly*, Where he founds on facts and circumstances to make out *compensatio injuriarum*. 3*dly*, Where he maintains his right to have acted in the way charged against him, in respect of privilege. And, 4*th*, Where his defence is founded on a waiver or discharge of the grounds of action.

(1.) *Veritas Convicii.*—It is a settled rule, that, to entitle a defender to an Issue or Issues in justification, he must have set forth in the Record the facts on which he is to found, with the same minuteness and precision as to time,

place, and other circumstances, as if he had been pursuer. And it is a rule equally settled, that no proof of the *veritas convicii* can be allowed to a defender at the trial, without an Issue or Issues specially taken to that effect.—*Scott*, 25th June 1821; 2 M. p. 486.—*Brodie*, 20th January 1836; 14 S. p. 267.

(2.) *Compensatio Injuriarum.*—This plea also requires a separate Issue on the part of the defender; and to lay the foundation of such an Issue, the defender must set forth, in due and relevant form, facts and circumstances sufficient to raise the plea.—*Goddard and Co.* 4th Nov. 1816; 1 M. p. 156.—*Edwards*, 23d Dec. 1823; 3. M. p. 375, *et seq.* An example of an Issue of *compensatio injuriarum* is afforded by the case of *Tytler* v. *M'Intosh*, No. 1, *infra*. But although it is competent to raise and maintain the plea of *compensatio* in defence to an action for slander, this course is seldom followed in practice. It is found to be much more adviseable for a defender who has grounds for such a plea, to institute a separate and independent action at his own instance. Under separate counter actions the respective rights of parties can be much more satisfactorily explicated than where they are mixed up and set off against each other in one and the same process. Accordingly Issues of *compensatio injuriarum* are now unknown in practice.

(3.) *Privileged Cases.*—It is frequently a question of great nicety and difficulty to determine, whether the defender is, or is not, entitled to maintain the plea of privilege. Where it appears on the face of the pursuer's own averments, that the defender acted in the discharge of a public or official duty, or otherwise in the exercise of a legal and undoubted right, and did not voluntarily and gratuitously put himself forward in a matter in which he had no proper concern, in order to gratify some private motive or feeling, he is entitled to a greater measure of protection than the wrong doer in an ordinary case of slander. He is, in short, held to stand in a privileged situation. And therefore, to subject him in

liability, the pursuer must specially aver, and undertake to establish, that he acted maliciously. Where, accordingly, the case is held to be of the privileged class, either malice is expressly charged in the Issue, or some other form of expression is used, which has the effect of throwing on the pursuer the *onus* of proving, not only that the matter complained of was in itself false and injurious, but also, that the defender had been moved by malice, or had otherwise overstepped the limits of his right, and acted in violation of his duty. The cases which are more particularly held to be privileged will be afterwards adverted to, and illustrated in separate Chapters applicable to actions against Clergymen, Judges, &c. It is open, however, in all cases, for the defender to aver such facts and circumstances as will entitle him to establish, under a Counter Issue taken by and for himself, that he had acted in the discharge of some right or duty. Thus, in Example No. XI. *infra*, the defenders would appear to have taken and been allowed an Issue, under which they might establish their privileged situation, and so obtain a verdict on the assumption even of the pursuer's case being in the first instance sufficiently made out. It is this which marks the distinction practically observed in the framing of the Issues, between cases bearing privilege in their front, and cases which, although on investigation they may turn out to be entitled to the protection of privilege, do not necessarily or *prima facie* raise any such presumption.

(4.) *Waiver or discharge.*—It cannot be supposed that in many cases a party, after discharging or waiving his claim, would put it in action. But where such a thing happens, or where the defence is founded, whether well or not, on an alleged waiver or discharge, it must be made out, where disputed, under an express Issue taken by the defender to that effect.

With these general remarks the following examples are given of Issues in *ordinary* questions of slander. It is sufficient in such cases that the words are in themselves

calumnious; they are *presumptione juris*, both false and malicious. In all ordinary cases therefore, of slander, where the defender does not appear *ex facie* of the pleadings to have been acting in the discharge of a public duty, or in the exercise of some other legal right, the issue is simply whether the words complained of were false and calumnious, and to the loss, injury, and damage of the pursuer,—

No. I.

Tytler v. *Mackintosh*,—*28th May* 1822.

It being admitted that the pursuer is Sheriff and Vice-Lieutenant of the County of Inverness, and that the defender is a Justice of Peace for the said County:

Whether, on or about the 21st day of June 1820, the defender did write and send to Colonel Francis William Grant, Lord Lieutenant of the County of Inverness, a letter containing the following words, viz. "That," &c. and whether the whole, or any part of the said words are of and concerning the pursuer, and were meant and intended to represent, and do falsely and injuriously represent the pursuer as capable of extremely incorrect things, and as lending himself to objects inconsistent with his station and his duty,—or as joining in an infamous transaction, or as making the office of Justice of Peace a prize for degradation, to the injury and damage of the said pursuer?

Whether, on or about the 11th day of July 1820, the defender did write and send to the said Colonel Francis William Grant a letter containing the following words, or words to that effect, viz. "It," &c. and whether the whole, or any part of the said words, are of and concerning the pursuer, and were meant and intended to repre-

sent, and do falsely and injuriously represent the pursuer as a person who knowingly and improperly recommended persons of abandoned character to be Justices of the Peace, on account of their laxity of principle—or who neglected his duty and supported abuses—or who was engaged with the greatest culprits about Inverness in the management of a newspaper conducted in the most unprincipled manner, or who acted as a political agent, or who betrayed his trust and violated his oath as a Commissioner of Property Tax, by imposing tax on £200 as the income of an individual, knowing that that individual was possessed of a much larger fortune—or who sanctioned gross fraud and oppression, or was notoriously guilty of the grossest fraud, and was not a man of ordinary honesty, to the damage and injury of the said pursuer?

Whether, about the 23d day of May 1820, the defender did write and send to the Right Honourable Charles Grant, Member of Parliament for the said County, a letter containing the following words, or words to that effect, viz. "If," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and were meant or intended to represent, and do falsely and injuriously represent the pursuer as having, from corrupt and improper motives, been accessary to the appointment of improper persons to be Justices of Peace in the County of Inverness, or as having been accessary to an unjust selection of persons to be Justices of the Peace, and exclusion of persons from the roll of Justices of Peace for the said County, to the injury and damage of the said pursuer?

Whether, on or about the 7th day of July 1820, the defender did write and send to the said Charles Grant a letter containing the following words, or words to that effect,

viz. "The," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and were meant and intended to represent, and do falsely and injuriously represent the pursuer as a man of abandoned principles, and unworthy of public trust, to the injury and damage of the said pursuer?

Whether, on or about the 21st day of September 1820, the defender did write and send to the said Charles Grant a letter containing the following words, or words to that effect, viz. "I," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and were meant and intended to represent, and do falsely and injuriously represent the pursuer as having, from improper motives, been accessary to the appointment of improper persons to be Justices of Peace, or of attempting to verify by signatures, self-evident falsehoods in favour of local abuses—or of having sacrificed the interest of the country to favour the interest of the lawyers, to the injury and damage of the said pursuer?

Or,

It being admitted that a meeting of certain persons, inhabitants of Inverness and its vicinity, was held at Inverness upon the 30th day of March 1818, and that resolutions were entered into by the said meeting which contained the following words, viz. "That," &c.

Whether the whole, or any part of the said words, are of and concerning the defender, and were meant and intended to hold up, and do falsely, injuriously, and calumniously hold up and represent the defender as having made a publication to vilify the chief magistrate of Inverness, or as having made allegations wholly calumnious and false, or as being a person guilty of anonymous malignity, or as not having dared to put his name to Henderson's productions. And, Whether the pursuer

agreed to or signed the said resolutions; and Whether the said resolutions were afterwards published; and Whether the pursuer was one of a deputation from the meeting aforesaid, who, on or about the 3d day of April 1818, waited upon and presented the said resolutions to Provost Robertson?

Damages laid at £5000.

No. II.

Hamilton v. *Stevenson.—5th June* 1822.

It being admitted, that during the months of April, May, and June in the year 1821, the defender was printer and publisher of a certain periodical called the Beacon.

It being also admitted that the sixteenth number of said paper was printed and published at Edinburgh on the 21st day of April in the year aforesaid; Whether the said number contains the following words and figures? "Burgh," &c.

Whether the whole, or any part of the aforesaid words, are of and concerning the pursuer, and are meant and intended to hold up, and do hold up the character and conduct of the pursuer to discredit and contempt, and were meant and intended to bring his loyalty and attachment to his Majesty and to the Constitution into doubt and question, by falsely and injuriously accusing and representing the pursuer as being guilty of presumption, or of purposely creating groundless discontent among the lower orders—of being a worker of public mischief, or of being an enemy to the happiness of the lower orders, or of trying to place the lower orders at variance with their rulers, or leading certain persons into mischievous and extravagant folly, to the loss and damage of the said pursuer?

And it being also admitted that the 18th number of the said periodical paper was printed and published as aforesaid, at Edinburgh, on the 5th day of May of the year aforesaid; Whether the said paper contained the following words and figures? "Lord," &c. And,

Whether the whole, or any part of the aforesaid words, are of and concerning the pursuer, and are meant and intended to hold up the character and conduct of the pursuer to discredit and contempt, and were meant and intended to bring, and do bring his loyalty and attachment to his Majesty and to the Constitution into doubt and question, by falsely and injuriously accusing the pursuer of corresponding for improper and unconstitutional purposes, with people of low character on political subjects, or of opposing Bills in Parliament, merely in order to acquire popularity, or of being willing to open a correspondence with any person who can be prevailed on to enter into his political measures, or being regardless of his high birth, or of corresponding with people of a suspicious cast on political subjects, or of having procured from a person of the name of Turner, a petition complaining of the arbitrary conduct of the Lord Advocate, or having induced the said Turner to apply to Parliament, or of being the noble correspondent of Crail radicals and Strathaven traitors,—or of having called in question the conduct of the Lord Advocate, although the conduct of that public officer had never been called in question, except by the patrons or associates of crimes, to the injury and damage of the pursuer?

It being farther admitted, that the nineteenth number of the aforesaid paper was printed and published as aforesaid, at Edinburgh, on the 12th day of May in the year aforesaid; Whether the said paper contained the following words, "The," &c. And,

Whether the whole, or any part of the aforesaid words, are of and concerning the pursuer, and are meant and intended to hold up, and do hold up, the character and conduct of the pursuer to discredit and contempt, and were meant and intended to bring, and do bring his loyalty and attachment to his Majesty and the Constitution into doubt and question, by falsely and injuriously stating and setting forth that the pursuer had presented to the House of Commons, a petition in name of James Turner, who was confined for high treason; which petition was malicious, and not the complaint of Turner, but was in truth the complaint of Lord A. Hamilton, or as having so far degraded himself as to become the patron of suspected patriots, to the injury and damage of the pursuer.

Whether the 22d number of the aforesaid paper was printed and published as aforesaid at Edinburgh, on the 2d day of June in the year aforesaid; Whether the said paper contains the following words, "Lord," &c. And

Whether the whole, or any part of the aforesaid words, are of and concerning the pursuer, and are meant and intended to hold up, and do hold up the character and conduct of the pursuer to discredit and contempt, and are meant and intended to bring, and do bring his loyalty and attachment to his Majesty and to the Constitution into doubt and question, by falsely and injuriously representing the pursuer as being unceasing in his endeavours to bring himself into notice, and certainly not at all scrupulous as to the means of doing so, to the injury and damage of the pursuer.

Damages laid at £5,000.

No. III.

Alexander v. *Macdonald*,—*15th June* 1826.

It being admitted that the pursuer is a Professor of Greek in the University of St. Andrews, and that the defender is and was, on the 24th of March 1825, printer and publisher of the newspaper called the Dundee, Perth, and Cupar Advertiser,—

It being also admitted that the words hereinafter set out were printed and published in the said newspaper, on the said 24th day of March 1825, viz. "Saint," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously represent the pursuer as unfit for the discharge of, or as neglecting his duty as a Professor, to the injury and damage of the pursuer;

Or,

Whether at the time aforesaid, the Greek class taught by the pursuer was in a state of insubordination; and Whether the pursuer had thus lost all control over his students, and was in a state of extreme perplexity?

Damages laid at £1,000.

No. IV.

Fair v. *Barclay, &c.*—*4th July* 1833.

It being admitted that the pursuer is, and prior to the 16th day of June 1832, was agent at Jedburgh for the British Linen Company's Bank, and that on the said day, and subsequent thereto, the defender, James Hooper Daw-

son, was proprietor and editor of a certain newspaper called the Kelso Chronicle, and that the defender, Thomas Barclay, was printer and publisher of the said paper,—

Whether on or about the said days, there was printed and published in the said Newspaper the following words, according to the meaning herein set forth, viz. " The," &c. and Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Or,

Whether on a day between the 16th March and 16th June, 1832, the pursuer informed David Murdie, a tenant of certain fields, the property of the pursuer, that he must either vote for the said Candidate, or flit from the said fields?

Damages laid at £1,000.

No. V.

Bee v. *Martine*,—*2d July* 1833.

It being admitted, that on the day of the defender wrote and transmitted to the pursuer a letter containing the following words, viz. " Sir," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and injuriously represent the pursuer as having stolen the defender's straw, or as not being a trust-worthy person, to the injury and damage of the said pursuer?

Or,

Whether in a straw-yard in the town of Haddington, possessed jointly by the pursuer and defender, the pursuer,

on the 1st day of June 1820, or on divers days and times in the course of the said month, or in course of the month of July, or in course of the month of August, all in the year 1820, the pursuer did, without the knowledge or consent of the defender, or without any authority from him, take and carry off, and appropriate to himself straw, bran, riddlings, or cuttings of birch, exclusively the property of the defender?

Whether, in the straw-yard aforesaid, on the 1st day of February 1821, or on divers days and times in the said month, or in the course of the month of March, or in the course of the month of April, all in the year 1821, the pursuer, without the knowledge and consent of the defender, or without any authority from him, did take and carry off, and appropriate to himself straw, bran, riddlings, or cuttings of birch, exclusively the property of the defender?

Damages laid at £300.

No. VI.

Compton v. *Home*,—*29th February* 1832.

It being admitted that the letter or writing, No. 3 of Process, contains calumnious matter calculated to injure the character and feelings of the pursuer, Mrs. Compton,—

Whether on or about the 8th day of December 1830, the defender did write and transmit the said letter or writing to the said pursuer, or cause the same to be written and transmitted to the said pursuer, or did transmit the same to the said pursuer, knowing the contents thereof, to the loss, injury, and damage of the pursuers.

Damages laid at £10,000.

No. VII.

M'Kay v. *Campbell*,—13*th June* 1833.

Whether, on or about the 28th day of November 1831, the defender did write and publish, or cause to be written and published, a paper containing the following words, or words to the following effect, viz. " Fort," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and held up the pursuer to the contempt of the public, to the loss, injury, and damage of the pursuer?

Damages laid at £1,500.

No. VIII.

M'Farlane v. *M'Kechnie*,—16*th January* 1834.

Whether at Falkirk, on or about the 23d day of November 1831, the defender did wrongfully write and transmit to the pursuer a letter containing a challenge to fight a duel, to the loss, injury, and damage of the pursuer?

Whether, on or about the said 23d day of November 1831, the defender did write and publish, or cause to be written and published, by placing the same in the reading or public room of the Red Lion Inn, Falkirk, a writing or placard containing the following words, viz. " Mr." &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously hold up the pursuer to the contempt of the public, to the loss, injury, and damage of the pursuer.

Damages laid at £1,000.

No. IX.

Russell v. *Lumsden*,—*2d February* 1837.

It being admitted that at Mintlaw, on the 14th December 1835, the defender did put up and publish a placard containing the following words, viz. " James," &c. And on the 15th day of the said month and year, did put up and publish, in each of the following places in the city of Aberdeen, viz. the news-room of the County Buildings in Union Street, in the news-room called the Athenaeum, in Castle Street, and in the shop of Mr. Laing, perfumer in Union Street, a placard containing the following words, viz. "James," &c.—

Whether the said words, or any of them, contained in the said placard, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Damages laid at £5,000.

No. X.

Waddell v. *Forsyth*, *&c.*—*22d June* 1836.

Whether in the months of September, October, and November 1834, or any of them, the defenders, or any of them, did compose, or write, or print, or did cause to be composed, or written, or printed, certain words and sentences, of which No. 4 of process is a copy; or during the said months, or any of them, did publish or circulate the same in the towns of Airdrie or Hamilton, or neighbourhood thereof, or in the town of Glasgow, or neighbourhood

thereof; And Whether the whole or any part of the said words and sentences are of and concerning the pursuer James Waddell, and falsely and calumniously represent the pursuer as guilty of various crimes, or as having been afflicted with insanity, and held him up to the hatred, scorn, ridicule, or contempt of his neighbours, to the injury and damage of the pursuer?

Whether at the time or times aforesaid, and at the place or places aforesaid, the defenders, or any of them, did compose, or write, or print, or cause to be composed, written, or printed, the said words and sentences, of which No. 4 of process is a copy, and did publish or circulate the same as aforesaid; and Whether the whole, or any part of the statements contained in the said words and sentences, are of and concerning the pursuer, Margaret Waddell, and falsely and calumniously impeach her chastity, to the loss, injury, and damage of the said Margaret Waddell.

Joint damages laid at £7,000.

No. XI.

Peterkin v. Laing, &c.—9th March 1837.

It being admitted that James Allan MacConochie, Esquire, is, and since the year 1822, has been Sheriff or Sheriff-Depute of the County of Orkney, and that during the year 1823, the pursuer was Sheriff-Substitute of the said county, until his appointment was recalled by the said James Allan MacConochie, and that the defenders are, and during the year aforesaid, were Justices of Peace and Commissioners of Supply for the said county,—

Whether, on or about the beginning of the year 1823, the

defenders, or either of them, did wrongfully enter into a scheme to deprive the pursuer of his office, and did, both or either of them, in pursuance of the said scheme, on or about the 3d day of April 1823, write and transmit, or cause to be written and transmitted to the said James Allan MacConochie, the card or letter No. 141 of process, falsely representing to the said James Allan MacConochie, that the pursuer had placed himself in a situation of disrespect with the respectable inhabitants of the said county, and had so misconducted himself as to disqualify him from discharging properly the business of the said office, and to render necessary the residence in the said county of the Sheriff-Depute, to the loss, injury, and damage of the pursuer?

Whether, in pursuance of the said scheme, the said Samuel Laing did compose and write, or cause to be composed and written, and did lay, or cause to be laid before Statutory meeting of Justices of Peace and Commissioners of Supply for the said county, held at Kirkwall on the 30th April 1823, the statement No. 109 of process; and Whether the whole, or any part of the said statements, are of and concerning the pursuer, and falsely represent the pursuer as being involved in personal animosity with the principal resident heritors, gentlemen, and respectable families of the said county, and the town of Kirkwall, to such an extent that it was impossible that the business of the said county could go on while the pursuer remained in the said office, as being an unfit person to hold the office of the Sheriff-Substitute, to the loss, injury, and damage of the pursuer?

Whether, in pursuance of the said scheme, the said James Baikie, defender, did wrongfully assume and hold out the said meeting to have been a general county meeting, and did, on or about the 1st day of May 1823, transmit to the

said James Allan MacConochie, and deposit in the hands of William Watt Bain, Clerk of Supply, the said statement containing the said false representations of and concerning the pursuer, and did falsely represent to the said James Allan MacConochie that the said statement contained an expression of the sense or opinion of the said county as to the character and conduct of the pursuer, to the loss, injury, and damage of the pursuer?

Whether, in pursuance of the said scheme, the said James Baikie did, on or about the 12th day of May 1823, write and transmit, or cause to be written and transmitted to the said James Allan MacConochie, a letter containing the following words, or words to the following effect, viz. "The," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely represent to the said Sheriff-Depute, that the judicial business of the county could not go on while the pursuer held the office of Sheriff-Substitute, to the loss, injury, and damage of the pursuer?

Or,

Whether, on all or any of the said occasions set forth in the preceding Issues, the defenders, or either of them, acted in discharge of their or his duty, or exercise of their or his right as Convener of the said County, or Freeholders, or Justices of Peace, Commissioners of Supply, or heritors of the said County.

Damages claimed,

Value of office, £3,164. 5s. with Interest.

Solatium £2,000.

No. XII.

Malcolm v. *Paul*,—21*st May* 1839.

It being admitted that on the 27th December 1838, in an action by the pursuer against the defender, the following Issues came on for trial, viz. :—

" Whether, at Edinburgh, on or about the 27th day of January 1838, at a meeting of the creditors of one James Livingstone, merchant in Newburgh, and in presence and hearing of John Young, John Marshall, David Monypenny Adamson, and William Anderson, writers in Edinburgh, or any of them, the defender did falsely and calumniously say, that a conspiracy had been formed against him as disgraceful as that of the Glasgow Cotton Spinners, and that there was in this conspiracy an Elder of the Church of Scotland, meaning the pursuer, and that he had entered into a disgraceful conspiracy for the purpose of injuring the defender, or did falsely and calumniously use or utter words to that effect and meaning, to the loss, injury, and damage of the pursuer?

" Whether, at the time and place aforesaid, and in presence and hearing of the persons aforesaid, or any of them, the defender did falsely and calumniously say that the pursuer was a damned brute, meaning that the pursuer was unworthy of holding the position of a person of respectable character, or the station of an Elder of the Church of Scotland, or of a gentleman, or did falsely and calumniously use or utter words to that effect and meaning, to the loss, injury, and damage of the pursuer?

" Whether, at the time and place aforesaid, and in presence and hearing of the persons aforesaid, or any of them, the

defender did falsely and calumniously say, that the pursuer was a hollow-hearted deceitful vagabond, or did falsely and calumniously use or utter words to the effect and meaning aforesaid, to the loss, injury, and damage of the pursuer. Damages laid at £500. (Signed) JAMES W. MONCRIEFF.—23d November 1838."

Whether, when the said Issues came on for trial, the following Minute was given in by the counsel for the parties, and sanctioned by the Court.—" Edinburgh," &c.

Whether, on or about the 29th of December 1838, the defender, by himself or another, or others, did print and publish in the Newspapers called the Edinburgh Evening Courant, the Scotsman, Caledonian Mercury, and the Edinburgh Evening Post, or any of them, the following letter, viz. :—" Damages," &c.

And Whether, in the said letter, the defender reiterated or re-asserted all or any part of the charges or statements contained in the said Issues? and Whether the same are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. XIII.

Greenshields v. *Dalzell*,—20*th December* 1839.

It being admitted that during the years
the pursuer was arbiter in a question submitted to his decision by the defender and Messrs. Johnston, engravers in Edinburgh,—

Whether, at Edinburgh, on or about the 28th day of October 1836, the defender did write and transmit, or cause to be written and transmitted to the pursuer a letter, containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz. " Let," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, on or about the 8th day of December 1836, the defender did write and transmit, or cause to be written and transmitted to the pursuer a letter, containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz. " I," &c. meaning thereby that the pursuer, as referee aforesaid, industriously sought opportunities, in course of the reference, for committing wanton injury against the defender. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, on or about the 19th day of October 1837, the defender did write and transmit, or cause to be written and transmitted to the pursuer a letter, containing the following words, or words to the following effect, according to the meaning hereinafter set forth, viz. " After," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Damages laid at £2,000.

No. XIV.

Morris v. *King*,—*7th July* 1840.

Whether, on or about the 4th day of March 1840, the defender did write and transmit, or cause to be written and transmitted to the pursuer a letter, containing the following words, or words to the following effect, viz. "Sir," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. XV.

Walker v. *Arnots*,—*4th July* 1820.

Whether, on or about the 20th day of November 1818, at a general meeting held at Auchtermuchty, of the creditors of the Town of Auchtermuchty, and in the hearing of the said creditors and others, the defender, David Arnot, did falsely and injuriously allege or say, that the pursuer had falsified, vitiated, or forged writings, and particularly the minutes of former meetings of the creditors of the said Town, or did use words and expressions to that effect, to the injury and damage of the said pursuer?

Whether, at the time and place aforesaid, the defender, John Arnot, did, in the hearing of the said creditors and others, use the same, or similar words and expressions to those aforesaid, or did affirm that the allegations made

as aforesaid by the other defender were true, to the injury and damage of the said pursuer?

Whether, on or about the 26th day of December 1818, at an adjourned meeting held at the said Town of the said creditors, and in hearing of the said creditors and others, the defender, David Arnot, did falsely and injuriously allege or say that the pursuer had falsified, vitiated, or forged writings, and particularly the minutes of former meetings of the creditors of the said Town, or did use words or expressions to that effect, to the injury and damage of the said pursuer?

Whether, at the time and place last aforesaid, the defender, John Arnot, did, within hearing of the said creditors and others, use the same or similar words and expressions to those last aforesaid, or did affirm that the allegations made as aforesaid by the other defender were true, to the injury and damage of the said pursuer?

Damages laid at £2,000.

No. XVI.

Allan v. *Morris*,—*7th July* 1820.

Whether, in the different months between March and October 1818 inclusive, or about that time, the defender repeatedly, upon various occasions, in the town of Kilmarnock and its neighbourhood, did falsely and injuriously say or insinuate to William Rankine, druggist in Kilmarnock, Thomas Baird, grocer there, Alexander Stewart, Junior, manufactory agent there, and others, that the pursuer was a dishonest or perjured man, and had been guilty of some dishonest action or actions, and of perjury;

and Whether, during the said period, the defender was in the use, in speaking of the pursuer, to or in the hearing of the said persons and others, in the said town of Kilmarnock and its neighbourhood, to describe or allude to the pursuer by the name of Honesty, or Mr. Honesty, and to call him by that name, meaning thereby to have such appellation understood in an ironical sense, and thereby to represent the pursuer to the persons aforesaid and others as a dishonest man. And

Whether, at the times and places aforesaid, to the persons aforesaid and others, and before and at the time of the exhibition of a certain figure made of stone, and representing a man, (which exhibition is hereafter more particularly mentioned), the said defender, besides calling the pursuer by the name of Honesty, or Mr. Honesty, as aforesaid, did, in the hearing of, and to the persons aforesaid, and others, at or about the times aforesaid, in the places aforesaid, represent the pursuer, (he being by trade a watch and clock-maker), as having fraudulently retained a watch entrusted to him to repair, and as having perjured himself in a cause which depended before the Sheriff of Ayr, respecting clock weights, in which Finnie and Son, or Archibald Finnie and Sons of Kilmarnock, brassfounders, was the opposite party?

And Whether, in the months of July and August 1818, the defender did place, or caused to be placed upon a crate or stand in the street of the town of Kilmarnock aforesaid, opposite, or near to his the said defender's shop-door, an image or figure of stone, and representing a man with a label on the head of the said figure, bearing the inscription "Honesty," in legible characters, and having a toy to represent a watch hung about the neck of the said figure, and also some pieces of lead hung about and attached to the said figure, meant to represent clock weights,

and upon the breast or body of said figure, another inscription, with the words "Clock Weights swallowed in any quantities." And Whether the said image or figure, with the said inscriptions and emblems appended thereto, was exhibited by the said defender on various occasions, for several days at a time, subsequent to the months of July and August aforesaid, in his shop, or in the window of his dwelling-house, and in the public street, or in the window of the staircase of his dwelling-house, within the town of Kilmarnock aforesaid? And Whether the said figure, so exhibited as aforesaid, was meant to represent the pursuer, and to exhibit him as a dishonest person, and as one who had acted dishonestly in respect to retaining the watch as aforesaid, and as having sworn falsely in respect to the clock weights? And Whether the said defender did thereby intend to exhibit the pursuer to the inhabitants of the said town of Kilmarnock, and the neighbourhood thereof, as a person who was dishonest, and as one who had been guilty of fraud and perjury, to the great loss and damage of the pursuer?

And Whether, at the time of the exhibition of the image aforesaid, and for sometime afterwards, the defender did exhibit, in his house and shop, situated as aforesaid, and in the neighbourhood thereof, a print or drawing upon paper, having a figure or representation of a dog, on which was delineated certain figures or drawings? And Whether the said drawings were meant to represent the clock weights hanging about the neck of the said dog? And Whether the word "Honesty," and certain other words written thereon, purported that the dog had swallowed a quantity of clock weights, which were sticking in his stomach? And Whether the said picture of the dog, and the inscription and drawing thereon, were meant and intended to be of and concerning the pursuer? And Whether the defender thereby meant to insinuate, and make

it be believed, that the pursuer had sworn falsely in the cause before the Sheriff of Ayr aforesaid, and intended falsely and injuriously to represent the pursuer as a dishonest or fraudulent person, to the loss and damage of the said pursuer?

Damages laid at £500.

No. XVII.

Dunlop v. *Wilson*, *7th March* 1826.

Whether, on or about the 25th day of May 1821, at a fair held at Dunlop, in the County of Ayr, in the house of George Howie, Innkeeper in Dunlop, and in presence and hearing of Robert Kerr, junior, cattle-dealer, and John Gilmour, of Craignaught, the defender did falsely and calumniously say, that in the year 1820, the pursuer had been guilty of forgery, to the injury and damage of the pursuer?

Whether, on or about the 24th day of August 1821, in the Turf Inn, in the Town of Kilmarnock, in presence and hearing of John Allan, the defender did falsely and calumniously allege that the pursuer had forged certain bills to the injury and damage of the pursuer?

Whether, on or about the 31st day of August 1822, in the house of Robert Paton, in Kilmarnock, and in presence and hearing of Andrew M'Gregor and John Blair, the defender did falsely and calumniously say, he, the defender, could not get payment of certain bills due to him, the defender, in consequence of the insolvency of the pursuer, to the injury and damage of the pursuer?

Whether, on or about the day of August 1822, or on or about the 18th day of November 1822, at Irvine, in the County of Ayr, and in presence and hearing of Robert Dunlop, farmer in Sawthorn, the defender did falsely and calumniously say, that the pursuer was a person in desperate circumstances, and that in six months he would not be able to pay one shilling, to the injury and damage of the pursuer?

Or,

Whether the name Gabriel Dunlop, subscribed to a bill for the sum of £22 sterling, dated 13th June 1811, bearing to be drawn by James Maitland upon the defender, is a forgery, and executed by the pursuer?

Whether in the said month of August 1822, and prior to the said day of the said month, the pursuer was notoriously insolvent?

Whether, at Kilmarnock Fair, held in the end of Autumn or beginning of Winter 1820, the late John Gibson, farmer at Dundaff, did, in presence of John Allan, now farmer in Old Hall, Dundonald, exhibit to the defender a bill for £100, bearing to be drawn by the defender upon, and accepted by the pursuer, and whether the defender's name adhibited to that bill was a forgery executed by the pursuer?

Damages laid at £1,000.

No. XVIII.

Mundell v. *Nicholson*, *20th January* 1829.

It being admitted that the pursuer is, and in the months of February or March 1828, was a married man, the father of a family, and an Elder of the Parish of Mousewald,—

Whether, in the end of the month of February or beginning of the month of March 1828, at the residence of the defender in Calf Park, and in presence and hearing of the wife of the defender, of William Garvin in Scathet, and John Cowan in Bloomfield, or in presence or hearing of one or other of the said persons, the defender did falsely and calumniously say, that in coming from the Dumfries market, on the road from Dumfries to Annan, he, the pursuer, had repeatedly kissed a woman, and had taken her behind a dyke near the said road, and had kissed her in a side-room in the house of one Thomas Hethrington, on the said occasion, meaning that the pursuer had had carnal intercourse with the said woman, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, on a Wednesday in the end of the said month of February or beginning of the said month of March 1828, at Dumfries, in the house of Thomas Wells, Innkeeper in the said town, and in presence and hearing of Thomas Edgar, in Stockmiln, the defender did falsely and calumniously say that the pursuer, along with a woman of known bad character, did go into the house of the said Thomas Hethrington, where they remained together till about one o'clock of the morning, meaning that the pursuer had had carnal intercourse with the said woman, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, on an evening in the end of the said month of February, or beginning of the said month of March 1828, on the road near Collin, in the presence and hearing of William Johnston, farmer in Brantetle, and James Johnston in Borowhouse, or one or other of the said persons, the defender did falsely and calumniously say that the pursuer had had connection with a widow belonging to

the parish of Ruthwell a short time before on his way home from Dumfries; that the pursuer and the said woman were together in a hole in the roadside, and that they afterwards went into a house in Collin, where the pursuer had connection with her once or twice, and that after leaving the village he again had connection with her; meaning that at these places the pursuer had carnal connection with the said widow, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, during the said months of February or March 1828, within the shop or house of Thomas Jameson, draper in Dumfries, or in the street of the said burgh, and in presence and hearing of the said Thomas Jameson, the defender did falsely and calumniously say that the pursuer had had carnal connection with a woman on his way from Dumfries, either on the road from Dumfries to Annan, or in the said village of Collin, or did use or utter words to that effect, to the injury and damage of the pursuer?

Damages laid at £1,000.

No. XIX.

Kingan v. *Watson*,—*27th February* 1828.

It being admitted that during the years 1822, 1823, 1824, and 1825, a great number of anonymous letters were written and transmitted to certain individuals of a number of families residing in or connected with the parishes of Govan in the county of Lanark, containing gross and obscene allusions and abominable insinuations,—charges of improper and immoral conduct against the parties, or the near relatives of the parties to whom the said letters

were transmitted, and containing matter offensive and insulting to the said parties, and calculated to hurt the feelings of the individuals to whom they were addressed, and to create dissensions in families and destroy friendly intercourse, and containing matter of so abominable description, that whoever was guilty of writing or transmitting the said letters, knowing their contents, ought to be branded with infamy and banished from society,—

Whether, at various times and places in and near Glasgow, during the years 1825 and 1826, or either of them, the defender did falsely and calumniously state or insinuate to various persons, that the pursuer was the author of the said anonymous letters, or any of them, or was concerned in composing the said letters, or any of them, or in transmitting the said letters, or any of them, knowing the contents of the same, to the injury and damage of the pursuer?

Or,

It being admitted that the letters forming No. 18, 19, 20, 21, 22, 30, 31, 49, 50, 77, 79, 80, 81, 82, 83, 84, and 85 of process Kingan *v.* Watson, and No. 19 of the process Watson *v.* Kingan, are part of the said anonymous letters;—

Whether the pursuer did write and transmit the whole or any part of the anonymous letters last aforesaid, or did transmit the whole or any of them, knowing the contents of the same?

Damages laid at £10,000.

No. XX.

Rutherford v. *Smith*,—*27th June* 1834.

Whether, at or near the malt barns belonging to John Riddell, Jedburgh, on or about the 3d day of November 1833, in presence and hearing of Colin Robertson, Excise Officer in Jedburgh, the defender did falsely and calumniously say, that the pursuer proposed or drank as a toast, a speedy death to the King, (meaning thereby his Majesty King William IV), or damnation to the King, (meaning as aforesaid), or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether, in or near the shop of James Bunyan, barber in Jedburgh, on or about the 7th or 8th day of the said month, and in presence and hearing of the said James Bunyan, Alexander Jaffrey, writer, William Elliot, auctioneer, and John Turnbull, messenger-at-arms, all residing in Jedburgh, or in presence or hearing of one or other of the said persons, the defender did falsely and calumniously say that the pursuer had proposed or drank as a toast, a speedy death to the King, meaning thereby his Majesty King William IV, or the speedy dissolution of the King, meaning the death of his Majesty, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether, at or near the door of the public-house kept by the defender in Jedburgh, on or about the 10th day of the said month, in presence and hearing of Oliver Young, servant to Gavin Hilson, doctor of medicine and surgeon in Jedburgh, the defender did falsely and calumniously say that he heard the pursuer propose or drink as a toast,

the speedy death of the King, meaning his said Majesty, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether, at or near the Abbey-Mill of Jedburgh, on or about the day of the said month, in presence and hearing of William Thomson, corn-dealer in Jedburgh, and Thomas Kinlayside, wright at Abbey-Mill aforesaid, or either of them, the defender did falsely and calumniously say, that the pursuer had, on a recent occasion, proposed, or drunk as a toast, a speedy dissolution to King William IV, meaning his Majesty aforesaid, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether, at or near the door of the said public-house, on or about the day of the said month, in presence and hearing of Alexander Baird, jailor in Jedburgh, the defender did falsely and calumniously say, that the pursuer had drunk as a toast a speedy death to the King, meaning his said Majesty, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Damages laid at £300.

No. XXI.

Gray v. *Ramsay, &c.—22d November* 1831.

Whether, on or about the said 4th day of February 1830, in the shop in Princes Street aforesaid, and in presence and hearing of the said Robert Morton, the defenders, George Syme and James Syme, or either of them, did falsely and calumniously say, that at a meeting of Market

Gardeners held at Mrs. Jeffrey's aforesaid, on or about the 21st day of October 1829, the pursuer did, in reference to a question then depending before the said Robert Morton, as one of the said Magistrates, say, that the pursuer had such a control over, and possessed such an interest with the said Robert Morton, that he as a Bailie, could not decide against him, the pursuer,—meaning that the said Robert Morton was of a corrupt disposition, and would, from corrupt and interested motives, violate his duty as a Magistrate, or did falsely and calumniously use or utter words to the effect foresaid, and with the meaning foresaid, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XXII.

Scott v. *Scougall*,—*25th June* 1821.

Whether, on or about the 18th day of November 1828, near the Exchange Buildings in Leith, and in presence and hearing of Alexander Brodie, Patrick Hodge, and Andrew Gray, merchants in Leith, or one or other of the said persons, the defender did falsely and injuriously say that the pursuer was a liar or a damned liar, or did use or utter words to that effect, to the injury and damage of the said pursuer?

Whether, on the said 18th day of November, in Bernard Street in Leith, the defender did violently assault and strike the pursuer, to the injury and damage of the said pursuer?—Or Whether, on the said occasion, the pursuer struck the defender first.

Damages laid at £2,000.

No. XXIII.

Rae v. *Smith*,—18*th June* 1830.

It being admitted that the pursuer is a preacher of the gospel, and a married man, and was so in the month of December 1828,—

Whether, on or about the days of December 1828, or one or other of them, at Laudhall, in presence and hearing of Agnes Kirk and Mary M'Queen, then servants to the defender, or either of them, the defender did falsely and calumniously say, that the pursuer had been in bed with Elizabeth Corrie, then a servant of the defender, and had been seen with his hand round her waist, and that the pursuer was a curious sort of man to preach against this way on Sunday, and to behave in such a manner during the week; and that when in Edinburgh, the pursuer, in the street, touched with his cane women or girls whom he would not be seen speaking to, meaning that the pursuer held familiar intercourse with women of abandoned character, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether, on or about the 18th day of April 1829, in the house of Miss Gillespie, Anne Street, and in the presence and hearing of the wife of the pursuer, the defender did falsely and calumniously say, that Jean Smith, formerly servant in the pursuer's house, could not keep the pursuer from her bed, and that she had complained to the defender's sons of the pursuer taking improper liberties with her, meaning that the pursuer had, or attempted to have illicit carnal intercourse with the said Jean Smith, and that she, the wife of the pursuer, knew this to be true,

or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Or,

Whether, during the months of June, July, August, September, or October 1828, or any of them, within the dwelling-house of the pursuer, in India Street, Edinburgh, the pursuer repeatedly had, or attempted to have, carnal connection with the said Jean Smith.

Damages laid at £3,000.

No. XXIV.

Aitken v. *Sanderson*,—*3d June* 1840.

It being admitted that the pursuer is a Surgeon in Musselburgh, and that in the year 1839, he professionally attended and prescribed for a boy, the son of one James Collier, in New Craighall, who soon afterwards died,—

Whether, on or about the 4th day of October 1839, in or near the house of the said James Miller, and in his presence and hearing, the defender did falsely and calumniously say, that the said boy required no medicine, and that the medicine which he got had the effect of enlarging the boy's heart, and cut his days short, meaning thereby that the pursuer had, through want of ordinary skill requisite in a professional man, and by such improper and unskilful treatment as indicated a want of such ordinary professional skill or care as is requisite for carrying on the business of a surgeon, administered medicines where none were required, and that the medicines so unskilfully administered by him had the effect of encreasing the disease, by enlarging the heart, and of cutting short the days of

the patient, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XXV.

Horne v. *Rose*,—*25th June* 1840.

Whether, at Inverness, in Wilson's Inn, on or about the 3d day of October 1839, and in presence and hearing of Alexander Thomson Munro, Lieutenant and Adjutant in the Royal Horse Guards, Colin M'Kenzie, and Colin John MacKenzie, son of Sir Colin MacKenzie of Kilcoy, and Alexander Cumine, clerk to Alexander M'Tavish, solicitor in Inverness, or any other of them, the defender did falsely and calumniously say, that the pursuer was a coward, or a damned coward, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

CHAPTER II.

OF THE STRUCTURE OF ISSUES IN ACTIONS AGAINST CLERGYMEN FOR LIBEL AND DEFAMATION.

If a Clergyman indulges in slander, he is liable in damages the same as any other person. But statements which are slanderous and unjustifiable, when voluntarily and gratuitously uttered by a private individual, may not only be excusable, but necessary and meritorious, when made use of by a person in the discharge of a public duty, or in the exercise of a legal right. As a Clergyman has certain public duties to perform in virtue of his character and office, he is not answerable in damages for anything done, spoken, or written by him while fairly and *bona fide* acting in the discharge of these duties. Accordingly, where it appears, *ex facie* of the proceedings, that a Clergyman has been acting in the legitimate discharge of his official duties, an action will not lie against him in respect of such proceedings, without an express allegation of malice. Such is the general rule, and such is the Clergyman's privilege.

It is for the Court to declare, whether a defender is entitled to the benefit of privilege or not; and however difficult it may occasionally be to determine such a question *ab ante*, and before the whole case has come out in evidence, the uniform practice of the Court, since the institution of trial by Jury, as well as the established forms of process, require that it should be done. On the solution of this question, depend the terms of the Issue; and on the terms of the Issue depend the legal principles by which the Judge and Jury are governed at the trial.

In this way it becomes a matter of very serious consideration, and often of much nicety, to adjust and settle the terms of the Issue in cases against Clergymen or others,

where privilege, or duty, is pleaded in defence. Of course, the allegations of the pursuer must be chiefly looked at, and it must be assumed that he is prepared to establish them. If he should fail in proving his allegations, the action must, on that ground alone, prove abortive, independently altogether of the plea of privilege. It is only, indeed, where the matter complained of is admitted, or, on the assumption that it may be proved, that any plea of privilege,—which is properly a plea in excuse and not of denial,—can, strictly speaking, come into operation. In determining, therefore, the preliminary question of privilege, or not, the Court assumes the facts to be as set forth by the pursuer, and in that way the difficulty which might otherwise be encountered, is, in a great measure, avoided.

These remarks apply generally to all cases in which the plea or defence of privilege, or duty, is set up. The precedents and principles, more especially applicable to actions against Clergymen, have now to be noticed.

As every case must depend on its own *species facti*, it is impossible to lay down any general rule or criterion for determining whether a case should be dealt with as a privileged one or not,—although no doubt the analogies of reported and decided cases must be always, in that question, of great service and weight. If it should appear, from the pursuer's own statement, that the matter, of which he complains, had been spoken or written by a Clergyman in his official capacity, within his jurisdiction, and in the fair and legitimate exercise of his ecclesiastical functions, the presumption will generally be in his favour, and the *onus* of proving that he acted maliciously, or in violation of his duty, will be thrown on the pursuer. But this presumption is not to be given effect to merely because a clergyman has been *ostensibly* acting in the discharge of his official duties. There may be a very material and important distinction between things done *in the exercise* of one's duty, and things done *while one is exercising* his duty. Accordingly, an ac-

tion of damages for defamation has been sustained against a Clergyman, and an Issue framed in the ordinary way, just as if no privilege whatever attached to the case, for words uttered by him during divine service in his own pulpit,—it appearing to the Court, from the whole complexion and circumstances of the case, that the defender had taken the opportunity, while engaged in the exercise of his clerical duty, of slandering the pursuer.—*Adam*, 23d June 1841 ; 3, D. p. 1058. In a word,—while, on the one hand, such a measure of protection ought to be extended to Clergymen and other public functionaries, as will enable them freely, independently, and correctly, to discharge their duties,—on the other hand, care must be taken to prevent the cloak of office, or the pretence of duty, becoming a cover or protection to the indulgence of individual and private malevolence. How the course between these conflicting principles has been hitherto steered, can best be shewn by a reference to the decided cases.

(1.) In the case of *M'Lean*, 19th May 1823,—3, M. p. 353, the defender, a Clergyman, would appear, from the terms of the Issue, to have been held entitled to the benefit of the plea of privilege, in relation to words affecting the character and conduct of a parishioner, spoken at a meeting of Presbytery. Accordingly, the Issue sent to the Jury in that case, put it to them to say,—Whether the defender " falsely, *maliciously*, and injuriously," uttered the words complained of.*

(2.) In two cases more recent, the form of Issue adopted and approved of by the Court was peculiar,—being neither that usual in cases of privilege, nor that which denotes an ordinary case of slander. In place of an express charge of malice in the Issues, the modified form was adopted, of put-

* But the mere allegation of malice in the Summons will not entitle a pursuer to insist in his action, unless he has averred facts and circumstances relevant and sufficient to support his charge and ground of action. *M'Dougal*, 6, S. p. 742, *Mone*, 25th February 1842, 4 D. 786.

ting it to the Jury—Whether the defender, "in violation of his duty as a Clergyman," falsely and calumniously uttered the defamatory words complained of.—*Dudgeon*, 20th July 1833, 11, S. p. 1014; and *Grant*, 1st Feb. 1834, 12, S. p. 385. In the former of these cases, the action was founded on defamatory expressions directed by a Clergyman from the pulpit against one of his parishioners, in reference to a dispute which had occurred betwixt them on the subject of the distribution of the poors' funds; and in the latter, the action was founded on certain defamatory and injurious expressions contained in a series of letters which were addressed by the defender, a country Clergyman, to one of his elders, who was also one of the principal heritors of the parish, respecting the conduct of the pursuer, as manager of a cotton-factory, belonging to the person to whom the letters were addressed. In neither of these cases, however, does the question of privilege appear to have been seriously argued or authoritatively decided. It does not appear, indeed, that, in the former, any discussion whatever took place in Court on the subject; and, in the latter, the pursuer, who had obtained from the Lord Ordinary an Issue in the ordinary form and terms, as if the defender was not entitled to the protection of privilege, proposed, of himself, in the course of the discussion under a Reclaiming Note—apprehensive, it may be fairly presumed, of the result—to take an Issue similar to that in the previous case of Dudgeon, and this proposal was acceded to by the defender, and sanctioned by the Court.

(3.) The subject of privilege, as applicable to actions against Clergymen, has recently undergone a very full discussion in the case of *Adam*, 23d June 1841, 3, D. p. 1058, where the opinions of the whole Court were taken on the question,—Whether or not malice required to be expressly charged and inserted in the Issues? In this case the pursuer libelled on certain epithets and expressions—which, in ordinary circumstances, would have been viewed, unhesitat-

ingly, as grossly slanderous—used by a parish minister in the course of a sermon from the pulpit, with reference to a newspaper, in which articles had been published ridiculing the Clergy and Church establishment, and with reference to the editor of that paper personally. After the fullest consideration, and when the opinions of the whole Court had been taken, it was held, by a majority, that the defender was not, in the circumstances, and *prima instantia*, entitled to any protection from the plea of privilege; and it was accordingly ruled, that it was not necessary expressly to insert a charge of malice in the Issue. The report of this case is very valuable for the citation of authorities it contains, and the full exposition which it affords of the principles on which cases of privilege,—especially in questions with Clergymen,—fall to be regulated and decided in the preliminary adjustment of the Issues.

It is, of course, always in the power of a defender,—whether he be a Clergyman or not,—where he cannot *prima instantia* obtain the benefit of privilege, to take a counter Issue for himself, to the effect that, in the matter complained of, he acted in the proper discharge of his duty,—provided he has put on record the suitable and corresponding averments and pleas.

No. I.

Walker v. *Robertson*,—*5th June* 1821.

Whether at Inverkeithing, on Sunday the 3d day of October 1813, when the Magistrates of Inverkeithing went for the first time to Church after the election of the late Robert Walker to be Provost of the said burgh, the defender, being minister of the parish of Inverkeithing, from the pulpit of the Church thereof, and in presence of the congregation then and there assembled, did say or

assert, meaning to allude to and point out the said Robert Walker by the denomination of his adversary or antagonist, say of the said Robert Walker, that his heart was puffed up with vanity, but that a time might soon come when his pride would be lowered, or did use words to that effect; and Whether the said words were calumnious and injurious, and tended to hold the said Robert Walker up to the derision or contempt of those present, to the damage and injury of the said pursuer?

Whether, time and place aforesaid, and on the occasion aforesaid, the defender did say from the pulpit, that the hopes of persons prosecuting claims to worldly estate might soon be overturned and disappointed, or did use words to that effect; and Whether the said words were of and concerning the said Robert Walker, the pursuer's father; and Whether they were meant and intended to convey an indecent personal allusion against the said Robert Walker, in respect to his claim to an estate, and were to the damage and injury of the pursuer?

Whether, on a Sunday of the month of October 1814, or about that time, the defender, in an address from the pulpit of the church aforesaid, in presence of the congregation then and there assembled, did say that his adversary never sat down to the table of the Lord, or did use words to that effect; and Whether said words were of and concerning the said Robert Walker, the pursuer's father, and were calumnious, and to the damage and injury of the pursuer?

Whether, on the last Sunday of the year 1817, and upon Sunday the 18th of January 1818, and upon Sunday the 8th day of March 1818, or upon one or other of these days, the defender, from the pulpit of the parish church aforesaid, in presence of the congregation then and there

assembled, did falsely, calumniously, and injuriously, say or assert that the said Robert Walker had, in the management of a fund subscribed by the elders of the said parish for relief of the poor, defrauded the poor, or did use words to that effect, of and concerning the said Robert Walker, to the damage and injury of the pursuer?

Whether, upon the aforesaid Sunday, the 8th of March 1818, in the church aforesaid, and in presence of the congregation then and there assembled, the defender, in a discourse from the pulpit, did say, "I have," &c. (pointing with his hands towards the Session-House), &c. or did use words to that effect; and Whether by the word adversary, the defender meant and intended the said Robert Walker; and Whether the said words then spoken were of and concerning the said Robert Walker, and were calumnious or injurious, and tended to expose the said Robert Walker to the contempt and dislike of the congregation or persons present, to the damage and injury of the said pursuer?

Whether the defender did compose, write, print, or circulate, or caused to be composed, written, printed, or circulated, a paper dated 14th February 1818, purporting to be a Memorial or Statements of the Kirk-Session of the Parish of Inverkeithing and Rosyth, and addressed to the heritors of that parish, containing the words following, or words of similar import,—"That," &c. and the following words:—"That," &c. and the following words:—"That," &c.—And Whether the said words, or any part thereof, were of and concerning the said Robert Walker, and are false and calumnious, and to the damage and injury of the pursuer?

Damages laid at £2,000.

No. II.

M'Lean v. *Fraser*,—*28th June* 1822.

Whether, on or about the 21st day of March 1821, at Aross in the island of Mull, at a meeting of the Presbytery of Mull, the defender did falsely, maliciously, and injuriously say and allege that the pursuer had been guilty of a gross violation of the Sabbath day, by having, after coming out of church, on a Sunday recently before the said 21st day of March, taken his fishing-rod, or other implement for killing fish, and gone out to take fish, and had been employed in fishing during a part of that day, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, on or about Sunday the day of July 1821, at or near the parish church of Kinfinelzow, at the celebration of the Sacrament in the said parish church, the defender did falsely and injuriously say to Neil Shaw, elder of the said parish, that the pursuer had been guilty of the said offence, and did direct the said Neil Shaw to prevent the pursuer from advancing to the Communion Table, or did use or utter words to that effect, to the injury and damage of the pursuer?

Damages laid at £500.

No. III.

Dudgeon v. *Forbes*,—*20th July* 1833.

It being admitted that during the year 1832, and prior thereto, the pursuer was an inhabitant of the parish of

Tarbet, and that the defender is, and then was, the Clergyman of the said Parish, and that the pursuer, on or about Sunday the 8th day of January 1832, put into the poors-box of the said parish a paper, No. 6 of process, assigning reasons for the pursuer and his family withholding their contributions to the poors funds:

Whether, on or about Sunday the 5th of February 1832, from the pulpit, in the Church of the said parish, and in presence and hearing of the congregation then and there assembled, the defender, in violation of his duty as a Clergyman, did falsely and calumniously say that the said paper was a tissue of misrepresentations, falsehood, and bad grammar;—that at any time when the pursuer had occasion to apply to the defender for baptism, the defender had catechised him, and found the pursuer ignorant of the Catechism,—and that it was easy for those, (meaning the pursuer and others), who were deficient in their own duty, to find fault with others; but that it was proper that they (meaning the pursuer and others) should be shewn their insignificance. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false, calumnious, and injurious, and intended to hold up the pursuer to the contempt of the said congregation, to the loss, injury, and damage of the pursuer?

Damages laid at £1000.

No. IV.

Grant v. *Coltart*,—17*th Jan.* 1834.

Whether, on or about the 20th day of August 1832, the defender did, in violation of his duty as a Clergyman, write and transmit, or cause to be written and transmit-

ted to Alexander Graham Speirs, Esq. of Culorinoch, a letter containing the following word or words, to the following effect, viz.:—" What," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, on or about the 23d day of August 1832, the defender did, in violation of his duty as a Clergyman, write and transmit, or cause to be written and transmitted to the said Alexander Graham Speirs, a letter containing the following word or words, to the following effect, viz.:—" I," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, on or about the 5th day of September 1832, the defender did, in violation of his duty as a Clergyman, write and transmit, or cause to be written and transmitted to the said Alexander Graham Speirs, a letter containing the following words, or words to the following effect, viz.:—" When," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, on or about the 6th day of September 1832, the defender did, in violation of his duty as a Clergyman, write and transmit, or cause to be written and transmitted to the said Alexander Graham Speirs, a letter containing the following words, or words to the following effect, viz. " With," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, in or near the manse of Fintry, on or about the day of September 1832, and in presence and hearing of Dr. Thomas Brown, minister of St. John's Church, Glasgow, the defender did, in violation of his duty as a clergyman, state the various accusations contained in the said letters, as set forth in the 1st, 2d, 3d, and 4th Issues, or any of them, or did, in violation of his duty as a Clergyman, time and place aforesaid, shew to the said Dr. Brown the said letters, or any of them; and Whether the accusations aforesaid, or any of them, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer?

Whether, in or near the garden at the Manse of Fintry, or in or near to the village of Fintry, on or about the day of September, or the day of October 1832, and in presence and hearing of Cowan, distiller at Fintry, and Mrs. Cowan, his wife, or either of them, the defender did, in violation of his duty as a Clergyman, falsely and calumniously say that the pursuer had acknowledged all the charges preferred against him, (meaning the accusations aforesaid,) by the defender to be true, with the exception of bathing in the river on the Sabbath, to the loss, injury, and damage of the pursuer?

Whether at Fintry, on or about the day of September, or the day of October 1832, the defender did, in violation of his duty as a Clergyman, communicate to James Stewart, Innkeeper at Fintry, all or any of the accusations or charges aforesaid, and did, in violation of his duty as a Clergyman, falsely and calumniously say, that the pursuer had acknowledged all the charges preferred against him by the defender to be true, with the exception of bathing in the river on Sabbath, to the loss, injury, and damage of the pursuer?

Damages laid at £2,000.

No. V.

Adam v. *Allan.*—*23d June* 1841.

It being admitted that the pursuer is editor of a newspaper entitled the Aberdeen Herald, and that the defender is minister of the Union Parish in Aberdeen :—

Whether, on or about Sunday the 27th of January 1839, in the church of the said parish, and in the presence and hearing of the congregation then and there assembled, the defender did falsely and calumniously say, that the said newspaper was edited by an infidel—that he, the editor of the said newspaper, was an infamous infidel —an infidel villain—a blasphemous villain—a low villain —a hired agent for attacking the clergy—an agent of the devil—a satanic agent—and was not a christian ; or did falsely and calumniously use or utter words to that effect, or to the effect of any of the said expressions, to the loss, injury, and damage of the pursuer ?

Damages laid at £1,000.

CHAPTER III.

OF THE STRUCTURE OF ISSUES IN ACTIONS FOR JUDICIAL SLANDER—INCLUDING ACTIONS AGAINST JUDGES, COUNSEL, AGENTS, AND LITIGANTS.

In actions also of this description, privilege may be, and generally is pleaded. If a Judge, (in an inferior Court,) or Counsel, or Agent, or litigant, be a party to acts of slander, he is no more protected from the consequences, than clergy-

men or other public functionaries. If, however, like clergymen, he can shew that the acts charged against him, took place in the fair and regular course of judicial procedure in which he was engaged, and that they formed a proper part of such procedure, or otherwise, that they were performed in the legitimate and *bona fide* exercise of his rights or duties, he is entitled to be protected, and is not answerable in damages.

Here, also, as in actions against clergymen, it is for the Court to determine, in the adjustment and settlement of the Issues, whether the defender is, or is not, entitled to the benefit of privilege. And, when the case is to be dealt with as privileged, malice must, as in other cases of that class, be expressly charged in the Issues. Some doubt would appear to have prevailed, as to whether, in cases of judicial slander, want of probable cause, in addition to malice, does not require to be expressly inserted in the Issues; but, it is now settled, that it is not necessary, in actions for judicial slander, to charge want of probable cause in the Issues,—such actions being, in this respect, distinguishable from actions for malicious prosecution. *Marianski*, 17th June 1841; 3, D. 1036.*

* Although certainly a distinction, to the effect here mentioned, would appear to have been recognised in the case referred to, it may, with deference, be questioned, whether there is any sound reason for such a distinction. It must be kept in mind that malice, in its constructive or legal meaning and effect, *or malice in law*, is essentially different from malice in its ordinary acceptation, *or malice in fact*. An individual may subject himself to the charge of legal malice, and yet be altogether free from such an imputation, taken in its ordinary sense: or, to take the converse, he may be actuated by the deepest hatred and ill-will—which is malice as commonly understood—and yet be entirely blameless, as regards malice in its constructive or legal sense. Thus, it can be readily imagined, that an inferior judge in pronouncing sentence, or an agent in conducting a suit, or a litigant in prosecuting a claim, may be filled with hatred and animosity towards the party against whom the proceeding is directed, (and in one sense may be said to act maliciously), and yet, after all, may have had no alternative but to have acted as he did, and therefore cannot be amenable to the charge of legal malice. He cannot be said to act maliciously if he decides justly, or conducts his case correctly: indeed if he did otherwise, it might be charged *against* him that he had *failed* in his duty.

In determining whether an action for judicial slander is, or is not, entitled to be dealt with as privileged, each case must, of course, be considered with reference to its own specialties.

(1.) The principle, however, may be taken as completely settled, that no action, founded on statements admittedly made, in the course of judicial procedure, and forming part thereof, is maintainable, unless it be averred, that the statements are, besides being false and injurious, altogether irrelevant and impertinent to the subject matter of inquiry. Indeed, no action will lie at all against a Judge of the Supreme Court for words uttered by him from the Bench, and in the exercise of his judicial duty, even although malice is averred.—*Haggart*, as affirmed on Appeal, 1st April 1824, 2, S. Ap. 125.*

(2.) In regard, however, to inferior Judges, Counsel, Agents, and Litigants, if malice, falsehood, and injury, be

Where a man does no more than his duty, he cannot be said to act maliciously. On the contrary, it would be *malicious* to infer that he acted from any bad motive,

Truly then, malice, in its legal sense, is much the same thing as want of probable cause: For, if a judge, or agent, or litigant, can shew that he had probable cause, or reasonable grounds, for what he did; or, in other words, can shew that he was in the exercise of his legal rights or duties, no action is maintainable against him—whatever may have been the state of his personal feelings. And, on the other hand, if a judge, or agent, or litigant, overstep the limits of his province, and so cannot shew that he had probable cause, or reasonable grounds, for what he did, he is answerable under an Issue charging malice merely, although it should appear, beyond all question or doubt, that he had not entertained,—or, it might be, from his total ignorance of the party—never could have entertained the smallest spark of animosity to the pursuer.

With reference to these considerations, and keeping in view the distinction between the private and personal feelings of ill-will, and constructive or legal malice, it may be doubted, whether there is any good or sufficient reason for requiring in any class of cases—excepting, of course, where the matter is ruled by statute—that want of probable cause, in addition to malice, should be expressly charged in the Issue. It is obviously of much consequence to preserve, as far as possible, uniformity in the terms and structre of Issues.

* Actions against Judges or Magistrates, in respect of warrants granted, or sentences pronounced by them; and the statutory and common law protection applicable to such actions; form the subject of a subsequent part of the Volume.

expressly libelled by the pursuer, and facts and circumstances, sufficiently relevant to support such grounds of action, be duly set forth—an Issue, containing the charge of malice, will in general be granted, although the statements complained of were made in the course of judicial proceedings, and although it does not appear that they were, in themselves, necessarily irrelevant and impertinent to the matter to which they profess to relate.—*Robertson*, 13th December 1827, 6 S. 242; 14th May 1829, 7 S. 601; and 8th April 1830, 4 W. and S. App. 102.—*Forteath*, 18th November 1819, F. C.—*Davidson*, 12th May 1821, 1 S. 7.—*Swinton*, 8th June 1821, 1 S. 59, as affirmed 28th May 1824, 2 S. App. 245.—*Yeats*, 6th December 1825, 4 S. 275.—*Manson*, 7th December 1839, 2 D. 208. And the same principle applies, whether the defamatory expressions relate to a litigant in the cause in which they are used, or to a third party.—*Ewing*, as reversed on appeal, 6 W. and S. 366. What may, or may not, be sufficient to support and instruct the charge of malice, is of course for the consideration of the Judge and Jury at the trial, and when the whole case has come out in evidence. It will not, however, be always enough to infer malice, that the matter complained of was not strictly relevant or pertinent: It may be sufficient to exonerate the defender, that he believed it to be pertinent. —*Gray*, 12th July, 1837, 15 S. 1296.

(3.) Nor is it enough for the pursuer, of an action for judicial slander, simply to libel malice in order to obtain an Issue. He must allege such facts and circumstances as, if proved, would in law, be held to instruct malice. But if, notwithstanding the allegation of malice, the facts and circumstances set forth and founded on, in place of supporting such a charge, demonstrate its groundlessness, the case would be at once dismissed as irrelevant and untenable. *Mone*, 25th February 1842, 4 D. p. 786.

(4.) On the other hand, it is not indispensable, in order to entitle a defender to the privilege attached to actions for

judicial slander, that the expressions or passages complained of should be strictly of the nature of a judicial act. It is enough that they have a close connection with, or relation to judicial proceedings, and that they occurred fairly in furtherance of such proceedings. On this principle, it has been ruled, that an action of damages brought against an agent in a cause, for slander contained in an instrument of protest given into process, and in certain letters addressed to the opposite parties in the cause, reflecting on the conduct of the litigation as carried on by these parties and their agent, was, in the adjustment of the Issues, entitled to be considered as belonging to the privileged class.—*Manson*, 7th December 1839; 2 D. 208.

The same principles—in so far, at least, as the Issues are concerned—apply equally to all actions for judicial slander, whether directed against Inferior Judges, Counsel, Agents, Litigants, or Witnesses. Accordingly, the cases above cited relate to persons in all of these situations. In the case of *Robertson*, the defenders were Justices of the Peace: In the cases of *Forteath*, *Swinton*, *Ewing*, and *Gray*, a party litigant was the defender: In the case of *Davidson*, the defender stood in the situation of agent and mandatory for a litigant: In the cases of *Yeats*, *Manson*, and *Marianski*, the defenders were procurators or agents, and were proceeded against as such. And example No. II. of the following Issues applies to the case of a witness against whom an action was brought for malicious and injurious falsehoods in the course of his testimony. At the same time the peculiar position and character of the defender may unquestionably be of much importance at the trial, as, it is obvious, that in regard to the charge of malice, a judge, or counsel, or procurator, may be able to justify and exonerate himself much easier than a party litigant, but this cannot affect the form of Issue, according as it is determined, whether the case is privileged or not.

The following examples sufficiently illustrate the form of Issues in actions for judicial slander.

No. I.

Hamilton v. *Rankine*.—19*th May* 1826.

It being admitted that on the 7th day of October 1825, the defender acted as one of the Commissioners for hearing Appeals under the local Police Act of Dumfries :—

Whether, at the time and place foresaid, the pursuer was employed to conduct an appeal for John Fraser, landlord of the King's Arms Inn, before the said complainer?

Whether, in presence and hearing of the said John Fraser, the defender did falsely, maliciously, and calumniously say that the said John Fraser had committed his cause to bad hands, meaning thereby that the pursuer was professionally unfit to conduct, and had misconducted and mismanaged the said cause, or did, as aforesaid, use or utter words to that effect, to the injury and damage of the pursuer?

Whether, at the time and place aforesaid, and in presence and hearing of William Dinwoodie, hosier in Dumfries, James Thomson, architect there, Samuel Primrose, shoemaker there, James Reid, draper there, Robert Wallace, writer there, or one or other of the said persons, the defender did say, I have just been telling Mr. Fraser that he had put his case into bad hands, or did use or utter words to that effect, thereby falsely, maliciously, and calumniously stating, that the said John Fraser had committed his cause into bad hands, or that the pursuer was professionally unfit to conduct, and had misconducted and mismanaged the said cause, to the injury and damage of the pursuer?

Damages laid at £200.

No. II.

Mackenzie v. *Wilson.*—*25th February* 1837.

Whether, on or about the 22d of July 1833, in the trial of a cause at the instance of the pursuer, against Andrew Small, the defender, Robert Wilson, knowing that the pursuer was in good credit, and knowing that legal diligence had not been done against the pursuer prior to the 22d and 25th days of April 1829, when certain arrestments and inhibitions were used against him by the said Andrew Small, falsely, maliciously, and calumniously swore, that at and prior to the date of the said arrestment and inhibition, the pursuer was not in good credit, and that legal diligence had been used against him, at the defender, Robert Wilson's instance, to the loss, injury, and damage of the pursuer.

Damages laid at £2,000.

No. III.

Gilfillan, &c. v. *Guthrie, &c.*—*21st January* 1830.

Whether the defenders, or any of them, did insert or cause to be inserted in the said Summons in the said action in the Court of Session, the following words, or words to the following effect, according to the meaning hereinafter set forth, viz.:—" That," &c.; and the following words, or words to the following effect, viz.:—" That," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuers, or either of them, and are false and calumnious; and Whether

the said defenders did maliciously conspire together to circulate, and in conspiring, did maliciously circulate, the said Summons extrajudicially, to the loss, injury, and damage of the pursuers, or any of them?

Damages laid at £2,000.

No. IV.

Ramsay v. *Nairne*,—*14th June* 1833.

Note.—Several Issues having been given in this case to the pursuer, the following Counter Issue was taken by the defender.

Whether the defender was Agent for the said Sir Thomas Ramsay and his trustees, or either of them; and Whether, on all or any of the occasions specified in the first clause of the foresaid Issues, the defender acted in discharge of his duty as law-agent for the said Sir Thomas Ramsay, and on all or any of the occasions specified in the last six of the foresaid Issues, the defender acted in the discharge of his duty as law-agent for the said Sir Thomas Ramsay and his Trustees, or either of them?

Damages laid at £12,000.

No. V.

Hallam v. *Gye and Company*,—*25th November* 1835.

It being admitted that on the 3d day of February 1830, the defenders, Gye and Hughes, raised, and thereafter insisted in an action against the pursuer for payment of the

sum of £500, or of such other sum as should appear to be due by him, as a balance due by the pursuer to the defenders,—

Whether, in a paper or pleading, entituled Revised Condescendence in the said Action, the said Gye and Hughes did insert, or cause to be inserted, the following words, or words to the following effect, according to the meaning hereinafter set forth, viz. "The," &c. meaning that the pursuer was dishonest in his dealings, and unworthy of confidence; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or maliciously caused to be inserted in the said paper or pleading, to the loss, injury, and damage of the pursuer?

Whether in London, on or about the 27th day of March 1830, the defenders maliciously, and without probable cause, wrongfully arrested the pursuer, or wrongfully caused him to be arrested, or wrongfully detained the pursuer, or wrongfully caused him to be detained, to the loss, injury, and damage of the pursuer?

Damages laid at £5,000.

No. VI.

Pollock v. *Christie, &c.*—10*th July* 1820.

Whether in an action brought before the Sheriff-Court of Stirlingshire on the day of 1819, in which Messrs. Thomson and Pollock of Leith, merchants, were pursuers, and James Hay, vintner in Denny, was defender, the following words contained in the written Defences in the said action:—"Pollock," &c. are false, calumni-

ous, and injurious to the character of the pursuer William Pollock; and Whether the said words were maliciously inserted by the defenders, or either of them, in the said Defences, to the loss and damage of the said pursuer?

Damages laid at £1,000.

No. VII.

Yeats v. *Ramsay*,—*23d February* 1827.

It being admitted that the pursuer and defender are advocates in Aberdeen, and that during the year 1824, in an Action of Multiplepoinding depending before the Sheriff of the county of Aberdeen, a written pleading, being No. 25 of the said process, was lodged, containing the following words, viz. "The," &c.—

Whether the whole, or any part of the said words, contained in the said pleading, are of and concerning the pursuer, and are false and calumnious; and Whether the defender maliciously inserted, or caused to be inserted the said words in the said pleading, or did maliciously sign and lodge the said pleading, knowing it to contain the said words, to the injury and damage of the pursuer?

Damages laid at £1,000.

No. VIII.

Gray v. *Walker*,—*18th February* 1837.

It being admitted that on or about the 18th day of July 1836, the defender prepared and transmitted to the Sheriff-

Clerk of the county of Ayr a claim or schedule of enrolment, containing the following words and figures, viz. "I," &c.—

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously accuse the pursuer of perjury, and were maliciously inserted in the said claim or schedule, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. IX.

Kennedy v. *Johnstone*,—18*th March* 1840.

Whether at Ayr, on or about the 28th day of January 1837, in the Sheriff-Court-Room, in presence and hearing of William Eaton, Esq. Sheriff-Substitute of Ayrshire, and a number of persons then and there assembled, the defender did falsely and calumniously say, that the pursuer was a swindler, and went through the country with no other intention but to swindle, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Or,

Whether at the time and place aforesaid, and in uttering the words aforesaid, the defender acted in the proper discharge of his duty as law-agent for one George A. Creighton of Ardoch, in a cause then depending before the said Sheriff?

Damages laid at £500.

No. X.

Hill v. *Mack*,—*19th June* 1828.

It being admitted that in an action depending in the Sheriff-Court of Edinburgh in December 1827, at the instance of Thomas Storrar, baker in Edinburgh, and his wife, against the pursuer, the defender was appointed commissioner to take the oaths and depositions of the witnesses, and that a witness examined before the said defender on the 20th day of the said month of December, stated that climbing boys are used in cleaning particular vents to this day,—

Whether, on or about the said 20th day of December, during the examination of the said witness, the defender did falsely and calumniously say that none but villains, such as you, (meaning the pursuer,) would use such means; meaning thereby to describe and hold forth the pursuer as a villain, or did use or utter words to that effect, to the injury and damage of the pursuer?

Damages laid at £700.

No. XI.

Manson v. *Macara*, *&c.*—*5th July* 1839.

It being admitted that during the years 1836 and 1837, an action depended in the Court of Session at the instance of the present defender, Mr. Clyne, against the present pursuer, David Manson and others, trustees of the late David Clyne, S. S. C. in which the defender, Lawrence Mudie Macara, acted as agent for Clyne, and that the defender,

Macara, composed, and for and in name of the other defender, Clyne, served on each of the said trustees a protest, and also composed and gave into the said process an instrument of protest, containing the following words, viz.— "That," &c.—

Whether the whole, or any part of the said words, are of and concerning the pursuer, Manson, and falsely and calumniously hold him out as unworthy of confidence; and that as agent for the said trust, he had, without the authority or cognizance of the said trustees, wilfully involved the trust-estate in litigations which he knew to be ruinous and desperate; and Whether the said words were maliciously inserted in the protest served on each of the said trustees, and in the said instrument by the defenders, or either of them, to the loss, injury, and damage of the pursuer?

It being also admitted, that on the 11th of August 1837, the defender, Macara, wrote and transmitted to certain of the trustees a letter containing the following words, viz.— "I," &c.—

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously hold him out as unworthy of confidence, and that, as an agent, he was wilfully adopting proceedings which he knew to be injurious to the interests of the trust, and using the names of the said trustees as parties thereto, without their cognizance or authority; and Whether the said words were maliciously inserted by the defenders, or either of them, in the said letter by the said defender Macara, to the loss, injury, and damage of the pursuer?

It being also admitted, that on the day of

1837, the said defender, Macara, composed and gave into Court, Answers to a Bill of Suspension in name of the trustees, and that the said Answers contain the following words, "There," &c.—

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously hold him out to the Court and his constituents as wanting in personal respectability, and as an agent who had wilfully mismanaged the trust and abused the confidence of his employers; and Whether the said words were maliciously inserted by the defenders, or either of them, in the said Answers, to the loss, injury, and damage of the pursuer?

It being also admitted that on the 16th day of November 1837, the defender, Macara, wrote and gave into the said process a paper, entituled a Minute, containing the following words, "State," &c.—

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely and calumniously hold him out to the Court and his constituents as an agent who had wilfully mismanaged the trust, and abused the confidence of his employers; and Whether the said words were maliciously inserted by the defenders, or either of them, in the said Minute, to the loss, injury, and damage of the pursuer?

Whether, on or about the 2d day of December 1837, the defender, Macara, wrote and transmitted to Mr. Meiklejohn, one of the trustees, a letter containing the following words, according to the meaning hereinafter set forth, viz. "1st," &c. And Whether the whole, or any part of the said words, are of and concerning the pursuer, and maliciously, falsely, and calumniously held out the pur-

suer to his constituents as a person unworthy of belief, and as having been guilty of resorting to unfair and improper means in order to control the conduct of the other trustees, to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. XII.

Robertson v. *Allardice*,—*26th February* 1828.

It being admitted that the defenders are Justices of the Peace and Commissioners of Supply for the county of Kincardine, and in that character attended a meeting at Stonehaven in the said county, on the 3d day of March 1823, and that the pursuer was then brought before the said Court, upon a complaint preferred against him for unlawfully shooting at game, and being thereof convicted, he did then and there make application to the Court to mitigate the punishment,—

Whether, at the time and place, pending the proceeding aforesaid, and in presence and hearing of the persons then and there assembled, the defender, Robert Barclay Allardice, did falsely, maliciously, and calumniously say that the pursuer, besides being a poacher, was a thief,—that he had been known to steal bee-hives and leather, and that the defender, John Boswell, knew this to be true, or did falsely, maliciously, and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Whether at the time and place, and pending the proceedings aforesaid, and in presence and hearing of the persons

aforesaid, the defender, John Boswell, did falsely, maliciously, and calumniously say that he was informed by a respectable farmer, now dead, that the pursuer stole a quantity of leather; or did falsely, maliciously, and calumniously use or utter words to that effect, to the injury and damage of the pursuer?

Damages laid at £800.

No. XIII.

Douglas v. *Thomson*,—*5th July* 1839.

Whether in the Burgh Court at Musselburgh, on or about the 5th day of February 1839, in an action depending before the Magistrates of the said Burgh, in presence and hearing of the said Magistrates, and a number of persons then and there present, the defender did falsely, maliciously, and calumniously say that the pursuer was a low swindling blackguard, who would swear to anything, or did falsely, or maliciously, and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

CHAPTER IV.

OF THE STRUCTURE OF ISSUES IN ACTIONS FOR SLANDER GENERALLY, WHERE PRIVILEGE MAY BE PLEADED—SUCH AS WHERE RIGHTS OF CRITICISM, PLEAS OF CONFIDENTIALITY, AND SIMILAR QUESTIONS ARISE.

As the rule is general, that a party, exercising a lawful function, is protected, and entitled to the benefit of the plea of privilege against actions in respect of his acts and conduct when so engaged, the situations and circumstances in which this plea may arise, must necessarily be very numerous and diversified. The cases of clergymen, and of counsel agents and litigants in regard to judicial proceedings, have been already noticed. Another class is that of public journalists or critics,—another, that of masters furnishing characters of servants,—another, that of agent and client communicating confidentially;—and many more might be referred to.

In all such cases the Court decides the question of privilege, when raised in the preliminary adjustment of the Issue, and the charge of malice must be inserted, or not, according to the judgment come to. But although malice should not be inserted in the Issue, it does not follow that the case may not, after all, turn out, on trial, to be privileged; and, it is always therefore in the power of a defender to maintain and support the plea of privilege, by putting on record the requisite averments, and taking the corresponding Counter Issue or Issues. The whole effect of the decision of the Court in the preliminary adjustment of the form of Issue or Issues for the pursuer, is to settle on whom lies, in the first instance, the *onus* of making out the case to be privileged, or the reverse.

Besides the cases cited in the preceding Chapter, all of

which have a general application to actions for slander against persons standing in a privileged situation, the following have likewise occurred in the Jury Court :—

(1.) *Communications between Agent and Client.*—Such is the confidential and sacred character of communications between Agent and Client, that it has, in one instance, been held they are not actionable, even although alleged to have been made maliciously and falsely. *Stewart*, 26th May 1825. F. C. But, from the report of this case, there would appear to have been several specialties attending it, which influenced the majority of the Court: In particular, while it was not averred that the publicity of the letters containing the slander was attributable to the defender, it would rather appear, and was assumed by the Judges, that they had gained publicity and come to the knowledge of the pursuer through some gross breach of confidence, for which the defender was not answerable. Notwithstanding however, of these specialties, Lord Gillies dissented from the rest of the Court, and expressed his opinion that the action was relevant; "*first*, because publicity was given to the communications by the party to whom they were addressed; and, *secondly*, because malice was charged against the defender in making the communications." If, indeed, it were to be held as settled law, that no communication between agent and client, is, in any circumstances, actionable, notwithstanding of the most explicit charge of falsehood, injury, and malice, with a relevant allegation of facts in support of the charge, it is easy to conceive how, under the shelter of such a rule, serious wrong might be perpetrated with impunity. And, the distinction in principle between such cases, where the communications complained of have gained publicity, and were productive of injury, and other privileged cases—more particularly those of judicial slander—is, certainly, not very obvious. Any distinction that may exist could, it is apprehended, be given

effect to with more propriety at the trial, in weighing the evidence in support of the charge of malice, than in the preliminary adjustment of the Issues. It is rather thought that the case of *Stewart* can only be viewed as one in which the Court were of opinion, with reference to the particular circumstances, that the case was not sufficiently relevant to be sent to trial. It would be going a length, for which there does not appear to be any sufficient authority, to hold that agents and clients, *quoad* their communications *inter se*, have an absolute protection, the same as members of the Legislature, in regard to statements made by them in Parliament. And it is difficult to see any sound reason for so extending the privilege of protection. The freest and most unrestrained intercourse between Agent and Client is allowed—and from the nature of the thing, must subsist without interference or check, so long as that confidentiality and secrecy—which their communications imply, and which give them a claim to be protected—are preserved. It is only when such communications—being diverted from their proper object—are divulged and become known to parties for whom they were not intended, that they can possibly give rise to an action of damages: And then, the seal of confidence and secrecy under which communications between Agent and Client are understood to be made, being broken, they no longer continue to retain the character which alone entitles them to be protected; they come to stand in much the same situation as ordinary calumny. At any rate, it would seem to be a sufficient protection to communications of this description which have gained publicity, to throw the burden on the pursuer of proving them to have been made without just or reasonable cause, by making him take an issue with the charge of malice inserted in it.

(2.) *Communications between Creditors in relation to their Bankrupt Debtor.*—It has been ruled that Creditors are privileged in communicating with each other in relation to the

Bankrupt and his affairs, touching their joint interest and a joint co-operation, and that malice must be charged and put in Issue in any action of damages by the Bankrupt founded on such communications.—*Torrance*, 21st November 1834. 13. S. 72.

(3.) *Statements made at Public Meetings.*—Statements made at a regular meeting of the *Senatus Academicus* of a University, by one Professor regarding another, in reference to a matter fairly coming within the cognizance of the Senatus, have been found entitled to the benefit of privilege; and it has been therefore ruled, that malice must be alleged, and put in issue in any action of damages founded on such statements.—*Hamilton*, 10th March 1827. 5. S. 569.

(4.) *Communications by Masters in regard to their Servants.*—As a master is entitled freely to communicate his opinions and impressions regarding his servant on being applied to for a character, he is entitled, as respects all such communications, to the benefit of the plea of privilege; and accordingly, in order to make an action lie for such communications, malice must be alleged and put in issue. Such, it is apprehended, notwithstanding a certain degree of ambiguity exhibited by the reports of decided cases, is the true legal principle according to which an Issue would now be framed in actions of this class.—*Christian*, 6th July 1818, 1. M. 419. *Anderson*, 13th July 1818, 1. M. 429: And the Lord Chief Commissioner's charge in *Forteath*, 20th March 1821, 2. M. 470. With reference to these authorities however, the principle would not apply, where the master has, unasked, gratuitously volunteered to persons who had no proper interest in the matter, statements of a slanderous tendency regarding his servant. When a master so acts, it is obvious that he places himself in the position of any ordinary calumniator, and forfeits all claim to privilege, just because it is impossible for him to

instruct that he had any good or reasonable cause for his conduct.

(5.) *Public Journalists or Critics.*—Persons of this class are also privileged, so long as they do not overstep the proper limits of their province. In this class of Actions, as in others, it is for the Court to determine before the trial, whether the case is to be dealt with as privileged or not, and to settle the Issues accordingly. The legal principles by which such cases fall to be governed, may be collected from the report of *Leslie* v. *Blackwood*, 22d July 1822, 3. M. 157; and *Hamilton* v. *Stevenson*, 19th June 1822, 3. M. 75. In the former case, malice was expressly charged in the Issues; in the latter, the Issues were in the ordinary form. It may be stated generally, that the observations of a reviewer or journalist, will be held as fair criticisms, and entitled to the protection of the plea of privilege, in so far as they can be shewn to have fairly arisen out of the facts set forth in the work, or writing, or other matter, criticized. But, whenever the critic, or journalist, travels out of the work or matter he professes to deal with, and proceeds on the assumption of facts taken from extrinsic sources, his privilege ceases. Neither is a critic, or journalist, entitled in his observations or comments, to exceed a moderate and reasonable latitude of discussion, even although, strictly speaking, he has not resorted to extrinsic sources. For example, no journalist or critic is entitled to charge an individual with positive crime; at least, he is not, in such a case, entitled, in the first instance, to the benefit of the plea of privilege, although, of course, it is in his power to take a counter issue of the *veritas*, and so to justify himself.

No. I.

Gibson v. *Cheape.*—10*th July* 1822.

It being admitted that the pursuer is, and has for many years been a Writer to the Signet, and has been Agent and Attorney for the Bank of England since the 26th day of December 1811, and has brought prosecutions for forgery on their account, and was employed as Agent in the trial of Frances Mackay, which took place before the High Court of Justiciary on the 1st day of February 1819,—

Whether the 25th No. of a certain Newspaper called the Beacon, was published at Edinburgh on or about the 23d day of June 1821, and contained the following words, or words of the following tenor or effect, viz. :—" To the," &c.

Whether the whole, or any part of the aforesaid words, are of and concerning the pursuer, and were published with the malicious purpose and intention of injuring, and do injure the pursuer in his private and professional character, and do falsely and injuriously hold forth the pursuer's incapacity as Agent for the Bank of England,—as having unnecessarily brought prosecutions for forgery for his own private advantage, and having unnecessarily expended large sums of money in conducting the same, or of officiously interfering in regard to the said forgeries, and of conducting the trials and prosecutions for the same, injuriously to the interests of the Bank and of the public, and unfairly to the persons accused :—Or of having induced the said Frances Mackay to admit her guilt, by promising to her that she should not be tried, and afterwards inducing the Lord Advocate to try the said Frances Mackay by concealing the promise ;—And Whether the

said words do falsely and injuriously set forth that the Court of Justiciary on being informed by Sir William Rae, Baronet, the former Sheriff of the county, of the circumstances of the case, meaning the circumstances set forth in the said Newspaper relative to the said Frances Mackay, expressed its high disapprobation of the pursuer's conduct, to the damage and injury of the said pursuer?

Whether the 26th Number of the said Newspaper was printed and published on or about the 30th day of June 1821, and contained the following words, or words of the following tenor and effect, viz. :—" We," &c.

Whether the said words are of and concerning the pursuer, and are false and injurious, and to the damage and injury of the pursuer?

Whether the 27th Number of the said Newspaper was printed and published on or about the 7th day of July 1821, and contains the following words, or words of the following tenor and effect, viz. :—" In," &c.

Whether the said words are of and concerning the pursuer, and are false and injurious, and to the damage and injury of the pursuer?

Whether, in the months of June and July 1821, at the time the aforesaid words were published, the defender, Douglas Cheape, Esq. was the editor, conductor, proprietor, or publisher, or one of the editors, conductors, proprietors, or publishers of the said Newspaper called the Beacon, or was author of the paragraphs and words aforesaid?

Damages laid at £5,000.

No. II.

Aiton v. *M'Culloch*,—*3d December* 1822.

It being admitted that the pursuer is a Surgeon,—

It being also admitted, that in the month of December 1820, and of January and February 1821, the defenders, Alexander Abernethy and James Walker, were printers of a certain Newspaper called the Scotsman, and that the said defenders, and the defender John Ramsay M'Culloch, are conjunctly and severally responsible for the articles with which they are charged in this action, and which are admitted to have been published in the said Newspaper on the 23d day of December 1820, 20th day of January, and 10th day of February 1821,—

It being also admitted that a public meeting was held at the Pantheon near the head of Leith Walk, Edinburgh, on Saturday the 16th day of December 1820, at which the pursuer was present,—

Whether, on or about the 23d day of December 1820, in the 205th Number of the said Newspaper, the defenders did print and publish, or cause to be printed and published, the following words, or words of the following tenor or effect, viz. :—" Anxious," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and were published with the malicious purpose and intention of injuring, and do injure the pursuer, or do falsely and injuriously hold forth the pursuer as a maniac or as fatuous, or as uttering frenzied and beastly insults, or as sunk to the level of blackguards who would shrink from nothing, however mean or base, if it promise only to gratify a paltry and unmanly revenge, or as a person who courts degradation and merits infamy,—or is capable of misleading, inflaming and treason stirring, or

as willing to become an assassin of persons as well as character, and as only restrained by cowardice from using the stilletto, to the injury and damage of the pursuer?

Whether, on or about the 20th day of January 1821, in the 209th No. of the said newspaper, the defenders did print and publish, or cause to be printed and published the following words, or words of the following tenor and effect, viz. "Darkness," &c.; and Whether the whole, or any part of the said words, are of and concerning the pursuer, and were maliciously meant and intended to injure the pursuer, or do falsely and injuriously hold forth the pursuer as an unworthy person, who conducted himself in a scandalous and discreditable manner, or as a surgeon who habitually conducted himself in so degrading a manner as justly to forfeit public esteem, to the injury and damage of the pursuer?

Whether, on or about the 10th day of February 1821, in the 212th No. of the said newspaper, the defender did print and publish, or cause to be printed and published the following words, or words of the following tenor and effect, &c. "The," &c.? and

Whether the whole, or any part of the said words, are of and concerning the pursuer, and were maliciously meant and intended to injure, and do injure the pursuer, or do falsely and injuriously hold forth the pursuer as a madman, to the injury and damage of the pursuer?

Damages laid at £5,000.

No. III.

Leslie v. *Blackwood*,—*28th May* 1822.

It being admitted that the pursuer is Professor of Natural Philosophy in the University of Edinburgh,—that the defender is proprietor and publisher of a certain periodical work called Blackwood's Edinburgh Magazine, and it being also admitted that the 35th No. of the said work published by the defender at Edinburgh on or about the month of February 1820, contains the following words and figures, viz. "Leslie," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer; and Whether the pursuer is therein falsely, maliciously, and injuriously represented and held up to ridicule and contempt, as ignorant of the Hebrew language, and even of the Hebrew alphabet,—or as being guilty of impertinence—or of disliking the Hebrew language merely because it is the language of the Old Testament, and to be attacked *per fas aut nefas*,—or as being *un enfant perdu*?

It being also admitted that the 40th No. of the said Magazine published by the defender at Edinburgh, on or about the month of July 1820, contains the following words, viz. "The King," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely, maliciously, and injuriously represent and hold up the pursuer to ridicule and contempt, as being a plagiary, to the injury and damage of the said pursuer?

It being also admitted, that the 44th No. of the said

work published by the defender at Edinburgh, on or about the 9th of November 1820, contains the following words, viz. " In," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely, maliciously and injuriously, represent and hold up the pursuer to public ridicule and contempt—representing him to be, or asserting that he is an ignorant dogmatist, or that he has the impudence to criticise that of which he is ignorant, or that he is actuated by hostility to the language of revelation, simply because it is the language of revelation, or as being lying, dishonest, or or joining with a bookseller to impose upon the public by dishonesty, or as having purloined from other authors, or as having been guilty of a thousand bêtises, or as resembling a parrot, or as an object of suspicion to those who hold the scriptures in honour, and impiety in detestation, or as going out of his way to recommend an impious work, or as having cast an ignorant sarcasm on the language of the Bible, or as sneering at the fancies of one of the Apostles, to the injury and damage of the said pursuer?

It being also admitted, that the said 44th No. of the said Magazine contains the following words, " With," &c.

Whether the whole, or any part of the said words, are of and concerning the pursuer, and falsely, maliciously and injuriously, hold out and represent the pursuer as being one of the public teachers by whom young men, who come as students to the University of Edinburgh, have their religious principles perverted, and their reverence for holy things sneered away, to the injury and damage of the said pursuer?

Or,

Whether the pursuer held himself forth as the author of

certain discoveries in regard to freezing or artificial congelation by means of evaporation under an exhausted receiver,—but the pursuer knowing, or being aware that the same, or similar discoveries, were previously pointed out or described in a paper in the 67th volume of the Philosophical Transactions of the Royal Society of London, entitled an account of some experiments made with an air pump on Mr. Smeaton's principle; together with some experiments with a common air-pump by Mr. Edward Nairne, F.R.S.?

It being admitted, that a book entitled the Philosophy of Arithmetic, was published by the pursuer in the year 1820, and is described in the title-page as a second edition improved and enlarged, meaning thereby, that the said book described as a second edition, was enlarged and improved in comparison with the first edition of the said book,

Whether the pursuer with the bookseller, in holding out to the public the book first aforesaid as a second edition enlarged and improved, was guilty of a dishonest attempt to impose upon the public?

Or,

Whether the pursuer did write and compose the following words contained in the 11th article of the 8th No. of a certain periodical work called the Edinburgh Review, for the month of July 1804, pp. 399, viz. "We," &c.?

And, Whether the defender, in stating that he had often likened the pursuer to a parrot, meant and intended to allude to and characterize the pursuer solely as the author of the said passages?

Damages laid at £5,000.

No. IV.

Hamilton v. *Hope*,—17*th February* 1826.

It being admitted that the pursuer is Professor of Midwifery in the University of Edinburgh, and that the defender is Professor of Chemistry in the said University,

Whether, on or about the 23d day of April 1825, at a meeting of the Senatus of said University, and in presence and hearing of the Professors then and there present, the defender did falsely, maliciously, and calumniously impute intended falsehood to the pursuer, by stating that the pursuer was a liar, or a malicious and impudent liar; or that he, the pursuer, not only lied, but knew that he did so, or did use or utter words to that effect, to the injury and damage of the said pursuer?

Or,

Whether, on or about the 19th day of January 1824, the pursuer did present or communicate to the Magistrates of Edinburgh, as Patrons of the said University, a printed Memorial containing the following words, or words to the following effect, viz. "Now," &c. And Whether the whole, or any part of the averments aforesaid, contained in the Memorial aforesaid, were known to the pursuer to be false at the time he presented the said Memorial to the said Magistrates?

Whether, on or about the 19th day of January 1824, the pursuer did present to the said Magistrates, as Patrons aforesaid, a Petition containing the following words, or words to the following effect, viz. "The," &c. And

Whether the whole, or any part of the aforesaid words contained in the Petition aforesaid, were known to the pursuer to be false at the time he presented the said Petition to the said Magistrates?

Damages laid at £5,000.

PART III.

ACTIONS FOR MALICIOUS PROSECUTION, AND GROUNDLESS ACCUSATION.

I. — ACTIONS OF DAMAGES FOUNDED ON MALICIOUS PROSECUTION, OR ON FALSE AND GROUNDLESS ACCUSATIONS MADE OR INFORMATION GIVEN, TO THE PUBLIC AUTHORITIES.

II. — ACTIONS OF DAMAGES FOUNDED ON COMPLAINTS MADE, AGAINST OFFICERS ENGAGED IN THE PUBLIC SERVICE, TO THEIR SUPERIORS.

CHAPTER I.

ACTIONS OF DAMAGES FOR MALICIOUS PROSECUTION, OR FOUNDED ON FALSE AND GROUNDLESS ACCUSATIONS MADE, OR INFORMATION GIVEN, TO THE PUBLIC AUTHORITIES.

CASES of this description are nearly allied to those of judicial slander. Both belong to the privileged class; and in both, malice is the essence of the ground of action. Accordingly, the Issue in an action of damages for judicial slander, and the Issue in an action of damages for malicious prosecution, is, and must necessarily be, very similar. But, in a proper action of the latter description, not only must

malice be charged, but also the want of probable cause. This, then, is the distinguishing feature between actions which are founded on malicious prosecutions and actions for judicial slander. The distinction was clearly recognised, and given effect to, in the recent case of *Marianski*, 17th June 1841, 3. D. 1036.*

It may therefore be stated as a general rule, (notwithstanding a certain looseness which has exhibited itself in practice), that, in actions of damages founded on malicious prosecution, or on information given, or accusations made to the public authorities, which has led to criminal proceedings, the pursuer must libel and aver malice and want of probable cause against the defender, in order to support and maintain his case; and that without distinct and relevant allegations to that effect no issue or issues can be granted. Lord Chancellor's speech in *Young and Others* v. *Leven*, 8th July 1822, 1. Sh. App. 179; and opinions of the Judges in *Marianski*, *supra*.

But it is not enough, in order to impose on the pursuer the burden of establishing a charge of malice and want of probable cause, that his action is founded on proceedings which exhibited the form and appearance merely of a process at law. Thus, if the action be founded on the allegation that the defender had made an incompetent charge against him to an incompetent party,—that is to say, to a party who had no right to interfere in the matter,—and that there was then adopted against him a proceeding having the colour and semblance of a judicial process, but which in truth and reality was utterly lawless and extrajudicial, the pursuer would not be obliged to take an issue containing the charge of malice and want of probable cause: In such a case the pursuer would be entitled to an issue in similar terms to that in an ordinary case of slander; that is to say, it would not be incumbent on him either to libel

* For some remarks on the reason of this distinction, see *antea*, p. 77.

malice and want of probable cause, or to take an issue containing these charges. *Smith*, 15th February 1827, 5. Sh. 364.

Where the pursuer is obliged to take an Issue charging malice and want of probable cause, it is, of course, unnecessary for the defender formally and expressly to undertake the burden of establishing the converse in a counter Issue, —the legal presumptions being already in his favour. But where the pursuer has been allowed an Issue in the ordinary terms, and resting simply on the allegations of falsehood and injury, the defender may, if he pleases, and has put on record the requisite averments, take a counter Issue, to the effect that he had acted regularly, and had probable cause, or reasonable grounds, for what he did.

As may be supposed, an action founded on the allegation of malicious prosecution, has been rarely attempted, excepting where the prosecution, which forms the subject of dispute, had failed. Where, however, the pursuer has been actually convicted under the prosecution on which he founds, it would rather seem that an action of damages at his instance would not lie, even on the allegation of malice and want of probable cause, unless he has, in the first instance, and as a preliminary and preparatory step to his civil remedy for damages, proceeded against the wrong doer by criminal process, with concourse of the public prosecutor. In short, the conviction in the Criminal Court in the original prosecution, is held, of itself, so completely to answer and rebut the charge of want of probable cause, that till it has been shewn by some other and subsequent proceedings, also in the Criminal Court, to have been groundless and unwarranted, no civil action, which rests upon, and has been brought in respect of such conviction, will be entertained. *Maclellan*, 7th December 1832, 11. S. 187.

The examples of Issues which are annexed to the next Chapter are also illustrative of the present.

CHAPTER II.

ACTIONS OF DAMAGES FOUNDED ON COMPLAINTS MADE AGAINST OFFICERS ENGAGED IN THE PUBLIC SERVICE, TO THEIR SUPERIORS.

ACTIONS of this description would appear to have been classed with, and held to be subject to the same rules of pleading, as actions for malicious prosecutions, by the Lord Chancellor in moving the Judgment of the House of Lords, in *Young and Others* v. *Leven*, *supra*. But, in a late case, the Court of Session disregarded that precedent, and decided that, in this class of actions, it is not indispensable for the pursuer to aver want of probable cause. *Mackenzie*, 2d December 1831, 10. S. 89.

The distinction, however, in point of principle, between these classes of actions is certainly not very obvious. Public policy requires that every encouragement should be given to the suppression of crime. Accordingly, if an individual gives such information against another as leads to a criminal prosecution, he is not liable in damages, even although the charge should ultimately, and when thoroughly sifted, turn out to be without any good foundation, and although the accuser may have been influenced by motives of ill-will towards the accused, provided he has had probable cause, or reasonable grounds for his conduct. Such being the principle of law applicable to actions for malicious prosecutions, it is difficult to see why the same principle should not equally apply to the case of an individual, who, on probable cause or reasonable grounds, gives information, in the proper quarter, of misconduct on the part of a public officer. Social and State expediency suggests, it is thought, the same measure of protection to the one case as to the other It may be doubted, therefore, whether in the case

of *Mackenzie*, the Court did not overlook the distinction between actions of the description in question and for malicious prosecution generally, and actions for judicial slander. In the former the interests of the public are alike concerned, while in the latter, individual interests are alone affected.

The following examples of Issues will be found to illustrate the general principles which have now been explained; and they also exhibit some of the specialties and distinctions which may occur in actions founded on malicious prosecution and false and groundless accusation :—

No. I.

Harper v. *Robinson*,—10*th July* 1820.

Whether, at the Town of Banff, before or after the month of August 1815, or about that time, the defender, George Forbes, Sheriff-Substitute of the county of Banff, did maliciously combine and conspire with the other defenders, George Robinson and William Robinson, or one or other of them, falsely and injuriously to defame the pursuer and to ruin him in his character; and Whether, combining and conspiring as aforesaid, they did procure or cause to be procured, a petition to be presented to the said George Forbes, as a Justice of the Peace for the said county of Banff, by John Smith, Procurator-Fiscal of the said county, falsely, injuriously, and maliciously accusing the said pursuer of being guilty of reset of theft, without probable or reasonable cause for the said accusation,—and

Whether the said George Forbes did afterwards, as such Justice of Peace, maliciously, partially, and irregularly, take a precognition upon the said petition, and did mali-

ciously transmit a false accusation without due enquiry into the truth of the same, in order that the same might be laid before the Lord Advocate; and Whether the said pursuer was tried before the High Court of Justiciary, at Aberdeen, on the 6th of September 1815, and found not guilty of the crime of reset of theft as aforesaid, on an indictment at the instance of the said Lord Advocate, founded on the precognition taken, and the accusation made as aforesaid, to the injury and damage of the said pursuer,—and

Whether the said defenders, William and George Robinson, or one or other of them, did maliciously combine and conspire with the said George Forbes, in preparing the said petition containing the alleged false and injurious statement aforesaid, and in transmitting the precognition and false accusation aforesaid to the Crown Agent at Edinburgh, for the purposes aforesaid, to the loss and damage of the said pursuer,—and

Whether the said defenders, William and George Robinson, or one or other or both of them, did falsely and injuriously, and without reasonable or probable cause, accuse the said pursuer of reset of theft, and did, one or other or both of them, procure or cause to be procured, the said petition, to be presented and transmitted, and urged the same to trial as aforesaid, for the purposes aforesaid, to the loss and damage of the said pursuer.

Damages laid at £2,000.

No. II.

Gray v. *Marjoribanks*,—12*th February* 1823.

It being admitted that the pursuer is clerk to the Justices of Peace for the Coldstream District of the County of Berwick, and Baron Bailie of Coldstream,

It being also admitted, that the defender is a Justice of Peace for the said county,

Whether, on or about the 12th day of May 1820, the defender did take the declaration of certain persons, viz.:—George Houy, writer in Kelso, William Hall, residing there, and William Allison, quarryman, residing at Lees Lodge, relative to an alleged assault committed by the pursuer in the town of Coldstream, and did thereafter transmit the same to the Procurator-Fiscal; and Whether, in transmitting the said declaration to the said Procurator-Fiscal, the defender did falsely, maliciously, and injuriously, and contrary to the tenor of the said declaration, represent the pursuer as having been the aggressor in the said alleged assault, and as having made a wanton and unprovoked attack upon William Hall and George Houy, and as being a turbulent person, and a man of quarrelsome character, or a bad member of society, to the injury and damage of the said pursuer?

Whether, on or about the 29th May 1820, the defender did, at his House of Lees, take the declarations of William Allison and James Gilroy, relative to the assault aforesaid, and did thereafter write and transmit to the Lord Advocate, or one or other of his deputes, letters bearing dates the 29th, 30th, and 31st of May, and 1st and 2d of June 1820, or one or other of the said days, and did, in the said letters, falsely, and injuriously, and maliciously, and

contrary to the tenor of the said declarations taken as aforesaid in his own presence, represent the pursuer as having been guilty of a gross and aggravated assault without provocation, upon two peaceable and respectable individuals; and that the pursuer was a quarrelsome person, a dangerous neighbour, a bad member of society, of whom it was absolutely necessary to make a public example, to the injury and damage of the pursuer?

Whether, on or about the 30th day of May 1820, at Coldstream, the defender did falsely and injuriously say to David Buist, factor to the Right Honourable the Earl of Haddington, the Superior of the burgh of Coldstream, that the pursuer was an improper person to fill any office of trust, and that it would be the duty of the said Earl to dismiss the pursuer from the situation of Baron Bailie of Coldstream, as he was now unworthy to hold that situation, or did use or utter words to that effect, to the injury and damage of the said pursuer?

Whether, on or about the 13th day of May 1820, in the Black Bull Inn at Coldstream, the defender did falsely and injuriously say to James Bell, Esq. Sheriff-clerk of Berwickshire, that the pursuer was unfit to hold any public trust, or to be admitted into respectable or honourable society, and that it would be the duty of the said James Bell to dismiss the pursuer from the situation of Clerk to the peace for the Coldstream District of Berwickshire, or did use or utter words to that effect, to the injury and damage of the pursuer?

It being admitted that the defender did write and transmit to the Earl of Haddington, Lord Superior of Coldstream, the letter in process, dated 30th May 1820; and it being admitted that the said letter is of and concerning the said pursuer,

Whether the defender did therein falsely, maliciously and injuriously, describe the said assault as an inhuman outrage committed by the pursuer, and did injuriously endeavour by other false statements in the said letter regarding the conduct of the pursuer, to cause the said Earl to withdraw his confidence from the pursuer as Baron Bailie of Coldstream, to dismiss him from the said office, to the damage and injury of the said pursuer?

Whether the pursuer was tried at Greenlaw on the 12th and 13th days of September 1820, before the Sheriff of Berwickshire and a Jury; and Whether, on the said 13th day of September, the following verdict was returned, viz. "They," &c.? (The verdict was one of acquittal.)

Whether, on or about the 3d day of October 1820, at a meeting of the freeholders of the said county held at Coldstream, the defender did in a public speech in the hearing of several persons there assembled, falsely and injuriously say, that the pursuer was utterly disgraced by the said trial and sentence, and was disqualified from acting as clerk of the peace, or holding any public office, or that he was unfit to sit in the company of gentlemen, and ought to be dismissed from his said office, or that the pursuer had obtained the said verdict by means of perjured witnesses, or was guilty of subornation of perjury, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, on or about the said 3d day of October 1820, the defender did falsely, maliciously and injuriously, say to the aforesaid James Bell, that the pursuer was utterly disgraced by the said trial and sentence, and was disqualified from acting as clerk of the peace, or holding any public office, or that he was unfit to sit in the company

of gentlemen, and ought to be dismissed from the said office, or that the pursuer had obtained the said verdict by means of perjured witnesses, or was guilty of subornation of perjury, and that the defender would never officiate as a magistrate so long as the pursuer should officiate as clerk; and did urge the said James Bell to dismiss him from the said office, or did use or utter words to that effect, to the injury and damage of the pursuer?

Whether, at Lees, in the county of Berwick, on or about the 9th day of October 1820, the defender did falsely, maliciously and injuriously, say to George Manderston, residing in Cornhill, that the pursuer had obtained the verdict aforesaid, by means of false and perjured witnesses, and that the pursuer had been guilty of subornation of perjury, and had suborned the witnesses on the trial aforesaid, to the injury and damage of the pursuer?

Damages laid at £5,000.

No. III.

Gibsons v. *Marr*,—*22d June* 1822.

Whether, in the month of June 1820, or about that time, in the town of Leith, or upon Leith Walk, leading to Edinburgh, and in the presence and hearing of James Frederick Denovan, sometime before Superintendant of Police in Leith, and of Timothy Lane, merchant in Leith, or one or other of the said persons, the defender did falsely and injuriously say that the pursuers had issued or forged a Bank of England Note, knowing the same to be forged, which note had come into the defender's possession, or did use or utter words to that effect, to the injury and damage of the said pursuers?

Whether, on or about the 15th day of July 1820, at a Court held at Edinburgh, by the Justices of Peace for the county of Edinburgh, and in presence and hearing of James Gibson, Esq. and William M'Farlane, Esq. Justices of Peace for the said county, and in presence and hearing of a number of persons then and there assembled, the defender did falsely, maliciously, and injuriously, say that the pursuers had used as genuine, a forged note of the Bank of England, of the value of one pound, after the pursuers had been informed that the said note was forged, or did use or utter words to that effect, to the injury and damage of the pursuers:—

Or,

Whether the defender did apply to the said James Frederick Denovan, as an officer, or as having been an officer of Police, with a view to recovery of payment of the aforesaid forged note; and Whether the defender had good probable cause in stating to him that the pursuers had issued, or caused to be issued, the said forged note, knowing the same to have been forged?

Whether, at the pleading before the Justices of Peace for the county of Edinburgh, aforesaid, the defender had good probable cause for stating that the pursuers had issued, or caused to be issued, the said forged note marked No. 11,263, after they had been informed by the Commercial Bank that the said note was forged?

Damages laid at £5,000.

No. IV.

M'Millan v. *M'Millan*,—1*st July* 1824.

Whether, on or about the 25th day of October 1823, in the House of Barwhinnock, in the stewartry of Kirkcudbright, the defender did violently assault and drag the pursuer to the ground, and did bind him, or cause the pursuer to be bound and conveyed out of the said house, and from thence to the town of Kirkcudbright, to the injury and damage of the said pursuer?

It being admitted, that on the said 25th day of October, the pursuer was incarcerated in the Jail of Kirkcudbright by virtue of a warrant from the Stewart-Substitute of the said stewartry,

Whether, on or about the said 25th day of October, the defender did falsely and maliciously represent to the procurator-fiscal of the said stewartry, or to his Majesty's Advocate, that the pursuer had intruded himself into the defender's house, and threatened to take his, the defender's life, or those of his servants, on the 25th October aforesaid, to the injury and damage of the said pursuer?

Or,

Whether, on the 25th day of October aforesaid, the pursuer violently intruded himself into the defender's house armed with a loaded pistol; and Whether the defender had reasonable grounds to apprehend violence to himself and his family; and Whether, what the defender did, or caused to be done, on the occasion aforesaid, was necessary for the security of him, the defender, and the members of his family?

Damages laid at £1,000.

No. V.

Mowatt v. *Gray, &c.—20th February* 1827.

Whether, on or about the 20th day of February 1826, the defenders, or any of them, maliciously, and without probable cause, did cause the pursuer to be apprehended and conveyed to the Calton Police Office of Glasgow, or caused the pursuer to be imprisoned in the jail of Glasgow, and to be therein detained, to the loss, injury, and damage of the pursuer?

Damages laid at £3,000.

No. VI.

Pattison v. *M'Nab.—28th February* 1828.

It being admitted that the defender was, during the years 1824 and 1825, one of the proprietors of the stage coaches called Union and Commercial, for carrying passengers to and from the city of Edinburgh to Dundee, and that from the month of September 1823 to the 24th day of May 1825, the pursuer was employed by James Scott, one of the proprietors of the said coaches, to keep, or assist in keeping, the books of the said coaches in Edinburgh,

Whether, on or about the 24th day of May 1825, the defender did write and transmit, or cause to be written and transmitted, to Archibald Scott, Esq. Procurator-Fiscal for the county of Edinburgh, a written paper or information, falsely, maliciously, and without probable cause, accusing the pursuer of fraud, or falsely, maliciously, and without probable cause, accusing the pursuer

of having on many occasions exacted a higher rate of fare from passengers travelling, and for carriage of parcels conveyed by the said coaches, than he, the pursuer, was authorised to do, to the injury and damage of the pursuer?

Whether, on or about the said 24th day of May 1825, the defender did falsely, maliciously, and without probable cause, say to the said Archibald Scott, or to the clerks in the office of the said Archibald Scott, that the pursuer had been guilty of fraud, and had on many occasions exacted a higher rate of fare from passengers travelling, and for the carriage of parcels conveyed by the said coaches, than the said pursuer was authorised to do, and that the pursuer had appropriated to his own use the difference between the regular charge and the higher charge so made by the pursuer, to the injury and damage of the pursuer?

Whether, on or about the 24th day of May 1825, a Petition was presented by the said Archibald Scott to the Sheriff of the said county, proceeding upon, and founded on the information given as aforesaid, by the defender; and Whether the pursuer was, on or about the day last aforesaid, apprehended and incarcerated by virtue of a warrant granted by the said Sheriff, proceeding and founded on the said Petition, to the injury and damage of the pursuer?

Damages laid at £500.

No. VII.

Neillands v. *Tait, &c.*—1*st December* 1840.

Whether, on or about the 27th day of June 1839, at

Fisherrow, in the house of the defender, R. Tait, and in presence and hearing of David Harley, town-officer, Musselburgh, and David Taylor, waiter, Fisherrow, or either of them, the said defender did falsely and calumniously say, that the pursuers, or one or other of them, had robbed him, and that the pursuer, Ann Neillands, was a whore, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuers, or either of them?

Whether, at the time aforesaid, the said defender himself, or by another or others acting by his authority, wrongfully entered and searched the house of the pursuer, Robert Neillands, to his loss, injury, and damage?

Whether, at the time aforesaid, the defender, Henry List, wrongfully and irregularly searched the said house of the pursuer, and opened lockfast places in the same without a warrant so to do, to the loss, injury, and damage of the pursuer, Robert Neillands?

Or,

Whether the pursuers, or either of them, themselves, or by another acting by their authority, compromised and abandoned all or any of the said claims of damage, in terms of, and on the conditions contained in the minute No. 5 of process?

Damages laid at £600.

PART IV.

WRONGOUS APPREHENSION AND IMPRISONMENT.

CHAPTER I.

ACTIONS OF DAMAGES FOR WRONGOUS APPREHENSION AND IMPRISONMENT, GENERALLY,—WHERE THERE IS NO ROOM FOR ANY QUESTION OF PRIVILEGE.

EVERY person who is instrumental in the illegal apprehension or detention of another, lays himself open to an action of damages. The terms of the Issues for trial, however, differ according to the peculiar position of the defender, and the nature of the pleas which are available to him. Public functionaries, such as magistrates and others, who have no private or individual end to serve, but who happen unintentionally to err in the execution of their public or official duties, stand in a very different situation

from ordinary persons, who neither have, nor can have, any object in view but their own personal interest or feeling. Hence the necessity for a distinction in the terms of the Issues in actions of damages for wrongous apprehension and imprisonment, according to the position which the defender occupies.

In the ordinary case, which alone is to be noticed at present, there is no question of privilege, and the Issue is, therefore, simply to the effect,—Whether the defender wrongfully apprehended the pursuer, or wrongfully caused him to be apprehended, or (as the case may be) wrongfully imprisoned the pursuer, or wrongfully caused him to be imprisoned and detained in jail, to his loss, injury, and damage? There are various collateral considerations, however, which may arise in the settlement of the Issue.

Preliminary measures.—In cases of this description, whether ordinary or privileged, the preliminary question may arise, how far it is necessary, in the first instance, and in order to render competent an action of damages for wrongous apprehension or imprisonment, to reduce and set aside the warrant, decreet, or other writs, under colour, or in virtue of which the alleged apprehension and imprisonment have taken place? Whether any such previous measure is necessary, depends on circumstances.

Where the alleged apprehension or imprisonment has taken place under and in virtue of a warrant or other writs, *ex facie* regular, and unobjectionable, and the illegality of which is denied, and has not been in any shape judicially determined, it may be advisable, *ante omnia*, and before proceeding with an action of damages, to get them quashed and set aside, and their illegality ascertained, in a process of reduction or otherwise. Thus in the case, which not unfrequently occurs, of a party being apprehended and imprisoned in virtue of a decree of an incompetent court, or on the strength of some statutory provision which had been erro-

neously supposed to apply to the case, although in reality it did not, it would be well in the first instance, and before an action of damages is brought, to quash the interlocutor or decree, either in a regular action of reduction, or in a suspension or advocation. In short, in such cases, an action of damages will be exposed to many difficulties in its prosecution, so long as the illegality of the proceedings founded on has not been ascertained and settled in some competent process.

It does not necessarily follow, however, that an action of damages will lie as for wrongous imprisonment, where ultimate diligence has been done on a decree regularly pronounced by a competent Judge, *causa cognita*, but which has been afterwards set aside in a Court of Review, as ill founded on its merits. On the contrary, it has been held that an action of damages, in such circumstances, is incompetent;—*Aitken*, 25th February 1837, 15, S. 683. Neither is a decision of the Court of Justiciary in a suspension and liberation, to be taken and yielded to as *res judicata*, touching the legality or regularity of the imprisonment, in an action of damages in the Civil Court.—*M'Leod*, 10th June 1837, 5, S. 1113.

Although it may, as already said, be often desirable to have the question of legality or illegality discussed and determined in a previous process, before asserting a claim for damages, any such previous process of reduction or otherwise is not in the general case indispensable. No doubt, if a party has formally transacted or entered into any arrangement or settlement on the footing of a decree being legal and valid, which afterwards turns out to be illegal and invalid, it will be necessary, in order to clear the way for a claim of repetition or of damages, to reduce and set aside the transaction or settlement on the head of fraud or error, or whatever else may be the ground of complaint. That, however, is a very different case from the ordinary one of a decree or warrant, the illegality of which has not been barred

or excluded from challenge by any formal act of homologation or adoption. Where no such act exists, there does not, in the general case, appear to be any incompetency in proceeding at once with an action of damages,—the pursuer, of course, undertaking to establish, as the basis of his claim, the illegality of the writ or proceeding of which he complains.

It is settled, at least, that where the *gist* of the action is, not the illegality of the decreet or warrant, but rather that it has been carried into effect with unnecessary violence, or, in other words, has been oppressively executed, no reduction or other preliminary action is requisite, or indeed would be competent. *M'Leod*, 11th February 1829, 7 S. 396.

The same principle applies where the ground of action is —not that the warrants were in themselves illegal, or that the execution of them was informal or irregular—but that the debt had been previously paid or tendered, or that the defender had proceeded in the face of a sist or a decree of cessio, or other supersedere of diligence.

Neither is it necessary, in the first instance, and as preliminary to an action of damages, to reduce the warrants or writs under and in reference to which the apprehension or imprisonment took place, where these warrants or writs are plainly, and on the face of them, informal and inept. Thus, it is not necessary in that class of cases which sometimes occur, of a person being apprehended and imprisoned in virtue of a writ bearing to be a warrant, but which, from the illegal, irregular, and informal manner in which it is conceived, cannot be recognised in law at all. Such was the description of the writ which would appear to have been used as a warrant of imprisonment in the case of *Rae*, 12th July 1838. M'F.'s, J. R. p. 73.

In cases also of masterful violence, such as abductions and the like, where there has not been even the form or colour of a warrant of any description, there is, of course, no room for any previous process of reduction.

Admissions prefixed to the Issue.—In actions of this class, as in others, admissions engrossed in the Issue are of very great importance in simplifying the question for the Jury, and narrowing the procedure at the trial. When the illegality of a warrant of imprisonment has been already conclusively determined in some preliminary process, there is usually prefixed to the Issue an admission to that effect, and then, of course, the dispute comes to be limited to little more than the amount of the damages to be assessed;—here, however, the illegality of the writ which forms the ground of action, has not yet been decided, and is not admitted, the Issue for trial must of course embrace not only the quantum of damages, but also the question of, whether there are any grounds for damages at all. The fact of the apprehension or imprisonment, along with its duration, as also that it took place at the defender's instance, may generally be admitted, without prejudice to, or foreclosing in any respect, the pleas of either party. The examples which follow exhibit other particulars, which may, according to circumstances, be made the subject of admission.

Counter Issue for the Defender.—It is seldom that the defender, in cases of this description, requires to take a counter Issue, although, no doubt, circumstances may render it necessary or advisable for him to do so. Thus, where it is pleaded in defence, that the pursuer had agreed to waive or discharge his claim, it may be necessary for the defender to take an Issue to that effect; and he may also require to take an Issue for himself, or, at least, such an issue, if not absolutely necessary, may be advisable, to enable him to establish a plea of privilege, where he is not entitled to have it conceded to him, *prima instantia*.

EXAMPLES.

No. I.

Cowan v. *Thomson*,—*5th June* 1822.

It being admitted, that on the 27th day of January 1821, the pursuer borrowed from the defender, George Thomson, town-clerk of Musselburgh, a process then depending before the Magistrates of the said burgh, at the instance of Thomas Thomson, defender, against James Cowan, pursuer,

Whether the said process was forced back from the pursuer by a caption, dated 2d March 1821, and was returned by the pursuer to Thomas Ogilvie, messenger or town-officer, upon the 8th day of March, and by him returned to the said George Thomson, upon the 9th day of March aforesaid; and Whether, after the said process was so returned, the said Thomsons, defenders, or either of them, did issue, or cause to be issued, a caption which appears vitiated in the date, but which, in so far as can be read, bears to be dated 31st January 1820, which they put, or caused to be put, into the hands of Walter Hilson, messenger or town-officer in Musselburgh, to be executed against the said pursuer,—upon which caption the pursuer was apprehended by the said Walter Hilson, at Musselburgh, upon the 15th day of March 1821, and was carried to the Tolbooth of Musselburgh, where he was incarcerated, at about half-past eleven in the forenoon, and detained till half-past eight at night, on the same day, to the loss and damage of the said pursuer?

Damages laid at £500.

No. II.

Gordon v. *Dunlop*,—*22d June* 1825.

It being admitted, that on the 8th day of June 1820, Thomas Barrie, grocer in Edinburgh, obtained decree in the High Court of Admiralty against the late Janet Gordon of Viewfield, for the sum of £14, 19s. 8d., with interest and expences, and that the same was carried into execution, and the said Janet Gordon apprehended on the day of April 1821, and detained in custody for some hours, at the instance of the said William Dunlop, defender, trustee on the sequestrated estate of the said Thomas Barrie, and that the said Janet Gordon, during the period of the said detention, paid £20 to the defender,

It being also admitted, that the said decree has since been reduced and set aside by the Court of Session, and that decree of the said Court, for repetition of the said sum, has been pronounced in favour of the said Janet Gordon, dated 16th December 1822,

What loss and damage has the pursuer suffered in consequence of the said decree of the Court of Admiralty dated 8th June 1820, having been executed as aforesaid?

Damages laid at £1000.

No. III.

Wallace v. *Anderson*, *&c.*—*28th February* 1826.

It being admitted that David Wallace, pursuer, was imprisoned in the Jail of Glasgow upon the 15th day of June

1825, and remained a prisoner in the said Jail until the 9th day of July 1825, by virtue of letters of caption at the instance of the defenders, William Anderson and Hector Grant, upon a debt due to the said defenders, of the sum of £5, 7s. 8d,

Whether, on or about Saturday the 9th day of July 1825, the pursuer caused the said sum of £5, 7s. 8d. to be tendered to the defenders in payment of the said debt; and Whether, notwithstanding the said tender of payment, the defenders, or either of them, illegally refused to accept of the said debt, whereby the pursuer was detained in the said Jail until Monday the 11th day of the said month of July, to the injury and damage of the said pursuer?

Damages laid at £300.

No. IV.

Gillespie v. *Smith*,—18*th January* 1833.

Whether, in violation of the protection granted by the said decree, the defender, on or about the 13th day of March 1832, wrongfully caused the pursuer to be apprehended and imprisoned for payment of the sum of £49, 3s., or any part thereof, due to the defender prior to the said 23d day of December 1831, to the loss, injury, and damage of the pursuer.

Damages laid at £300.

No. V.

Tait, &c. v. *Wilson*,—*28th June* 1831.

Whether, on or about the 4th day of July 1828, the defender wrongfully imprisoned, or wrongfully caused to be imprisoned, the pursuer, Janet Tait, in the Jail of Canongate, Edinburgh, or wrongfully detained her, or caused her to be detained in the said Jail, during the period of thirty days from the said 4th day of July, or any part of the said period, to the loss, injury, and damage of the pursuer?

Damages laid at £200.

No. VI.

Dougall v. *Macartney*,—*17th June* 1831.

Whether, at Stirling, on or about the 17th day of June 1826, the defender wrongfully incarcerated the pursuer, or caused him to be incarcerated, by virtue of letters of caption raised on a Bill of Exchange for the sum of £75, 15s. 11d. dated the 6th day of August 1825, drawn by the pursuer upon, and accepted by John Yuill, John Gilfillan, and William Risk?

Or,

Whether, on or about the 20th day of June 1826, the pursuer agreed to abandon all claim for damages on account of having been imprisoned as aforesaid?

Damages laid at £3,000.

No. VII.

Menzies v. *Stevenson & Co.*—*30th November* 1839.

It being admitted, that an action depended before the Bailie of Holyrood, at the instance of the defenders, Stevenson and Company, against James John Fraser, W. S.

Whether the pursuer acted as the clerk of the said James John Fraser; and Whether, on or about the 23d day of July 1838, in the said process, a caption was issued against the present pursuer for not returning the process to the clerk?

And,

Whether, on or about the 4th day of August 1838, the defenders, or any of them, wrongfully apprehended and incarcerated the pursuer, or wrongfully caused him to be apprehended and incarcerated, by virtue of the said caption, to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. VIII.

Gibson v. *Watson, &c.*—*24th February* 1838.

Whether, on or about the 17th April 1837, the defenders, or others acting under their authority, wrongfully and forcibly abducted and conveyed the pursuer from the house of the defender, William Watson, in the town of Cromarty, to the town of Nairn, to the loss, injury, and damage of the pursuer?

Whether, on or about the 16th of the said month and year,

the defenders, or others acting under their authority, wrongfully and forcibly put the pursuer into a post-chaise at the said town of Nairn, to the loss, injury, and damage of the pursuer?

Whether, on or about the said 14th day of April, the defender, William Watson, wrongfully and forcibly abducted the pursuer from the said town of Nairn, to an Inn called New Inn, kept by one Mrs. Falconer, and forcibly detained him in the said Inn, to the loss, injury, and damage of the pursuer?

Damages laid at £900.

No. IX.

Jamieson v. *Laidlaw*,—19*th December* 1839.

Whether, on or about the evening of the 20th, or morning of the 21st days of March 1839, the defender did wrongfully and forcibly detain the pursuer in a bakehouse there, occupied by the defender in Richmond Lane, Edinburgh, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the defender wrongfully apprehended the pursuer, or caused him to be apprehended and conveyed from the said bakehouse to the police station at St. Leonard's, and from thence to the Head Police-office, Edinburgh, and to be then detained until he found caution to appear in Court, and answer a complaint lodged against him by the defender, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

CHAPTER II.

ACTIONS OF DAMAGES FOR WRONGOUS APPREHENSION AND IMPRISONMENT, AGAINST MAGISTRATES, AND OTHERS OCCUPYING A PRIVILEGED POSITION.

The form of the Issue in a privileged case, differs from that in an ordinary one, inasmuch as, while, in the former, not only the question is,—Whether the apprehension or imprisonment was wrongful? but also,—Whether it was malicious, and without probable cause? or otherwise, according to the special nature of the privilege pleaded. The chief varieties of actions of damages for wrongous apprehension and imprisonment, of the privileged class, are those against Judges or Magistrates—Clerks of Court—Public Prosecutors—and other parties acting officially, and in the discharge of a right or duty.

I. *Actions against Inferior Judges or Magistrates.*—The principles which regulate cases of this description have only recently been thoroughly sifted and cleared up. Looking at the decisions, as well as the *dicta* of the Judges as reported, in many of the earlier instances which have occurred since the introduction of Jury trial in civil causes, it would be very difficult to lay down any precise or definite rules on the subject. But it is thought that the more recent cases afford materials, sufficiently clear and distinct, in support of the following positions:—

(1.) Inferior Judges and Magistrates enjoy a certain measure of protection against the consequence of their official acts, both at common law, and in virtue of certain statutes passed for the purpose.

(2.) At common law, and independently of the statutes, an inferior Judge or Magistrate is, to some extent, pro-

tected against the consequences of error in judgment, or innocent mistake; and it is but reasonable that it should be so. But, a very marked distinction exists in this respect between the *ministerial* or *magisterial* acts of an inferior Judge, and his purely *judicial* acts. With regard to the former, he has an ample protection under the statutes, which are immediately to be noticed; but with regard to the latter, he enjoys an absolute protection at common law, independently of the statutes. That is to say, an inferior Judge, who falls into an error or mistake, while acting judicially in a Court of Record, and in a case within his jurisdiction, and competently raised before him, cannot be made amenable in an action of damages for the consequences, or alleged consequences. Such, it is apprehended, is one principle fairly deducible from the *dicta* of the Judges, and the authorities cited in the recent cases of *Orr*, 22d February 1839, and *Malonie*, 21st January 1841.

(3.) The statutory protection again, of Magistrates, is also of a very ample description. By the 43 of Geo. III, c. 141, it is provided, that in any action against Justices, for any conviction by their orders, or any thing done by them, in the levying of any penalty in carrying such conviction into effect, the plaintiff shall recover " no greater damages than twopence, unless he shall have expressly alleged that such acts were done maliciously, and without any probable cause." This Act, although held to apply to Scotland as well as to England, being limited in its operation to the levying of penalties *after conviction*, was found to afford little, or rather no protection to inferior Judges, in the exercise of the greater portion of their duties. Such was the state of the law when the 9. Geo. IV, c. 29, was passed, by which it was enacted, (§ 26), that the provisions of the former Statute (43. Geo. III, c. 141), entituled, " An Act to render Justices of the Peace more safe in the execution of their duty," ' shall extend to all inferior Judges and Magistrates in Scotland, *in regard to any sentence pronounced, or proceeding had, in any*

criminal trial.'" Although the protection of inferior Judges and Magistrates was thus greatly extended, and was sufficiently ample in regard to proceedings "*in any criminal trial*," there remained various magisterial duties and functions which could not be brought within that category. Accordingly, in order to perfect and complete the remedy and protection of inferior Judges and Magistrates, it was, by the 11. Geo. IV, and 1. Will. IV. c. 57, § 13, enacted, that the preceding Act, the 9th Geo. IV, c. 29, "in so far as it provides for rendering all inferior Judges and Magistrates more safe in the execution of their duty, shall extend to all acts done by any such Judges and Magistrates, in apprehending any party, or in regard to any criminal cause or proceeding, or to any prosecution for a pecuniary penalty." The provisions of these statutes have been fully considered and given effect to in several recent cases, of which it is sufficient to refer to, *Railton*, 5th July 1836, 14. S. 1081; *Hay* or *Anderson*, 3d February 1837, 15. S. 481; and *Mackellar*, 18th December 1841, 4. D. 287. The last of these cases is peculiarly valuable, for the very full and lucid exposition of the law on this subject—its progress, as well as its present state—contained in the Note of the Lord Ordinary, Cuninghame.

(4.) But these statutes will not afford any protection, in respect of proceedings which are altogether lawless and extrajudicial, or in other words, where the Magistrate or Judge has disregarded the plain and most obvious forms of judicial procedure, or been clearly acting beyond his power and jurisdiction. *Richardson*, 1st June 1832, 10. S. 607; and *Rae*, 12th July 1838, M'F.'s J. R. p. 73.

(5.) But the operation of the statutes will not be excluded, merely by shewing that, on a nice and critical consideration of legal principles, the Judge or Magistrate had no proper jurisdiction. It would seem sufficient that he acted colourably, and in the supposed discharge of his

duties;—See the *dicta* of the Judges, and the authorities cited in the cases of *Malonie* and *M'Kellar*, *supra*.

II. *Clerks of Court and others acting officially under the Magistrate or Judge.*—The Clerk of the Court, or of the Magistrate or Judge, or the person who may have acted as clerk in any illegal process or proceeding, enjoys no statutory privilege or protection, similar to that of the Magistrate or Judge; *M'Kellar*, 18th December 1841, 4. D. 287. But at common law, it would now appear to be settled, that a clerk or other official of the Court, who has acted simply as such, and under the eye of the Magistrate or Judge, is no more answerable than the latter in an action of damages;—that is to say, an action will not be entertained against the Clerk of Court, who has merely acted as such, or against the Officer, who has merely carried the warrant or sentence of the Magistrate or Judge into effect, in proceedings which are found not sufficient to support a claim of damages against the Magistrate or Judge himself;—*Malonie*, 21st January 1841, 3. D. 418; and *Orr*, 22d February 1839, 1. D. 551. But if the Clerk, or other official, oversteps the ordinary limits of his duty, and by mixing himself up with either of the parties, or otherwise has been accessory to illegal proceedings, for which he had not the sanction or authority of the Judge, he will be answerable in an action of damages, without alleging malice against him;—*Landell*, 26th January 1838, 16. S. 388; and *M'Kellar*, 18th December 1841, 4. S. 287. Of course, the sanction or instructions of the Magistrate or Judge will not protect the Clerk or other official, where the whole proceedings have been so lawless and extrajudicial, that the Magistrate or Judge himself cannot plead the statutory protection;—*Richardson*, 1st June 1832, 10. S. 607.

III. *Public Prosecutors or Procurators Fiscal.*—These functionaries are not in general entitled to any peculiar privi-

lege, statutory or otherwise. As paid officers they are held to be answerable for the consequences of any erroneous proceeding within their department; and a plea of innocent mistake, or *bona fides*, however available in alleviation or mitigation of damages, affords no such defence as can be taken into view in framing the Issue. *M'Crone*, 10th February 1835, 13, S. 443.

But of course wherever it is provided,—as is sometimes done in Police Acts,—by any particular statute, that the official parties acting under it, are not to be answerable in an action of damages, unless malice or want of probable cause, or something else, is specially charged against them, such conditions must be given effect to in judging of the relevancy of these particular actions, and in framing the suitable Issues. *Nimmo*, 18th July 1832; 10, S. 844, and *Kelly*, 22d January 1833; 4, S. 287, as affirmed in the House of Lords, 16th May 1834; 7, W. S. 343.

IV. *Medical Men and Others interfering with Insane Persons.*—As lunatics or insane persons require coercion or restraint, so ought the individuals engaged in imposing such coercion or restraint, and acting in *bona fide* and with probable cause, to be protected from claims of damage. Accordingly, the law does extend a certain measure of protection to such parties; and this protection is greater or less according to the position and circumstances in which the party acts.

An action of damages, as for wrongous apprehension, and imprisonment, and confinement, may be brought against the person at whose instance or instigation the proceedings complained of took place; or, against the medical man on the strength of whose certificate or opinion, these proceedings were resorted to; or, against the magistrate under whose warrant the apprehension or confinement was more immediately had; or, against the keepers or others by whom the complaining party was actually restrained and confined;

or, it may be, that the action is libelled against all of these parties together. The terms of the Issue, however, is different as against each of them. Against the magistrate—who has his statutory protection as before explained—malice and want of probable cause must be charged. Against the medical man, want of due enquiry would appear to be the suitable expression. But against the private party, the Issue is in the ordinary terms. And it is also in the ordinary terms against the keepers and others engaged in imposing the restraint or confinement, where excess of violence, or unjustifiable treatment, or want of all warrant or authority, forms the ground of action. On the other hand, it would be difficult to make an action lie at all against the mere executors of a regular warrant, for in such a case it is not easily seen how want of probable cause,—an essential ingredient in such an action,—could consistently be charged; unless, indeed, the allegation were, that the whole affair was of the nature of a conspiracy, —all of the parties concerned having from the beginning, and throughout, been aiding and abetting one another in a common wrong.

V. *Fugæ Warrants.*—In regard to actions of damages for wrongous apprehension and imprisonment under *meditatio fugæ* warrants, it may now be held as settled law, that the pursuer does not require to charge malice, in respect that the proceedings in all such cases are taken *periculo petentis*, and without any judicial cognizance of the merits. *Swayne*, 27th June 1835; 13, H. 1,003.

VI. *Counter Issue.*—Although the pursuer may so aver his case as to exclude the defender from the benefit of the plea of privilege *prima instantia*, it is nevertheless always competent for the defender to take a counter Issue, to the effect that in the matter complained of, he acted in the execution of his right or duty.

EXAMPLES.

No. I.

Dickie v. *Dickie, &c.—6th June* 1825.

It being admitted that on the 4th day of May 1819, the defender, Alexander Black, granted a certificate that the pursuer then laboured under mental derangement, and ought to be removed to a proper receptacle for such patients,

It being also admitted that a petition was presented to the defender, Harry Davidson, Esq. Sheriff-substitute of the county of Edinburgh, in name of the defender William Dickie, and praying for a warrant immediately to remove the pursuer to the receptacle for lunatics at Saughton Hall, and that the said Harry Davidson granted the said warrant,

It being also admitted that the pursuer was taken to the said receptacle, and there detained from the said 4th day of May 1819, until the 12th day of March 1820,

It being also admitted that during the time last aforesaid, the defenders, George Wood, M. D. James Bryce, surgeon, and the said William Inglis, were proprietors, and John Pittit, manager of the said receptacle,

It being also admitted that on the 29th day of May 1819, an application was made to the Court of Session to appoint the said William Dickie, defender, factor *loco tutoris* on the pursuer's estate, and that the said George Wood and James Bryce granted a certificate that the pursuer remained in a state of mental derangement,

It being also admitted that the said William Dickie was appointed factor *loco tutoris* upon the said estate, and in that character intromitted with the property of the pursuer,

Whether, on or about the 4th day of May 1819, the pursuer was of sane mind; and Whether the said Alexander Black did, without sufficient enquiry, grant the said certificate, falsely stating that the said pursuer laboured under mental derangement, and ought to be removed to a receptacle for such patients, to the injury and damage of the said pursuer?

Whether, at the time last aforesaid, the pursuer was of sane mind; and Whether the said William Dickie did present, or cause to be presented the said petition to the said Harry Davidson, or caused the pursuer to be confined at Saughton Hall, a receptacle for lunatics, to the injury and damage of the said pursuer?

Whether the said Harry Davidson did maliciously grant the said warrant, without having satisfied himself of the propriety of granting the same, by obtaining the certificate or report of medical persons and otherwise, to the injury and damage of the said pursuer?

Whether the pursuer was of sane mind; and Whether the said William Dickie caused the application to be presented to the Court of Session to obtain the factory aforesaid, with the fraudulent intention of getting possession of the pursuer's effects, and caused the pursuer to be detained in confinement, as aforesaid, at Saughton Hall, and to be afterwards removed to the receptacle for lunatics at Morningside, to the injury and damage of the said pursuer?

Whether the pursuer was of sane mind; and Whether the

said George Wood did, by himself, or in combination with the defenders, James Bryce and William Inglis, or either of them, cause the pursuer to be detained at Saughton Hall, or to be ill-treated there by the defender, John Pittit, or did, without sufficient enquiry, grant the certificate, granted the 18th day of May 1819, to the injury and damage of the said pursuer?

Whether the pursuer was of sane mind; and Whether the said James Bryce did by himself, or in combination with the defenders, George Wood and William Inglis, or either of them, cause the pursuer to be detained at Saughton Hall, or to be ill-treated there by the defender, John Pittit, or did, without sufficient enquiry, grant the certificate dated the said 18th day of May 1819, to the injury and damage of the said pursuer?

Whether the pursuer was of sane mind; and Whether the said John Pittit, during the confinement of the pursuer at Saughton Hall as aforesaid, did falsely represent the pursuer as in a state of mental derangement, and did keep the pursuer in a state of seclusion from his, the pursuer's friends, or did prevent the pursuer from seeing or writing to, or receiving letters from those with whom he wished to communicate, to the injury and damage of the said pursuer?

Whether the pursuer was of sane mind; and Whether, during all or any part of the time aforesaid, the said William Inglis did instigate the said Alexander Black to grant the said certificate, or did present, or cause to be presented, the said petition to the said Sheriff, or did instigate the said William Dickie, defender, to present the same, or did cause the pursuer to be detained at Saughton Hall, and to be there treated by the said John Pittit as aforesaid, or did instigate the said George Wood and

James Bryce to grant the certificate aforesaid, or did instigate the said William Dickie to obtain the appointment of factor *loco tutoris* aforesaid, for the fraudulent purpose of getting possession of the pursuer's property; or Whether he intromitted with, and misapplied the property of the pursuer, or caused him to be removed to the Lunatic Asylum at Morningside, to the injury and damage of the pursuer?

Damages laid at £5,000.

No. II.

M'Cosh v. *M'Cosh*,—*8th March* 1832.

(After the Prefatory Admissions—)

Whether, on or about the 3d day of May 1826, at Dundee, the defenders, or any two or more of them, exclusive of the said William Radley, did wrongfully conspire to deprive the pursuer of his liberty, and to confine him in a madhouse, and did all, or any two or more of them, including the said William Radley, in pursuance of the said conspiracy, on or about the said day, wrongfully confine the pursuer, or wrongfully caused him to be confined in the Lunatic Asylum at Dundee, and to be therein detained from the 3d day of May 1826, to the 30th day of June same year, or during any part of the said period, to the loss, injury, and damage of the pursuer?

Damages laid at £5,000.

No. III.

Pulmar v. *Short*,—*29th June* 1839.

Whether at Edinburgh, on or about the 3d day of October 1837, the defenders, or either of them, maliciously, and without probable cause, wrongfully apprehended and detained the pursuer, Mrs. Pulmar, or maliciously, and without probable cause, wrongfully caused her to be apprehended and detained, to the loss, injury, and damage of the pursuer?

Damages laid at £100.

No. IV.

Jameson v. *Main*, *&c.*—*26th November* 1829.

Whether, on or about the 28th day of April 1829, in the house of the pursuer at Kelso, the defenders, or any of them, did violently assault and strike the pursuer, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the defenders, or any of them, did wrongfully apprehend the pursuer, or cause him to be apprehended, or did wrongfully imprison the pursuer, or cause the pursuer to be imprisoned, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the said George Main did wrongfully detain, or cause the pursuer to be detained, to the loss, injury, and damage of the pursuer?

Or,

Whether, at the time and place aforesaid, the said George

Main acted in the lawful execution of his duty as a Magistrate; and Whether the defenders, John Smith, John Brown, and Robert Brown, or any of them, acted by directions from, and under authority of the said George Main, acting as aforesaid?

Damages laid at £800.

No. V.

Nimmo v. *Stewart, &c.*—*8th March* 1831.

It being admitted that the defender, James Stewart, is Superintendant of the Edinburgh Police, and John Thomson is Clerk to, and represented the Commissioners of the Edinburgh Police Establishment,

Whether, at Edinburgh, on or about the 23d and 24th days of November 1830, or either of them, the said defender, James Stewart, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, applied for, and obtained a warrant, (of which No. 4 of process is a copy,) to search the house, and apprehend the person of the pursuer, to the loss, injury, and damage, of the pursuer?

Whether, at the time and place aforesaid, the said defender, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully searched the said house, or wrongfully caused the said house to be searched, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the said defender, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully appre-

hended and detained the person of the pursuer, or wrongfully caused him to be apprehended and detained, or wrongfully detained her, or wrongfully caused her to be detained, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the defenders, Donald Williamson, Charles Stewart, and James MacNicol, or any of them, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully searched the said house, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the defenders, Donald Williamson, Charles Stewart, and James M'Nicol, or any of them, from wilful oppression or culpable negligence, out of which real injury has arisen to the pursuer, wrongfully apprehended the person of the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. VI.

Pollock v. *Begg, &c.*—*30th May* 1828.

It being admitted that the defenders, Dr. Clark and Dr. Tennent, were Justices of the Peace for the county of Lanark during the year 1825, and that the defender, Dr. James Begg, was minister of, and Moderator of the Kirk Session of the parish of New Monkland, during the said year, and that the defender, Hugh Watt, was Session-Clerk of the said parish during the said year,

Whether, at Airdrie, on or about the 20th day of November 1825, the defenders, Dr. Begg and Hugh Watt, or either

of them, did wrongfully apprehend the pursuer, or wrongfully caused the pursuer to be apprehended, by virtue of a warrant granted by the defenders, Dr. Clark and Dr. Tennent, to the injury and damage of the pursuer?

Whether, on or about the said 20th day of November 1825, the defenders, Dr. Clark and Dr. Tennent, or either of them, did wrongfully grant the said warrant, or did wrongfully apprehend the said pursuer, or wrongfully caused him to be apprehended, by virtue of the said warrant, to the loss, injury, and damage of the pursuer?

Or,

Whether, at the time and place aforesaid, the said Dr. Clark and Dr. Tennent acted in the lawful execution of their duty as Magistrates?

Whether, at the time and place aforesaid, the said Dr. Begg acted in the lawful execution of his duty, as minister and moderator of the Kirk Session of the said parish, and the defender, Hugh Watt, in the lawful execution of his duty as Session Clerk of the said parish?

Damages laid at £2,000.

No. VII.

Hutchison v. *Moir*,—15*th June* 1833.

Whether, on or about the 26th day of September 1831, in or near the church-yard of Dollar, the defender did violently assault and strike, or kick the pursuer, to the loss, injury, and damage of the pursuer?

Whether, at the time aforesaid, the defender did wrongfully detain the pursuer, or wrongfully cause him to be detain-

ed, in the school-house at Dollar, to the loss, injury and damage of the pursuer?

Whether, on or about the said 26th day of September, the defender wrongfully caused the pursuer to be carried to Alloa, and to be there incarcerated and detained in the jail of Alloa, to the loss, injury and damage of the pursuer?

Or,

Whether, at the time aforesaid, the defender was a Justice of Peace for the County of Clackmannan, and on the occasion aforesaid acted in the discharge of his duty as a Magistrate?

Damages laid at £200.

No. VIII.

Landell v. *Landell, &c.*—*8th February* 1840.

It being admitted that, by a final judgment of the Court of Session, of date 26th January 1838, the warrant, No. 5 of process, was decided to be illegal and irregular,

Whether, at Dunse, on or about the 6th day of July 1836, the defender, James Bell, being Sheriff-Clerk of the county of Berwick, granted, or issued the said warrant, to the loss, injury and damage of the pursuer?

Whether the defender, William Landell, applied for and obtained the said warrant, to the loss, injury and damage of the pursuer?

Whether, by virtue of the said warrant, the pursuer was,

on the 7th day of July 1826, apprehended and imprisoned in the jail of Greenlaw by the said defenders, or one or other of them, and was detained there from or about the 7th day of July foresaid, till on or about the 12th day of the said month, or during any part of the said period, to his loss, injury, and damage?

Damages laid at £2,000.

PART V.

ASSAULT AND OTHER PERSONAL INJURIES.

CHAPTER I.

ACTIONS OF DAMAGES FOR ASSAULT AND BATTERY; AND FOR OTHER INTENTIONAL VIOLENCE TO THE PERSON.

Terms of the Issue in an ordinary case of Assault.—The expression Assault, being a *nomen juris*, having attached to it a certain definite meaning, and denoting or implying in law a wrongful act, the Issue for trying a claim of damages in respect of a wrong of that description, is very simple. The question is,—Whether the defender, at a particular time and place, assaulted the pursuer, to his loss, injury, and damage?

Sometimes it has been put in issue,—Whether the defender *wrongously* assaulted the pursuer? and occasionally the words have been,—Whether the defender *violently* assaulted the pursuer? Neither the word *wrongously*, nor the word *violently*, is necessary. There cannot be an assault without

a wrong; and therefore, to put in issue, whether the defender *wrongously* assaulted, is mere surplusage. And to ask, whether the defender *violently* assaulted, is also supererogatory; it being always for the Jury, in assessing the damages, to consider the violence or other qualities of the injury, according to the evidence.

What amounts to Assault and Battery?—While, on the one hand, mere words cannot be held as amounting to an assault, it is, on the other hand, not indispensable, that there should be actual violence. This is well brought out in the English case of *Stephens* v. *Meyers*, 4. C. & P. 349, where Chief Justice Tindal thus expressed himself:—"It is not every threat, when there is no actual violence, that constitutes an assault; there must in all cases be the means of carrying the threat into effect. If the defendant was advancing in a threatening manner to strike the plaintiff, so that the blow would have reached him within a second or two of time, if the defendant had not been stopped, tho' not near enough at the time to strike him, it seems to be an assault in law."

An assault may, therefore, be said to be any inchoate violence which amounts to something more than a bare threat, although it should be something less than injury. Accordingly, while it has been held that words spoken in coming forward, or furious looks, do not amount to an assault, (*Lang*, 12th July 1826, 4. M. 86,) it has been also held that, to constitute an assault, it is not necessary that the party be actually struck, but that it is sufficient that he has been put in dread, or in apparent and imminent danger of bodily harm. *Hyslop*, 12th March 1816, 1. M. 22.

But neither will it be always enough to establish a case of assault, that physical force has been used. Thus, in a case where the defender had walked, or gently assisted the pursuer out of a public meeting, for applying the term "direct falsehood," evidently either to what the defender or the

chairman of the meeting had been saying, no damages were awarded; *Brown*, 17th July 1834, 13 S. 697.

Mere verbal provocation, however, can never justify a blow; *Anderson*, 15th July 1835, 13 S. 1130; although it may be pleaded in alleviation or diminution of damages.

The term *Battery* is something worse than an assault, and always includes it. To constitute a battery, there must be the infliction of personal violence.

Terms of the Issue in doubtful cases of Assault.—Although in a clear and unequivocal case of assault, the simple Issue—Whether the defender assaulted? is sufficient, it may be advisable, whenever there is the least dubiety as to the precise nature and character of the alleged wrong, to make the Issue more special, by describing shortly the act of violence. Thus in No. XI. of the examples of Issues subjoined to this Chapter, the question in place of being simply—Whether the defender assaulted, &c. is,—"Whether the defender assaulted *or injured the pursuer by spitting upon him*, to the loss, &c." By so framing the Issue, all risk of discussion as to what in law constitutes an assault, is avoided. It is another advantage of expressing in the Issue the particular description of violence complained of, that the Court and Jury are thereby from the beginning, apprised of the peculiar nature of the case, and have their attention drawn to it accordingly.

Where acts of violence are charged in the Issue, without the expression assault being used, it may be proper and necessary to employ the word wrongfully; for example—Whether the defender, on the 1st of June, on the High Street of Edinburgh, nearly opposite the Royal Exchange, wrongfully struck the pursuer with a stick, (or whatever it may be,) to the loss, injury, and damage of the pursuer?

Place and Date.—It is also a beneficial rule, and one which is always attended to in practice, that the

locus delicti, or place where the assault or injury took place, as also the date of it, should be mentioned in the Issue. This, besides contributing to the elucidation of the particular matter to be tried, fixes down the parties, and precludes all doubt as to the leading points on which they have to prepare themselves.

Counter Issue.—Properly and strictly speaking, there can be no justification of an assault. In other words, if the act of violence complained of was legal and justifiable in the circumstances, then it could not have been an assault. When, therefore, the pursuer undertakes to establish an assault, and obtains the corresponding Issue, there is truly no room for a counter Issue in justification, because any circumstance on which the defender can found will go merely to lessen or mitigate the damages. The defender however, is always entitled to negative the pursuer's charge, but that is very different from justifying.

The practice, therefore, which at one time prevailed, of giving the defender a counter Issue, to the effect,—Whether the pursuer had not first assaulted him? was clearly erroneous; for, where the pursuer is himself the first aggressor, and the defender only returns violence for violence, the latter cannot be said to be guilty of an assault, at all;—he is rather in the position of a party who acts on the defensive for his own protection. It may, no doubt, be the case, that a person, although not the first aggressor, has subjected himself in damages, in consequence of carrying his retaliation to excess. *Dowie*, 27th March 1822; 1. S. App. 125. In such a case, the second party becomes in law the assaulter, and an ordinary Issue as for an assault would suffice. It might, however, be as well in such a case, to make the Issue in some degree special,—that is to say, to the extent and effect of bringing out the nature generally of the acts of violence and injury complained of.

It may here be stated as a general observation, that a

party claiming damages for an assault must come into Court pure. If he has given provocation by acts of violence on his own part, though greatly short of those he complained of, it will be held to be a sufficient ground to entitle the Jury, looking at the whole circumstances, to find for the defender; *Young*, 13th March 1820, 2 M. 231. But after an affray has terminated, the party who renews it will be liable in damages; *Robertson*, 10th December 1824, 3 S. 383.

Although it may not be indispensable for the defender to take a counter Issue, in a case where the pursuer undertakes, *in terminis*, to establish an assault, a different course is advisable, if not absolutely necessary, where the pursuer founds merely on certain alleged acts of violence or injury inferring damages, without saying whether they amount to an assault or not.

In many cases, even where the pursuer's Issue contains expressly a charge of assault, it may be as well, although not absolutely indispensable, for the defender to take a counter Issue, bringing out the grounds on which he is to rest his justification. Thus, where it cannot be denied that acts of violence have been resorted to by the defender, which, in ordinary circumstances, would be altogether unjustifiable, but are nevertheless excusable on the ground of some right or duty, it may be expedient for the defender to take a counter Issue, bringing out the nature of his excuse—for example, that he acted officially, or in the execution of a legal right or warrant.

And, when acts of violence and injury, amounting in themselves to wrong, are alleged by the pursuer, it of course devolves on the defender, if he admit the facts, specially to aver on the record, and afterwards to establish his grounds and plea of justification; or the defender may at one and the same time deny the truth of the facts alleged by the pursuer, and plead accordingly, and likewise alternatively aver and plead a case of justification. It can be no justification however to a defender, that he was invested

with extraordinary powers, or that he had official duties to perform, if it be established that these powers and duties have been exceeded, or in other words, that he had fallen into culpable excess; *Macfarlane*, 15th May 1824, 3 M. 415.

EXAMPLES.

No. I.

Gray v. *Smart, &c.*—*10th February* 1820.

Whether the defenders, or either of them, upon the forenoon of Tuesday the 9th day of June 1818, or about that time, did violently assault the pursuer at or within the door of his, the pursuer's shop in the High Street of Montrose, or afterwards in the said shop itself, to the damage and injury of said pursuer?

Whether the pursuer first struck and assaulted the defenders, or either of them, upon the occasion aforesaid?

Damages laid at £1000.

No. II.

Jameson v. *Dowie*,—*7th July* 1820.

Whether, on or about the 3d day of September 1818, the pursuer, being a messenger, did, in virtue of letters of caption at the instance of Mrs. Helen Smitten *alias* White, apprehend the defender, in the house of John Henderson in Kinross; and Whether Alexander Hog, Sheriff-clerk of Kinross-shire, did then and there intimate to the pursuer, that the jail of Kinross, the nearest jail, was insufficient; and Whether the pursuer did there-

after immediately inform the defender of said insufficiency, and that it would be necessary to convey him, the defender, to Dunfermline, the next nearest jail, and did provide a post-chaise to carry the defender there; and Whether, while taking the defender to the chaise aforesaid, for the purpose aforesaid, the defender did resist, assault, or strike the pursuer in the execution of his duty as a messenger, to the damage and injury of the said pursuer?

Whether the defender did, at the time aforesaid, in the town of Kinross, after he was put into the chaise aforesaid, strike and kick the pursuer, to his damage and injury?

Whether, on the day aforesaid, the defender did repeatedly assault and strike the pursuer, while in the chaise aforesaid, upon the road betwixt Kinross and Dunfermline Jail, to the effusion of his blood, to the damage and injury of the said pursuer?

Or,

Whether the pursuer, when he is alleged to have apprehended the defender as aforesaid, failed to perform the usual solemnities necessary to constitute a proper legal arrest?

Damages laid at £500.

No. III.

Gibson v. *Rae*,—10*th February* 1820.

Whether, on the 3d day of October 1818, or about that time, in the Court-room of the First Division of the Court of Session, or in the Outer Parliament House, the defender did assault, strike, or kick the pursuer, or did push

him to the ground, to the injury and damage of the said pursuer?

Or,

Whether the defender, on or before, and since the 3d day of October 1818, was keeper of the buildings in which the said Court-room and Outer Parliament-house is situated; And whether, as such keeper, he had received the orders of certain of the trustees in whom the care of the said buildings is placed, to exclude all strangers from entering the same, for a certain period before and after the day aforesaid? Whether the pursuer did enter the said room, or Outer Parliament House, on or about the day aforesaid, and did then and there resist and obstruct the defender in the execution of the order of the said trustees, as aforesaid?

Damages laid at £500.

No. IV.

M'Farlane v. *Young*,—12*th February* 1824.

It being admitted that in the month of June 1822, the pursuer was a prisoner for debt in the Calton Hill Jail, Edinburgh,

Whether, on or about the 10th day of June 1822, the pursuer was assaulted and struck, or dragged from his bed in the said Jail, by Peter Buncle or Michael M'Culloch, either or both of them, or a party of Policemen acting by orders from, or under the authority of the said James Young, to the injury and damage of the said pursuer?

Whether, at the time and place aforesaid, the said Peter Buncle or Michael M'Culloch, either or both of them, acting by orders from, or under the authority of the said

James Young, did any or all of the injuries hereafter enumerated to the said pursuer, viz.—Whether one or other or both of them, did assault and drag the pursuer from his room or cell in the said Jail, did bind or tie the pursuer hand and foot, or did lock the pursuer up in a cell appropriated for criminals, and did detain him therein, without bed or bed-clothes, from the evening of the said 10th to the forenoon of the 12th day of June 1822, and did fail or refuse to supply the pursuer with his apparel, or part thereof, and the necessaries of life, from the evening of the 10th to the morning of the 12th of June, or during the greater part of that time, did refuse to allow him the use of pen, ink, and paper, and to allow George Webster and James Ker, the pursuer's medical attendants, access to him, the pursuer, in the said criminal cell, to the injury and damage of the pursuer?

Whether a letter or letters addressed to George Currie, the creditor-incarcerator on the 11th of June, was intercepted and detained by the defender for a time; and Whether the said George Ewing did, on the said 12th day of June, consent to the liberation of the pursuer from the said jail; and Whether the said consent was intimated to the said James Young, about two o'clock P. M. of said 12th of June; and Whether, notwithstanding the said intimation, the said James Young detained, or caused the pursuer to be detained within the said jail, until about nine o'clock P. M. of the said 12th of June, to the injury and damage of the said pursuer?

Or,

Whether, on the said 10th of June, one Captain Baird, and one William Stretty, surgeon, were in the same room or cell with the pursuer, and did remain in the said cell until after nine o'clock P. M. of the said day, contrary to, and in violation of the rules of the said jail; and Whether

the pursuer violently and forcibly resisted the officers acting under the authority of the defender, when conveying the said Stretty from the said cell?

Whether, on the said 10th day of June, the said defender, or one of the officers of the said jail acting under his orders, did demand admission to the room or cell of the said pursuer, for the purpose of conveying the said William Stretty to another room or cell in the said jail; and Whether the pursuer, while they were so employed under the authority aforesaid, did, in violation of the rules of the said jail, obstruct the entrance of the said defender, or officers acting under his orders, to the said cell?

Damages laid at £1000.

No. V.

Finlayson v. *Baird, &c.*—*20th November* 1827.

Whether, on or about the 4th day of June 1826, at or near Pollockshaws, in the County of Renfrew, the defenders, or one or more of them, did violently assault and strike the pursuer, to the loss, injury, and damage of the pursuer?

Whether, on or about the said 4th day of June 1826, at or near the said place, the defenders, Thomas Baird, Matthew Baird, Thomas Baird, junior, William Kesson, Alexander Baird, and William Hector, did wrongfully apprehend, or cause the pursuer to be apprehended, and did wrongfully confine the pursuer, or cause him to be confined, in the jail of the said burgh, to the loss, injury, and damage of the said pursuer?

Or,

Whether, at the time and place aforesaid, the said Thomas Baird acted in the lawful execution of his duty as a Magistrate; and Whether the defenders, Matthew Baird, Thomas Baird, junior, William Kesson, Alexander Baird, and William Baird, acted by direction from, and under the authority of the said Thomas Baird, acting as aforesaid?

Damages laid at £500.

No. VI.

Beavon v. *Simpson*,—*5th June* 1828.

It being admitted, that during the month of May 1825, the defender was master of the vessel called Wilson of Saint Andrews, and that the pursuer was second mate of the said vessel,

Whether, on or about the 21st day of May 1825, at a place called Diggory Quash, near Saint Andrews, New Brunswick, on board the said vessel, the defender did violently assault and strike the pursuer, to the injury and damage of the pursuer?

Or,

Whether, at the time and place aforesaid, the pursuer refused to obey the defender's orders relative to the management of the said vessel, or cargo of timber; and Whether the defender used no more violence than was necessary to compel the pursuer to the performance of his duty?

Damages laid at £500.

No. VII.

Murray v. *The Alloa & Stirling Steam-Boat Company,—7th December* 1839.

It being admitted, that the defenders, in the month of September 1838, were owners of the Victoria steam vessel plying between Stirling and Newhaven,

Whether, near Stirling, on or about the 8th day of the said month and year, on board of the said vessel, the defenders, or any of them, by themselves or by another, or others acting under their authority, did assault the pursuer, and push or carry him from on board the said vessel, or aided or encouraged others in assaulting the pursuer, and in pushing and carrying him from on board the said vessel, to the loss, injury, and damage of the pursuer?

Or,

Whether at the time and place aforesaid, the pursuer came on board the said vessel in such a state from intoxication, filth, or under such suspicions as to character, as made it proper and necessary to remove him as aforesaid; and Whether the defenders did no more than was necessary to remove him from the said vessel?

Damages laid at £1000.

No. VIII.

Miles v. *Finlayson, &c.—4th June* 1829.

It being admitted that the pursuer was the teacher of a school at the Ballindalloch Cotton Works, in the month of September 1828,

Whether, on or about the 10th day of September 1828, the defenders, or any of them, did violently assault the pursuer, or cause him to be assaulted, or did wrongfully enter the said school-house, or did wrongfully cause the pursuer to be taken by violence from the said school-house, to the loss, injury, and damage of the pursuer?

Whether, on or about the 10th day of September 1828, the defenders, or one or other of them, did wrongfully take possession of, or cause to be taken possession of, and wrongfully detain, or cause to be detained, certain articles the property of the pursuer, or which were in the custody of the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £400.

No. IX.

Ball, &c. v. *Longlands, &c.—23d May* 1834.

It being admitted, that in the month of May 1832, the pursuer obtained against the defenders, David and Thomas Longlands, letters of lawburrows under the penalty of four hundred merks each, and that the defender Alexander Johnston was cautioner for the said defenders in the said lawburrows,

Whether, on or about the 16th day of September 1832, on a road leading southward from the gate of the avenue of the mansion house of Kersie Bank, in the County of Stirling, the defender, Thomas Longlands, did assault, or assault and strike the pursuer, in contravention of the said lawburrows?

Whether, at the time and place aforesaid, the said defender,

Thomas Longlands did assault, or assault and strike the pursuer, to the loss, injury, and damage of the pursuer?

Whether, at the time and place aforesaid, the defender, David Longlands, did assault, or assault and strike the pursuer, in contravention of the said lawburrows?

Whether, at the time and place aforesaid, the defender David Longlands, did assault, or assault and strike the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £250,
against each of the Defenders.

No. X.

M'Fee v. *Donaldsons.—6th July* 1833.

Whether, at North Brook Street, Calton, at or near Glasgow, on or about the 2d day of April 1829, the defenders, John and Catherine Donaldsons, or one or other of them, did assault or strike Ann M'Beth the original pursuer, to the loss and damage of the said Ann M'Beth?

Whether the defender, Samuel Donaldson, abetted or instigated the said John and Catherine Donaldson, or either of them, to commit the said assault, to the loss, injury, and damage of the said Ann M'Beth?

Whether, on or about the 2d day of April 1829, at the said place, the said Samuel Donaldson wrongfully apprehended the said Ann M'Beth, the original pursuer, or wrongfully caused her to be apprehended and conveyed to the Police-

office of Calton aforesaid, to the loss, injury, and damage of the said Ann M'Beth?

Damages laid at £500.

No. XI.

Tullis v. *Glenday*,—*24th June* 1834.

Whether, on or about the 27th day of June 1833, in the street of Cupar-Fife, the defender assaulted or injured the pursuer, by spitting upon him, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XII.

Jameson v. *Pritchard*,—*20th February* 1841.

Whether, on or about the 1st day of December 1840, the defender did "wrongfully"* assault the pursuer, to his loss, injury, and damage?

Damages laid at £500.

* This word "wrongfully" ought not to have been in the Issue. See remarks, *supra* p. 148.

CHAPTER II.

ACTIONS OF DAMAGES FOR INJURIES TO THE PERSON, ARISING FROM NEGLIGENCE AND *CULPA* GENERALLY.

Every person is answerable for the damage arising from personal injury caused by, or in consequence of his fault or negligence, or want of skill. It is on this principle—that the proprietors and drivers of carts or carriages are liable in reparation to the sufferer of a personal injury, which has resulted from careless or unskilful driving, and that the owners or keepers of dogs, or other animals, are answerable for injuries committed by them.

The terms of the Issue in cases of this class, seldom present anything remarkable. The peculiar nature of the case, —for example, whether the ground of complaint relates to the overturn of a carriage, the bite of a dog, or something else,—should be shortly indicated. The subjoined examples sufficiently illustrate how this is accomplished in practice.

Although any serious difficulty can seldom arise as to the terms of the Issue in cases of this class generally, it is frequently a question of great nicety, and one susceptible of much discussion, whether there is relevant matter for trial at all. As such questions may, and generally do, arise, while the Issue is in the course of being prepared, some of the more important of them, so far as they have been of recent occurrence, may be shortly noticed.

Liability of an Owner or Master for his Subordinates.—If no responsibility attached, except to the actual committer of an injury, there would very often, in cases of the present description, be no means of redress. But the general rule is undoubted, that a master or owner is liable for the illegal or injurious act of the person employed by him, if it be

within the scope of his, the master or owner's probable authority, and done for his benefit. The action may therefore be brought either against the person from whom the power or authority flowed, or against the person by whom the injury was actually committed, or against both together. So accordingly:—The proprietor of a watch-dog, accustomed to be chained, which, when loose, had bitten a passenger who had formerly provoked him when confined, has been held liable in damages. *Brown & Company*, 26th June 1824; 3. S. 187. The proprietors of a stage coach have been subjected in damages for injury done to a passenger, through the negligence or improper conduct of themselves, or others in their employment. *Allan*, 10th July 1819; 2. M. 158. *Gunn*, 28th February 1820; 2. M. 194. The owner of a horse and cart is answerable for the damage caused by the horse and cart, through the fault, negligence, or want of skill of his servant in charge of them. *Fraser*, 22d January 1822; 1. S. 258. *Baird*, 4th July 1826; 4. S. 790. *M'Laren*, 10th December 1827; 4. M. 384. A passenger on board of a Canal boat may have his claim against the proprietors for injury caused by the fault, negligence, or want of skill of their subordinates. *Edinburgh and Glasgow Union Canal Company*, 15th March 1832; 10. S. 505. And the proprietors of any work or construction are liable for the fault, negligence, or want of skill of those employed by them to take charge of such work or construction. *Hunter*, 16th March 1836; 14. S. 717.

But although it may be stated as a general proposition, that the proprietors of carriages are liable for personal injuries caused, not only by careless and faulty driving on the part of those in charge, but also by the defective or faulty state or structure of the vehicle, it will be sufficient to exonerate them in the latter case, that the defect was latent, and could not have been discovered or provided against by all the care, diligence, and attention, which could reasonably

have been expected to be applied in the circumstances. *Anderson*, 18th March 1820; 2. M. 269. In this case it was put in issue, whether the overturn complained of as the cause of the alleged injury, arose from the inattention, 'negligence, or misconduct of the defenders, or persons 'acting for them?' Under such an issue—which, so far as it involves any general principle, is the ordinary issue in cases of the class in question—it is obvious that the defenders could not have been subjected for anything of the nature of a *damnum fatale*, or for what human foresight could not reasonably be expected to reach or provide for. It was on this principle, as well as that the servant was acting without orders from his master, that the judgment was pronounced in the case of *Linwood*, 14th May 1817; F. C.

Neither is a master liable for the wilful criminal act of his servant, to which he, the master, was not himself a party. Thus, in the case of *M'Laren*, 10th December 1827; 4. M. 384, where the question turned on the liability of a master for an injury caused by his cart while in the charge of his servant, Lord Chief Commissioner Adam said—'The 'fault must arise from want of skill or attention, and not 'from a wilful act. A criminal act will not subject the 'absent and innocent master.' And in the case of *Miller*, 24th December 1827; 4. M. 388, which was of a similar description, the same Judge stated in his charge to the Jury, in reference to the previous case of M'Laren,—'We had very 'recently occasion to consider the law on this subject, and 'although the facts of the one case do not bear on the 'other, the law is the same in both. The issue is laid on 'the fault and negligence of the servant, and it could not 'have been otherwise. Neither here, nor elsewhere, could 'it be held that the master is liable for the wilful acts or 'criminal acts of a servant.'

Road Trustees.—Actions of damages against the Statutory Trustees in charge of public roads, were, till lately, of fre-

quent occurrence, at the instance of parties founding on injuries from overturns and other accidents caused by the defective and improper state of the roads; and such actions were invariably entertained, it being held that the trustees in charge of a public road, and in possession of the trust funds, were liable for any injury which might happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees. Several examples of Issues in such cases will be found among those subjoined. But the question of liability in such cases having been recently brought under the consideration of the House of Lords, on an appeal by road trustees from the Court of Session, in an action where large damages had been awarded to sufferers from an overturn, the judgment was reversed, and the principle given effect to, that trustees, doing only that which by the Statute it was their duty to do, and being guilty of no personal default, were, (no more than the funds under their charge,) not answerable for damages sustained by the acts or neglect of persons employed by them in the active execution of that duty. *Duncan* v. *Findlater*, 23d August 1839; M'L. & R. 911. The personal liability of trustees for their individual acts, or the personal liability of those under them for their individual conduct, is a totally different matter, which would fall to be governed by the general rules of responsibility applicable to such cases.

Questions of Assythment.—Actions for personal injury, where death has been the consequence, may be pursued by the deceased's nearest relations; for example, by the father, as also by the brothers and sisters. The objects of the action in such cases may be reparation for loss of services, and also *solatium* for wounded feelings. *Hislop and Others*, 14th March 1842; 4. B. M. & D. 1168.

Example No. XVIII. exhibits the terms of the Issues in an action of damages at the instance of the widow and children of a man for causing his death, and also for indignities and wrongful acts towards his corpse after his death. It is understood that these Issues have not yet been finally approved of or settled by the Court.

Counter Issue.—It is seldom that there can be any room or occasion for a counter Issue on the part of the defender in such actions as those in question. He does not require to take a counter Issue, to enable him to plead that the accident or injury complained of happened through the recklessness or folly of the pursuer himself; for in that state of the matter, the pursuer could not obtain a verdict to the effect, that the injury founded on by him arose from the fault or negligence, or want of skill of the defender. In short, the defender is entitled to plead, and to prove the recklessness and folly of the pursuer under the latter's own Issue, and in order to negative the charge on which it must necessarily be based. *M'Lachlan*, 14th May 1827; 4. M. 216. *Millar*, 17th July 1828; 4. M. 568. *Crombie*, 25th July 1838; M'F's J. R. 155; and *Watson*, July 24, 1838; M'F's J. R. 146.

Where, however, satisfaction or discharge is pleaded,—a counter Issue may be necessary, as in Example No. XIII.

EXAMPLES.

No. I.

Cullen, &c. v. *The Monkland Canal Company*,—*1st June* 1825.

It being admitted, that on the 12th day of May 1824, the late Archibald Cullen was a passenger on board a truck boat, the property of the defenders, plying on the Monkland

Canal, and that in passing under the bridge at Kielhill over the said Canal, the said Archibald Cullen came into contact with the said bridge, whereby he received grievous bodily harm, in consequence of which he died in the course of a few hours thereafter,

Whether the said hurt took place in consequence of the carelessness, negligence, or unskilfulness of the persons employed by the defenders in navigating, conducting, or managing the said truck-boat, to the loss and damage of the pursuer?

Damages laid at £1000 to the pursuer, Mrs. Margaret Cullen, and to each of the nine children of the deceased, £500.

No. II.

Rodgers v. *The Union Canal Company*,—*2d July* 1830.

It being admitted, that during the year 1829, the defender, George Johnston, was proprietor of a certain boat used for the purpose of carrying stones along the Union Canal from Redhall Quarry to the city of Edinburgh, and that the defenders, the Union Canal Company, were, during the said period, proprietors of another boat, for the purpose of conveying passengers along the said canal;

It being also admitted, that on the 24th of June 1829, the pursuer was a passenger on board the boat last aforesaid, for the purpose of being conveyed from the said city to Ratho,

Whether, on or about the said 24th of June 1829, at or near the said Quarry of Redhall, by the fault, negligence,

or want of skill of the defenders, or any of them, or of those in their employment, in the conduct or management of the said boats, or either of them, the pursuer suffered severe bodily harm, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. III.

Union Canal Company v. *Johnston*,—19*th November* 1831.

It being admitted, that during the year 1829, the defender, George Johnston, was proprietor of a certain boat, used for the purpose of conveying stones along the Union Canal from Redhall Quarry to the city of Edinburgh, and that the pursuers, the Union Canal Company, were, during the said period, proprietors of another boat for the purpose of conveying passengers along the said canal;

It being also admitted, that one May Rodgers was, on the 24th of June 1829, a passenger on board the said boat, the property of the pursuers, and on the said day sustained certain injuries, for which, on the 22d day of January 1831, she obtained decree, finding the pursuers and defender conjunctly and severally liable in the sum of £300, 14s. 5d. as damages and expenses on account of the said injury, reserving all questions of relief,

Whether the said injury was caused by the fault, negligence, or want of skill of the defender George Johnston, or of any person or persons in his employment, for whom he is responsible, or by the fault, negligence, or want of skill of the pursuers, the Union Canal Company, or any person or persons in their employment, for whom they are responsible?

No. IV.

Hunter or Niven v. *Edinburgh, &c. Union Canal Company*,—*19th February* 1836.

It being admitted, that on the 17th day of August 1834, and prior, and subsequent thereto, one William Cuninghame was employed by the defenders to manage the Drawbridge near Edinburgh, No. 2. on the Union Canal,

Whether, on or about the said day, by the fault, negligence, or want of skill of the said William Cuninghame, in the management of the said bridge, the pursuer suffered severe bodily harm, to the loss, injury, and damage of the pursuer?

Damages laid at £300.

No. V.

Campbell v. *Wood, &c.*—*26th February* 1831.

It being admitted, that on or about the 9th day of December 1829, the defender, John M'Gilvray, was a servant in the employment of the other defender, Francis Wood, and on or about the said day was in the city of Glasgow with a horse and cart, the property of the said Thomas Wood, and then under the charge of the said John M'Gilvray,

Whether, on or about the said 9th day of December 1829, and in Salt Market Street, Glasgow, at or near the corner of the said street, the said horse and cart, through the fault, negligence, or want of skill of the said John

M'Gilvray, acting as the servant of the said Francis Wood, did cause bodily harm to the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £200.

No. VI.

Miller v. *Harvie*,—*3d July* 1827.

It being admitted, that William Wilson was servant to the defender, Thomas Harvie, from Whitsunday to Martinmas 1826;

It being also admitted, that on the 16th day of September 1826, in the street in the city of Glasgow called Gallowgate, a cart, the property of the defender, passed over and caused the death of the pursuer's son, and that at the time it so passed over the child, the said cart was under the management of the said William Wilson,

Whether the death of the said child was caused by the fault, negligence, or want of skill on the part of the said William Wilson, to the loss, injury, and damage of the pursuer?

Damages laid at £1000.

No. VII.

Mackay v. *Downie*,—*7th March* 1833.

Whether, on or about the 20th day of December 1831, and on the turnpike road which leads from Glasgow to Airdrie, and near to the parish road leading towards

Old Monkland, in the county of Lanark, the defender wrongfully delivered, or caused to be delivered to the pursuer, for the purpose of being fired, a gun, knowing the same to be overcharged; and Whether, in consequence of the said overcharge, the gun burst, to the loss, injury, and damage of the pursuer?

Damages laid at £2000.

No. VIII.

Harveys v. *Stodart*,—*24th February* 1835.

Whether, on or about the 24th day of November 1832, the defender kept a dog, and knowing the same to be of a vicious and ferocious disposition, and in the habit of biting, wrongfully allowed the same to go at large; and Whether, on or about the said day, the said dog bit or lacerated the pursuer Helen Harvey, daughter of William Harvey, also pursuer, to the loss, injury, and damage of the pursuers, or either of them?

Damages laid at £600 to Helen Harvey,
and William Harvey £50.

No. IX.

Dewar v. *Aitken*,—*17th November* 1835.

It being admitted, that the pursuer is the widow of the late William Aitken, formerly residing in Edinburgh, and that the defender is clerk to, and represents the Road Trustees of the third district of Peeblesshire, and that the road from Leadburn to Peebles is in the said district,

Whether, on or about the 8th day of October 1832, by the fault or negligence of the said trustees, or those in their employment, the said William Aitken, while travelling along the said road, was drowned in the river Eddleston, to the loss, injury, and damage of the said pursuer?

Damages laid at £1000.

No. X.

Wrights v. *Leitch*,—22*d June* 1839.

It being admitted, that the pursuer, in November 1838, was the driver of a cab or two-wheeled carriage, the property of George Henderson, coach proprietor in Edinburgh, and that in driving the said carriage in Leith Walk, on the evening of the 24th November 1838, the said cab struck a log of wood,

Whether, at the time and place aforesaid, by the fault or negligence of the defender, or those in his employment, the pursuer was thrown from the said cab, to the loss, injury, and damage of the pursuer?

Damages laid at £200.

No. XI.

Macdonald v. *Thorburn*,—12*th February* 1840.

Whether, on or about the 6th day of September 1839, about a mile to the east of Slateford, on the road from Currie to Edinburgh, a carriage drawn by one horse, the

property of the pursuer, through the fault or negligence of the defender, was overturned, to the loss, injury, and damage of the pursuer?

Damages laid at £200.

No. XII.

Dauney, &c. v. *Scott, &c.*—*2d July* 1836.

Whether, during the months of June and July 1834, or either of them, the defenders, or any of them, by themselves, or another, or others acting under his or their authority, wrongfully performed certain operations, on all or any part of the road leading from the city of Glasgow, to a place called the Three Mile House on the road from Glasgow to Paisley, whereby, on or about the 29th day of July 1834, a certain steam carriage, the property of the pursuer, was injured, to the loss, injury, and damage of the pursuers?

Damages laid at £36,000.

No. XIII.

Comb v. *Turnbull*,—16*th June* 1837.

It being admitted, that the pursuer is proprietor of certain lands and houses situate at Abbey Hill, near Edinburgh, and that the defender is clerk to the Road Trustees of the Leith Walk District of Roads,

Whether the said trustees altered the road leading from

Abbey Hill to the high road to Leith, commonly called the Easter Road, at or near the said property, to the loss, injury, and damage of the pursuer, as libelled ?

Or,

Whether the pursuer represents, and is liable for the acts and deeds of his mother the late Mrs. Comb; and Whether the said Mrs. Comb held herself out as proprietrix of the said property, and on or about the day of received from the defenders the sum of £35, as the full compensation of the damage aforesaid, done to the said property ?

Whether the pursuer homologated the act of his said mother, in receiving the said sum as full compensation of the damage aforesaid, done to the said property ?

Whether the said sum of £35, or part thereof, was received by the said Mrs. Comb on behalf of the pursuer, and was in *rem versam*, and expended for the special use and maintenance of the pursuer ?

Damages claimed, £300.

No. XIV.

Watson, &c. v. *Roxburgh Road Trustees*,—*20th June* 1838.

It being admitted, that the defender is clerk to the Turnpike Road Trustees of the county of Roxburgh, and that the road from Melrose by Leader Water to Lauder, is under the management of the said trustees,

Whether, on or about the 12th day of August 1835, the pursuers, or any of them, while travelling along the said road in a gig, were, or was overturned by the fault or ne-

gligence of the defenders, or of those in their employment, to the loss, injury, and damage of the pursuers, or either of them ?

Damages laid at £300.

No. XV.

Hislops v. *Durham,—February* 1842.

It being admitted, that the defender is proprietor of the lands of Polton, in which the coal pit libelled on is situated, and that the body of the deceased Elizabeth Hislop was found in that pit,

Whether the defender wrongfully failed to have the said coal-pit properly secured or protected, and that, in consequence of the said failure, the said Elizabeth Hislop, on or about the 7th of May 1841, fell accidentally into the said pit, and lost her life, to the loss, injury, and damage of the pursuers ?

Schedule of damages claimed.

£525 to Robert Hislop.
£500 to Thomas, Helen, Jane, Agnes, and Janet Hislops.

No. XVI.

Symington v. *Glasgow Police Commissioners,—5th February* 1839.

Whether the pursuer, Jean Symington, is the widow, and the other pursuers the children, of the late John Symington, poulterer in Belfast ; and Whether, on or about

the 19th day of September 1837, the said John Symington died, or lost his life, through the fault or negligence of the defenders, or any of them, or of those in their employment, to the loss, injury, and damage of the pursuers, or any of them?

Whether, on or about the 20th day of the said month and year, the defenders, or any of them, or those in their employment, wrongfully transmitted the body of the said John Symington to a place called the Dead-House in Glasgow; and Whether, in consequence of its being so transmitted, the said body was, on or about the day and place last aforesaid, delivered to the defender William M'Intyre, and there wrongfully exposed for sale, or wrongfully subjected to, or wrongfully allowed to be subjected, to anatomical operation, examination, or dissection, to the loss, injury, and damage of the pursuers, or any of them?

Whether, on or about the day, and at the place last aforesaid, the said defender, William M'Intyre, wrongfully sold or disposed of the clothes in which the said body was dressed, to the loss, injury, and damage of the pursuers, or any of them?

Whether, on or about the day of the said month and year, the said defender, William M'Intyre, wrongfully failed to inter, or to cause to be interred, the said body, in a church yard, or ordinary or proper place of burial, to the loss, injury, and damage of the pursuers, or any of them?

Damages laid at £1000.

PART VI.

WRONGOUS USE OF DILIGENCE,

INCLUDING

ACTIONS FOR THE WRONGOUS USE OF ARRESTMENT, INHIBITION, INTERDICT, SEQUESTRATION, POINDING, &c.

A party who imposes a restraint on the property and effects of another without good and sufficient cause, is liable in any loss or damage, which his proceedings may have occasioned. This, as a general proposition, cannot be questioned. But the nature and extent of the *onus* on the pursuer, and the precise terms of the Issues, in actions of this class, depend on circumstances.

A claim for reparation may arise in consequence of nullities or informalities in the diligence of the law itself, or the mode in which execution has been done; or, even where there is no room for any objection of form or regularity, a claim of damages may lie against the party who imposes the restraint, in respect of his having resorted to such a step maliciously, or in the absence of reasonable or probable cause, or from recklessness, or for the purpose of oppression.

Arrestment.—There can be no doubt, that where an arrestment is in itself informal and inept, an action of damages will lie for the use of it, without the necessity of charging malice, or the want of probable cause. In such a case, as there has been nothing more than the colour of legality, no serious question of relevancy can occur. The Issue will

simply be,—whether the defender wrongfully arrested, &c. to the loss, injury, and damage of the pursuer? as in Example No. III. Where also a party arrests what does not belong to his debtor, he will be answerable to the true owner for the actual loss and damage, which his arrestment may have occasioned; and in such a case, there can be no reason for requiring the pursuer to undertake any but the ordinary Issue.—*Smiths*, 15th May 1821; 1. S. 8.

It is sometimes, however, a question of much nicety, how far the pursuer is bound to undertake a proof of malice, or want of probable cause, where the arrestments founded on were in themselves regular and formal, and had been used on the dependence of an action, having for its apparent object the trial of a fair and substantial matter of right. It may, no doubt, be considered somewhat hard, to hold that a party who has regularly used an arrestment in security on the dependence of an action brought in *bona fide*, is answerable in an action of damages, merely because he ultimately proves unsuccessful in his action. It would be still harder, however, were the opposite party to be subjected in actual loss, without any means of redress, on account of measures resorted to against him, however honestly, for the purpose of aiding and accomplishing the ill-founded objects of another. When it is kept in view, therefore, that this diligence is, or at least may be, obtained *in initio litis*, and without any discussion of the merits, at the mere will and discretion of the applicant, it seems but reasonable to hold that it is resorted to *periculo petentis*, and consequently infers liability for damages, if injury is actually sustained, without any allegation of malice.

But whatever may be the verdict of the Jury or direction of the Judge, on a consideration of the whole circumstances as they may appear in evidence, it may be taken at least, as a settled point in practice, that the pursuer is not, in cases of the nature in question, bound to charge malice expressly in the Issue. *Vide* the Lord Ordinary's (Jeffrey)

Note, in *Swayne*, 27th June 1835; 13. S. 1003, and the cases there referred to.

It is for the Court, however, to determine the matter of relevancy, on a consideration of all the circumstances of each particular case. Accordingly, it has been held that an averment, that an arrestment on the dependence of an action was illegal, nimious, and oppressive, was not relevant,—malice not being alleged, and the action having, in part, been decided against the pursuer; *Duff*, 19th May 1825; 4. S. 22. It was probably for the same reason, viz. that the action on the dependence of which the arrestments were used proved in part successful, that malice was charged in the Issues in the case of *Duffus*, 17th July 1828; 4. M. 558. Nor will it be sufficient to support an action of damages for the use of arrestments, merely that, the officer has followed the usual practice of inserting in his schedule a larger sum than that claimed by the creditor. *Cooper*, 18th April 1825; 1. W. and S. 131.

A party may subject himself in damages, not only for the use of arrestments, which are illegal or informal in themselves, or which have been groundlessly resorted to, although legal and formal in themselves, but also for unnecessarily or illegally keeping up the diligence, or refusing to loose the *nexus* created by it;—as, for example, after his claim had been paid, or offered to be paid. No. IV. is an example of an issue in such a case.

Nos. V. VI. and VII. are examples of Issues in actions for breach of arrestment, or in actions of forthcoming, where the question is, Whether the defender was indebted to the common debtor in any particular sum of money at the date of the arrestments, or, according to the circumstances, was then in possession of any effects belonging to him.

Inhibition.—The same considerations are applicable to this diligence as to that of arrestment. No. VIII. is

an example of an Issue in an action of damages for the illegal use of an inhibition.

Sequestration and Poinding.—A claim of damages founded on the use of these steps of diligence are also very much regulated by the same principles. But as the effects of a sequestration or a poinding are more immediate and stringent than those of an arrestment or inhibition, so there will be, generally, less room for difficulty or nicety in the matter of relevancy, as regards actions founded on the former.

It is a relevant ground for an action of damages, that the stock of a tenant has been sequestrated for rent subsequent to an offer of payment of the rent to the factor of the proprietor; and a *solatium* for injury to the feelings can be claimed as well as actual loss. *Cameron*, 14th March 1820; 2. M. 232. But an action of damages by a tenant against his landlord, for alleged ruinous and oppressive sequestrations, while the tenant had counter claims which more than extinguished the landlord's claims, was dismissed, —the counter claims being illiquid, and not made in the processes of sequestration. *Granger*, 19th December 1822; 2. S. 100. It is not necessary to reduce decrees awarding sequestrations of a tenant's effects, to enable him to raise an action of damages against his landlord for having obtained and executed them oppressively; and neither is it any reason for sisting such an action, that the landlord has brought a count and reckoning against the tenant. *M'Leod*, 11th February 1829; 7. S. 396.

All the persons who are participant in committing a wrong, are of course responsible for the consequences,—all being *versantes in illicito*. It may, however, be sometimes matter of nicety to determine who are, and who are not, responsible for the alleged execution of diligence. Thus, in the case of a creditor, whose claim of debt is indisputable, and who has put diligence into the hands of a messenger-at-arms, with instructions to put it in force, the question has arisen,

—Whether the creditor is answerable for the blunders or illegalities of the messenger in executing the diligence? It is generally understood, that the creditor, or party in whose name, at whose instance, and for whose behoof, steps of diligence are taken, is answerable for the consequences of all errors or blunders which may be committed by those entrusted with the diligence. So, accordingly, it was ruled that a creditor was liable in damages on account of the illegal or blundered manner in which the messenger executed a poinding. *Macdonell*, 21st July 1835; 13. S. 701. But if a messenger, to whose charge a diligence has been committed for the purpose of execution, spontaneously steps out of his jurisdiction altogether, it would rather seem that his employer, if he did not specially authorise or direct any such proceeding, will not be answerable for the consequences. *Menzies*, 27th December 1839; M'F.'s J. R. 281.

If a party poinds effects belonging not to his debtor, but to some other person, he will be answerable in damages to the true owner. *Combe & Co.* 23d March 1826; 4. M. 49. And to use a poinding in virtue of diligence expede on a bill which had been extinguished by a renewal, will subject the owner in damages. *Charters*, 14th March 1838; M'F.'s J. R. 5.

Interdict.—In actions of damages founded on the use of this species of legal restraint, as on those which have been already referred to, the general rule would appear to be, that a party who wrongously obtains and uses an interdict, is answerable for the loss which may be thereby occasioned to his opponent. There can at least be little room for questioning the soundness of this proposition, when the interdict has interfered with the state of possession as previously existing, and has been the cause not only of loss to the party against whom it was directed, but of gain to the user of it;—as, for example, when the tenant of a quarry has been illegally, and in violation of the terms of his lease, interrupted in his oper-

ations, and for sometime interdicted from carrying them on. *Roberts*, 7th December 1825; 4. M. 1.

On the other hand, where an interdict was applied for and obtained, in circumstances indicative of the most perfect *bona fides*, on the part of the user of it, and where the effect of it has been merely to preserve things entire, and in the same state and condition in which they had previously been for a course of time, till the determination of the disputed matter of right, the Court refused to sustain an action of damages,—there being no allegation of *mala fides*, although there was an allegation that the interdict had been the source of patrimonial loss to the party against whom it was directed, and of gain to the interdictor. *Moir*, 16th November 1832; 11. S. 32. In this case, the general principles of law were stated by Lord Balgray, as follows:—'The question is, whether the record contains relevant matter of damages? Generally speaking, where a summary interdict is craved, this pretorian interposition is used *periculo petentis*; and the party using it, is liable to indemnify the other party, if he be wrongously interdicted. It is not enough for a party to say, in defence to a claim of damages, that he did not proceed *brevi manu*, but by judicial authority, and the use of Interdict. But it is always a question of circumstances, whether damages are due in the special case in which the interdict has been asked and used. And on looking to the whole facts of this case, and especially to this, that the Sheriff, in granting the interdict, as in a possessory question, reserved to the pursuer to try the question of right in a declarator, and that it was only after ascertaining the question of right in the declarator that the interdict was recalled, I do not think that the defender incurred liability for damages, merely because he applied for the interdict, and kept it up till the Issue of the declarator, in which there was no excessive litigation.'

Claims of damage may arise in consequence of the breach,

as well as the use of an interdict. Nos. XI. and XII. are examples of Issues in the former description of cases.

Seizure under the Excise Laws.—In a case which occurred of this description founded on the seizure of a certain quantity of seed under the Statute 24, Geo. II. c. 31, § 2 and 6, the issues—of which Example No. XVII. is a copy—contained the charge of malice; and the discussion turned on, whether the public officer had fairly exercised his official duties, and had probable cause for his conduct? *Watt*, 18th July 1828; 4. M. 571.

Admissions prefixed to the Issue.—The nature of the prefatory admissions in cases of the present class generally, may be collected from the examples which follow. It may be made matter of admission, that the particular diligence in question had been used; and, when such is the case, it will also be found to simplify the matter for trial, to prefix an admission, to the effect that the diligence was ultimately recalled, or found to be informal or inept; or, that the action on which it was founded, was dismissed, or held to be untenable.

Counter Issue.—It will always be a good defence, and afford relevant matter for a counter Issue, that the property or effects which the restraint complained of is alleged to have affected, did not *de facto* belong to the party pursuing for reparation—as illustrated by Example No. XIII. It would also be an equally good defence for a counter Issue, that the pursuer's claim had been satisfied or discharged, or that the defender had acted with the concurrence or authority of the pursuer himself. In the case, also, of an action for breach of arrestment, it would be a good defence, and might be made the subject of a counter Issue, that the diligence or *nexus* had been loosed or taken off before the Act complained of was done, as in Example No. VI.

EXAMPLES.

No. I.

Quigley v. *Reid and Vallance*,—11*th July* 1826.

It being admitted, that on the 4th day of November 1824, the pursuer was indebted in the sum of £2 : 12 : 7. to the defender, and that on the said 4th day of November 1824, the pursuer was cited to appear at the defender's instance before the Justices of Peace for Ayrshire for payment of said debt, and upon the same day that arrestments were used by the defender in the hands of Robert M'Allister, Robert Girvan, and David Brown, and John Thom, in security of the said debt,

Whether the pursuer was thus cited, and said arrestments were used by virtue of an illegal and irregular complaint, precept, or warrant, alleged to be of the clerk for the district of Kilmarnock, to the Justices of Peace for the County of Ayr, to the injury and damage of the pursuer?

Whether the said arrestments were used in the hands of the said persons in security of the said debt, to the amount of betwixt £30 and £40, to the injury and damage of the pursuer?

Damages laid at £100.

No. II.

Anderson, Senior, v. *Anderson, Junior*,—15*th June* 1830.

It being admitted, that on the 10th day of December 1828, the defender did raise before the Magistrates of the

city of Glasgow an action against the pursuer for repayment of the sum of £59 : 11 : 6d. sterling, deposited by the defender in the hands of the pursuer, and for payment of £23 sterling, as wages due by the pursuer to the defender,

Whether, on or about the 10th day of March 1829, the defender maliciously, and without probable cause, did take out, or cause to be taken out, a precept of arrestment upon the dependence of the said action, or on or about the 11th day of the said month, maliciously, and without probable cause, did use, or cause to be used, against the pursuer's correspondents in the hands of Andrew Sclanders, Deacon of the Incorporation of Bakers in Glasgow, and Andrew Brownrig, Baker, Collector of the said Incorporation, or in the hands of either of them, for the sum of £300 sterling, to the injury and damage of the pursuer?

Whether, on or about the 14th day of March 1829, the defender maliciously, and without probable cause, did use, or cause to be used against the pursuer, arrestments in the hands of William Taylor, keeper of the wheat lofts or granary at Clayslap, and of Forsyth, keeper of the wheat loft at Partick, both near Glasgow, or in the hands of either of them, for the sum of £150 sterling, to the injury and damage of the pursuer?

Damages laid at £500.

No. III.

Clarke v. *Brooks*,—*8th June* 1837.

Whether, at Fisherrow, on or about the 4th day of September 1835, the defender wrongfully arrested certain

rags, the property of the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. IV.

Mackarsie v. *Fleeming, &c.—24th November* 1829.

It being admitted, that on the 27th August 1827, the pursuer granted to the defenders, Fleeming and Watson, a bill of exchange for the sum of £49 : 9 : 1; and that on the 5th day of January 1828, there was a balance of £32 : 12s. 10d. due on the said bill,

It being also admitted, that diligence was done on the said bill, and that arrestments were used by the said Fleeming and Watson in the hands of Pillans, George Russel, and George and John Dron, on the 31st day of December 1827,

Whether, on or about the 10th day of January 1828, the pursuer tendered payment of the said sum of £32 : 12s. 10d. the balance of the said bill, to the defender, Archibald Walker, as the authorised agent, and acting for the defenders, Fleeming and Watson; and Whether the defenders, or any of them, wrongfully refused to accept the said sum of £32 : 12 : 10, and to deliver up the said bill, and loose the said arrestments, to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. V.

Rough v. *Carrick*,—10*th February* 1820.

Whether, in the months of August or October 1818, at Edinburgh, the defender did receive from William Carrick, formerly Candlemaker in Edinburgh, now Merchant in Cronstadt, in Russia, 1,210 and 1,000 pieces of lathwood or thereby, 2 deals, 8 casks tallow; 3 dozen tongues, and one bear, the price or value of which still remained due, and for which he had not accounted to the said William Carrick, on the 16th October 1818, when the arrestments were laid in the defender's hands by the pursuer.

No. VI.

Lowrie v. *Thomson*,—2*d December* 1828.

It being admitted, that on the 4th day of October 1823, John Howison, builder in Edinburgh, was indebted to John Lowrie, the pursuer, in the sum of £81 sterling, contained in a bill dated the 7th January 1818, drawn by the said John Howison on, and accepted by Henry O'Harra,

It being also admitted, that on the 4th day of October 1823, arrestments were used at the instance of the pursuer, in the hands of the defender, John Thomson, of any sum due by him to the said John Howison, in security, and for payment of the said sum of £81, and interest thereon.

Whether, on the said 4th day of October 1823, the said John Thomson was indebted and resting-owing to the said John Howison, as an individual, in the sum of £250 sterling, or any part thereof?

Or,

Whether the said sum of £250 was paid by the said John Thomson, to or on account of the said John Howison, subsequent to the said 4th day of October 1823; and Whether, on or about the 29th day of December 1823, and previous to the said payment, the said correspondents were regularly and properly loosed?

No. VII.

Wood and Co. v. *Walker,—2d February* 1841.

It being admitted, that by decrees of the Court of Session, dated 3d July and 18th December 1835, and 12th January and 2d February 1836, the late John Spence, accountant in Edinburgh, was found indebted to the pursuers in various sums, amounting to £569, 9s.; and also that arrestments were used in the hands of the defender, on the dependence of the process in which said decree was obtained, and that of dates the 1st day of June 1832, the 24th day of February 1834, and the 15th day of June 1835,

Whether, at the time when all or any of the said arrestments were used, the defender had in his possession property belonging to the said John Spence, or was indebted to him; and Whether the defender, by virtue of the said arrestments, or any of them, is indebted and resting-owing to the pursuers in the said sum, or any part thereof, with interest thereon?

No. VIII.

Mackarsie v. *Williamson,—5th February* 1825.

It being admitted, that the pursuer, Thomas Mackarsie,

was attorney for George Williamson, residing in Richmond, Virginia, in North America, and that the said George Williamson, and the said Thomas Mackarsie, as his attorney, did, upon the 23d day of January 1823, obtain a decree in absence, reducing and setting aside a settlement executed by the late John Williamson, manufacturer in Auchtermuchty,—It being also admitted, that the defender, Christian Thomson or Williamson, and John Williamson, brought an action for reducing the said deed, in which the said George Williamson was called as a defender, and the said Thomas Mackarsie, as his attorney, which said action concluded that both the defenders should be conjunctly and severally liable in expenses,

It being also admitted, that on the 14th day of July 1823, the diligence of inhibition was used against the said Thomas Mackarsie on the dependence of the said action, by the said Christian, Mary, and John Williamson,

Whether the said inhibition was illegally used against the pursuer, Thomas Mackarsie, to the loss and damage of the said pursuer?

Whether, on the said 8th day of July 1823, the said Thomas Mackarsie, by himself or his agent, offered payment of the expenses incurred in the said action; and Whether the said offer was not accepted; and Whether, notwithstanding the said offer, the said inhibition was used as aforesaid, to the injury and damage of the said Thomas Mackarsie?

Whether, on or about the 17th day of January 1824, the sum of £69 was consigned in the Commercial Bank, in payment of the expenses in said action of reduction at the instance of the said Christian, Mary, and John Williamsons; and Whether, notwithstanding the said con-

signation, the said inhibition was continued in force, to the injury and damage of the said Thomas Mackarsie?

Damages laid at £500.

No. IX.

Forsyth v. *Matheson*, *&c.*—10*th July* 1823.

It having been found by a decree of the Sheriff of Rossshire, dated the 1st day of June 1821, acquiesced in by the defenders, that Colin Matheson, Esq. of Bennetsfield, let to the pursuer the farm of Kirkton, and part of the lands of Easter Suddy and Wardies, for the period of 20 years from and after the term of Whitsunday 1817,

And it being admitted, that on or about the 16th day of February 1820, the defenders were trustees on the estate of Bennetsfield, and applied for and obtained from the said Sheriff, on the said 16th day of February, an interdict, prohibiting the pursuer from occupying and labouring certain parts of the said lands,

It being also admitted by the defenders, that in consequence of the said interdict, the pursuer was deprived of the use of about five arable acres of the said land from the said 16th day of February till the 1st day of June 1821,

Whether, under said interdict, the pursuer was prevented from labouring and occupying, and using the said lands to the extent of about six acres, two roods, twenty-nine falls arable, and about three acres pasture, from the 16th day of February 1820 aforesaid, until Whitsunday 1822, to the loss and damage of the said pursuer.

Damages laid at £500.
Sum offered by defenders, £31: 10s.

No. X.

Roberts v. *Earl of Rosebery*,—11*th July* 1825.

It being admitted, that by a missive of lease dated the 20th day of August 1819, John Laing, factor for the defender, acting in name of the defender, and by his authority, let in lease to the pursuer, for the period of ten years from and after Martinmas 1819, a lime-rock or quarry, the property of the defender,

Whether, on or about the 12th day of September 1820, the defender did, in violation of the said missive of lease, apply for and obtain from the Sheriff of the county of Linlithgow an interdict, prohibiting the pursuer from working the said lime-rock or quarry; and Whether, by the said interdict, the pursuer was prevented from working the said rock or quarry from about the said 12th day of September 1820, until on or about the 11th day of November 1821, or any part of the said period, all to the loss and damage of the said pursuer?

Damages laid at £500.

No. XI.

Magistrates of Perth v. *Moncreiff.*

It being admitted, that on the day of March 1819, the defender was, by the Sheriff of the county of Perth, interdicted from slaughtering, or selling butcher meat elsewhere, within the Royalty of the Burgh of Perth there, in the public slaughtering and market place,

It being also admitted, that from the day of 1819, to

the 9th day of July 1819, the defender did slaughter and sell butcher meat in a certain shop, on the north side of the street or road, leading from the said burgh to the village of Auchterarder,

Whether the defender, by slaughtering and selling as aforesaid, in the said street, subsequent to the day of March 1819, did slaughter and sell, within the Royalty of the said Burgh, in violation of the said interdict.

5th March 1831.

No. XII.

Mackenzie, &c. v. *Magistrates of Dingwall, &c.*

It being admitted that in a process of declarator and damages at the instance of the pursuers against the defenders, Lord Corehouse, Ordinary, on the 11th day of March 1828, pronounced the following interlocutor:—'The Lord,' &c.

Whether, between the 14th day of March 1828, and the 19th day of June thereafter, the defenders, in violation of the interdict granted by the said interlocutor, wrongfully fished in any part of the said river, situate above the line delineated on the plan* in process as the march between Balblair and Breakin Ord, as specified in the above interlocutor?

8th July 1834.

* Any such reference as this to a plan is now discountenanced, and indeed given up, in the practice of the Issue Chamber. It has been found to be more satisfactory to embody in the Issue itself, or in a schedule subjoined, a precise description of the subject of enquiry.

No. XIII.

Hossack v. *Combe & Co.*—14*th May* 1825.

Whether, on or about the 10th day of September 1824, the defenders did poind, or cause to be poinded, for a debt alleged to be due by Colin Morrison, Distiller in Ratho, twenty-four dozen of Port and Sherry Wine, and four and a-half dozen of Port Wine, all in bottles, the property of the pursuer, and in a shop No. 18, Hanover Street, in the City of Edinburgh, and Cellar thereof, to the loss and damage of the said pursuer?

Or,

Whether the said Wine was not the property of the pursuer, but was the property of the said Colin Morrison, Distiller at Ratho, and was poinded for a debt alleged to be due by the said Colin Morrison to the defender?

Damages laid at £500.

No. XIV.

Moncur, &c. v. *Carson, &c.*—14*th June* 1834.

It being admitted, that on the 14th day of June 1833, the defender poinded certain goods, the property of the pursuer,

Whether, on the said day, the defender wrongfully sold the said goods, or part thereof, contrary to the Statute, 10, Geo. III, c. 55, to the loss, injury, and damage of the pursuer?

Whether the defender charged more than the sum autho-

rised by the said statute, for executing the said poinding and sale, to the loss, injury, and damage of the pursuer?

Damages laid at £50.

No. XV.

Young v. *Watson.*—*5th July* 1836.

Whether, on or about the day of 1835, the defender wrongfully poinded, or caused to be poinded, certain furniture, the property of the pursuer, in the house, No. Bellevue Crescent, to the loss, injury, and damage of the pursuer?

Whether the defender wrongfully failed to give the pursuer due and regular intimation of the sale, proposed to be made of the furniture poinded as aforesaid, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XVI.

Gordon v. *Royal Bank.*—*19th June* 1828.

It being admitted, that from the month of June 1819 to the month of January 1823, the pursuer was proprietor of certain shops fronting the High Street, in the city of Edinburgh,

It being also admitted, that an application was made by the pursuer for liberty to advance the front wall of his said shops towards the said street, and that the defenders opposed the said application; and that the Second Division of the Court of Session, by an interlocutor dated the 26th

day of February 1819, dismissed the original application for the pursuer, by which interlocutor the pursuer was prevented from making the said alteration,

It being also admitted, that on the 4th day of June, the House of Lords reversed the said judgment, and that an interlocutor dated the 19th day of December 1826, the Second Division of the Court of Session found, that the pursuer had grounds for claiming damages prior to the date of entering the said Appeal to the House of Lords,

Whether the defenders wrongfully resisted the said application, and from the month of June 1819 to the month of January 1238, or during any part of the said period, wrongfully prevented the pursuer from advancing the said wall as aforesaid, to the injury and damage of the pursuer?

Damages laid at £2,000.

No. XVII.

Watt v. *Blair*.—11*th July* 1826.

It being admitted, that in the year 1808, the defender was Stamp-master in Dundee, and General Surveyor of the Linen Manufacture under the Board of Trustees, and that the pursuer is a merchant in the said town,

It being also admitted, that in the end of the year 1808, the pursuer purchased two cargoes of lint or flax seed, amounting to fifty-seven lasts or thereby, imported into port of the said town by Leighton and Guthrie, merchants there,

Whether, on or about the 8th day of March 1809, the defender, knowing the said seed to be good, fresh, and fit

for sowing, did illegally, wrongfully, aud maliciously seize, or cause the same to be seized, and did apply to the Sheriff of Forfarshire to have the same condemned as unfit for sowing, to the injury and damage of the pursuer?

Whether, in the month of October 1809, the defender did illegally and maliciously instigate the Board of Trustees or their officers, to make a second seizure of the said seed; and Whether, in consequence of the said instigation, the said seed was illegally seized by the said officers in the month of 1811, to the injury and damage of the pursuer?

Damages laid at £10,000.

PART VII.

BILLS OF EXCHANGE AND PROMISSORY NOTES,

INCLUDING

QUESTIONS AS TO THE FORGERY—ADOPTION—NEGOTIATION OF BILLS AND PROMISSORY NOTES,—AND OTHER CIRCUMSTANCES, IN RELATION TO THEIR VALIDITY AS OPERATIVE GROUNDS OF DEBT.

THAT questions of fact frequently arise in regard to bills and promissory-notes, peculiarly fitted for trial by a Jury, is well illustrated by the subjoined examples of Issues. It can scarcely be said, however, that as yet, there is any well settled course of practice in regard to the terms and structure of the Issues in such cases.

The general Issue—Whether, under any particular bill or promissory-note, the defender is, or is not indebted and resting owing to the pursuer in the sum of money which it bears to contain, or any part thereof?—is of very simple construction; and may be, in an enlarged sense, made to serve the objects of the parties in almost every case that can arise in relation to bills of exchange or promissory-notes. Under such an Issue it may be tried,—Whether the alleged debtor is, or ever was, a party to the bill?—or rather, Whether his name has not been forged?—Whether,—supposing his name is not to the bill,—he nevertheless became responsible for its contents, on the principle of adoption or delegated authority? Whether he became a party to the document

not been discharged by want of due negotiation or otherwise? Or, Whether the bill was concocted in such circumstances, or for such a consideration, as to render it invalid and inoperative in law? All of these distinct and separate questions might, doubtless, be tried under the general Issue of resting owing—leaving it to the record to denote the real point or points in the case, and to circumscribe the parties in regard to the nature and extent of the investigation admitted to probation. But it has been already, oftener than once, endeavoured to be shewn, on the one hand, that an Issue so perfectly general as to be in itself almost unmeaning, is exposed to many disadvantages, while, on the other hand, there are many and great advantages in the Issue being always briefly, and in some measure, indicative of the real matter for trial. In practice accordingly, the leaning has been in favour of the latter course.*

Some of the leading questions which have occurred, or which are most likely to arise in connection with Jury cases, relating to bills and notes, may be shortly noticed:—

Genuineness of party's Signature.—When it is pleaded,—and it may be done either by way of reduction or suspension,—by the alleged debtor in a bill or promissory-note, that the name said to represent his signature, and in virtue of which he is proceeded against, is not truly his handwriting, but must either be a forgery, or the name of some other party, or a purely fictitious name, the matter goes to a Jury for investigation and trial. The question can be tried, as already observed, under the general Issue of "not resting owing," as in Example No. I.; or, where the dispute arises with the acceptor, or alleged acceptor of a bill, the general Issue may be adopted, of—Whether the bill is "not the

* With great deference, I cannot help considering the reasoning of Lord Chief Commissioner Adam (Treatise on trial by Jury, p. 65, *et seq.*) in support of the general Issue, as very far from being satisfactory or conclusive; and extending to cases for which they were not intended, the remarks of Lord Eldon in Fife's case.

acceptance," &c. as in Example No. VI. But both of these forms of Issue are objectionable, in respect of their vagueness and generality. Under the Issue of "not resting owing," it has been shewn that all sorts of pleas may be insisted in. Under the Issue, again, of "not acceptance," various and inconsistent pleas may also be raised. It may be meant that the name representing the acceptor's, is a forgery, or is fictitious; or the plea may be fraud or concussion, or minority, or something else denoting that there never was any legal obligation.

In place, therefore, of adopting either of the form of Issues referred to, it would seem to be better in all cases turning simply on the genuineness of a name or signature, to put the question,—Whether the particular name is not the subscription and proper handwriting of the defender or suspender, as in Example No. V? This form of Issue, while it indicates the real nature of the matter for investigation, is equally brief and distinct as the general Issue either of "not resting owing," or "not acceptance."

The plea of forgery was negatived by the verdict of a Jury in *Hepburn*, 14th July 1817; 1. M. 261. On the other hand it was found by a Jury, that a subscription to a bill, was not the handwriting of the party, in *Lindsay*, 12th July 1822; 3. M. 97. The defence to payment of a bill, that it was a fictitious document, was given effect to by a Jury in *M'Nab*, 18th June 1821; 2. M. 479. But where a party was personally cited as a defender to an action in an inferior Court, founded on a Bill apparently subscribed by him, and pleadings were lodged by him in his name, and after being made aware that his name had been forged by his brother—allowed decree to pass—he was not permitted in a suspension to allege forgery, or that no authorised agent had appeared for him; *Provan*, 29th June 1821; 1. S. 92. On the same principle it has been decided, that a party who once admitted his subscription, is barred from pleading forgery afterwards. *M'Kenzie*, 4th March 1825; 3. S. 614.

So also an allegation by one of two brothers, *ex facie* co-acceptors of a Bill, that his signature had been forged by his brother, was held barred, as he had received a charge for payment, and acquiesced in it for a long time, during which his brother left the country. *Maiklem*, 16th November, 1833; 12. S. 53.

Fraud or Force.—When a party's signature to a Bill or promissory note is admitted, it is, in the general case, incompetent for him to support a defence or objection to payment, except by the writ or oath of the holder. An exception, however, is made from this rule, where either fraud or force is duly alleged: and such questions are now usually sent to a Jury for trial. Nos. VIII. IX. and X. of the subjoined Issues, are examples of this description.

To enable a party to get into a case of fraud or force, it would rather appear that he must bring a reduction, such pleas not being competent *ope exceptionis;* although it may also be necessary at the sametime to suspend, in order to stay the execution of diligence, as in the case of *Campbell*, 24th January 1822; 1. S. 266. An allegation, that a Bill had been obtained by concussion, was held refuted by a partial unconstrained payment, before the Bill fell due. *Thomson*, 23d January 1829: 7. S. 305.

Adoption of, or authority to grant Bills.—A party, although his own proper handwriting should not be on a Bill or promissory note, may nevertheless be liable for the contents of it, in respect of his having adopted it as his obligation, or in respect of his having authorised another to adhibit his name to it. Thus where forgery was pleaded in defence against a Summons for payment of two Bills specially libelled on, it was held competent to prove that the Bills were delivered by the party himself as genuine, and this was sufficient to entitle the pursuer to decree. *Miller*, 22d January 1831;

9. S. 328. See also the cases of *Provan*, *M'Kenzie*, and *Maiklem*, noticed above, under "Genuineness of party's signatures."

No. XIII. of the subjoined Forms, is an example of an Issue founded on the principle of adoption; and No. XIV. is an example of an Issue, where the alleged debtor's liability was maintained on the ground of his having authorised his name to be adhibited to the Bill.

Consideration given for Bill.—Although in general, the question, of what consideration was given for a Bill or Note, cannot be made the subject of enquiry before a Jury,—yet there are special cases when such a course is both competent and advisable:—For example, when the allegation or plea against payment is, that the Bill was granted *ob turpem causam*, or as a *donatio mortis causa*, as would appear to have been the case in examples, Nos. XV. and XVI.; or the enquiry might involve the question, whether the document had been given for money lost at play—it having been held that such a Bill is bad, even in the hands of an onerous *bona fide* indorsee. *Laidlaw*, 9th June 1801; *Hume* 45. Or, the question might be raised, whether a Bill was granted as a bribe or inducement to frustrate the ends of justice in a matter of crime, as in the case of *Kennedy*, 7th February 1823; 2. S. 192; where a Bill of Suspension of a charge by an indorsee, was passed, it appearing that the Bill had been accepted to induce the drawer not to prosecute a charge of theft against the acceptor, but who was tried and committed, and the Bill had been produced on the trial, and the indorsation was posterior to it. Or the defence, that a Bill was granted as payment of the wages of prostitution, might be pleaded, and sent to a Jury. *Hamilton*, 3d June 1823; 2. S. 356. In the most of these cases, it would appear to have been unnecessary to go into any investigation before a Jury,—the matter of fact being either admitted, or made out through concussion, or fraud? Whether his liability has

otherwise,—but where relevant allegations are made, and an investigation becomes requisite in such cases, a trial by Jury is the course which would likely be adopted.

Negotiation of Bills and Notes.—Questions of this description may resolve into matters of disputed fact, well adapted for the determination of a Jury. Nos. XIX and XX of the subjoined Issues are forms applicable to such cases. Accordingly, where the disputed allegations were, that the indorsee of a Bill had sent an intimation through the post-office, addressed to a party, who signed per procuration of the drawer, of the dishonour of the bill, and that the drawer had at all events waived the effect of non intimation by subsequent acts, the case was remitted to a Jury. *Murray and Son*, 2d July 1824; 3. S. 202. The question again,—Whether the dishonour of a bill had been duly intimated? has been tried by a Jury, under the Issue—"Whether the defender is indebted and resting owing to the pursuer in the sum of £50, with interest, in the promissory note, No. 9 of process, bearing to be granted by John Milne, baker in Galashiels, on which the defender's name appears as indorser, dated 6th February 1837, and to be payable two months after date?" *Thomson*, 13th July 1838; M'F.'s J. R. 85.

On whom rests the Onus Probandi?—Whether the alleged debtor in a Bill or Note should stand as the pursuer in the Issue, and so undertake the *onus* of establishing his *non*-liability, depends on circumstances.

Where the alleged debtor admits his signature to a bill or promissory note, but pleads *non*-liability, in respect of having been concussed or deceived into becoming a party to it, the *onus* will lie on him, and he must stand as pursuer in the Issue—the *prima facie* case and presumption of law being against him. No. IX of the subjoined Issues is an example in point.

The same rule generally applies, (as may be observed from the examples Nos. V and VI), even in those cases where the alleged debtor's name is apparently adhibited to the document, although in place of being admitted, it is challenged as a forgery,—bills and promissory notes being, by the law of Scotland, probative in themselves, and entitled to receive effect as such, till the contrary has been shewn.

But where liability is attempted to be fixed on the alleged debtor, in respect of his having adopted the bill, or become otherwise responsible for it, in circumstances collateral or extrinsic of the document itself, the creditor, or party insisting for payment, must undertake the *onus*, as in examples Nos. XIII and XIV.

The distinction, as now adverted to, in regard to the *onus probandi*, was well illustrated in the case of *Rathbone*, 18th March 1833; 11. S. 574. Two questions having, in that case, been raised—(1.) Whether the acceptor's signature was genuine? and (2.) Whether, though it were not, he had not adopted the bill? and these being combined in one Issue, on which the acceptor stood as pursuer, it was observed by the Court, that there should have been a separate Issue as to the adoption, in which he should have stood as defender.

Although the general rule of law, as well as the practice, is undoubted, that in Scotland (differing in this respect from the law and practice of England), a Bill or Note is probative in all respects, both as to the genuiness of the date and of the signature, till it be found that they are not genuine, yet the hardship of such a rule must in many cases be very great; so much so, that probably the rule would not be given effect to in any case involving specialties operating against it. Lord Moncreiff in a late case—an Advocation touching a bill from the Sheriff-court of Glasgow—took occasion to express his opinion on the subject thus:—"The Sheriff (Depute), by his first interlocutor, returning to that of the Sheriff-Substitute, laid the *onus* on the pur-

suer of the action, as the party founding on an instrument no way authenticated, except by a subscription *alleged* to be that of the apparent obligant, the body of it *being in the hand* of the author of the party founding on it as creditor. There seems to be much reason in this; and though it has not always been observed, and might, if not cautiously administered, be liable to abuse, the Lord Ordinary thinks, and has long thought, that it is, in many cases, the just principle. For to put a man to prove the *negative*, that certain words or letters are *not* his writing, merely because another has impudently put the paper in circulation, when there is no statutory attestation, and no evidence whatever of his having written it is offered, has always seemed to him to be a system which, in many situations, must be calculated to expose innocent parties to the skilful machinations of sharpers." The case having turned, however, on another point, no authoritative judgment was given on the matter thus broached by Lord Moncrieff, as Ordinary.—*Macdonald*, 9th March 1839; 1. D. 706.

As the general rule is, that the burden of proving lies on the party suing for recourse, so it was laid on the chargers and holders of the Bill in the case of *Thomson*, 13th July 1838; M'F.'s J. R. 85.

EXAMPLES.

No. I.

Anderson v. *Cautioner, &c.—26th January* 1826.

It being admitted, that the pursuer, William Anderson, subscribed the promissory-note, No. 3 of Process, dated the 4th day of December 1819, for the sum of £25,

Whether the pursuer, William Anderson, is not indebted

and is not resting-owing to the charger, William Anderson, under the said promissory-note, in the said sum of £25, contained in the said promissory-note?

No. II.

Cochrane v. *M'Cartney*,—*29th January* 1830.

Whether, under the bills, or any of them, in the schedule hereto annexed, the pursuer, Robert Cochrane, is not indebted, and is not resting-owing to the defender in the sum or sums of money contained in the said Bills, or any of them?

No. III.

King v. *Creichton*,—*12th December* 1839.

It being admitted that the pursuer indorsed his name on the promissory-note for £300, dated 9th December 1828, No. 10 of Process,

Whether the pursuer is not indebted and resting-owing to the defender in the said sum contained in the said note?

Welch, &c. v. *Young*,—*29th January* 1840.

Whether the defender is indebted and resting-owing to the pursuer in all or any part of the sum or sums of money, with interest thereon, contained in the three bills of exchange, Nos. 5, 6, and 7 of process, bearing to be accepted by the defender, and to be dated Mayence, two of them on the 1st, and the other on the 3d day of August 1837?

No. IV.

Arnot v. *Graham, &c.*—1*st June* 1837.

It being admitted, that on the 10th day of October 1826, certain individuals, members of a congregation in connection with the body of Dissenters denominated Relief, feued a certain portion of ground for the purpose of erecting a chapel and other buildings in Brighton Street, Edinburgh, in terms of a feu-disposition dated the 10th day of October 1826,

It being also admitted, that the pursuer is executor of the said James Arnot, and in right of the promissory-notes after mentioned,

Whether on or about the 5th day of December 1830, the managers of the said congregation, or any of them, granted to the late James Arnot, the promissory-note, No. 3 of process, for the sum of £200, and on or about the 6th day of June 1831, the other promissory-note, No. 4 of process, for £150, or either of them?

Whether the defenders, or any of them, are conjunctly and severally indebted and resting-owing to the pursuer in the sums contained in the said promissory-notes, or either of them, or any part thereof, with interest thereon?

No. V.

Neilson v. *Murrison.*

Whether in the Bill, No. of process, dated the 23d of February 1842, and bearing to be drawn by William Robertson upon, and accepted by "Robt. Neilson,' adhi-

bited to the said Bill as the acceptor thereof, is not the subscription and proper handwriting of the suspender?

No. VI.

Tolmie v. *Dallas.*—*4th June* 1830.

Whether the Bill of Exchange in the Schedule hereunto annexed, is not the acceptance of the pursuer John Tolmie, Esq. residing in Uiginislo by Dunvegan?

No. VII.

Paterson v. *Montrose Bank.*—*1st July* 1830.

Whether the Bills of Exchange or Promissory Notes in the Schedule hereunto annexed, were not, or any of them was not, indorsed by the pursuer, David Paterson, Merchant in Nether tenements of Brechin?

Or,

Whether tbe pursuer is indebted and resting-owing to the defender in all or any part of the sum or sums of money, contained in the said Bills of Exchange or Promissory Notes?

No. VIII.

Armstrong v. *Leith Bank.*—*7th March* 1833.

Whether the late Thomas Armstrong was induced, by the false and fraudulent representations, or concealment of the defenders, or any of them, to grant the Bill of Exchange, No. 9 of process, dated the 3d day of October 1826, for the sum of £1,500 sterling?

Whether, on or about the 11th day of July, and 21st day of August 1827, the defenders wrongfully exacted and received from the pursuer the sum of £1,500, and £19, 14s. 6d. or any part thereof, as payment of the said bill, with interest; and Whether the defenders are indebted and resting owing to the pursuer in the sum wrongfully exacted as aforesaid?

No. IX.

Greig v. *Miln*—16*th January* 1838.

It being admitted that the defender, David Miln, during the year 1835, was cashier of the said Dundee Union Bank, and that Messrs. Guthrie are and were agents of the said Bank at Brechin;

It being also admitted, that on or about the 17th or 18th September 1835, the pursuer wrote his name as indorser on the bill of exchange for £150, No. 10 of process,

Whether, by fraudulent misrepresentation, or fraudulent concealment, the said Messrs. Guthrie induced the pursuer to indorse the said bill?

No. X.

M'Nab, &c. v. *Telfer.*—12*th May* 1821.

Whether the bill in process, dated 20th May 1819, for £66, 12s., purporting to be drawn by Joseph Johnstone, and to be accepted by John Campbell, Preses of the Society of Grocers and Spirit-dealers at Dalry, in the county of Ayr, which bill is admitted by the defender to have been the value given by the said Joseph Johnstone to the

pursuers, in return for the bill charged on, was a fictitious and false document, in respect there was no such person as John Campbell, the supposed acceptor, and no such company as the Society of Grocers and Spirit-dealers at Dalry aforesaid?

Whether, at the time the pursuers received the said bill, dated the 20th May 1819, the defender represented to them, that the said bill was a good and sufficient, or genuine document?

Whether, at the time the pursuers received the said bill, dated the 20th May 1819, the defenders knew or believed that the said bill was a false and fictitious document?

No. XI.

Berry, &c. v. *Balfour, &c.*—*21st June* 1822.

Whether the bill in process, dated 11th January 1819, for the sum of £385 : 18 : 1, drawn by the pursuers, and accepted by Alexander Elder and Company, was not protested for non-payment, on the 14th day of April 1819, by James Lundin Cooper, notary-public in Kirkaldy, in the usual place of business of the said Elder and Company, at Kirkaldy, or in the personal presence of George Elder, a partner of the said Company, and in presence of Thomas Meldrum and Robert Beatson, both writers in Kirkaldy?

Or,

Whether, on the said 14th April, the said bill was protested for payment, at the usual place of business of the said Elder and Company, by James Moyes, clerk to James Balfour, agent at Kirkaldy for the Commercial Bank, the holder of said bill,—and whether the said bill was noted as protested by the said Cooper at Kirkaldy the same

day. And Whether, by the usual practice, a bill is held duly protested, when it is presented for payment on the last day of grace by a person authorised by the holder, and, upon non-payment, is noted by a notary as protested upon the same day on which it was presented for payment?

No. XII.

Beveridge v. *Scott*,—*5th June* 1822.

Whether the bill in process, dated February 25, 1817, for £100, bearing to be drawn by John Scott, addressed to Mr. John Beveridge, town-treasurer, Auchtermuchty, and accepted by the said John Beveridge, and indorsed by the said John Scott to Thomas Adamson, was accepted by the said John Beveridge solely in his capacity of treasurer of Auchtermuchty aforesaid, or by the said John Beveridge, as an individual, for which he was to be personally liable?

Whether the bill aforesaid was accepted by the said John Beveridge merely as an accommodation bill, for which no value was paid, for behoof of the Mason Lodge of St. Cyre, of which the aforesaid John Scott was then boxmaster;—or, Whether the said bill was accepted for value, or in part payment of a debt admitted to have been previously due by the Town of Auchtermuchty to the said Mason Lodge of St. Cyre?

Whether diligence was raised upon the said bill on or about the 26th day of August 1817, in the name, and at the instance of the aforesaid John Scott, upon which the pursuer, by directions and orders of the defenders, John Williamson junior, James Bonthorn, David Chalmers,

James Stewart, Alexander Simpson, James Dempster, James Weddell, and John Black, all and each, or one or other of them, was apprehended at Auchtermuchty aforesaid, on or about the 13th day of April 1818, by George Coll, messenger in Falkland, and detained for a time in the custody of the said George Coll, a prisoner, to the damage and injury of the said pursuer?

Whether, on the 6th day of May, in the year aforesaid, upon the diligence raised as aforesaid, and by the directions and orders of the defenders as aforesaid, the pursuer was again apprehended at Auchtermuchty, or the neighbourhood thereof, by the said George Cole, and detained a prisoner, to the damage and injury of the said pursuer?

Whether, on the 7th day of May, in the year aforesaid, upon the diligence raised as aforesaid, and by the directions and orders of the defenders as aforesaid, the pursuer was again apprehended at Auchtermuchty, or the neighbourhood thereof, by the said George Coll, and was detained a prisoner, to the damage and injury of the said pursuer?

Whether, upon the 8th day of May, in the year aforesaid, and upon the diligence raised as aforesaid, and by the orders and directions of the defenders as aforesaid, the pursuer was again apprehended on his way to Edinburgh, about six miles from Auchtermuchty aforesaid, by the said George Coll, and taken a prisoner to the jail of the said place, and there detained till the 28th day of May aforesaid, to the damage and injury of the said pursuer?

Damages laid at £500.

No. XIII.

Hay v. *Boyd*,—*2d June* 1821.

Whether at Perth, in the house or shop of Andrew Millar, on or about the 3d day of August 1820, the suspender Boyd, acknowledged his having accepted the bill in process, purporting to be drawn by William Boyd, and accepted by the said Thomas Boyd, for £100, bearing date 24th January 1820; or Whether the said suspender agreed to pay the said bill to the charger?

No. XIV.

Gray and Co. v. *Robertson*,—*3d July* 1834.

Whether, on or about the 21st day of May 1832, the defender authorised his son Robertson to subscribe his, the defender's name, as acceptor to the bill of exchange, No. 5 of process, for the sum of £36 sterling, and is indebted, and resting owing to the pursuer in the said sum?

No. XV.

Campbell and Company v. *Kay*,—*17th May* 1833.

Whether the defender is indebted and resting owing to the pursuer in the sum of £27, 9s. 5d. or any part thereof, with interest thereon, as the balance of a bill of exchange for the sum of £30, dated 19th January 1828, granted by the defender to the pursuer?

Or,

Whether the defender granted the said bill as the consideration for the pursuers desisting from a criminal prosecution against the son of the defender?

Whether the defender was induced by the false representation of the pursuers, as to the conduct of his, the defender's son, to grant the said bill?

No. XVI.

Thomson or Young v. *Grant or Young*,—19*th February* 1828.

It being admitted, that the pursuer is the widow, and the defender the executor, of the late William Young, wright in Hamilton;

It being also admitted, that the bill or document in process, for the sum of £52, 10s., dated Hamilton, November 10, 1820, was drawn by the said William Young upon, and accepted by Thomas Selkirk, sawer, and William Selkirk, grocer, Hamilton,

Whether the said bill or document was indorsed by the said William Young, and delivered by him to the pursuer as a donation *mortis causa*?

No. XVII.

Turner v. *Bank of Scotland*,—14*th February* 1834.

Whether the name, James Turner, indorsed on all or any of the said bills and promissory notes in the schedule hereunto annexed, is not the true and genuine subscrip-

tion and proper handwriting of the pursuer, James Turner?

Or,

Whether, under the said bills and promissory notes, or any of them, the pursuer, James Turner, is indebted and resting owing to the defender, as treasurer of the Bank of Scotland, in all, or any of the sum or sums of money contained in all, or any of the said bills and promissory notes, and interest thereon?

No. XVIII.

Morrison v. *Murray*,—*2d February* 1828.

It being admitted, that on the 27th day of June 1824, John Aitchison, farmer in Duncanlaw, was due to the pursuer, Morrison, the sum of £300, contained in a promissory note, dated the 24th day of April 1824;

It being also admitted, that on the 21st day of August 1824, the defender, John Murray, was due to the said pursuer the sum of £170 sterling, contained in a bill dated the 27th day of March 1824, drawn by the said John Murray, defender, and accepted by James Dickson, butcher in Dunse;

It being also admitted, that to account of both, or one or other of the said bills, there was paid to the pursuer the following sums, viz. on the 3d day of July 1824 the sum of £150 sterling, on the 17th day of the said month the sum of £100 sterling, on the 7th day of August 1824 the sum of £49, 0s. 8d. sterling, and on the 21st day of August 1824 the sum of £70 sterling,

Whether, on the said 3d day of July 1834, there was paid to the pursuer, to account of the said bill and promissory

note, the sum of £250 sterling, being £100, along with and in addition to the aforesaid sum of £150 sterling?

No. XIX.

Strathearn v. *Butter*,—*6th June* 1833.

It being admitted, that on the day of the pursuer indorsed to the defender a bill of exchange for the sum of £96, 18s. dated 9th July 1817, drawn by William Baxter, and accepted by James Anderson, at Cleaves, William Anderson, at Burnside, and Charles Liston, sometime at Kinloch;

It being found by an Interlocutor of the Lord Ordinary, dated the 9th day of March 1832, now final, that the defender agreed to accept of a composition on the sum contained in the said bill from the said William Baxter and the said James Anderson, by which they were discharged, and the recourse of the pursuer against the said William Baxter and James Anderson as prior obligants on the said bill, was discharged;

It being also admitted, that by virtue of letters of horning, raised on the said bill, the defender poinded the goods of the pursuer, and sold them for the sum of £40 : 4 : 2,

Whether, in consequence of the pursuer being deprived of his recourse as aforesaid against the said prior obligants in the said bill, the defender is indebted and resting owing to the pursuer in the said sum of £40 : 4 : 2, or any part thereof, with interest thereon?

Or,

Whether the pursuer consented or agreed to the defender's acceptance of the said composition, whereby the prior obligants were discharged as aforesaid, or afterwards acquiesced in the same?

XX.

Smith v. *North of Scotland Banking Company*,—
12*th November* 1839.

It being admitted, that the defender is Manager of the North of Scotland Banking Company, and that, on or about the 21st day of August 1837, the pursuer discounted at the office of the said Bank at Peterhead, the bill of exchange for £300 dated 21st August 1837, No. 4 of process, payable on the 11th and 14th November 1837, and that the bill was protested on the said 14th day of November 1837;

Whether, on or about the said 14th day of November 1837, the defender wrongfully protested the said bill, or wrongfully caused the same to be protested for non-payment, to the loss, injury, and damage of the pursuer?

Whether, after the said bill was protested for non-payment as aforesaid, the defender wrongfully failed to intimate to the pursuer the dishonour of the same, to the loss, injury, and damage of the pursuer?

PART VIII.

LANDLORD AND TENANT,

INCLUDING

QUESTIONS RELATING TO THE CONSTITUTION OF THE CONTRACT OF LEASE—IDENTITY, BOUNDARIES, AND EXTENT OF SUBJECT OF LEASE—FRAUD, ERROR, AND MISREPRESENTATION IN THE CONCOCTION OF A LEASE—MISLABOURING OR MISMANAGEMENT BY THE TENANT—MELIORATION AND REPAIRS—THE OBLIGATIONS OR WARRANDICE OF THE LANDLORD—FAILURE TO GIVE OR TO TAKE POSSESSION OF SUBJECT OF LEASE—NUISANCE OR IMPROPER USE OF SUBJECT LET—INVERSION OF POSSESSION—WRONGOUS USE BY THE LANDLORD OF SEQUESTRATION AND OTHER DILIGENCE—AND, LANDLORD'S RIGHT OF HYPOTHEC.

Constitution of the Contract of Lease.—Although a lease—being generally matter of special written contract—cannot often present a proper Jury question in regard to its constitution, yet there are instances and occasions, when such a mode of investigation may be both competent and advisable. Where, for example, the contract is only for a year—writing being unnecessary—a dispute may, and does frequently arise, as to its true nature and terms, which, like any other contested matter of fact depending on parole testimony, can be most suitably determined by a Jury.

Although none of the subjoined examples are precisely in point, the manner in which an issue for ascertaining the

nature and terms of a bargain or contract of lease, ought to be framed, can be readily collected from several of them.

Operation of rei interventus upon a verbal or informal lease.—The principle of *rei interventus*, as bearing on the contract of lease, is obviously one which must frequently give rise to a trial by Jury.

Whether there has been any *rei interventus*, or whether the acts and conduct of a party are sufficient to support such a principle, is a question which may depend upon a great variety of facts and circumstances—such as possession having been taken, rents paid, entries made in books, or any other act indicative of the real object and understanding of the contracting parties. The case of *Cairns*, 18th June 1833, 11. S. 737—involving the question, whether the possession of a tenant was referable to certain informal writings—although determined by the Court on the facts and circumstances, as admitted by the parties, or proved by their productions, is plainly one of a Jury complexion, and would probably, in more recent years, have been so dealt with.

Identity, Boundaries, and Extent of subject of Lease.—Notwithstanding that a contract of lease has been reduced to writing, and is in all respects regular and formal, a dispute may—in consequence of the generality of the description—arise in regard to the precise boundaries or extent of the subjects let, or even in regard to the identity altogether. For example, where the subject of the contract is referred to, simply as that which had been previously possessed by another person, the identity, boundaries, and extent of such previous possession, may all be made such matter of controversy, as can only be settled after investigation and proof.

For the leading principles which bear on questions of this description, and which may be brought—in some degree at least—under discussion in the preparation of the Issues,

as matter of law and relevancy, reference is made to the recent case of *Hardie*, 12th November 1842, 5 D. 64. In this case a farm, which in the lease was said to contain certain fields specified by name, and to extend to a certain measurement "or thereby," was let to a tenant, as it should be delivered to him at his entry, and the measurement was declared not to be warranted, the lands being let in slump: The tenant having possessed the lands as delivered to him for several years without objection, it was held that he was not entitled to claim, in addition, as part of the subjects let, a small enclosure at the end of one of the fields, which he alleged to be necessary to complete the measurement of the whole farm, and also the measurement of that field, as laid down in the plan referred to in the advertisement of the farm, and furnished to him before he took the farm.

Fraud, Error and Misrepresentation in the concoction of a Lease.—A false or fraudulent representation of the extent of a subject let, will, if considerable, have the effect of nullifying the contract; but if inconsiderable, it will not. Hence questions of fact for a Jury.

In *Balmer*, 11th March 1830, 8. S. 715, and 10. S. App. No. 1, there was a very full discussion of the legal principles which regulate questions of this description. The case having been appealed, was ultimately referred, on a recommendation from the Woolsack. But an opinion was expressed that the Issues, which had been sent to trial in the Court of Session were incorrectly framed, inasmuch as the questions of falsehood and fraud ought to have been put separately. The reason of this is obvious. Whenever there is fraud, however slight, in a material part of an agreement, it cannot stand. But a mis-statement merely, is quite a different matter, and will not nullify a contract, unless it be of a material description, or, in technical phraseology, amount to an error *in essentialibus*.

In the recent case of *Oliver*, 1st February 1840, 2. D. 514, the Note of Lord Cuninghame as Ordinary in the case, is particularly valuable for the exposition of authorities it contains. The decision was to the effect, that a tenant in the last year of a lease of nine years duration of a sheep farm, (which was described as possessed by the preceding tenant, without any specification of quantity of acres, and for which a slump rent was payable,) who, during its currency, declined to give it up, although frequently in arrear of rent, of which he was occasionally relieved, was not entitled to have it reduced, on the allegation that in the advertisement it was represented as containing 6000 acres, whereas it contained only 4000, and to insist for count, reckoning and damages—there being no charge of fraudulent misrepresentation.

Mislabouring, or Mismanagement by the Tenant. — The mode of management or cultivation incumbent on a tenant, and the manner in which he is bound to exercise his possession, depend of course on the nature and terms of the contract betwixt him and the landlord. These matters may be made the subject of special written stipulation, or they may be left to the ordinary rules of law.

Where there is a special written contract, it must speak for itself, and its interpretation or construction is for the consideration of the Court.

In the absence of any special contract, the right of parties fall to be determined agreeably to the rules of common law, —the principles of which are likewise applied by the Court, according to the circumstances of each case, and the usage or practice of the district.

In all cases where the question is—not what is incumbent on the tenant, but—whether he has duly implemented his obligations, it may, as depending on contested facts, be indispensable to send the parties to a Jury.

In the case of the *Marquis of Tweeddale*, 18th Septem-

ber 1821, 2 M. 563, it was matter of issue before a Jury—Whether, or how far, a tenant had mislaboured his farm, in violation of the rules of good husbandry as these were understood and established by the ordinary usage of the district? And in the case of *Hamilton*, 26th December 1825, 4 M. 8, it was tried by a Jury—Whether a tenant had mislaboured his farm, in violation of the express written conditions of his lease?

Nos. I. II. III. and IV. of the subjoined examples are illustrations of cases falling under this head.

Meliorations and Repairs.—Whether the landlord or tenant is bound to be at the expense of meliorations or repairs, or has a claim—the one against the other—for such expenses, or for damages, will generally be matter of law and construction, for the Court to determine on a consideration of the nature and terms of the contract of parties. But the extent of the meliorations or repairs, and the amount of the expenses or damages, or other reparation, are proper questions of fact for a Jury.

The case of *Bell*, 26th February 1822, 1 S. 353, is a striking example of the inexpediency of resorting to any other mode of adjustment. There,—in a question as to the amount of damages due by a tenant to his landlord for non-implement of his lease,—the reporters to whom the case had been remitted, differed in opinion; and a new report having been ordered, but rendered impracticable by lapse of time; the Court resorted to the very unsatisfactory and anomalous expedient of decerning for an average of the damages as formerly reported.

The tenant may, by his acts and conduct, have so barred himself from maintaining an action for meliorations against the landlord, as to preclude even a trial of his claim. *Jenkin*, 10th March 1825, 3 S. 639.

Nos. IX. and X. of the subjoined examples are Issues applicable to questions of meliorations.

Claims arising on the obligations or warrandice of the landlord.—As the landlord is always—(except in the unusual case of there being a special stipulation to the contrary)—under an express or implied obligation to warrant the right to the tenant, and to protect him in the possession, Jury questions—generally arising in the shape of claims of damages—have frequently occurred, founded on this obligation; and the Court has determined various questions of relevancy, bearing on the subject, which arose, or might have arisen, in the preparation of Issues.

In *Munro* v. *MacKenzie*, 18th December 1823, 2 S. 593, the principle was recognised and given effect to—that where a particular mode of settling disputes has been made the subject of special contract and agreement between landlord and tenant, they cannot insist on these disputes being sent to a Jury. The tenant may also be barred altogether from claiming damages from his landlord for operations by the latter, alleged to have been injurious to him, but of which he did not complain at the time. *Clugston*, 15th May 1823; 2. S. 308. A bar, however, of this description, founded as it is on the principle of acquiescence or homologation, is obviously one, which can seldom be given effect to before trial, and will generally—as depending on a variety of facts and circumstances—be the subject of a separate or counter issue for the defender, rather than of preliminary discussion before the Court.

The Court are averse to interpose between the parties and a Jury, by taking up and deciding questions of law and relevancy, previous to the trial, provided there are otherwise sufficient matter of averment in point of disputed fact on record. *Devon Iron Company*, 20th December 1839; 2. D. 268. The Issues in this case—which involved a claim of damages by tenants against their landlord for devastation by fire of the subjects of the lease—are peculiarly complicated. It may be questioned, whether a general Issue of resting owing would not have been better suited than those

which were adopted, for trying the case,—leaving it for the presiding Judge to direct the Jury as to the various points requiring their attention as these might appear in evidence, and if necessary, to require them to return a special verdict.

As illustrations of cases, where claims of damages founded on the warrandice of the landlord, either expressed or implied, have actually occurred, and of corresponding Issues which were sent to and tried by a Jury, reference may be made to—*Roberts*, 7th December 1825, 1 M. 3, where the claim was founded on the allegation of the tenant that he had been for a certain time deprived of the subject let. *Dalziel*, 2d February 1826, 4 M. 18; and *Innes*, 12th January 1828, 4 M. 434, where the tenant was deprived of his farm in consequence of want of power in his landlord to grant a lease; and *Watson*, 15th March 1839, M'F.'s J. T. R. 213; and 11th July 1839, 1 D. 1254; where a verdict was returned for the tenants, as pursuers of an action of damages against their landlord for non-implement of the conditions of the lease.

In the case of *Weston & Sons*, 26th December 1838, M'F.'s J. R. 191, the Issue tried, related to a claim of damages by third parties against both the landlord and the tenant of an upper floor of a house for damage done by an overflow of water into the floor below. A new trial was afterwards granted on the discussion of a Bill of Exceptions to the law stated to the Jury, in regard to the liability of a landlord for his tenant, 10th July 1839, 1 D. 1218; and on this point some observations are afterwards made.*

Failure to give, or to take possession of subject of Lease.—The landlord may be in fault for not duly *giving* possession, or the tenant may be in fault for not duly *taking* possession of the subject let. A claim of damages may thus arise to either party, requiring the interposition of a Jury.

In the case of *Dickson*, 7th September 1828, 6 S. 504,

* *Infra*, p. 228.

damages were awarded to a landlord against his tenant for failure on the part of the latter to enter into possession. And in the case of *Smith*, 16th June 1831, 9 S. 751, and 18th June 1832, 10 S. 829-807, damages were awarded to a tenant against his landlord, in respect of failure on the part of the latter duly to give possession.

Nos. V. VI. VII. and VIII. of the subjoined Issues are examples of cases where the ground of action was failure on the part of the landlord duly to give, or failure on the part of the tenant duly to take possession.

Questions of Nuisance or improper use of subjects let.—The general principles which require attention in the framing of Issues for the trying of questions of nuisance, will be afterwards adverted to under a separate part or division of this Work.* Besides, such questions generally occur—not between the landlord and the tenant—but between them, one or both, and third parties.

There can be no doubt, however, of the landlord's right and title to prevent his tenant making such use of the subject let as amounts to a nuisance, in the same way as he would be entitled to prevent an inversion of the possession. Accordingly, on this principle, a landlord, who had let his coal with exclusive privileges to a tenant, was entitled to prohibit charring coal, in respect there was no permission to that effect in the lease, *Heriot*, 31st January 1804, F. C. and Mor. 15,251. And in the later case of *Mowbray*, 13th June 1833, 11 S. 714, a complaint by a landlord against his tenant for using a sink-pipe in the kitchen as a soil-pipe, and thereby creating a nuisance, was dismissed—not for want of title, right, or interest on the part of the pursuer—but in respect there was no proof of the sink-pipe being employed in an unusual or improper manner, and that the nuisance arose from a defective construction of the pipes and gutter attached to the house. This case exhibits many of the features of a proper Jury question, although having

* See "Nuisance" *infra*.

originated in the Inferior Court, the requisite proof was taken on commission.

The still more recent case of *Johnston*, 17th July 1841, 3 D. 1263, is an instance of a complaint, as for a nuisance, by a tenant against his landlord, founded on the allegation that the latter, by the use of a steam engine, boiler, and machinery in the lower floor of a house, had caused, and was causing injury and discomfort to the former in the upper floor. It is true that in this case, it was remitted to inspectors of skill to report on the state of matters, but that remit was made before answer, and with reference to the more immediate and interim question of interdict. This would not necessarily preclude a trial of the main question by a Jury, especially with a view to the assessment of damages, supposing a claim for damages or reparation had been insisted in.

In the case of *Collins*, 14th and 19th April 1837, 15 S. 895, where premises situated on a stream were let on a lease, in which it was declared that they were to be used "for purposes of bleaching, dying, or printing, and any other operations connected with bleaching, dying, or printing;" it was held that if the tenant established a dye-work, which created a nuisance, to the injury of the proprietors or tenants of inferior properties, the landlord was not necessarily liable in the damage occasioned by his tenant, but that he was liable for such damages only as were the inevitable consequence of his manner of letting the subjects. This is an important precedent in actions of damages for a nuisance by third parties against both the landlord and the tenant of a subject; for, in such cases a question of relevancy may arise in framing the Issues, touching the liability in law of the landlord even assuming the liability of the tenant. In *Collins*' case the pursuers would appear to have so laid their case on record as entitled them to an Issue against the tenant, and also to a second Issue, to the effect—Whether the operations complained of, as carried on by the tenants, "were in whole or in part wrong-

fully authorised by the defenders, James Hamilton or his predecessor, and Archibald Arthur, or either of them"?—these latter parties standing in the position of landlords. In reference to this Issue, Lord Cockburn who presided at the trial, charged the Jury in point of law thus:—"If you are of opinion under the first Issue that no wrong has been done, you must of necessity find for the defenders here. If, on the other hand, you think damage has been proven, then you are called on to consider this second Issue. In so far as the pursuer rests his case upon this, viz.—that in law the mere granting of the lease, or of the sub-lease, makes the granters liable respectively for the damage occasioned by the sub-tenant, I lay it down to you that no such liability is implied in these acts. If, in addition to granting the lease and sub-lease, you shall be satisfied either that the pollution of the stream down at Dalmuir was intended by Mr. Hamilton or Mr. Arthur, or that it was the necessary consequence of their letting or sub-letting, they are responsible. But if you are not satisfied that the pollution was intended, or that it was the necessary consequence of what they did, so that nothing can be charged against them except the mere granting of the tack or sub-tack, then I repeat that in law, this act does not make them liable."

A similar charge in point of law was, about the sametime, given by Lord Jeffrey in the case of *Dun* v. *Hamilton*, 11th March 1837, 15 S. 853; or (as appealed) *Hamilton* v. *Dun*, 30th July 1838, 2 S. & M'L. 356, where the general principle was very anxiously discussed.

The result would appear to be, that the law was laid down too broadly in favour of the landlord by Lords Jeffrey and Cockburn, and that it is enough to subject him, as well as the tenant, that the nuisance might have occurred in the ordinary *bona fide* exercise of the powers of the lease, although it should not be a "*necessary* consequence." The Lord Chancellor remarked—"If the operations connected with bleaching, dying or printing, would in the ordinary course of business have created a nuisance, is the landlord

to be irresponsible because the tenant might by possibility have avoided the nuisance, and yet have obtained a reasonable profit, or have prevented the injury without much expence. There is no such distinction in the doctrine laid down in the *King* v. *Moore*, in 2 Barnwell and Adolphus, p. 184, or the *King* v. *Pedley*, in 3 Neville and Manning, and no author in Scotland is cited to support the rule, as laid down by the learned Judge."

The legal principles, bearing on the liability of the landlord for his tenant, in questions with third parties, were more recently very fully discussed in the case of *Weston and Sons*, 10th July 1839, 1 D. 1218. In that case—which involved a claim of damage by the owners of a street floor against both the landlord and tenant of an upper floor in respect of an overflow of water into the former, from a water-closet in the latter—Lord Meadowbank, who presided at the trial (26th December 1838; M'F.'s J. R. 191), charged the Jury in point of law to the effect, that a landlord, as he had a right to choose his tenant, was responsible for such damage as that in question, though arising solely from the act of the tenant. His Lordsnip said, "I lay it down as law, that if any thing has been done, whereby damage has been created to the possessor of the inferior tenement through the fault or negligence of the tenant of the upper, it must be held that it was done by him acting for behoof of the proprietors of the latter, under implied authority from them; in fact he was placed there as their representative, and it must be held that the act was done for their behoof." To this law an exception was taken by the landlord, and, as already mentioned,* was sustained, and a new trial granted. In disposing of the bill of exceptions, the true legal principle was thus enunciated by the Lord Justice-Clerk, Boyle.—"In the present case every thing should have gone to the Jury; and as to the law applicable to the Issues, I should perhaps have put the case thus—"that if the Jury were satis-

* *Supra*, p. 224.

fied, on the evidence, that the landlord had been guilty of any fault or negligence, either by himself or any one employed by him, from which the damage arose, he was liable; or if they were satisfied that the water-closet in question, when let with the house to Mr. Pettit was so constructed as necessarily, or in strong probability from its *ordinary* use, to lead to the damage sustained, the landlord would also be liable; but if the water-closet was constructed in the usual way, and not in its construction such as to lead to what occasioned the damage, except from the negligence, ignorance or mischievous conduct of those who used it, then the landlord of this tenement could not be held responsible for what happened."

With regard to the terms and structure of the first issue —which put it to the Jury to say, "Whether by the fault or negligence of the said Incorporation (the landlords) or of another, or those acting under their authority and for their behoof," the water-closet overflowed and occasioned the damage—the Lord Justice-Clerk also remarked, that "the question it contains, would not have been a proper question to put, if the law, which has been laid down, (by Lord Meadowbank), had been the law of the case. The pursuer had to prove damage done by the incorporation themselves, or of others acting for their behoof; and with reference to this, it is said that the landlord of such a tenement as the present is responsible for any damage arising from the act of his tenant, who is to be taken as "acting for his behoof," the party suffering the injury not being bound to look to the tenant. I cannot discover legal principle to authorise me in concurring in the law so laid down."

Inversion of possession.—As a tenant is not entitled to invert the state of possession, or, in other words, to use the subject of his lease in a way inconsistent with the special nature and *bona fide* construction of the contract and understanding of parties, the Jury questions may arise—Whether there has been *de facto* any inversion; and, if there has been an inversion,—What reparation or redress is the landlord

entitled to? The case of *Ford*, 20th May 1808; Mor. *voce* Tack, App. No. 17, is a good illustration of the Jury nature of questions of this description, although having occurred before the institution of Jury trial in this country, it was determined by the Court on such materials as were presented by the parties.

Where, in answer to a complaint by the landlord, of an inversion or improper use of the subjects of lease, the tenant pleads acquiescence, as in the case of *Skene*, 2d March 1822, 1 S. 369, two Issues arise for trial—one in which the landlord stands as pursuer—to ascertain whether or not there has been any inversion or improper use of the subject? and another—in which, as the Counter Issue, the tenant stands as pursuer, to determine whether the landlord has, by acquiescence in the new or inverted state of possession barred himself from challenging it?

Wrongous use of sequestration and other diligence by the landlord.—The general principles which require attention in the framing of Issues in actions of damages by a tenant against his landlord, for the wrongous use of sequestration and other diligence, were formerly adverted to.*

Nos. XVIII. XIX. and XX. of the subjoined Issues are additional examples of cases of this class; and there are some farther precedents which may be noted. Thus:—

It was found that damages were due to a tenant by his landlord, in consequence of the latter having arrested farm stock for rent, after an offer of payment to a factor. *Cameron*, 14th March 1820, 2 M. 232.

The case of *Davidson*, 13th March 1826, 4 M. 40, was an action of damages by a tenant, who had been ejected from his farm, against his landlord, for illegally detaining certain effects belonging to the pursuer. And in the case of *Urquhart*, 28th May 1824, 3 S. 84, the Court sustained as relevant an action of damages at the instance of a tenant against his landlord, founded on an illegal ejectment. In an action of damages by a tenant against his landlord, for

* Part VI. *supra* p. 174, *et seq.*

an illegal sequestration of his effects, which had been recalled, but the process remained in dependence as to expences, the Court repelled a preliminary defence of *lis alibi*, the pursuer having consented that an advocation *ob contingentiam* should be brought by the defender. *Aitchison*, 19th February 1830, 8 S. 562.

Where a tenant claimed damages because a sequestration of his effects had been executed for the current rent on the 19th of May, whereas it did not become due till the 26th, the defence, that the sequestration was justifiable in respect the tenant was carrying off his effects, and the rent was legally due at Whitsunday (the 15th), but payment postponed till the 26th, was sustained, and the action dismissed. *M'Intyre*, as affirmed in the House of Lords, 8th July 1831, 9 S. App. 7, No. 24, Note.*

In *Horn*, 5th February 1830, 8 S. 454, it was held to be incompetent for a landlord to sequestrate the crop of one year for the rent of a previous crop and year; and a remit was made to the Jury Court to ascertain whether damages were due to the tenant in respect of a sale under such a sequestration.

An application by a landlord against a tenant under a nineteen years' lease, which had fifteen years still to run, to have the tenant imprisoned as *in meditatione fugæ*, till he found caution *de judicio sisti* to the amount of the future rents of the lease, the terms of the payment being first come and bygone, and the warrant following thereon, were found to be competent and legal. *M'Gill*, 9th March 1838, 16 S. 934.

In *Bisset*, 27th July 1842, 5 W. 5, it was ruled that the applying for and obtaining an illegal warrant of ejectment may in certain circumstances form a relevant ground of damage, though the warrant may not have been executed; and a landlord was also found liable in damages for illegally unroofing his tenant's dwelling-house.

Questions touching the landlord's right of hypothec.—Cases of this nature may so depend on circumstances as to require

the interposition of a Jury. No. XXI of the subjoined Issues is an example in point.

The case in which these Issues were framed for trial was evidently one of a sale of the subject of the hypothec, privately, and not in open market. But a sale, even in open market, if made not in bulk, but merely by sample, will not protect the purchaser in a competition with the landlord's right of hypothec. *Earl of Dalhousie*, 27th February 1828, 6 S. 626. Aff^{d}. 7th December 1830, 4 W. & S. 420. Nor will a sale of cattle in a public market, two days before the term, stand good against the landlord's right of hypothec, if the purchaser is made aware, before carrying them off, that the rent has not been paid. *Cooper*, 18th December 1823, 2 S. 598.

These precedents will at once serve to illustrate the nature of the contested facts, which may, in cases of this class, require to be sent to a Jury for trial, and to suggest the points of relevancy and law, which may require attention in the preparation of the Issues.

Admissions prefixed to the Issue.—It will be observed from the examples which follow, that the admissions prefixed to the Issues in actions between landlord and tenant, generally refer to the relative position of parties, the title of the pursuers, and the subject matter of the dispute. In the absence of admissions on these points, they—or at least the matter of title—would require to be put in Issue.

Counter Issue.—It will be noticed also, that a Counter Issue is necessary on the part of a defender, who urges a plea founded on homologation, which necessarily proceeds on the assumption of the truth of the pursuer's case considered by itself, and his being entitled to a verdict, were it not for the intervention of a separate principle. When the defender pleads a discharge or abandonment of the pursuer's claims, the corresponding Counter Issue falls to be given to him.

EXAMPLES.

No. I.

Johnston v. *Little*,—*12th February* 1825.

It being admitted, that William Little, defender, possessed the farm of Seafield, extending to about acres, the property of Simon Halliday of Whinnyrigg, for the period of fourteen years from and after the term of Candlemas and Whitsunday 1810, under articles of roup, being No. 21 of process, dated the 17th day of February 1810,

It being also admitted, that on the 14th February 1818, the defender assigned to William Johnston, pursuer, possession of the said farm, from and after the term of Whitsunday 1818,

Whether it was agreed betwixt the said pursuer and the said defender, that the defender should be bound to crop and manage the said farm from the said 14th day of February 1818 to the term of Whitsunday 1818, according to the rules of good husbandry, or according to the rules laid down in the said articles of roup entered into between the said William Little and the said Simon Halliday?

Whether the defender did violate the obligation so undertaken to the pursuer to crop and manage the farm as aforesaid, to the loss, injury, and damage of the said pursuer?

Or,

Whether the pursuer, on or subsequent to the said 14th day of February 1818, agreed to, or homologated the course of cropping or management of the said farm, followed by

the defender from the said 14th day of February 1818 to Whitsunday 1818?

No. II.

Home v. *Calder*,—*20th February* 1827.

It being admitted, that the pursuer is proprietor of the estate of Linhouse, including the farm of Skivo and West Park of Balquin, and has been so from the 30th day of June 1801; and that the defender and his predecessors possessed the said farm and park from Martinmas 1774 to Martinmas 1824, by virtue of a lease dated the 16th and 17th days of November 1774, and a missive letter dated the 16th day of August 1793, and from Martinmas 1824 to Martinmas 1825, by tacit relocation,

Whether the defender did, during the years 1822, 1823, 1824, and 1825, or any of them, cultivate the said farm or field in violation of the rules of good husbandry as practised in the neighbourhood, to the loss, injury, and damage of the pursuer?

Whether, in violation of the conditions of the said tack and missive, the defender failed to keep the houses on the said farm in good repair, and to leave the same in good habitable and tenantable condition at the end of the said lease, to the loss, injury, and damage of the pursuer?

Whether, in violation of the conditions of the said lease and missive, the defender failed to leave, at the end of the lease, the said Balquin Park in grass, sown with good clover and rye grass seed, to have the ground well prepared for the said seeds, to the loss, injury, and damage of the pursuer?

Whether, in violation of the conditions of the said tack and missive, the defenders failed to lay on the land of the said farm, all the dung made upon the same during the last year he possessed the same, to the loss, injury, and damage of the pursuer?

No. III.

Lyon, &c. v. *Reid's Trustees*,—18*th December* 1835.

It being also admitted, that by a lease for 500 years granted by the late Sir James Montgomery to the deceased Peter Lyon, druggist in Edinburgh, the pursuer, as heir of the said Peter Lyon, has right to the said lease of the garden called Comely Garden, situate near the Palace of Holyroodhouse, and had so from the death of the said Peter Lyon, in June 1826,

It being also admitted, that the defenders are trustees appointed by the late John Reid, innkeeper in Glasgow, and that the said John Reid by himself, or others, possessed the said garden from the said year 1826 to October 1832, by virtue of an assignation to the said lease,

Whether, during the said possession, the said John Reid by himself, or another or others, wrongfully injured the fruit trees and shrubs, or any of them, in the said garden, to the loss, injury, and damage of the pursuer?

Whether, during the said possession, the said John Reid by himself, or another or others, wrongfully failed to clear, or keep in order, certain drains or common sewers passing through the said garden, to the injury and damage of the pursuer?

Whether, during the said possession, the said John Reid by himself, or another or others, wrongfully permitted cer-

tain drains or common sewers to be formed or constructed in or through the said garden, to the loss, injury, and damage of the pursuer?

Damages laid at £600.

No. IV.

Hart v. *Alexander*,—1*st July* 1840.

It being admitted, that the defender became tenant of a villa, the property of the pursuer, near Blackness, in the county of Linlithgow, in terms of the letters, Nos. 3, 4, & 5, of process, and continued to possess the same during the years 1838 and 1839,

Whether, in Spring 1839, the defender, in violation of the understanding and agreement of parties, wrongfully ploughed up, or during the said year, wrongfully cropped all or any part of the land attached to the said villa, or wrongfully destroyed or injured all or any part of the shrubs growing on the said lands, to the loss, injury, and damage of the pursuer?

Damages laid at £250.

No. V.

Pratt v. *Dundas*,—25*th June* 1829.

It being admitted, that the defender, James Buice, was in the year 1819, Commissioner in Orkney for Thomas, late Lord Dundas, father of the defender, Lord Dundas, with power to let the farms, the property of Lord Dundas,

Whether, on or about the 22d day of July 1819, the defender, as Commissioner foresaid, agreed to let to the pursuer,

for the period of seven years from Martinmas 1819, the farm of Overbister, otherwise called Queensbrig and Cunninghole in Overbister lands, the property of the late Lord Dundas, and now of the defender, and the kelp shores thereof; and Whether the defender has failed to put the pursuer in possession of the said farm and kelp shores, to the loss, injury and damage of the pursuer?

Damages laid at £1500.

No. VI.

Monro v. *Kennedy*,—10*th July* 1840.

Whether, on or about the 16th day of April 1836, the defender took in lease from the pursuer, the farms of Arskeg, Crossmel, and Salachy, for nineteen years from Whitsunday 1836, at the rent of £240 sterling a year; and Whether the defender wrongfully failed to enter into possession of the said farms, or any of them, and to pay the rent of the same, to the loss, injury, and damage of the pursuer?

Damages laid at £10,000.

No. VII.

Swanston v. *Falconer*,—10*th February* 1829.

It being admitted that the defender and Robert Barclay, on the day of April 1826, were joint proprietors of the White Horse Inn, situate in Canongate, Edinburgh, and that by letter dated the day of April 1826, the pursuer made offer for a lease of the said Inn, at the rent of £50 a year,

Whether, at and prior to Whitsunday 1826, the defender, for himself, and as having authority from the said Robert Barclay, accepted of the offer in the said letter; and Whether he failed to perform the conditions contained in the same, to the loss, injury, and damage of the pursuer?

Damages laid at £574 17 6
and yearly during
the lease, . 100 0 0

No. VIII.

Chisholm v. *Lambton*,—16*th June* 1837.

Whether, on or about the 8th day of April 1836, the defender agreed to let to the pursuer the right of shooting over the lands of Colzium and Cairns, for the ensuing year, in terms of the missive letter, No. 3 of process, and wrongfully failed to implement the said agreement, to the loss, injury, and damage of the pursuer?

Damages laid at £15.

No. IX.

Fraser v. *Fraser*,—13*th December* 1831.

It being found by the First Division of the Court of Session, that the defender is liable to the pursuer in the value of the meliorations on the farms of Kintylie, Well, and others, Little Glendoe and others, and Drummond and others, part of the entailed estate of Lovat, so far as due under two leases and a contract of lease, dated 9th October 1802, being Nos. 6, 7, and 8, of process, and under two mis-

sives for meliorations, dated respectively 30th November 1802, and 28th November 1803, being Nos. 9 and 10 of process, granted by the late Honourable Archibald Fraser, then proprietor of the said estate, to and in favour of the late Alexander Fraser of Well; and it being admitted that the endurance of the said leases, and contract of lease was for nineteen years,

Whether the said Charles Fraser, or his predecessors, as tenants of the said farms, executed meliorations on the same, or any of them; and Whether, under the said leases, contract of lease, and missives, or any of them, the defender is indebted and resting owing to the pursuer in the sum of £1063 : 12 : 3 sterling, or any part thereof, with interest thereon, from the 25th day of May 1821, as the value of the said meliorations?

No. X.

Falconer v. *Fraser*,—*29th June* 1833.

It being admitted that the defender, Archibald Thomas Frederick Fraser, is general disponee and representative of the late Honourable Archibald Fraser of Lovat, who died in December 1815, and has been succeeded by Thomas Alexander Fraser, as heir of entail; and that by the lease dated 6th June 1807, No. of process, the said Honourable Archibald Fraser let the farms of Englishtown and Kinley to Murdo Dallas, for the period of 19 years from Whitsunday 1808;—It being also admitted, that under the stipulations of the said lease, the said Murdo Dallas paid the outgoing tenant the sum of £236 : 10s. sterling as the part of the estimated value of the houses, biggings, dykes, and enclosures on the said farms, to which the said outgoing tenant had right,

Whether, on or about Martinmas 1810, Alexander Anderson became tenant or sub-tenant of the said farms, or either of them, with the consent of the said Honourable Archibald Fraser, and the said Thomas Alexander Fraser, or either of them, and paid to the said Murdo Dallas the said sum of £236 : 10s. or any part thereof?

Whether, on or about the 3d day of November 1820, the pursuer became tenant or sub-tenant of the said farms, or either of them, under the said lease, with the consent and approbation of the said Thomas Alexander Fraser; and Whether the pursuer paid to the said Alexander Anderson, outgoing tenant or sub-tenant, the said sum of £236 : 10s. or any part thereof; and Whether the defender, under the stipulation in the said lease, is indebted or resting owing to the pursuer in the said sum, or any part thereof, with interest thereon, as the said part of the value of the said houses and biggings, dykes, and enclosures?

Whether the pursuer, or predecessors, tenants, or sub-tenants of the said farms, or either of them, under the said lease, executed meliorations on the said farms, or either of them; and Whether the defender, under the stipulations of the said lease, is indebted and resting owing to the pursuer in the sum of £354 : 19 : 6, or any part thereof, with interest thereon, as the value of the said meliorations?

No. XI.

Dods v. *Marquis of Tweeddale*,—*5th June* 1824.

It being admitted that the pursuer, Dods, took in lease from the Marquis of Tweeddale, defender, the farm of Westhopes, and that by the articles of roup, the pursuer was

bound to receive the houses and fences in the condition in which the former tenant was bound to leave them, and that the said houses and fences were not repaired by the defender or the outgoing tenant, subsequent to the entry of the pursuer,

Whether the said houses and fences were delivered to the pursuer not in so good, habitable, tenantable, and fencible condition as that in which the outgoing tenant was bound to leave them?

Or,

Whether the pursuer agreed to receive the said houses and fences in the condition in which they were delivered to the pursuer at his entry to the said farm?

No. XII.

Campbell v. *Clephane*,—10*th March* 1838.

It being admitted that the defender let to the pursuer the farm of Ensay for 12 years, from Whitsunday 1835, and agreed to deliver certain sheep to the pursuer, in terms of the missives, Nos. 4 and 23 of process,

Whether the defender failed to put the pursuer in possession of the said farm, in terms of the said missives, or either of them, until on or about the 10th day of July 1835, to the loss, injury, and damage of the pursuer?

Whether the defender failed to deliver to the pursuer all or any of the said sheep, in terms of the said missives, or either of them, to the loss, injury, and damage of the pursuer?

Whether the defender wrongfully failed to erect a house on the said farm, in terms of the said missives, or either of them, to the loss, injury, and damage of the pursuer?

Damages claimed under			1st	Issue,	£75
„	„	„	2d,	„	175
„	„	„	3d,	„	30
					£280

No. XIII.

Rae v. *Jack*,—*3d February* 1838.

1. Whether, by a tack dated 23d June 1823, the pursuer became tenant of part of the lands of Uddingstone, for 19 years, from Martinmas 1822 and Whitsunday 1823?

2. Whether, on or about the . day of September 1835, the defender wrongfully cut down, or wrongfully carried off, or wrongfully deprived the pursuer of certain oats, beans, and pease, or any of them, the property of the pursuer, from all or any part of four acres of the lands of the said farm, to the loss, injury, and damage of the pursuer?

3. Whether, on or about the said day of September 1835, the defender wrongfully took and retained possession of all or any part of the said four acres of the said farm, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XIV.

Aitchison v. *Earl of Mansfield*,—*22d January* 1831.

1. Whether, by a tack dated the 12th and 19th days of December 1828, the pursuer became tenant of certain farms, the property of the defender?

2. Whether the defender, in violation of the conditions of the said tack, wrongfully failed to put the houses and fences on all or any of the said farms in good tenantable, habitable, and fencible condition, to the loss, injury, and damage of the pursuer?

3. Whether, at the time the pursuer entered on the said lease, it was agreed between the said parties that certain straw then on the farm of Ardgilzean should be delivered to the pursuer at its value, and whether the defender wrongfully failed to deliver the said straw, to the loss, injury, and damage of the pursuer?

4. Whether, at the time last aforesaid, it was agreed between the said parties that certain dung on the said farm should be delivered to the pursuer at half its value, and whether the defender wrongfully failed to deliver the said dung at the said value, to the loss, injury, and damage of the pursuer?

Damages laid at £1,500.

No. XV.

Watsons v. *Kidston & Co.*—1*st December* 1838.

It being admitted that on the 25th and 31st days of August 1835, the pursuer and defenders entered into the tack, or contract of lease, No. 4 of process,

Whether, in violation of the stipulations and conditions of the said tack, the defenders wrongfully refused or failed to erect the buildings, with the necessary accommodation stipulated for in the said tack, to the loss, injury, and damage of the pursuer?

Damages laid at £650.

No. XVI.

Scott v. *Tait & Russell*,—1*st March* 1826.

It being admitted that the defender, Crawfurd Tait, let in lease to the pursuer the farm of Lower Sheardale for the period of 19 years, from and after the term of Martinmas 1820;

It being also admitted that the said defender became bound to inclose, during the spring or summer 1820, with a sufficient sea-dyke, the whole of the said farm upon the north and upon the east sides, so as to prevent its being overflowed by the river Devon, and to put in tooks, and otherwise to defend the banks of the river, and to make the sea-dyke, all at his own expense,

Whether the said Crawfurd Tait, in violation of the said

obligation, failed to defend the bank of the said river, by making a sufficient sea-dyke upon the said farm?—and Whether, in consequence of the said failure on the part of of the said defender, the said river did, on or about the 7th or 8th days of March 1825, overflow part of the said farm, to the loss, injury, and damage of the pursuer?

Damages laid at £2,000.

No. XVII.

Kennedy v. *Duke of Queensberry's Executors*,—*25th May* 1825.

It being admitted that Crawfurd Tait, Writer to the Signet, Commissioner for the late Duke of Queensberry, by lease dated the 17th and 25th July 1810, let to the pursuer the farms of Glenmanno, Welltrees, and part of Craigbuie, lying in the parish of Penpont, and county of Dumfries, and the farms of Craigburra and Chappel, lying in the parish of Tynron, and sheriffdom aforesaid, for a period of 19 years, from Whitsunday 1810, as to the houses and grass, and the separation of crop 1810 from the ground, as to the arable land;

It being also admitted, that by decree of Lord Cringletie, dated 8th December 1821, now final, the said lease was reduced and set aside,

What loss and damage has the pursuer suffered by, and in consequence of the said lease having been reduced and set aside as aforesaid?

(Schedule of Damages claimed.)

No. XVIII.

Granger v. *Duke of Buccleugh*,—*20th January* 1838.

It being admitted that, previous to Whitsunday 1832, the pursuer was tenant of the farm of Morton Mains, the property of the defender, and that at the said date he obtained a new lease of the whole or a part of the said farm, for the period of 19 years, at the rent of £310 per annum;

It being also admitted, that before granting the new lease, the defender obtained caution that the arrears due under the former lease should be paid within five or six years from the 4th day of April 1832,

1. Whether the defender, on or about the 2d day of May 1835, wrongfully sequestrated all, or any part of the crop and stock on the said farm, in security of the rent due at Martinmas 1834 and Whitsunday 1835, and on or about the 22d day of the month and year last aforesaid, wrongfully sold a part of the said crop and stock for the sum of £331, 7s., or about that sum, in payment of the rent last aforesaid, to the loss, injury, and damage of the pursuer?

2. Whether, during the year 1832, the defender shut up a road leading from the said farm southwards, forming the direct communication therefrom to Closeburn Lime-works and Lockerby Market, to the loss, injury, and damage of the pursuer?

3. Whether, during the years 1832, 1833, 1834, and 1835, or any of these years, the defender opened or worked a quarry on the said farm, occupying about a rood of ground, for supplying stones to build a number of steadings, and other erections, and led carriages to and from

the said quarry through the said farm, to the loss, injury, and damage of the pursuer?

4. Whether, during the year 1832, the defender took off, and disjoined from the said farm about 53 acres, let to the pursuer as part of the same, to the loss, injury, and damage of the pursuer?

Damages claimed under 1st Issue, £1,500.
— — — 2d, 3d, and 4th, 600.

No. XIX.

Campbell v. *Moffat's Trustees*,—*8th June* 1833.

It being admitted that James Campbell is assignee of the Rev. James Russell, the original pursuer,

Whether, on or about the 30th June, and 22d and 26th August 1828, the defenders, or any of them, wrongfully sequestrated, inventoried, and advertised for sale, the furniture, the property of the said James Russell, in the house in Dirlington Wynd, Kirkcaldy, to the loss, injury, and damage of the said James Russell?

(Schedule of Damages.)

No. XX.

Johnston v. *Hall & Buist*,—*16th June* 1841.

It being admitted that the pursuer became tenant of the farm of Redhaugh, the property of the defender, Sir John Hall, for the period of 19 years, from Martinmas 1823,

1. Whether, on or about the 7th July 1840, the defenders, or either of them, wrongfully sequestrated, or caused to be sequestrated, all or any of the crop, stock, and effects on the said farm, as specified in the Summons, for payment of rent said to be due, and to become due by the pursuer, to the loss, injury, and damage of the pursuer?

2. Whether, on or about the 22d day of July 1840, the defenders, or either of them, wrongfully applied for, and on or about the 18th of August, obtained from the Sheriff of Berwickshire the appointment of a Manager of the property sequestrated as aforesaid, to the loss, injury, and damage of the pursuer?

3. Whether, on or about the 20th, 21st, 22d, 24th, and 25th days of August 1840, the defenders, or either of them, by themselves, or by another, or by others, wrongfully took possession of all or any part of the property sequestrated as aforesaid, or wrongfully interfered or intermeddled with the pursuer's management of the said farm, or crop and stock thereof, to the loss, injury, and damage of the pursuer?

Damages laid at £1,000.

No. XXI.

Ramsay v. *Glen*,—*4th June* 1829.

It being admitted that the pursuers are Commissioners appointed by the Earl and Countess of Dalhousie for the management of their property in Scotland, and that the farm of Seggarsdean is the property of the said Earl and Countess;

It being also admitted that, by a lease dated the 30th

day of November 1819, the late Robert Amos became tenant of the said farm, for the period of 19 years, from 1819, and that, on the 26th day of September 1825, the said Robert Amos died, and at the period of his death was due to the said Earl and Countess, as rent for crop 1824, the sum of £250;

It being also admitted that the rent for crop 1825 amounted to £400, and that no part of the said £400 was paid before the 28th day of October 1825, when the crop and stock on the said farm were sold, under a sequestration for payment of the said rent,

Whether, between the 25th day of September and the said 28th day of October 1825, the defender privately, and not in public market, purchased about 30 bolls of wheat, reaped from the said farm during the said year 1825? and, Whether the defender is indebted and resting-owing to the pursuer, as Commissioner aforesaid, in any, or what sum, as the price of the said wheat?

Note.—The claim is limited to £94, 15s. 9d.

XXII.

Urquhart v. *Camerons & MacRae*,—*3d March* 1847.

It being admitted that the pursuer, Thomas Urquhart, was and is proprietor of the estate of Kinbeachie, in Rossshire, and that Roderick MacRae was, in the years 1844 and 1845, tenant of the farm of Mains of Kinbeachie, part of the pursuer's said property, at the rent of £75 per annum,

1. Whether, on or about the 9th, 10th, or 11th days of April 1845, or one or more of the days of that month, the defenders, William Cameron, Murdoch Cameron, and

Kenneth MacRae, or one or more of them, in concert with the said Roderick MacRae, clandestinely and wrongfully removed or secreted, or assisted in clandestinely removing or secreting the stock, crop, and articles on the said farm, specified in the Schedule hereto annexed, or any of them, for the purpose of injuring or impairing the pursuer's right of hypothec; and, Whether the defenders, or one or more of them, are thereby liable to the pursuer in the sum of £73, 17s., or any part thereof?

2. Whether, on or about the 9th, 10th, or 11th of April 1845, or one or more of the days of that month, the said William Cameron did wrongfully receive or intromit with three heifers, a cow and calf, and a mare, or certain of them, the property of the said Roderick MacRae, and wrongfully retain the same, to the effect of injuring or impairing the pursuer's right of hypothec? and, Whether the said defender is liable to the pursuer in the sum of £73 sterling, or any part thereof, as the value of said articles, or of certain of them?

3. Whether, on or about the 9th, 10th, or 11th of April 1845, or on one or more of the days of that month, the said Murdoch Cameron did wrongfully receive or intromit with the machinery of a thrashing-mill, a long cart, two meal barrels, a cart-saddle, two cart-collars, two hens, one brace and one stretcher, a black year-old bull, three black cows, a grey mare, and a brown horse, or certain of them, the property of the said Roderick MacRae, and wrongously retain the same, to the effect of injuring or impairing the pursuer's right of hypothec? and, Whether the said defender is liable to the pursuer in the sum of £73, or any part thereof, as the value of said articles, or of certain of them?

4. Whether, on or about the 9th, 10th, or 11th of April

1845, or one or more of the days of the said month, the said Kenneth MacRae did wrongfully receive or intromit with a grey mare, a coup-cart, two iron ploughs, a pair of harrows, and three cart loads of potatoes, or certain of them, the property of the said Roderick MacRae, and wrongously retain the same, to the effect of injuring or impairing the pursuer's right of hypotheo? and, Whether the said defender is liable to the pursuer in the sum of £73, or any part thereof, as the value of said articles, or of certain of them?

Schedule,—Articles referred to in *First* Issue.

Nine head of black cattle—cows and heifers—and one bull, five horses, three iron ploughs, two pair of harrows, two coup carts, one wood cart, one roller, one fanners, one bushel measure, harness for two pair and a half of horses, a gig and harness, one riding saddle and bridle, a quantity of dressed oats, amounting to quarters or thereby, a quantity of potatoes, amounting to bolls or thereby, a quantity of straw, and the machinery of a thrashing-mill.

No. XXIII.

Mackintosh v. *Wishart*,—*8th June* 1843.

It being admitted that the pursuer is proprietor of the farm of Dalmagary, and that his predecessor in the said property did, by a missive letter dated the 7th day of May 1831, let to the defender the said farm, and that the defender entered into possession thereof at or about the terms following, viz. Whitsunday 1831 as to the houses and pasture, and Martinmas 1831 as to the arable land and natural hay grass,

Whether the defender agreed, in addition to the rent, to deliver at Whitsunday yearly, the following customs, viz. seven wedders, nine custom fowls, six faces of peats and nine long loads, to the proprietor of the estates of Mackintosh, during the currency of the said lease?—and, Whether the defender is indebted and resting-owing to the pursuer the sum of £70, 13s. 9d. sterling, as the value of the said customs since Whitsunday 1838?

No. XXIV.

Ogilvy v. *Devon Iron Co. and Others*,—*12th March* 1846.

It being admitted that the defenders, the Devon Iron Co., became tenants of all and whole the iron-stone and iron-ore within the three-sixth parts of the town and lands of Blairngone, then belonging to Mark Watt, Esq. of Blairngone, under the tack No. 8 of process, and that the pursuer is trustee of the said Mark Watt;

It being also admitted that the defenders, the Devon Iron Co., entered into possession and worked the minerals under the foresaid lease, from the 10th July 1827 till the term of Martinmas 1842,

Whether the operations by the defenders, in working the iron-stone and iron-ore, sinking pits, making roads, or otherwise, under the foresaid lease, occasioned surface damage to the said lands of Blairngone? and, Whether the defenders are indebted and resting-owing to the pursuer, as trustee foresaid, in the sum of £500, or any part thereof, as the damage caused by the said operation?

No. XXV.

Sutherland v. *Macadams*,—13*th November* 1845.

Whether, on or about the 5th day of September 1844, the defenders applied for, and obtained sequestration of the goods and effects, crop and stocking, situated on the premises at Lochside, in the parish of Old Monkland, and shire of Lanark, then occupied by the pursuer, as tenant of the defenders; and did thereafter, on or about the 27th September 1844, wrongfully apply for, and obtain from the Sheriff-Substitute of the county of Lanark, warrants to sell the said sequestrated crop, or part thereof; and did thereafter, on or about the 9th October 1844, wrongfully publish and proclaim the intended sale of the said sequestrated crop, or part thereof, under the said warrant of sale, by circulation of printed handbills, to the loss, injury, and damage of the pursuer?

Damages laid at £100.

No. XXVI.

Bisset v. *Whitson*,—10*th June* 1842.

1. Whether the pursuer was tenant of a dwelling-house and other premises at Countlaw, on the estate of Parkhill, the property of the defender, from the term of Martinmas 1839 to the term of Martinmas 1840? and, Whether the defender, on or about the 26th day of May 1840, wrongfully applied for and obtained the warrant, No. 23 of process, for ejecting the pursuer from the said dwelling-house and premises?

2. Whether the defender wrongfully removed, or caused to be removed, the roof of the said dwelling-house, or otherwise injured the same, and the other premises, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XXVII.

Ferrier v. *Combe*,—*6th July* 1842.

It being admitted that the pursuer is proprietor of Seafield Baths, with the dwelling-house and other premises connected therewith, and that the same were let to the defender, as a public bath establishment, for the period of one year, from July 1841, at the rent of £80 sterling,

Whether the defender, during the said period, wrongfully discontinued the use of the same as a public bath establishment, to the loss and damage of the pursuer?

Whether, in consequence of the ignorance, unskilfulness, or negligence of the defender, or of those employed by him, the machinery, apparatus, and erections of the said baths, have been deteriorated, to the loss and damage of the pursuer?

Or,

Whether, in violation of the conditions of the said tack, the pursuer failed to put and keep the said bath establishment in good and sufficient condition and repair, to the loss, injury, and damage of the defender?

Damages claimed by the pursuer, £1,000.
Damages claimed by the defender, £400.

No. XXVIII.

Wilson v. *Wemyss and Erskine's Trustees*,—
22d January 1848.

Whether the defender, Captain James Erskine Wemyss, is proprietor of the lands called Muirton and the Dargs, part of the estate of Lundin, in the parish of Largo, and county of Fife, and the pursuer is tenant thereof, under missives of lease dated 10th May and 15th June 1837, for 19 years from and after the term of Martinmas 1837, at the rent of £130, 14s. 10d. or thereby; and the said parties were respectively proprietor and tenant of the said lands in the year 1845; and,

Whether the growing crops on the said lands, in the year 1845, were injured by the game preserved wrongously in excess thereon, by the said defender, to the loss and damage of the said pursuer?

Damages claimed, £80, 8s. 0d.

N.B.—For the discussion of the right of the tenant, on which the above Issue is founded, see *Wemyss and Others* v. *Wilson*,—December 2, 1847; and as to other similar questions between landlord and tenant, the case of *Wemyss* v. *Gulland*, decided same day, and authorities referred to in these two cases.

PART IX.

INSURANCE,

INCLUDING

CONSTITUTION OF THE CONTRACT OF INSURANCE—QUESTIONS AS TO PAYMENT OF PREMIUMS—STRUCTURE OF GENERAL AND COUNTER ISSUES—ISSUES IN CASES OF MARINE INSURANCE—ISSUES IN CASES OF LIFE INSURANCE—ISSUES IN CASES OF FIRE INSURANCE—ISSUES IN ACTIONS OF REDUCTION AND CONJOINED ACTIONS.

Constitution of the Contract of Insurance.—As the contract of Insurance is invariably reduced into a written instrument—the policy—questions of fact regarding its constitution and terms can rarely arise for trial by a Jury. Such questions, however, do sometimes occur. In the case of *Mills* v. *Albion Fire and Life Insurance Co.*, 4. Murr. 133; 5. Sh. 930; 6. Sh. 409; and 3. W. & Sh. 218, the question was, Whether the Albion Company had agreed to insure a vessel against fire *while at sea?* The fact, as proved before the Jury, was, that they had, by their agent in Scotland, undertaken to do so, although, when the policy was made out, it contained a clause exempting the Company from loss while the vessel was at sea. The policy, however, had not been delivered or exhibited to the insured. The Lord Chancellor held, that having agreed to effect a policy of a particular description, the Company were answerable to the party for the loss arising from their not having done so, and were bound to settle with him "precisely as if the agreement had been executed."

It may also be a question for a Jury, Whether an Insurance-broker undertook to effect an insurance in certain terms, and not having done so, is liable in damages. In *Gilbert* v. *Galloway*, June 12, 1811, F. C. it was held that an Insurance-broker was liable as the insurer if he undertook to get a complete policy, and by delay or negligence failed to do so; and in *Scott & Gifford* v. *Miller & Ker*, 5 Murr. 236, a broker was found liable as the insurer, who, upon an order to effect an Insurance, with leave to call at a port or ports in the Highlands, procured one, with leave to call at Tobermory alone, the vessel having, in fact, called at Inverary, and the insurers having been held discharged on the ground of deviation. In the latter case, the Lord Chief Commissioner, in reference to a defence that there had been another subsequent deviation sufficient to have liberated the underwriters, directed the Jury thus:—"The single question is, Whether the non-recovery has been occasioned by the non-performance of the agreement? The broker will be relieved if the underwriter would have been relieved, and this is to be decided on the order, not on the policy"—5 Murr. 246. There was also in this case the Counter-Issue, which may always be taken in such cases, Whether the pursuer accepted of the policy in question as implement of the agreement?—See No. XI.

On the same principle, liability as insurers was inferred against a trading Company who were part-owners of a vessel with the master and neglected to re-insure the "captain's effects" upon the master informing them, by letter, of a change of voyage, and requesting them to insure to cover any extra risk to "ship and goods," *Petrie's Executors* v. *Aitchison*, Feb. 6, 1841. In the case of *Harding* v. *Carter*, Park on Insurance, p. 4, 5, Lord Mansfield held the brokers liable as actual insurers, because they had represented to the master of a vessel that they had effected an Insurance on his clothes and wages, when, in fact, they had only done so on the ship.

Somewhat akin to the above is the question, Whether a warehouseman promised to communicate the benefit of Insurances to a party who deposited goods in his warehouse? —See No. XXXI.

Unless made matter of prefatory admission, the pursuer must of course prove the insurance on which he founds, and the Issue will generally commence with the initiatory question, Whether the defender granted the policy of Insurance founded on? see No. X. If there is anything left ambiguous in the policy, the burden of proving that the agreement was made as alleged, falls on the pursuer. Thus in *Lister* v. *Scott*, December 22, 1809, F. C. where the name of the ship only was inserted, and not that of the port or of the master, and there were two ships of the name, the burden of proving that the one lost was stated to the underwriter as the subject of Insurance, was laid on the pursuer. It has been held in England that the claim under a policy will not be avoided by a mistake in the name of the ship as "Leopard" for "Leonard," if the identity be proved,—the policy containing the words, "or by whatsoever other name or names the same ship should be called," Park 19; *Le Mesurier* v. *Vaughan*, 6 East. 382.

Questions as to Payment of Premiums.—Few Issues of Fact arise in regard to premiums of Insurance. The policy itself generally proves payment of the premiums, but in cases of Fire and Life Insurance the premiums after the first, must, if denied, be proved to have been paid within the time and under the conditions stipulated in the policy, as requisite to secure its renewal or prevent forfeiture. In the case of *Barker* v. *North British Insurance Co.* 9 Sh. 869, on appeal, Sh. Suppl. 61, and under remit, 12 Sh. 500, the Issue of Fact came to be, whether a bill placed in the hands of the secretary of the company before, but not falling due till after expiry of the period stipulated in the policy, was received by him as payment of the premium then due? The House of

Lords remitted to the Court of Session, *inter alia*, "to ascertain, by the examination of the Secretary," if consistent with the law and practice of Scotland, and from "other legal evidence," whether the bill was received by him as payment of the premium. The Judges of the First Division remarking that, under the remit, it was open to them to proceed either by hearing evidence *in præsentia*, or on commission, or by obtaining the verdict of a Jury, held that this was a proper question for a Jury, before whom the Secretary might be examined, and approved of the Issue No. XXII of the subjoined Examples, as calculated to try the question. The question may sometimes go to the Jury, Whether the premiums have been paid, or what is their amount?—See No. XIII.

Structure of General and Counter-Issues.—The subject of Insurance affords a favourable occasion for the general Issue, the question being, whether the defender is indebted and resting-owing the sum in the policy? The admissions may set forth the policy and the occurrence of the event the risk of which was undertaken. Frequently, however, the latter is disputed, and then the question of loss by one of the perils insured against must be put to the Jury. If the title to recover be in dispute, this question also must be put in issue, as in No. IV and XI of the annexed Examples.

Under the general Issue the defender is entitled not only to put the pursuer to the proof of the contract, his title to recover, the loss, and the amount of damage, but himself to lead proof in support of most, if not all, of the avoidances which arise out of the nature of the contract of Insurance. And generally, pleas in defence may be maintained by way of exception to the action on the policy; and in each case, when the general Issue, or pursuer's Issue alone goes to the Jury, the averments and pleas on record both direct the Judge as to the evidence to be admitted for the defender, and guard the pursuer against surprise.

Under the general Issue the defence of unseaworthiness has gone to the Jury in *Cook* v. *Greenock Marine Insurance Co.* July 18, 1843; those of want of due notice of abandonment and election in *Fleming* v. *Smith*, March 5, 1846; and that of deviation in *Logan* v. *Forth Marine Insurance Co.* not reported. The defence pleaded in *Forbes & Co.* v. *Edinburgh Life Assurance Co.*—5 Murr. 247 and 10 Sh. 451—was misrepresentation and non-statement of material facts as to the health and habits of the insured, and proof of this was led under the general Issue; the view of the Lord Chief Commissioner being, that concealment voids the policy, and therefore being proved, prevents the Jury from returning an affirmative answer to the question of resting-owing. In the case of *Campbell* v. *Aberdeen Fire and Life Assurance Co.* June 12, 1841, an allegation was made on the record, that the Fire Policy on which the action was founded had been fraudulently entered into by the pursuer. The Court held that the defence of fraud in the original constitution of the contract might, in the general case, competently, and without disadvantage, be tried under the general Issue of resting-owing; but that it was not imperative on the Judge to allow the case to go to trial on the general Issue; and looking to the circumstances of the case, the vague nature of the allegation, and the manner in which it was insinuated along with other grounds of defence, they directed, that in this case the defenders should either take a special Issue on the allegation of fraud, or expunge the averments and pleas regarding it from the record. The latter course appears to have been adopted.—See Example No. XXIV.

In such a course the defender suffers no prejudice, because the burden must always lie on him of proving his defence, since *prima facie* evidence that the conditions of the policy have been observed will be sufficient on the part of the pursuer. The view taken in the case of Campbell is confirmed by the observations of Lord Fullerton in the subsequent case of *Hutchison*, Feb. 21, 1845:—"It requires no Counter-Issue

to enable the defender to prove the violation or non-performance of the conditions of the contract. The party founding on the contract, and claiming payment, must bring at least *prima facie* proof that the conditions have been observed, and his adversary would be entitled, without a Counter-Issue, to negative the averment of their fulfilment." 7 Cases, 477. It may also be observed, that although fraud is alleged on the record, it was held, in an action to reduce a Life Policy, not necessary for the pursuers to take an Issue going that length, provided the Issue taken was at once within the summons, and relevant to support the conclusions of the action, *Sprott* v. *Ross*, June 16, 1838; 16 Sh. 1145. It does not seem to have been thought necessary in this case to expunge the allegations of fraud from the record.

Under the general Issue may also be tried the disputed fact, whether payment has been made by the insurer to the insured of the whole or part of the sum admitted to be due under the policy, *Anderson, Garrow & Co.* v. *Forth Marine Insurance Co.* Jan. 15, 1845, and Example No. XII.

Although the general Issue is of such comprehensive use, there is so much convenience in indicating the nature of the defence by a Counter-Issue, that this is occasionally done in practice, even when not required by the Court from any peculiar circumstances. This is the more appropriate, because in Insurance the defences generally range themselves under certain known legal positions, and thus admit of Counter-Issues which are, in their nature, general Issues of style, applicable to these known legal avoidances, and not special Issues, or Issues of specific fact.—See Examples III, IX, XV, XVI. In the case of *Symers* v. *Glasgow Marine Insurance Co.* 25th November 1846, a Counter-Issue of fraudulent misrepresentation and concealment was settled for trial, although not quoted in the Report.

Defences may exist to payment, not arising out of the nature of the contract of Insurance, and on these a Counter-

Issue ought to be taken, as when it is alleged that the insured agreed to discharge the underwriters.—See Example No. XXX.

The Issue ought always to put the question, Whether interest is due on the sum claimed? as the Court, in applying the verdict, cannot add interest to the sum found due by the Jury, *M'Kay* v. *M'Leods*, 4 Murr. 291. In England the Jury is empowered by Statute to give damages in the nature of interest, over and above the money recoverable in all actions on Policies of Insurance, 3 and 4 Will. IV. c. 42, § 29.

For the earlier forms of Issue in cases of Insurance, see 1 Murr. 25, 302; 2 Murr. 265; 3 Murr. 294, and 4 Murr. 189.

Issues in cases of Marine Insurance.—In an action under a policy of Marine Insurance, the ownership of the vessel insured may afford question of fact for a Jury. In the case of *Scott & Gifford* v. *Miller & Ker*, 7 Sh. 56, one plea in defence was, that one of the registered owners truly held in trust for an alien. The Court held that the registry of the vessel in the names of the pursuers was not *per se* evidence that the vessel was truly their property, and that it was incumbent on them to prove the fact by other evidence. An Issue was accordingly taken, Whether Gifford was owner of one-half of the vessel? and the case having gone to trial—5 Murr. 236—the Jury on this Issue found for the defenders. In a discussion on a Bill of Exceptions to the charge of the Judge—11 Sh. 21—it was held that although a conveyance to Gifford was proved, yet it was rightly left to the Jury, Whether on the evidence the transaction by which he became the owner was simulate, and truly to enable him to hold in trust for the alien? and that it would have been erroneous to have directed that under the Registry Acts there could not be any trust created in the property of a vessel.

If the loss is not admitted, it will be put in Issue, and

must be proved to have arisen in the course of the voyage insured, and from perils of the nature insured against. The Judge will construe the policy and direct as to the law on these points. Sometimes the legal view of what is within the voyage or risk insured will depend on facts to be found by the Jury, as for instance the question, Whether underwriters will be freed by a delay in landing goods after arrival? will depend on the enquiry, Whether by the usage of the place as to landing of goods, the delay was unreasonable?—*Noble* v. *Kennoway*, Dougl. 492, where Lord Mansfield said that the underwriter must be presumed to be acquainted with the practice of the trade he insures. Barratry of the master or mariners is one of the risks usually insured against, and wilful breach of embargo is held as barratry, it being a question for the Jury, Whether the master knew of the blockade?—*Harratt* v. *Wise*, 9 B. and C. 712. Deviation from the voyage on a private adventure of the master's, is also barratry—Park, 205; and an averment of loss by "fraud and negligence" of the master, is a sufficient averment of loss by barratry, *Knight* v. *Cambridge*, 2 Raym. 1349.

The Lord Chief Commissioner in *Cairns* v. *Kippen*, 2 Murr. 258, laid down, on the authority of the English cases, that the owners are liable for the conduct of the master if it be short of barratry. Lord Moncreiff, however, stated the doctrine in a more qualified manner in *M'Callum* v. *Sea Insurance Co. of Scotland*, July 22, 1839, M'F. J. R. 273, observing that the result of the English decisions was, that if the proximate cause of the loss had been perils of the sea, although originating in negligence and misconduct on the part of the master and crew, the underwriters would not be liberated; which they would be, if the negligence and misconduct were the proximate causes of the loss, or the facts necessarily inferred that the crew or master had not been of competent skill at first; the owner, as a condition precedent, being bound to provide a crew of competent skill. In the case of the cargo being damaged, the owners

will be liable if the injury arose from bad stowage or negligence on board the vessel. In *Strong* v. *Martin*, July 11, 1839, the Court held that a part-owner of a vessel is entitled to recover to the extent of his interest, when the other part-owner, being also the master, has committed barratry. The expenses of salvage may be recovered under the allegation that goods were spoiled by perils of the sea, Park, 329, and the overturn of a vessel in a dry harbour, occasioned partly by accident and partly by the state of the weather, may be within the terms of a policy of Insurance, *Napier* v. *Wood*, 4 Sh. 19. Loss occasioned by another vessel running down the ship insured, is a loss by perils of the sea, although there be negligence on the part of the assured as well as of the other vessel, *Smith* v. *Scott*, 4 Taunt. 126.

Deviation from the voyage insured will, in the general case, discharge the underwriter; but if it arise from necessity, or some just cause, or for the general benefit of all concerned, the underwriter will not be discharged, and these are questions for the Jury, on the evidence, under direction on the legal principles by the Judge. The legal principles are explained in Park on Insurance, chap. 17, and other writers; and several cases have been adjudicated in Scotland, and on appeal, as *Wilson*, 4 Brown's Parliamentary Cases, 470; *Smith* v. *Macniel*, 2 Dow, 538; *Tasker* v. *Cuninhgame*, 1 Bligh, 87. The definition of "stranding," as employed in policies, is fully discussed in *Thomson* v. *Murison*, June 8, 1844.

The insured may prove a total or a partial loss of the subject insured, which may be the ship, goods on board, or the freight. The distinction between total and partial, or average loss, and the cases when the latter can be claimed under a policy, are explained in Park on Insurance, chaps. 6 and 9. If a ship has not been heard of within a reasonable time after sailing, the presumption will be that she has been lost by foundering at sea; but it will be a question

for the Jury in all the circumstances—Park 147 and 919; and the pursuer must prove that when she left the port of outfit she was bound on the voyage insured, *Koster* v. *Innes*, R. and M. 333; *Cohen* v. *Hinckley*, 2 Camp. 51. If the Jury find that a total loss is not proved, it would seem they might still—under the Issue Whether the whole "or any part" of the sum in the policy is due?—find for the pursuer to the extent of the partial loss proved, on the same principle that in England, under a Declaration for a total loss, a partial loss may be proved and recovered; Lord Mansfield in *Gardiner* v. *Croasdale*, 2 Burr. 904. The case of *Fleming* v. *Smith*, March 5, 1846, affirmed an Appeal, April 18, 1848, illustrates the procedure which may be adopted where a total loss is proved; and failure to abandon in due time, or election to treat the loss as partial, is the defence relied on.

In the case of total loss under a valued policy, the value is agreed, and it is just as if the parties had admitted it at the trial, 2 Burr. 1117. An average loss opens the policy, —*Le Cras* v. *Hughes*, 3 Dougl. 81; and in such cases, as well as that of an open policy, the Jury must estimate the damage from the evidence led. When the question under a valued policy is, Whether a constructive total loss took place by the ship not being worth repairing? the Jury, in judging of that question, must consider the real value of the ship, although, should they arrive at the conclusion that a total loss has been sustained, they will find a verdict to the amount mentioned in the policy; Lord President in *Stewart* v. *Greenock Marine Insurance Co.* January 9, 1844.

The contract of Insurance being pre-eminently one of good faith, it is a good defence to an action on the policy that there was fraud in the constitution of the contract, or undue concealment, or even non-communication of any fact which may appear to the Jury to be material. Any erroneous representation in material points, as that the vessel had sailed, or was likely to sail, on a particular day, or that she had a certain number of guns, however innocently made,

has the same effect; because it may affect the underwriters' calculation of the risk. In the case of *Wake* v. *Atty*, 4 Taunt. 493, a broker had completed a policy in the forenoon before calling for his letters, one of which contained information of the loss; and Sir James Mansfield left it to the Jury, Whether he ought first to have gone to his office and got his letters, and whether the omission was gross and palpable negligence in him? The Court of Common Pleas held that the direction was right—that the matter of due diligence had been left to the Jury—and that they were warranted in finding that there was no such want of diligence as voided the policy. This case was the subject of discussion in that of *Stone* v. *General Maritime Insurance Co.* February 1848, before the First Division, where there was an allegation of a similar nature, and the Issue No. IX was settled to try the case.

Warranty differs from representation, as it forms part of the contract; and breach of warranty will therefore void the policy without the necessity of proving that it was in a point material to the risk, or that it occasioned the loss. That the vessel will sail with convoy, or from a certain port on or before a certain day; that she is neutral property, or has a certain crew, or number of guns; and generally whatever is written on the policy, or contained in proposals referred to in it, is a warranty. But it is the province of the Jury to say what is matter of warranty, what of representation, and what of mere intention or expectation.—See Lord Mansfield's charge in *Bize* v. *Fletcher*, Dougl. 271. Seaworthiness is an implied warranty in every marine insurance, and the burden lies on the insured of satisfying the Jury that it has been complied with. "It is a condition precedent to the policy, and it is indispensable it should be proved before the policy attaches."—Lord President in *Cook* v. *Greenock Marine Insurance Co.* July 18, 1843. In this case the question was tried without a Counter-Issue, and the Judge directed the Jury, if satisfied that the ship

had not a sufficient complement of sails, to disregard evidence that she had the equipment usual on the particular voyage insured. The verdict was for the pursuer; and the Court, holding the charge correct in point of law, granted a new trial on the ground of the verdict being contrary to evidence and to the direction of the Judge. In *M'Callum*, M'F. J. R. 271, Lord Moncreiff directed the Jury, that if the vessel were originally sea-worthy on sailing from the home-port, unseaworthiness proved at starting from the out-port would not liberate the underwriters.

It is also an implied warranty that the ship shall be duly navigated—that is, shall have a master and crew of competent skill, and a pilot where necessary; but as to the legal principles on this point, on that of seaworthiness, and in regard to express warranties, reference is made to the writers on Insurance, and to the cases noted in Shaw's Digest and Harrison's Digest *voce* Insurance. All the questions arising have been conveniently tried under the general Issue, the record limiting the field of proof, as in *M'Loskey* v. *Glasgow and Clyde Marine Insurance Co.* August 4, 1843, and the Judge laying down the law applicable to the facts as brought out in evidence.

Issues in cases of Life Insurance.—The death of the party whose life is insured is generally prefixed as an admission. It may, however, be a question for the Jury, Whether the death occurred within the term insured? as when the party insured sailed in a ship which was never afterwards heard of, *Patterson* v. *Black*; Park on Insurance, 919. There is in Life Insurance no distinction between total and partial loss, and therefore the Issue puts the question of resting-owing the full sum insured, and the words "or any part thereof," need only be added to cover the case of any payment having been made to account.

The most usual defence under a Life Insurance policy is, that at the time of granting the policy, erroneous informa-

tion was given, or important circumstances were withheld as to the health and habits of the deceased. Although not necessary, *Forbes & Co. and Hutchison, ut supra*, it is almost the invariable course for the defender to take a Counter-Issue on this point whether fraud is averred or not, and the Issue is the same with the pursuer's Issue in a reduction of the policy on the same ground. The party applying for Insurance usually fills up a proposal, in which the names of his medical attendant and of a private friend are mentioned, and subscribes a declaration as to his health, which declaration and proposal are declared to be the basis of the contract. Any fraudulent proceeding, such as was alleged and put in Issue in Example No. XX, will undoubtedly annul the contract. But any misrepresentation, although arising from mistake or negligence, any concealment of, or even omission to communicate facts of importance, occurring either in the statement of the party himself, or his medical attendant or friend, will vitiate the policy. Reference to a medical man not the ordinary attendant, is of the nature of a misrepresentation, and goes to the Jury with other circumstances, and they are always the judges of what is material. It does not require "concealment" to make the policy void—"non-communication" is sufficient, Lord Lyndhurst in *Duckett* v. *Williams*, 2 Cr. & Mees. 348. Mr Park thus states the result of the cases on this point, p. 936-7: "The question is this, Did the insured, or any one who made a statement on his behalf to the Company, know of a particular fact?—Yes. Do the Jury think that fact material to be communicated?—Yes. Was it communicated? If not, the policy is void." For instance, when the assured was described as "resident" at a place, and was in fact a prisoner in the county gaol there, it was left to the Jury whether this was a material fact, and ought to have been communicated, *Haguenin* v. *Rayley*, 6 Taunt. 186; and where a representation that the assured was in good health, was made by A, and repeated some months after by

A, and she had in the interval a pulmonary attack, during which she was attended by B, and she eventually died of pulmonary disease; it was held that it was not enough to tell the Jury to consider whether there had been misrepresentation, but that it ought to have been put to them whether the fact of the attack and attendance by B ought to have been disclosed, *Morrison* v. *Muspratt*, 4 Bing. 60.

It was held—*Forbes & Co.* v. *Edinburgh Life Assurance Co.* 10 Sh. 451—that although a question asking information as to the habits of the party remained unanswered by the friend to whom reference was made, this was no waiver or abandonment on the part of the Company of the inquiry into habits, and did not relieve the assured from the obligation to disclose every fact material to be known: and that evidence adduced of a dangerous habit of opium eating ought to have gone to the Jury to say whether it was proved, and if so, whether it was material or not. In the case of *Sprott* v. *Ross*, June 16, 1838, the Court altered the words in the prepared Issue from "false statement, or undue concealment, or non-statement," into "misrepresentation, or undue concealment, or non-statement of material facts," and they refused to introduce the word "wilful," the insertion of which was proposed, on the ground that, without it, the affirmative might cover a statement only proved to be erroneous by subsequent discovery of a latent disease, or even by *post mortem* examination. It is proved to be unnecessary to guard against any such event, by the decision in the case of *Hutchison* v. *National Loan Fund Life Assurance Society*, Feb. 21, 1845, where it was held that a declaration, by the party assured, of good health, forming the basis of the contract—whether to be viewed as a representation, warranty, or condition of the contract—is sufficiently complied with, if it was true according to the knowledge or reasonable belief of the party at the time, after due care to ascertain the truth. It is not a warranty that the party is free from all latent disease, to require which would put an end to Life Insur-

ance. According to Lord Mansfield—"A warranty that a man is in health, or in good health, can never mean that a man has not the seeds of disorder: we are all born with the seeds of mortality in us," *Willis* v. *Poole*, 1780; Park, 935.

It will be equally fatal to the policy if the suppression or false representation has occurred in verbal answers to a parole inquiry, such as, whether similar Insurances have been effected at other offices? although the articles of the Company only stipulate that the policy is to be void on false answers being given to written enquiries, *Wainwright* v. *Bland*, 1 Mee. & W. 32.

In England a distinction is drawn between representation and warranty in Life Assurance, applicable, it would appear, to cases where a person insures the life of another in which he has an interest. If there is neither warranty nor representation, the insurers take the risk, being presumed to satisfy themselves by enquiry; if there are representations by the party effecting the Insurance, falsehood or non-disclosure will void the policy. If there is a warranty that the party on whose life the Insurance is effected is in good health, particular representations on the one hand, and enquiries by the Insurance Office on the other, are superseded; and the person effecting the Insurance must prove that the warranty was complied with, which he sufficiently does, by proving that the life was a reasonably good and insurable one. It may be such, although there was a particular infirmity not tending to shorten life, and yet one which it would have been necessary to communicate, had a detailed representation been made as to health and habits, Lord Mansfield in *Ross* v. *Bradshaw*, 1 Black. Rep. 312. In an Insurance on the life of another, if the person whose life is insured is applied to for information, he, in giving such information, becomes by implication the agent for the party effecting the Insurance, who is bound by his statements, and must suffer if they are false or defective, although he himself is

unacquainted with the life assured, and the servant of the Insurance Office has undertaken to do all that is required by his Office, *Everett* v. *Desborough*, 5 Bing. 503. See also *Forbes & Co. ut supra*; and *Paul* v. *British Commercial Insurance Co.* 10 Sh. 618; which were both Insurances on the life of the Earl of Mar by his creditors.

Issues in cases of Fire Insurance.—Unless admitted, the fact of a fire having taken place, and caused loss, must be proved, and therefore will be put in Issue. Destruction of property by mere heat will not be sufficient to subject the insurers; actual ignition must be proved, Park 950; but ignition of the articles injured is not necessary, if the damage is attributable to fire, although only in a neighbouring house, *Johnston* v. *West of Scotland Insurance Co.* 4 Murr. 189, and 7 Sh. 52. The insured must prove the extent of the damage he has suffered, and the insurers are liable for partial loss although not expressly undertaking such liability in the policy. It may sometimes be a question of fact, whether the pursuer was interested in the goods destroyed? as in *Friedlander* v. *London Assurance Co.* 1 Nev. and M. 31. The policy is vitiated by misrepresentation and by suppression of any facts material for the insurers to know, as in *Bufe* v. *Turner*, 6 Taunt. 338, where the plaintiff wrote to effect an Insurance without mentioning that that very evening a fire had taken place in a neighbouring warehouse, although it was apparently extinguished; and the fire afterwards broke out and consumed the subject of the Insurance.

Warranty is frequently required as to the nature of the building or other property insured, and the trade or operations carried on; for instance, that a mill is of the first class of rates described in the Proposals of the Company, which pays a lower premium than the second class, as in *Newcastle Insurance Co.* v. *M'Morran & Co.*, reversed on Appeal, 3 Dow. 255. The warranty must be strictly complied with,

and it is of no avail to prove that the difference was immaterial to the risk. Lord Eldon said in the above cited case :—" It is a first principle in the Law of Insurance, on all occasions, that where a representation is material, it must be complied with ;—if immaterial, that immateriality may be enquired into and shown ; but that if there is a warranty, it is part of the contract that the matter is such as it is represented to be, therefore the materiality or immateriality signifies nothing," 3 Dow. 262. On the same principle, if a building is altered, so as to change the class, or increase the risk, or mills warranted to be worked by day only, are worked at night, these form grounds of defence which, on being proved to the Jury, will secure a negative answer to the question of resting-owing.

The Insurance Company may negative the proof of loss, and prove the defence of breach of warranty under the general Issue. It was also held, in the case of Campbell already referred to, that fraud in the constitution of the contract does not necessarily require a Counter-Issue, although in the peculiar circumstances of that case the defender was not allowed to prove fraud, without taking an Issue upon it. When the defence is, that the insured wilfully set fire to the premises, it has been held in England that the Jury must be satisfied that the crime imputed to him is as fully and satisfactorily proved as would warrant them in finding him guilty on a criminal charge for the same offence, *Thurtell* v. *Beaumont*, 8 Moore, 612. It follows that a separate Issue ought to be taken under such a defence, which is farther necessary, as the defence does not arise out of the nature of the contract. In *Hercules Insurance Co.* v. *Hunter*, 14 Sh. 147 and 1137, and 15 Sh. 800, there was a reduction of a decreet-arbitral, and such an Issue was taken. There was in the same case another Issue, which lies open to the objection made in the House of Lords in *Clelland* v. *Weir*, 6 Bell, 78, where Lord Brougham observed—" One affirmative on the one side, and

one negative on the other, meeting that affirmative, is the definition of an Issue; and if there are more facts than one sent to a Jury, there ought to be for each of those facts one negative on the one side, and one affirmative on the other, which forms the Issue upon that fact."—"Four distinct answers might be given to this question—Whether Weir, knowing of the existence of the will, wrongfully took possession?" In the same way the question—"Whether the Insurance was effected on a fraudulent over-valuation, with the intention of destroying the premises by fire?"—was capable of more than one answer, without finding either for the pursuer or defender. Accordingly, the Jury returned a special verdict, finding the fraudulent over-valuation proved, but not the intention to destroy; and it remained for the Court to decide whether this was in substance a verdict for the pursuer or defender.

It is sometimes a condition of the policy that if there is any false swearing or affirming in support of a claim under the policy, the insured shall forfeit all benefit. This is proper matter for a Counter-Issue, as in No. XXVIII of the Examples. In an English case where there was such a condition, and an affidavit had been made of loss to the extent of £1,085, while the Jury returned a verdict for only £500, the Court granted a new trial, *Levy* v. *Baillie*, 7 Bing. 347. The taking of a separate Issue on the point will generally prevent such a result. Negligence on the part of the insured does not afford a Counter-Issue or defence, because the policy is an indemnity against that, *Shaw* v. *Robberds*, 1 Nev. and P. 279. It is usually a condition of a Fire Policy that it shall be void unless notice is given of any Insurance effected with other Companies. This affords a defence not requiring any Counter-Issue.—See *Donaldson* v. *Manchester Insurance Co.* Mar. 2, 1836, 14 Sh. 681, where various points as to this condition were under judicial discussion.

Issues in Actions of Reduction and Conjoined Actions.—It not unfrequently happens that the insurer, where no action is brought against him, raises an action to get rid of the claim which hangs over him, by having the policy set aside on some ground affecting the constitution of the contract, or for having it declared, on some of the grounds already adverted to, that he is not liable. The Lord Chief Commissioner cites the Issue in *Promoter Life Assurance Co.* v. *Barrie*, 5 Murr. 135—Whether the policy under reduction is not the policy of the pursuers? as the general Issue adapted for setting aside the instrument. The ground of action in that case was misrepresentation as to the health and habits of the person whose life was insured. This form of Issue, however, appears to be more peculiarly adapted to a reduction on the head of forgery, and it has not been followed in practice where fraud or misrepresentation is the ground of reduction.—Examples Nos. XVIII and XIX. Sometimes actions of Reduction and for Payment are conjoined when there will be Counter-Issues, and the Court will direct which party is to stand pursuer at the trial.

EXAMPLES.

MARINE INSURANCE.

No. I.

Thomson v. *Patten, &c.*—*22d February* 1838.

It being admitted that, on the 19th day of August 1835, the defenders granted the policy of Insurance No. 4 of process, whereby, in consideration of a certain premium paid by the pursuer, the hull and materials of a certain vessel called "Home," the property of the pursuer, was insured by the defenders against the perils stated in the said policy,

to the amount of the sums attached to their names in the schedule hereunto annexed, amounting in all to the sum of £600;

It being also admitted that, on the 23d day of November 1836, on the voyage mentioned in the said policy, the said vessel was totally lost,

Whether the defenders, or any of them, are indebted and resting-owing to the pursuer in the sums attached to their names respectively in the said policy, or any part thereof, with interest thereon, as the value of the hull and materials of the said vessel?

No. II.

M'Kenzie & Co. v. *Aberdeen Marine Insurance Co.*—*23d May* 1843.

It being admitted that, on the 17th of March 1841, the defenders, the Aberdeen Marine Insurance Co. granted the policy No. 59 of process, whereby, in consideration of a certain premium paid by the pursuers, a certain vessel named the "Reform," the property of the pursuers, was insured by the defenders against the perils stated in the said policy, for the period of one year from the said 17th of March 1841 to the 17th of March 1842, at noon, to the amount of £400; the said vessel, during the said period, to be employed in the coasting trade,

Whether, on or about the 12th day of March 1842, the said vessel, while in the prosecution of a voyage covered by the said policy of Insurance, was totally lost? and Whether, under the said policy, the defenders are indebted and resting-owing to the pursuers in the foresaid sum of £400, or any part thereof, with interest thereon, as libelled?

No. III.

Cameron, Son, & Co. v. *Dundee Marine Insurance Co.*—*20th March* 1846.

It being admitted that, on 30th October 1841, the defender granted a policy of Insurance, of which No. of process is a certified copy, whereby, in consideration of a certain premium paid by the pursuers, the hull and materials of the ship or vessel called the "Aurelian," were insured by the defenders against the perils stated in said policy, lost or not lost at and from New Glasgow, Nova Scotia, to Liverpool, to the extent of £500 sterling,

Whether, on or about the 20th and 25th days of November 1841, and intermediate days, and on or about the 12th or 13th days of January 1842, or on or about one or other of these dates, pending the currency of said policy, and in prosecution of said voyage, the said vessel suffered injury and damage through the perils insured against, or either of them, and whether the defenders are resting-owing to the pursuers the sum of £535, 7s. 1d. sterling, and interest thereon as libelled, or any part thereof?

Or,

Whether the said vessel, when she sailed on said voyage, was not sea-worthy?

No. IV.

Cook v. *Greenock Marine Insurance Co.*—18*th July* 1843.

It being admitted that, on the 5th day of August 1842, the defenders, the Greenock Marine Insurance Co. granted

the policy of Insurance No. . of process, whereby, in consideration of the premium paid to them by Messrs William and Samuel Irvine, merchants in Glasgow, acting as agents, a certain vessel named the "Maria," was insured by the defenders against the perils stated in the said policy, on a voyage at and from Clyde to the Havannah, and until the said vessel should be moored at anchor there twenty-four hours in good safety, to the amount of sums attached to their names in the schedule hereto annexed, amounting in all to the sum of £1,500, the said vessel being valued at the sum of £3,000,

Whether the pursuers were sole owners of the said vessel at the date of the policy? and Whether the same was effected by the said William and Samuel Irvine as their agents, for their behoof? and Whether, on or about the 22d day of August 1842, the said vessel, while in the prosecution of the said voyage, became a wreck, and was totally lost? and Whether the defenders, or any of them, under the said policy, are indebted and resting-owing to the pursuers in the sum or sums attached to their names respectively in the said policy, or any part thereof, with interest thereon as libelled?

No. V.

Fleming v. *Smith*,—10*th July* 1844.

It being admitted that, on the 25th day of August 1841, the defenders granted the policy No. 98 of process, whereby the vessel "William Nicol" of Glasgow, the property of the pursuers, was insured by the defenders against the perils therein stated, from the 18th of August 1841 to the 18th of August 1842, to the amount of the sums attached to their names respectively therein, amounting together to the sum of £5,800,

Whether, about the months of May and June 1842, or one or other of the said months, and within the said period stated in the policy, the said vessel was totally lost? and Whether the defenders are, under the said policy, indebted and resting-owing to the pursuers in the foresaid sums attached to their names in the said policy respectively, with interest thereon as libelled, or any part thereof, under deduction of the sum of £2,469, 10s. 8d. with interest thereon?

No. VI.

M'Callum's Trustees v. *Aberdeen Marine Insurance Co. and Cockerell*,—11*th February* 1848.

It being admitted that, on the 22d day of August 1842, the defenders, the Aberdeen Marine Insurance Co. granted the policy of Insurance No. 5 of process, whereby the vessel "Ann," the property of the pursuers, was insured by the defenders against the perils stated in the said policy, at and from London to Algoa Bay, Cape of Good Hope, there and thence to Valparaiso, or any other ports and places on the West Coast of South America, in any order or rotation, and back to a port or ports of call and discharge in the United Kingdom, to the extent of £1,300;

It being also admitted that, in or about the said month of August 1842, the said vessel sailed from London with a cargo for Algoa Bay, and thereafter proceeded to certain ports or places on the West Coast of South America, where she loaded a cargo and sailed from Valparaiso, bound for a port in the United Kingdom,

Whether, in or about the month of July 1843, the said vessel, after leaving Valparaiso, and in prosecution of her voyage to the United Kingdom, as aforesaid, was totally

lost by the perils insured against under the said policy? and Whether the defenders are indebted and resting-owing to the pursuers the sum of £1,300, or any part thereof, with interest thereon?

No. VII.

Logan v. *Forth Marine Insurance Co.*—*6th December* 1844.

It being admitted that, on the 15th day of October 1842, the defenders granted the policy No. 8 of process, in favour of the pursuer James Logan, whereby goods, the property of the pursuer, shipped on board of the vessel "Jessie Logan" of the port of Liverpool, at and from Calcutta to her port of discharge in the United Kingdom, were insured by the defenders to the amount of £1,000 sterling, against the perils therein stated,

Whether, in or about the month of January 1843, goods belonging to the pursuer on board of the said ship, were lost by the perils of the sea insured against by the said policy? and Whether the defenders are, under the said policy, indebted and resting-owing to the pursuer in the sum of £964, 13s. 4d. sterling, as their proportion of such loss, corresponding to the foresaid sum of £1,000 underwritten by them as aforesaid, with interest thereon since the 10th June 1843, or any part thereof?

No. VIII.

Allan & Co. v. *Tay Marine Insurance Co.*—
6th July 1842.

It being admitted that, on the 14th day of December 1840, the defender granted the policy of Insurance No. 3 of process, whereby, in consideration of a certain premium paid by the pursuer, the freight of a certain vessel called the "Montrose," on a voyage from Quebec to Leith and Peterhead, was insured by the defender against the perils stated in the said policy to the extent of £250;

It being also admitted that, on or about the 11th day of November 1840, the said vessel was wrecked on the coast of Nova Scotia, and the freight totally lost,

Whether the defenders, under the said policy, are indebted and resting-owing to the pursuer in the said sum of £250, or any part thereof, with interest thereon?

No. IX.

Stone v. *General Maritime Insurance Co.*—
18*th February* 1848.

It being admitted that, on or about the 5th day of December 1846, the defenders granted the two policies of Insurance, of which Nos. 6 and 7 of process are copies, whereby a certain vessel called the "Margaret" of Leith, and her freight and cargo, were insured by the defenders against the perils stated in the said policies on a voyage from Middlesbro' to Leith, to the extent of £700;

And it being admitted that the pursuer held a vendition of said vessel in security and payment of debt owing to him,

in terms of the deed No. 13 of process, and that the amount of said debt exceeded the value of said vessel;

And it being farther admitted that the said policies were applied for and obtained from the defenders in name of the pursuer by Allan M'Naughton, ship-broker in Leith, now deceased, acting for behoof of the pursuer,

Whether, on or about the 3d day of December 1846, the said vessel, while in the prosecution of the said voyage, was totally lost? and Whether the defenders are indebted and resting-owing to the pursuer in the sum of £679, 9s. 2d. conform to schedule hereto annexed, or any part thereof, with interest?

Or,

1. Whether said policies of Insurance were obtained to be granted by the said defenders, through misrepresentation or undue concealment on the part of the said Allan M'Naughton? or Whether the said Allan M'Naughton wrongfully failed to acquire and communicate information material to the risk, which was within his power at the date of granting the said policies?

2. Whether said vessel was not sea-worthy when she sailed on the voyage insured?

Schedule.

Sum insured, ...	£1,300	0	0
From which falls to be deducted the proportion of £465, 18s. 6d. net proceeds of salvage, effeiring to £4,000, total sum insured on hull with several Companies,	151	8	6
Loss,	£1,148	11	6

No. X.

Lowrey v. *Cockerell*,—*9th December* 1847.

1. Whether the defender granted the policy of Insurance No. of process, whereby he insured to the extent of £150 against sea and other risk, as therein stated, the ship or vessel, called the "Jane" of Newcastle, belonging to the pursuer, on her voyage from Falmouth, or a port or place in that neighbourhood, and from thence back to her port or ports of call and discharge in the United Kingdom?

2. Whether the said vessel, by and through injury sustained on or about the 1st day of December 1845, and during the currency of the said policy, became a wreck, and was totally lost? and Whether the defender is, under the said policy, indebted and resting-owing to the pursuer in the sum of £126, 6s. 10d. or any part thereof, with interest thereon?

No. XI.

Scott & Gifford v. *Miller & Kerr*,—*22d March* 1830.

It being admitted that the pursuer Scott was, on the 26th day of June 1821, proprietor of one-half of the vessel called the "Earl of Dalhousie," and that on the 4th day of July 1821, the said vessel sailed from the Clyde, and touched at Fort-William in the north of Scotland, and on her outward bound voyage was totally lost on the 6th day of September 1821, on the side of the Island of Anticosti in the Gulf of St Lawrence;

It being also admitted that by a policy of Insurance dated the 3d day of July 1821, the Sea Insurance Company of Scotland insured the said vessel in a voyage from Clyde to Quebec, and ports of discharge and loading in British North America while there, and back to Dundalk and Greenock, with leave to call at Tobermory for passengers on the voyage out;

1. Whether, on the 20th day of June 1821, the pursuer, John Gifford, was owner of the one-half of the said vessel?

2. Whether the defenders, or any of them, promised and agreed to insure, or to get £1,000 insured on the said vessel, on a voyage at and from Clyde to Quebec (with leave to call at a port in the Highlands to take in passengers), while there, and thence to Dundalk, and from Dundalk to Greenock, in terms of a letter from Mr Joseph Manticha, dated 16th June 1821? and Whether the defenders failed to perform the said promise and agreement, to the loss, injury, and damage of the pursuers, or either of them?

Or,

Whether the pursuers accepted of the said policy dated 3d July 1821, as implement of the promise and agreement foresaid, on the part of the defenders?

No. XII.

Anderson, Garrow, & Co. v. *Forth Marine Insurance Co.*—13*th March* 1844.

It being admitted that, on the 26th April 1841, the defenders granted the policy No. of process, whereby in consideration of a certain premium paid by the pursuers,

certain goods shipped by the pursuers on board a brig called the "John" of Liverpool, from that port to the port of Miramichi, were insured against the perils stated in the policy, for the sum of £1,000; and it being further admitted, that on or about the 19th May 1841, the said goods, to the amount of £892, 4s. 7d. were lost by the wreck of the said vessel, and that the said sum of £892, 4s. 7d. became due and payable by the defenders to the pursuers; and it being further admitted that the sum of £442, 4s. 7d. has since been paid,

Whether the said defenders are indebted and resting-owing under the said policy in the sum of £400, being the balance of the said sum of £892, 4s. 7d. with interest thereon, or any part thereof?

No. XIII.

St Patrick Assurance Company of Ireland v. *Metcalf*,—
21*st February* 1833.

It being admitted that by a policy of Insurance dated the 22d day of November 1825, the pursuers insured the vessel "Ann," the property of the defenders, at a premium of Nine Guineas per cent.

Whether the defenders are indebted and resting-owing to the pursuers in the sum of £97, 5s. or any part thereof, with interest thereon, as the amount of premiums on the said vessel under the said policy, from 1st October 1825 to 31st October 1826?

LIFE INSURANCE.

No. XIV.

Forbes & Co. v. *The Edinburgh Life Assurance Co.*—
19th January 1830.

It being admitted that, on the 20th day of September 1826, the defenders granted the policy of Insurance No. 6 of process, whereby, in consideration of a certain premium, the defenders agreed to pay to William Inglis, Writer to the Signet, the sum of £3,000 sterling, on the death of John Thomas Earl of Mar, and that the right to the said policy is now in the pursuers;

It being also admitted that, on the 20th day of September 1828, the said Earl died,

Whether the defenders are indebted and resting-owing to the pursuers in the said sum of £3,000 contained in the said policy?

No. XV.

Semple v. *Glasgow Insurance Co.*—*2d June* 1842.

It being admitted that, upon the 14th day of December 1839, the defenders granted the policy of Insurance No. 4 of process, whereby, in consideration of a certain premium, the defenders agreed to pay to the Reverend George Thornton Mostyn, Samuel Coleman, and David Tweedie, the sum of £995 sterling, within three months after the death of Samuel Gordon Semple should have been certified and

proved to the said Insurance Co. and that the right to the policy is now in the pursuers;

It being also admitted that on the 27th of December 1840, the said Samuel Gordon Semple died,

Whether the defenders are indebted and resting-owing to the pursuers in the sum of £995, contained in the said policy or any part thereof, with interest thereon, from the 28th day of March 1841?

Or,

Whether, by misrepresentation or undue concealment as to the health and habits of the late Samuel Gordon Semple, the defenders were induced to grant the said policy?

No. XVI.

M'Loskie v. *National Loan Fund Life Assurance Society*,—*20th December* 1844.

It being admitted that, on the 13th day of January 1840, the defenders granted the policy of Insurance No. 15 of process, whereby, in consideration of a sum of £13 as the premium of Insurance for twelve calendar months, from 9th January 1840, the defenders became bound that if the said James M'Loskie died on or before the 8th January 1841, or on condition of payment by him, or his assignees, of the said premium yearly, then if he should die at any time thereafter, the said defenders became bound, within three calendar months after proof, satisfactory to the Directors of the Society, should be received of his death, to make payment to his executors, administrators, or assignees, of the sum of £499, 19s., and that the right to the said policy is now in the pursuers;

It being also admitted that the said James M'Loskie died on the 22d day of July 1844,

Whether the defenders are indebted and resting-owing to the pursuers in the sum of £499, 19s. contained in the said policy, with interest from the 25th day of October 1844?

Or,

Whether, by fraudulent misrepresentation, concealment, or non-communication of material fact or facts touching the health and habits of the insured, the defenders were induced to grant the said policy?

No. XVII.

Hutchison v. *National Loan Fund Life Assurance Society*,— 21*st February* 1845.

It being admitted that, on the 4th April 1843, the defenders granted the policy of Insurance No. 5 of process, whereby, in consideration of a certain premium, and on certain conditions therein set forth, the defenders agreed to pay to the executors, administrators, or assignees of the said Mrs Anne Paton or Armstrong, the sum of £499, 19s. after her death, and that the right to the said policy is now in the pursuers, as assignees of the said Mrs Anne Paton or Armstrong;

It being also admitted, that on the 28th October 1843, the said Mrs Anne Paton or Armstrong died,

Whether the defenders are indebted and resting-owing to the pursuers the said sum of £499, 19s. contained in the said policy, or any part thereof, with interest thereon from the day of February 1844?

Or,

Whether, by fraudulent misrepresentation or undue concealment as to the health or habits of the said Mrs Anne Paton or Armstrong, the defenders were induced to grant the said policy?

No. XVIII.

Scottish Amicable Life Assurance Society v. *Ross, &c.*—
27th June 1838.

Whether, by misrepresentation or undue concealment, or non-statement of material facts as to the health or habits of the late Mrs Catherine Munro or Paton, the pursuers were induced to grant the policy of Insurance No. 12 of process, dated 18th April 1834?

No. XIX.

North British Insurance Co. v. *Ralston's Executors,*—
10*th June* 1837.

Whether the policy of Insurance No. 23 of process, bearing to be an Insurance by the pursuers of the sum of £2,500 on the life of the late Mrs Agnes Ralston of Warrickhill, for a year from the 10th December 1833, was obtained from the pursuers by the misrepresentation or by the undue concealment of material facts by Mrs Ralston, or by any one acting in her behalf?

Or,

Whether, under the said policy, the pursuers are indebted and resting-owing to the defenders in the said sum of £2,500, or any part thereof, with interest thereon?

No. XX.

The Scottish Equitable Life Assurance Society v. *Hairstens' Trustees*,—3*d June* 1846.

It being admitted that the certificate or policy of Insurance dated 7th May 1841, being No. 18 of process, was granted by the pursuers in favour of the deceased John Hairstens; and that the said John Hairstens died on 8th December 1841,

Whether the said certificate or policy of Insurance was granted by the pursuers on the faith of the Schedule or Private Friend's Report, No. 39 of process? and Whether the subscription thereto was not the genuine subscription of Robert Corrie or Currie, draper in Dumfries, but false and forged? and Whether the said subscription was forged and fabricated by the said John Hairstens, or others acting under his direction or with his knowledge? or Whether the said report was delivered or held out and represented by the said John Hairstens, or others acting on his behalf, to the pursuers, or others acting on their part, as the genuine report, and bearing the genuine subscription of the said Robert Corrie or Currie?

Or,

Whether the pursuers, under the said certificate or policy, are indebted to the defenders in the sum of £4,999, 19s. 5d. with interest from 8th June 1842, or any part thereof?

No. XXI.

City of Glasgow Assurance Co. v. *Crichton & Macdonell*,—14*th July* 1846.

It being admitted that, on or about the 25th day of July 1844, the pursuers granted the policy No. of process,

in favour of the deceased Dr James Crichton; and that the said Dr James Crichton died on or about the 11th day of August 1844,

Whether the pursuers were induced to grant the said policy by fraudulent misrepresentation, or undue concealment as to the health and habits of the said Dr James Crichton?

Or,

Whether, under the said policy, the pursuers are indebted and resting-owing to the defender, Charles Crichton, as executor of the said Dr James Crichton, the sum of £593, 9s. 9d. or any part thereof, with interest thereon, from and after the 20th day of November 1844?

No. XXII.

Barker v. *North British Insurance Co.*—*28th February* 1844.

It being admitted that the late James Lyon, Writer in Edinburgh, received in loan from the defenders the sum of £2,500, and insured his life in their office for the said sum, and paid the interest on the said sum, and premiums due on the said Insurance, up to the 4th day of May 1827;

It being also admitted that, on the day of the said James Lyon put into the hands of John Brash, Secretary to the said Company, a bill of exchange for the sum of £140, accepted by D. S. Ronaldson or Dickson, and blank indorsed by the said James Lyon,

Whether the said bill was received by the said John Brash, in payment of the premium which fell due on the said 4th day of May 1827, for the continuance of the said Insurance on the life of the said James Lyon, for

one year, from and subsequent to the said 4th day of May, or for what other purpose?

FIRE INSURANCE.

No. XXIII.

Allan & Watson v. *Independent West Middlesex Fire & Life Assurance Co.*—18*th February* 1840.

It being admitted that, by a policy of Insurance dated 31st August 1838, No. 5 of process, the defenders insured certain premises, the property of the pursuers, in the village of Johnstone, to the amount of £3,140 sterling,

Whether, on or about the 6th November 1838, the said premises were consumed or damaged by fire? and Whether the defenders are indebted and resting-owing to the pursuers under the said policy, in all or any of the sums in the schedule hereunto annexed, or any part thereof, with interest thereon?

No. XXIV.

Campbell v. *Aberdeen Fire and Life Insurance Co.*—*2d July* 1841.

It being admitted that, on the 10th day of June 1837, the defender granted the policy of Insurance, of which No. 5 of process is a copy or duplicate, whereby, in consideration of a certain premium paid by the pursuer, the defenders agreed to insure a certain house, shop, cellar, and store-room, with certain furniture and stock and effects in the said house, shop, and store-room, the property of the pur-

suer, to the amount specified in the schedule hereunto annexed, against damage by fire during the period from 25th September 1837 to 25th March 1838;

It being also admitted that, on the 2d day of January 1838, the said building, furniture, stock, and effects, were consumed or damaged by fire,

Whether the defenders are indebted and resting-owing to the pursuers in all or any part of the sum or sums contained in the said policy as the value of the building, furniture, stock, and effects, destroyed and damaged as aforesaid?

Schedule.

No. XXV.

Lennox v. *Ewing, &c.*—*22d June* 1838.

It being admitted that, on the 21st day of January 1836, the defenders granted the policy of Insurance No. 5 of process, and that on the 11th and 12th days of February 1836 certain of the articles mentioned in the said policy were consumed, and others damaged by fire,

Whether, under the said policy, the defenders are indebted and resting-owing to the pursuer in the sum of £700, or any part thereof, with interest thereon?

No. XXVI.

Hercules Insurance Co. v. *Hunter, &c.*—*9th July* 1835.

It being admitted that certain machinery, the property of the defender Hunter, was insured by the pursuers against

damage by fire for the period from 8th October 1831 to Martinmas 1832, and that the said machinery was, on the 22d of October 1831, destroyed by fire;

It being also admitted that the said parties submitted to the amicable decision of Claud Girdwood, engineer, and Hector Grant, merchant, in Glasgow, the claims arising for the damage done by the said fire, and that, on the 3d and 4th days of April 1832, the said arbitrators pronounced the decree, of which No. 4 of process is an extract,

Whether the defender destroyed the said machinery, or caused the same to be destroyed, as aforesaid, for the purpose of defrauding the pursuers of the said sum insured, as aforesaid?

Whether the said Insurance was effected by the defender upon a fraudulent over-valuation of the said machinery, with the intention of destroying the same by fire?

No. XXVII.

Glen v. *Aberdeen Fire and Life Assurance Co.—22d January* 1845.

It being admitted that the policy of Insurance No. 4 of process, with the indorsations thereon, was granted by the defenders, whereby, in consideration of certain premiums paid by the pursuer, the stock in trade of the pursuer, in the shop therein mentioned, was insured against loss or damage by fire from 17th August 1842 to 25th September 1843, and from 5th September 1843 to 25th September 1844, to the extent of £1,000 sterling,

Whether, on or about the 28th day of November 1843, a fire took place in the said shop, in consequence whereof

the said stock in trade therein was destroyed in whole or in part? and Whether the defenders are indebted, under and in terms of the said policy, to the pursuer in the sum of £705, 3s. 5d. sterling, or any part thereof, as the amount of the loss and damage sustained by the pursuer, by and in consequence of the said fire; and farther, in the sum of £11, 13s. sterling, as the amount of an account incurred by the pursuer in ascertaining the said loss and damage, with interest on the said sums?

No. XXVIII.

Wilsons v. *Edinburgh Friendly Assurance Society against Losses by Fire*,—17*th February* 1847.

It being admitted that, on the 18th September 1843, the defenders granted the policy of Insurance No. 4 of process, whereby, in consideration of a certain premium, and on the conditions therein set forth, they agreed to pay to the pursuers all loss and damage which they should suffer on stock and utensils in trade, including cages, and Foreign and British birds therein, shop furniture and fixtures in their shop, area flat, No. 34, Princes Street, Edinburgh, to an extent not exceeding £450;

It being also admitted that a fire took place in the said shop or premises occupied by the pursuers, on the evening of the 29th or morning of the 30th December 1845,

Whether goods and effects belonging to the pursuers were destroyed or damaged by the said fire? and Whether, under the said policy, the defenders are indebted or resting-owing to the pursuers in the sum of £450, or any part thereof, as the value of the goods and effects so destroyed or damaged as aforesaid?

Or,

Whether it was a condition of the said policy, that if there appear fraud on the claim made for a loss alleged to be incurred under the same, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under the said policy? and Whether there was fraud in the claim made for such loss under the said policy? or Whether the said claim was supported by false swearing on the part of the pursuers, or either of them?

No. XXIX.

Mills v. *Albion Insurance Co.*—*20th September* 1826.

It being admitted that, on the 27th or 28th day of August 1821, the steam-vessel called the "Robert Bruce," the property of the pursuers, was destroyed by fire while at sea, on her voyage betwixt Liverpool and Dublin,

Whether the defenders promised and agreed to insure the pursuers to the extent of £3,000, or about that sum, from all loss and damage which might be caused by fire to the said steam-vessel while at sea as aforesaid? and Whether the defenders have failed to perform the said promise and agreement, to the loss and damage of the pursuers?

Damages laid at £3,000.

No. XXX.

Donaldson & Pinkerton v. *Brierly, (Manchester Fire and Life Insurance Co.)*—*15th December* 1832.

It being admitted that the defenders granted to the pursuer Donaldson the policy of Insurance No. 6 of process, upon certain warehouses and the goods therein contained, and that the said policy was current on the 20th November 1829;

It being also admitted that, on the said 20th November 1829, the said warehouses, the property of the said pursuer, and the goods therein, were partially destroyed by fire,

Whether the pursuer Pinkerton, on the said 20th November 1829, had in the said warehouses certain wheat, amounting in value to not more than the sum of £1,746, 13s. destroyed by the said fire? and Whether the defenders, under the said policy, are indebted and resting-owing to the pursuers, or either of them, in the sum of £408, 1s. 11d. (and interest thereon from and since the said 20th November 1829) or any part thereof, as their proportion of the loss upon the said wheat?

Or,

Whether, on or about the 16th day of January 1830, the pursuer Donaldson, discharged the defenders of their liability under the said policy?

No. XXXI.

Pinkerton v. *Donaldson*,—15*th December* 1832.

It being admitted that, on the 20th day of November 1829, there lay deposited in certain warehouses, the property or in the occupation of the defender in Glasgow, a certain quantity of wheat, the property of the pursuer, amounting in value to £1,746, 13s. and that on the said day the said wheat was destroyed by fire in the said warehouses,

Whether, at a subsequent date to the time when the said wheat was deposited in the said warehouses, the defender promised and agreed to communicate to the pursuer the benefit and protection against fire, under certain policies of Insurance held by the defender from the Manchester Alliance and other insurance offices? and Whether the defender failed to perform the said promise and agreement, and is indebted and resting-owing to the pursuer the said sum of £1,746, 13s. or any part thereof, with interest thereon from the 20th day of February 1830?

PART X.

CONTRACTS OF CARRIAGE,

INCLUDING

CONTRACTS FOR CARRIAGE OF GOODS—CHARTER-PARTY AND BILL OF LADING—FREIGHT—DEMURRAGE—RESPONSIBILITY OF SHIPOWNERS AND MASTERS—COMMON CARRIERS BY LAND OR WATER—CARRIAGE OF PERSONS.

Contracts for Carriage of Goods.—Few Issues have been settled, or discussions arisen as to their construction, in cases of contracts, specific or implied, for carriage by land or water, and little scope is afforded for practical remark.

When the contract of affreightment is reduced to writing in the form of a Charter-party, the stipulations of the parties appear from the instrument, and are more fitted for legal construction than determination on matter of evidence. In the subjoined Example No. III, however, the Counter-Issue puts to the Jury a proper question of fact, Whether it formed part of the contract that the shipmaster should act in conformity with instructions contained in a separate paper? and in Example No. IV, the question is put, Under what agreement certain goods were carried on to another port, after the voyage strictly under the Charter-party had been completed?

When goods are sent on board a general ship, the contract of carriage is contained in the Bill of Lading, either alone, or taken along with the advertisement or other writing by which the ship was offered for hire. The contract to carry for hire, whether by land or water, is also

implied from status as a public carrier, and reception of goods in that character; specific contract is seldom entered into for land-carriage, and the general rules of the implied contract in both cases fall to be treated of under this Part.

Charter-Party and Bill of Lading.—The various stipulations in these instruments give rise to actions of damages for non-implement, in which Issues will be framed applicable to the particular covenant, breach of which is alleged, and will be constructed on the same principles with those for breach of other contracts. The more admissions obtained, the simpler will be the resulting question.

When the party sued for damages alleges breach of an undertaking by the opposite party, the relevancy of this as a defence depends, in the English Courts, on the distinction whether the undertaking so broken was a condition precedent or not. If it was, the allegation goes to proof as a good defence, *Shadworth* v. *Higgins*, 3 Camp. 385. If not, it only affords ground for a separate claim of damages, *Hall* v. *Cazenove*, 4 East. 477. This distinction may be of use in determining whether a Counter-Issue is necessary for the defender. Any defence not arising out of the nature of the contract will require a Counter-Issue.

The amount of damage sustained, as for instance by the freighter failing to furnish a cargo, is always a matter to be estimated by the Jury; and if the vessel deviates in sailing to the port of loading, the Jury are to consider whether the deviation was of such a nature as to deprive the freighter of the benefit of his contract, and so discharge him of his obligation to furnish a cargo, *Freeman* v. *Taylor*, 8 Bing. 124. Questions may arise as to deviation at the request of the freighter from a voyage insured, and his liability for loss of the vessel in consequence, and the defence that the shipowners acquiesced in such deviation, or lost insurance by their own neglect, *Russell* v. *Shannon*, 1 Sh. Ap. 83; and the Issues in such cases must be adapted to the circumstances.

Freight.—In an action for freight, the circumstances of the agreement and of the voyage ought to be prefaced as admissions, and the question of resting-owing the whole or a balance of the freight put in Issue, as in Example No. I. If not admitted, the essential points must also be put in Issue. The amount of freight is generally part of the written agreement; if not, it must be proved verbally; in the case of a general ship, it may not have been stipulated, and then the Jury will fix it on evidence of the usage of trade. Abbott on Shipping, 406-10. Freight may be sought only *pro rata itineris*, if the vessel has been wrecked, *Taylor* v. *Hogg*, 1802, Dict. 10,113. It will be due if the shippers take the goods off the hands of the owners, *Wilson* v. *Bennet*, March 10, 1809, F. C. They may defend themselves on the ground of having abandoned to the owners, not to the underwriters, *Lutwidge* v. *Grey*, 1732, Dict. 10,111; *Luke* v. *Lyde*, 2 Burr. 882. And thus questions of fact may arise, but generally capable of being proved under the Issue of resting-owing.

A claim of damages for injury to his goods may be pleaded by the merchant in compensation as a defence to an action for freight, *Lamont*, 1680, Dict. 10,109, *Taylor* v. *Forbes*, 9 Sh. 113; and the burden of proving it under a Counter-Issue lies on the defender, as in *Campbell* v. *Tyson*, December 22, 1841, and Example No. II. In *Pillans & Co.* v. *Pitt*, 4 Sh. 350, delivery had been taken by consignees, without warning the master that they meant to resist payment of the freight, and without having the cargo judicially inspected and sold, and a claim of damage against the master for injury to the goods, and for granting a false bill of lading, was held to be no relevant defence.

Demurrage.—The number of days to be allowed for loading and unloading, and the rate of demurrage, are generally matters of stipulation in the Charter-party, but if not, they form questions for the Jury, as in Example No. VII. Under

such Issues the Jury has to try such questions as, Whether the detention arose from the fault of the pursuer, or from stress of weather, for which the freighter is not liable, Abbott, 313, or How long from each cause? and these questions sometimes involve proof of the usage of trade, *Lannoy* v. *Merry*, 2 Bro. P. C. 60; *Jameson & Co.* v. *Laurie*, House of Lords, 10th March 1796, 6 Bro. P. C. 472.

The Examples No. VIII and IX arise out of contracts not of carriage, but of sale—where a vessel sent by the purchaser according to agreement, was detained by the sellers not shipping the goods sold as stipulated. Demurrage is due in these cases, and in other cases of wrongous detention, *Gray & Co.* v. *Farquhar*, 2 Sh. 160; and the questions of fact are similar to those where the claim is under a Charter-party, *Wight* v. *Liddell*, 4 Murr. 325.

Responsibility of Ship-Owners and Masters.—The Bill of Lading, signed by the master, generally fixes the amount of goods received on board, and their condition. It also binds the master, and through him the owners, to deliver them in like good order and condition under the exception of the perils enumerated. The question of fact will be, Whether the goods perished, or were damaged by one of these perils, or by such fault of stowage, or other negligence of the master or mariners, as to render the owners liable? Even without express exception, the common law would not hold ship-owners responsible for the result of storms or other acts of God; for that would be to make them insurers, which they are not.—Lord Mansfield, in *Hotham* v. *East India Co.* Dougl. 272. The enquiry of fact may also be into breach of implied warranty, as sea-worthiness—or express warranty, as sailing with convoy,—whether the loss could be traced to that cause or not; because the owners will be liable if the merchant has lost the benefit of an Insurance owing to breach of a warranty which he made, relying upon their representation to him,—Abbott 340, 351-2. The

defence, that the goods were damaged in consequence of the improper mode in which they were packed by the pursuer, does not require a Counter-Issue, *Urquhart* v. *Brown*, 11 Sh. 566.

The liability of ship-owners is, by Statute, limited to the value of the ship and freight, where the loss was without the fault or privity of the owners, 53 Geo. III. c. 159, § 1, the value to be taken as at the time of the loss, *Wilson* v. *Dickson*, 2 B. & A. 2. The burden of proving that the value was less than the damage sustained through their fault would seem to lie on the owners under a Counter-Issue. —See below, Part XI, Example No. X. Similar Counter-Issues may arise from the other Statutory limitations, as, for instance, Whether the damage arose from the fault of the pilot, duly licensed, for whom the owners are not responsible?—6 Geo. IV. c. 125, § 55.

The right to call the ship-owners to account was the subject of discussion in the case of *Dunlop* v. *Lambert*, 15 Sh. 884, 1232, reversed on appeal, M'Lean and Rob. 663, when it was held that the freighters and consignors having raised the action, the questions, Whether the goods were delivered on the risk of the consignors or consignee? and Whether there was a special contract between the consignors and carriers sufficient to enable them to recover in the action? ought to have gone to the Jury along with the rest of the case, under the Issues No. XI. In *Campbell* v. *Tyson*, December 22, 1841, the freighters were also the consignees; and it was held that an averment in the summons—that the goods were shipped "for and on account of" the pursuers—covered the Issue Whether they were put on board for the pursuers "as freighters and consignees?"

Common Carriers by Land or Water.—By the common law, based on the edict *nautæ caupones stabularii*, public carriers receiving goods in that capacity are, without any express contract, responsible for their safe delivery. The first question of fact then is, Whether the goods were

delivered to the carrier or his servants in such circumstances as to imply an undertaking on his part to carry and deliver them according to their address? The next question is, Were they so delivered by him? It being proved by the pursuer that the goods were given to the carrier, *prima facie* evidence of non-delivery will throw the burden on the defender of accounting for them. Under the Issue, Whether he "failed" to deliver?—Examples XII and XVII,—he may prove delivery, or what is equivalent, as delivery to a servant of the pursuer, or to a carrier going to his residence, *Bain*, 1 Sh. 14; *Armstrong*, 3 Sh. 464. In *Ogilvie* v. *Edinburgh, Leith & Hull Shipping Co.* 2 Murr. 136, the Company endeavoured unsuccessfully to prove to the Jury that delivery to a Leith carter was, by the usage of the place, sufficient exoneration; and in *Chatto & Co.* v. *Pyper & Co.*, 4 Murr. 351, the defenders successfully maintained that delivery to a respectable-looking person, representing himself as sent by the pursuer, was enough, the pursuer having been in the habit of sending clerks without written authority or introduction for their parcels.

Under the Issue, Whether the carrier "wrongfully failed" to deliver? Examples XI, XIII, XVI,—he may prove that the loss arose from inevitable accident, or other cause which by Statute or common law exempts him from responsibility, such as want of specific address on the goods, *Weir*, Hume's Col. 304. Theft forms no defence, according to the policy of the rule of law; nor does fire, except under the limits of the Statute. If a ship has been stranded and the cargo saved, the ship-owner will not be relieved of his responsibility unless he prove that the goods amissing were lost by the wreck, *Rae* v. *Hay*, 10 Sh. 303. In No. X, the pursuer, by his second Issue, takes the burden of shewing fault, negligence, or want of skill on the part of the defender; probably, because the goods, butter and poultry, were actually delivered, although in a damaged condition. Even here, however, a *prima facie* case would throw the burden of proof on the car-

rier. Temporary loss of luggage from the negligence of a carrier, is a good ground for damages, *Ogilvie*, 6 Sh. 691.

The carrier must take a Counter-Issue if he founds his defence on the Statute 11 Geo. IV. and 1 Will. IV, c. 68, which limits his responsibility to £10, in the case of sundry enumerated kinds of goods, unless informatiom is given of the value of the parcel, and such increased charges paid, or engaged to be paid, as the carrier may by notice require. —See Example XV. He may also, as in that case, take a Counter-Issue on the want of reasonably prompt notice of the non-delivery of the package, Mann & Co. 7 Sh. 806, or other special circumstances or matters of agreement, varying the common law rules.

The pursuer must prove his loss,—the value declared not concluding the carrier who received the increased rate, 11 Geo. IV. and 1 W. IV, c. 68, § 9, and he is allowed his oath *in litem* as to the value before the Jury, on the same conditions as before the Court, *Crawcour* v. *St George Steam Packet Co.* July 30, 1842.—See Example, No. XVI, where the second Issue was required, owing to the Company having denied that they were responsible for the other defender, and a supplementary action having been accordingly raised against him as an individual.

Carriage of Persons.—Proprietors of stage-coaches, steamboats, &c. are responsible for any accident or damage occasioned to those they have undertaken to carry by the insufficiency of the vehicle, or unskilfulness of the driver, boatman, or others employed. They are not held as *insuring* the safety of passengers, but the presumption is against them, and when injury is done, the burden lies on them of proving that it arose from inevitable accident or such defect of construction as experienced persons, with reasonable attention, could not have discovered, *Anderson* v. *Pyper*, 2 Murr. 261; *Lyon* v. *Lamb*, 16 Sh. 1188; *Aston*, 2 Esp. 531. Some Examples of Issues under this head are given in

addition to those at pp. 167 and 173. The annexed Example, No. XVIII, was the subject of judicial discussion before both Divisions of the Court,—*Cooleys* v. *Edinburgh and Glasgow Railway Co.* December 13, 1845,—on a proposal by the Company to admit in the Issue fault and negligence on the part of their servants, and that damage was suffered, and to put as the sole question to the Jury, "What is the amount of the said loss, injury, and damage?" The avowed object was to prevent the pursuers going into a proof of the circumstances of negligence, lest the minds of the Jury should be inflamed, and vindictive damages be the result. They had not, however, admitted on record the detailed statement of the circumstances given by the pursuers. A majority of the two Divisions held that the ordinary form of Issue ought not to be departed from; and that it could not serve the defenders' purpose if it were; because, although the claim for *solatium* is difficult to define, the nature and degree of the negligence by which the loss or injury was occasioned, form relevant subjects of enquiry and consideration for the Jury in assessing the damages.

The provisions of the Passenger Act may be referred to, 5 and 6 Vict. c. 107; and further, in reference to this part, the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, and the English Cases collected in Harrison's Digest, *voce Ship* and *Carrier*, may be consulted.

EXAMPLES.

No. I.

Fenwick v. *Campbell*,—10*th July* 1835.

It being admitted that, at Barbadoes in March 1832, the vessel named "Duke of Clarence" of London, was chartered to take on board a cargo of molasses and other produce at the Island of Tobago, in the West Indies, to be delivered

at the port of Greenock in Scotland, in terms of the charter-party No. 34 of process, and that the pursuer is master of the said vessel;

It being also admitted that, in the month of June 1832, in the said Island of Tobago, there were shipped on board the said vessel 490 puncheons of molasses, and 133 puncheons of rum, consigned to the defender and for his behoof, to be delivered at the said port of Greenock, and that the pursuer granted the bill of lading No. 12 of process;

It being also admitted that the pursuer, under the said bill of lading, delivered in quantity to the defender 435 puncheons of molasses, and 132 puncheons of rum,

Whether the defender is indebted and resting-owing to the pursuer in the sum of £374, 13s. 11d. or any part thereof, with interest thereon, as the balance of the freight of the said puncheons?

No. II.

Campbell & Co. v. *Tyson, &c.*—*19th March* 1840.

It being admitted that the defenders are owners of the brig "Wasdale" of Whitehaven, and that on the 14th day of November 1837, the pursuers chartered the said vessel in terms of the missives of charter-party, No. 5 of process,

Whether, on or about the 9th day of April 1838, 216 hogsheads 22 tierces and two barrels of sugar, were put on board the said vessel at Grenada for the pursuers, as freighters and consignees? and,

Whether, under the said missives, it was agreed and understood that the defenders should bring the said sugar from Grenada to Port-Glasgow in good condition? and Whether they wrongfully failed to deliver 50 hogsheads and one

tierce of the said sugar, or a part thereof, in the said condition, to the loss and damage of the pursuer!

Sum claimed, £758, 15s. 10d.

No. III.

Lyon v. *Hutchinson & Son*,—*4th June* 1830.

It being admitted that the pursuer James Lyon, in the month of March 1826, was owner of the vessel "James," and that in the said month the defenders, by a charter-party dated 9th March 1826, chartered the said vessel to proceed in ballast to Pictou, and there load from the factory of the defenders not exceeding 80 loads of hard wood, and with the same to proceed to Richibucto, and at that port fill up with yellow pine timber, with deals, billets, staves, and lathwood, for broken stowage only, not exceeding what she can reasonably stow and carry, and to proceed to Leith, and there deliver the said cargo; and that in consideration of the said voyage the defenders became bound to pay, as freight, pilotage, and port charges, to the pursuer, for the hard wood 45s. per load of 50 cubic feet; for yellow pine timber 42s. per load of 50 cubic feet King's calliper measure; broken stowage two-thirds—that is billets, staves, and lathwood at 28s. per fathom of four feet; lathwood deals the same per load of 50 cubic feet,

Whether the defenders are indebted and resting-owing to the pursuer in the sum of £237, 19s. 1d. or any part thereof, with interest thereon from the day of , as the balance of the freight of the said vessel on the said voyage?

Or,

Whether, at the time of sailing on the said voyage, it was understood and agreed betwixt the said parties that the

pursuer should act in conformity to the instructions contained in a letter without a date, being No. 56 of process?

And,

Whether the pursuer wrongfully failed to implement the said charter-party or agreement?

No. IV.

Mitchell v. *Galloway*,—3*d July* 1847.

It being admitted that under the charter-party No. 5 of process, the vessel called the "Royal Adelaide," belonging to the pursuer, sailed on a voyage from Glasgow to Bombay, and arrived at Bombay on or about the 19th July 1842, and that freight from Glasgow to Bombay has been paid,

Whether, after the arrival of the said vessel at Bombay as aforesaid, the defenders used and employed her on a further voyage from Bombay to Madras, and are indebted and resting-owing to the pursuer in the sum of £449, 5s. 7d. or any part thereof, with interest from 23d September 1842, as the freight of the said vessel during that voyage?

Or,

Whether, after the completion of the said voyage by the vessel's arrival at Bombay, goods in the said vessel belonging to the defenders were, at the request or for the convenience of the pursuer, or of others acting and having authority so to act for him, carried on to the port of Madras, upon the understanding and agreement that the defenders were not to be liable in any charge for freight in respect of such further voyage?

No. V.

M'Kay v. *M'Leod*,—*27th February* 1827.

It being admitted that on the 10th day of December 1824, the vessel called the "Diana," was the property of the defender Norman M'Leod, and that, at the same time, the defender Murdoch M'Leod, was master of the said vessel;

It being also admitted that on the said day there were shipped at Clare, in Ireland, on board the said vessel, 1,583 barrels of oats, the property of the pursuer, and that the defender Norman M'Leod, by a bill of lading dated the 10th day of December 1824, subscribed by Murdoch M'Leod, master of the said vessel, undertook and agreed to deliver the said oats in good condition at Glasgow, the danger of the sea, fire, rivers, and navigation, of whatsoever nature and kind excepted;

It being also admitted that decree in absence was pronounced against the said Murdoch M'Leod,

Whether the defender Norman M'Leod failed to perform the said undertaking and agreement, to the loss and injury of the pursuer?

Sum claimed, £1,078, 13s. 6d.

No. VI.

Murray v. *M'Iver*,—*17th February* 1847.

It being admitted that the defender, in the month of December 1845, was owner of the schooner "Jessie" of Stornoway, and that, upon the 4th day of December 1845, Campbell and Rudd of Liverpool, agents for the pursuer, shipped on board the said schooner then lying in Liverpool, 1,258

bags of Angra Pequina Guano, to be delivered at the port of M'Duff in Scotland, to the pursuer or his assignees, conform to bill of lading signed by Angus M'Leod, master of the said schooner,

Whether, in consequence of the insufficiency of the said vessel, or through the fault, negligence, or want of proper care on the part of the defender, or others in his employment, the cargo, by being injured by sea-water, was not delivered in the like good order and condition in which it was shipped, to the loss, injury, and damage of the pursuer?

Damages laid at £380.

No. VII.

Nairne v. *Watt*,—*26th June* 1829.

It being admitted that, on the 27th day of June 1827, the master of the vessel called the "Palladium" of Newburgh, the property of the pursuer, entered into an agreement with the defender to proceed with the said vessel to Cronstadt, and to bring to Dundee, or any other safe port betwixt Aberdeen and Newcastle, both inclusive, a cargo of oats;

It being also admitted that the said vessel proceeded to Cronstadt aforesaid, and brought home the said cargo, and that on the 23d day of March 1828 the defender paid the stipulated freight,

Whether four guineas a-day was agreed to be the amount of the demurrage for the said vessel if detained beyond thirty days in loading and unloading the said vessel? and

Whether the said vessel was detained by the defender, or those acting for him, for days beyond the said

thirty days, in loading and unloading the said cargo? and Whether the defender is indebted and resting-owing to the pursuer the sum of £155, 8s. or any part thereof, as demurrage, with interest thereon from the 8th day of October 1827?

No. VIII.

Brooks v. *Clark, &c.—7th July* 1837.

Whether the pursuer purchased from the defender Clark a certain quantity of rags, to be shipped from Dublin on board a vessel called the "Lion?" and Whether, by the fault or negligence of the defender, the said vessel was detained or delayed, whereby the pursuer was subjected to demurrage and expenses? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £ , or any part thereof, with interest thereon, as the amount of demurrage and expenses aforesaid?

No. IX.

Wight v. *Liddell,—21st July* 1827.

It being admitted that the pursuer is assignee of the estate of Johnston and Wight, late merchants in Leith;

It being also admitted that on the 15th day of January 1815, the defender William Liddell promised and agreed to sell and deliver to the said Johnston and Wight from 14,000 to 16,000 feet of wood at the price of £1, 2s. 6d. per ton, deliverable at Pictou, or a safe port in the neighbourhood, first open water, in 1815,

Whether the said Johnston and Wight sent a vessel called the "Friendship," to receive delivery of the said wood? and Whether the said vessel arrived at Pictou in the month of November 1815?

Whether the defender failed to furnish the timber at the port aforesaid in due and proper time, and thereby delayed the sailing of the said vessel, to the injury and damage of the said pursuer?

No. X.

Burns v. *London, &c. Shipping Co.*—11*th June* 1839.

It being admitted that the defenders are proprietors of the steam-vessel "Royal Victoria," and that the pursuer is assignee in trust, under the deed No. 5 of process,

Whether, on or about the 13th day of February 1836, the pursuer, and the persons for whom he is assignee aforesaid, did ship at Leith, on board the said steam-vessel, the quantities of butcher-meat and poultry specified in the accounts Nos. 6 to 24 inclusive of process, or any part thereof, to be conveyed to London on board the said vessel?

Whether, through the fault, negligence, or want of skill of the defender, or those in their employment, the said meat and poultry, or any part thereof, was lost or damaged? and Whether the defenders are indebted and resting-owing to the pursuer himself, and as assignee foresaid, in the sum of £1,332, 18s. 9d. or any part thereof, with interest thereon, as the loss or damage caused as aforesaid?

No. XI.

Dunlop & Co. v. *Lambert & Others*,—22*d January* 1836.

1. Whether, on or about the 31st day of August 1833, the pursuer shipped a puncheon of spirits on board the "Ardin-

caple " of Newcastle, a vessel belonging to the defenders, for the purpose of being conveyed to Newcastle, and delivered to Matthew Robson, Collier Row, by Houghton-le-Spring, care of Mrs Latimer, Newcastle? and

2. Whether the defenders wrongfully failed to deliver the said puncheon to the said Matthew Robson, and are indebted and resting-owing to the pursuers in the sum of £75, 9s. or any part thereof, with interest thereon, as the value of the said puncheon of spirits?

No. XII.

Chatto & Co. v. *Piper & Bain*,—14*th June* 1827.

Whether, on or about the 19th day of September 1825, the pursuer delivered a parcel containing letters of horning and caption for an alleged debt of £135, 2s. 9d. or caused the same to be delivered at the Mail Coach Office, Edinburgh? and Whether the defenders promised, agreed, or undertook to deliver the said parcel to Edward Railton, Agent, Glasgow, and failed to perform the said promise, agreement, or undertaking, to the loss, injury, and damage of the pursuers?

Sum claimed, £135, 2s. 9d.

No. XIII.

Harvey, Brand, & Co. v. *Carron Co.*—2*d March* 1831.

Whether at London, on or about the dates specified in the schedule hereto annexed, the pursuers and their constituents delivered to the defenders the whole or any part

of the goods in the schedule hereunto annexed? and Whether the defenders then and there agreed to convey the same to Grangemouth or Carron? and Whether at Grangemouth, the defenders, as common carriers, received the said goods on board a lighter or vessel, the property of the defenders, and undertook to carry the same to Port-Dundas? and Whether the defenders wrongfully failed to deliver the same at Port-Dundas aforesaid, and are indebted and resting-owing to the pursuers in the sum of £1,981, 11s. 4d. or any part thereof, as the value of the said goods, with interest thereon from the 13th day of January 1829?

No. XIV.

Urquhart v. *Brown*,—*12th March* 1833.

It being admitted that the pursuer, on the 22d November 1825, shipped a quantity of corks on board the vessel called the "Greenock," the property of the defender; and it being also admitted that the defender advanced to the pursuer the sum of £150 on account of said corks,

Whether the defenders are indebted and resting-owing to the pursuer in the sum of £314, 6s. 2d. or any part thereof, with interest thereon, as the balance of the value of the said corks?

No. XV.

Drummond & Kevan v. *London, Leith, Edinburgh, and Glasgow Shipping Co.*—*20th December* 1841.

Whether the pursuers, on or about the 12th day of October 1839, delivered to the defenders, at their office in Vir-

ginia Street, Glasgow, a truss or package addressed to J. Morrison & Co., London, containing goods to the amount of £61, 16s. 3d. or thereby? and Whether the said defenders agreed or undertook to deliver the said truss or package to the said J. Morrison & Co. and wrongfully failed to perform the said agreement or undertaking, and are indebted and resting-owing to the said pursuers in the said sum of £61, 16s. 3d. as the value of the said goods, with interest thereon?

Or,

Whether the pursuers failed to give reasonable or timeous notice to the defenders of the non-delivery or loss of the said truss or package?

Whether the defenders are common carriers by land for hire, in terms of the Statute 1 Will. IV. c. 68, and complied with its enactments and provisions? and Whether the goods contained in the said truss or package were of the description specified in the said Statute? and Whether the pursuers failed, in terms of the said Statute, to certify the nature and value of the said goods, and to pay an additional sum for the carriage of the same?

No. XVI.

Crawcour v. *St George Steam Packet Co. and William Blair M'Kean*,—*25th February* 1842.

Whether, on or about the day of June 1837, the pursuer deposited with T. S. Pirn, as agent at Hull for the defenders—the St George Steam Packet Co.—four boxes or packages, containing all or any of the articles contained in the schedule hereunto annexed? and Whether the defenders—the St George Steam Packet Co.—wrongfully

failed to deliver all or any part of the said articles to the pursuer, to his loss, injury, and damage?

Whether, on or about the day of January 1838, the said boxes or packages, or any of them, were delivered to the defender William Blair M'Kean, as an individual? and Whether the defender last aforesaid wrongfully failed to deliver all or any of the said articles to the pursuer, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XVII.

Blackwoods v. *General Steam Navigation Co.*—
26th January 1848.

Whether, on or about the 21st day of November 1846, the pursuers delivered to the defenders at Edinburgh, a box or package containing a sable-fur cape and other articles? and Whether the defenders undertook to deliver the same to Robert Clarke and Sons, furriers, London, and failed so to deliver the said sable-fur cape, and are indebted and resting-owing to the pursuers the sum of £24, 10s. or any part thereof, as the value of the said cape, with interest thereon?

No. XVIII.

Cooleys v. *Edinburgh and Glasgow Railway Co.*—
13th December 1845.

It being admitted that, on or about the 19th day of May 1845, the said deceased Thomas Cooley was killed while

passing from Glasgow to Edinburgh in a railway carriage belonging to the defenders,

Whether the death of the said Thomas Cooley was caused by fault, negligence, or want of skill on the part of the defenders, or another in their employment, and for whom they were and are responsible, to the loss, injury, and damage of the said Mary Cooley, or Thomas Cooley, or either of them?

Damages laid at £5,000.

No. XIX.

Gunn v. *Taylor, &c.—20th February* 1841.

It being admitted that, on the 17th day of August 1840, the pursuer was a passenger from Blackshields to Edinburgh by the Leader Coach, of which the defenders Daniel Taylor, George Taylor, and William Binnie, are, and on the said day were proprietors, and that on the said day the defender James Topping, was the coachman,

Whether, on the said day when the pursuer travelled as aforesaid, the said coach was overturned through the fault, negligence, and want of skill of the defenders, or any of them, or of a person or persons in their employment, respectively, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XX.

Jane, Robert, and John Brash v. *Steele, &c.*—
21*st December* 1844.

It being admitted that the defenders were, on 8th July 1843, proprietors of the "Defiance Stage Coach," running between Carlisle and Edinburgh,

Whether, on said day, in or near Selkirk, said coach was overturned by unskilfulness, rashness, or negligence of the driver, then the servant or in the employment of the defenders? and Whether the said deceased Robert Brash, being an outside passenger on said coach, thereby received severe bodily harm, or such bodily injuries as caused his death on or about the 19th day of the said month of July, to the loss, injury, and damage of the pursuers, or any of them?

Damages laid as under,—

To Jane Brash, . .	£1,500,
To Robert Brash, . .	£1,000,
To John Brash, . .	£1,500.

No. XXI.

Mackie v. *Ramage, &c.*—23*d June* 1846.

Whether, on or about the 3d day of September last, the pursuer being an outside passenger by the omnibus or stage coach then running between Edinburgh and Lasswade, of which the defenders were the proprietors, was thrown from the top thereof to the ground, owing to

the improper conduct and reckless driving or negligence of the coachman, then acting for the defenders, whereby the pursuer suffered bodily harm, to the injury and damage of the pursuer?

Damages laid at £20 for medical expenses, and £100 for *solatium*.

PART XI.

MISCELLANEOUS MARITIME QUESTIONS,

INCLUDING

SALVAGE—SEAMEN'S WAGES—EXERCITORIAL POWER OF MASTER —LIABILITY OF MASTER TO OWNERS—COLLISION OF VESSELS.

Salvage.—The questions of fact which arise in regard to salvage may be tried under such an Issue as Example No. I, where the ownership and value of the vessel are admitted, and the questions for the Jury are—Whether the pursuers, or any of them, saved the vessel, and what is the reasonable amount of recompense? It is also part of the admission in that case, that the master and crew had abandoned the vessel. This question may be important in proof; because when the vessel is derelict, it is held that the salvage is of a higher class than when the crew have not left, or have left with the intention of returning. —*Davidson* v. *Jenkins*, Feb. 24, 1844, and English cases there referred to; in one of which Lord Stowell said—"It is by no means necessary to constitute derelict that no owner should afterwards appear. It is sufficient if there has been an abandonment at sea by the master and crew without hope of recovery. I say without hope of recovery, because the mere quitting of the ship, for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment," the *Aquila*, 1. Rob. 40. In the case of *Davidson* the action was raised before the Sheriff, and the proof taken on commission,

but the nature of the questions arising, and of the evidence, may be collected from the report, which seems also to indicate that the questions are well fitted for the decision of a Jury. It would seem that the question—Whether a joint-salvor is entitled to reward?—to entitle him to which he must prove necessity for interference, the *Maria*, 1. Edw. 175—might be tried under the same general Issue—Whether the pursuers, "or any of them," saved? &c.—See further under this head Bell's Prin. § 443-6, and the Statutes regulating Salvage.

Seamen's Wages.—The various Statutory regulations regarding seamen are consolidated by the Act 5 and 6 Will. IV. c. 19, and from its provisions may arise avoidances to the action for wages, which, it would appear, will not require Counter-Issues, but being averred on record, may be proved under the general Issue of resting-owing,—Adam on Jury Trial, p. 87-3. By Sections 2, 3, and 4 of the Act, penalties are imposed for engaging seamen without a written contract, but this does not prevent the mariner's right to prove his engagement by parole testimony, Section 5, *Thomson* v. *Izatt*, 9 Sh. 598. The employment may therefore be matter of Issue for the Jury, as in Example No. II, where there is also a question of damages for infringement of the Statute. At common law there are also avoidances to the demand for wages different in their nature from those which arise in other contracts of service. The principal one is, that freight has not been earned—freight being the mother of wages; and if such defence is taken, evidence will go to the Jury as to the service of the pursuer during a complete voyage, or such part as may entitle to wages *pro rata itineris*, *Harris* v. *Ive*, 1 Har. & W. 238, and other cases in Harrison's Digest *voce* Ship, § vii.

Very few cases in regard to seamen's wages have arisen in the Courts in Scotland, and no Issue has been settled in

regard to such actions. No. III of the Examples would more properly be reserved for the head of reduction on facility and circumvention. As to the effect of the written agreement of service, see *Henderson* v. *Burns*, 10 Sh. 467.

Exercitorial Power of Master.—The authority of the master to bind the owners is proved by his acting as master, but his presumed authority extends only to the management of the ship, and obtaining freight, outfitting and furnishings to the vessel in the absence of the owner. Owners are not liable for furnishings made to a person possessing the ship on a temporary title, and which furnishings were not *in rem versum* of the ship, *Brown* v. *Balfour*, 4 Sh. 398. The holder of a vendition in security is not liable unless he has assumed possession and management of the vessel, which is a question of fact for evidence *prout de jure*, *Russell* v. *Baird*, June 13, 1839. The owner being by law the debtor, it will be for him to shew, by positive and direct evidence or necessary inference, that the creditor has abandoned that security, and accepted or elected other parties as his debtors, *Stewart* v. *Hall*, 2 Dow. 29; *Carsewell*, July 10, 1839. This would give rise to a Counter-Issue of fact. It may also be a question of fact, and would require a Counter-Issue, Whether the furnishings were made contrary to instructions of the owner, of which the furnisher was aware?—*M'Donald* v. *Denny*, 5 Sh. 801.

The owners are also liable for contracts entered into by the ship's husband, whose authority may be proved *rebus ipsis et factis*. He cannot delegate his power, *Forbes*, 2 Sh. 87, so that no action can lie against the owners for furnishings made on the order of persons appointed by him to act in his absence. He binds the owners only within the limits of the exercitorial power, and so not for the expense of a lawsuit, *Campbell* v. *Stein*, 6 Dow, 116; *M'Naughton* v. *Allhusen & Co.* December 11, 1847. His writ binds the owners, but in a reference to oath under the triennial prescription, his oath

affirmative was held to bind only himself; the owners deponing negative of the reference were free, *Duncan* v. *Forbes*, 7 Sh. 821, and 9 Sh. 540.

The Examples Nos. IV and V put the Issue—Whether furnishings were made on the order of the master? and Whether the amount is resting-owing? No. VI seems rather to be founded on some special mandate to make the purchase for which the bill in question was granted.

Liability of Masters to Owners.—Although the owners are liable for the acts of the master to third parties, he is accountable to them for any damage suffered by them through his misconduct, *Urquhart* v. *Brown*, 11 Sh. 567. In Example No. VII are two Issues founded, one on disobedience to instructions, and the other on fault and negligence in the treatment of the cargo. It is a doubtful question how far the master is responsible to the owner for damage traced to the negligence or unskilfulness of the mate, *Petrie's Executors* v. *Aitchison*, February 6, 1841; Report in Fac. Col.

Collision of Vessels.—The rules of law as to "the entire loss of a ship and cargo, occasioned by two vessels running foul of each other," are thus concisely stated by Lord Stowell:—"There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as when the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, A misfortune of this kind may arise where both parties are to blame, —where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both. Thirdly, It may happen by the misconduct of the suffering party only; and

then the rule is, that the sufferer must bear his own burden. Lastly, It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other."—*Woodrop-Sims*, 21st November 1815, 2 Dodson, 83. From this passage, the nature of the questions of fact which arise under such Issues as Examples No. VIII to XII, will be apparent. See also *Burns* v. *Stirling*, 2 Murr. 93. It has been settled that where there is blame on both sides, although one may be more in fault than the other, there is to be no attempt to apportion the damages otherwise than by laying them equally on the parties, *Hay, &c.* v. *Le Neve, &c.* 2 Sh. App. 395; *Innes*, 4 Murr. 161.

The responsibility of ship-owners for damage caused by collision is limited by Statute—53 Geo. III. c. 159, § 1—to the value of the ship and freight due or to become due. This may give rise to a Counter-Issue for the defender, as in Example No. X. See also *Potts* v. *Scurrfield*, 14 Sh. 879, and *Hay* v. *Le Neve*, *ut supra*.

It has been already remarked, p. 264, that loss by collision of vessels is a peril of the sea for which underwriters are liable. On paying the loss they become entitled to relief against the owners of the vessel which ran down the other, if they can establish fault. Hence the Issue No. XI.

EXAMPLES.

No. I.

Ritchie & Others v. *Smith & Greig*,—21*st December* 1833.

It being admitted that the defenders are owners of the vessel called the "Neptune" of Portsoy, and that the said vessel was of the value of £400: It being also admitted that, on the 8th December 1831, the master and all on

board left the said vessel in the Moray Frith, near Rosehearty,

Whether, on or about the 8th day of December 1831, the pursuers, or any of them, saved the said vessel from being lost or wrecked? and Whether the defenders are indebted and resting-owing to the pursuers in the sum of £100, or any part thereof, as a reasonable reward for saving the said vessel, or any part thereof, as aforesaid?

No. II.

Pattullo v. *Cooper*,—*26th May* 1846.

Whether the pursuer was employed as carpenter, and was, as such, one of the crew of the barque "Stirling," of which the defender was master, during the month of December 1842, while the said barque was lying at the port of Memel in East Russia, waiting for a cargo?

Whether, on or about the 10th day of December 1842, the defender wrongfully and illegally caused the pursuer to be apprehended and detained in custody in a prison at Memel for a period of four days, or part of said time, to the loss, injury, and damage of the pursuer?

Whether the defender, on or about the 13th day of December 1842, wilfully and wrongfully, and in contravention of the Statute 5 and 6 Will. IV. c. 19, left the pursuer, one of the crew of the said barque Stirling, behind at the said foreign port of Memel, and sailed away from the said port with the said vessel and the rest of his crew, to the loss, injury, and damage of the pursuer?

Damages laid at £100.

No. III.

Fraser v. *Cant*,—*2d June* 1843.

It being admitted that on or about the 12th day of April 1842, the pursuer signed a letter or acknowledgment of that date, bearing that the pursuer was indebted to the defender in the sum of £88, 11s. for wages and arrears for servitude on board the schooner "Vintage" of Leith,

Whether the said letter or acknowledgment was obtained or impetrated from the pursuer while in a state of mental weakness or facility, arising from severe illness or from other causes, and through fraud and circumvention on the part of the defender, to the hurt and lesion of the pursuer?

No. IV.

Lyle v. *Sloan*,—*7th July* 1842.

It being admitted that, from the year 1834 to the period of raising this action, the defender was the agent for the owners of the vessels Sybella, London Packet, Hope, St Rollox, Glasgow Packet, and Christina, all of Glasgow, in regard to the management of the said vessels,

Whether the pursuer made the furnishings specified in the account No. of process, to the masters of the said vessels? and Whether the defender is indebted to the pursuer, and owing the sum of £41, 3s. 4d. as the price of the said furnishings, with interest, or any part thereof?

No. V.

Yates v. *Mitchell*,—*8th March* 1845.

It being admitted that the defender is owner of the ship or vessel called the "John Mitchell" of Glasgow, and that David Cable was the master or commander of that vessel in the months of July and August 1842, while she lay in the port of London,

Whether, on the order of the said David Cable, the pursuer furnished the wine and other stores mentioned in the account No. 4 of process, or any part thereof, to and for the said ship the "John Mitchell?" and Whether the defender is resting-owing and indebted to the pursuer, in respect of the said furnishings, the sum of £71, 8s. 3d. and interest as libelled, or any part thereof?

No. VI.

Whites v. *M'Callum & Co.*—*1st July* 1843.

Whether the bill of exchange for £720, No. 4 of process, was drawn upon the defenders by Robert Laing, the master of their vessel the "Duchess of Richmond," for the price of certain teak-wood shipped for the defenders on board the said vessel, and was indorsed to the pursuers? and Whether the defenders wrongfully refused to accept or pay the said bill, and are indebted and resting-owing to the pursuers in the said sum of £720 contained in the said bill, or any part thereof, with interest thereon?

No. VII.

Izatts v. *Scotland*,—*2d December* 1843.

It being admitted that the pursuer George Izatt, and Miss Janet Izatt, his sister, were, in the years 1837 and 1838 and part of 1839, joint owners of the barque or vessel called the "James Izatt" of Kincardine, the former to the extent of two-thirds, and the latter to the extent of one-third, and that the pursuer George Izatt was then ship's-husband of the said vessel, and also that the defender James Scotland sailed as master of the said vessel in the year 1837 or 1838, on a voyage from Leith to the port of Sydney, in New South Wales,

1. Whether the pursuer George Izatt, as one of the owners and ship's-husband of the said vessel, gave the defender instructions with reference to the said voyage, that if, on his arrival in Sydney and before the ship was discharged, he did not procure a freight of £1,600 direct to Britain, he should ballast the vessel and proceed either to Batavia, Singapore, or Manilla, (as the monsoons might suit) for the purpose of procuring a return freight, or instructions to that effect? and Whether the defender wrongfully disobeyed the said instructions, to the injury, loss, and damage of the pursuers?

2. Whether part of the cargo of the said vessel on the voyage back from Sydney to London, consisting of whale-bone or whale-fins, was damaged through the fault, negligence, or unskilfulness of the defender, to the injury, loss, and damage of the pursuers?

3. Whether the defender received into his possession, and

wrongfully retained or retains a chronometer, the property of the pursuers, to the loss, injury, and damage of the pursuers?

Damages £1,727, 7s. 5½d. sterling.

No. VIII.

Darg v. *Dickie and Others*,—10*th December* 1824.

It being admitted that, on the 21st day of November 1822, the sloop "Diamond," the property of the pursuer, and the smack or vessel called the "Triumph" of Aberdeen, the property of the defenders, came into collision within a few miles of Dunstanburgh, on the coast of England, and that the said sloop "Diamond" soon afterwards sunk, and was totally lost,

Whether the said collision arose from the fault or mismanagement of the master or mariners on board the said smack or vessel the "Triumph," to the loss and damage of the said pursuers?

Schedule of Damages claimed.

No. IX.

Martin v. *Carter and Others*,—15*th March* 1843.

It being admitted that, on 5th December 1841, the vessel called the "Frederick," commanded by the defender John Wilfred Carter, the property of the defenders Stephen Wiggins and Frederick Augustus Wiggins, and the brig "Alicia" of Sligo, came into collision in the river Clyde,

and that immediately after the said collision the said brig "Alicia" went down and was totally lost,

Whether the pursuer was the owner to the extent of sixty sixty-fourth shares of the said brig "Alicia?" and Whether the loss of the said brig "Alicia" was caused by the fault, want of skill, and negligence of those in charge of the "Frederick," and for whom the defenders are responsible, to the loss and damage of the pursuer?

Damages laid at—

For loss of vessel,	£935
„ loss of freight,	65
	£1,000

No. X.

Potts & Scurrfield and Others v. *Pollock, Gilmour, & Co.*—*22d February* 1837.

It being admitted that, on the morning of the 12th day of August 1835, a vessel called the "Red Wing," the property of the pursuers, Potts and Scurrfield, came into collision with a barque called the "Oxford," the property of the defenders, in consequence of which collision the "Red Wing" became a total wreck, and was abandoned;

It being admitted that the said vessel and freight were insured by the other pursuers to the extent of £2,300 sterling, and that the said sum has been paid by the said insurers to the pursuers, Potts and Scurrfield,

Whether the loss of the said vessel "Red Wing," was caused by the fault, negligence, or want of skill of the master or mariners on board the said barque "Oxford," and was

to the loss and damage of the pursuers, or any of them?

Sum claimed, £2,470, 10s. 9d.

Whether the said barque "Oxford" was not of the value of £2,470, 10s. 9d.? and Whether the cargo on board the "Red Wing" at the time of the said collision was of the value of £550, or part of the said sum?

No. XI.

Innes v. *Glass & Co.*—*23d November* 1826.

It being admitted that, on the 9th of February 1825, the lat. 42° 24′ N. and long. 15″ 52′ W. or thereabouts, the vessel called the Corsair, the property of the defenders, and the vessel called the "Haabet or Hope," came into collision, and that immediately after the said collision the said vessel "Haabet or Hope" went down and was totally lost,

Whether there was property or goods to the value of £2,200, or about that sum, lost on board the said vessel, at the time she went down as aforesaid? and Whether the said property and goods were insured by Nicolas Warren, as agent and acting for the owners thereof? and Whether the pursuers became insurers of the said property or goods by a policy dated the 10th day of February 1825, and on or about the day of did, under the said policy, pay, or cause to be paid £2,200, or about that sum, to the assured as the value of the said property or goods? and Whether the loss of the said vessel called the "Haabet or Hope," was caused by the fault, want of skill, or negligence of the master or mariners of the said

vessel called the "Corsair," to the loss, injury, and damage of the pursuer?

Damages claimed £2,200.

No. XII.

Lintons v. *Brodie, &c.*—*8th July* 1847.

It being admitted that the defenders the Kirkaldy, Leith, and Newhaven Steam-Boat Company, are owners of the vessel called the "Edinburgh Castle," and that the defender Robert Brodie, is manager at Kirkaldy for the said Company,

1. Whether, on or about the 28th day of May 1846, and at a place to the north of the Gunnel Rock, in the Frith of Forth, the said steam-vessel was, through or by means of the gross recklessness, carelessness, and mismanagement of Samuel Barker, the master, or other party or parties then in charge thereof, brought into collision with a boat belonging to the pursuers, whereby the said boat, with fish-nets and stores aboard thereof, also belonging to the pursuers, was run down and sunk, to the loss, injury, and damage of the pursuers?

2. Whether, on or about the 28th day of May 1846, and at a place to the north of the Gunnel Rock, in the Frith of Forth, the said steam-vessel was, through or by means of the gross recklessness, carelessness, and mismanagement of Samuel Barker, the master, or other party or parties then in charge thereof, brought into collision with a boat in which the pursuers then were, whereby the said boat was run down and sunk, the pursuers plunged into

the water to the imminent danger of their lives, and otherwise injured in their persons, to the loss, injury, and damage of the pursuers?

Damages laid under 1st Issue at £28
„ „ 2d „ 100

PART XII.

PATENT AND COPYRIGHT,

INCLUDING

GENERAL ISSUES ON INVASION OF PATENT RIGHTS—COUNTER-ISSUES FOR THE DEFENDER—ISSUES IN CASES OF COPYRIGHT—WRONGFUL INVASION OF COPYRIGHT BEFORE REGISTRATION.

General Issues in Actions for Invasion of Patent Rights.—The letters-patent and specification are generally prefixed as matters of admission, and if not, they must be put in Issue as in Example No. II. The recent practice is to recite these very shortly as contrasted with the older forms—Examples I and II. If the pursuer is not the original patentee, but has acquired right by assignment, this will be matter of admission or be put in Issue—see Nos. II and V. The general Issue, which approaches very nearly to an issue of style, (Adam on Jury Trial, p. 115) embraces what is requisite to secure a finding for the pursuer, Whether at a time during the currency of the letters-patent the defender used machinery substantially the same with that described in the patent and specification, to the loss and damage of the pursuer? In *Neilson* v. *Househill Coal and Iron Co. January* 27, 1842, the Court refused to give the pursuers an Issue, Whether the patentee was the true and first inventor of the invention described in the letters-patent and specification? the ordinary course being for the defenders to take the Counter-Issue,—Whether the

invention so described was *not* the original invention of the patentee? It was otherwise in the older practice, *Martin* v. *Barclay*, 3 Murr. 398, Example No. I.

The remit of the House of Lords in *Astley* v. *Taylor*, 1 Sh. App. 54, directing Issues to be tried by a Jury, the observations of the Lord Chief Commissioner (Adam on Jury Trial, p. 109-16), and the Statutes Jas. I, c. 23, and 5 and 6 Will. IV, c. 83, may be referred to. The case of *Neilson* v. *Harford*, May 4, 1841—the trial of the Hot-Blast Patent in England—is instructive as to the mode of laying such questions before a Jury in that country.

Counter-Issues for the Defender.—These arise out of the nature of the defences to the action, which depend on the general doctrine that the patent right is a privilege accorded to the original inventor of a machine, process, or invention not previously known, in return for his disclosing its nature, and giving to the public such a description as to enable workmen of ordinary skill to construct or practise it. There are four principal defences, to each of which an appropriate Counter-Issue has been adapted:—

1. That the invention is not the original invention of the patentee. It was held—*Russell* v. *Crichton*, June 19, 1838—that the burden of proving this rests on the defender, the granting of the patent being sufficient *prima facie* evidence for the pursuer, and that the defender must aver sufficient facts on record to prevent surprise, and then take an Issue on the point. The terms of such an Issue were under discussion in *Neilson*, *ut supra*.

2. That the invention was known or publicly used before the date of the patent. This was pointed out in the House of Lords in the case of *Neilson*, 2 Bell, p. 20, to be a distinct question from that of original invention. "A person may be disentitled to a patent who is the first inventor on account of user at the time, or he may be disentitled to a patent though not used at the time, if he was not the first

inventor; both titles must concur." See also the remit in *Astley* v. *Taylor*, *ut supra*. In Neilson's case it was also held, reversing the decision in the Court of Session, that "if the contrivance or machine has been once in public use, and the recollection of it has not been altogether lost, that will be sufficient to invalidate the letters-patent, although the use may be discontinued at the time when the letters-patent were granted." A patent may be granted for a contrivance imported for the first time, and therefore the question as to previous use must bear "within the United Kingdom," as in No. XI, or at a place within it, as in No. III, "at Edinburgh and Glasgow, or either of them." Use in England invalidates a patent in Scotland, *Brown* v. *Annandale*, July 8, 1841.

3. That the description in the specification is not such as to enable workmen of ordinary skill to construct a machine or practise the invention, so as to produce the effect set forth in the patent and specification. See Nos. II, V, VI.

4. That a machine constructed according to the description in the specification is not practically useful for the purposes set forth in the letters-patent, see Examples IV and V.

For details where questions of infringement of patents have gone to trial, see cases of *Russell* v. *Crichton*, M'F. J. R. 179, and Session Cases, June 8, 1839; *Neilson*, April 1-7, 1842; *Wilson* v. *Black*, July 27, 1847; and *Templeton* v. *M'Farlane Brothers*, July 30, 1847.

Issues in Cases of Copyright.—Cases of this nature seem to be appropriated for Jury trial under the description of actions arising out of *quasi* delinquency. The right of exclusive privilege is founded on Statutes regulating the copyright of books, engravings, patterns, &c. The question of copyright or invention will generally be put in Issue, and next that of the infringement by selling or exposing to sale the subjects covered by the exclusive right. The Jury will judge of the question whether the article is really a piracy

or not. In questions of interdict it is for the Court, *Constable*, 3 S. & D. 216; *Hedderwick* v. *Griffin*, January 20, 1841; *Alexander*, February 27, 1847. The question for the Jury may be—where a license or permission was given by the author—Whether the defender published in a manner not authorised by the license? *Stewart* v. *Black*, December 23, 1846, No. IX.

The defence may be first publication in foreign countries, which will require a Counter-Issue, as in No. VIII. On this subject see 1 and 2 Vict. c. 59, especially § 14. That the article was not invented or published by the pursuer, or not copied by the defender till after the time limited by Statute, are defences going to proof under the pursuer's Issue. See No. X.

Wrongful Invasion of Copyright before Registration.—Where copyright in a pattern or design is given for a limited period, on condition of registration before it is published, 2 and 3 Vict. c. 17, an action of damages may arise for any wrongful appropriation, prior to such registration, of what might thereby become the subject of copyright. For instance, in *Rowburgh* v. *M'Arthur*, February 13, 1841, the ground of action was that the defenders, in violation of the rules and practice of the trade, prevailed upon a person employed in weaving a pattern for a shawl-border for the pursuers, to disclose it to them, and that they thereby brought into the market, before the pursuers, this pattern invented and paid for by them, and obtained from their servants "by fraudulent and underhand dealings." The defender contended that the pursuer had no case without averring and proving fraud, and that therefore the word "fraudulently" ought to be in the Issue; but the Court held that the word "wrongfully" or "unwarrantably" sufficiently covered the ground of action, and that although fraud was averred, it was not necessary to prove more than the wrong which gave right to reparation. The Issue is Example No. XI.

EXAMPLES.

No. I.

Morton v. *Barclay & Others*,—*22d January* 1824.

It being admitted that, on the 18th day of August 1818, the pursuer obtained letters-patent under the Great Seal kept and used in Scotland in place of the Great Seal thereof, whereby he acquired the exclusive privilege, for and during the period of fourteen years from the said 18th day of August, of using as his original invention certain machinery for drawing ships out of the water on dry land, being an improved method of performing that operation, and that the pursuer (as required by law and by the said letters-patent) did make out a particular description of the nature of the said invention, and in what manner the same is to be followed out, and did—within four months of the date of the said letters-patent—as required, viz. on the 17th day of December 1818, make out, sign, and seal, and cause to be enrolled in the Court of Chancery, a specification or particular description of the nature of the said invention; a copy of which said specification is transcribed into the summons in this case,

Whether the said machinery described in the said specification for the purpose of drawing ships out of the water on dry land, was an original invention of the pursuer?

Whether, on or about the 26th day of October 1821, and subsequent to the date of the said letters-patent and of the said enrolment of the specification, the defenders by themselves, or others carrying on business as ship-wrights

in Glasgow, under the firm of the Stobcross Ship-Wright Company, did, without the consent or permission of the pursuer, and in contravention of the privilege granted and protected by the said letters-patent, erect machinery at or near Stobcross, near Glasgow, in imitation of, and which was substantially and in effect the same with the machinery described in the said specification, to the loss and damage of the pursuer?

Damages laid at £500.

No. II.

Crossley v. *Milne*,—*30th June* 1831.

Whether, on or about the 17th day of June 1816, Samuel Clegg, engineer, obtained letters-patent in the usual terms, being No. 5 of process, under the Great Seal kept and used in Scotland in place of the Great Seal thereof, whereby there was granted the exclusive privilege, for and during the period of fourteen years from the said 17th day of June 1816, of using, &c. as his original invention, certain machinery as described in the said letters-patent and in the specification enrolled in the Court of Chancery, for extracting, purifying, measuring and regulating the efflux of gas extracted from pit coal-tar, and other substances? and Whether the said Samuel Clegg, as required by law and the said letters-patent, did make out a particular description of the nature of the said invention, and in what manner the same is to be followed out; and did, on the 29th day of August 1816, make out, sign, and seal, and cause to be enrolled in the Court of Chancery a specification or particular description of the said invention?

Whether, on or about the 5th day of July 1824, the said Samuel Clegg assigned to the pursuer the right to the said exclusive privilege of using, &c. the said machinery protected by the said letters-patent?

Whether, during the years or any of them, and subsequent to the date of the said letters-patent and of the enrolment of the said specification, the defender by himself or others, did wrongfully, without the consent or permission of the said Samuel Clegg, or of the pursuer, and in contravention of the privilege granted and protected by the said letters-patent, make or construct, and sell machines called metres, in imitation of, and substantially the same with the machine called a metre described in the said specification, to the loss, injury, and damage of the pursuer?

Or,

Whether the machinery, as described in the said letters-patent and specification, is not the original invention of the said Samuel Clegg, grantee of the said letters-patent?

Whether the description of a metre or metres, contained in the said specification, is not such to enable workmen of ordinary skill to make a machine or machines capable of producing the effects set forth in the said letters-patent?

Whether a machine or machines constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes therein set forth?

Damages laid at £5,000.

No. III.

Russell v. *Crichton*,—*26th June* 1838.

It being admitted that, on the 25th day of May 1825, one Cornelius Whitehouse of Wednesbury, by letters-patent No. 3 of process, obtained for the period of fourteen years from the said 25th day of May, the exclusive privilege of manufacturing tubes for gas and other purposes, according to the specification or particular description of which No. 12 of process is an extract; and that on the 12th day of June 1830, the said Cornelius Whitehouse transferred to the pursuer his right in the said patent, conform to the deed of assignation No. 5 of process,

Whether the defender, by himself or others did at Glasgow, in the year 1825, and subsequently to that year, without the consent or permission of the pursuer, and in contravention of the privilege granted by the said letters-patent, wrongfully manufacture, or wrongfully cause to be manufactured, tubes for the said purpose, by machinery or means substantially and in effect the same with the machinery and means described in the specification aforesaid, to the loss, injury, and damage of the pursuer?

Or,

Whether the said mode of manufacturing tubes was not an original invention of the pursuer or the original patentee?

And,

Whether tubes for the said purposes were manufactured by machinery, or means substantially and in effect the same with those described in the said specification, at Edinburgh and Glasgow, or either of them, and previous to the date of the said letters-patent?

Damages laid at £2,000.

No. IV.

Brown v. *Annandale, &c.—25th February* 1841.

It being admitted that, on the 4th day of February 1836, the pursuer obtained letters-patent under the Great Seal used in Scotland in place of the Great Seal thereof, whereby there was granted the exclusive privilege, during the period of fourteen years from the said 4th February 1836, of using as his original invention certain machinery as described in the said letters-patent and in the specification enrolled in the Court of Chancery, for the application in paper-making of a vacuum to the horizontal web of wove cloth of a *fourdrinier* machine, in the manner described in the said specification,

Whether, during all or any part of the years 1839 and 1840, at the paper-mill works of the defenders at Polton, subsequent to the date of the said letters-patent and said specification, the defenders, by themselves or others, without the consent or permission of the pursuer, wrongfully, and in contravention of the said letters-patent, used in their said works machinery in imitation of, and substantially the same with the machinery described in the said specification, to the loss, injury, and damage of the pursuer?

Or,

Whether the said machinery described in the said specification is not the original invention of the pursuer?

Whether a machine or machines constructed according to the description in the said letters-patent and specification is not practically useful for the purposes therein set forth?

Whether the description of the machine contained in the said specification is not such as to enable workmen of ordinary skill to make a machine capable of producing the effects set forth in the said patent?

Damages laid at £1,000.

No. V.

***Neilson* v. *Househill Coal and Iron Co.*—*27th January* 1842.**

It being admitted that, on the 1st day of October 1828, the pursuer James Beaumont Neilson obtained letters-patent under the Great Seal used in Scotland in place of the Great Seal thereof, and duly enrolled a specification in terms of the proviso contained in the said letters-patent, being Nos. 21 and 22 of process;

It being also admitted that the pursuers, other than the said James Beaumont Neilson, have acquired by assignment from him a joint interest with him in the said patent,

Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron-works at Househill, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in the said specification, and to the effect set forth in the said letters-patent and specification, to the loss, injury, and damage of the pursuers?

Or,

1. Whether the invention, as described in the said letters-patent and specification, is not the original invention of the pursuer, the said James Beaumont Neilson?

2. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in the said letters-patent and specification?

3. Whether machinery or apparatus constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes set forth in the said letters-patent?

The Damages are laid as under,—

Profits claimed as at the date of the Action,	£10,000
Other Damages as at same date, . .	2,000
	£12,000

No. VI.

Templeton v. *M'Farlane & Others*,—*30th July* 1847.

It being admitted that, on or about the 17th of July 1839, James Templeton the pursuer, and William Quiglay, weaver in Paisley, obtained letters-patent for Scotland, and enrolled a specification in terms of the proviso contained in the letters-patent, being Nos. 5 and 38 of process. It being further admitted that, by the deed of assignment dated the 5th and enrolled in the Record of Chancery 29th December 1839, the pursuer acquired from the said William Quiglay his share and interest in the said patent,

Whether, in the course of the years 1844, 1845 and 1846, or any part thereof, and during the currency of the said letters-patent, the defenders did, at their works at Bridgeton, near Glasgow, by themselves or others, wrongfully,

and in contravention of the privileges conferred by the said letters-patent, use a mode of manufacture substantially the same with that which is described in the said specification, to the loss, injury, and damage of the pursuer?

Or,

1. Whether the invention, or mode of manufacture described in the said letters-patent and specification, was known and publicly used within the United Kingdom prior to the date of the said letters-patent?

2. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to practise the invention or mode of manufacture, so as to produce the effects set forth in the said letters-patent and specification?

Schedule.

Profits claimed as at the date of the Action,	£500	0	0
Other Damages as at the same date, .	500	0	0
	£1,000	0	0

No. VII.

Wilson v. *Black*,—*27th July* 1847.

It being admitted that, on the 3d day of February 1840, the pursuer obtained letters-patent under the Great Seal used in Scotland in place of the Great Seal thereof, for "an Improved Paper-cutting Machine;" and it being also admitted that, in terms of the proviso contained in the said letters-patent, he duly enrolled a specification describing the nature of his said invention, and the manner in which the

same was to be performed; the said letters-patent and an extract of the said specification being Nos. 4 and 22 of process,

Whether, during the currency of the said letters-patent, the defender did, by himself or others, wrongfully, and in contravention of the said letters-patent, make or sell a machine or machines substantially the same with those described in the said specification?

Or,

Whether, prior to the date of the said letters-patent, a machine or machines substantially the same with those described in the said specification was or were known and publicly used within the United Kingdom?

No. VIII.

Cocks v. *Mitchison*,—11*th March* 1845.

1. Whether the pursuer, as assignee and in right of the original composer, is proprietor of the copyright of (1) A set of waltzes, or one or other of them, called or known by the name of "Die Kosenden Walzer," composed by Joseph Lanner; (2) A set of waltzes, or one or other of them, called and known by the name of "Die Aelpler Walzer," composed by the said Joseph Lanner; (3) A set of waltzes, or one or other of them, called and known by the name of "Brandhofen Walzer," composed by Joseph Labitzky, music-director in Carlsbad; (4) A set of waltzes, or one or other of them, called and known by the name of "Die Petersburger Walzer," composed by the said Joseph Lanner; and Whether the defender did, between 18th January 1843 and 18th January 1844, without the consent of the pursuer, wrongously print, or cause to be printed, the foresaid musical compositions, or

one or other of them, or musical compositions substantially the same, to the loss, injury, and damage of the pursuer?

2. Whether the defender, time foresaid, and in his shop in Glasgow or elsewhere, knowing the same to have been so printed, did, without the consent of the pursuer, wrongously sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, the foresaid musical compositions, or one or other of them, or musical compositions substantially the same, to the loss, injury, and damage of the pursuer?

Damages laid at £200, more or less.

Or,

Whether the said several musical compositions, or any of them, were published in foreign countries previous to the registration thereof respectively by the pursuer in the book of registry kept at Stationers' Hall, in terms of the Statutes made thereanent?

No. IX.

Stewart v. *Black*,—*23d December* 1846.

It being admitted that the pursuer's father, the deceased Dugald Stewart, Esq. was the author of a Work entitled "Dissertations on the Progress of Metaphysical, Ethical, and Political Philosophy, since the revival of Letters in Europe," published in a Work entitled, "Supplement to the Fourth, Fifth, and Sixth Editions of the Encyclopædia Britannica," in or about the year 1816, formerly belonging to Archibald Constable and Company, sometime booksellers in Edinburgh, and now to the defenders,

Whether the copyright of the said work remained with, and belonged to the said Dugald Stewart, and now belongs to the pursuer, as his assignee, subject to a license or permission to publish the same only as part of said general Work, entitled "Supplement to the Fourth, Fifth, and Sixth Editions of the Encyclopædia Britannica,"

And,

Whether the defenders, in violation of the said copyright, have wrongfully published the said Work entitled, "Dissertations on the Progress of Metaphysical, Ethical, and Political Philosophy, since the revival of Letters in Europe," or any part thereof, in some other form or manner than as a part of the said "Supplement to the Fourth, Fifth, and Sixth Editions of the Encyclopædia Britannica," to the loss, injury, and damage of the pursuer?

Damages laid at £2,000.

No. X.

Baird, &c. v. *Thomson, &c.*—*March* 1841.

Whether, on or about the month of February 1840, the pursuers invented, or caused to be invented, and became proprietors of a certain design or pattern for shawl borders, and on or about the 28th day of February 1840 published the same? and Whether the defenders, or any of them, within three months of the said 28th day of February, contrary to the Statutes 27 Geo. III. cap. 38; 34 Geo. III. cap. 23; and 2d and 3d Vict. cap. 13; or any of them, wrongfully, and without consent of the pursuers, printed or copied, or caused to be printed or copied, a design or pattern in imitation of, and substantially the same with the said design or pattern of the pursuers, and

published, sold, exposed to sale, or disposed of, or caused to be published, sold, exposed to sale, or disposed of, certain shawls or pieces of cloth, having on or attached to them a design or pattern as aforesaid, to the loss, injury, or damage of the pursuer?

Damages laid at £2,000.

No. XI.

Roxburgh v. *M'Arthur*,—13*th February* 1841.

Whether, during the Spring or Summer 1840, the pursuer invented, or caused to be invented, a certain pattern for shawl borders? and Whether, during the month of June 1840, the defender, by himself or another, or others, wrongfully prevailed upon, or induced a workman employed by the pursuer, to disclose the said pattern, to the loss, injury, and damage of the pursuer?

Damages laid at £3,000.

PART XIII.

NUISANCE AND INJURIOUS USE OF PROPERTY,

INCLUDING

LIMITATIONS ON USE OF PROPERTY—PURSUER'S ISSUE IN CASES OF NUISANCE—COUNTER-ISSUES FOR THE DEFENDER—ISSUES IN CASES OF INJURIOUS USE OF PROPERTY—OBSTRUCTIONS AND ENCROACHMENTS—QUESTIONS OF INTERDICT—QUESTIONS REGARDING LANDLORD AND TENANT.

Limitations on Use of Property.—It has been laid down, Bell's Prin. § 963, that the absolute right of a land-owner to do what he pleases with his property, and to derive all the uses and services from it of which it is capable, is subject to three limitations.—1. From neighbourhood; 2. By the law of nuisance; 3, By servitude. Questions of fact arising under the two former limitations will be considered here; the subject of servitude will require a separate part.

No one is entitled so to use his own property as to cause actual damage to that of his neighbour—*e. g.* to pull down his house so as to bring his neighbour's with it. But mere inconvenience arising from a neighbour making the full use of his property every one must submit to, unless it amounts to a *nuisance* on the one hand or is restrained by a right of servitude on the other. The first nine of the subjoined Examples are Issues in proper cases of nuisance—the last seven arise out of allegations of such operations on the

defender's property as caused damage to the pursuer's, while Nos. X and XI approach very nearly to the former class.

Pursuer's Issue in Cases of Nuisance.—The law of nuisance seems to be but a branch of the law of neighbourhood, having acquired a more defined form owing to the use of a *nomen juris*, which is thus defined:—"Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort of life, whether by stench, by noise, or by indecency, is a nuisance."—Bell's Princ. § 974. Whether any particular operation comes within the category of nuisance is a question of fact peculiarly fitted for a Jury to decide on all the circumstances. "That is a nuisance which a Jury of intelligent gentlemen think so in the circumstances of each case."—Lord Gillies, 4 Murr. 156. This class of cases has accordingly been appropriated by Statute for Jury Trial.

The Issue is usually prefaced by an admission of the relative position of the parties and their properties, and the question is then put—Whether certain effects followed from the operations of the defender "to the nuisance" of the pursuer? No technical terms are required in describing the obnoxious effects, but they must describe what may relevantly amount to nuisance; and the more brief the expressions the better. It is observed by Mr Murray, 5 J. R. Introd. p. 48, that the Issues in *Arrott* v. *Whyte*, and *Hart* v. *Taylor*, reported 4 Murr. 151 and 307, Nos. II and III of the annexed Examples, are redundant in expression. The Lord Chief-Commissioner, although approving of their structure, seems to admit this animadversion, and prefers the Issue in *Andrew* v. *Allan*, which is annexed, No. I.—Adam, p. 117. If the object is to recover damages, the words

"and to the loss, injury, and damage of the pursuer" must be added, but it seems improper to make this addition where the action is merely to have the nuisance declared and interdicted; Lord Chief-Commissioner, 5 Murr. p. 32. See *Dunn* v. *Hamilton*, March 11, 1835, 15 Sh. p. 853; M'F. J. R. 241; and on Appeal, 3 Sh. & M'L. 356, where the claim of damages was reserved, and only the fact of nuisance sent to the Jury. Example No. VII. The case of *Raeburn* v. *Kedslie*, 1 Murr. 1, illustrates the defects of the earlier Issues in cases of nuisance.

Counter-Issues for the Defender.—Whatever tends to establish that the alleged effects do not follow from the operations of the defender, or that these effects do not amount to nuisance, goes to proof under the pursuer's Issue. But there are some defences, implying an admission of the nuisance, which require to be raised by relevant statements on record, and to be put to the Jury under a Counter-Issue. These are—

1. *Acquiescence.* The Jury are best qualified, by the evidence before them, to say whether there has been such acquiescence on the part of the pursuer as to constitute a defence. The Issue may be put as in Examples Nos. III, VIII, and IX, or as in the second Counter-Issue in No. II, where lapse of time, without complaint, is founded on as constituting acquiescence. This is necessarily mixed up with the questions—Whether the offensive works were at first to the same extent, or gradually increased? and Whether protests and remonstrances were made? See *Arrott* v. *Whyte*, 4 Murr. p. 37, where Lord Gillies further directed the Jury that the acquiescence proved might be sufficient to bar a claim for damages, though not to continue the nuisance. The nature of this defence, and the evidence in support of it, are discussed in *Hart* v. *Taylor*, 4 Murr. 307, and *Miller* v. *Marshall*, 5 Murr. 28.

2. It is a good defence that the pursuer *came to* the nui-

sance by purchasing property in the neighbourhood of which the offensive work had already been for a length of time in operation, *Duncan*, June 9, 1809; *Colville*, May 27, 1817. The same is the rule in England, *Rex* v. *Cross*, 2 Car. & P. 483; *Laurence* v. *Obee*, 3 Camp. 514. On this principle the first Counter-Issue in Example No. II proceeds.

3. That the place where the nuisance is established is *already the site of offensive works*, is a defence as to which there has been much fluctuation of opinion. It would seem to be a good defence, unless by the addition, the situation is rendered actually intolerable and dangerous, Ivory's Ersk. p. 219, note; Bell's Princ. § 977. The law is so laid down in England, where—"setting up a noxious manufactory in a neighbourhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased," is not indictable, *Rex* v. *Neville*, Peake 91; Harr. Dig. 2142. It may be doubtful whether this defence would require a Counter-Issue, or a simple denial of the nuisance. "Certainly what is a nuisance in one situation is not so in another. In places where offensive trades have been long carried on they are not nuisances, though they would be so in any of the squares or other places where such trades have not been exercised." — Lord Kenyon in Neville's Case.

Issues in Cases of Injurious Use of Property.—Negligence in performing any operation on one's own property, whereby that of a neighbour suffers injury, is a good ground for a claim of damages. Thus, in *Thomson* v. *Gray*, December 22, 1842, the disputed allegation of fact was, that by wrongfully working a quarry, the tacksman caused debris and sludge to fall into and injure the shrubbery of the pursuer; being before the Sheriff, the proof was taken on commission. The Issues No. XVI, XVII, and XVIII arise out of alleged fault and negligence in working coal-pits and ironstone, which led to danger and injury to neighbouring property; and No. XIV

Suspension is passed to try the question as to the particular work, interdict being in the meanwhile refused, *Donald* v. *Humphrey*, July 9, 1839. Although interdict is granted in the case of an obvious nuisance, yet if there are relevant averments of peculiar processes by which nuisance can be avoided, the Court, if the proposal is not fantastical, will permit experiments to be made, *Trotter* v. *Fernie*, 9 Sh. 144; and 5 W. & Sh. 649; and *Swinton* v. *Pedie*, 15 Sh. 775; M'L. & Rob. 1018. In the former case the Lord Chancellor appeared to anticipate that the result of the experiments would be tried by a Jury; but the Court—10 Sh. 423—remitted to men of science to inspect the works during the carrying on of the experiment, taking the assistance of practical men, and to report. However, in *Arnot* v. *Brown*, Nov. 17, 1847, the Court appeared to take the same view as the Lord Chancellor in *Trotter* v. *Fernie*, for while they allowed an experiment to which the suspenders were to have access, they "were of opinion that it would be inexpedient to order any report as to the success of the experiment, in case of this afterwards prejudging the matter should it go to a Jury." A conclusion for damages is not necessary, *Dunn* v. *Hamilton and Magistrates of Perth*, *ut supra*. The conclusion in the latter case was to have the right declared, and the defender ordained to remove the whole or some of the jetties complained of.

Questions regarding Landlord and Tenant.—On this subject reference is made to page 225-9 *supra*, where the questions arising are discussed under the head of "Landlord and Tenant." Without resuming anything there said, it may be added, that the doctrines laid down in Weston's case appear still to regulate the law on the subject, and the Issues in No. XVI and XVII seem to have been framed in accordance with them. The liability of the proprietors as an Issue of fact, arises on the question Whether there was fault in them or "those for whom they were responsible!" The

facts might come out so that the landlord would be responsible for the wrongful act of his tenant, although in the general case he is not. Compare this Issue with Examples No. VII and XV.

Questions of Relief, *inter se*, may arise between landlord and tenant, involving disputed matter of fact as to agreement, understanding, &c. No such questions have as yet gone to trial; and reference is made on the point to Mr Hunter's chapter on the subject, in his Work on the Law of Landlord and Tenant, Vol. II. p. 511-26.

EXAMPLES.

No. I.

Andrew v. *Allan*,—*8th December* 1829.

It being admitted that the pursuer is proprietor of certain houses on the north side of a road or street called Anderson's Walk, near Glasgow, and that the pursuer began to build the said houses in the month of May 1822, and that the defender is proprietor of a piece of ground immediately to the north side of the said houses,

Whether, on or about the day of 1823, the defender wrongfully formed and used a dung-pit on his said property, at or near the said houses of the pursuer, to the loss, injury, and damage of the pursuer?

Whether, from the said day of 1823, the defender wrongfully used the said pit to the nuisance of the said pursuer, and to the loss, injury, and damage of the pursuer?

Damages laid at £300.

No. II.

Arrott v. *Whyte*,—18*th May* 1826.

It being admitted that the pursuer is proprietor, and has been proprietor since 1807, of a house and about three acres of arable land situated on the banks of the river Clyde, and that the defenders are proprietors and tenants of about three acres of land immediately adjoining on the north-west to the property of the pursuer;

It being also admitted that upon the property occupied by the defenders there are erected buildings in which soda and other substances are manufactured,

Whether, on or about the 1st day of January 1816 and subsequent thereto, there arose, and continued to arise from the said manufacture certain noisome, offensive, noxious, or unwholesome vapours or stenches, which were diffused or spread over the property of the pursuer, to the nuisance of the said pursuer, whereby the said property was deteriorated, and the pursuer incommoded and annoyed in the enjoyment thereof, to the injury and damage of the pursuer?

Or,

Whether, in the foresaid year 1807 or prior thereto, the vapours issuing from the manufactures carried on in the premises of the defenders, and in the neighbourhood thereof, were as great, or nearly as great in quantity, and as noisome, noxious, offensive, or unwholesome, or nearly so, in reference to the premises now the property of the pursuer, as those issuing from the premises of the defenders at the commencement of the present action in 1823?

Whether, for a tract of time subsequent to the acquisition of the aforesaid property by the pursuer, the vapours issuing from the manufactures carried on in the premises of the defenders and in the neighbourhood thereof were as great, or nearly as great in quantity, and as noisome, noxious, offensive, or unwholesome, or nearly so, in reference to the said premises, now the property of the pursuer, as those which issued from the same in 1823, without any challenge or complaint being made against the same by the pursuer?

No. III.

Hart v. *Taylor*,—12*th June* 1827.

It being admitted that the pursuer is proprietor, and has been proprietor since 1807, of a house, garden, and field situate near the west end of the village of Blackness, in the county of Linlithgow; and that the defender is proprietor, and has been proprietor since 1813, of a piece of ground to the westward and southward, and immediately adjoining to the property of the pursuer;

It being also admitted that upon the property of the defender there are certain buildings in which black-ash, mineral, alkali, and other substances were and are manufactured,

Whether, during the years 1813, 1814 and 1815, and subsequent thereto, there arose and continued to arise from the said manufacture, great quantities of smoke and certain noisome, offensive, noxious, or unwholesome vapours or stenches, which were diffused or spread over the property of the pursuer to the nuisance of the said pursuer, whereby the said property was deteriorated, and the pursuer incommoded and annoyed in the enjoyment thereof, to the loss, injury, and damage of the pursuer?

Or,

Whether the pursuer acquiesced in the erection of the said buildings, and the carrying on of the said manufacture by the defender?

No. IV.

Rutherfurd & Others v. *Kinnells*,—*23d June* 1832.

It being admitted that the pursuer Andrew Rutherfurd is proprietor of a manufactory, and that the other pursuers are proprietors of certain portions of lands and houses situate near Dunfermline, and on or near a certain burn called Mounthooly or Baldridge Burn, and that the defenders are proprietors of certain works lately erected on the banks of the said burn,

Whether, on or about the month of February 1830 and subsequent thereto, the defenders wrongfully polluted the water of the said burn, to the nuisance, and to the loss, injury, and damage of the pursuers?

Whether the said defenders have wrongfully interrupted or diminished the supply of water in the said burn, to the loss of the pursuers?

Damages laid at £1,000.

No. V.

Hamilton v. *Tennant & Co.*—*29th June* 1836.

It being admitted that the defenders are, and since the year 1829 have been proprietors of a certain portion of

land, and buildings erected thereon, near Glasgow, and that chemical substances are and have been manufactured since the said year;

It being also admitted that by the lease, of which No. 6 of process is an extract, dated 30th May 1816, the pursuer obtained possession, as at Candlemas 1815, as tenant of a certain garden situated to the eastward of the said works;

Whether during the year 1819 and subsequent thereto up to Martinmas 1832, or during any part of the said period, there arose from the said works of the defenders certain noisome, offensive, noxious, or unwholesome smoke and other vapours, to the nuisance of the said pursuer, whereby the produce of the said garden was deteriorated, and the pursuer incommoded and annoyed in the enjoyment thereof, to the loss, injury, and damage of the pursuer?

Or,

Whether, in the said year 1819, previous to the pursuer entering into possession of the said garden, the smoke or other vapour issuing from the said works of the defenders was as great, or nearly as great in quantity, and as noisome, offensive, noxious, or unwholesome, or nearly so, in reference to the said garden of the pursuer, as those issuing from the said works of the defenders during the said period from 1819 to Martinmas 1832?

No. VI.

Collins v. *Hamilton & Others*,—13*th February* 1836.

It being admitted that the pursuer is a paper-maker on the Dalmuir or Duntocher Burn, and that one of the streams which unite to form the said burn passes from the Cochney Loch through the property of the defender James Hamilton;

It being also admitted that on the said property there

are certain premises or buildings thereon let by the predecessor of the defender James Hamilton, of which the defender Arthur is or was tenant, and the defenders M'Donald and M'Kay are sub-tenants,

1. Whether, during the year 1826 and subsequently, or during any part of the said period, the defenders M'Donald and M'Kay did, by certain operations carried on in the said premises and buildings, wrongfully pollute and spoil the water of the said burn, so as to injure the quality of the water of the same, to the nuisance of the pursuer as a paper-maker aforesaid, and to the loss, injury, and damage of the pursuer?

2. Whether the said operations so carried on by the defenders M'Donald and M'Kay, to the loss, injury, and damage of the pursuers, were in whole or in part wrongfully authorised by the defender James Hamilton or his predecessors, and Archibald Arthur, or either of them?

No. VII.

Dunn v. *Hamilton & Others*,—16*th June* 1836.

It being admitted that the pursuer is proprietor of the lands of Duntocher and Faifley, situated on the site of the Cochney, Duntocher, or Dalmuir Burn, and that one of the streams which unite to form the said burn passes through the property of the defender Hamilton;

It being also admitted that on the said property of the defender Hamilton, there are certain premises and buildings erected, of which the defender Arthur is or was tenant, and the defenders M'Donald and M'Kay are sub-tenants,

Whether, during the year 1826 and subsequently, or during

any part of the said period, the defenders M'Donald and M'Kay did, by certain operations carried on in the said premises and buildings, wrongfully pollute and spoil the water of the said burn, so as to injure the quality of the water of the same, to the nuisance of the pursuer as proprietor of the land aforesaid?

Whether, during the said period, the defender Hamilton or his predecessors, or the defender Arthur, by themselves or another, or others authorised by them, did wrongfully pollute and spoil the water of the said burn, so as to injure the quality of the water of the same, to the nuisance of the pursuer, as proprietor of the said lands?

No. VIII.

Thomson & Others v. *Buchan & Co.*—11*th July* 1843.

It being admitted that the pursuer Thomson is proprietor of the lands of Gogar Burn—that the pursuer Melville is proprietor of the lands of Stanley and Nortonhaugh, and that the pursuer Brown is proprietor of the lands of Ashley, formerly called Ratho Bank—and that all the said lands are situated upon the stream called Ratho Burn or Cockle Burn;

It being also admitted that the said stream passes through the property commonly called Ratho Hall, belonging to William Hill of Hillwood and Ratho Hall, before it enters the properties of the several pursuers, and that the premises on the said lands of Ratho Hall, occupied by the defenders Buchan & Co. as tenants of Hill, upon the banks of the said stream, are occupied and used by them as a distillery?

Whether, during the year 1840 and subsequently, or during any part of the said period, the defenders did, by dis-

charging refuse or other impure matter from said distillery, or the premises occupied by them as aforesaid, wrongfully pollute and spoil the water of the said burn, so as to injure the quality of the water of the same, to the nuisance of the pursuers as proprietors of the lands aforesaid, and to their loss, injury, and damage?

Damages laid at £300.

Or,

Whether the pursuers, or any of them, or their authors, acquiesced in the use of the said burn or stream now complained of?

No. IX.

Wallace & Others v. *M'Culloch*,—*26th February* 1847.

It being admitted that the pursuers George Paxton, Thomas Stewart, James Crooks, David Ramsay Andrews, and William Rankin, are proprietors in trust for themselves and others of the premises in Portland Street in Kilmarnock, partly occupied by Charles Broun as the George Inn and Hotel there, and partly occupied by Mrs Jessie Clough, milliner, and others;

And that the pursuers William Wallace, Matthew Thomson, John Broun, Robert Bishop and others, are beneficially interested in the said premises held by the said George Paxton and others, as trustees foresaid;

It being also admitted that the defender is, and was during the year 1842 and subsequently thereto, tenant of certain premises in Portland Street of Kilmarnock, situate within fifty yards or thereby of the said premises belonging to the pursuers,

Whether, during the year 1842 and subsequently thereto, the defender carried on in his said premises the trade and

occupation of making and repairing boilers, such process causing a great noise, and being to the nuisance of the tenants and inhabitants of the pursuer's property, and to the loss, injury, and damage of the pursuer?

Or,

Whether the pursuers acquiesced in the carrying on of the said trade and occupation by the defender?

No. X.

Magistrates of Perth v. *Earl of Zetland*,— 17*th February* 1843.

It being admitted that the defender is proprietor of the estate of Balmbreich in the county of Fife, and that certain heads, jetties, or bulwarks, projecting from the said estate into the river Tay, have been constructed from time to time by the said defender, his predecessors and authors, or others for whom he is responsible, one of which jetties is 430 yards or thereby below and to the eastward of the stream called the Pow of Lindores; another about 1340 yards or thereby; a third about 1910 yards or thereby; a fourth about 3070 yards or thereby; a fifth about 5010 yards or thereby; a sixth about 5460 yards or thereby; a seventh about 5910 yards or thereby; an eighth about 6770 yards or thereby; and a ninth about 9040 yards or thereby, below or to the eastward of the said stream,

1. Whether the whole, or any part of the jetty first above mentioned, interferes with, or prejudices, or impedes, or is calculated to* interfere with, or prejudice, or impede the free navigation of the said river Tay?

* The Lord Ordinary (Ivory) appended the following "Memorandum at settling Issues:"—"The Lord Ordinary's object in substituting the words 'is calculated to' for the word 'may,' has been to make the Issue

2. &c. [Eight similar Issues with regard to the other jetties.]

No. XI.

Brock & Lumsden v. *Glasgow & Ship Bank Co. & Others*,—*20th December* 1844.

It being admitted that the pursuers are proprietors of certain pieces of ground in Glasgow, described in the title-deeds as bounded on the east by a lane or passage twelve feet broad, leading from Virginia Street to Ingram Street, and that the defenders are proprietors of certain subjects situated at the head of Virginia Street, and also described in the title-deeds thereof as bounded on the west by the foresaid lane or passage of twelve feet broad;

It being also admitted that certain buildings were erected by the said original defenders upon the ground formerly belonging to them, and now to the defenders,

1. Whether the said buildings, or any part thereof, wrongously encroach, and if so, to what extent, upon the lane or passage of twelve feet broad, described in the titles of both parties as forming the boundary between their respective properties, to the loss, injury, and damage of the pursuers?

2. Whether certain posts have been wrongously erected, or are wrongously continued to be kept up across the said

turn on something presently *in action*, instead of on a bare conjectural *possibility*. The intended reading of the second branch of the Issue, as thus altered, is—'Whether the jetty (in each particular case) is *actually producing effects* calculated, *by their continued operation*, hereafter to interfere with, prejudice, or impede the navigation.' If the jetty in its present state be *wholly inoperative*, there would seem to be nothing at this moment open to complaint or challenge, as amounting in the legal sense to nuisance."

lane or passage by the defenders, or original defenders aforesaid, to the loss, injury, and damage of the pursuers?

Or,

3. Whether the pursuers or their authors acquiesced in the said operations of the defenders, or original defenders aforesaid, or in any part of them?

Damages laid at £1,000.

No. XII.

Graham v. *Locke*,—2*d June* 1829.

It being admitted that the pursuer was tenant of the farm of Whiteslade, the property of Thomas Tweedie, from Whitsunday 1822 to Whitsunday 1828, and that part of the said farm is bounded by Biggar Water and Holmes Water, above their junction,

Whether, during the year 1823, the defender wrongfully erected a damdyke or canal across Biggar Water, lower down than where Biggar Water bounds the said farm, whereby, during the years 1823, 1824, 1825, 1826, 1827, 1828, or any of them, the said waters, or either of them, did overflow a part of the said farm, to the loss, injury, and damage of the defender?

No. XIII.

Johnston v. *Miller*,—29*th January* 1833.

It being admitted that the pursuer is proprietor of the upper division of the lands of Wester Duncow, and of the

Mills of Duncow, and has right to the use of the water of the burn of Duncow;

It being also admitted that the defenders are proprietors and lessees of certain lands above the lands of the pursuer on the banks of the said burn, and of a distillery situated on the lands last aforesaid,

Whether, during the years 1829, 1830 and 1831, or any of them, the defenders wrongfully executed certain operations in or near the course of the said burn, whereby the water of the said burn was diverted, arrested, or detained, to the loss, injury, and damage of the pursuer?

No. XIV.

Dick v. *Weir*, *&c.*—*8th July* 1841.

It being admitted that the pursuer is, and has been for a period prior to the 4th day of October 1839, proprietor of the lands of Craigingelt, which are partly bounded by the burn or rivulet called Earls Burn,

Whether by the fault, negligence, or want of skill of the defenders, or any of them, in the original construction or subsequent maintenance of a damdyke on the said rivulet, the water of the said dam did, on or about the said 24th day of October 1829, overflow certain portions of the said lands of Craigingelt, the property of the pursuer, to his loss, injury, and damage.

Damages claimed, £550.

No. XV.

Weston & Sons v. *Pettif's Trustees & Others*,—
11*th December* 1838.

It being admitted that the pursuers are, and during the years 1836 and 1837 were tenants of a shop on the ground floor of a house in Lothian Street, Edinburgh, and that the defenders, the Incorporation of Tailors of Potterrow, are, and then were proprietors, and the late John Pettit then was tenant of the floor of said house immediately above the said shop,

Whether, by the fault or negligence of the said Incorporation, or of another, or others acting under their authority and for their behoof, the water of a water-closet in the said floor overflowed on or about the 26th day of November 1836 and on the 4th day of May 1837, or either of the said days, to the loss, injury, and damage of the pursuers?

Whether, by the fault or negligence of the said John Pettit, or another, or others acting under his authority and for his behoof, the water of the said water-closet overflowed on or about the 26th day of November 1836 and the said 4th day of May 1837, or either of them, to the loss, injury, and damage of the pursuers?

Sums claimed £71, 15s. 4d. reserving to the defenders their respective rights of relief *inter se*.

No. XVI.

Fullarton v. *Eglinton's Trustees, &c.*—*June* 16, 1841.

It being admitted that the late Hugh Earl of Eglinton let in lease to the late John Marshall the Snodgrass and Longford Coal-field, part of which is under the river Garnock, the former for the space of fifteen years, from the term of Whitsunday 1815, and the latter for the space of sixteen years, from the term of Whitsunday 1819, that the defenders are trustees and representatives of the said Earl and John Marshall respectively, and that the said Alexander Guthrie was a partner with the said John Marshall in working said coal-field;

It being also admitted that on the 20th day of July 1833, the water of the said river broke into the coal-field of Snodgrass, the property of the defenders, the trustees of the said Earl, and from thence overflowed the workings of Bartonholm coal, the property of the pursuer,

Whether by the fault, negligence, or want of skill of the said John Marshall, or of his said trustees and representatives, or of the said Alexander Guthrie, or of persons in their employment, or for whom they were responsible in working the said coal of Snodgrass and Longford, the said water broke into and overflowed the workings of Bartonholm as aforesaid, to the loss, injury, and damage of the pursuer?

Whether by the fault or negligence of the said Earl, or of his said trustees, or those for whom they were responsible, the said water broke into and overflowed the workings of Bartonholm as aforesaid, to the loss, injury, and damage of the pursuer?

Damages laid at £20,000.

No. XVII.

Earl of Elgin's Trustees v. *Wellwood & Spowart*,—
21*st June* 1844.

It being admitted that the pursuers are the trust-disponees of the late Earl of Elgin; and it being found by interlocutor of the Lord Ordinary, dated 25th January 1843, that the "various dispositions produced, afford a sufficient title to enable the said trustees now to sist themselves in this action, and to follow out the same without calling the heir or executor of his Lordship;"

And it being further admitted that Andrew Moffat Wellwood, Esquire, is proprietor, and the defender James Spowart, tenant of the coal-field under the lands of Easter Baldridge, immediately adjoining the coal-field of Wester Baldridge, which belonged to the said Earl of Elgin,

1. Whether in working the said coal-field under the lands of Wester Baldridge, there was left a barrier or entire wall of coal between the said coal-fields of Easter and Wester Baldridge? and Whether during the years 1837, 1838 and 1839, or any of them, the defender James Spowart himself, or by another or others, wrongfully worked out part of, and broke through the said barrier or wall, to the loss, injury, and damage of the pursuers?

Damages claimed down to the date of the Action, £1,000.

2. Whether the defender Andrew Moffat Wellwood himself, or by others, wrongfully worked out part of the said barrier, and broke through the same, to the loss, injury, and damage of the pursuers?

Damages down to the date of the Action, £500.

No. XVIII.

Thomson's Trustees v. *Dixon & Co.—5th February* 1847.

It being admitted that the defenders William Dixon and Co. were, in the years 1840 and 1841, tenants of the ironstone within the said lands of Dykehead, of and under the said George More Nisbett, the proprietor of the same, and that the pursuers are proprietors of the lands of Whiterigg, immediately adjacent and contiguous to the said lands of Dykehead, including the coals and minerals under the said lands of Whiterigg,

Whether, in the course of the years 1840 and 1841, a fire took place in one of the coal-pits within the said lands of Dykehead aforesaid, in consequence of the fault or negligence of the defenders William Dixon and Company, or of any person or persons for whom the said defenders were responsible? and Whether the pursuers expended, in extinguishing of the said fire, the sum of £2,040, as contained in the schedule hereto annexed, or any part thereof? and Whether the defenders are indebted and resting-owing to the pursuer in the said sum, or any part thereof, with the interest due thereon?

Schedule referred to,

Amount advanced by pursuers under first and second Agreements,	£1,734
Amount for which they were further liable under second Agreement,	306
	£2,040

No. XIX.

Clerk, &c. v. *Haig, &c.*—*15th December* 1831.

It being admitted that the pursuer Sir George Clerk is proprietor, and the pursuers Messrs Cowan & Son, are tenants of a certain mill on the river Esk, called the Low or Little Paper-Mill, and that the said Sir George Clerk conveyed to the defenders a certain portion of land situate on the banks of the said river, and a certain mill called the Waulk Mill, with the waterfall of the same, situate below the said paper-mill, in terms of Charters Nos. 13 and 14 of process, dated 13th August 1827,

Whether, wrongfully or in violation of the rights granted by the said Charters, the defenders or any of them, executed certain operations in or upon the said river or the said waterfall, to the injury and damage of the pursuers, or either of them, as proprietors and tenants of the paper-mill aforesaid?

No. XX.

Johnstone, &c. v. *Scott,*—*7th November* 1834.

Whether the pursuers are proprietors of a mill or certain mills on the Waters of Gogo, in the county of Ayr? and Whether, during the years 1826 and 1832, and intervening years or any of them, the defender wrongfully performed certain operations by erecting jetties, bulwarks, embankments, or other works in the bed of the said river and elsewhere, to the loss, injury, and damage of the pursuers?

Damages laid at £1,000 as the amount sustained previous to the commencement of the action, and £500 yearly thereafter.

N.B.—This case is reported in 13 Sh. 717; and at a previous stage a discussion took place, reported 12 Sh. 492, on a proposed Counter-issue of acquiescence, which was disallowed, on the ground that the averments on record did not set forth what in law amounts to acquiescence.

No. XXI.

Gordons v. *Suttie*,—18*th January* 1826.

It being admitted that the late Countess of Hyndford let in lease to the pursuers a Flint Mill at the foot of the Preston-Grange avenue, for the period of 14 years from and after the month of April 1812, and that the said Countess bound and obliged herself and her heirs and successors to warrant the said pursuers in the peaceable possession of the said mill during the term of the said lease, at all hands;

It being also admitted that the defender succeeded the said Countess in the said lands,

Whether the stream of water which was employed in driving the said mill, when it was let to the pursuers in April 1812, has been since that time so lessened in quantity, or diverted from the said mill by William Aitchison of Drummore, the conterminous heritor, as to diminish the power of the said mill in performing the work which it was capable of performing at the time the lease was granted? And, Whether the diminution or divertion of the said stream was caused and continued by the negligence or by the permission of the defender, to the loss and damage of the pursuers?

Damages laid at £300, and annually, during the continuance of the lease, £60.

No. XXII.

Suttie v. *Aitchison*,—*9th February* 1826.

It being admitted that the pursuer is proprietor of the lands of Preston-Grange, and of the Flint Mill situate at the foot of Preston-Grange avenue, possessed by Robert and George Gordons,

Whether the defender, without the consent or permission of the pursuer did, subsequent to the month of April 1812, divert from the said mill the stream of water belonging to the same, or did so lessen the quantity of the said stream as to diminish the power of the said mill, to the loss and damage of the pursuer?

N.B.—As to this and the preceding Issue, which were set down to be tried simultaneously,—see Adam on Jury Trial, p. 126-7. The venerable author remarks that they are good Issues of style in an action for diverting a water-course, and that the trial which took place proved their adequacy.—See also Example No. XIII, *supra*, p. 367-8. In further illustration of the principle that damages are due for such use of one's own property as injures that of a neighbour, the case of *Robertson* v. *Hamilton's Trustees*, 4 Sh. 6, may be referred to, and the cases of *Callender* v. *Eddington*, and *Douglas* v. *Monteith*, reported 4 Murr. 108 and 130.

No. XXIII.

Paterson, &c. v. *Black*,—*20th June* 1833.

It being admitted that the pursuer and defender are proprietors of two contiguous portions of ground and houses thereon, on the north side of Stirling Street, in the town of Airdrie, in the county of Lanark;

It being also admitted that the original march to the west of the pursuer's property, dividing it from that of the defender, was a thorn hedge, and that in the year 1831 a wall was built at or near the said march,

Whether the south end of the said wall was wrongfully built by the defender from about 2 to 2½ feet to the east of the said hedge, extending to about 25 feet in length in a straight line, till it meets the old march, thereby encroaching on the property of the pursuer, to the loss, injury, and damage of the pursuer?

Whether the defender wrongfully caused a water-course or conduit to be formed on the top of the said wall, or any part thereof, whereby the said water is or was thrown upon the said property of the pursuer, or against the wall of the said house of the pursuer, to the loss, injury, and damage of the pursuer?

Whether, about the month of March 1831, the defender wrongfully executed certain operations on his said property, whereby the gable and west wall of the said house of the pursuer were injured, to the loss, injury, and damage of the pursuer?

No. XXIV.

Reid v. *Best*,—10*th July* 1827.

It being admitted that the pursuer is proprietor of a house situated in Golden Square in the city of Aberdeen, and that the defender is proprietor of an area of ground in the said square, and a house erected thereon immediately to the east of the said house, the property of the pursuer,

Whether, during the summer or autumn of 1826, certain operations were wrongfully carried on by the defender or those acting under his authority, by digging, excavating the ground or otherwise, adjoining to or in the immediate neighbourhood of the said house, the property of the pursuer, whereby the said house was injured, to the loss, injury, and damage of the pursuer?

No. XXV.

Bruce v. *Allan*, *&c.*—16*th June* 1836.

It being admitted that the pursuer is proprietor of the house, No. 3, Hillside Crescent, Edinburgh,

Whether, during the year 1832, certain operations were wrongfully and improperly carried on by the defenders, or any of them, or others acting under his, her, or their authority at, near, or under the house No. 4, in the said Crescent, whereby the said house, the property of the pursuer, was injured or deteriorated, to the loss, injury, and damage of the pursuer?

PART XIV.

REPARATION.

CHAPTER I.

SEDUCTION—BREACH OF PROMISE OF MARRIAGE—ADULTERY.

Seduction.—The ground for damages in this class of cases lies in the arts used and delusive expectations held out, which constitute seduction; by means of which a person of previously virtuous character is led to permit sexual intercourse, without any such precedent promise of marriage, as when so followed up, would constitute marriage by the law of Scotland—*M'Candy*, 4 *Sh.* 520. These three essentials of the action—previous virtue, seduction, and loss of virtue, must appear in the Issue, and in No. III they appear in the simplest form, for it is unnecessary, as in the earlier Examples, to set forth the birth of a child,—compare No. III with report, *Monteith* v. *Robb*, 5th March 1844,—and it is sufficient to use the word of style "seduce," without particularising the kind of arts employed. A course of artful solicitation, however, must be specifically set forth in the Summons, *Stewart* v. *Menzies*, 15 Sh. 1198, for it is not enough, as held in that case, that the female has consented to an illicit connection, for tempting her to which the man may reproach himself as most to blame. It is no ground for damages on failure of a declarator of marriage, that the man has held out the woman as his wife for many years

and then deserted her, unless she originally consented to cohabit with him under false promises or deceptive appearances of marriage. *Sassen* v. *Campbell*, 3 Sh. 159; 2 W. and Sh. 309.

Breach of Promise of Marriage.—The ground of action here is a breach of engagement, which does not indeed leave the suffering party with impaired reputation, but with wounded feelings and often actual loss, for both which it was solemnly decided in the case of *Hogg* v. *Gow*, 27th May 1812, F. C. the offending party must make reparation. The Jury will take all the circumstances into view in assessing the damages, *Rose* v. *Gollan*, 1 Murr. 82, and *Tucker* v. *Aitchison*, July 27, 1846, where the Jury gave damages for the breach of promise, although no evidence was led in support of the averment in the Summons of a courtship preceding the promise. The form of Issue admits of little variety or remark. The Example No. IV is given by the Lord Chief Commissioner Adam as a well settled Issue of style, and has been followed since, as in Nos. V, VI, and VII. No. VIII is given as an instance of the man being pursuer; it is incorrect in form in stating the subsequent marriage, which, as the Lord Chief Commissioner observes, is truly *proof of* the breach of promise, and therefore out of place in the Issue.

Adultery.—The injured husband is entitled to damages from the paramour, and that whether he has obtained divorce or not, *Paterson*, 1803, Morr. 13,920. The Example No. IX has been cited, Adam on Jury Trial, p. 108, as a correct Issue of style. It may be doubted if No. X is so correct a form; it embodies so many details as almost to form a Summons put interrogatively. It is no defence to the action that the spouses lived separately, or that the husband was unfaithful, but these circumstances may be proved in mitigation of damages, and without a Counter-Issue.

The defence of *remissio injuriæ*, if remitted to proof, would probably require the defender to take an Issue.

Separation of Husband and Wife.—Only one set of Issues is on record in such a case—Example No. XI—where the pursuer's 2d Issue, putting the question of ill-treatment and wrongful failure to aliment, is met by the defender's Issue, Whether the pursuer wrongfully failed to return to her husband? and both are combined with other questions. An ordinary action of separation *a mensa et thoro* is, like actions of divorce and other consistorial causes, remitted for probation, not to a Jury, but to the Sheriff's Commissaries as Commissioners for taking the proof.

EXAMPLES.

No. I.

Finlay v. *Yule*,—*8th February* 1827.

Whether, prior to the day of 1822, the pursuer was a person of virtuous conduct and untainted character? and Whether during the said year, the defender, by various arts and pretences, and by false promises, did seduce the affections of the pursuer, and did prevail on her, the pursuer, to permit him, the defender, to have carnal knowledge of her, the pursuer, whereby she became pregnant, and brought forth a child on or about the 19th day of June 1823, to the injury and damage of the pursuer?

Or,

Whether the pursuer abandoned all claim against the defender, except a claim for aliment of the said child as a bastard?

No. II.

Rae v. *Paterson*,—18*th June* 1840.

Whether the defender, by various arts and pretences, and by false promises, did seduce the affections of the pursuer, and did prevail on her to permit him, the defender, to have carnal knowledge of her person, whereby she became pregnant, and brought forth a child on or about the 27th day of January 1839, to the injury and damage of the pursuer? and Whether, previous to her intercourse with the said defender, the pursuer was a person of virtuous conduct and untainted character?

No. III.

Monteith v. *Robb*,—2*d July* 1844.

Whether, betwixt the month of January 1837 and the month of January 1840, the pursuer being a virtuous person, the defender did seduce her, and in consequence thereof did prevail on her to permit him to have carnal connection with her in the said month of January 1840, or soon thereafter, to the loss, injury, and damage of the pursuer?

No. IV.

Dinwoodie v. *M'Ewan*,—19*th February* 1835.

Whether, on or about the 18th day of March 1834, the defender promised and agreed to marry the pursuer, and wrongfully failed to perform the said promise and agreement, to the loss, injury, and damage of the pursuer?

No. V.

Croall v. *Hutchison*,—11*th June* 1844.

Whether the defender in the month of April 1843, promised and agreed to marry the pursuer? and Whether the defender has wrongfully failed to perform the said promise and agreement, to the loss, injury, and damage of the pursuer?

No. VI.

Tucker v. *Aitchison*,—10*th June* 1846.

Whether, in or about the months of September, October, November, or December 1845, the defender promised and engaged to marry the pursuer? and Whether the defender has wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer?

No. VII.

Booth v. *Goudie*,—27*th February* 1847.

Whether, in or about the month of July 1845, the defender promised and engaged to marry the pursuer? and Whether the defender wrongfully failed to perform his said promise and engagement, to the loss, injury, and damage of the pursuer?

No. VIII.

Forsyth v. *Gray*,—23*d June* 1824.

Whether, between the beginning of March 1821 and the end of May 1823, the defender Ann Gray or Paterson, did promise and engage to marry the pursuer? and Whether, in violation of the said promise and engagement, the defender did, in the month of June or July 1823, marry William Paterson, ferryman at Kessock, to the loss and damage of the said pursuer?

No. IX.

Baillie v. *Bryson*,—12*th February* 1818.

Whether the defender did, on the 1st day of January 1808, or at any time between that time and the 1st January 1812, seduce and maintain an adulterous connection, and did commit adultery with Mrs Elizabeth Cross or Boyes, then the wife of the pursuer, at the pursuer's house at Carnbroe, or in the neighbourhood thereof?

No. X.

Bell v. *Murray*,—19*th June* 1833.

It being admitted that Elizabeth Colville or Bell was, during the years 1828, 1829, 1830, and 1831, the wife of the pursuer,

Whether, during the months of April, October, and December 1829, or prior thereto, the defender wrongfully alien-

ated the affections of the said Elizabeth Colville from the pursuer, and wrongfully seduced her from her marriage-vows and engagements, and did, in the house of the pursuer at Dundee, on or about the Fast-day preceding the dispensation of the Lord's-Supper at Dundee, in the month of April 1829; and in the said house, on or about the 18th day of the month and year last aforesaid; and in the said house during the month of October in the said year; and in the house or lodgings of Mrs Rutherford in High Terrace, Leith Street, Edinburgh, on or about the 28th, 29th, 30th, and 31st days of December of the said year; and the 1st and 2d days of January 1830, or on or about any of the said days, at the said places respectively as aforesaid, wrongfully commit adultery with the said Elizabeth Colville, to the loss, injury, and damage of the pursuer?

No. XI.

M'Kellar v. *Lambert*,—1*st February* 1828.

It being admitted that the pursuer was married to the defender in 1805, and that the pursuer and defender lived separate from the month of August 1809 until the month of October 1823, and that on the 23d and 24th days of October 1823 decree of divorce was pronounced against the defender,

Whether, on or about the 24th day of August 1809, the defender agreed to pay to the pursuer the sum of £20 a-year, by four quarterly payments? and Whether the defender wrongfully failed to pay the said aliment, or any part thereof, to the loss, injury, and damage of the pursuer?

Whether, on or about the 9th day of August 1809, the defender, by his conduct, and by his treatment of the pursuer, caused the pursuer to leave the family of the defender, and to live separate from the same during the period from 1809 to 1823, or any part thereof? and Whether he has wrongfully failed to aliment the pursuer during the said period, or any part thereof, to the loss, injury, and damage of the pursuer?

Whether, from 1809 to 1823, or during any part of the said period, the pursuer alimented John Lambert, a son of the defender's? and Whether the defender wrongfully failed to pay the said aliment, to the loss, injury, and damage of the pursuer?

Whether the defender, on the said 3d and 4th days of October 1823, was indebted and resting-owing to the pursuer the sum of £700, or any part thereof, on account of her third of the goods in communion, and on account of her terce of the heritable property of the defender?

Or,

Whether, during the period from 1809 to 1823, the defender required the pursuer to return to his family? and Whether the pursuer wrongfully refused to do so?

Sum claimed £1,237.

CHAPTER II.

DESTRUCTION OF, OR INJURY TO PROPERTY.

The important subject of the Issues required in actions for reparation of injury to the person, by assault or otherwise, to reputation by libel or defamation, and to liberty by wrongous apprehension or use of diligence—have been already fully discussed.—See Parts II to VI. In this Chapter it only remains to collect a few Examples of Issues where an action of damages is brought for injury to, or destruction of property;—a relevant ground of action, *Wilson* v. *Macknight*, 8 Shaw, 398. The construction of such Issues is simple; the question being, Whether the particular act was done to the loss and damage of the pursuer? To meet the defence of a justifiable cause for the injury, and cover cases on the one hand of wanton malice, and on the other of mere negligence, the Jury is asked if the act was done "wrongously?" In the case of *Grubb* v. *Mackenzie*, 2 Murr. 1, the Jury were simply asked Whether certain stake nets were destroyed to the damage of the pursuer? and they were directed to take no notice of the defence that the nets were illegal machines; as they had only two points to consider, Were the nets destroyed? and What was the amount of loss? The use of the word of style "wrongously," enables the defender to prove any defence arising from a justifiable cause of the act complained of, or that it was occasioned by accident. Thus in *Herriot* v. *Unthank*, 6 Sh. 211, the defender successfully shewed—the proof being in the Inferior Court on Commission—that a horse which was killed came by its death accidentally when his servants were driving it back, without unnecessary violence, from a field into which it had strayed. The case of *Cumming* v. *Turnbull*, Feb. 12, 1840, was of a precisely similar nature; and in *Grant* v.

Barclay Allardyce, 5 Murr. 130, (Example No. I,) where two dogs had been shot, the Lord Chief-Commissioner directed the Jury that it was a question for them whether, in the whole circumstances, the dogs having been on the defender's property, where there were sheep, he was justified in shooting them?. The Jury thought not, and gave damages. The Issue in the case of *Callender* v. *Eddington*, 4 Murr. 108, is cited by the Chief-Commissioner as a good Issue of style where damages for injury to a house are sought. It is given No. VI, although rather belonging to the previous Part, as appears from the Report by Mr Murray; where also will be found the Issue in an action of relief against the superior by the party performing the operations, who was bound by his feu-contract to build a house with sunk storey, and contended, but unsuccessfully, that his operations were conducted in a proper and workmanlike manner. On the latter subject see also the Lord Ordinary's Note in *Brown* v. *Rollo*, 10 Sh. 670.

EXAMPLES.

No. I.

Grant v. *Barclay, &c.—8th December* 1829.

Whether, on or about the 9th day of November 1827, on or near the Muir of Terrochie, in the parish of Fetteresso, and county of Kincardine, the defenders, or either of them, did wrongfully shoot, or cause to be shot, a dog or dogs, the property of the pursuer, to the loss, injury, and damage of the pursuer?

No. II.

Brownlees v. *Inglis*,—*12th December* 1846.

Whether the pursuers were, in or about the month of August 1845, proprietors of the house which is mentioned and described in the disposition, No. of process? and Whether the defender by himself, or others acting by his directions or under his authority, in or about the said month of August 1845, wrongously pulled down, or caused to be pulled down the said house, to the loss, injury, and damage of the pursuers?

No. III.

Archibald v. *Lauder*,—*6th July* 1847.

Whether, in the course of the months of December 1846 and January 1847, or either of them, the defender, by himself or another, or others acting under his authority, or for whom he is responsible, wrongously injured certain flowers, shrubs, plants, and other nursery stock belonging to the pursuer, and growing or situated in a park or field called Quarry field, on the estate of Grange, in the neighbourhood of Edinburgh, to the loss, injury, and damage of the pursuer?

Whether, on or about the 5th day of the month of February 1847, the defender, by himself or another, or others acting under his authority, or for whom he is responsible wrongously prevented or interrupted a sale of shrubs,

flowers, plants, and other nursery stock belonging to the pursuer, and growing or situated within the said park or field, to his loss, injury, and damage?

No. IV.

Robertson & Others v. *Shotts Iron Co.*—*2d March* 1848.

It being admitted that the pursuers are joint-proprietors of the lands and estate of Hallcraig, and that the defenders are lessees of the mines and minerals in the immediately adjoining estate of Milton-Lockhart: And it being further admitted, that all surface damage done to the pursuers' foresaid lands through the operations and encroachments of the defenders down to May 1842, have been paid and settled for by them,

1. Whether, in the course of the years 1839, 1840, 1841, 1842, 1843, 1844, and 1845, or any of them, the defenders, by and through their operations in opening and working the said mines and minerals in the estate of Milton-Lockhart, encroached upon, and occupied portions of the lands of Hallcraig, extending in measurement to four-fifths of an acre or thereby, lying immediately to the north of the boundary line between the said estates of Milton-Lockhart and Hallcraig, and to the east and south-east of a burn called Horley Burn, to the loss and injury of the pursuers?

2. Whether, by and through the said encroachments, damages have been suffered by the pursuers' fault after May 1842?

3. Whether, in the course of the year 1837, the defenders, without the consent of the proprietors of Hallcraig, or any one on their behalf, encroached upon, and made and

constructed a railway partly in the bed or channel of a burn called Jock's Burn, where it forms the boundary of the properties of Hallcraig and Milton-Lockhart, to the loss, injury, and damage of the pursuers?

Damages claimed in addition to the demand for restoration of the subject to its former condition £1,000;

Or,

1. Whether in the course of the months of February and March 1843, or about that time, the defenders restored the foresaid portions of the pursuers' lands to the original condition in which they were previous to any encroachments thereon by the defenders?

2. Whether the pursuers, their predecessors or authors, acquiesced in the construction of the said railway?

No. V.

Mackinlay v. *Mark & Wright*,—30*th June* 1848.

It being admitted that the pursuer is the proprietor of the lands of Newlandburn, in the parish of Borthwick, and county of Edinburgh, and that the defender Thomas Mark, is, or was in the month of January 1847, proprietor of a feu or out-field adjoining to the said lands,

Whether, in or prior to the said month of January 1847, there was a row of larch trees, forming a mutual fence and enclosure on the march betwixt the said lands and the said feu or out-field? and Whether, in or about the said month of January 1847, the defender wrongfully cut down the said trees, or any of them, to the loss, injury, and damage of the pursuer?

No. VI.

Callendar v. *Eddington*,—19*th July* 1826.

Whether, in summer or beginning of autumn 1825, certain operations were improperly carried on by the defender, or those acting under his authority, by digging or excavating the ground adjoining to, or in the immediate neighbourhood of a house, the property of the pursuer, situated in West Maitland Street, in the city or in the county of Edinburgh, whereby the said house was injured or deteriorated, to the loss and damage of the pursuer?

CHAPTER III.

INJURIES FROM ILLEGAL, CULPABLE, OR FRAUDULENT CONDUCT.

In this Chapter are grouped together specimens of the Issue taken in various descriptions of cases, not previously noticed, where loss is alleged to have arisen to the pursuer from some unwarrantable act or conduct of the defender. The nature of the fact set forth in the Issue must be as various as the possible occasions on which men may, by violence, or fraud, or negligence, or mistaken views of right, injure one another.

Thus, one merchant knowingly executing an order intended for another, *Dickson* v. *Dicksons & Co.*; 1. Murr. 55, and 8 Sh. 933, (Example, No. III); the interruption of a roup by unwarrantably serving a protest which had the effect of deterring purchasers, *Philp* v. *Morton*, Hume Coll. 865; misrepresenting to the assignee of a lease the nature of a sub-lease of part of the lands, *Duncan* v. *Cowie*, November 20, 1841; subscribing a bond as witness without seeing the granter subscribe, by which the bond was rendered null, *Blair*, Morr. 13,942; have been held to afford ground for damages. The Examples given below will furnish further variety; and *vide supra*, p. 388, No. III.

The essentials of the Issue are, that the act was done "wrongfully," and to the loss and damage of the pursuer. The Issue will not be granted unless the Court are satisfied that the Statement of facts in the Record is relevant to infer liability for damage. In *Gordon* v. *Royal Bank*, 5. Sh. 164, it was held to be no ground for damages that the defender had, by a litigation ultimately unsuccessful, prevented his neighbour, during its course, from erecting a building; but it was remitted as a proper Jury question, Whether he had wrongfully neglected to intimate the withdrawal of

an Appeal,—loss having been sustained by unnecessary continuance of an interdict for two years. In *Cleland* v. *Laurie*, June 21, 1848, an action which bore that a lady had "assisted and abetted" her son in certain legal proceedings, which it was alleged were vexatious and to the damage of the pursuer, was dismissed, as containing neither a relevant nor a sufficiently specific statement, although fraud was alleged. Where patrimonial loss was sustained by legal proceedings, and particularly by execution pending appeal, and the Appeal terminated in a reversal, it was held there was no case to go to a Jury, *Graham* v. *Dundas*, 7 Sh. 876. Interdict on summary application is granted *periculo petentis*, and may found an action of damages, *Moir* v. *Hunter*, 11 Sh. 32; but the Court will not send an Issue for trial unless malice, or excessive litigation, or *mala fides* of some kind is alleged, *Graham* v. *Dundas*, 7 Sh. 874, and *Mudie* v. *Miln*, 6 Sh. 967. In the case of *Moir* v. *Hunter*, Lord Gillies refused to direct an Issue, "Whether the defender illegally obtained and kept in force an interdict, to the loss and damage of the pursuer?" because, as the interdict had been judicially found to be illegal, such an Issue would have left nothing to the Jury but to assess the damages, while he doubted whether there was a relevant ground for damages in the circumstances, and the Court ultimately held that there was not, there having been nothing irregular or unfair in obtaining the interdict, and no excessive litigation.

In *Dick* v. *Mitchell*, December 3, 1845, a discussion took place on the form of the Issue, Example No. IX, which was ultimately approved of by the Inner-House. It was held that a magistrate certifying the solvency of the attestors of a cautioner in a Suspension is not entitled to privilege, as it is not an act which he can be compelled to do; and the words "falsely, and without due inquiry or information," were substituted for "falsely, and without probable ground of belief;" as the latter, being those used in cases of privilege, might have led to misconception at the trial.

In *Dauney* v. *Maxwell*, 14 Sh. 1037, an action against road-trustees for purposely laying heaps of metal on a road whereby a steam carriage was injured, it was held that although malice was averred both in the Summons and Condescendence, it was not necessary, it not being a case of privilege, for the pursuer to charge malice in the Issue; and the Issue, Whether the defenders "wrongfully" performed certain operations, &c. was approved of.

Issues have gone to a Jury where damages were sought for conveying in liferent a superiority affording a vote, which had previously been absolutely conveyed to the pursuer, *Graham* v. *Westenra*, 4 Murr. 292; and for sequestrating in the name of, but without due authority from the landlord, and obtaining interdict of a poinding, which deprived the poinder of his preference, *Miller and Baird* v. *Rae*, 13 Sh. 699.

Here also may be noticed the subject of fraudulently inducing to enter into a contract where the contract itself cannot be set aside. In *Campbell* v. *Boswell*, Feb. 27, 1841, where damages were claimed for inducing the pursuer to take a lease of coal, it was held that, in the circumstances set forth in the Record, an Issue could not be taken —Whether the pursuer was induced by "false" representations; as they might be so, and yet made perfectly *bona fide* on the part of the proprietor, and without any intention to warrant their accuracy; the word "fraudulent" was inserted—see Example No. XI. The same form of Issue was followed in *Miller* v. *Geils*, Feb. 16, 1848, see Example No. XII, in which a discussion arose on a motion for a new trial, Whether, under an Issue grounded on fraudulent representation, *moral* fraud must be established?

An Issue may be taken by the defender on acquiescence in the wrongful act, as in No. VII; but generally in this class of cases, the task of the defender is to show from the circumstances, and under the pursuer's Issue, that the act was not wrongful, or was excuseable, or was not attended with damage.

EXAMPLES.

No. I.

Lonie v. *List*,—21*st May* 1844.

Whether, on or about the 24th day of June 1843, the defender did wrongfully detain, or cause to be detained in the premises of the White Hart Inn, in the Grassmarket of Edinburgh, kept by Mrs Haddo, innkeeper there, a horse and cart, and a quantity of straw, the property, or in the possession of the pursuer, from and after the said 27th day of June 1843, till the afternoon of the 29th of that month, or part of that time, to the loss, injury, and damage of the pursuer?

No. II.

Crawford v. *Mill, &c.*—19*th January* 1830.

It being admitted that on the 30th day of May 1829, the pursuer hired a coach for the purpose of conveying certain persons to Libberton Church-yard,

Whether, at or near Mayfield Toll-bar, on the road from Edinburgh to Libberton aforesaid, the defenders, or any of them, by themselves, or others acting under their authority, wrongfully stopped the said coach, and prevented the same from proceeding to the said church-yard, to the loss, damage, and injury of the pursuer?

No. III.

Dickson v. *Dicksons & Co.*—*2d February* 1830.

It being admitted that the pursuers are nursery and seedsmen carrying on business in Edinburgh under the Company-firm of Dicksons & Co., and that the defender, James Dickson, is also a nursery and seedsman, carrying on business under the firm of James Dickson & Son,

Whether, on or about the 23d day of January 1829, an order was transmitted by Mr Richard Bradley, then gardener to Sir James Graham of Netherby, Bart. intended for the pursuers? and Whether the defender, knowing that the said order was intended for the pursuers, did wrongfully execute the same, to the loss, injury, and damage of the pursuers?

Whether, on or about the 4th day of March 1829, an order was transmitted from Colonel Gordon of Harperfield, intended for the pursuers? and Whether the defenders, knowing that the said order was intended for the pursuers, did wrongfully execute the same, to the loss, injury, and damage of the pursuers?

No. IV.

Downes v. *Cassells*,—11*th February* 1830.

It being admitted that the defender, Walter Gibson Cassells, was, during the year 1828, agent at Leith for the National Bank of Scotland,

Whether, on or about the 4th day of March 1828, a Bill of Exchange for the sum of £70 sterling, dated 4th

March 1828, drawn by the pursuer, and accepted by Robert Smith, grocer in Leith, was put into the hands of the defender, for the purpose of getting the same discounted at the said bank? and Whether the defender wrongfully retains the said bill, or all, or any part of the contents thereof, to the loss, injury, and damage of the pursuer?

No. V.

Maitlem v. *M'Grather*,—*7th December* 1841.

It being admitted that on or about the 19th day of July 1839, a bond was executed in favour of the pursuer by Thomas Henderson, Edward Buchan, and Jean Henderson or Buchan,

Whether the said bond was delivered to the defender as agent for the pursuer, or for his behoof? And Whether the defender wrongfully retains and refuses to deliver the same to the pursuer, to the loss, injury, and damage of the pursuer?

No. VI.

Melrose & Co. v. *Hastie & Co. &c.*—*16th December* 1846.

It being admitted that on or about 15th June 1843, the defenders Robert Hastie and Co. sold to James Bowie and Co. merchants in Glasgow, 761 bags of sugar or thereby;

And it being admitted that on or about the same date, the said James Bowie and Co. sold to the pursuer the said 761 bags of sugar or thereby,

Whether the defenders wrongfully prevented or obstructed the pursuers in removing 591 bags of the said sugar, or

any part thereof, from the bonded warehouse in which they were deposited, to the loss, injury, and damage of the pursuers?

No. VII.

Renton v. *Hamiltons*,—12*th May* 1836.

It being admitted that the late Alexander, Lord Elibank, the first of that name, was proprietor of the estate of Ballincreiff, comprehending the farm Stantalane, as heir of entail under a deed dated the 26th May, and recorded 24th July 1777, and that the liferent interest of the said Lord in the said estate was conveyed in trust, for payment of his debts, to Charles Selkrig, accountant in Edinburgh, by a deed dated ; and that by a deed dated , the said life-interest was conveyed to the defender James Hamilton;

It being also admitted that the late Alexander, the second Lord Elibank of that name, was heir of entail in the said estate, and conveyed to the pursuer his interest in the said estate, for the benefit of his creditors,

1. Whether, during the year 1813, the defender James Hamilton, for the purpose of securing to himself an interest in the said estate, wrongfully granted to the defender George Lowther Hamilton, and the late Thomas Hamilton, his father, or either of them, as trustee or trustees for the said James Hamilton, a lease of the said farm, at the rent of £450 sterling, or about that sum, to the loss, injury, and damage of the pursuer?

2. Whether, at the time the said James Hamilton granted, or became bound to grant the said lease to the said Thomas and George Lowther Hamiltons, or either of

them, he, the said James Hamilton, had the offer of, and might have obtained from a substantial tenant a greatly higher rent? and What rent for the said farm?

3. Whether in 1820 the sub-lease to John Reid was put an end to by the insolvency of the tenant?

Or,

Whether the said second Alexander Lord Elibank homologated and approved of the said lease of the farm of Stantalane?

No. VIII.

Clark v. *Mackenzie & Others*,—*2d December* 1842.

Whether, on or about the 30th day of March and 27th day of April 1841, or either of them, the defenders or any of them, wrongfully refused to take trial of the qualifications of the pursuer as presentee to the Church and United Parishes of Lethendy and Kinloch, to the loss, injury, and damage of the pursuer?

Damages laid as under—

Pecuniary loss, .	£7,000
Solatium, . .	2,000
	£9,000

No. IX.

Dick v. *Mitchell*,—*29th November* 1845.

Whether, on or about the 8th August and 19th September 1839, the defender falsely, and without due enquiry or information, certified that George Mackay, designing

himself of the Excise, Glasgow, and residing at Stonefield Lodge, near Glasgow, James Watt, designing himself as of Bogiehaffle, in the parish of Kincardine, Perthshire, and residing at No. 38, Oxford Street, Glasgow, and George Macmaster, designing himself grocer and spirit dealer in Glasgow, were, at the said dates respectively, habit and repute responsible for the obligations contained in a bond of caution dated 6th July 1839, and attestations thereon, to the loss, injury, and damage of the pursuer?

No. X.

Boyd v *Buist & Co.*—16*th February* 1846.

Whether the Writing or Missive of Agreement No. 4 of process, was originally framed and signed by the parties thereto, containing, among others, a clause in the following terms, viz. :—"The said Robert Boyd to cut all dykes or hitches up or down the height of the working; the said Buist & Co. being bound to provide rails and sleepers; Robert Boyd being bound to take charge and keep up the engine and machinery, and restore them in the same good condition as now delivered over to him?" and Whether, after the said Missive of Agreement was so signed, the defenders or either of them, fraudulently inserted or interpolated therein certain words and letters, whereby the above recited clause was altered so as to run as follows:—"The said Robert Boyd to cut all dykes or hitches up or down the height of the working; the said Buist & Co. being bound to provide rails and sleepers, Robert Boyd's *out-put* being *to be not less than four hundred calcined tons per month;* and bound to take charge and keep up the engine and machinery, and restore them in the same good condition as now delivered over to him," to the injury and damage of the pursuer? and

Whether the bill No. 6 of process, was granted by the pursuer and paid to the defenders in ignorance of the foresaid interpolation?

Schedule.

Amount of the said bill, . £100

No. XI.

Campbell v. *Boswell*,—13*th March* 1841.

It being admitted that the defender is proprietor of Wardie and Windlestrawlee,

Whether, by false and fraudulent representation, the defender himself, or by another or others, induced the pursuer to enter into the lease, No. 22 of process, and to expend large sums of money preparatory to working coal under the said lands, to the loss, injury, and damage of the pursuer?

No. XII.

Miller v. *Geils*,—16*th February* 1848.

It being admitted that on the day of 1839, the Minute of Set, No. of process, was entered into by the defender on behalf of Colonel Andrew Geils of Dumbreck, his father, on the one part, and the pursuer on the other part, whereby the defender, on behalf of his said father, let to the pursuer the farm of Highmains of Dumbreck, belonging to the said Colonel Andrew Geils, for the period of fourteen years from the term of Martinmas 1839 and Whitsunday 1840, at the rent of £200 per annum, and that the

pursuer entered into and still continues the possession of the said farm under the said Minute of Set,

Whether the defender, by fraudulent representation, or by fraudulent concealment, induced the pursuer to enter into the foresaid Minute of Set, and to become bound for the rent of £200, therein stipulated, to the loss, injury, and damage of the pursuer?

No. XIII.

National Bank of Scotland v. *Heath*,—*7th July* 1832.

Whether, on or about the 26th day of December 1830, the defender wrongfully stole, abstracted, or carried away, or wrongfully caused to be stolen, or wrongfully assisted, or was art and part in stealing, abstracting, or carrying away certain bank notes or banker's notes, the property of the pursuers, from the office of Messrs James and Robert Watson, bankers in Virginia Street, Glasgow; or the said notes having been stolen, abstracted, or carried away, received possession of the said notes, and wrongfully retains the same, or refuses to deliver back the same, or any of them; or wrongfully received the said notes, knowing the same to have been stolen, abstracted, or carried away as aforesaid, and wrongfully put the same out of his possession, to the loss and damage of the pursuers? and Whether the defender is indebted and resting-owing to the pursuers in the sum of £1,500 sterling, or any part thereof, as the value of the said bank notes stolen, abstracted, received, or retained as aforesaid?

No. XIV.

Glasgow and Ship Bank v. *Wishart*,—*27th June* 1843.

Whether, at various times, between the 11th October 1838 and the 3d January 1842, Robert Smith, then in the employment of the pursuers, wrongfully embezzled a sum or sums of money amounting to £10,715 : 5 : 8, the property of the pursuers, or any part thereof? and Whether the defender James Wishart, wrongfully aided and abetted the said Robert Smith in the embezzlement of the said sum or any part thereof, to the loss, injury, and damage of the pursuers?

Damages claimed, £10,715 : 5 : 8.

CHAPTER IV.

DAMAGE FROM BREACH OF AGREEMENT.

The appropriate forms of Issue in actions upon the breach of the various nominate contracts, will be found treated of under the respective heads of these contracts. In this place a few examples are collected of Issues where damage was alleged to have arisen from the violation of some innominate agreement or undertaking. Reference is made also to the Issues in the case of *Inglis* v. *Robertson*, December 21, 1841; they are contained in the Report, and were approved of by the First Division, 30th June 1841. The discussion on the application for a new trial, which was granted on the 3d June, is reported of date March 9, 1842.

In the case of *Walker* v. *Milne & Others*, 2 Sh. 379, and 3 Sh. 478, damages were sought for not implementing an agreement to take the pursuer's ground as the site of a public monument. The Court held that there was no completed contract to bar *locus pœnitentiæ*, and that the subscribers were entitled to alter the site; but they held the pursuer "entitled to indemnification for any actual loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the site of the monument." The case was remitted to the Jury Court, and the Issue, Example No. VII, was settled.

It will be observed that in the earlier forms the question is put simply, Whether the defender "failed to perform, &c." while in the later the word "wrongfully" is invariably inserted. The use of this term seems to have this advantage, that it enables the defender under the pursuer's Issue to prove any justifiable cause of failure, or if this is not done, it leads necessarily to a verdict for the pursuer; and if a Counter-Issue be taken on failure of any condition on the

pursuer's part, the affirmative of the one Issue is the negative of the other, which would not be the case if the question in the pursuer's Issue was failure only. In No. VIII of the Examples, however, where personal injury is alleged from breach of an agreement to provide sufficient machinery, the term wrongfully is not employed.

EXAMPLES.

No. I.

Johnston v. *Mackenzie*,—*29th November* 1823.

It being admitted that in the year 1819, the defender Mrs Mackenzie sold to the pursuer the stock and furniture of her shop in Princes Street, and the good will of her business as milliner and dress-maker, for the sum of £1,393 : 2s. and that she recommended Miss J. Mackenzie to the pursuer as a partner in trade.

Whether the defender promised, engaged, or undertook to the pursuer, to enable the said Miss Mackenzie to advance a sum of £1,000 or thereabouts, as capital in the said trade? and Whether the defender failed to perform her said agreement, to the loss and damage of the pursuer?

No. II.

Dickson v. *Bonar*, *&c.*—*29th November* 1827.

It being admitted that by the missive letters in process, dated 28th March and 3d of April 1821, the deceased John Bonar agreed to employ the pursuer to erect three houses at Grove, near Dalry, on the terms mentioned in the said

missive letters, and to grant to the pursuer a feu of a certain area of ground for the purpose of erecting a house for the pursuer, also in terms of the said missive letters;

It being also admitted that the pursuer erected two of the said houses,

Whether the southmost of the houses erected as aforesaid, was erected on the area agreed to be feued to the pursuer? and Whether the defenders failed to grant the said feu-right, or to purchase the said house, and pay the value thereof in terms of the agreement entered into by the said missive-letters, to the loss, injury, and damage of the pursuer?

No. III.

Kerr v. *Butchart*,—*25th November* 1828.

It being admitted that in the year 1825, the defender was proprietor of the lands of Newgate, in or near the town of Arbroath, and that part of the said land was feued by the defender to one Finlay,

Whether the defender promised and agreed, on the conditions stated in the paper No. 3 of process, to feu to the pursuer a certain portion of the said ground, extending to 60 feet in front, by 90 feet in depth or thereby, pointing to the east, and situated immediately to the south of the portion of the said lands feued to Finlay? and Whether the defender failed to grant a feu-disposition to the pursuer of the said portion of the said ground according to the said conditions, to the loss, injury, and damage of the pursuer?

No. IV.

Macra v. *Weir, &c.*—18*th March* 1840.

It being admitted that the defenders are trustees appointed by the late Andrew Bowman, sometime merchant in Glasgow,

Whether, on or about the 30th day of May 1838, the said Andrew Bowman agreed, in terms of the missive No. 3 of process, to grant to the pursuer a sub-lease of the Island of Lamlash, and to sell to him the stock on the farm, and the other articles specified in the said missive? and Whether the said Andrew Bowman and the defenders wrongfully failed to implement the said agreement, to the loss, injury, and damage of the pursuer?

No. V.

Piper, &c. v. *Mitchell*,—10*th February* 1841.

It being admitted that the contracts, Nos. 5, 6, 12 and 13 of process, were entered into, the former on the 19th, 23d, 24th, and 26th November, and 23d December 1836; and the latter on the 12th, 13th, 14th, and 15th June, and 28th July 1837, for the purpose of conveying the Mails between Edinburgh and Carlisle, and that the defenders were originally, or became parties to the said contracts,

Whether, from on or about the 5th day of October, to on or about the 19th of November 1839, or during any part of the said period, the defenders, or any of them, by themselves or with others, wrongfully, and in violation of the said contracts, or either of them,

run or carried on an opposition Coach between Edinburgh and Carlisle, to the loss, injury, and damage of the pursuers?

No. VI.

Wilsons v. *Railton*,—1*st July* 1843.

Whether the Promissory Note, No. 17 of process, was granted by the pursuers James Wilson and Co. on or about the date it bears, to and for the accommodation of the defender, subject to the agreement contained in the letters Nos. 18, 19, and 20 of process? and Whether the defender, wrongfully and in breach of the agreement contained in the said letters, or wrongfully and in breach of the agreement contained in the deed Nos. 45 and 46 of process, indorsed away the said promissory notes, and thereby allowed diligence to be used thereon against the pursuers, or any one or more of them, to the loss, injury, and damage of the pursuers, or of any one or more of them?

No. VII.

Walker v. *Milne*, *&c.*—12*th February* 1825.

It being admitted that in consequence of certain communings betwixt the pursuer and defenders, it was resolved by the defenders, and understood by the pursuer, that the Monument to the memory of Lord Viscount Melville, should be erected upon a part of the lands of Coates, the property of the pursuer;

It being also admitted that the said Monument was not erected on the said lands, but has since been erected in St Andrew Square, in the city of Edinburgh;

And it being found by an Interlocutor of the First Division of the Court of Session, dated the 4th day of March 1823, and now final, "that," &c.

Whether actual loss and damage has been sustained? and What expences have been incurred by the pursuer in consequence of the alteration of the site of the Monument in question?

No. VIII.

Stevenson v. *Earl of Zetland and John Williamson*,—
18*th March* 1848.

It being admitted that in the year 1844, the pursuer entered into a contract with the defenders or either of them, for sinking a pit for working ironstone at Castlecary, in the county of Stirling,

Whether the defenders or either of them, undertook and agreed to furnish proper and suitable machinery requisite for the execution of the said work? and Whether, on or about the 9th day of December 1844, in consequence of the insufficiency of the machinery and tackling furnished by the defenders or either of them, the pursuer sustained a severe bodily injury to his loss and damage?

PART XV.

CONTRACTS OF SERVICE,

INCLUDING

CONSTITUTION OF CONTRACT OF SERVICE—VERBAL CONTRACT AND IMPROBATIVE MISSIVES—BREACH OF CONTRACT OF SERVICE—COUNTER-ISSUES FOR DEFENDERS—CONTRACTS OF APPRENTICESHIP—MISCELLANEOUS QUESTIONS OF SERVICE.

Constitution of the Contract of Service.—When the contract has been reduced to writing, it generally prevents question, and may furnish matter of prefatory admission; but a question of fact may arise on the terms of the writing, as in No. XVII of the subjoined Examples, where an action to reduce a Minute of Appointment, so far as it bore the appointment to be during life and good behaviour, was conjoined with the action of damages for dismissal. The action for breach of the contract may also be met by an action to set aside the document constituting it, on the ground of false representations inducing to the contract, as in No. XVI. When the contract of hiring or its more important terms are not in writing, the Jury will determine upon the evidence what was the nature of the engagement, depending, as this must often do, on usage and understanding in regard to each particular species of employment.

A doubtful question sometimes arises where services have been rendered, whether there was any contract of service at

all, or whether the party being a relation or dependent merely gave service in return for food and lodging. See Fraser, Dom. Rel. II, p. 379-81. An Issue went to trial in a case of this sort (No. VI of the Examples), where the Court declined to hold that there was a presumption either way, and left it for the pursuer to satisfy the Jury that wages were due, —*Smellie* v. *Gillespie*, 12 Shaw 125, and 13 Shaw 700. Where services have been rendered without stipulation as to remuneration, the amount due will be a question for the Jury, as in the alternative Issue in Example No. XVIII. In such cases also the Jury may have to judge of the question, Whether the services were rendered on the employment of the defenders?

Verbal Contracts and Improbative Missives.—A contract of service for more than a year requires for its validity a probative writing, or an improbative missive perfected by *rei interventus*. Fraser, Dom. Rel. II, p. 369-75. It would appear that, in certain circumstances, the Issue may put the question without special reference to the writ, leaving it as a matter of direction at the trial whether the contract libelled is legally proved. In *Ivison* v. *Edinburgh Silk Yarn Company*, December 1845, Example No. XIV, there was an informal memorandum of salary bearing also the term of engagement, which was seven years; but it was not referred to in the Issue. In the analogous case of *locatio rei* it does not appear to have been always necessary to refer to the missive in the Issue, as in No. IV and V of Part VIII *supra*, p. 236-7; but in the case of *Forbes* v. *Dunbar*, July 6, 1848, the Inner-House required that the Issue should run, "Whether in virtue of the missive of date it was agreed;" but it is to be noticed that in that case the missive had been set forth in the Summons, and throughout founded on as the ground of action. Had an agreement been averred and the missive only referred to *in modum probationis*, it would appear that the Issue need not have embodied a reference

to it; but in the circumstances, it was observed on the Bench, that to omit it would have implied a judgment that parole evidence alone would be sufficient at the trial.

Breach of Contract of Service.—The pursuer's Issue is in general founded on the breach of some condition of the contract expressed or implied. The conditions vary according to the nature of the service, as that of domestic servant, clerk, tutor, overseer, &c. or according to the express terms of the bargain. On the one hand the employer has his action for damages for desertion of service, and, in the case of an agent or overseer, for a balance of intromissions due,—Example No. XIII, and the case of *Gye & Co.* v. *Hallam*, 10 Shaw, 512; 1 Sh. and M'L. 747. On the other hand the person employed has his action for wages for the service performed, or for damages for dismissal without due warning,—*Anderson* v. *Wisharts*, 1 Murr. 429. An Issue rises out of each of these grounds of action; and it may happen also that an Issue is necessary on allegations of assault in connection with the dismissal. Any such subordinate Issue ought to be kept carefully distinct, as in Example No. IX, and not to be put in the same query, as was done in some of the earlier forms. There may also arise, in connection with the same facts, claims of damages for defamation on the one hand, as in Nos. IX and XVI, or on the other for wrongous use of the employer's property, as in No. XIII. The law as to defamation of a servant by a master is laid down in *Christian* v. *Lord Kennedy*, 1 Murr. 427, and in Fraser Dom. Rel. II, p. 439-40. It would seem unnecessary and incorrect, although done in some earlier cases, to embody the pretext of dismissal in the Issue, as "Whether the master did, on the false and injurious pretext of, &c. wrongfully dismiss the servant?" He may have dismissed him without any sufficient cause, therefore wrongfully, and yet not on the pretext alleged. It is therefore the safer and more usual course to use the more general Issue.

Counter-Issues for Defender.—In general whatever goes to disprove the pursuer's case—employment, resting-owing, term of service, desertion, &c.—may be proved under the pursuer's Issue; even under a general Issue of wrongful dismissal a good cause of dismissal may be proved. But it is sometimes thought better to take a defender's Issue, to procure the answer of the Jury as to the allegations of misconduct on the part of the employed.—See Examples Nos. IV and V. In the former case, *Matheson* v. *M'Kinnon*, 10 Sh. 826, the Counter-Issue was rendered the more necessary by several Issues arising out of allegations of defamation, and was in truth an Issue on the *veritas convicii*. A Counter-Issue may be required if the defender founds on non-fulfilment of some condition incumbent on the pursuer, as in No. XVIII.

Contracts of Apprenticeship.—As this contract can only be proved by a probative writing, or an informal missive completed by *rei interventus*, such as service under it—Fraser, Dom. Rel. II, p. 374-5,—the Issue is usually prefaced by an admission of the indenture. When the apprentice is pursuer the question generally is that of wrongful dismissal by his master, which is met by the master either with or without a Counter-Issue, by proof of good and sufficient cause of dismissal. It may be met by proof that the apprentice deserted, or that he on his part violated conditions of the indenture; and Counter-Issues may be taken, as in Examples Nos. XX and XXII, although in the ordinary case a Counter-Issue is not necessary, as it is sufficient for the defender to meet the pursuer's case, and to show that the dismissal was not wrongous or unwarrantable. In *Stirling, Gordon & Co.* 11 Sh. 180, where the action was for wages and board-wages, the proof was taken in the inferior Court, and the Court of Session thought it established desertion, without good cause, on the part of the apprentice. The breach of indenture on

the part of the master may be failure to instruct his apprentice in the stipulated branch of trade, for which damages were recovered in *Lumsdaine* v. *Hamilton*, Example No. XXI.

When the action is at the instance of the master for breaking of indenture by desertion of service, the apprentice may plead ill-usage on the part of the master, and it has been held that personal chastisement may be so immoderate or unreasonable as to liberate the apprentice, although not sufficient to found an action of damages as for assault,—*Smart* v. *Gairns*, Hume's Coll. 18. He may also prove, as relevant justification of leaving the employment, that he was required to do menial work, or services not falling within the indenture, *Peter* v. *Terrol*, 2 Murr. 28, such as shaving on Sunday morning required from a barber's apprentice, *Phillips* v. *Innes*, 2 Sh. and M'L. 465. When the master gives a charge on the indenture, the apprentice becomes virtually pursuer and must take the Issue, as in *Stewart* v. *Crichton*, March 15, 1847, Example No. XXII. But when the master raises action, the Issue is his, and any defence arising out of the circumstances of quarrel, may be proved without a Counter-Issue. See *Gunn* v. *Goodalls*, 13 Sh. 1142, and Example No. XIX. As in that case, however, a defence of agreement on the master's part to pass from the indenture, and to permit the apprentice to leave the service, requires the defender to take an Issue. As in the same case, the action may be directed against the cautioner for the apprentice, jointly with him, but the liability of the cautioner for damage will be limited by the penalty, which is also subjected to equitable restriction in the event of the damage sustained being less in amount. *Wright* v. *M'Gregor*, 4 Sh. 434.

Miscellaneous Questions of Service.—A form of Issue is given, Example No. XXIII, in an action of damages for corrupting a servant,—*Rutherford* v. *Boak*, 14 Sh. 732.

The Issue in *Kerr* v. *Duke of Roxburghe*, 3 Murr. 126, for bribing a confidential law clerk to disclose information obtained in that capacity, was framed on similar principles. See also *Roxburgh* v. *Macarthur*, *supra*, p. 349, and *Dickson* v. *Taylor*, 1 Murr. 141, where it was held that a party engaging a collier, not knowing of a previous engagement to another master, is bound to turn him off on hearing of it, and damages were found due for retaining him. As to the amount of damage claimable in such cases, see *Gunter* v. *Astor*, 4 Moore, 12.

Many questions occur as to the responsibility of masters for the acts of those employed by them. These are questions, however, regarding third parties, and not falling under this head. Reference may be made to the Chapter on Personal Injuries, *supra*, p. 163-5, and to Mr Fraser's Work, Vol. II, p. 450, *et seq*.

The Issues No. XXIV and XXV, arise out of actions by workmen, against their employers, for damages in consequence of injury sustained in the service through the negligence of the master, according to the principle sanctioned in *Sword* v. *Cameron*, February 13, 1839. See also Fraser, Dom. Rel. II, 426.

EXAMPLES.

No. I.

Woodward v. *Scott*,—*January* 21, 1845.

Whether, some time previous to Whitsunday 1844, the pursuer was engaged by the defender as his butler and servant from the said term of Whitsunday to the term of Martinmas then next, for which he was to receive wages at the rate of £36 sterling per annum, besides board!

and Whether, after the pursuer had entered into the said service, he, on or about the 1st day of June 1844, was wrongously dismissed from the service by the defender, without any justifiable cause of dismissal? and Whether, in consequence of the said wrongous dismissal, the defender is indebted to the pursuer in the amount of £18 sterling, being the pursuer's wages from the said term of Whitsunday 1844 to Martinmas 1844, together with the sum of £16, 16s. as board wages for the same period, or any part of the said sums?

No. II.

Youngson v. *Davidsons*,—*28th January* 1846.

It being admitted that the pursuer was engaged as gardener to the defenders for the half-year from Martinmas 1843 to Whitsunday 1844, for the sum of £17, 10s. sterling of wages, besides an allowance for milk,

Whether the defenders are indebted and resting-owing to the pursuer the foresaid sum of £17, 10s. sterling of wages, and £2, 5s. sterling, being the half-year's allowance for milk, or either of them, or any part thereof, with the legal interest of the said sums from the 15th day of May 1844, and till paid?

Whether the pursuer employed Janet Macdonald and Margaret Macdonald, and paid to them the sums of £2, 2s. 9d. sterling, and 3s. 9d. sterling respectively, for behoof of the defenders? and Whether the defenders are indebted and resting-owing to the pursuer in the said sums, or either of them, or any part thereof?

No. III.

Jackson v. *The Marquis of Ailsa and Others (Earl of Cassillis' Representatives)*,—*10th July* 1833.

Whether at York, on or about the 10th day of August 1826, the late Earl of Cassillis, by himself or another authorised by him, engaged the pursuer as a jockey or riding-groom for a year from the said 10th day of August, at the rate of £150 a year? And Whether the defenders, as representing the said Earl, are indebted and resting-owing to the pursuer in the sum of £150 sterling, or any part thereof, as wages or remuneration for his services during the said period?

No. IV.

Matheson v. *M'Kinnon*,—*28th February* 1832.

It being admitted that in the month of July 1829, the pursuer was engaged as tutor in the family of the defender for a year, at a salary of £20, together with board and lodgings,

Whether, on or about the 22d January 1830, the defender wrongfully dismissed the pursuer from the said employment, to the loss, injury, and damage of the pursuer?

Or,

Whether, in violation of his duty as tutor aforesaid, the pursuer, during his residence in the defender's family, did recite indecent verses or compositions in the hearing of his pupils or other members of the defender's family: Or did commit to writing indecent verses or compositions,

and did shew the same to his pupils or other members of the defender's family: Or did place, or dispose of the same so that his pupils or other members of the defender's family had opportunity of seeing the same: Or did make use of indecent expressions, or exhibit indecorous or unbecoming gestures or deportment in presence of his pupils or other members of the defender's family: Or did fail to superintend the morals and conduct of the young persons committed to his charge: Or did treat them, or any of them, with excessive cruelty?

[Four other Issues grounded on alleged defamation of pursuer by defender; reported, 10 Shaw, 826-7.]

No. V.

Laidlaw v. *Nairne*,—*3d July* 1833.

Whether, in the month of April 1831, the pursuer was engaged as governess in the family of the defender for a year from and after Whitsunday 1831, at a salary of £52, 10s. together with board and lodgings? And Whether, on or about the 11th day of November 1831, the defender wrongfully dismissed the pursuer from the said employment, and is indebted and resting-owing to the pursuer in the sum of £26, 10s. as the balance of salary, and £35 as board wages, or any part of the said sums, with interest thereon?

Or,

Whether the pursuer, during her residence in the family of the defender, in violation of her duty as governess aforesaid, was in the practice of clandestinely drinking ardent spirits?

No. VI.

Smellie v. *Gillespie*,—19*th July* 1834.

It being admitted that the children of the defender resided in a house in Linlithgow from 1st April 1821 to 15th May 1829, under the charge of the pursuer,

Whether the defenders are indebted and resting-owing to the pursuer in the sum of £121, or any part thereof, as remuneration for her care and attendance on the said children?

No. VII.

Cooke v. *Murray*,—29*th May* 1828.

Whether, in the end of the month of November or beginning of December 1826, the defender agreed to employ the pursuer at the rate of two guineas a week, with a benefit during the season, as a performer at the Edinburgh Theatre, for the season extending from December 1826 to the end of that season, for exhibitions in the Theatre? And Whether, on or about the 24th day of February 1827, in violation of the said agreement, the defender did wrongfully dismiss the pursuer from his said employment, to the loss, injury, and damage of the pursuer?

Sum claimed for Salary, Benefit, and Damages, £842: 6s.

No. VIII.

Macdonald v. *Macarthur*,—*9th March* 1841.

It being admitted that the pursuer was employed by the defenders as assistant manager of their shop, as provision dealers in Greenock, for six years from June 1837, in terms of the letter No. of process,

Whether, on or about the 15th day of November 1838, the defenders, or either of them, wrongfully dismissed him from his said situation, to his loss, injury, and damage?

Damages laid at £500.

No. IX.

Williams v. *Kennington, &c.*—*17th July* 1840.

It being admitted that, in the month of October 1839, the pursuer was engaged as a salesman or shopman by the defenders at the rate of £50 a year, besides being furnished with bed and board by the defenders, and that the pursuer entered upon his said service on the 12th day of October, and continued therein till the 13th day of April 1840,

Whether, on or about the 11th or 13th days of April 1840, the defenders wrongfully dismissed the pursuer from his said employment, to his loss, injury, and damage?

Whether, on or about the 13th day of April 1840, in or near the shop of the defenders in Princes Street, Edinburgh, the defender Charles Kennington did assault or strike the pursuer, to his loss, injury, and damage?

Whether, on or about the 15th, 16th, or 17th days of April 1840, in the said shop, or in the house of the said Charles Jenner, in Rose Street, Edinburgh, and in presence and hearing of George Godfrey and Minchill, shopmen to the defenders, or either of them, the defender Charles Jenner did falsely and calumniously say that the pursuer had been guilty of stealing cigars, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

No. X.

Kinnear v. *Bowie*,—17*th February* 1844.

It being admitted that upon the 18th February 1843, an agreement was entered into between the parties, whereby the pursuer was employed to officiate as managing clerk in the office of the defender for three years, from the first day of January 1843, at the annual salary of £150 sterling,

Whether the defender, in breach of the said engagement, wrongfully and unwarrantably dismissed the pursuer from his said employment, to the loss, injury, and damage of the pursuer?

Damages laid at £500.

No. XI.

M'Leod v. *Wigham & Others*,—11*th February* 1840.

It being admitted that in the year 1825 the defenders formed a Joint Stock Company for the purpose of carrying on brewing in Leith,

Whether the pursuer was employed by the defenders as their manager, and invested £2,000 in the stock of the said Company, in terms of the missive dated 28th February 1825? and Whether the defenders are indebted and resting-owing to the pursuer in the said sum of £2,000, or any part thereof, with interest thereon from and after the 11th day of October 1828?

Whether, on or about the 11th day of October 1828, the defenders, in violation of the agreement contained in the said missive, did wrongfully dismiss the pursuer from his situation of manager aforesaid, to the loss, injury, and damage of the pursuer?

No. XII.

M'Geachies v. *Wrigley & Others*,—18*th June* 1830.

It being admitted that in the month of 1829 the defender appointed the pursuer John M'Geachie, his agent in Scotland for the sale of cloth,

Whether, at the time of the said appointment, it was understood and agreed between the said parties that the said appointment should continue for the period of three years? and Whether, on or about the 5th day of May 1829, the defender wrongfully put an end to the said appointment, to the loss, injury, and damage of the pursuer?

Whether, on or about the 6th day of May 1829, the defender did wrongfully insert, or cause to be inserted in the "Edinburgh, Leith, Glasgow, and North British Commercial and Literary Advertiser," an advertisement containing the following words, or words to the following effect, viz:—"Notice—The subscribers have withdrawn their

agency from Mr John M'Geachie. Neither he nor Mr Robert M'Geachie have a right to make any settlements, or receive any payments, or transact any other business, either on account of the late firm of R. & R. Wrigley of Netherton, near Huddersfield, or of R. Wrigley, Senior, of the same place.—Glasgow, 6th May 1829.—(Signed) Robert Wrigley, Senior. Robert Wrigley, Senior, only acting] partner of the late firm of R. & R. Wrigley. James Mitchell, witness—David Murray, witness,"—to the injury and damage of the pursuer John M'Geachie?

No. XIII.

Ross v. *Baxter*,—*3d July* 1844.

It being admitted that, during the period between the 11th day of November 1831 and the 25th day of May 1839, the defender was manager or overseer for the pursuer on the pursuer's farms in the counties of Ross and Sutherland,

1. Whether the terms of the defender's engagement with the pursuer were that the defender should have £50 of yearly wages, a dwelling-house and garden, eight bolls of oatmeal, and to be furnished with coals, and a couple of milch cows, five bolls of potatoes, the keep of a horse, twenty sheep, two pigs, and two dozen of fowls; the horse to be shod at the pursuer's expence, and the defender's travelling expences on the pursuer's business to be paid by the pursuer? and Whether the defender's wages were subsequently raised to £60 per annum?

2. Whether the defender has failed to account for his intromissions as manager aforesaid, and is indebted and resting-owing to the pursuer the sums specified in the Schedule No. I, annexed hereto, or any part thereof?

3. Whether the defender, during the period of his management aforesaid, and in breach of his duty and engagement to the pursuer, trafficked on his own private account in horses, cattle, and sheep, and employed the pursuer's servants and others, at the pursuer's expence, to attend to the said horses, cattle, and sheep, and maintained the same, or part thereof, on the pursuer's farms, at the pursuer's expence, as specified in Schedule No. II hereto annexed, to the loss, injury, and damage of the pursuer?

4. Whether the defender, during the period of his management aforesaid, and in breach of his duty and his engagements to the pursuer, applied to his own purposes, from time to time, timber belonging to the pursuer, and employed the pursuer's servants and others, at the pursuer's expence, to manufacture the same into articles of household furniture and implements of husbandry, which the defender appropriated to his own use, as specified in Schedule No. III hereto annexed, to the loss, injury, and damage of the pursuer?

No. XIV.

Ivison v. *Edinburgh Silk Yarn Co.*—*6th June* 1844.

Whether, about the beginning of 1839 or in the course of that year, the pursuer entered into the employment of the said Company as superintendent or manager of the mills in the neighbourhood of Edinburgh known by the name of the "Castle Silk Mills," under an agreement that he should receive a salary of £400 per annum for an engagement of seven years, from the 1st of December 1839? and Whether under the said agreement, the said Company, and the said Sir George Carrol, Knight, William Miller Christy, Frederick Huth, John Sivewright,

James Wall, James White, Richard Lawrey Cox, Isaac Laurence, Charles Vane Sivewright, and William Quilter, or any of them as partners of the said Company, are indebted and resting-owing to the pursuer the sums, with interest, set forth in the Schedule annexed, or any part thereof?

No. XV.

Arneil v. *Robertson*,—*25th June* 1842.

It being admitted that on the 8th February 1826 the late William Currie Arneil was ordained Pastor of the United Secession Congregation at Portobello, and officiated as such from the said day to the 8th February 1833, and that the pursuer is executrix of the said William Currie Arneil,

Whether, at the time of his said ordination, it was understood and agreed that the said congregation should pay to the said William Currie Arneil the sum of £180 as a stipend or salary, and £5 for sacramental charges on each sacramental occasion, or any part of the said sums? and Whether the said congregation failed to perform the said understanding and agreement? and Whether the defenders, or any of them, were parties to or acceded to the said agreement, and are conjunctly and severally indebted and resting-owing to the pursuer, as executrix of the said William Currie Arneil, in the sum of £330, or any part thereof, with interest thereon, as the arrears of the stipend, salary, and charges aforesaid?

No. XVI.

Aiton v. *Orr*,—11*th July* 1844.

1. Whether, on or about the 12th day of December, the defender agreed to employ the pursuer as Sheriff-Clerk-Depute in the county of Forfar, for the Forfar District, for two or more years, or part thereof, from and after Thursday the 22d of December foresaid, on a yearly salary, which was to be £110 for the first year, and £120 for the second and subsequent years? and Whether, on or about the 16th day of December foresaid, in violation of said agreement, the defender refused to receive the pursuer into the said employment, and failed to perform the said agreement, to the loss, injury, and damage of the said pursuer?

2. Whether, on or about the 16th day of December 1842, the defender wrote and addressed to the pursuer the letter No. 7 of process, contained in the Schedule hereunto annexed, and sent the same open and unsealed to Messrs Montgomerie and Fleming, writers in Glasgow, for their perusal, and to be delivered or transmitted to the pursuer? and Whether the said letter is of and concerning the pursuer? and Whether the defender did therein falsely and calumniously represent that the pursuer's conduct as a clerk had, from negligence or dishonesty, been so grossly incorrect in money matters, or that he had otherwise so misconducted himself as a clerk as to shew unfitness for the trust or situation intended to be conferred on him, to the loss, injury, and damage of the pursuer?

Or,

Whether, previous to the date of the said missive-letter, the pursuer had been extremely inattentive as a clerk? and

Whether his conduct as to money matters had been grossly incorrect? and Whether he was dismissed from the employment of the Sheriff-Clerk-Depute at Hamilton, in consequence of having been tried and convicted of an assault?

Issue in Conjoined Actions in which Orr is held as pursuer and Aiton defender, and which Issue is to be tried first.

Whether the pursuer was induced to subscribe and deliver the missive-letter No. 6 of process, to the defender, or was induced to enter into the alleged agreement with the defender by false representations on the part of the said defender?

No. XVII.

Graham & Others v. *Sime, (Conjoined Actions,)*—
16*th March* 1841.

1. Whether the writing No. 18 of process, bearing date 24th March 1822, in so far as it bears that the defender was appointed Session-Clerk of North Berwick during life and good behaviour, is not the true and genuine Minute and Record of the transactions of the meeting of the Kirk-Session of North Berwick held there on that day?

2. Whether the writing bearing date the 24th March 1822, contained in the book No. 5 of process, is not the true and genuine Minute and Record of the transactions of the said Kirk-Session of North Berwick, held there on that day?

Or,

Whether, on or about the 24th day of March 1822, the defender was appointed Session-Clerk of the Parish of North Berwick during his life and good behaviour? and

Whether, on or about the 3d day of March or the 20th day of November 1834, the pursuers, or any of them, wrongfully dismissed him from his said office, or wrongfully prevented him from discharging the duties and drawing the emoluments of the same, to his loss, injury, and damage?

No. XVIII.

Douglas v. *Neill & Others*,—*19th July* 1842.

1. Whether the defenders, or any of them acting as a Committee of Management of the Edinburgh Zoological Gardens, or as Directors of the said Gardens, employed the pursuer in the service of the said Institution from on or about the 1st day of September 1837 to on or about the 31st day of December 1840, or during any part of the said period? and Whether the said defenders, or any of them acting as aforesaid, agreed to make payment to the pursuer of the sum of £400 sterling, or any part thereof, with interest thereon, as remuneration for the said service, and are indebted and resting-owing to the pursuer in the said sum, or any part thereof, with interest thereon?

2. Whether the defenders, or any of them acting as aforesaid, employed the pursuer in the service of the said Institution from on or about the 1st day of September 1837 to on or about the 31st day of December 1840, or during any part of the said period? and Whether the said defenders, or any of them acting as aforesaid, are indebted and resting-owing to the pursuer in the sum of £600 sterling, or any part thereof, with interest thereon, as remuneration for the said services?

Or,

Whether it was understood and agreed between the pursuer and defenders that the defender should pay, and the pur-

suer accept in remuneration of his said services prior to the 31st December 1840, the said sum of £400, payable in the terms and on the conditions specified in two Minutes, the one of a meeting of the said Directors, dated 18th March 1841, No. 46 of process, and the other of a general meeting of Donors and Subscribers to the said Institution, dated 22d March 1841, No. 35 of process?

No. XIX.

Gunn v. *Goodalls*,—18*th June* 1835.

It being admitted, that by indenture No. 3 of process, dated 13th June 1831, William Goodall, son of the defender, was bound apprentice to the pursuer for the period of five years, from and after the 1st day of March 1831, and that the said defender, under the said indenture, entered into the service of the pursuer, and that the defender, Adam Goodall, was cautioner for the said William Goodall,

Whether, on or about the 6th day of May 1833, in violation of the said indenture, the said William Goodall wrongfully deserted his said service, to the loss, injury, and damage of the pursuer? and Whether the said William Goodall and the said Adam Goodall are liable, conjunctly and severally, in reparation of the said loss, injury, and damage?

Whether the defender Adam Goodall, as cautioner aforesaid under the said indenture, is indebted and resting-owing to the pursuer in the sum of £20, or any part thereof, as the penalty under the said indenture?

Or,

Whether, between the 4th day of February and the 6th day of May 1833, the pursuer agreed to pass from the

said indenture, and to allow the said William Goodall to leave his service?

Sums claimed,—
Penalty in Indenture, £20.
Damages, 200.

No. XX.

Drummond v. *Thomson*,—*17th March* 1843.

It being admitted that the parties entered into the indenture dated 31st December 1839, No. 6 of process,

1. Whether, on or about the 4th day of September 1842, the defender in violation of the foresaid indenture did dismiss the pursuer from his service, to the loss, injury, and damage of the pursuer?

2. Whether, on or about the 4th day of September 1842, the defender did violently and illegally assault and strike the pursuer, to the injury and damage of the said pursuer?

No. XXI.

Lumsdaine v. *Hamilton & Muller's Trustee*,—
27th February 1844.

It being admitted that on the 9th day of August and 28th day of September 1839, the pursuer and Messrs Hamilton and Muller, of which firm the defender David Hamilton and the late John Martin Muller were then the individual partners, entered into the deed of indenture libelled,

Whether the said Hamilton and Muller, and the said David Hamilton or the said John Martin Muller, or either of

them, wrongfully failed or neglected to instruct the pursuer in voicing organ pipes and in making metal pipes for organs, and in tuning organs, or in any of these particulars, in breach of the foresaid indenture, to the loss, injury, and damage of the pursuer?

No. XXII.

Stewart v. *Crichton*,—11*th February* 1848.

It being admitted that the pursuer, with advice and consent of John Stewart his father, as taking burden on him for his said son, on or about the 18th day of March 1844 entered into the service of the defender under the indenture No. of process,

Whether, on or about the 31st day of August 1844, the defender in violation of the said indenture, did wrongfully dismiss the pursuer from his service, to the loss, injury, and damage of the pursuer?

Or,

Whether the pursuer did violate or fail to fulfil the conditions and stipulations of the said indenture, to the loss, injury, and damage of the defender? and Whether, on or about the 31st day of August 1844, the pursuer was for good and sufficient cause dismissed by the defender?

No. XXIII.

Rutherfoord v. *Boak*,—23*d January* 1836.

Whether one Charles Bryan was engaged by the pursuer for a year, from 5th April 1834 until the 5th April 1835, to assist the pursuer in his trade of a leather japanner?

and Whether, on or about the month of May 1834, the defender, being in the knowledge of the said engagement, by himself, or another, or others, wrongfully seduced the said Charles Bryan from his said service, and caused him to desert the same, whereby the pursuer was deprived of the services of the said Charles Bryan from the 26th day of May 1834 until the 11th day of September 1834, or during any part of the said period, to the loss, injury, and damage of the pursuer?

No. XXIV.

Duncans v. *Burgess*,—*29th January* 1847.

It being admitted that the defender carries on business as a brass and bell founder in Portugal Street, Gorbals of Glasgow, and that he has a steam-engine and engine-house in the said foundry, and that the pursuer, the said Charles Macdonald Lockhart Duncan was, in the month of October 1844, employed in the service of the defender,

Whether, in consequence of the fault, negligence, or carelessness of the defender, the pursuer, while employed in the defender's service in the said engine-house, was, on or about the 8th day of October 1844, seriously injured in his person by the fly-wheel or other part of the said engine, to the loss and damage of the said pursuer?

No. XXV.

Nicol v. *Dawsons*,—*24th June* 1848.

It being admitted that the defenders are distillers at Linlithgow, and that they have a malt-mill attached to, and forming part of their distillery, and that the pursuer was, in

the month of August 1845, employed in the said malt-mill, in the service of the defenders,

Whether in consequence of the fault or negligence of the defenders, or those employed by them, and for whom they are responsible, in the construction and maintenance of the machinery of the said mill or part thereof, the pursuer, while employed in the defenders service in the said malt-mill, was on or about the 28th day of August 1845, grievously injured in his person, to the loss, injury, and damage of the pursuer?

PART XVI.

EMPLOYMENT,

INCLUDING

HIRING OF LABOUR—CONTRACTS FOR THE EXECUTION OF WORKS—COUNTER-ISSUES FOR DEFENDER—PROFESSIONAL RESPONSIBILITY—LIABILITY OF MESSENGERS AND OTHERS—HIRING OF THINGS—HIRING OF CARE AND CUSTODY.

Under this Part are included such branches of the Contract of Hiring as have not been treated of under the heads of Lease, Carriage, and Service,—Parts VIII, X, and XV.

Hiring of labour.—An action for recompence will arise from the fact of employment; and in the absence of special agreement the remuneration will be judged of by the practice of trade, or equitable views of what is right and fair, affording matter for evidence to the Jury, *Smails* v. *Potts*, March 17, 1847. From this action arises the simple Issue of resting-owing the amount of the account rendered, or remuneration demanded. There is no variety in the case of common or skilled labour. It was held in *Laidlaw* v. *Smyth*, June 2, 1842, an action for payment of business accounts, where there were contradictory averments supported on both sides by documentary evidence alone, that it was nevertheless a proper Jury case, and an Issue ought to have been framed. Under such Issues as Examples No. I to XIII, the defence going to proof may be denial of the employment; or allegation that the work was not

done as charged, or done in an unbusiness-like manner, so as to damage the employer; Bell Pr. § 159; *Lockhart* v. *Wighton*, 9 Sh. 134, where a law agent was refused expenses incurred through his own misconducting a case; or denial of the fairness of the charge made, as in *Laing* v. *Johnston*, M'F. *J. R.* 263; where the question for the Jury was the remuneration a horse-dealer was entitled to for valuing a number of horses.

The question may be, whether the defender adopted the employment of the pursuer, as in Examples Nos. IX and XIV; and it may sometimes be a Jury question whether employment involves liability, as in *Kerr* v. *Marshall*, 1 Murr. 59, where the liability of a writer in Greenock, for the business-account of an agent in Glasgow, employed by him in his client's business, was determined by evidence of the usage of the profession in Glasgow and Greenock. In this case the burden lay on the defender to establish the practice favourable to him, by taking an Issue.

When the materials as well as the work are furnished, the contract partakes of the nature of sale, Bell Pr. § 147; and the disbursements of a law agent are of the nature of mandate or loan; but the form of Issue is not affected. The workman must restore the subject on which his work is expended; and is liable in damages if he substitute an inferior material, as a miller receiving wheat to grind into flour. See Example No. XV.

Contracts for the execution of Works.—As such contracts are usually engrossed in writing, there is no room for a general Issue, but special Issues will be framed, depending in each case on the terms of the agreement. The Lord Chief-Commissioner remarks,—p. 95-6—"In adjusting an Issue in such a case, any expression in the Issue implying that a written contract is to be controlled by evidence of extrinsic matter must be avoided." For this reason, he states, that in the case of *Inglis* v. *Cuningham*, 4 Murr. 73, the expressions "whether,

at the time of entering into the said contract, it was understood and agreed," were altered to "whether the defender was bound and obliged." He adds that the Issue completely answered the object, and may be considered a good precedent in similar cases. His charge to the Jury—4 Murr. 80-1—may be referred to on this subject. In that case there was an averment of a usage which took effect in the absence of express stipulation to the contrary; but in *Robertson* v. *Hyndman*, 12 Sh. 544, where the Lord Ordinary allowed an Issue, "whether it was at such a date understood and agreed, &c." putting in the Issue the interpretation the pursuer gave to a written contract; the Second Division recalled the remit to the Jury-Court, the Lord Justice Clerk observing that it was quite out of the question to allow an Issue as to the meaning of a written document. Where a contract entered into by road-trustees stipulated that no additional work should be done without a written order, and no such order was produced, the claim was not allowed to go to proof although the knowledge and acquiescence of the defenders were averred, *Brown* v. *Rollo*, *&c.* 10 Sh. 666.

Counter-Issues for Defender.—When the pursuer's Issue is one of resting-owing, the defender may take an Issue on the insufficiency of the work, or any breach of contract by the workman. But this does not seem to be necessary, as in *Smails* v. *Potts*, March 17, 1847, the case went to the Jury on a general Issue of resting-owing for work done, where the defence of the employer was a written contract to do the work for a fixed sum; and the case of the pursuers was, that the contract was superseded by unexpected difficulties in working. The Jury found for the pursuers, and gave *quantum meruit*. In a case where the price has been paid, and repetition is sought, the Issue must be taken by the employer as pursuer. In No. XXI it is founded on insufficiency of the work done. In the case of *Macdonald* v. *Mackie & Co.* 8 Sh. 686, reversed an Appeal, 5 W. & Sh.

462, an action was brought for repetition of sums paid to account of the price of pipes laid according to agreement, and for damages in respect of their insufficiency. The facts were fully stated in the Summons and Condescendence, and met by the defenders in their Answers; notwithstanding which, the Court looking at all the averments and admissions on both sides, particularly of partial payments made to account, and of another tradesman having been employed to lift and relay the pipes, held that there was nothing which could be made the subject of Issue, and assoilzied the defenders. The Lord Chancellor holding that the Court were in error in entering on the question of relevancy at so late a stage of the case, and that the disputed averments were peculiarly fitted for trial before a Jury, reversed the Interlocutors, and remitted for the purpose of an Issue being prepared to try the case in proper form. Severe strictures were made on the mode in which the case had been dealt with throughout, and it was observed that the advantage of Jury trial would be lost if instead of a short Answer by the defender denying the pursuer's averments, and leading to an Issue for the Jury, the parties were to be allowed to aver on Record every one particular fact and circumstance which ought to have been the evidence to support the averments. Ultimately the Issue No. XVIII of the Examples was prepared for trial.

When the action is by the employer for damages for non-execution of the contract, or for deviation from the agreed on plans, the defender may take an Issue, as in Nos. XVI, XIX, and XX, on any cause of justification, or on the acquiescence of the employer in the deviation, or that it was directed by him. It would however appear that such an Issue is seldom necessary. In *Gordon* v. *Miller*, M'F. *J. R.* 174, where the Issue was that of damages for failing to superintend the execution of work, and wrongfully directing or permitting deviations from the specification, it would seem that no objection occurred to proving, in defence, that the deviations were made

with the acquiescence of the pursuer or those acting under him; but the presiding Judge would not allow, under the Issue, proof that the work as done was as good as it would have been if done according to the specification, and a Bill of Exceptions on the ground that this evidence being to disprove "loss, injury, and damage," ought to have admitted, was refused by the Second Division, May 28, 1839. The Lord Chief-Commissioner remarks, p. 97-8, "that in a mere simple case of non-performance, the Issue will always be a simple general Issue; and even where the action is on insufficient performance of the work, which leads to more complication in the trial, the Issue will either be the general Issue, or a general question upon the point of the cause." The Example No. XIX illustrates the nature of the Issue sometimes necessary under specific contracts for performance of work, combined with other stipulations.

Professional Responsibility.—In the case of skilled labour, loss may arise very much disproportioned to the remuneration for the work, if rightly performed. The professional person is bound to give skill and careful attention; and loss arising from the want of these, must be made up to the employer. The most frequent case is that of law-agents taking defective securities, or misconducting legal proceedings. For the legal rules on the subject, reference may be made to the cases collected in Bell Illustr. I. p. 125-131, and III, p. 106-7, and in Sh. Dig. *voce* Reparation, p. 1177-81. It will be sufficient here to cite the case of *Landell* v. *Purves*, May 27, 1842, reversed on Appeal, March 10, 1845, as bearing on the structure of the Issue. The client had been found liable in damages to a person whom he had imprisoned on a border warrant, which his agent had applied for as his professional adviser. The warrant was held to be illegal, although it had been long in use; and the client sought reparation from his agent, stating as his ground of action the employment of the defender, his taking out an

illegal and irregular warrant, and the damage sustained. Lord Cockburn held that the Summons contained no relevant ground of action, as it set forth "neither negligence nor ignorance, nor any other ground for making a law-agent responsible to his employer for a legal error,"—since the fact of the warrant being "illegal and irregular" was quite consistent with the defender having had the best possible reason for believing it to be regular and lawful, and so with the due skill and care which alone he was bound to afford to his employer. The Second Division took a different view, and remitted to proceed; when an Issue was prepared by the pursuer the material question in which was "Whether the defender advised the pursuer to apply for the said warrant, and represented the same to be legal and proper." See 4 Bell's Appeal, p. 52-4. On this being reported to the Inner-House, they granted leave to appeal, 4 D. Bell, 1543, July 20, 1842, and the House of Lords reversed the previous Interlocutor, holding the Lord Ordinary to have been right, and "the reasoning in his Note perfectly satisfactory." It was laid down by the Lord Chancellor that "the Summons must state either a case of want of reasonable skill or a case of gross negligence, or a case of breach of duty;" and Lord Campbell observed that it would be impossible to frame an Issue, as the best Issue had been framed which the case admitted of, and yet it averred a finding in favour of the pursuer, which would not have been found by the special finding of the Jury, because, although the warrant might have been wrong, the defender still might have acted with the greatest care.

The form of Issue in the case of *Smith* v. *Kemp*, 4 Murr. 400, which runs—"Whether the agent undertook to do so and so, and failed to perform his undertaking, to the loss, &c." is erroneous, and the correct form must now be, "Whether the agent was employed, and failed through negligence, fault, or want of skill." Although not responsible for a mistake in point of law, it was held in *Rowand* v. *Stevenson*, 5 Sh. 903,

4 W. and Sh. 177, that an agent "departing without sufficient reason from the ordinary and beaten course," and so raising a nice point of law, is liable as for negligence. For examples of Issues which have gone to trial in this class of cases, see *Brown* v. *Wemyss*, 7. Sh. 626, and *Stewart* v. *Miller*, December 12, 1840. The Issue in *Campbell* v. *Campbell & Clason*, Example No. XXIII, does not appear ultimately to have gone to a Jury; but important questions arose on the legal principles affecting the amount of reparation due, reported December 20, 1838, and June 16, 1840. The agent of a borrower is liable in damages to the lender of money, if he has misrepresented the nature of the security—the agent of the lender being separately liable to his employer for his neglect, *Brown* v. *Cuthill*, 4 Murr. 474, where the Issue is one of "wrongful misrepresentation."

Liability of Messengers and Others.—A messenger holds himself out to perform a particular ministerial duty, and he is bound to perform it accurately; and failure to do so, grounds an action against him and his cautioners for the whole loss, *Glen* v. *Black*, November 19, 1841; *Clason* v. *Black*, February 15, 1842. In the Example No. XXIX, the Issue puts the employment to perform a step of diligence and wrongful failure to perform it, as necessarily leading to an award of damages. A farrier is, on the same principle, liable for the value of an animal perishing through his grossly unskilful treatment, *Pedie*, Hume, 304. It is not a ground for damages against a skilled labourer, or for resisting payment of his account, that express directions were given him, if his treatment was substantially right, and the deviations within the fair limits of professional discretion; *Laing* Elch. Mandate, 4, *Burnet*, Morr. 8491. But beyond these limits, special directions must be followed; and as a necessary consequence, proof that such were given and followed, would furnish a good defence to an action of damages; but such defence would probably require a Counter-Issue.

Hiring of Things.—The action may be one of resting-owing the stipulated hire, which may be met by a defence of the insufficiency of the subject. This defence could go to proof under the pursuer's Issue, although there may be peculiarities making a Counter-issue desirable, as in *Flowers* v. *Graydon*, December 18, 1847, a question regarding the rent of furnished lodgings. On the other hand, if the subject of hire has perished or suffered injury, an action lies against the person hiring it; the case most frequently occurring being that of a horse injured by reckless treatment, or beyond the stipulated journey; and when the injuries appear *ex facie* to be owing to ill-treatment, the burden lies on the user to shew they were accidental. See *Robertson*, June 23, 1809, *F. C.*—*Wilson* v. *Norris*, March 10, 1810, and cases in Hume's Coll. 296-9.

Hiring of Care and Custody.—If any property entrusted to the care of a person holding himself out and receiving hire as custodier, suffers damage by defect of care, he must make up the loss. In *Hagart* v. *Inglis*, 10 Sh. 506, a horse placed with a livery stabler had been hunted by him when not in condition, and died. Under the Issue (Example No. XXX), the defence went to proof, not only that the horse suffered no improper treatment, but that it had been hunted with the knowledge and approbation of the owner. An action would lie for the hire, and for any expense laid out on the subject of the contract; leading to a simple Issue of resting-owing.

EXAMPLES.

No. I.

Ramsay v. *Scott*,—*3d February* 1835.

Whether, during the summer of 1832, the pursuer painted all or any part of the house, No. 10, Darnaway Street,

Edinburgh, on the employment of the defender? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £101 : 0 : 4½, or any part thereof, with interest thereon, being the amount of the account No. 3 of process?

No. II.

M'Nab v. *Taylor*,—1*st July* 1836.

Whether, from the 17th day of April 1823 to the 23d day of August 1833, or during any part of the said period, the pursuer attended the defender and his family, or any of them, as physician or surgeon, and furnished medicines as stated in the account No. 4 of process? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £96 : 18 : 8, or any part thereof, on account of the said medical attendance and medicines.

No. III.

Smith v. *Ross, &c.*—13*th June* 1837.

Whether the pursuer furnished all or any of the articles, and gave all or any of the medical attendance charged for in the account No. 5 of process, on the employment of the defenders or any of them, by themselves or another, or others acting under their authority as a board of health, or as a voluntary association for the prevention or cure of cholera? or Whether the defenders, acting as aforesaid, homologated the said employment, or part thereof? and Whether the defenders or any of them are indebted and resting-owing to the pursuer in the sum of £62 : 8 : 5, or any part thereof, with interest thereon, as the amount of said account?

No. IV.

Fairley v. *M'Goun*,—*12th June* 1835.

It being admitted that the pursuer is one of the nearest of kin of the late John Fairley, and acting for the other nearest of kin of the said John Fairley,

Whether, in the course of the year 1818, the defender employed the said John Fairley as an accountant, upon his own account, to prepare and make out the state of accounts No. 10 of process? and Whether the said John Fairley acting as aforesaid, prepared or made out the said state? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £71 : 10s. or any part thereof, with interest thereon, on account of the said business?

No. V.

Graham v. *Donaldson's Trustees*,—*8th June* 1841.

Whether the defenders employed the pursuer to make or construct a model of an hospital after plans and drawings prepared by the pursuer? and Whether the defenders are indebted and resting-owing to the pursuer in the sum of £624 : 15s, or any part thereof, with interest thereon, as the price of the model made or constructed as aforesaid?

No. VI.

M'Gregor v. *Watson*,—*8th June* 1843.

It being admitted that during the years from 1827 till 1838 inclusive, the defender was engaged in proceedings to establish his right of succession as heir-at-law and next of kin of the deceased Alexander Watson, town-clerk of Port-Glasgow,

Whether the pursuer made the disbursements, incurred the expense, and performed the services in relation to the said proceedings set forth in the account No. 48 of process or any part thereof? and Whether the defender is indebted and resting-owing to the pursuer in £500 sterling, or any part of that sum, in respect thereof?

No. VII.

Laidlaw v. *T. & J. Blackwood*,—*7th June* 1844.

Whether the defenders or any of them, as creditors of William Ewing, sometime of Pilrig Street, Edinburgh, employed the pursuer to do the business, and make the advances contained in the accounts No. 4, 5, 6, 7, 8, 9 & 10 of process or any of them, or approved and sanctioned an employment to this effect by Andrew Bell, as trustee under the disposition No. of process, executed by the said William Ewing? and Whether in respect thereof the defenders or any of them, are addebted and resting-owing to the pursuer the sum of £177 : 9 : 2½ sterling, or any part thereof, with interest thereon, as libelled?

No. VIII.

Hunter v. *Orr*,—*8th July* 1845.

It being admitted that in the month of August 1842, the interim management of the sequestrated estates of Peter Borrie & Co. engine-makers and founders in Dundee, and Thomas Adamson & Co. shipbuilders there, devolved on the defender as sheriff-clerk of the county of Forfar, under the provisions of the Bankrupt Act 2d & 3d Vict. c. 41,

1. Whether the pursuer, under the employment of the defender, made the disbursements, incurred the expenses, and performed the business in relation to the said sequestrated estates as set forth in the account No. 3 of process, or any part thereof? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £165 : 8 : 10, or any part of that sum in respect thereof?

2. Whether the said defender homologated the actings and proceedings of the pursuer in relation to the said account and business? and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £165, 8 : 10, or any part of that sum in respect thereof?

No. IX.

Clyne v. *Earl of Kinnoul*,—*8th March* 1832.

Whether the defender employed the pursuer to perform all or any part of the business charged for in the account No. 8 of process, and the accounts therein included, commencing 2d January 1819 and ending 22d April 1824, or

promised, agreed, and undertook to pay for the same? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £270 : 8 : 4½ or any part thereof, on account of the said business?

No. X.

Wallace v. *Dickson, &c.*—*10th July* 1832.

It being found by an Interlocutor of Lord Corehouse, dated 11th March 1831, "That all the members of the committee of management of the Portobello United Associate Secession Congregation, from the period when the pursuer was employed to fit up the temporary meeting-house," &c.

Whether, in the years 1824 and 1825, the pursuer was employed to erect, and did erect a chapel at Portobello, in the county of Edinburgh, for the United Associate Secession Congregation, at the price of £1,733, to be paid by instalments? and Whether the defenders or any of them, are indebted and resting-owing to the pursuer in the sum of £388 as the balance of the expense of erecting the said chapel, and of the sum of £46 : 6 : 4½ for extra work, or of any part of the said sums, with interest on the said sum or sums?

Whether, in the year 1824, the pursuer was employed to fit up, and did fit up a temporary place of worship for the congregation aforesaid? and Whether the defenders or any of them, are indebted and resting-owing to the pursuer in the sum of £11 : 3 : 4 or any part thereof, with interest thereon, as the expense of fitting up the said place?

No. XI.

Baily v. *M'Lellan*,—*26th February* 1848.

Whether, in or about the month of November 1846, the pursuer executed, on the order of the defender, and delivered to him a piece of sculpture in marble? and Whether the defender is indebted and resting-owing to the pursuer the sum of £210 or any part thereof, as the price of the said piece of sculpture, with interest thereon?

No. XII.

Rathbone Brothers v. *Bain*,—*19th January* 1847.

Whether, in the course of the year 1845, the defender employed the pursuers to fabricate certain articles of earthenware called insulators? and Whether the pursuers, in accordance with the agreement of parties, fabricated and furnished the said articles? and Whether the defender is resting-owing to them therefor the sum of £63: 6s. sterling, with interest since the 1st day of January 1846, or any part of that sum?

No. XIII.

Bremner v. *Jardine, &c.*—*4th June* 1847.

It being admitted that the pursuer and defenders entered into the contract No. 16 of process,

Whether the defenders, by themselves or others duly authorised by them, employed the pursuer to execute certain

works at Sarclet, in the county of Caithness, not embraced in the said contract? and Whether, in respect of the execution of the said works or any part thereof, the defenders are due and resting-owing to the pursuer the sums set forth in the annexed schedule or any part thereof?

No. XIV.

Willox v. *Binnie*,—15*th July* 1843.

1. Whether, between the 1st July 1839 and the 15th May 1840, the pursuer furnished to the defender certain wrightwork for constructing a tunnel on the Polloc and Govan Railway? and Whether the defender is resting-owing to the pursuer the sum of £58 : 10 : 11, with interest from 2d May 1840, or any part of said sum, as the price of the said furnishings?

2. Whether, in or about the month of July 1839, the pursuer was employed by John and Andrew Stewart, sometime masons and builders in Hamilton, and residing there, for the furnishing of certain wrightwork for the said tunnel, and supplied the same? and Whether the defender adopted the said employment, and the said wrightwork was supplied by the pursuer, and possession of the same was received by the defender? and Whether the defender is resting-owing to the pursuer the said sum of £58 : 10 : 11, with interest from 2d May 1840, or any part of the said sum, as the price of the said wrightwork.

No. XV.

Thomson v. *Brakenrig*,—*7th December* 1841.

Whether, in the course of the months of August, September, and October 1839, the pursuer delivered to the defender 105 quarters of wheat or thereby, of good quality and in good condition, for the purpose of being ground into flour? and Whether the defender wrongfully failed to deliver to the pursuer the said wheat ground into flour, of a quality corresponding to the wheat delivered as aforesaid, to the loss, injury, and damage of the pursuer?

Schedule of Damages,—

1. Value of flour, . . £63 16 0
2. Damages otherwise, . 500 0 0

No. XVI.

Napier v. *Campbell*, *&c.*—*18th June* 1839.

It being admitted that the defenders during the years 1834, 1835, and 1836, were proprietors of a certain steam-vessel named the "Maid of Islay,"

Whether, during the said years or any of them, the pursuer, on the employment of the defenders or any of them, or their agents, executed all or any of the repairs on the said vessel and machinery, charged for in the account No. 4 of process? and Whether the defenders are indebted and resting-owing to the pursuer in the sum of £379 : 7 : 11½, or any part thereof, with interest thereon, in payment of the said repairs and furnishings?

Whether, on or about the day of the defenders or any of them by themselves, or another or others, employed the pursuer to send a steam-vessel named the "Ewing" from Glasgow to Islay, to run between Skye and Islay? and Whether the defenders or any of them, are indebted and resting-owing to the pursuer in the sum of £20 sterling or any part thereof, with interest thereon, as the expense of said vessel going to and returning from Islay, as charged in the said account?

Or,

Whether all or any of the said charges made in the said account arose from the failure of the pursuer to furnish to the defenders certain machinery, and to make or repair a boiler for the said vessel called the "Maid of Islay," of proper and sufficient workmanship and materials, and to deliver the same in good working order under the agreement entered into on or about the month of March 1834?

No. XVII.

Macdowall v. *Matheson*, *&c.*—21*st June* 1833.

Whether, on or about the 12th September, 5th October, and 12th November in the year 1821, 22d May 1822, and 7th June 1823, or on or about one or other or all of these dates, the defender Matheson, agreed or undertook to make or execute certain work for making a pier and harbour at Portnissock, now Port Logan, and to finish the same on or before the 1st May 1824? and Whether the defender wrongfully failed in whole or in part to execute the said agreements and undertakings, or any of them, to the loss, injury, and damage of the pursuer?

Whether the defender John Wilson Anderson, was cautioner for the said defender Matheson, for the execution of all or any part of the said agreements or undertakings? and Whether the defender last aforesaid is indebted and resting-owing to the pursuer in the sum of £5,000 or any part thereof, on account of the failure aforesaid?

N. B.—Matheson raised a Counter action for payment, *vide* 7 Sh. 449, in which Issues of resting-owing for work executed under the contract, for extra work, for upholding the work, and for plans and estimates, were framed in the usual form.

No. XVIII.

Macdonald v. *Mackie & Co.*—*29th June* 1833.

Whether, on or about the day of December 1824, the defender undertook and agreed to furnish to the pursuer, good and sufficient pipes and plumber work for the purpose of carrying water from a well called the Lady-well, to the House of St Martins, and to lay the said pipes and connect them with the fountain and cisterns, in a workmanlike manner, and calculated to produce the said effect? and Whether the defenders wrongfully failed to perform the said undertaking and agreement, to the loss, injury, and damage of the pursuer, and are indebted and resting-owing to the pursuer in the sum of £150, or any part thereof, with interest thereon, the sum paid to the defenders under the said undertaking and agreement?

Damages claimed, £150.
Sum reclaimed, £150.

No. XIX.

Walls v. *Ramsay & Lind*,—*27th June* 1840.

It being admitted that in the year 1835 the pursuer was lessee of the Craigs Quarry, near the town of Dumfries, and that in the said year the defenders were contractors for the mason-work of a lunatic asylum then building near the said town,

Whether, on or about the 5th day of February 1835, in terms of the letter No. 6 of process, the defender agreed to make a cut or drain through the ground betwixt the said quarry and the level of the Lochar moss, 3 feet 6 inches in depth by 1 foot 6 inches in width, from the moss level to the face of the rock of said quarry, and to tirr and work the said rock within the limits then marked off, being to the extent of 260 feet or thereby in advance towards the west or south-west, from the road leading from Dumfries past the said quarry, and 100 feet or thereby in width, and to pay the pursuer the sum of £200 for the whole stone produced from the said working, for the purpose of being used in the building of the said asylum, and also to purchase from the pursuer all the additional stones required in the building of the said asylum, and to take the hewn and ruble stones in equal quantity and value from the said workings and the said quarry; and Whether the defenders wrongfully failed to implement all or any part by the said agreement, by failing to execute and complete the said drain, to tirr and work the said rock, to take an equal quantity and value of the hewn and ruble stones, as aforesaid, from the pursuers' quarry and the said workings, and to purchase from the pursuers all the additional stones required in the building of the said asylum beyond those produced from

the said workings, to the loss, injury, and damage of the pursuer?

Or,

Whether the stones contained in the said portion of rock, extending 260 feet or thereby in advance, and 100 feet or thereby in width, could not be used for the purposes contemplated and intended by the parties, at the time of entering into the said agreement?

No. XX.

Campbell v. *M'Farlane & M'Lauchlan,—February* 1835.

Whether, on or about the 6th day of May and the 9th day of June 1831, the defender John Macfarlane, agreed and undertook to make and execute a certain embankment on the south side of the river Isla, with what is called a land-arm at the east or upper end, in terms of the contract and specification Nos. 5 and 9 of process? and Whether the said defender wrongfully failed to fulfil the said agreement and undertaking, to the loss, injury, and damage of the pursuer?

Whether the defender Robert M'Lauchlan, admitted to be cautioner for the said John Macfarlane for the execution of the said agreement, is indebted and resting-owing to the pursuer in the sum of £150, or any part thereof, as the damage caused by the failure of the said John Macfarlane?

Or,

Whether those parts of the work complained of, as the cause of the alleged damage, were executed by direction and under authority of the pursuer, or were afterwards acquiesced in or approved of by him?

No. XXI.

Scott v. *Ross*,—*7th June* 1833.

It being admitted that the defender agreed to execute certain painting work in the inside of the following houses, the property of the pursuer, viz.: The house, No. 5, Forres Street; the house No. 45, Moray Place; the house, No. 49, Moray Place; and that the pursuer paid to the defender the sum of £160, 7s. as the price of the work executed as aforesaid,

Whether the defender wrongfully failed to execute the said painting in a workman-like manner, to the loss, injury, and damage of the pursuer? and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £160, 7s., or any part thereof, with interest thereon?

Damages laid at £150.

No. XXII.

Cuninghame v. *Paul*,—*22d February* 1837.

Whether, in the year 1817, the pursuer gave in loan to one John Barr, the sum of £100 sterling, and in security of the said loan employed the defender to obtain and complete a bond and assignation of a lease held by the said John Barr? and Whether, by the fault, negligence, or want of skill of the defender, he wrongfully failed to complete the said assignation, to the loss, injury, and damage of the pursuer?

No. XXIII.

Campbell v. *Campbell*,—10*th July* 1835.

It being admitted that, in the year 1820, the pursuer agreed to lend to John Campbell of Lochend the sum of £1,750, and to take an heritable security for the said sum,

Whether, on or about the 1st day of May 1820, and subsequent thereto, the pursuer employed Messrs Campbell and Clason, or the late John Kirkpatrick Campbell, one of the partners of the said Company, to obtain information as to the nature and amount of debts and incumbrances then affecting the estate of Lochend? and Whether the said Company, or the said John Kirkpatrick Campbell, by negligence or want of skill, wrongfully failed to inform the pursuer as to the nature and amount of said debts and incumbrances, or misrepresented the nature or extent of the same? and Whether, by the said failure or misrepresentation, the pursuer was induced to advance the said sum of £1,750, upon taking an heritable bond for the same, to the loss, injury, and damage of the pursuer?

Whether the said Company, or the said John Kirkpatrick Campbell, undertook and agreed to apply, or caused to be applied, the said sum of £1,750, or any part thereof, in payment of heritable debts and incumbrances then affecting the said estate? and Whether the said Company, or the said John Kirkpatrick Campbell, wrongfully failed to apply, or to see the said sum, or any part thereof so applied, to the loss, injury, and damage of the pursuer?

Or,

Whether, subsequent to the said transactions, the pursuer waved or abandoned his right to challenge the same?

Sum claimed £1,750.

No. XXIV.

Mitchelson v. *Thomson*,—18*th February* 1840.

It being admitted that in the year 1829 the late Mr Smith of Land granted an heritable bond over his said estate to the late Mr Archibald Mitchelson, the father of the pursuer, for the sum of £1,000, of which £200 were afterwards repaid. It being also admitted that in the year 1818, the said Mr Mitchelson conveyed the said bond to certain trustees who, in 1822, assigned the bond to the pursuer,

Whether, at or prior to the time when the said bond was granted as aforesaid, the defender, as agent for the said Archibald Mitchelson, undertook to obtain a valid heritable security for the said sum over the estate of Land? and Whether, through fault, negligence, or want of skill, the defender failed to obtain the said security, to the loss, injury, and damage of the said pursuer?

Or,

Whether, on or about the 12th day of December 1818, the said Mr Mitchelson, Mr William Gordon, or Mr Thomas Harkness, or Messrs Gordon and Harkness, his law-agent or agents, or either of them, knew that the security granted by the said Mr Smith for the said sum was imperfect, and acquiesced in the same?

Whether, on or about the 14th day of February 1822, the said Mr William Gordon or Thomas Harkness, or

Messrs Gordon and Harkness, his law-agent or agents, or either of them, knew that the security granted by the said Mr Smith for the said sum was imperfect, and acquiesced in the same?

No. XXV.

MacKenzie v. *MacQueen*,—19*th June* 1832.

It being admitted that during the months of March and April 1827, the defender was employed by the pursuer to conduct a process of Advocation then in dependence in the Second Division of the Court of Session, at the instance of the pursuer against Alexander Taylor;

It being also admitted that on the 10th day of the said month of March, Lord Medwyn, Ordinary, pronounced an Interlocutor in the said cause,

Whether the defender, through negligence or want of skill, failed to bring the said Interlocutor under review of the said Court in a proper and competent form, to the loss, injury, and damage of the pursuer?

No. XXVI.

Porteous v. *Gibson*,—26*th February* 1834.

It being admitted that the defender is a practitioner in the Sheriff-Court of Clackmannan, and that in the month of February 1832, the pursuer employed the defender in that character, to raise and conduct an action in that Court against James Lothian, printer in Alloa,

Whether, from negligence or want of skill, the defender wrongfully failed in the discharge of his duty as agent in

raising or conducting the said action, to the loss, injury, and damage of the pursuer?

No. XXVII.

Buchanans v. *Strang & Yuille*,—15*th February* 1843.

It being admitted that the pursuer Peter Buchanan is heir-at-law to the late Miss Margaret Buchanan,

Whether the defenders, or either of them, on the employment of the said Miss Margaret Buchanan and her sister Miss Jane Buchanan pursuers, between the day of March 1830 and the day of May 1830, undertook to lend the sum of £4,000 on sufficient heritable security? and Whether, by the fault, negligence, or want of skill of the defenders or either of them, the said Misses Jane and Margaret Buchanan, or either of them, was induced to lend out the said sum on insufficient security, to the loss, injury, and damage of the pursuers?

Or,

Whether the said Misses Jane and Margaret Buchanan, and the pursuer Peter Buchanan, or any of them, acquiesced in the security actually taken?

Whether the said Misses Buchanan and the pursuer Peter Buchanan, or any of them, neglected to intimate in due time to the defenders the claim now made, to the loss, injury, and damage of the defenders?

No. XXVIII.

Fraser's Trustees v. *Falconer*,—*12th February* 1830.

It being admitted that the defender is senior partner of the company carrying on business as writers under the firm of Falconer and Johnston, and that the said company was employed to conduct certain pleadings for the pursuer and the deceased David Sandeman, sometime merchant in Perth, afterwards residing in Edinburgh, trustees of the late Captain Hugh Fraser, in a submission to John Hope, Esq. his Majesty's solicitor-general, between the pursuers and the said David Sandeman, as trustees foresaid, and Hugh Macqueen, W.S. for himself and as trustee for the deceased Donald Macqueen of Carybrough and others; and that in the said submission the said arbiter found the pursuers personally liable in the expense thereof, and of a former submission to Francis Jeffrey and George Cranstoun, Esqrs. and of certain Actions of Reduction and Count and Reckoning; and also that no part of the expenses incurred by the pursuer in the several actions thereby submitted, or in the said submission to Messrs Cranstoun and Jeffrey, or in the said submission to the said John Hope, should be chargeable against the trust-funds in any accounting between them and the said Hugh Macqueen, or any other of the family of the said Donald Macqueen, or Elizabeth Macqueen his spouse; reserving to the pursuers their relief as accords against the legatees or other parties interested in the succession of the said Hugh Fraser, against whom they can establish instructions and employment in regard to the pleadings in the said several actions and submissions,

Whether a memorial and claim given in to the said arbiter in the said submission contains the following words, or words to the following effect, viz.—"The, &c.?" and

Whether, without the authority or sanction of the pursuer, and contrary to his duty as agent aforesaid, the defender did insert, or cause to be inserted, the whole or any part of the said words in the said pleadings, or any of them, and did lodge, or cause to be lodged the said pleadings, or any of them, in the said submission? and Whether the words so inserted and lodged without authority, and contrary to his duty as agent aforesaid, were the grounds on which the said arbiter found the pursuers personally liable in payment of expenses, and that they were not entitled to charge against the trust-funds the expenses incurred by themselves as aforesaid, to the injury and damage of the pursuer? and Whether, in consequence thereof, the defender is indebted and resting-owing to the pursuers in the sum of £567 : 3 : 5, or any part thereof?

No. XXIX.

Russel v. *Milne, &c.—27th January* 1837.

It being admitted that in the year 1835 the defender John Milne, was a messenger-at-arms, and that the defender John Louden, was cautioner for the said John Milne,

Whether, on or about the 14th day of August 1835, the pursuer by himself, or another, employed the defender John Milne, to execute Letters of Horning against James Raitt and Robert Thomson, or either of them, for the sums of £8; £5; £14 : 7 : 5; 5s.; and £1 : 14 : 1, or any of them? and Whether the said John Milne wrongfully failed to execute, or wrongfully failed to return an Execution of Charge on the said Letters of Horning against both or either of the said parties, to the loss, injury, and damage of the pursuer?

Whether, on or about the day of , the pursuer, by himself or another, employed the said John Milne to poind the goods of the said persons, or either of them? and Whether he wrongfully failed to execute the same, or wrongfully failed to return the Letters of Horning, with an Execution of Poinding, against both or either of the said persons, to the loss, injury, and damage of the pursuer?

Damages claimed, £29 : 6 : 6.

No. XXX.

Hagart v. *Inglis*,—*24th December* 1831.

It being admitted that the defender keeps livery and sale stables in Rose Street, Edinburgh, and that in the month of July 1830 a horse, the property of the pursuer, was placed in the said stables for the purpose of being sold; and that the said horse died in the said stables in the custody of the defender, on the 30th day of October 1830,

Whether the said horse died through the fault or negligence of the defender? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £60, or any part thereof, the price or value of the said horse?

PART XVII.

SALE,

INCLUDING

RESTING-OWING UNDER CONTRACT OF SALE—BREACH OF CONTRACT OF SALE—CONSTITUTION OF THE CONTRACT—WARRANDICE.

Resting-owing under Contract of Sale.—The simple Issue, Whether goods were "furnished," or "sold and delivered," and Whether the price is resting-owing, affords room for trying, without any Counter-Issue, such defences as that the quantity was short, *Schuurmans* v. *Stephens*, 10 Sh. 839, 11 Sh. 779, where the dispute regarded the mode of measurement, which differed at Rotterdam and Aberdeen; or that the article was only taken on trial and not purchased, *Robertson* v. *Aitchison*, July 25, 1846; or that the goods were not ordered by, or delivered to the defender, but another without his authority, *Dickson & Co.* 3 Murr. 440. The defence of insufficiency of the goods furnished also goes to trial under this simple Issue, *Bailey*, 4 Murr. 478. The contract may contain stipulations as to quantity, price, quality, and time or place of delivery. By embracing these in the admissions, or in the question Whether the parties contracted in such and such terms? the material points can all be tried without Counter-Issues. Thus in No. III the question of conformity to sample arises without a defender's Issue, similar to that which was taken in *Craig* v. *Edmonstone*, M'F. J. R. 249; and in Nos. IV, V, and VIII, that of

authority to contract for the defender, as in the case of *So. Metrop. Gas Co.* v. *Marquis of Lothian*, M'F. J. R. 13; and it appears that in *Davidson* v. *Leslie*, 1 Murr. 281, the Counter-Issue was unnecessary, as the defender's proof went to negative the pursuer's question of Whether a cargo was shipped according to agreement? In *Alison* v. *Garthshore*, M'F. J. R. 227, the pursuer sought not only the price but damages, for not taking delivery, and after he had proved a *prima facie* case, the defender undertook the burden of justifying his refusal. In *Wheatler* v. *Methven*, January 9 and 10, 1843, and June 20, 1843, the price had been paid before the goods were rejected, so that the position of the parties was reversed, and the buyer was pursuer of an Issue for damages for failure to deliver. The Jury were directed that the burden of proof was not altered by this accident, but that the seller was bound, as if seeking the price, to establish that he had furnished "herrings for exportation" as contracted for. In an English case, *Hayden* v. *Hayward*, 1808, 1 Camp. 180, where action was brought for the price of a riding habit, the Jury was directed that it was incumbent on the plaintiff to shew that the habit was made according to order. In *Rae* v. *Hunter*, 12 Sh. 946, Example No. XII, the defence going to trial under an admission of the sale of half the stock of sheep on a farm by one joint tenant to another, and an Issue of resting-owing a balance of the price, was, that the balance was reduced by certain counter-claims, the principal of which was, that under an arrangement with the shepherds as to certain of the sheep sold, the defender, carrying on the farm, became liable to them as for a partnership debt.

Breach of Contract of Sale.—The most ordinary breach of the contract is failure to deliver, which affords a simple Issue of damage, as in No. IX. Such was the Issue sent to a Jury in the recent important case of *Dunlop, Wilson & Co.* v. *Higgins & Son*, 2d July 1847, and affirmed on appeal

24th February 1848, which turned upon the question, Whether there had been timeous acceptance of an offer of sale of pig-iron? In *Bertram* v. *Barry*, 1 Murr. 348, the Jury assessed damages for non-delivery. In *Haldane* v. *Gray*, 28th May 1842, the Court having construed the agreement, sent the question of wrongful failure to furnish and of damage to a Jury, under the Issue, Example No. X. An order accepted or not repudiated completes the contract, and hence the Issue No. XI setting forth an order, and failure to furnish. In *Howie* v. *Anderson*, January 14, 1848, Issues went to trial in an action of damages for failure to deliver railway shares, and the Court, under the terms of the verdict, fixed the amount of damage. In contracts for the sale of growing wood, the seller's conduct may afford ground for damages, as in *Welsh* v. *Stewart*, 1 Murr. 397, where the negligence of the defender in selling the property, exposed the pursuer to litigation and an interdict; see also Example No. XVI. In *Vertue* v. *Lord Ward*, June 21, 1843, Example No. XV, damages were obtained from the buyer of the estate, who adopted the contract but refused to fulfil it. In *Henry* v. *Dunlop & Co.* July 27, 1842, an Issue went to the Jury, who gave damages against the seller for wrongfully taking possession of cattle after sale and delivery to the purchaser.

The bad quality of the article, when discovered, affords ground for damages, as in *Hill* v. *Pringle*, 6 Sh. 229, where grass seeds had been sown and returned no crop. If the insufficiency is not latent, the article must be rejected immediately; retaining and using it prevents defence to payment of the price, *Ramsay* v. *M'Clelland*, November 27, 1845; and it is not competent to retain and claim deduction from the price, *Watt* v. *Glen*, 7 Sh. 372. Where the buyer, after asserting a cargo of cork to be bad, and having it valued by the Sheriff, broke bulk without judicial authority, and used almost the whole of it, he was held liable for the contract price; and although he met the action for the price with an action of

damages, averring fraudulent breach of contract, the Court would not allow him an Issue. *Ransan* v. *Mitchell*, June 3, 1845. For short-coming in quantity or weight deduction may be claimed, as the objection need not be stated till the buyer is called on to pay, and it is a good defence always, that he has paid for all he got, *Robertson* v. *Harford*, 6 Wil. and Sh. 25.

Constitution of the Contract.—It may be a question for the Jury, as in *Drummond* v. *Russell*, 12 Sh. 949, Whether there was a sale or not? as a point in an action arising out of the relation, if established. It may also be a question, Whether a purchase was abandoned? as in *Reid* v. *Stoddard*, 2 Murr. 238, where damages were sought for selling a lottery ticket previously sold to the pursuer, and the defence was, that the pursuer gave up the purchase. The Court are cautious of sending any question to a Jury which involves the construction of a written agreement. Thus, in *Haldane* v. *Gray*, 28th May 1842, they pronounced an interlocutor finding the true construction of the agreement, and this was prefixed as an admission to the Issue; and in *Rutherford* v. *Carruthers*, November 24, 1838, where the Issue put the question of a sale to the pursuer, as introductory to the question of a fraudulent purchase of the same subject by the defender, the Court recalled the Issue, that they might themselves adjudge whether the first sale was a valid one—that point necessarily depending, whether before them or the Jury, on the opinion of English Counsel and nice points of law. In the case of *Vertue* v. *Lord Ward*, June 21, 1843, the Court held the presiding Judge to have rightly rejected evidence of the understanding of the original parties to a written contract adopted by the defender. Sale, like other contracts, may be set aside on various grounds, to be noticed under the head of Reduction; it is sufficient here to refer to the case of *Brown* v. *Syme*, 12 Sh. 536, where an action for the price of shares was met by a defence that the defen-

der had been fraudulently induced to purchase by the pursuer; and alternative Issues were allowed of wrongful failure to take delivery, and of inducement to purchase by fraudulent representations or concealment.

Warrandice.—Sale for a full price implies warranty of soundness; hence the Lord Justice-Clerk observed on the form of the Issue in *M'Bey* v. *Reid*, January 5, 1842, that the purchaser had unnecessarily undertaken to prove express warrandice. In *Fisher* v. *Ure*, July 27, 1846, Example No. XIX, the defender's Issue in an action for the price, is divided into two parts, one on soundness alone, and the other on warranty that the horse was a steady worker in cart and plough, and breach thereof. In M'Bey's case it was part of the Issue that notice of the defects was given within reasonable time; see also No. XVII. A latent defect is a ground for repetition, although not discovered till after a lapse of time, even after death from the latent disease, *Wright*, 11 Sh. 722. But, in such circumstances, there is no relevant case without a distinct averment that the unsoundness was latent, *Pollock* v. *MacAdam*, June 9, 1840. In the case of *M'Lellan* v. *Gibson*, March 22, 1843, the subject of the sale was a picture, and the Issue, No. XX., properly charges express warranty as to to the master. A sample may be exhibited without warranty that the goods are equal to it, while opportunity is given for the buyer examining for himself. In such case, there is no defence against payment unless there was fraud in exhibiting the samples, *Muil* v. *Gibbs*, June 27, 1840, which followed the English cases, *Meyer* v. *Everth*, 1814, 4 Camp. 22; and *Gardner* v. *Gray*, 1815, 4 Camp. 164. In the former case, Lord Ellenborough held that where the sale-note does not mention sample, it cannot be allowed to be incorporated in the contract, as that would be to allow parole evidence to contradict a written document, and the sample could only be used as evidence of a "deceitful representation." In sales

of land a good title must be given, and damages may be due for non-compliance with this implied stipulation, as in Example No. XXI; the defence may be agreement to take the titles as they stand, *Sorley's Trustees* v. *Grahame*, 10 Sh. 319. Under the warrandice, the subject must be delivered complete, and damages will be due for eviction of any part; and if the purchaser has so entered on possession, as by commencing to work a coal-field, that he cannot give up the purchase, a deduction may be made from the price, *Bald* v. *Scott and Globe Insurance Co.* December 17, 1847. In Example, No. XXII, the ground of damage is failure to deliver a house sold "in the state required by the warrandice." The case of *Ramsay* v. *Cuninghame's Trustees*, 8 Sh. 399, was one of eviction, and the Issue, No. XXIII, was settled, although, by the sequel of the case in 10 Sh. 745, it would rather appear that the Court assessed the damages.

EXAMPLES.

No. I.

Paterson, Peel, & Co. v. *Woodrow*,—*13th February* 1846.

Whether, between the 29th December 1838 and the 21st March 1839, both inclusive, the pursuers sold to the defender goods as specified in the schedule annexed? and Whether the defender is resting-owing to the pursuers the sum of £188 : 4 : 5, or any part thereof, as the price of the said goods, with interest?

No. II.

Sayer's Assignee v. *Haldane, &c,*—18*th July* 1840.

Whether, between the 10th day of February 1834, and the 10th day of November 1836, the pursuer furnished to the defenders all or any part of the sugars stated in the accounts, Nos. 6 and 47 of process? and Whether the defenders are indebted and resting-owing to the pursuer in the sum of £1,448 : 6 : 7, or any part thereof, with interest thereon, as the balance of the price of the said sugars, according to the orders, instructions, and subsisting account of the parties?

Sum claimed . £1,446 : 6 : 7
With interest of 1,325 : 13 : 7 thereof.

No. III.

Darling v. *Garland,*—10*th June* 1848.

Whether, on or about the 23d August 1847, 100 quarters of oats were sold by the pursuer to the defender, according to sample furnished to him, and delivered, or delivery tendered to him? and Whether the defender is indebted and resting-owing to the pursuer the sum of £135, or part thereof, with interest thereon, as the price of the said oats; and the sum of £16 : 10s. or thereby, as the price or value of the sacks or bags in which the said oats were shipped?

No. IV.

M'Gregor & Co. v. *Ross*,—21*st February* 1844.

Whether, on or about the 25th May 1842, Alexander Vallance & Co., as commission agents for the pursuers, sold and delivered to the defender a certain quantity of shawls, the property of the pursuers, at the price of £279 : 13 : 6? and Whether the defender is indebted and resting-owing to the pursuers the said sum of £279 : 13 : 6, with the interest from the said 25th May 1842, or any part thereof?

No. V.

Leven v. *Paterson*,—3*d July* 1845.

Whether William Hounsfield, commission agent, Manchester, on or about the 25th day of April 1844, purchased from the pursuer, for, and under authority from the defender, certain quantities of manufactured goods, as specified in the schedule annexed? and Whether the defender is due and resting-owing to the pursuer two sums of £494 : 10s, and £175 : 5 : 8, or any part thereof, besides interest, as the balances of the prices of the said goods?

No. VI.

Robertson v. *Pringle*,—4*th February* 1846.

Whether, on or about the 20th day of August 1845, the defender purchased from the pursuer 524 or thereby casks of grease-butter, by public roup, at the price of £2, 1s. per cwt.? and Whether the defender took delivery of certain of the said casks, and afterwards agreed that 488 or thereby of the said casks should be re-sold by public roup, for behoof of whom it might concern? and

Whether the defender is resting-owing to the pursuer the sum of £197 : 18 : 4 sterling, or any part thereof, as the balance of the said grease-butter and relative charges, after deducting the proceeds of the 488 casks re-sold as aforesaid?

No. VII.

Milne v. *Samson*,—20*th July* 1843.

(Conjoined Actions.)

1. Whether the defender agreed to purchase from the pursuer from 2000 to 2600 feet of oak timber, 6 inches to 11 inches on the side, at 3s. 1½d. per foot, deliverable at the port of Irvine; as also a quantity of Scotch fir-plank, to be delivered at the same port?

2. Whether the pursuer made offer to deliver the said timber, in terms of the said agreement? and Whether the defender is resting-owing to the pursuer the sum of £271 : 15 : 9, being the balance of the price of the said oak timber and Scotch fir-plank, after deducting £100 paid by the defender as freight, or any part thereof, with interest thereon from the 13th day of July 1841, being three months after delivery?

Or,

1. Whether the pursuer contracted with the defender to deliver at Irvine a cargo of from 2000 to 2600 cubic feet of oak-framing timber, of the size of from 6 inches to 11 inches on the side, at the price of 3s. 1½d. per cubic foot? and Whether the pursuer failed to implement his said contract, to the loss, injury, and damage of the defender?

N.B.—See this case reported of date December 26, 1843, and *dictum* of the Lord Justice-Clerk as to averments regarding the custom of trade.

No. VIII.

Henn v. *Stone*,—*27th February* 1847.

It being admitted that the defender contracted with Government to supply the troops at Birmingham with coals for the year ending 30th June 1846,

Whether the defender did, by himself or by another in his name, acting for him and on his behalf, contract with the pursuer to furnish the said coals, or did adopt a contract to furnish the said coals entered into by another in his name, with the pursuer? and Whether the defender is resting-owing to the pursuer the sum of £110 : 6 : 2½, with interest, since the date of citation to the present action, as the balance of the price of coals furnished under the said contract, or any part thereof?

No. IX.

Wakinshaw v. *Robertson*,—*17th June* 1845.

Whether, on or about the 19th January 1844, the defender, by himself or another, sold to the pursuer 200 tons of pig-iron or thereby, and wrongfully failed to deliver the same, to the loss, injury, and damage of the pursuer?

No. X.

Haldane & Abbot v. *Gray*, (*Fraser's Trustee*),—*31st May* 1842.

It being found by interlocutor of the Second Division of the Court of Session, dated the 28th and signed the 31st

days of May 1842, that, according to the true construction of the agreement between the said Messrs Haldane and Abbot the pursuers, and the said Alexander Fraser, dated the 25th day of December 1835, the defender Alexander Fraser, was bound to supply the pursuers with whisky at the rate of one puncheon per week, for the period, and at the price mentioned in the said agreement,

Whether the said Alexander Fraser wrongfully failed to implement the said agreement, to the loss, injury, and damage of the pursuers?

No. XI.

M'Culloch v. *Wright*,—*22d May* 1830.

It being admitted that on the 17th of March 1824, the pursuer ordered from the defender 12 bushels perennial rye-grass seed, and in spring of the year 1825, 20 bushels perennial rye-grass seed,

Whether the defender failed to furnish seed in terms of the said order, dated 17th March 1824, to the loss, injury, and damage of the pursuer?

Whether the defender failed to furnish seed in terms of the said order sent in spring 1825, to the loss, injury, and damage of the pursuer?

N.B.—See *infra*, Example No. XXV.

No. XII.

Rae v. *Hunter*,—*29th May* 1834.

It being admitted, that at and prior to the term of Whitsunday 1830, the pursuer and defender were joint tenants of

the farm of Glenocher, and joint proprietors of the stock of sheep on the said farm, and that by a previous arrangement, the pursuer agreed at the said term to transfer his half of the said stock of sheep to the defender at a price to be fixed by certain individuals;

It being also admitted that the whole of the said stock of sheep belonging to the pursuer and defender as proprietors, were valued at the sum of £1550 : 6 : 5, and that the defender paid to the pursuer the sum of £700 to account of one-half the value of the said stock of sheep,

Whether the defender is indebted and resting-owing to the pursuer in the sum of £75 : 3 : 2½, or any part thereof, with interest thereon, as the balance of the price of the said half of the stock of sheep on the said farm.

No. XIII.

Grote, &c. v. *Dunlop, &c.—9th February* 1848.

It being admitted that the pursuers, on or about the 7th day of December 1844, purchased from the defenders 500 tons of No. 1 Clyde or Dundyvan pig-iron, to be taken or paid for before the 1st of February 1845; and that in or about the 11th day of January 1845, the pursuers remitted to the defenders the sum of £1,285 : 12 : 6, whereby the price of the said iron was paid in full to the defenders,

Whether the defenders have wrongfully failed to deliver the said iron to the pursuers, to the loss, injury, and damage of the pursuers?

No. XIV.

Forster v. *Barclay*,—*12th February* 1847.

Whether, on or about the 12th day of July 1844, the defender entered into an agreement, No. 3 of process, for the sale of railway sleepers? and Whether the defender wrongfully failed to implement the said contract to the extent of 420 larch sleepers, 9 feet long by 9 by 4½ inches; 8,210 Scotch fir sleepers, 9 feet long by 10 by 5 inches, and 232 Scotch fir sleepers, 9 feet long by 9 by 4½ inches, or part thereof, to the loss, injury, and damage of the pursuer?

No. XV.

Vertue v. *Lord Ward*,—*6th December* 1842.

It being admitted that by missives dated 2d and September 1839, and 14th April 1840, No. of process, entered into between the pursuer and James Macgregor, writer in Fort-William, as factor for, and acting on behalf of George Marquis of Huntley, and Donald Lindsay, accountant in Edinburgh, trustee on his sequestrated estate, the said Marquis of Huntley, and the said Donald Lindsay as trustee foresaid, became bound to deliver to the pursuer certain quantities of fir-wood then growing on the estate of Glengarry, as specified in the said missives,

Whether the defender adopted the said obligation, and wrongfully failed to deliver all or any part of the said fir-wood, to the loss, injury, and damage of the pursuer?

Damages for failure to deliver, over and above delivery, . . £500

No. XVI.

Coilsfield Timber Co. v. *Lord Eglinton*,—*3d July* 1847.

It being admitted that in the month of January 1843, the defender sold to the pursuers the wood growing on the estate of Coilsfield on the terms contained in the missives between the parties, No. 9 and 27 of process, and that the pursuers proceeded to cut and carry away part of the wood so sold;

It being also admitted that by disposition dated 17th May 1840, in implement of previous minutes of sale, the defender sold the said estate of Coilsfield to the trustees of the late William Paterson;

It being further admitted that, in December 1845, an interdict was granted by the Lord Ordinary on the bills at the instance of the said trustees against the pursuers, prohibiting them from entering or cutting wood on the said estate of Coilsfield other than the lands of Barr and Parkmill, which interdict was served on the pursuers on or about the 22d December 1845,

Whether, through the fault or wrongful breach of contract of the defender, the pursuers were prevented by the said interdict from cutting the said wood or part thereof, from about the said 22d day of December 1845, until on or about the 19th of May 1846, or for part of that period, contrary to the terms of the said missives, to the loss, injury, and damage of the pursuers?

No. XVII.

Scott v. *Marshall*,—*29th May* 1827.

It being admitted that, on the 2d day of March 1825, Scott Marshall the defender, sold and delivered to James Scott pursuer, for the sum of £31, 10s., and which sum is not yet paid, a grey mare, which he Marshall warranted to be sound,

Whether, at the time of the said sale, the said mare was unsound, and was offered back by the said James Scott to the said Scott Marshall within a reasonable time?

No. XVIII.

M'Bey v. *Reid*,—*30th June* 1841.

It being admitted that the defender, on the 27th of November 1840, sold and delivered to the pursuer, a brown mare, at the price of £27, 15s., which was then paid by the pursuer,

Whether, at the time of the said sale, the defender warranted the said mare to be sound, and a good worker, free from vice? and Whether the said mare, at the time aforesaid, was not sound, or was not a good worker, or was not free from vice? and Whether the pursuer, within reasonable time, gave notice to the defender of the alleged defects? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £27, 15s., with interest thereon from the said 27th of November 1840.

No. XIX.

Fisher v. *Ure, &c.—25th June* 1846.

1. Whether, on the 22d December 1845, the defenders purchased from the pursuer a brown horse, at the price of £42 sterling, and took delivery of the same?

2. Whether the defenders are resting-owing to the pursuer the said sum of £42 sterling, being the price of the foresaid horse?

Or,

1. Whether, at the time of the said sale, the said horse was unsound?

2. Whether the pursuer warranted the said horse to be a good and steady worker in cart and plough? and Whether the said horse was not a good and steady worker as aforesaid?

No. XX.

M'Lellan v. *Gibson,—23d December* 1842.

It being admitted that, at Glasgow the 21st day of November 1840, the pursuer delivered to the defender certain pictures, and the sum of £5 for a landscape picture, now or lately in the custody of the defender's agent,

1. Whether, at the time of entering into the said transaction, the defender warranted the said landscape picture to be an original picture of Jacob Ruysdael, while it was the work of a different artist, to the loss and damage of the pursuer?

2. Whether, by false and fraudulent misrepresentations by the defender, the pursuer was induced to enter into the said transaction, to his loss, injury, and damage?

No. XXI.

Ralston v. *Farquharson, &c.*—*15th December* 1829.

It being admitted that the late Nathaniel Gibson conveyed his property to the defenders as trustees for the payment of his creditors, and that two enclosures of the ground in Laigh Common, within the burgh of Paisley, and on the east side of Lady Lane, are part of the said trust-estate;

It being also admitted that, by missive letters, dated 7th July 1824, No. 9 of process, the pursuer agreed to purchase the said two enclosures for the sum of £803 sterling,

Whether the defenders wrongfully failed to grant to the pursuer a valid and sufficient title to the said enclosures, in terms of the said missive letters and articles of roup, to the loss, injury, and damage of the pursuer?

Damages laid at £600, besides fulfilment of the agreement.

No. XXII.

Mackenzie v. *Winton's Trustees*,—*28th February* 1838.

It being admitted that the pursuer is proprietor of the house, No. 31, Abercromby Place, Edinburgh, and that the said house was built by the late George Winton, Thomas Morrison, and James Nisbet, architects in Edinburgh, and held by them to the late Charles Ross, Esq. in the year 1807;

It being also admitted that the defender Mansfield Winton, is one of the trust-representatives of the said George Winton, and that the other defenders are trustees under the settlements of the said George Winton and Thomas Morrison,

Whether, in violation of the warrandice in the said contract of sale, the defenders wrongfully failed to deliver the said house in the state and condition required by the warrandice, to the injury and damage of the said Charles Ross, and of the pursuer, as standing in his right?

Damages claimed, £292 : 15 : 7½.

No. XXIII.

Ramsay v. *Cunynghame*,—10*th March* 1831.

It being admitted that the ancient Glebe and Church-yard of Gogar has been evicted from the pursuer; and it being found, by an Interlocutor of the Second Division of the Court of Session, dated the 26th day of January 1830, that the defenders, the representatives of the late Sir William Augustus Cunynghame, are liable in warrandice to the pursuer,

What loss and damage the pursuer has suffered by the eviction of the said Glebe and Church-yard?

No. XXIV.

Cleland v. *Buchan*,—19*th January* 1842.

Whether, on or about the day of September 1839, the defender, by himself or another, agreed to sell to the pursuer the lands of Kirkmichael, in the Isle of Man, for the sum of £3,000, and to put him in possession thereof on the 12th November 1839? and Whether he wrongously failed to implement the said agreement, to the loss, injury, and damage of the pursuer?

Note by Issue-Clerk.—The defender declined taking an Issue founded upon any supposed peculiarity in the law of the Isle of Man.

No. XXV.

Guild v. *Mason*,—*25th February* 1842.

It being admitted that on the 5th and 24th days of November, and 7th December 1838, and 1st March 1839, the pursuer addressed and sent to the defender John Mason, certain letters, Nos. 10, 11, 12, and 13 of process, ordering a certain quantity of wheat, in terms of the said letters,

Whether the defender accepted of the said orders, or any of them, and agreed to transmit the said wheat in terms of the said letters, or any of them, and failed to deliver to the pursuer wheat of the weight and quality ordered, to the loss, injury, and damage of the pursuer?

No. XXVI.

Macdonald v. *Glenny*,—*19th June* 1840.
(Conjoined Actions.)

It being admitted that on the 8th day of January 1839, the pursuer Henry Macdonald agreed to purchase from the defender William Glenny, certain bones then in his ware-room, and also his collection of bones from the said day till Whitsunday 1840, at the rate £5 per ton,

Whether, at the time aforesaid, it was understood and agreed between the said parties that the bones so purchased should be of the same description, and equal in

quality to the said bones then shewn to the said Henry Macdonald in the said warehouse? and Whether the said William Glenny wrongfully failed to deliver bones of the said quality and description, according to the said understanding and agreement, to the loss, injury, and damage of the said Henry Macdonald?

Or,

Whether the said William Glenny transmitted, during the months of May and June, and in the beginning of July 1839, his collection of bones to the said Henry Macdonald? and Whether the said Henry Macdonald wrongfully failed to take delivery of, and pay the price of the same, or any part thereof, to the loss, injury, and damage of the said William Glenny?

No. XXVII.

Cullen v. *Stevenson & Sons*,—10*th February* 1842.

It being admitted that by contract of sale dated the 11th June 1841, the defenders sold to the pursuer 20 shares of the capital stock of the London, Leith, Edinburgh, and Glasgow Shipping Company, at the price of £17 : 10s. per share;

It being further admitted that Lord Cockburn, by an Interlocutor dated the 16th December 1841, now final, decerned against the defenders for implement of the said contract of sale;

It being further admitted that the defenders have failed to implement the said contract of sale,

What loss and damage has the pursuer suffered by the aforesaid failure of the defenders?

PART XVIII.

LOAN AND DEPOSIT.

The subjoined Examples illustrate the nature of the Issues required in cases of Loan. Nos. I and II arise out of the contract of commodate, and the action which the lender of a thing has for damage done to it while in the custody of the borrower. Nos. III and IV are the simple Issue of resting-owing in loan of money when the defence is either denial of the loan or of resting-owing; while Nos. V and VI exemplify what may be necessary where the defender avers some special agreement as to the repayment of advances, or where the liability of particular parties is disputed. The last Example is more strictly a case of Deposit.

EXAMPLES.

No. I.

Forbes v. *Gun*,—22*d May* 1828.

Whether, on or about the 15th day of June 1819, the defender borrowed from the pursuer a boat with its sails and other rigging? and Whether the defender failed to return the said boat in the same or equally good condition, to the loss, injury, and damage of the pursuer?

No. II.

M'Vitie v. *Laing*,—*3d July* 1841.

Whether, on or about the 15th day of August 1840, a mare, sound and in good condition, the property of the pursuer, was given in loan to the defender? and Whether, on or about the 18th day of the said month, the said mare was returned by the defender to the pursuer with the knees broken, or otherwise hurt? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £25, or part thereof, with interest thereon, as the value of the said mare?

No. III.

M'Nab v. *Taylor*,—*1st July* 1836.

Whether, on or about the 3d day of November 1832, the pursuer gave in loan to the defender the sum of £12, 12s., or any part thereof? and Whether the defender is indebted and resting-owing to the pursuer in the said sum, or any part thereof, with interest thereon?

No. IV.

Bond v. *M'Leod*,—*6th July* 1841.

It being admitted that the pursuer is the executor of the late Ephraim Bond, of St James' Street, London,

Whether, on or about the 11th day of January 1834, the said Ephraim Bond advanced to the defender the sum of £300 sterling? and Whether the defender is indebted and resting-owing to the pursuer in the said sum, or any part thereof, with interest thereon?

No. V.

Ainslie's Trustees v. *M'Crummen*,—*25th May* 1837.

It being admitted that the pursuers are trustees appointed by the late William Ainslie, Esq. of Huntington, in the County of Haddington,

Whether, on or about the 19th day of August 1822, the said William Ainslie gave in loan, or expended for behoof of the defender, the sum of £1,581 : 18 : 7, or any part thereof? and Whether the defender is indebted and resting-owing to the pursuers in the said sum, or any part thereof, with interest thereon?

Or,

Whether the said money was given to, or expended for behoof of the defender, on the agreement or understanding that the defender was to marry Miss Ainslie, the daughter of the said William Ainslie, and was not to be repaid unless the said marriage was broken off by the fault or refusal of the defender? and Whether the said marriage was broken off, but not by such fault or refusal?

No. VI.

Western Bank v. *Marshall, &c.*—*26th February* 1848.

It being admitted that on or about the year 1845, certain persons entered into arrangements for erecting a church in Greenock, called St Andrew's Church, and that the said church was erected;

It being also admitted, that the defenders, Claud Marshall, James Ballantyne, Alexander Kerr, John Anderson, James

Scott, and Archibald Davidson, and the now deceased James Watt, were appointed and acted as Managers of the said church,

Whether, during the period from October 1837 to May 1843, both inclusive, the Managers of the said church, by themselves, or by another or others acting under their authority, borrowed and received from the said Western Bank of Scotland, the various sums, or any of them, set forth in the account, No. of process? and Whether, in respect of the said advances the said defenders are, as Managers foresaid, resting-owing and indebted to the pursuer, for behoof of the said Bank, the sum of £856 : 6 : 9, or any part thereof, with interest from 29th May 1843?

Whether the said sums, or any part of them, were obtained from the said Bank by Robert Roxburgh, merchant in Greenock, acting in behalf of the said Managers; and were, under the authority, or with the approbation of the said Managers, and in their knowledge that the same had been received from the Bank as on their behalf, applied for the purposes of the said church? and Whether, in respect of the said advances, the said defenders are, as Managers foresaid, resting-owing and addebted to the pursuer, for behoof of the said Bank, the said sum of £856 : 6 : 9, or any part thereof, with interest from 29th May 1843?

Whether the said defenders, and the said deceased James Watt, or any of them, agreed or undertook to repay to the said Bank the said advances, or any part thereof? and Whether the said defenders, and the trustees of the said James Watt, or any of them, are indebted and resting-owing to the pursuer, for behoof of the said Bank, the said sum of £856 : 6 : 9, or any part thereof, with interest from 29th May 1843?

No. VII.

Anderson, &c. v. *National Bank of Scotland,—8th February* 1842.

It being admitted that the Rev. John Torry, Episcopal clergyman of Coupar-Angus, the Rev. T. G. S. Suther, of St George's Chapel, Edinburgh, and James J. Smith, S.S.C. were the Trustees under the contract of marriage between the Rev. Thomas Gordon Torry Anderson and Mrs Elizabeth Jane Suther, and that the pursuers are the assignees of the said Trustees;

It being also admitted that a draft for £500 by Messrs Perez Martin Cunningham and James Dewolf Fraser, was presented to the defenders, and acceptance of the same refused,

1. Whether, on or about the 21st day of January 1841, the said Trustees deposited with the National Bank of Scotland two sums, amounting together to £500 sterling, and for which the said Bank granted two receipts in name of the said trustees? and Whether the defenders are indebted and resting-owing to the pursuers, as assignees aforesaid, in the said sum of £500, or any part thereof, and interest thereon?

2. Whether the defenders wrongously refused to accept the said draft of Messrs Perez Martin Cunningham and James Dewolf Fraser, and are resting-owing to the pursuers in the sum of £63 : 4 : 7, or any part thereof, as exchange and re-exchange on said draft?

PART XIX.

CAUTIONARY OBLIGATIONS:

INCLUDING

GUARANTEE—BOND OF CAUTION—COUNTER-ISSUES FOR DEFENDER—BOND OF PRESENTATION—LAWBURROWS.

Guarantee.—The simple Issue of resting-owing in cases of guarantee or relief is exemplified in Nos. I to V of the subjoined forms. The defence going to the Jury under such an Issue may be, that the letter of guarantee does not apply to the account libelled, as in *Raimes* v. *Galloway*, March 14, 1842. In *Wilson* v. *Wilson*, 5 Murr. 1, the Court sent the case to a Jury to determine, on a series of letters alone, whether there had been a guarantee or a recommendation only. Parole evidence is not admissible to prove a guarantee for future furnishings, *Macewan*, February 13, 1816, F. C.; but a guarantee interposed *in ipso actu*, may be proved *prout de jure*.—In *Grant* v. *Johnston*, February 28, 1844, and February 7, 1845, parole evidence was admitted before a Jury, to explain the circumstance of a bank-cheque bearing a wrong date, and so to connect it with a letter of guarantee for the advance made by the bank.

Bond of Caution.—A bond of caution affords the simple Issue, Whether the principal defaulted and the cautioner is resting-owing the sum in his bond? as in Example No. VI. In the case of *Paterson* v. *Bonar*, March 9, 1844, where a bank gave a charge on a bond for a cash-credit, there was a suspension, on the ground that one of the intended co-obligants had never signed the bond. The Issue, Example No. VII, was sent to a Jury, the suspender being pursuer of the Issue, Whether he was *not* resting-owing? There were averments on record that the bank undertook to obtain the signatures of all the parties before acting on the bond. The evidence being entirely documentary, a juror was withdrawn, and the parties left the case both on fact and law to the Court. It was observed by the Lord Justice-Clerk that the Issue was not one adapted to the case where the question of fact, in consequence of which alone it was sent to a Jury, was an undertaking or agreement by the Bank, and this was by the form of Issue not disentangled from the questions of law. Other Judges observed that it was improper to leave the case to the Court on the matters of fact, and that there should have been first a verdict finding the fact, as to the suspender's averments. Dealing however with the case, a majority of the whole Judges thought that there was no sufficient evidence of a special undertaking by the Bank, but held, in point of law, that the Bank were not entitled to act on the bond until it had been completed by the signatures of all the parties whose names it bore.

In *Hamilton* v. *Watson*, December 8, 1842, there was a suspension of a charge on a cash-credit bond, on the ground that the whole sum was immediately drawn out and applied in payment of a debt previously due to the Bank in another character, and that this was intended, and the intention not made known to the suspender. The Lord Justice-Clerk was strongly of opinion that an Issue should have been sent to a Jury, but the Court below, and ultimately the House of Lords held that there was no relevant case to go to a Jury,

there being no averment of a stipulation on the part of the Bank, at granting the credit, that it was to be so applied; but only that they supposed it might be, or was evidently intended to be so applied.

Counter-Issues for Defender.—The defence that the employer has liberated the cautioner by gross negligence in superintending the conduct of the principal, or by concealing and misrepresenting the state of his intromissions after the date of the bond, must go to proof under a Counter-Issue, of which Nos. VIII and IX are examples. In the former case, *Magistrates of Glasgow* v. *Hopkirk's Trustees*, November 16, 1839, the question arose, Whether the defence was not of such a nature as to be better fitted for the Court than for a Jury? But the Court approved of the Issue prepared by the Lord Ordinary, only striking out the word "regularly," which had been inserted before the words "to account" in the last Issue. In the case of *Biggar* v. *Wright*, November 19, 1846, the cautioner of a trustee in a sequestration when sued for the trustee's deficiencies was refused an Issue in defence, Whether the commissioners and creditors wrongfully failed to superintend and call the trustee to account? In *Falconer* v. *Lothian*, March 8, 1843, the Court judged of the evidence afforded by the documents in process, both parties having renounced further proof, and repelled Defences by the cautioner for a commercial traveller, founded on alleged concealment and neglect to enforce payment of arrears. The Issue which went to trial in the case of *Railton* v. *Matthews*, January 31, 1844, and March 11, 1846, was one of Reduction of the bond, on the ground of inducement to subscribe by undue concealment or deception. In the conjoined actions of Resting-owing and Reduction, the Issue No. X also was prepared, of which Matthews and Leonard were pursuers, the Counter-Issue being properly one in defence. The second Issue in Example No. XI, *Swan* v. *Bank of Scotland*, May 20, 1847, arises out of the

defence or reason of suspension, that drafts on the Bank by the principal were objectionable under the stamp-laws.

Bond of Presentation—Lawburrows.—The Example No. XII is an Issue under a letter of presentation, putting the question of failure to present, as leading to that of resting-owing the debt due. It was held in the case of *Chaplin* v. *Allan*, Feb. 5, 1842, that parole evidence could not be received, nor the case be remitted to a Jury, where the obligation to present was not founded either on a probative writing, or on a written missive with *rei interventus*. Example No. XIII is a form in the case of Letters of Lawburrows, which went to trial in *Ball* v. *Longlands & Others*, 12 Sh. 934. There were Issues also as for an assault, but these were of course directed only against the principal parties.

Cautionary obligations, from their subsidiary nature, frequently give rise to Issues joined to those against the principal sued in the same action, but where it may be that the case is substantially defended by the cautioner. Examples of such Issues are given *supra*, p. 429, No. XIX, p. 450, No. XVII, and p. 453, No. XX. The Issue may be taken against the cautioner only, when its form will be as in Example No. XV. In the Issues settled in the case of *Chanter* v. *Borthwick, &c.* July 20, 1848, Example No. XIV, the word "wrongfully" was struck out by the Judges of the Second Division, as being unnecessary, where failure to implement an obligation is the ground of damages, and as therefore calculated to mislead or confuse the Jury.

EXAMPLES.

No. I.

Mercer v. *Duncan, &c.*—*26th June* 1833.

Whether the pursuer executed all or any part of the business charged in the accounts Nos. 3, 4, 5, 6, 7, 8, 9, and 10 of process? and Whether the defender John Neilson guaranteed the payment of the business executed as aforesaid, and is indebted and resting-owing to the pursuer in the sum of £213 : 6 : 2, or any part thereof, and interest thereon, as the balance due on the said accounts?

No. II.

Raimes v. *Galloway*,—*19th December* 1840.

It being admitted that the defender granted the letters of guarantee No. 4 of process,

Whether, in terms of the said letter, the pursuers furnished to David Alexander, druggist in Dundee, all or any of the goods charged in the account No. 10 of process? and Whether, under the said letter, the defender is indebted and resting-owing to the pursuers in the sum of £50, or part thereof, with interest thereon, in payment of the said goods?

No. III.

Grant v. *Johnston*,—*7th February* 1845.

It being admitted that the writing No. 5 of process (the letter of guarantee) was subscribed by the defender,

Whether the sum of £200 was advanced by the pursuer on Saturday the 23d day of October 1841, after receiving the said writing, with the subscription of the defender thereto, and on the faith of the same? and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £200, with interest?

No. IV.

Sutherland, &c. v. *Largue, &c.—28th May* 1844.
(After the prefatory admissions.)

Whether the letter of guarantee, No. 9 of process, was granted by the said deceased George Alexander on the 4th August 1828, or of any date prior to the 22d September 1828? and Whether the said William Gordon of Aberdour, Hugh Hay Rose, and Alexander Crombie of Phesdo, subscribed the bond of caution, No. of process, with reference to and on the faith of the said letter of guarantee? and Whether the defenders, as executors of the said George Alexander, and representing him, are resting-owing in the sum of £263 : 9 : 8¾ sterling, with interest on the sum of £160 : 18 : 6 thereof, as principal, from and after the 25th March 1843, or any part thereof?

No. V.

Rose, &c. v. *Milne, &c.—28th February* 1844.

It being admitted that by bond and assignation in security, dated 18th February 1840, of which No. 36 of process is a copy, the pursuers, along with, and as cautioners for Thomas Ramsay, then in Inverleith Place, Edinburgh, became bound to repay to the City of Glasgow Life Assurance and Reversionary Company the sum of £1,000 ster-

ling, in manner therein mentioned, and to keep up the policy of assurance on the life of the said Thomas Ramsay, also therein mentioned;

It being also admitted that in reference to that transaction the defenders granted to the pursuers the letter of relief, No. of process, and that the pursuers, under the said bond and assignation, have paid to the said Company on account of the said Thomas Ramsay, the sums set forth in the schedule hereto annexed, amounting to £287 : 13 : 9,

Whether the defenders, or any of them, have wrongfully failed to implement the said letter of relief, and are indebted and resting-owing to the pursuers, or either of them, the said sums of £287 : 13 : 9, or any part thereof, with interest thereon?

No. VI.

Watson, M'Night & Co.'s Trustees v. *West of Scotland Guarantee Association*,—14*th June* 1848.

It being admitted that at and prior to January 1847, William Lockhart was in the service of the said Watson, M'Night and Company as cashier, and that the defenders granted the bond of caution No. 4 of process, in the terms set forth in the schedule hereunto annexed,

Whether, on or about 29th January 1847, the said William Lockhart received on behalf of the said Watson, M'Night and Company, a sum of £1,200 or thereby, from the Union Bank of Scotland, and failed to pay or account to them for the same? and Whether, in respect of the obligations contained in the said bond, the defenders are indebted and resting-owing to the pursuer as trustee foresaid, in the sum of £500, or any part thereof, with interest from 29th April 1847?

No. VII.

Paterson v. *Bonar*,—*9th May* 1844.

It being admitted that the bond for £1,500, of which No. 52 of process is an extract, bearing to be granted to the defenders by Alexander Moffat, Mrs Elizabeth Carter, the pursuer, and William Williams, for a cash-credit account to be kept in the name of the said Alexander Moffat, is subscribed by the pursuer, Moffat, and Mrs Carter, but is not subscribed by William Williams,

Whether the pursuer is not indebted and resting-owing to the defender the said sum of £1,500, or any part thereof, under the said bond, as the balance upon a cash-credit account between the defender and the said Alexander Moffat, in terms of said bond?

No. VIII.

Magistrates of Glasgow v. *Hopkirk's Trustees*,—
16*th November* 1839.

It being admitted that the defenders, Mrs Hopkirk, Daniel M'Kenzie, and J. G. Hopkirk, are trustees of the late James Hopkirk, merchant in Glasgow, and that on the 25th day of July 1823, the Magistrates of Glasgow appointed Mr Thomas Hopkirk, merchant there, to collect a certain sum of teinds from the heritors of the parishes of the said city and barony thereof, and that he held the said appointment from the said day to the day of 1833;

It being also admitted that on the 20th day of August 1829, the said Thomas Hopkirk delivered to the said Magistrates the bond of caution, No. 6 of process,

Whether, under the said bond, the defenders or any of them, are indebted and resting-owing to the pursuers in the sums of £1,623 : 8 : 2, and of £1,500, or any part thereof, with interest thereon, as the balance due by the said Thomas Hopkirk, under the appointment made as aforesaid?

Or,

Whether the said bond is not the deed of the said James Hopkirk, and of the defender, James Hopkirk, or either of them?

Whether the said Magistrates, or those in their employment, through negligence, wrongfully failed to superintend the conduct of the said Thomas Hopkirk, and to call him to account as collector aforesaid?

No. IX.

Hill v. *Cowie, &c.—25th February* 1840.

It being admitted that the pursuer David Hill, was cashier of, and has been appointed to wind up the affairs of a certain banking company trading under the firm of the Montrose Bank;

It being also admitted that on the 30th day of May 1827, the defenders became cautioners, in terms of the bond of caution, of which No. 87 of process is an extract, to the said Bank for one George Strachan, as accountant and teller in the said bank,

Whether, when the transactions of the said Bank were closed, the said George Strachan was deficient in accounting, and was indebted to the said bank in the sum of £1,600 : 16 : 2, now restricted by subsequent payments

[illegible] Whether, as [illegible] or any of them, are [illegible] cashier, [illegible] behoof of the [illegible] £[illegible],3 : 8 : 9, [illegible]

[illegible]

[illegible] and the directors [illegible] subsequently to [illegible] of gross negligence in [illegible] and in superin- [illegible] and [illegible] afore- [illegible] bank, wrongfully [illegible] misrepresented to [illegible] in the dis- [illegible] or the state of [illegible] bank?

No. X.

[illegible] February 1843.

[illegible] on the [illegible] day of September and [illegible] the bond of caution or surety, [illegible] by the defender, Edward [illegible] George Hickes, of [illegible] of Glasgow, and Henry William [illegible] Worcester; and it being further admitted that [illegible] George Hickes acted as agent for the [illegible] and Leonard, from the date of the said [illegible] month of July 1837,

Whether, [illegible] Edward Rail- ton, is [illegible] the pursuers the [illegible] part thereof, as the [illegible] Hickes to the pursuers,

Or,

Whether, from the date of the said bond of caution or surety, to the month of May 1837, or during part of that period, the pursuers, or either of them, were guilty of gross negligence in reference to the said George Hickes, and in superintending his conduct and actings as their agent, or wrongfully concealed irregularities and misconduct on his part, as their agent, from the defender, to the loss and damage of the defender?

No. XI.

Swan v. *Bank of Scotland*,—21*st May* 1847.

It being admitted that the defender is treasurer of the Bank of Scotland, and that William Martin, writer in Lockerby, along with the suspender, granted the bond No. 5 of process, to the branch of the said Bank at Dumfries, and that in his bankruptcy on the 20th day of July 1831, there was an apparent balance due by Martin to the Bank on his cash-account of £590 : 17 : 1,

1. Whether the said balance, or any part thereof, was caused by the wrongful act or acts, or culpable negligence of the bank, or of the agent or agents for whom they are responsible?

2. Whether all or any of the money contained in the said cash-account was drawn by Martin from the said bank on the drafts or orders written on unstamped paper contained in the schedule herewith annexed, and drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time?

No. XII.

Liddell v. *Gilchrist*,—*23d February* 1832.

It being admitted that on the 4th day of June 1818, the defender granted the letter of presentation, No. 5 of process,

Whether the defender wrongfully failed to present the person of John Gilchrist at the office of George Steele, messenger in Lanark, in terms of the said letter, and is indebted and resting-owing to the pursuer in the sum of £12: 2: 6, or any part thereof, with interest thereon, from the 6th October 1817?

No. XIII.

Ball v. *Longlands, &c.*—*25th June* 1833.

It being admitted that in the month of May 1832, the pursuer obtained against the defenders David and Thomas Longlands, Letters of Lawburrows, under the penalty of 400 Merks each, and that the defender Alexander Johnstone, was cautioner for the said defenders in the said Lawburrows,

Whether, on or about the 16th day of September 1832, on a road leading southward from the gate of the avenue of the mansion-house of Kersie Bank, in the County of Stirling, the defender Thomas Longlands did assault, or assault and strike the pursuer, in contravention of the said Lawburrows?

Whether, at the time and place aforesaid, the defender David Longlands did assault, or assault and strike the pursuer, in contravention of the said Lawburrows?

No. XIV.

Chanter & Co. v. *Borrie's Trustee & Thoms*,—*20th July* 1848.

1. Whether the said Peter Borrie entered into a contract with the pursuers, by missives dated the 11th day of October 1838, for the construction and delivery to the pursuers of certain locomotive engines, under the terms and conditions therein specified? and Whether the said Peter Borrie failed to implement and fulfil the said contract, to the loss, injury, and damage of the pursuers?

2. Whether the said Peter Borrie, having then received from the pursuers the sum of £800 in advance, for locomotive engines to be delivered by him to the pursuers by his obligatory letter dated the 4th day of January 1840, as accepted by the pursuers' letter of acceptance dated the 6th day of January 1840, undertook and agreed to deliver to the pursuers, on one of the railway lines in London, three locomotive engines constructed and finished according to the descriptions contained in the foresaid missives, in terms following, viz.:—"One to their order," &c.? and Whether the said Peter Borrie failed so to deliver to the pursuers the said locomotive engines, constructed and finished as aforesaid, to the loss, injury, and damage of the pursuers?

3. Whether the defender Thoms added his holograph obligation to the foresaid obligatory letter, in terms following, viz.:—"On receiving J. Chanter & Company's acceptance pro £1,000 at three months, and a settlement of the balance in terms of the above, I agree to guarantee delivery of the engines on board of a vessel for London. (Signed) "WILLIAM THOMS."? and Whether the said

William Thoms having received the pursuers' acceptances pro £1,000, in terms of the said obligatory letter, failed to implement and fulfil the foresaid obligation, to the loss, injury, and damage of the pursuer?

No. XV.

M'Vinish v. *M'Pherson, &c.*—16*th March* 1844.

It being admitted that the defender M'Pherson is a messenger-at-arms, and that the other defenders are cautioners for him in his said office of a messenger,

Whether, on or about the 22d day of June 1841, the defender Wm. C. M'Pherson was employed by or on behalf of the pursuer to search for, apprehend, and imprison John Hossack, of Monkwearmouthshire, in the county of Durham, shipowner? and Whether the said defender wrongfully, and in violation of his duty, failed to apprehend and imprison the said John Hossack? and Whether the defenders, or either of them, are indebted and resting-owing to the pursuer the sum of £30 : 3 : 10, with interest?

No. XVI.

Abraham v. *Steel*,—8*th March* 1843.

Whether, on or about the day of a bond of caution was granted by W. and M. Cochrane, jewellers in Glasgow, and the individual partners of that firm, and produced by them in a process of Suspension at their instance against the pursuer, subscribed by Charles Donaldson, linen merchant in Glasgow, and Robert M'Clelland, work-

ing jeweller there, as cautioners in the said Suspension, attested by William Munro, writer in Glasgow? and Whether the defender granted a certificate that the said cautioners and attestor were habite and repute responsible for the obligations contained in the said bond, through fraud, collusion, or gross negligence, and afterwards adhered to the said certificate, to the loss, injury, and damage of the pursuer?

N.B.—For another Issue of the same description, see above, p. 399, No. IX.

PART XX.

PARTNERSHIP.

THE subject of Partnership gives rise to several Issues on particular facts, the bearing of which on the cause or accounting between the parties is judged of by the Court. Such are the questions, Whether a partnership was dissolved at a particular date? and Whether certain parties were in the knowledge of the dissolution? See Example No. IV. Such also is the question, Whether a partnership existed? as in Examples No. I, II, and III; the first being similar to the Issue in *Mack* v. *Cleland*, 10 *Sh.* 850, where the defender was successful in proving that the pursuer had been only a clerk. No. II was the Issue in the case of *Wilson* v. *Beveridge*, 10 Sh. 110, and was allowed upon a general averment of partnership, without any specification on the Record of the facts from which partnership was to be inferred. No. III is the Issue approved by the First Division, in *Fraser* v. *Hair*, 24th June 1848, where the Court overruled the objection that the firm being Alexander Hair & Coy. and Fraser's name not appearing above the door, or in the licence, or pawn tickets, the partnership was illegal under the Pawnbroking Acts. They sent the Issue to the Jury as settled by the clerks, rejecting that proposed by the Lord Ordinary, which would have laid the burden on the pursuer of proving that in the contract of copartnership it was stipulated that there should be publicity. But in accordance with the decision of the House of Lords, in *Gordon* v. *Howden*, 28th April

1845, the pursuer's Issue as settled bound him to prove the fact of publicity. The old and defective form of Issue is exemplified in *Smith* v. *Puller*, 2 Murr. 340.

In the case of *Campbell's Trustees* v. *Thomson*, 7 Sh. 650, reversed on Appeal, 5 W. & Sh. 16, the question being, What share of profits a partner was entitled to? the House of Lords held that this was a proper subject for investigation before a Jury, and that there was no presumption of law for equality, independent of the circumstances, but that equal division was a result to be come to by a Jury, if they should have no evidence leading them to a different proportion. The English precedent of *Peacock* v. *Peacock*, 2 Camp. 45, and 16 Ves. 49, was followed, where an Issue was directed out of Chancery "to try whether the plaintiff was beneficially a partner with the defendant, and if he was, for what share, not exceeding one moiety of the profits?" and the Jury, on evidence of the relative situations of the parties,—a son taken by his father into partnership without any contract, —found the son entitled to one-fourth of the profits.

In *Venables* v. *Wood*, M'F. J. R. 44, and 8th March 1839, 1 D. 659, the question of Whether there was a joint adventure in the publication of certain books? was put as leading to the Issue of resting-owing for furnishings of paper. The question Whether the defender was, or held himself out to be a partner? leads, in Example No. V, to the Issue of resting-owing to a third party making furnishings; and in No. VI the admission of being a shareholder, paves the way for the question of resting-owing certain instalments on the shares held. The nature of the defence in the latter case appears from the Issues in a Counter-Action between the same parties, see Example No. VII, where the liability of the company to a partner in consequence of illegal proceedings in violation of a Statute is put in Issue along with the defender's alternative Issue of homologation or acquiescence in the proceedings, *Clyne's Trustees* v. *Edinburgh Oil Gas Co.* 2 Sh. and M'L. 243; *Edinburgh Oil Gas Co.* v. *Clyne's Trustees*,

16 Sh. 164. In *Campbell* v. *Campbell and Others*, 12 Sh. 573, the Issue was one of resting-owing the balance of a sum of penalties incurred by illegal operations by the other partners without the knowledge of the pursuer, who succeeded in obtaining a verdict, the defenders having failed to shew under an alternative Issue his knowledge of the illegal transactions. In the case of *Nisbet* v. *Taylor's Executors*, December 19, 1840, the plea of the partner of a dissolved company in defence to a claim for an admitted partnership debt, was novation by acceptance of a security from the other partner, and this was tried under the Issue No. IX of the Examples, in which the burden is laid on the defender (and advocator.) In *Gallie* v. *Wylie*, January 25, 1845, the questions Whether there was a *bona fide* partnership? and Whether certain goods were the property of the partnership? were raised in a multiplepoinding, and after considerable discussion on the Issues, those in Example No. XI were settled by the Second Division, and sent to trial; the company creditors being pursuers of the leading Issue, and the trustee on the sequestrated estate of the individual being defender in that, and pursuer of a Counter-Issue founded on the plea of reputed ownership.

An Issue of damage will go to the Jury for wrongfully failing to fulfil an agreement to enter into a partnership, Example No. XII; and for wrongfully putting an end to a copartnery as in Examples No. XIII to XV. The case of *Ewing* v. *Crichton*, 4 Murr. 180, furnishes an Issue where damages were sought against directors of a company for illegally transferring the property of the company at a private valuation, with an alternative Issue of acquiescence by the pursuer in the valuation; the Lord Chief Commissioner observed that the point on the pursuer's side was, Whether the property would have sold for more at a public than a private sale? as well as the illegality of the transaction, for the Issue could not be cut in parts, as it put in one question "the illegal injury of the pursuer by a private valuation."

EXAMPLES.

No. I.

Robertson v. *Morrison, &c.—9th March* 1842.

Whether, during all or any part of the period from Martinmas 1816 to Martinmas 1836, the late John Robertson, in Sheriff-muir lands, in the parish of Logie, and county of Clackmannan, and the pursuers, carried on the business of lime burners at the lime works of Sheriff-muir lands aforesaid, as copartners, or as joint lessees of the said lime works?

No. II.

Beveridge v. *Wilson—24th January* 1832.

Whether William Beveridge, pursuer, was a partner of the mill-spinning concern carried on at Midmill of Pitliver, posterior to the 21st day of September 1821? and if so, how long thereafter?

No. III.

Fraser v. *Hair,—16th June* 1848.

Whether, on or about the month of September 1840, the pursuer and defender entered into partnership for the purpose of carrying on the business of pawnbrokers in Glasgow, and did carry on the said business in partnership, under the firm of Alexander Hair and Company, from said month of September 1840 till in or about the month of August 1844? and Whether, during the said period from September 1840 to August 1844, the pur-

suer openly and avowedly acted as, and was generally and publicly known by the customers and others dealing with the concern of Alexander Hair and Company, to be one of the partners thereof?

No. IV.

Johnston & Co. v. *Vallance & Co.*—*7th July* 1823.

(*After Prefatory Admissions.*)

Whether, on or about the 1st day of May 1817, or on the 30th day of April preceding, the said concern of Hugh Vallance & Co. was dissolved by mutual consent?

Whether, previous to the 2d day of April 1819, the said Pollock, Gilmour, & Co. were in the knowledge that the said company or concern of Hugh Vallance & Co. had been dissolved?

No. V.

Burstall v. *Stein*,—*7th March* 1834.

It being admitted that a steam-engine was ordered from the pursuer, and erected by him at the distillery at Kirkliston, carried on under the firm of Messrs Andrew Stein and Company,

Whether the said engine was furnished to the firm, the defender being, or holding himself out to be, a partner of that said firm, or to the defender carrying on the business of the distillery under the said firm, for his own behoof, and at his own risk? and Whether the defender is indebted and resting-owing to the pursuer in the sum of

£236 : 13 : 4, or any part thereof, as the balance of the price of the said engine?

No. VI.

Oil Gas Company v. *Clyne*,—16*th June* 1831.

It being admitted that by an Act of Parliament, 5 Geo. IV. c. 76, a company was established in Edinburgh under the name of the Edinburgh Oil Gas Light Company, for the purpose of manufacturing gas from oil and other substances;

It being also admitted that the defender was proprietor of forty-two shares of the stock of the said company during the months of January and February 1826,

Whether the defender is indebted and resting-owing to the pursuers in the sum of £130 sterling, or any part thereof, with interest thereon from the 10th day of January 1826; and the sum of £130 sterling, or any part thereof, with interest thereon from the 13th day of February 1825, as the instalments or instalment on the shares of the said company, held by the defender as aforesaid?

No. VII.

Clyne v. *Oil Gas Co.*—16*th June* 1831.

It being admitted that under an Act of Parliament, 5 Geo. IV. c. 76, a company was established in Edinburgh, under the name of the Edinburgh Oil Gas Light Company, for the purpose of manufacturing gas from oil and other substances;

It being also admitted that the pursuer was an original partner of the said company, and as such, held twelve shares

of the stock of the said company, on which he paid certain instalments, and that between the 17th day of January and 21st day of April 1834, the pursuer purchased forty additional shares of the said stock, with which he paid certain instalments and premiums,

Whether, between the 19th day of January 1824 and the 15th day of May 1828, the defenders wrongfully violated the provisions of the aforesaid Statute, and thereby became indebted to, and are resting-owing to the pursuer in the sum of £1,183 : 10 : 5½, or any part thereof, with interest thereon, as the value of the share of stock held by the pursuer as aforesaid?

Or,

Whether the pursuer homologated or acquiesced in all or any of the said actings of the defenders?

No. VIII.

Hogarth & Co. v. *Gordon's Trustees,—27th February* 1844.

It being admitted that the pursuers are the whole surviving solvent partners and representatives of the whole deceased solvent partners except the said Hugh Gordon, of the said Union Whale Fishing Company of Aberdeen;

It being also admitted that the said Hugh Gordon was, at the time of his death, which happened in July 1834, a partner of the said Company, and that the defenders are his trustees, executors, and personal representatives,

1. Whether the defenders, as trustees and executors of the said Hugh Gordon, became partners of the said Company, and are as partners, resting-owing to the pursuers the sum of £336 : 0 : 10, or any part thereof, with interest from the 31st of January 1843

2. Whether the defenders, as representing the said Hugh Gordon, formerly a partner of said Company, are resting-owing to the pursuers the sum of £336 : 0 : 10, or any part thereof, with interest from 31st January 1843?

No. IX.

Nisbet v. *Taylor's Executors*,—*30th May* 1840.

It being admitted that prior to the 1st day of June 1831, the pursuer and James M'Ally carried on business as soap manufacturers in Glasgow, under the firm of M'Ally and Nisbet, and that in the dissolution of the said company on the said day, they were due to the late William Taylor a balance of £395 : 16s,

Whether the pursuer is still not indebted and not resting-owing in the sum of £208 : 13s, with interest, or any part thereof, as the balance of the said debt?

No. X.

Whitehaven & Furness Junction Railway Co. v. *Macfadyen*,—17*th November* 1848.

Whether the defender is the holder of 20 shares of the Whitehaven and Furness Junction Railway Company, and is indebted and resting-owing to the pursuers in the sum of £40, being the amount of the second call of £2 per share on said 20 shares of the Whitehaven and Furness Junction Railway Company, with interest thereon, from the 1st day of May 1846? and Whether the defender is resting-owing to the pursuers in the farther sum of £40, being the third call of £2 per share on said 20 shares, with interest thereon, from the 24th day of May 1847?

No. XI.

Gallie, &c. v. *Wilson's Trustees*,—*2d July* 1844.

Whether, on or about 7th April 1840, a partnership existed bearing the name of Alexander Wilson and Company, and of which Alexander Wilson and Robert Watt, were the partners, and carried on and transacted business under the said firm? and Whether the stock of goods and outstanding debts, the proceeds of which form the fund *in medio*, or any part thereof, belonged to or were the property and stock in trade of the said partnership?

Or,

Whether the stock in trade, or part thereof contained, on 7th April 1840, in the shop in Dalkeith sometime occupied by the said Alexander Wilson, was in the ostensible possession and reputed ownership of the said Alexander Wilson? and Whether the fund *in medio*, or any part thereof belonged, or is justly addebted to the trustee on the sequestrated estate of the said Alexander Wilson?

No. XII.

M'Ewans v. *Miller*,—*25th June* 1829.

Whether the defender agreed to enter into a partnership with the pursuers in terms of a paper entituled, Heads of Agreement, dated 10th June 1828, being No. 2 of process?

Whether the defender wrongously failed to implement the said agreement of copartnery, to the loss, injury, and damage of the pursuers, or any of them?

No. XIII.

Peebles v. *Turner*,—*3d March* 1840.

Whether, about the end of the month of March or during the month of April 1837, the pursuer and defender entered into a copartnership for five years from the 21st of February 1837, or for any part of that period, for the purpose of carrying on business as druggists and apothecaries in Greenock, the pursuer to have a salary of £120 a year, as manager, and to draw one-third of the profits of the said business? and Whether, on or about the 30th day of October, the defender wrongfully put an end to the said copartnership, to the loss, injury, and damage of the pursuer?

Sum claimed, £1,246 : 1 : 2.

No. XIV.

Lawson v. *Drysdale*,—*20th February* 1844.

Whether, in the year 1837, or at least prior to the month of December 1841, the pursuer Lawson, and the defender Drysdale, carried on business in Glasgow as nursery, seedsmen, and florists together, under the firm of Drysdale and Lawson, on an agreement of copartnership for nineteen years, from the term of Martinmas 1836?

Whether, on or about the end of the month of December 1841, or beginning of January 1842, the defender did, in breach of the said agreement, issue a notice of dissolution of the said copartnership, as at the 31st of December 1841,

and thereafter refused to act along with the pursuer as a partner, under the said agreement, to the loss, injury, and damage of the pursuer Lawson?

No. XV.

Campbell v. *M'Leish, &c.*—*12th February* 1825.

It being admitted that on the 10th day of May 1818, the pursuer, defenders, and others, formed themselves into a company denominated the Edinburgh and Perth Waterloo Coach Company, and that on the said day the said partners did enter into certain resolutions for the regulation and management of the business of the said company, which said resolutions are produced in process,

Whether the said company still subsisted? and Whether the said resolutions continued in force, and were the regulations under which the affairs of the said company were managed in the beginning of the month of August 1823? and Whether, in violation of the said regulations, the defenders, on or about the 23d day of August 1823, put an end to the said company, to the loss and damage of the said pursuer?

Whether, on or about the said 23d day of August 1823, the defenders, without due and sufficient cause or warning, did put an end to the said copartnery, to the loss and damage of the said pursuer?

Or,

Whether, on or about the 10th day of June 1820, the said Waterloo Coach Company was dissolved?

PART XXI.

MANDATE AND AGENCY,

INCLUDING

AGENT AND PRINCIPAL—COMMISSION AGENCY—TRUST.

Agent and Principal.—Mandate may be admitted, as for instance, by power of attorney, and then the question for the Jury will be, Whether the mandant is resting-owing sums expended in his business, as in *Sassen* v. *Campbell*, 8 Sh. 707, Example No. I. The enquiry of the Jury may be, Whether authority was delegated or not? The question may arise between the mandant and mandatory, as in the case of power to indorse bills. It was held in *Davidson*, 3 Dow, 218, that authority to indorse bills may be given without specific mandate, and may be proved by facts and circumstances; and in *Anderson* v. *Buck & Holmes*, June 3, 1842, an averment of a practice for agents to indorse *per procuration* of the principal was held relevant, and the Issue, Example No. II, was approved of. The question may arise with third parties, as in *Chanter* v. *Thoms*, February 20, 1845, and Example No. IV, where the principal succeeded in setting aside an agreement as entered into by an agent not duly authorised. The same may arise in regard to the extent of a factor's powers, as matter of fact, *Marquis of Tweeddale*, M'F. *J. R.* In *Bridges* v. *Willison's Trustees*, 10 Sh, 43, the pursuer made a loose general averment that the defenders had conferred ample powers on their commissioner to enter into the transaction, and in proof conde-

scended particularly only on certain accounts already in process, and the Court therefore held that there was no room for an Issue. The Issue No. V was settled in the case of *Macdonald* v. *Baxter*, 12 Sh. 557, where the allegation was, that the defender, as the pursuer's factor, had let a farm without authority, and involved his principal in litigation with the tenant. In *Burrell* v. *Hodge*, 2 Murr. 525, damages were found due by an agent to his principal for having concealed from an intending purchaser the acceptance of his offer.

Commission Agency.—The subjoined Examples Nos. VI to X, illustrate the Issues arising out of reciprocal actions by commission agents for the balance of their account, and by their employers against them for damages for failure in duty. In *Hallilly* v. *Railton*, 5 Murr. 322, an agent was found resting-owing the price of goods which he was instructed to sell for ready money, but sold on credit. Under the simple Issue of resting-owing, he was allowed to prove that he had communicated the name of the purchasers to his employer, who was said to have adopted them as his debtors, but was unable to do so. In *Rawson & Co.* v. *Johnston*, 11 Sh. 1011, the Issue was resting-owing for goods sold through a commission agent. Evidence went to the Jury on the defender's averment that he had bought the goods supposing they were the property of the agent, and as part of a transaction with him, and also that the pursuer had adopted the agent as his debtor. In *Sheriff* v. *Stein's Assignee*, 4 Murr. 454, the question of fact for the Jury was, Whether the agent was "entitled" to retain commission, and *del credere* commission? and this was interpreted to be, Whether he was so "by the usage of trade?" and the Issue not being a general one of resting-owing, proof of acquiescence by an authorised party was refused.

Trust.—The matters of fact requiring the interposition of a Jury under this head, are such as, Whether a sale was

collusive, and for the trustee's own behoof, as in Example No. XII; failure to recover rents from want of ordinary diligence, as in No. XIII; and loss of sums belonging to the trust-estate by gross negligence, as in Nos. XIV and XV. The last is the Issue in the case of *Home* v. *Menzies*, July 10, 1845, where the presiding Judge directed the Jury that, looking to the legal principles, and the words of a protecting clause in the trust-deed, they must, under the words "wrongfully and in contravention of his duty as trustee," be satisfied that the trustee was "guilty of gross and culpable negligence." It was held, on a Bill of Exceptions, that the Judge had not "changed the Issue and substituted another in its place," and that it was his duty to direct the Jury what constitutes "wrong" as applicable to the case appearing on evidence.

In the case of *Clay* v. *Home*, M'F. *J. R.* 9, an Issue went to trial, Whether the defender, one of several trustees, had wrongfully delayed to subscribe a disposition of trust-property, to the loss and damage of the pursuer, his co-trustee, as representing the trust? and the defender proved to the satisfaction of the Jury that his delay had not been unreasonable or wrongful. In *Campbell* v. *Gordon*, Mac. 20, 1844, the Issue was the ordinary one in an action of damages, and the point for the Jury was, Whether horning and caption had been wrongfully used against a trustee for a trust-debt for which he was not personally liable? The defence was, that the diligence was only used against him as trustee, and not so as to affect his character as an individual, and the Jury found for the defender.

The Example No. XVII arises out of an action by a trustee for creditors against his constituents for law expenses, on the ground of his having acted under their authority and instructions; and No. XVIII from an action against a bondholder on his liability to account as mandatory or trustee, for the surplus price of the subject, after satisfying his own debt.

EXAMPLES.

No. I.

Sasses v. *Campbell*,—*27th May* 1829.

It being admitted that the defender, while residing in Paris, granted to the pursuer a power of attorney, in terms of a letter dated 23d June 1808,

Whether, in execution of the powers granted by the said letter, the pursuer came to Britain and transacted certain business for the defender, during the years 1808 and 1809? and,

Whether the pursuer expended £1,240, or any part thereof, according to the schedule hereunto annexed, in execution of the said business? and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £1,240, or any part thereof, for expense in the execution of the power granted by the said letter, and in the sum of £1,000, or any part thereof, as remuneration for his services in the execution of the said powers?

No. II.

Anderson v. *Buck & Holmes*,—*4th June* 1841.

It being admitted that the bill of exchange for the sum of £265 : 7 : 4, No. 3 of process, bearing to be drawn and indorsed by "Duncan M'Corkindale & Co." merchants and agents in Glasgow, *pro* Buck & Holmes the defenders, was discounted at the bank of which the pursuer is manager, and was protested for non-payment,

Whether the said Duncan M'Corkindale & Co. were authorised to draw and indorse the said bill per procuration of the defenders? and Whether the defenders are indebted and resting-owing to the pursuers in the said sum of £265 : 7 : 4, contained in the said bill, or any part thereof, with interest thereon?

No. III.

Glasgow Marine Insurance Co. v. *The Royal Bank of Scotland*,—18*th March* 1843.

It being admitted that the bill, No. 6 of process, dated 27th October 1841, for £58 : 17 : 11, bears to have been drawn by James H. Robertson upon, and accepted by Messrs Gilmours & Waters, merchants in Glasgow; and also bears to have been indorsed by the said James H. Robertson, as agent for the Glasgow Marine Insurance Co., and was discounted with the Branch of the Royal Bank of Scotland at Greenock;

And it being also admitted that the bill, No. 8 of process, dated 7th November 1841, for £197, 15s., bears to have been drawn by the said James H. Robertson, payable to his order, as agent for the Glasgow Marine Insurance Co. upon and accepted by James Morris, Esq. Greenock; and that the same bears to have been indorsed by the said James H. Robertson, as agent for the said Glasgow Marine Insurance Co., and was discounted with the Branch of the Royal Bank of Scotland at Greenock,

Whether the said James H. Robertson was authorised to draw, and indorse, and discount the said bills, or either of them, in behalf of the defenders and advocators? and Whether the defenders are indebted and resting-owing to the pursuers in the sums of £58 : 17 : 11 and £197, 15s.

contained in the said bills, or any part thereof, with interest thereon?

No. IV.

Chanter & Co. v. *Borthwick & Esson,—7th December* 1844.

It being admitted that the deed of agreement, being No. 16 of process, was executed on the 15th day of August 1840, by Joshua Richardson, civil engineer at Croydon, in the county of Surrey, stating himself as acting in behalf of the said pursuers, and by the said William Esson on behalf of the said Peter Borrie,

1. Whether the said deed was executed by the said Joshua Richardson without the authority of the pursuers?

2. Whether the said deed was executed by the said Joshua Richardson in consequence of wilful misrepresentation on the part of the said Peter Borrie, or the said William Esson, or either of them, or of their agent Mr David Mitchell, writer, Dundee, acting on their behalf; or through essential error on the part of the said Joshua Richardson?

3. Whether it was understood and agreed by the parties to the said deed, that the arrangement effected by it was only to be binding in the event of its being confirmed by the pursuers and the said Peter Borrie? and Whether the said deed was not confirmed by the pursuers?

No. V.

Macdonald v. *Baxter,—24th May* 1833.

Whether, on or about the 28th day of February 1827, the defender, without authority from the pursuer, and falsely

assuming that he had such authority, wrongfully allowed William Bisset to retain possession for one year from Whitsunday 1827, of the farm of Windy Hill, the property of the pursuer, to the loss, injury, and damage of the pursuer?

Whether the defender wrongfully concealed from the pursuer the transaction aforesaid, to the loss, injury, and damage of the pursuer?

Or,

Whether the pursuer authorised or agreed to, or homologated the transaction aforesaid?

No. VI.

Handysides v. *Mason*,—12*th July* 1845.

It being admitted that the pursuers N. and R. Handyside, are commission agents in Glasgow, and that the defender John Mason is a merchant in Memel,

Whether the pursuers were employed by the defender to forward to him orders for grain, to be executed by him upon an agreement or mutual understanding that they were to receive a commission of one per cent on the amount of such orders? and Whether they did forward to him the various orders referred to in the account-current, No. of process? and Whether the sum of £117 : 9 : 9, being the balance due on the said account-current, and interest thereon, or any part thereof, is resting-owing by the defender to the pursuers?

No. VII.

Farr v. *Williams*,—14*th February* 1845.

It being admitted that the pursuer was employed, and acted for some time as a commission agent for the defenders; and it being also admitted that a bill or promissory-note for £53 : 16s. was taken by the pursuer from Messrs Robertson and Ewan, merchants, Glasgow, dated 17th March 1842, and payable two months after date, which bears to have been dishonoured,

1. Whether the pursuer paid or retired the said bill to the extent of £33, or thereabouts, for behoof of the defenders? and Whether the defenders are resting-owing to the pursuer the said sum, or any part thereof, with interest as libelled?

2. Whether the defenders are resting-owing to the pursuer in the sum of £24 : 3 : 11, or any part thereof, with interest as libelled, as the balance due to him on his account for commission against them?

No. VIII.

Muirs v. *Muirs*,—1*st July* 1830.

It being admitted that in the month of September 1823, the pursuer shipped from the Clyde 311 bags of coffee, and 298 bags of coffee in the month of November 1823,

Whether the said coffee, or any part thereof, was consigned to the defenders, or either of them, as commission agents at Malta? and Whether the defenders, or either of them,

wrongfully failed in their duty as commission agents aforesaid, and are indebted and resting-owing to the pursuers in the sum of £1,390, 5s. sterling, or any part thereof, as balance of the price or value of the said coffee?

No. IX.

Lawson, &c. v. *Cross & Co.*—*23d June* 1836.

It being admitted that, during the years 1825 and 1826, the pursuers transmitted to the defenders, as commission agents in South America, certain cotton goods, to be there disposed of for behoof of the pursuers,

Whether the defenders wrongfully acted contrary to the instructions of the pursuers, or in violation of their duty as commission agents, in the management and disposal of the said goods, to the loss, injury, and damage of the pursuers?

Whether the defenders are indebted and resting-owing to the pursuers in the sum of £6,000, or any part thereof, with interest thereon, as the balance due to the pursuers on account of the said goods?

Damages laid at £6,000.

No. X.

Graham & Co. v. *Mackay*,—16*th May* 1828.

It being admitted that on the 11th day of June 1824, the defender consigned to the pursuers for sale, 480 bolls of grain, shipped on board the sloop "Jean," and 471 bolls

on board the sloop "Sisters" of Gardenstone, and on the 9th day of July 1824, 507 bolls on board the "George" of Gardenstone;

It being also admitted that on the said 11th day of June 1824, the defenders drew two bills upon the pursuers, one for the sum of £450, and the other for the sum of £400; and on the 9th day of July 1824, another bill for the sum of £500, all on the credit of the said shipment, and that the said bills were accepted and afterwards paid by the pursuers;

It being also admitted that the said grain sold for the sum of £1,435 : 9 : 5, which was received by the pursuers,

Whether the defender remains indebted and resting-owing to the pursuer in the sum of £141 : 16 : 2, or any part thereof, upon account of the said transactions?

Or,

Whether the pursuers wrongfully failed in their duty as consignees in the management, and disposal, and sale of the said grain?

No. XI.

Smith v. *Leech*,—19*th February* 1847.

It being admitted that the pursuer, in the employment and on behalf of the defender, purchased a tenement which is situated at the corner of West George Street and Buchanan Street in Glasgow, and that the sum of £100 has been paid to the pursuer by the defenders, as vouched by the document No. 36 of process,

Whether the defenders are resting-owing to the pursuer the sum of £150 sterling, with interest thereon, from the 11th day of November 1845, or any part thereof, as the

balance of his commission or remuneration in the said transaction?

No. XII.

Dowie's Trustees v. *Aitchison, &c.—2d June* 1836.

It being admitted that the late William Dowie was proprietor of certain heritable property situate in East Register Street, Edinburgh, and that, by trust-disposition and settlement of date 29th January 1808, he appointed the late John Aitchison and others, trustees for the management of, and with power to sell the said property,

Whether, between the 1st day of November 1816 and the 1st day of June 1817, in violation of his duty as trustee, the said John Aitchison, for the purpose of acquiring right to, or interest in the said property, by himself or another, wrongfully and fraudulently sold the said property to the defender William Aitchison, baker in Haddington, to the loss, injury, and damage of the pursuers?

Whether, in violation of his duty as trustee, the said John Aitchison, between the said 1st day of November 1816 and 1st day of June 1817, wrongfully sold the said property at an under value, to the loss, injury, and damage of the pursuers?

Whether the defenders, William Aitchison, baker in Haddington, George Ritchie, and John Richard, or any of them, knowing the nature of the said transactions or either of them, wrongfully and fraudulently aided and assisted the said John Aitchison in carrying into execution the said transactions or either of them, or participated in the same, to the loss, injury, and damage of the pursuer?

Whether, between the 1st day of November 1816 and the 1st day of June 1817, the said John Aitchison, in violation of his duty as trustee aforesaid, by himself or another, or others, purchased the said property? and Whether the said William Aitchison, baker in Haddington, defender, knowing that the said John Aitchison had purchased the property as aforesaid, between the said days, wrongfully purchased the aforesaid property from the said John Aitchison, to the loss, injury, and damage of the pursuer?

No. XIII.

Ogilvie v. *Muir, Chalmer's Trustee*,—11*th June* 1841.

It being found, by an Interlocutor of Lord Moncreiff, dated 20th March 1840, now final, that the pursuer is proprietor of certain subjects in the Canongate of Edinburgh, and that the defender William Muir having, as trustee for David Chalmers and his creditors, taken and held possession of the property, in virtue of a title which has been reduced, as having been fraudulently obtained by the said David Chalmers, is personally liable to account to the pursuer as the lawful proprietor for all the rents thereof not admitted to have been previously accounted for to the pursuer, which it can be shewn that the defender might by ordinary diligence have recovered,

Whether the defender wrongfully failed to use ordinary diligence to recover all or any of the said rents from Whitsunday 1828 to Whitsunday 1832, or collected all or any of the same, and is indebted and resting-owing to the pursuer in the sum of £232, 4s., or any part thereof, with interest thereon, as the amount of the rent of the said property during the said period?

No. XIV.

Mackenzie v. *Cameron*,—*24th February* 1844.

It being admitted that the defender John Cameron was named as trustee under the trust-deed No. of process, now revoked,

Whether the said defender acted as trustee under the said deed? and Whether, by the wrongful act or acts of the said defender, or by the wrongful act or acts of others done with his consent, privity, or knowledge, or by the gross and culpable negligence of the said defender, the sum of £1,550, or any part thereof, has been lost and is now irrecoverable? and Whether the said defender is addebted and resting-owing to the pursuer in the said sum, or any part thereof?

No. XV.

Home v. *Menzies*,—*20th July* 1844.

It being admitted that James Home, sometime of Linhouse, now residing in London, the said William Menzies, and Alexander Robertson, Writer to the Signet, accepted and acted as trustees of the late Mrs Catherine Home, widow of the deceased James Home of Linhouse;

It being also admitted that the pursuer, Captain John Belshes Home, is a beneficiary under the trust of the said Mrs Home,

Whether, on or about the 2d day of March 1833, the defender wrongfully, and in contravention of his duty as

trustee, allowed the sum of £4,375 or thereby, being part of the trust-estate, to fall into and thereafter remain in the hands of the said Alexander Robertson, without taking any security therefor, to the loss, injury, and damage of the said trust.

Damages laid at £1,275, with interest thereon.

No. XVI.

Stewart v. *Rae Wilson*,—16*th December* 1836.

It being admitted that by certain deeds of settlement dated in the years 1792, 1802, and 1803, the late John Wilson of Kelvinbank, conveyed his property to trustees for behoof of the defender, under the burden of £1,000 to the pursuer Mrs Stewart in liferent, and her issue in fee; and that on the 19th March 1810, the said trustees conveyed the said property to the defender;

It being also admitted that, on the 14th May 1810, the defender, as proprietor of the said lands, granted an heritable bond over the same to himself and others as trustees, in security to the said Mrs Stewart in liferent, and her issue in fee, of the said sum of £1,000,

Whether, on or about the day of , the defender, as sole surviving trustee to whom the said bond was granted, wrongfully renounced and discharged the said bond, to the loss, injury, and damage of the pursuers, or any of them?

No. XVII.

Inglis v. *Robertson's Creditors*,—27*th January* 1846.

It being admitted that, on the 22d of June 1839, the whole estates, heritable and moveable, of John Robertson,

senior, woollen manufacturer in Stirling, were sequestrated by the Lords of Council and Session, in terms of the Act of the 54th year of the reign of his late Majesty George the Third, cap. 137, and that the pursuer was duly elected interim factor, and afterwards trustee on the said sequestrated estates;

It being further admitted that, on the 30th September 1839, an action was raised against the Port-Eglinton Spinning Company, and the individual partners thereof, for enforcing restitution and re-delivery from them to the pursuer of certain yarns, as the said action more fully instructs;

It being further admitted that Defences were put in for the Port-Eglinton Spinning Company to the said action, and various proceedings had therein, and that, on the 27th of January 1842, the Lords of the Second Division of the Court assoilzied the said Company and the partners thereof from the said action, and found the pursuer, as trustee foresaid, liable to them in expences,

1. Whether the pursuer employed law agents in Edinburgh and Glasgow to conduct the said proceedings, and has incurred accounts to them for the expences thereof, amounting, as taxed, to the sum of £349 : 4 : 3½, whereof there has been paid £150, leaving a balance due amounting to £199 : 4 : 3½?

2. Whether he has paid to the said Port-Eglinton Spinning Company the expences awarded to them by the judgment of the Second Division of the Court before mentioned, amounting to the sum of £232 : 13 : 4?

3. Whether the defenders, or any of them, authorised and instructed the pursuer to institute and carry on the said action and proceedings, or knew of the same, and acquiesced in or approved thereof? and Whether they, or any of them, are now indebted and resting-owing to the pursuer in the amount of the said sums, or any part thereof?

No. XVIII.

Robertson v. *Commercial Bank*,—18*th November* 1846.

It being admitted that the pursuer is trustee for the creditors of the Earl of Fife under the trust-disposition dated the 11th day of November 1825 ; that the disposition No. 9 of process, was granted by the Earl of Fife to his brother General Duff, and that the assignation, No. 4 of process, was granted by the said General Duff in favour of the Commercial Bank,

1. Whether, on or about the 20th April 1826, the Commercial Bank sold to Alexander Buie, inn-keeper, Fochabers, certain portions of the Braemar Woods contained in the said disposition and assignation, at the price of £8,450, payable at the periods mentioned in the Articles of Roup, No. 324 of process ? and Whether a balance of £2,059 : 9 : 9, or any part thereof, of the said price, remains unpaid, with interest from the 7th day of May 1832 ?

2. Whether, on or about the 7th day of May 1827, the said Commercial Bank sold to the said Alexander Buie a further portion of the said Woods at the price of £4,250, conform to Articles of Roup, No. 324 of process ? and Whether a balance of £3,886 : 9 : 2, or any part thereof, of the said purchase of wood remains unpaid, with interest from the 7th day of May 1832 ?

3. Whether the Commercial Bank of Scotland, or those acting for them, and for whom they are responsible, in violation or neglect of their duty as acting under the said disposition and assignation Nos. 9 and 4 of process, wrongfully failed to recover the said sums of £2,059 : 9 : 9, and £3,886 : 9 : 2, with interest, or any part thereof, and are

indebted and resting-owing in the said sums, with interest, or any part thereof, in account with the pursuer?

N.B.—These Issues were given by the clerks, but the case was compromised before they were approved of by the Lord Ordinary.

No. XIX.

M'Grigors v. *Ord*,—*24th June* 1830.

It being admitted that, on or about the 30th day of May 1827, George Ord, accountant in Glasgow, as trustee upon the sequestrated estates of John M'Grigor and Company, calico printers at Kelvinhaugh, and John M'Grigor, John M'Grigor, junior, and John Clerk, the individual partners of the said company, exposed to sale in Glasgow certain heritable subjects at Kelvinhaugh; and it being farther admitted that at the said sale the said subjects were purchased by John Borrowman, writer in Glasgow, in trust,

Whether the said John Borrowman made the said purchase in trust and for behoof of the pursuers James and Alexander M'Grigor, or either of them?

Whether the said John Borrowman made the said purchase in trust and for behoof of the said John M'Grigor, junior?

No. XX.

Macdonald v. *Macdonald*,—*24th January* 1844.

It being admitted that Donald Macdonald, sometime tacksman of the inn and farm of Auchnanault, Ross-shire, now deceased, executed the trust-disposition and deed of settlement dated 26th May 1842, No. 11 of process,

1. Whether the valuations Nos. 12, 13, 14, and 15 of pro-
[illegible] were duly and justly made, in terms of the said
trust-disposition and deed of settlement?

2. Whether the means and estate of Donald Macdonald,
as at the date of his death, exceeded the sum of
£[illegible] 7 [illegible], and in what extent?

PART XXII.

REDUCTION OF DEEDS,

INCLUDING

REDUCTIONS ON DEATH-BED—GENERAL AND SPECIAL ISSUES IN REDUCTIONS—INSANITY—FACILITY AND CIRCUMVENTION—FORGERY—DEFECT OF STATUTORY SOLEMNITIES—FRAUD—ERROR—FORCE AND FEAR—MINORITY AND LESION—PACTUM ILLICITUM—REDUCTION OF DECREES, ETC.—ISSUES FOR DEFENDER, AND IN COUNTER-ACTIONS.

Reductions on Death-bed.—The Form No. I is given by the Lord Chief-Commissioner as having been settled "after a full consultation with the Judges of the Jury Court," as a good general Issue to try the question of death-bed, and it has since uniformly been followed in practice, and has been found well adapted to try all subordinate questions arising under this general head. It was decided in the case of *Hardie* v. *Macall*, February 13, 1847, that under the general Issue as above, the defender may prove that the party was at kirk and market, that being a legal exception to the plea of death-bed, and not requiring a Counter-Issue.

The Form No. II arises in an action of declarator by the party desirous of maintaining the settlements, and who therefore undertakes the burden of proving that the granter was *not* on death-bed at the date of their execution. It was held in the case of *Macdougall* v. *Gordon*, 9 Sh. 392, where a reduction by the heir-at-law on the head of death-bed, and a declarator of *liege poustie* by trustees were conjoined, that the pursuer of the reduction should stand as pursuer

at the trial, where therefore the Issue would be in the form of the Example No. I.

The general Issue, Whether the instrument under reduction is not the deed of the granter! has no place in the question of death-bed, since the heir-at-law alone can use that ground for setting aside a deed, and that only so far as it affects heritage. In other respects the deed is good, and it further affords a good defence to a reduction that the deed was not to the prejudice of the heir, as for instance, if he had been excluded by a previous deed not revoked, or if the deed was granted for onerous causes. This defence furnishes a Counter-Issue in No. III, but these points can seldom be matter for evidence before a Jury, and arise on written documents, and are usually disposed of as questions of law.

The heir may homologate the deed, and a Counter-Issue on that fact may arise, as in Example No. IV; or he may by special agreement give up his right of challenge. An averment of such agreement was made in *Richardson* v. *Richardson*, March 8, 1848, and the Lord Ordinary, in respect thereof, approved of a Counter-Issue, but it was disallowed by the Court on the ground that the record set forth no relevant case of completed agreement; it was observed on the Bench, that although it is generally convenient to have a verdict of a Jury on the facts, before deciding on the questions of law regarding such an agreement as was here alleged, yet where the leading case is reduction of a deed, it is important to examine the relevancy first, because the trial of such an Issue being a bar to challenge, must delay the trial of the Issue of reduction. It would appear therefore, that such a Counter-Issue would be tried before the pursuer's Issue, and not simultaneously with it.

General and Special Issues in Reduction.—The general Issue to set aside a deed was first settled in the leading case of the Earl of Fife's settlements, noticed *ante* p. 6. Under

the remit from the House of Lords in that case, the Issue, Example No. V, was settled to try the ground of reduction, that the granter being blind, but accustomed to sign his name, and having subscribed without notaries, the deed was not read over to him, or was not proved to have been so. It would appear, that any ground of reduction inferring nullity of the deed might be tried under this general Issue, Whether it is not the deed of the party? But this must be taken with limitations; and it is the more recent practice to take a general Issue on each special head of reduction, reserving the general Issue of reduction for the case of insanity or total imbecility alone. The advantage of this is peculiarly evident on considering the case of several grounds of reduction in the same action. The Lord Chief-Commissioner, in recommending the general Issue even in this case, is obliged to propose, Practical Treatise, p. 40, that the Jury should indorse on their verdict the particular ground on which they have gone—a course evidently attended with inconvenience, not attaching to the use of a general form of Issue for each head of reduction. The progress towards this view will appear in noticing the several grounds of reduction in their order.

Insanity—Facility and Circumvention.—The only appropriate Issue in cases where a deed is sought to be set aside on the ground of insanity or mental imbecility is the general question, Whether it is not the deed of the party?—*Stewart* v. *Boyes*, M'F. *J. R.* 27; *Pollok* v. *Pollok*, July 4, 1845; *Waddell* v. *Hope*, June 29, 1844, and July 12, 1845. A verdict for the pursuer on such an Issue is warranted by proof of intoxication to such an extent as to have caused for the time total incapacity, *Duncan* v. *Martin*, M'F. *J. R.* 278; *Grant* v. *Lauder*, 4 Murr. 580.

The earlier practice was to try questions of facility and circumvention under the general Issue, as in the Dundonnell Case, *M'Kenzie* v. *Roy*, 5 Murr. 257; but in *Jaffray* v. *Simp-*

son's Trustees, 12 Sh. 241, after a consultation of the whole Judges, it was considered better to try the question of facility, combined with fraud and circumvention, under a separate Issue, applicable to that head, as in Examples Nos. VII and VIII; and that case has regulated the subsequent practice. The Lord Ordinary (Moncreiff), in reporting the case, stated as his view, that "when the ground of reduction did not infer nullity, but only that the deed was reducible, it was incorrect and contrary to principle to put that Issue, which the Jury could not truly answer in favour of the pursuer, seeing the deed was the deed of the party, though voidable;" and he further "stated, as the result of his own personal experience at the bar, that he had always found under a general Issue like the present, that when Counsel for the pursuer, he had suffered disadvantage not consistent with the justice of the case; and when for the defender, he had a most undue advantage from the form of the Issue." It was observed by the Lord Chief-Commissioner on the case of *Bathurst* v. *Mackenzie*, 1834, Pract. Tr. p. 59, 60, that "fraud *and* circumvention" was improper, as either, combined with facility, is sufficient to set aside a deed, and the disjunctive *or* is now always used. The Lord Justice-Clerk, in *Home* v. *Hardy*, March 30, 1842, observed that the words "prevail on" were improperly used in the Issue, instead of the more usual style "procure" or "obtain." Prevail on, seems to imply fair argument and persuasion.

In *Suttie* v. *Ross*, M'F. *J. R.* 25, and 16 Sh. 1108, the question was stirred, Whether the Issue should have borne the granting of the deed to be "to the lesion of the *pursuer*" or "of the *granter*," where the latter was dead and the representative pursued? The practice appearing to be in favour of the latter form, it was retained, and is still the usual style, although both the Lord President and the Lord Chief-Commissioner on that occasion appear to have disapproved of it.

Forgery and defect of Statutory Solemnities.—The general Issue has been employed where forgery is the ground of reduction, as in *Graham* v. *Johnstone*—M'F. *J. R.* 140—although the usual course now is to take the Issue, Whether the signature is not the genuine hand-writing of the alleged granter of the writing? as in Examples XII, XIII, and XIV. The general Issue may be the most appropriate, where it is alleged that a writing has been superinduced above a genuine signature improperly obtained. The subject of the Issue when Bills are alleged to be forgeries, has been considered above, p. 199, 200.

The general Issue is also appropriate to try the question of want of Statutory Solemnities, because, without these, the law will not regard the writing as the deed of the party. It was so used in *Macdougall*, 5 Murr. 106, and *Mason* v. *Merry*, 5 Murr. 306, and in *Stevenson* v. *Wallace*, M'F. *J. R.* 228, where the signature of one of the instrumentary witnesses was proved to be a forgery; in *Cuninghame* v. *Spence*, 3 Murr. 402, where one of the instrumentary witnesses was blind; and in *M'Dowall* v. *Campbell*, M'F. *J. R.* 100, where the granter was unable to write, and in place of signing by notaries, her hand was led. The Fife Case itself was an illustration under this head; but in the case of *Reid's Trustees v. Reid*, 13 Sh. 1063, where the question was somewhat similar, regarding the extent of blindness, and the necessity of having had notaries, the special Issue, Example No. VI, was sent to trial. It was held "that the case was not in a proper state for trial by Jury under a general Issue," and Lord Glenlee observed that "the judgment of the House of Lords in Lord Fife's case gives no countenance to the idea that a man totally blind can legally sign without notaries; but only, that one in the situation of Lord Fife, could and ought to subscribe his own deed." In Example No. X also, the question is special, Whether the deed under reduction was "not duly tested?"

Fraud—Error—Force and Fear.—A deed or bargain of any kind is voidable on the ground of fraud, *dans locum contractui*, but the Jury cannot be asked to say that it is not the deed of the party, which it is, although liable to be set aside. The question therefore is, Whether the document was procured to be signed, or consent to a transaction obtained through "false and fraudulent representations or fraudulent concealment?" as in Example No. XV; by "fraud or fraudulent misrepresentations," as in Example No. XVI; by "misrepresentations," as in *Stewart* v. *Fraser*, 5, Murr. 166; by "fraud, deceit, or misrepresentation," as in *Hill* v. *King*, 5 Murr. 151; "fraudulent misrepresentations or fraudulent concealment," as in *Kirkpatrick* v. *Douglas*, Mar. 5, 1847; the Issues in which case were approved of by the First Division after a discussion; "undue concealment or deception," in *Railton* v. *Mathews*, Jan. 27, 1844, and on Appeal, 3 Bell, 56, where it was held in the House of Lords that a bond of caution may be vitiated by undue concealment alone, or "non-communication of material facts," without proof of the fraud or wilful concealment implied in the term "deception." In *Foggo* v. *Hill & Co.* July 7 and 11, 1840, where a double sale was alleged, the Issues were of a special nature.

The Issue to be taken when essential error is the ground of reduction, is well illustrated by the Examples Nos. XVII and XVIII, the former of which went to trial; see *Murray* v. *Murrays*, Jan. 16, and Feb. 12, 1839.

No Issue appears to have been framed in a case where force or fear is founded on to set aside an instrument, that ground apparently not having been relied on in *Mason* v. *Merry*, 5 Murr. 306. Following the principle of the case of *Jaffray* v. *Simpson*, *ut supra*, the correct Issue would probably be the question, not Whether it was not the deed of the party granting it, but, Whether it was obtained by constraint and force, or by threats of personal violence, or injury to the granter or his near relations?

Minority and Lesion.—When it is thought expedient to send cases under this head to a Jury, the point chiefly to be attended to is, that lesion must be proved, and therefore is always put in the Issue; so that the defender may, under the pursuer's Issue, prove that the deed granted, or money advanced, was *in rem versum* of the minor, as in *Dempster* v. *Potts*, 15 Sh. 364. The defence, that the minor was engaged in trade on his own account, and granted the deed in the course of it, and those of homologation after coming of age, and of non-challenge during the *quadriennium utile*, afford Counter-Issues, as in Examples No. XIX and XX, and in *Dempster*, *ut supra*. In many cases the Court consider the evidence without the assistance of a Jury, *Sinclair* v. *Brown*, March 10, 1841, and *M'Michael* v. *Barbour*, Dec. 17, 1840.

Pactum Illicitum.—Example No. XXI is the style of Issue in a reduction under the Act of Queen Anne, which annuls securities for money won at play, and went to trial, resulting in a verdict for the pursuer, *M'Laine* v. *Cooper*, February 4, 1846. In *Graham* v. *Ferrier*, 6 Sh. 818, it was held that an onerous holder must be proved to have been in the knowledge of the true nature of the transaction, and accordingly the Issue was so drawn in that case; see *Graham* v. *White*, 5 Murr. 92 (Example XXII.) In *Hamilton* v. *Russell*, 10 Sh. 549, it was on the other hand held that a *vitium reale* attaches to the security even in the hands of a *bona fide* onerous holder. The effect of the Statute 5 and 6 Will. IV. c. 41, seems to be to establish the former view, and therefore the form of Issue since that Statute, Example No. XXIII, puts the question almost in the same terms as were used in the case of Graham.

When the ground of reduction is usury, it would seem that a special Issue, Whether more than the legal rate of interest was stipulated? is appropriate, but there is no more recent example than those in *Strachan* v. *Graham*, 2 Sh.

391 and 3 Murr. 434, and in *Glen* v. *Pentland*, Examples Nos. XXIII–IV.

In *Johnston* v. *M'Kenzie's Executors*, 14 Sh. 106, the Issue, Example No. XXV was prepared, where an annuity left by will was sought to be reduced, as granted or promised *ob turpem causam*. In *Robertson* v. *Ainslie's Trustees*, 15 Sh. 1299, the question put to the Jury was the existence of a corrupt stipulation or understanding as vitiating an assignation by a bankrupt to his cautioner for a composition.

Reduction of Decrees, &c.—A decree may be set aside on the ground that the defender was not duly cited to the action; for the form of Issue see Example No. XXVI, and *Kay* v. *Rodger*, 10 Sh. 831. In the report of *Neilson* v. *Leighton*, February 7, 1843, and February 9, 1844, will be found a form of Issue in a reduction of an instrument of protest as irregularly taken, and much discussion on the view taken of its terms by the Judges at two successive trials. Example No. XXVII is an instance of an Issue where the ground of reduction of a decree was the insanity of the defender at its date.

Decrees of constitution and adjudication were brought under reduction in *Gray* v. *Johnston*, M'F. *J. R.* 58, on the ground of fraud by the pursuer in obtaining them. The verdict of a Jury on a brief of idiocy was, in *Graham & Co.* v. *Newlands*, 3 Murr. 531, sought to be set aside on the ground that fraudulent means had been used to induce the Jury to cognosce, and an Issue of fraud went to trial. In *Currie* v. *Jardine & Currie*, 5 Sh. 838, a verdict cognoscing an individual, but finding a lucid interval on a particular day, was brought under reduction, on the ground that it was incompetent to find a lucid interval, and that that finding was contrary to the evidence. The Court conjoined this action with an action of reduction of the deed executed on the day in question, and held the verdict to be no bar to that reduction, and remitted both for Jury trial. The only

Issue in the conjoined actions appears to have been Example No. XXVIII, the affirmative of which, finding insanity "at the time" of execution, is not necessarily inconsistent with a lucid interval "on the day" of execution. The course to be followed where returns of service of heirs are sought to be set aside on the ground of being erroneous or contrary to evidence, will be subsequently considered under the head of Propinquity.

The usual ground of reduction of decrees-arbitral is corruption, and Examples Nos. XXIX and XXX illustrate the Issues required. One ground of reduction in *Macphersons* v. *Ross*, 9 Sh. 797, Example No. XXXI, was, that the arbiter had not heard parties, and the Court refused to alter the question, whether it was "wrongfully" into whether it was "corruptly" pronounced! on the principles laid down in *Sharp* v. *Bickerdyke* and other cases, that not hearing parties is of itself a ground of reduction without proof of corruption. Another ground of reduction in the same action, on which an Issue was taken, was fraud practised by one of the parties to the submission. In *Aitchison* v. *Sawers*, M'F. *J. R.* 1, an Issue of damage was taken on collusion in entering into and carrying on a submission which expired without decree.

Issues for Defender and in Counter-Actions.—The defender may take an Issue on homologation, or on authority being given by a wife, independently of her ratification, as in Examples No. IX and X. In conjoined actions an Issue of resting-owing may arise, as in *Scott* v. *Bannerman*, March 22, 1847; or of repetition, as in Example No. XI. In the case of *Stewart* v. *Boyes*, M'F. *J. R.* 27, a counter-action was raised to set aside a deed of 1830, on the ground of subsequent revocation, whether the deed of 1834 attacked on the ground of imbecility should be set aside or not, and the Issue No. XXXII of the Examples was prepared. In *Macphersons* v. *Ross*, *ut supra*, where there were conjoined actions of reduction, and for implement of a decree-arbitral,

the Court held that the former, besides being first brought into Court, was necessarily the leading action, and therefore ordered the pursuers in it to stand as pursuers at the trial, and the defender in it took the alternative Issue of resting-owing. In *Morton* v. *Scott*, Mar. 1, 1844, there were two Issues, one of resting-owing, and another to reduce, on the ground of fraud, an agreement which, while unreduced, barred the petitory conclusions, and the Court appointed the Issues to be tried separately, and the second reducing the agreement to be tried first. In *Gray* v. *Johnston*, *ut supra*, the decree had been obtained on imperfect missives, and the defender of the reduction of the decree stood as pursuer of the leading Issue, which went to set up these. In *Graham* v. *Watt*, July 15, 1843, an Issue on the exception of *non valentia agere* was disallowed, and the exception repelled, there being no sufficiently relevant averments in support of it. In *Dow* v. *Henderson*, June 30, 1848, an action of reduction was brought of a deed of settlement which had been found torn in two parts. After discussion as to the proper form of Issue and the onus of proof, the Court sisted the case till the defender should bring a proving of the tenor; and it was observed by the Lord Justice-Clerk, that "the Issue, in whatever shape it is put, just comes to be a proper case for the Court in a proving of the tenor," and that he had a strong impression it was not a case for a Jury.

EXAMPLES.

No. I.

Strathern v. *Carmichael*,—*25th May* 1830.

It being admitted that the pursuer is heir-at-law to the late Peter Strathern, joiner in Crawford's Dyke, and that the said Peter Strathern died on the 6th day of January 1829,

Whether the trust-disposition and settlement, dated 8th December 1828, of which No. 5 of process is an extract, and sought to be reduced, was executed by the said Peter Strathern on death-bed?

No. II.

Lindsay v. *Johnston*,—*4th June* 1830.

It being admitted that a deed bearing to be dated 14th January 1821, and of which No. 14 of process is a copy, is holograph of the late James Spink, Lieutenant in the Royal Navy,

Whether at the time the said deed was executed, the said James Spink was not on death-bed?

No. III.

Thomson v. *Thomson*, *&c.*—11*th February* 1832.

It being admitted that the pursuer is heir-at-law of the late Robert Thomson, shipmaster in Aberdeen,

Whether the disposition, dated the 21st November 1814, sought to be reduced, is not the deed of the said Robert Thomson?

Whether on the said 26th day of November 1814, when the said deed was subscribed, the said Robert Thomson was on death-bed?

Or,

Whether the said deed was granted for onerous causes, and was not to the prejudice of the heir?

No. IV.

Gibson v. *Huttons*,—18*th January* 1828.

(After an Issue, Whether a certain Deed was not the Deed of Peter Gibson?)

It being admitted that the late David Gibson was the heir of conquest and of line to the said Peter Gibson,

Whether the said deed, dated the 2d day of September 1803, was executed by the said Peter Gibson on death-bed?

Or,

Whether the said David Gibson homologated the said deed, dated 2d September 1803?

No. V.

Earl of Fife v. *Earl of Fife's Trustees*,—9*th March* 1825.

Whether the instruments of trust-disposition and deed of entail, both dated the 7th day of October 1808, sought to be reduced, were not, or either of them was not, the deeds or deed of the Earl of Fife? and Whether the deed of alteration of the 12th day of November 1808, being, in law, a probative instrument, was not the deed of the Earl of Fife?

No. VI.

Reid v. *Reid's Trustees*,—22*d December* 1836.

It being admitted that on the 29th November 1822, 13th October 1825, and 16th April 1830, the dates of the deeds sought to be reduced, and prior and subsequent thereto, the late John Reid could write his name, and did, prior and

subsequent to the said dates, write the same upon various documents,

Whether, at the dates or date of all or any of the deeds sought to be reduced, the said John Reid was so blind as to be unable to read writing?

No. VII.

Allison v. *Allison*,—10*th February* 1848.

1. Whether the testamentary deed, No. 5 of process, bearing date the 16th day of July 1847, is not the deed of the now deceased Charles Cheyne Allison, whose signature it bears?

2. Whether, at the date of the said testamentary deed, the said Charles Cheyne Allison was weak and facile in mind, and easily imposed on? and Whether the defender, taking advantage of his said weakness and facility, obtained or procured the said testamentary deed by fraud or circumvention, to the lesion of the said Charles Cheyne Allison?

No. VIII.

Bryson v. *Bryson and Others*,—21*st February* 1845.

1. Whether the trust-disposition and settlement, of which No. 6 of process is an extract, bearing to be made and granted by the deceased Janet Bryson on 15th November 1842, is not the deed of the said Janet Bryson?

2. Whether, on or about the said 15th November 1842, the said Janet Bryson was in a weak and facile state of mind; and Whether the defenders, Jean Bryson, Mrs Dick or Marshall, and John Corbet, or any of them, taking

advantage of her said facility, did by fraud or circumvention, impetrate and obtain the said deed from the said Janet Bryson to the lesion of the granter?

No. IX.

Hamilton v. *Ronald*,—*8th June* 1842.

Whether the minute of ratification sought to be reduced, dated 10th January 1839, endorsed on the deed of agreement, No. of process, is not the deed of the pursuer Mrs Hamilton?

Or,

Whether the said deed of agreement also dated the said 10th day of January 1839, was entered into by the defenders, or either of them, with the authority and consent of the said Mrs Hamilton?

No. X.

Thomson v. *Annandale*,—18*th January* 1832.

It being admitted that in the year 1826, the Company carrying on business under the firm of Archibald Allardice and Co. became bankrupt, and that by the bond of caution, of which No. 4 of process is an extract, William Gracie as principal, became bound to the creditors for a composition on the debts due by said Company;

It being also admitted, that the said bond bears to be subscribed by the pursuer and defender as cautioners for the said William Gracie,

Whether the said bond is not the deed of the pursuer James Thomson?

Whether, under the alleged obligation in the said bond, the pursuer, on or about the day of paid to the

defender the sum of £400 or any part thereof? and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £400 or any part thereof, with interest thereon from the day of 1827?

Or

Whether, under the obligation in the said bond, the pursuer is indebted and resting-owing to the defender in the sum of £1,072 : 3 : 5¼, or any part thereof, with interest thereon from the day of .

No. XI.

Walker v. *Walker*,—*20th July* 1844.

(*Approved of by Second Division.*)

Whether the assignation and conveyance, No. 4 of process, is not duly tested?

Or,

Whether the said assignation and conveyance was adopted and homologated by the pursuer?

Or

Whether, on or about the 10th day of May 1838, when the said assignation and conveyance was granted, the pursuer was of weak and facile mind and easily imposed on? and Whether the defender, taking advantage of his said facility and weakness, did by fraud or circumvention procure and obtain the said assignation and conveyance, to the lesion of the pursuer?

No. XII.

Sim v. *Cruickshanks*,—*26th June* 1844.

Whether the name, "E. Sime," subscribed to the minute of agreement or writing No. 5 of process, is not the true and genuine subscription and proper hand-writing of the pursuer Mrs Elizabeth Sim?

Or,

Whether the pursuer homologated the said minute of agreement?

No. XIII.

Miln v. *British Linen Co.*—22*d May* 1847.

Whether, in the bill No. 123 of process, dated 1st November 1843, bearing to be drawn by Charles Durie upon, and accepted by Charles Thomson, Joseph Sanderson Esplin, and Alexander Miln, the name "Alr. Miln" adhibited thereto is not the genuine subscription of the pursuer?

No. XIV.

Macgregor & Co. v. *Commercial Bank of Scotland*,—19*th July* 1843.

It being admitted that the pursuers, prior to the 4th day of June 1841, kept a deposit-account with the defenders at their Branch at Glasgow,

Whether the name Robert Macgregor & Co. adhibited to the cheque or order for £3,500, No. 25 of process, is not the genuine signature of the pursuers? and Whether the defenders are indebted and resting-owing to the pursuers the sum of £476:7:7, or any part thereof, as the balance due on the said account on the said 4th day of June 1841, with interest as libelled?

No. XV.

Keith v. *Leighton*,—18*th February* 1832.

It being admitted that in the month of August 1826, the defender was proprietor of certain shares of the stock of

the Banking Company carrying on business under the name of the Montrose Bank,

Whether, on or about the 5th day of the said month and year, the pursuer was induced by the false and fraudulent representations, or the fraudulent concealment of the defender as to the credit and solvency of the said Company, to purchase one of the said shares?

Whether, on or about the 11th day of the said month and year, the pursuer was induced by the false and fraudulent representations, or the fraudulent concealment of the defender as to the credit and solvency of the said Company, to purchase one of the said shares?

No. XVI.

Summers, &c. v. *Fairservice,—7th December* 1841.

It being admitted that the pursuers obtained from the defenders a lease of a quarry, at Quarryhole, for ten years from Martinmas 1839,

Whether, on or about the 19th day of October 1840, the defender himself, or by another, by fraud or fraudulent misrepresentation, induced the pursuer to grant the deed No. of process, renouncing the said lease?

No. XVII.

Murray v. *Murray,—12th May* 1839.

Whether, in entering into and concluding the agreement No. 4 of process, dated the 13th December 1834, sought

to be reduced, the pursuer was under an essential error as to the substance of the said agreement?

No. XVIII.

Waddell & Husband v. *Waddell*,—*7th February* 1845.

It being admitted that the disposition No. of process, dated 6th April 1842, was granted by the pursuer Elizabeth M'Farlane Waddell, and her sister Ann Waddell or Glasgow, and William Glasgow her husband, along with the defender John Craig Waddell, in favour of the defender John Craig Waddell,

Whether the defender did, by fraud and circumvention, procure or obtain the said disposition, in so far as regards the following portion of the subjects comprehended within the same, viz. a stance or steading of ground, consisting of, &c. [description of subject.]

Whether the pursuer Elizabeth M'Farlane Waddell, in granting the said disposition, was under an essential error as to the subjects thereby intended to be conveyed, and understood that the disposition was not intended to embrace the stance or steading of ground built upon by John Waddell, as above described and referred to?

No. XIX.

Stewart v. *Cameron*,—*2d July* 1835.

It being admitted that the pursuer is heir of provision of the late Peter Lyon, and that on the 15th day of March

1831, the said Peter Lyon granted the two bills Nos. 4 and 5 of process, for the sums of £200 and £20 respectively,

Whether, at the time of granting the said bills, or either of them, the said Peter Lyon was a minor, and granted the said bills, or either of them, to his enorm lesion?

Whether the said bills, or either of them, were not, or was not the acceptances or acceptance of the said Peter Lyon?

Or,

Whether at the time the said bills, or either of them, were or was granted, the said Peter Lyon was engaged in trade, and granted the said bills in the course of, or for the purpose of carrying on the said trade?

Whether the said bills, or either of them, were or was granted in security of payment of a debt or debts due by the father of the said Peter Lyon? and Whether the said Peter Lyon viciously intromitted with the funds of his said father?

No. XX.

Philp v. *Pitcairn, &c.*—*20th June* 1838.

It being admitted that by a deed dated 14th August 1812, the late Robert Philp appointed the defenders and others as trustees, and tutors and curators for his children; it being also admitted that the pursuers are two of the said children, and that the pursuer William became major, being 21 years of age, on the 2d of August 1830, and that the pursuer Elizabeth became of age on the 2d May 1833,

Whether, on or about the 2d and 3d day of June 1826, during the minority of the pursuers, the defenders, or any

of them, wrongfully obtained from the pursuers, or either of them, the disposition No. 9 of process, to the enorm lesion of the pursuers, or either of them?

Whether, on or about the 11th day of August 1827, during the minority of the pursuers, the defenders, or any of them, wrongfully obtained from the pursuers, or either of them, the agreement No. 10 of process, to the enorm lesion of the pursuers, or either of them?

Whether, on or about the 8th, 9th, and 10th days of November 1832, during the minority of the said Elizabeth Philp, the defenders, or any of them, wrongfully obtained the disposition, of which No. 12 of process is an extract, from the said Elizabeth Philp, to her enorm lesion?

Whether the defenders, or any of them, wrongfully obtained from the pursuers, or either of them, the said deeds, or any of them, by fraud or misrepresentation, to the lesion of the pursuers, or either of them?

Or,

Whether the said William Philp, pursuer, did not challenge the disposition first aforesaid, and the agreement aforesaid, for more than four years after the said 2d day of August 1830, when he became of age as aforesaid?

Whether the pursuers, or either of them, homologated the said deeds, or any of them?

No. XXI.

M'Laine v. *Cooper*,—11*th March* 1845.

Whether the bond No. 38 of process was granted by the suspender Mr M'Laine, to the charger's cedent Mr

M'Leod of Rasay, being in consideration of money won by gaming at cards, in contravention of the Act 9 Anne, c. 14?

No. XXII.

Graham, &c. v. *Ferrier*,—11*th July* 1828.

(*After Prefatory Admissions.*)

Whether, at the time the said bonds, or either of them, were assigned as aforesaid, the said John White knew that the said bonds, or either of them, were granted by the said Sir John Lowther Johnston to the said William Cuninghame Cuninghame Graham, for money lost at play as aforesaid?

No. XXIII.

Ainslie v. *Sutton*,—11*th July* 1845.

Whether the bond dated 9th August 1832, No. of process, was made and granted, in whole or in part, for and in consideration of money won at play, or money alleged to be due in respect of losses at play? and Whether the bond charged on, No. of process, was granted in further security of the said gambling debt, or any part thereof, or of interest thereon? and Whether the charger acquired right to the debt alleged to be contained in and due by the said bond, dated 9th August 1832, No. of process, in the knowledge that the said debt, in whole or in part, was claimed as due for, and in respect of money lost at play? and Whether the pursuer is not indebted and resting-owing to the defender in the sum contained in the said bond, or any part thereof?

No. XXIV.

Glass v. *Pentland*,—*23d June* 1824.

It being admitted that by the bond under reduction, being a bond for £2,500 granted by Walter Stirling Glass pursuer, in favour of George Pentland defender, bearing date the 11th day of January 1813, it was stipulated that the pursuer should be bound to insure his life to the extent of the sums due in the bond, and pay the premium of insurance,

Whether the defender, under the pretext of becoming the insurer of the pursuer's life, charged for and obtained more than the legal interest of five per cent. on the bond in question?

No. XXV.

Johnstone v. *M'Kenzie's Executors.*

It being admitted that by a last will and testament dated 6th January 1829, of which No. 10 of process is an extract, the late John M'Kenzie appointed the defenders his executors; and that, by the said testament, he bequeathed to the pursuer an annuity of £200, payable by quarterly instalments, from the term of Candlemas 1829 after his decease; and that the said John M'Kenzie died on the 28th day of January 1829,

Whether the said annuity was bequeathed to the pursuer in consequence of a stipulation on her part, or agreement between the parties, as the consideration of her entering into or continuing a criminal intercourse with the said John M'Kenzie?

No. XXVI.

Leighton v. *Nicholson*,—11*th June* 1845.

Whether the Company of Leighton and Berrie were not legally and duly cited, in terms of the execution in process, bearing date 5th October 1841, to the action then raised at the instance of the defender against them, before the Sheriff of Forfarshire?

No. XXVII.

Easton v. *Thomson*,—16*th June* 1829.

It being admitted that on the 2d of August 1813, Andrew Easton subscribed a bill for the sum of £42 sterling, drawn by John Thomson, payable 12 months after date, and that on the 21st day of November 1821 decree was pronounced against the said Andrew Easton for payment of the said bill,

Whether on the day, and at the time the said bill was subscribed as aforesaid, the said Andrew Easton was insane?

Whether on the day, and at the time the said decree was obtained, the said Andrew Easton was insane?

No. XXVIII.

Currie v. *Jardine & Currie*,—5*th July* 1827.

Whether at the time the deceased Mrs Margaret Baldwin, subscribed the deed of settlement in process, bearing to be executed on the 2d June 1818, and at the time the said Mrs Margaret Baldwin subscribed the disposition

and deed of settlement, bearing to be executed on the 25th July 1825, the said Mrs Margaret Baldwin was insane? and Whether the said deeds were not, or either of them was not, the deeds or deed of the said Mrs Margaret Baldwin?

No. XXIX.

Henry v. *Burns, &c.—7th December* 1833.

It being admitted that on the 31st day of July 1829 the pursuer Lieutenant-Colonel Henry, and David Burns, writer in Perth, entered into the submission of which No. 5 of process is an extract, to John Millar and Harry M'Leod, writers in Perth, and that on the 3d day of June 1831, the said arbiters pronounced the decreet-arbitral, of which the said No. of process contains an extract,

Whether the said arbiters, or either of them, in pronouncing the said decreet-arbitral, were guilty of corrupt partiality?

No. XXX.

Fraser v. *G. Wright, &c.—5th July* 1836.

Whether in the year 1831, certain actions at law were in dependence between the pursuer and the defender Colonel Gordon; and Whether on the day of the said year, they agreed, by a minute dated 18th and 19th November 1831, to refer the same and all other matters then in dispute between them to the decision of the defenders, Thomas Guthrie Wright and Patrick Cockburn, as arbiters and referees, and did thereafter enter into the submission of which No. 43 of process is a copy?

Whether, on or about the 1st day of December 1831, the said arbiters accepted of the said submission, and pro-

ceeded to investigate the mutual claims of the parties? and Whether, on or about the 28th day of February 1833, the said arbiters, or either of them, contrary to their or his duty as arbiters or arbiter, did wrongfully and corruptly exact or require, and obtain from the parties to the said submission, or either of them, a written obligation dated 28th February 1833, of which a copy is contained on pages 3 and 4 of the summons, No. 75 of process?

No. XXXI.

Macpherson, &c. v. *Ross,—9th March* 1831.

It being admitted, that in the year 1825, the defender Ewen Ross became tenant of the farms of Gallovie and Loggan, in terms of the agreement No. 5-20 of process, and remained tenant of the said farms until Whitsunday and Martinmas 1829;

It being also admitted, that the pursuers became bound to pay to the defender the value of the stock left on the said farms by the defender, as outgoing tenant, and that the value of the said stock should be fixed by Duncan M'Laren and John Cameron as arbiters, and Ewen Cameron as oversman mutually chosen by the pursuers and defender,

Whether, by fraud and deceit practised by the defender, the said oversman was induced to pronounce the decreet-arbitral, No 12 of process?

Whether the said oversman wrongfully pronounced the decreet-arbitral, without hearing the parties on the matter submitted?

Or,

Whether, during the said year 1829, the said defender delivered to the said pursuer the numbers, kinds, and descrip-

tion of sheep stated in the schedule hereunto annexed; and Whether the pursuers, or either of them, is, or are indebted and resting-owing to the defender in the sum of £1371 : 4 : 5, or any part thereof, with interest thereon from Martinmas 1829, as the balance of the price of the said sheep?

No. XXXII.

Boyes v. *Boyes' Trustees*,—*2d December* 1837.

It being admitted that on the 11th October 1830, the late Robert Boyes executed the deed No. 20 of process, and on the 26th day of September 1831, annexed a codicil to the said deed;

It being also admitted, that the said Robert Boyes died on the 10th day of November 1834,

Whether the said deed and codicil, or either of them, had been revoked by the said Robert Boyes, and stood revoked at the time of his death?

PART XXIII.

BANKRUPTCY, INSOLVENCY, AND SEQUESTRATION,

INCLUDING

REDUCTION OF PREFERENCES UNDER THE BANKRUPT STATUTES —REDUCTION BY CREDITORS ON FRAUD AT COMMON LAW— QUESTIONS ARISING UNDER SEQUESTRATIONS.

Reduction of Preferences under the Bankrupt Statutes.—Several examples are given of the Issues required in Reductions under the Bankrupt Statutes, which afford little subject for remark. Those in No. II were settled by the Second Division after discussion, when it was held that the question of the onus of proving onerosity, or the want of it, in the circumstances, would remain open for the Judge at the trial, *Horne* v. *Hay*, February 12, 1847. In the case of *Anderson* v. *Walker*, March 29, 1842, the Jury, under the direction of the Lord Justice-Clerk, returned a special verdict, finding that the security, although granted within sixty days of bankruptcy, was in fulfilment of an express stipulation at the time the advances were made, which his Lordship held made the security good; but to save further trial, the law was thus separated from the fact. No. VII arises where the security was given for a future debt.

Reductions by Creditors on Fraud at Common Law.—Any deed or transaction by which the right of a Creditor is unfairly prejudiced is reducible at common law. Thus, if a factor and commissioner should, by fraudulent misrepresentations, induce other creditors to abstain from diligence

till his own security is completed, *Pearson* v. *Walker*, 13 Sh. 1188; or a debtor grant a draft without any real transaction, for the mere purpose of defeating the claims of just creditors, *Henderson* v. *Robb*, M'F. *J. R.* 171; or funds are provided by the insolvent indorsing bills not in the ordinary course of trade, that his bankers may be able to pay themselves by taking credit for a cheque, thereby giving them an undue preference, *Blincow's Trustees* v. *Allan and Co.*, 5 Murr. 231; 7 Sh. 124 and 753; 7 W. and S. 57, an Issue will be given for establishing the fact of fraud as available to set aside the transaction.

The nature of the fraudulent proceeding varies of course in each case, and the Issue must be adapted to the circumstances alleged. Examples will be found in Nos. VIII to XIV, and the second Issue in No. IV; and in the case of *M'Clelland* v. *Rodger and Co.* February 9, 1842, where some important discussions took place as to the rights of an indorsee of a Bill of Lading, and as to the granting of new trials. In No. IX it was alleged that delivery had been unfairly given by a buyer to a third party, in order to defeat the seller's right of stoppage *in transitu;* the result of three trials was against the buyer under the first two Issues, but under the third, in favour of the party who received delivery in *bona fide; Hastie & Co.* v. *Warden & Son*, December 13, 1848. In *Aberdeen Banking Co.* v. *Maberly &c.* 13 Sh. 827, Example No. XIII, a special verdict was returned on the facts, as the result depended on legal views. In *Wylie* v. *Smith and Hamilton*, 12 Sh. 903, Example No. X, reduction was sought of a discharge given, without onerous cause, to a brother, to the prejudice of a creditor holding decree. Examples No. XIV and XV are in cases of deeds granted in contravention of letters of inhibition. In the former case, *Smith* v. *Mackays*, 13 Sh. 323, the pursuer was the assignee of a trustee for creditors; in the latter, the inhibiting creditor was pursuer. It may be observed that several of the Issues under this head, enquire Whether the deeds, &c. were to the loss,

injury, and damage of the pursuer? This appears an incorrect or at least inexpedient phraseology; because, in general, it is only reduction which is sought, and not damages. When it is necessary, in order to set aside the deed, to prove injury by it to the pursuer, the more correct phraseology would be "to his hurt and prejudice," reserving the other expressions as appropriate where either damages are sought for a wrongous act, or where there are conclusions of damages for granting a deed or engaging in a transaction, over and above reduction and repetition of rents and profits.

A corrupt stipulation in a transaction for a composition is a ground for reducing an assignation forming part of it; *Robertson* v. *Ainslie's Trustees*, 15 Sh. 1299, Example No. XVI.

Questions arising under Sequestrations.—Examples No. XVII to XX illustrate the Issue where claims are to be insituted against the estate and trustee, as in *Hallilly* v. *Railton*, 5 Murr. 322. In *Taylor & Co.* v. *Sir Wm. Forbes & Co.* 4 Murr. 372, the question sent to the Jury was, Whether the trustee and creditors had undertaken a contract, and failed to fulfil it? In *Gordon's Executors* v. *Dunlop*, 3 Murr. 515, a trustee was found liable in damages for putting in force an incompetent decree which had been taken by the bankrupt. Another example of the trustee vindicating the estate is found in *Roberts* v. *Wallace*, July 28, 1842, and May 1, 1843, where the third Issue is against a creditor who having poinded goods within sixty days of bankruptcy, was resting-owing their value to the estate. No. XXII is taken to reduce a deed or writing as antedated. In *Johnston* v. *Law*, July 15, 1843, it was held that a trustee may object to an entry in the bankrupt's books, as being made fraudulently and on the eve of bankruptcy, without bringing a reduction.

In *Biggar* v. *Wright*, Nov. 19, 1846, an Issue was given to the cautioner for a defaulting trustee, when sued by a

creditor on his bond, Whether the pursuer had connived at the trustee's malversations? Example No. XXI is the Issue in *Inglis* v. *Gardner*, reported March 21, 1843, where a trustee petitioned to have the bankrupt's discharge annulled, under 1 and 2 Vict. c. 41, on the ground, that money had been given to one of the creditors for his concurrence. The Lord Justice-Clerk, at the trial, made the following observations:—"If the pursuer means to establish anything under this Issue, with regard to the 'facilitating' or 'obtaining' Gardner's discharge, I will not admit it. There is nothing beyond the 'concurring in' the discharge stated in the record, and the words 'facilitating' and 'obtaining,' though they occur in the 124th section of the Bankrupt Act are not contained in the 125th, which is the only one on which the pursuer has founded. A party is not entitled to go beyond the record, because there has been negligence in not objecting to the Issue. I see that the Issues are becoming loose, in consequence of the practice of parties giving in drafts, and consequently less care is taken in framing them."—The case of *Gall* v. *Watt*, 4 Murray 317, affords an example of an Issue in similar circumstances, under the Statute 33, Geo. III. c. 74.

EXAMPLES.

No. I.

Callan v. *Blake, &c.*—*18th February* 1846.

Whether the pursuer, at the date of the disposition No. 6 of process, was a just and lawful creditor of the said James Blake? and Whether, at the said date, the said James Blake was insolvent, and granted the said disposition without just and necessary cause to the defenders, conjunct and confident persons, contrary to the Statute 1621, c. 21?

No. II.

Horne v. *Hay*—*25th February* 1845.

It being admitted that William Hay, sometime carrying on business as a merchant and banker in Lerwick, and the Company sometime carrying on business there as merchants, under the Company-firm of Hay and Ogilvy, and as bankers, under the descriptive name of the Shetland Bank or Shetland Banking Company, of which the said William Hay was a partner, are bankrupt, and that their estates were sequestrated under the Bankrupt Act 2d and 3d Vict. cap. 41, on the 25th June 1842, and that the pursuer is trustee on said sequestrated estates for behoof of the creditors of the said William Hay, and of the said Firms or Companies, and is now pursuing a Reduction under the Act 1621, c. 18, and at common law, of the bond and disposition in security and instrument of sasine, Nos. 4 and 5 of process, and that the defender is the brother of the said William Hay,

1. Whether the said bond and disposition in security and instrument of sasine were executed, expede, and recorded respectively by the said William Hay, to and for behoof of the defender his brother, and of Andrew Hay, Junior, his son, conjunct and confident persons, without true, just, and necessary cause, and to the hurt and prejudice of prior creditors of him the said William Hay, and of the said Firms or Companies, the pursuer's constituents?

2. Whether the said infeftment on the said bond and disposition in security was expede and recorded in favour of the defender by or under the directions of the said William Hay, fraudulently, while the said William Hay was under no obligation to complete the said security, and to the hurt and prejudice of prior creditors of the said William Hay,

and of the said Companies or Firms, the pursuer's constituents?

No. III.

Royal Bank of Scotland, v. *Greenock Union Banking Co.*—*28th February* 1844.

It being admitted that the pursuers are creditors of John Sharp, and that by diligence at their instance, the said John Sharp was rendered legally bankrupt on 24th November 1842,

Whether, on or about the 7th day of October 1842, being within sixty days of his bankruptcy, the said John Sharp did make payment to the defenders the Greenock Union Bank, or to the defender Allan Fullerton, acting as their manager, of a sum of £500, or thereby, in contravention of the Statute 1696, c. 5, and in defraud of the rights of the pursuers as lawful creditors of the said John Sharp?

No. IV.

Stodart v. *North of Scotland Bank*,—*19th March* 1840.

It being admitted that on the 8th day of January 1838, the copartnery of Reid and Spark, and the individual partners thereof, were notour bankrupts, and that the pursuer, on the said 8th day of January, was a creditor of the said Company,

Whether, on or about the 23d day of December 1837 and the 26th day of December 1837, or either of them, and within sixty days of the said bankruptcy, certain sums, or a sum of money, were or was paid to, or placed to the credit of the defenders by the said Company, in satisfac-

tion of a prior debt due by them to the defenders, in preference to their other creditors, contrary to the Statute 1696, c. 5?

Whether the said sums, or either of them, were fraudulently paid to, or placed to the credit of the defenders by themselves, after they knew of the insolvency of the said Company? and Whether the defenders wrongfully retain the said sums, or either of them, to the injury of the pursuer?

No. V.

Johnston v. *Nairne, &c.*—*13th December* 1839.

It being admitted that on the 28th day of January 1837, the estate of James M'Leish, merchant in Auchtergaven, was sequestrated, and that the pursuer is trustee on that estate,

Whether, on or about the 9th day of December 1836, and the 6th and 14th days of January 1837, or either of them, and within sixty days of the said sequestration, the said James M'Leish, in violation of the Statute 1696, c. 5, wrongfully transferred all or any of the quantities of flax and tow, or either of them, specified in the schedule hereunto annexed, to the defenders, or either of them, in satisfaction or security of a prior debt due to them in preference to his other creditors?

No. VI.

Anderson v. *Leslie & Co.*—*6th February* 1844.

It being admitted that the estates of the said Houston and Potter, and Peter Houston and Robert Potter, the individual partners of that Company, were sequestrated on

the 11th day of March 1842, and that the pursuer is trustee on the said sequestrated estates,

1. Whether, on or about the 9th day of February 1842, the said Houston and Potter delivered to the defenders, and the defenders received from them a quantity of Arbroath pavement stones, in violation of the provisions of the Act 1696, c. 5, to the loss, injury, and damage of the pursuer?

2. Whether, on or about the said 9th day of February 1842, the defenders wrongfully removed, or caused to be removed, and took possession of the said quantity of pavement stones, the property of the said Houston and Potter, to the loss, injury, and damage of the pursuer?

No. VII.

Johnston v. *M'Culloch*,—16*th December* 1842.

It being admttted that James M'Bain, wright in Laurieston of Glasgow, was rendered bankrupt, and that his whole estate and effects were sequestrated under the Act 2d and 3d Victoria, cap. 41, on the 20th September 1839, and that the pursuer was subsequently appointed trustee upon the said sequestrated estates;

It being also admitted that on the 26th July 1839, and prior to the sequestration, the said James M'Bain was proprietor of certain heritable subjects at Kingston of Glasgow, and that on the said 26th July 1839, he granted a bond and disposition in security for the sum of £300, in favour of the defender, in virtue of which the defender was infeft, conform to instrument of sasine dated the 29th, and recorded in the General Register of Sasines kept at Glasgow, the 30th day of July 1839,

Whether the said bond and disposition in security was granted by the said James M'Bain to the defender, for relief or security of a future debt, to the amount of £2,400 sterling, or any part thereof, in violation of the Statute 1696, c. 5, and 54 Geo. III. c. 137?

No. VIII.

Stoppel & Son, v. *MacLaren & Co.*—21*st February* 1849.

It being admitted that the estates of the said John Martine, junior, were sequestrated under the Bankrupt Act, on 13th December 1847, and that the pursuer George Stoddart is trustee thereon;

It being also admitted that a cargo of linseed-cake was shipped at Memel by the pursuers Jurgen Stoppel and Son, for the said John Martine, junior, on board the ship "Union," and that the bill of lading thereof was sent by the said pursuers blank indorsed to the said bankrupt,

1. Whether, on or about the 17th November 1847, the said bill of lading was fraudulently, or without value, indorsed or transferred by the said bankrupt to, and received by the defenders, to the prejudice of the legal rights of the said Jurgen Stoppel and Son?

2. Whether, on or about the 17th November 1847, the said bill of lading was fraudulently indorsed or transferred by the said bankrupt, and received by the defenders, to disappoint the legal rights of the creditors of the said bankrupt?

3. Whether, on or about the 17th November 1847, or at any other time, within sixty days before the date of the said sequestration, the said bill of lading was indorsed or

transferred by the said bankrupt to the defenders, in security or satisfaction of a prior debt, contrary to the Act 1696, cap. 5?

No. IX.

Hastie & Co. v. *Johnston, &c.—2d July* 1846.

1. Whether, on or about the 17th June 1843, the pursuer sold to James Bowie and Company, merchants in Glasgow, 3,000 bags of sugar, at the price of £6,125 : 14 : 11, payable in cash on delivery?

2. Whether, on or about the 15th September 1843, the said James Bowie and Company wrongfully and fraudulently obtained from the pursuers an order for delivery of 1,216 bags of the said sugar, being No. 20 of process, without paying the price, or any part of the price thereof, upon the assurance and representation that they were ready to pay, and would pay the price upon receiving delivery, they well knowing that they were then in a state of insolvency, and approaching bankruptcy?

3. Whether, on or about the said 15th day of September 1843, the said James Bowie and Co. wrongfully and fraudulently indorsed and transferred said order of delivery to Warden and Son, and Warden and Son wrongfully and fraudulently accepted or received the said indorsation and transference, and obtained delivery of the said sugars without value or consideration, in the knowledge of the insolvency of the said Bowie and Co. for the purpose of defeating the pursuers' right of stoppage *in transitu*?

No. X.

Wyllie v. *Smith & Hamilton*,—*27th June* 1833.

It being admitted that Jean Wyllie or Hamilton has been found, by a decree of the Consistorial Court, the wife of the defender Hugh Hamilton, and that she has been found entitled to aliment from her said husband, and that the pursuer James Wyllie is the assignee of the said Jean Wyllie;

It being also admitted that the defender Hugh Hamilton granted to the defender John Hamilton the conveyance and discharge No. of process,

Whether the said deed was wrongfully and fraudulently granted by the said Hugh Hamilton, and wrongfully and fraudulently accepted by the said John Hamilton, with the fraudulent view and intention of defeating the just and lawful claims of the said Jean Wyllie, to the loss, injury, and damage of the said pursuer?

No. XI.

Bayne v. *Craigs*,—*7th December* 1847.

It being admitted that the assignation bearing date the 17th of December 1842, No. 5 of process, was granted by the defender James Craig, to the other defender Thomas Craig,

Whether the said assignation was granted and obtained through fraud and collusion on the part of the defenders, to the prejudice of the pursuer, as a just and lawful creditor of the said James Craig?

No. XII.

Stewart v. *Stewarts*,—17*th May* 1834.

It being admitted that the late Mrs Stewart, the mother of the pursuer and defenders, on the 16th day of September 1817, for onerous causes, executed in favour of the pursuer James Stewart, the deed No. 5 of process, by which she conveyed to the said James Stewart all the property which should belong to her at the time of her death, subject to the payment of debts, and legacies to the amount of £500;

It being also admitted, that after the death of the said Mrs Stewart, the defenders Misses Stewart, produced the receipt or obligation No. 24 of process, granted by one Rodney Myllins and his wife, for the sum of £200 sterling, dated London, 1st April 1826, blank indorsed by the said Mrs Stewart,

Whether in defraud of the said James Stewart's right under the said deed, the said Mrs Stewart, on or about the 7th day of August 1826, uplifted from the Perth Banking Company, and wrongfully delivered or wrongfully caused to be delivered to the said Misses Stewart, the sum of £500, contained in a deposit-receipt of the said Banking Company? and Whether the said Misses Stewart are indebted and resting owing to the said James Stewart in the said sum of £500, or any part thereof, with interest thereon?

Or,

Whether the said receipt or obligation for £200, as above described, was indorsed to, or is held by the said Misses Stewart for onerous considerations?

No. XIII.

Aberdeen Banking Co. v. *Maberley & Co.*—
22d February 1834.

It being admitted that on the 20th December 1831, John Maberley and Co. of Aberdeen, drew a bill upon their house in London, in favour of the pursuer for £456, of which payment was refused on the 2d of January 1832, when it became due;

It being also admitted, that on the 27th of December 1831, another bill for £900 was in like manner drawn on John Maberley and Company of London, in favour of the pursuer, of which payment was also refused on the 9th of January 1832;

It being also admitted, that on the 3d January 1832, the pursuers drew a bill or draft for £780 on Sir Richard Carr, Glynn, and Company of London, payable on the 16th January 1842, in favour of the said John Maberley and Co., of which bill the said Sir Richard Carr, Glynn, and Company, also refused acceptance; and it being admitted that on the 2d January 1832, the said John Maberley and Co. stopped payment,

Whether the last mentioned bill or draft for £780 was, on or about the 13th of January 1832, indorsed or delivered by the said John Maberley and Co. or by others acting for them, to the defenders? and Whether, when the pursuers received the said draft or bill, the stoppage of payment by the said John Maberley and Company was known to the defenders?

No. XIV.

Smith v. *Mackays, &c.*—*5th March* 1833.

It being admitted that the defender, Ewan Mackay, was a partner of the company of distillers carrying on business at Airdrie under the firm of Macintyre, Mackay, & Co., during the period when it carried on business as aforesaid;

It being also admitted that Alexander Galloway, agent at Airdrie for the National Bank of Scotland, was trustee for the creditors of the said company and the individual partners thereof, under the disposition No. 9 of process, and that the said trustee, on the 8th day of March 1831, conveyed the distillery and other property of the said company to the pursuer, by the disposition No. 25 of process,

Whether, on or about the 13th day of May 1830, letters of inhibition were executed against the said Ewan Mackay at the instance of one or more of his creditors, and published on or about the 15th day of the said month and year? and Whether, in violation of the prohibition contained in the said inhibition, the said Ewan Mackay granted the letter No. 4 of process, bearing to be dated 10th October 1829, to the injury and damage of the said creditors, or any of them?

No. XV.

Macfarlane v. *Macfarlane & Ure*,—*9th March* 1842.

It being admitted that, on the 8th day of June 1839, the pursuer executed letters of inhibition and arrestment against James Macfarlane, her husband, on the dependence of an action of separation and aliment then in dependence,

Whether the missive of sale No. 13 of process, was entered into by the defenders James Macfarlane and John Ure, wrongfully and collusively, for the purpose of defeating the pursuer's right under the said inhibition?

Whether the disposition No. 4 of process, was granted by the defender James Macfarlane, and accepted by the defender John Ure, in contravention of the pursuer's right under the inhibition used by her as aforesaid?

No. XVI.

Robertson v. *Ainslie's Trustees, &c.—28th February* 1837.

It being admitted that the pursuer Mrs Robertson is general disponee and executrix of the late Alexander Paterson Robertson;

It being also admitted that, about the month of November 1829, Robertson & Co., of which the said Alexander Paterson Robertson was the sole partner, became insolvent, and that the creditors of the company accepted of a composition of 8s. per pound on their respective debts;

It being also admitted that the late William Ainslie, and the defender John Ainslie, were then creditors of the said company, and that the said Alexander Paterson Robertson granted to them the assignation No. 5 of process,

Whether the said assignation was granted by the said Alexander Paterson Robertson, and accepted by the defender John Ainslie and the late William Ainslie, or either of them, in consequence or implement of a corrupt stipulation, agreement, or mutual understanding betwixt the said Alexander Paterson Robertson and the said William and John Ainslie, or either of them, that the debts then due to the said William and John Ainslie, or either of them, should be paid in full?

No. XVII.

Morton v. *Black*,—*2d December* 1842.

It being admitted that the defender is trustee on the sequestrated estate of William Morton, brother of the pursuer,

Whether, on or about the 19th day of January, or on or about the 27th day of April 1830, the pursuer advanced to, or paid for the said William Morton, the sum of £250? and Whether the defender wrongfully refuses to rank the pursuer for the said sum on the sequestrated estate of his said brother?

No. XVIII.

Thomson v. *Johnston*,—*8th December* 1841.

It being admitted that the defender is trustee on the sequestrated estate of the late Charles William Thornton Erskine, writer in Glasgow,

Whether, between the 2d day of May 1833 and the 12th day of June 1834, the said William Charles Thornton Erskine undertook an obligation to pay to the pursuer the sum of £200 sterling by equal instalments, at one two, and three years, from the said 3d day of May 1833? and Whether the defender, as trustee aforesaid, is indebted and resting-owing to the pursuer in the said sum of £200, or any part thereof, with interest thereon, from the respective terms above mentioned?

No. XIX.

Bennie v. *Thompson & Anderson's Trustees*,—*28th June* 1844.

It being admitted that the said James Anderson sold to the pursuer a number of trees growing on the estate of Gorthleck; and that on or about the 1st day of November 1841, being the date of the sequestration of his estates, there remained 2,137 of said trees undelivered, of which the defender, acting as trustee on the said sequestrated estate, has retained possession on behalf of the creditors, and that by Interlocutor of the Lord Ordinary, dated 20th May 1844, adhered to by the Court, it was found that the pursuer was entitled to claim the actual value of the said trees as at the date of the sequestration, and to be ranked along with the other creditors upon the said estate to that amount,

Whether at the date of said sequestration the said trees were of the value of £369: 18s. or thereabouts?

No. XX.

Roberts v. *Wallace & Douglas*,—*28th May* 1842.

It being admitted that the estate of Thomas Inches, sometime cattle-dealer at Beechhill, and tenant of the farms of Beechhill, Boatland, and Kempshill, was sequestrated on the 16th December 1837, and that the first deliverance of the Court on the petition for sequestration was on the 28th November 1837, and that the pursuer is trustee on the said sequestrated estate,

1. Whether after the date of the said first deliverance, the defenders, or either of them, took possession of, and in

whole or in part sold the farm-stocking and other personal effects, the property of the said Thomas Inches? and Whether in respect thereof, the defenders, or either of them, are indebted and resting-owing to the pursuer as trustee foresaid, in the sum of £1,000, or any part thereof, with interest thereon?

2. Whether, after the date of the said first deliverance, the said Thomas Inches was in right as tenant of all or any of the said farms? and Whether the defenders, or either of them, entered into possession of all or any of the said farms, and intromitted with, and appropriated the proceeds and profits thereof? and Whether, in respect thereof, the defenders, or either of them, are indebted and resting-owing to the pursuer in the sum of £1,000, or any part thereof, with interest thereon?

3. Whether, on or about the 6th day of October 1837, within sixty days of the date of the first deliverance, the defenders, or either of them, poinded certain turnips and farm-stocking, the property of the said Thomas Inches, on the farm of Beechhill? and Whether, under the 40th section of the Statute 54 Geo. III. cap. 137, the defenders, or any of them, are indebted and resting-owing to the pursuer, as trustee foresaid, in the sum of £42:10:11, or any part thereof, with interest thereon, as the proceeds or value of the said poinded effects?

No. XXI.

Inglis v. *Gardner*,—19*th January* 1843.

It being admitted that on the 17th of January 1842, the estates of James Gardner, perfumer in Glasgow, were seques-

trated, and that Malcom Inglis, merchant in Glasgow, was ranked as a creditor, and elected and confirmed as trustee on the said sequestrated estate;

It being also admitted that the said James Gardner, the bankrupt, on the day of , made an offer of a composition of 7s. 6d. per pound upon all the debts ranked upon the said sequestrated estates, and that the said offer was entertained and accepted of by his creditors, and reported to and confirmed by the Court; and that on the day of their Lordships pronounced an act and order discharging the bankrupt of all debts contracted prior to the sequestration,

Whether, within the city of Glasgow, and on or about the day of April 1842, the said James Gardner, the bankrupt, was personally concerned in, or cognizant of the granting, giving, or promising to Henry Burton, perfumer in London, a creditor ranked on the said sequestrated estates, or to another on his account, the sum of £13 : 7s., or part thereof, as a preference, gratuity, security, payment or consideration, to the said Henry Burton, for his concurring in, facilitating or obtaining the said James Gardner's discharge; or, time and place aforesaid, was personally concerned in, or cognizant of a secret or collusive agreement or transaction made and entered into by the said Henry Burton, or another on his account, for the payment of the said sum of £13 : 7s., or part thereof, for the object and purposes aforesaid, in contravention of the Statute 1 and 2 Vict. c. 41?

No. XXII.

Whitehead v. *Arnots*,—*23d February* 1844.

It being admitted that on the 2d September 1834, the estate of William Thomson, sometime writer and banker

in Kinross, was sequestrated under the Statute 54 Geo. III. c. 137, and that the pursuer is trustee on the said sequestrated estate,

Whether the receipt No. 4 of process is false in its date, and was granted by the said William Thomson subsequent to his sequestration, to the prejudice of the creditors on the said estate?

PART XXIV.

HERITABLE RIGHTS.

CHAPTER I.

BOUNDARIES AND POSSESSION OF LAND.

QUESTIONS of Fact arise frequently in written titles to property where the boundaries or extent of the subject conveyed are disputed. These are questions which are usually sent to a Jury. In *Fleming* v. *Baird*, Nov. 24, 1843, where a boundary depended on the position of a street, the House of Lords remitted to ascertain that fact, and the Issue given in Example No. III was prepared; No. IV is that prepared in *Richmond* v. *Inglis*, Feb. 23, 1842; a question similar to which went to a Jury in *Wilson* v. *Jamieson*, 4 Murr. 364. So also in *Gray* v. *Watson*, March 1, 1844, where the Issues, Example No. X, were prepared in the action of declarator; and in *Ure* v. *Anderson*, *&c.* 12 Sh. 494, Example No. I, where it was held that when boundaries and a measurement are set forth in the titles, the pursuer may prove a right within the specified boundaries to a greater extent than the measurement. In *Mitchell* v. *Wauchope*, July 9, 1842, the question was, Whether a road bounding a field conveyed, had been conveyed or reserved? and the Issues in Example No. IX were sent to trial.

Questions of Possession for the prescriptive period are frequently sent to a Jury when a right is to be vindicated

to subjects held under a clause of parts and pertinents; or where it is disputed whether the possession was exclusive, or in common with others. The latter was the question in *Henderson* v. *Gardyne*, 2 Murr. 333; and in *M'Kenzie* v. *Magistrates of Fortrose*, March 9, 1842, where the burgh claimed exclusive right, and the case turned on the character of the possession had by M'Kenzie's tenants, the Jury viewed it as having been allowed them only on the footing of their residence within the burgh, which included great part of M'Kenzie's lands.—See also Nos. XI and XIII.

Disputed right to exclusive property under a clause of parts and pertinents, with forty years' possession, gives rise to Issues as in Examples No. VI, XI, and XII, and to those in *Wilson* v. *Martin*, August 7, 1843. In *Christison* v. *Hope*, Nov. 1847, a discussion arose on the Issue, and the pursuer having set forth in his summons an exclusive right of property, and founded on sasines in 1712 and 1827, not expressly including the subject in dispute, with possession for forty years, was held bound, in order to make out his case, to take the Issue—Whether, "in virtue of the titles in process," he had had "exclusive" possession for forty years? His proposed Issue—Whether for forty years he had possessed, as part and pertinent? would have been improper, as not necessarily inconsistent with common rights of others or servitudes.—See particularly Lord Moncreiff's opinion. In *Campbell* v. *M'Neill*, Dec. 12, 1838, the Issue was directed to establish a march-line by possession for forty years.

In *Hunter* v. *Dodds*, 10 Sh. 833, the question arose in a division of commonty, Whether a piece of ground was part of the common or not? and an Issue on the possession for forty years was sent to a Jury, who found for the defender proprietor of the ground, on the charge of the Judge at the close of the pursuer's case, that it came to be a legal question, Whether the possession, which had been proved, gave a prescriptive right to the pursuer? and that in the opinion of the Court it fell completely short of that.

EXAMPLES.

No. I.

Ure v. *Spy.*—18*th June* 1833.

It being admitted that the pursuer is proprietor of certain portions of ground in the Village of Westerton of Tillicoultry, as described in the title-deeds No. 9 and 10 of process, and of certain houses built on one of the said portions of ground,

Whether a stripe of ground, about three feet in breadth, along the east side of one of the said houses running north and south, and about four feet in breadth along the north side of a tenement of houses running east and west, and about three feet in breadth along the east gable of the tenement last aforesaid, is included in the description in the said titles?

Or,

Whether the defender is proprietor of certain houses and a garden immediately adjoining to the said stripe of ground? and Whether, for forty years and upwards, or for time immemorial, the defender and his predecessors and authors have possessed all or any part of the said stripe of ground, as part and pertinent of the said garden?

No. II.

Brown v. *Magistrates of Edinburgh.*—28*th June* 1833.

It being admitted that, upon a piece of ground behind St Andrew's Church, extending to feet by feet, there was erected by the Magistrates of Edinburgh, predecessors of the defenders, a building which still remains

standing thereon, and which contains the room ordinarily used as the Session-house of the said church, and also a watch-house or cellar below the said room, and that the disposition No. 4 of process, by the late John Young, architect in Edinburgh, to the Magistrates of Edinburgh, predecessors of the defender, relates to the said piece of ground upon which, at the date of the disposition, the said building had been erected;

Whether the said watch-house or cellar was *not* comprehended as a part and portion of the subjects conveyed by said disposition?

No. III.

Fleming v. *Baird's Trustees*,—18*th July* 1844.

It being admitted that the defenders have right, under a contract of ground-annual, of date 25th November 1799, to a certain lot or piece of ground therein described, being part of the lands of Wester Common, lying in the barony parish of Glasgow, and belonging to the pursuer, on which lot or piece of ground there has been formed a garden, with a garden wall on the south of the said garden, and it having been found, by a judgment of the House of Lords, that "Baird Street, as delineated and set out in the map or plan bearing to be made by Mr Hugh Baird in 1799, and founded on by the said parties in the proceedings in the Court below and in this House, is to be considered and treated as the southern boundary of the lot or piece of ground comprised in the contract of ground-annual of the 25th November 1799,"

Whether the northern line of the said street, as delineated on the said plan would, if marked out in the ground, coincide with the line actually claimed by the defenders as the southern boundary of the said lot or piece of

ground, and if not, at what distance the northern line of the said street as delineated on the said plan would, if laid down on the ground, run from the said southern boundary actually claimed by the defenders for their said lot or piece of ground?

No. IV.

Richmond v. *Inglis*,—*24th January* 1844.

Whether the pursuer stands heritably infeft and seised, and is proprietor of the subjects described in the summons, lying on the north side of the street called London Street, within the burgh of Glasgow, including the piece of ground in dispute, in virtue of titles derived by progress from the Commissioners acting under the authority of the Act 1 Geo. IV, c. 88, entituled, *inter alia*, "An Act for opening certain streets, and otherwise improving the City of Glasgow;" and of the Act 5 Geo. IV, c. 69, entituled, "An Act to amend an Act of His present Majesty for opening a street from the Cross of Glasgow to Monteith Row?"

Or,

Whether the said piece of ground forms part of the public street constructed under the said Statutes, or either of them, and as such, was put under, and taken charge of by the Statute Labour Trustees, or other parties having the Statutory charge of the public streets in Glasgow, prior to the date of the said titles founded on by the pursuer?

No. V.

Smith v. *Mackintosh*,—*8th July* 1842.

(*Conjoined Actions.*)

It being admitted that the pursuer George Campbell Smith, is proprietor of the estate of Corrybrough, comprehending the lands of Raigbeg, Moreclune, Dalreach, Corrybroughbeg, Battanmore, and Tombreck, with the glen called Glenkirk of Corrybrough, with the muirs, marshes, and whole parts and pertinents thereof whatsoever, and that the defender Alexander Mackintosh of Mackintosh, is proprietor of the lands and estate of Pollachock, with parts, pendicles, and pertinents thereof, and that there is a portion of ground in dispute between the parties, consisting of about acres, bounded as follows, viz.—[boundaries,]

1. Whether the said disputed ground, or any part thereof, is contained in the title-deeds of the said George Campbell Smith and his authors?

2. Whether the said ground, or any part thereof, has been from time immemorial, or for forty years prior to the month of January 1840, possessed by the said George Campbell Smith, his predecessors and authors, in the said lands and estate of Corrybrough and others, or their tenants, as part and pertinent of his and their said lands and estate?

3. Whether the defender Alexander Mackintosh, between the 1st January 1840 and 3d September 1841, wrongfully trespassed upon the said ground as above described, or caused wrongful trespass thereon, to the loss, injury, and damage of the said George Campbell Smith?

Or,

[Three Issues for the defender the same as the above, *mutatis mutandis.*]

No. VI.

Mackenzie v. *Mackenzie*,—31*st May* 1844.

It being admitted that the pursuer Murdo Mackenzie, Esquire, is proprietor of all and whole the lands of, &c. and that there is a portion of ground in dispute between the parties, consisting of about 2,000 acres, bounded as follows,—[boundaries,]

1. Whether the said disputed portion of ground, or any part thereof, is contained in the title-deeds of the said Murdo Mackenzie, Esquire, and his authors?

2. Whether the said disputed portion of ground, or any part thereof, has been, from time immemorial, or for forty years prior to 12th December 1842, possessed by the said Murdo Mackenzie, Esquire, his predecessors and authors, in the aforesaid lands and subjects, admitted to be the property of the pursuer, as part and pertinent of his and their said lands and subjects, or any of them?

No. VII.

Stewarts v. *Fergusons*,—17*th December* 1842.

It being admitted that the feu-contract, dated 23d December 1837, and 2d and 3d January 1838, being No. of process, was executed by the pursuers and the defender; and it being also admitted that by the said feu-contract certain subjects, comprehending a piece of ground or yard situated in the Seagate of Dundee, were feued and disposed by the defender to the pursuers,

Whether the space or stripe of ground about 85 feet or thereby in breadth, and extending 500 feet or thereby southward from the said piece of ground or yard, to the line or space known by the name of Dock Street in Dundee, or any part thereof, is comprehended in, and conveyed by the said feu-contract? and Whether the defender has wrongfully failed to give possession to the pursuers of the said space or stripe of ground, or any part thereof, to the loss, injury, and damage of the pursuers?

Whether the pursuers were induced by the misrepresentation of the defender regarding the subjects to be conveyed, to enter into, and execute the said feu-contract, to the loss, injury, and damage of the pursuers?

Whether, in entering into and executing the said feu-contract, the pursuers were under an essential error as to the nature and extent of the subjects conveyed by the said feu-contract? and Whether the pursuers expended £3,000, or a part thereof, in ameliorating the said stripe or piece of ground? and Whether the defender is indebted and resting-owing to the pursuers the said sum of £3,000, or any part thereof?

No. VIII.

Berry v. *Dalgleish*,—*6th March* 1828.

Whether the rocks and land within flood-mark opposite to two acres of land, or thereby, lying east of Culdwill, disponed in a contract between Patrick Gordon and the Guildry of the town of Dundee in 1713 to the said Guildry, and the rocks opposite to other two acres of land or thereby, called Sea Craigland, disponed, in a contract between Gavin Hamilton and the said Guildry, also

in 1713, to the said Guildry, extended from the east march of Newport arable land so far to the eastward as certain rocks called Briggs, and comprehended the whole or any part of the said rocks called Briggs?

Or,

Whether the said Robert Dalgleish, and his predecessors and authors have, for forty years and upwards, possessed the said barren ground and rocks, or any part thereof, as their own property?

No. IX.

Mitchell v. *Wauchope*,—15*th February* 1842.

It being admitted that the pursuer is the proprietor of the mansion-house, and policy or pleasure-ground, and of certain other portions of the estate of Drum, and that the defender is proprietor of two portions of the said estate, the one called Easter Quarry Park, to the north, and the other called the Deer Park, to the east of the said property of the pursuer, with the exception of the coal and limestone under the said two parks;

It being also admitted that at or near the boundary of the said policy or pleasure-ground of the pursuer and Quarry Park of the defender, there is a path feet in breadth; and that during the year 1837, and prior thereto, there was a wall along the north side of the said path,

Whether the said path is comprehended within the bounds and marches of the said property of the pursuer, and is part and portion of the said property?

Whether the said wall was a mutual march fence between the said properties of the pursuer and defender? and Whether during the years 1838 and 1839, or either of

them, the defender wrongfully pulled down, or wrongfully caused to be pulled down, all or any part of the said wall, to the injury of the pursuer?

No. X.

Gray v. *Watson*,—*6th July* 1844.

(*Settled by Second Division.*)

1. Whether the gable or gables of the back portion of the properties of the pursuer and defender are not separate and distinct from each other?

2. Whether the said gable or gables form the wall of the Old Tolbooth, described in the titles of the defender?

3. Whether the gable or gables has or have for time immemorial, or for fifty years prior to 28th October 1842, been possessed by the said William Gray, his authors and predecessors, as his or their exclusive property, under reservation to the defender of his vents and fire-places, and laying his side walls to or against, and his roof to or upon the said gable or gables, as at present existing, in, to, or upon the said gable or gables?

No. XI.

Mackenzie v. *Munro*,—*26th February* 1830.

It being admitted that the pursuer Mrs Hay Mackenzie, is infeft in certain lands called Castle Cleod and Glenshingle, with parts and pendicles, and that the defender is infeft in the barony of Fowlis, which infeftment comprehends the

lands of Corrienafiole or Correfoel, and that the said properties of the pursuer and defender are contiguous to and bounded by each other,

Whether for forty years and upwards, or for time immemorial, the pursuer has had uninterrupted and exclusive possession of all or any part of a certain glen called Corrienafiole, bounded by a line which begins at or near the point where the burn Corrienafiole joins the burn of Alcorrynacoulach, and from thence runs south and east to the march between the property of the defenders Sir H. Munro and Mr Davidson of Tulloch, and from thence north-west and north along the top of certain hills, as wind and water shears, to a point called the Monument, and thence to another point called the Captain's Cairn, from thence south-east by Carnacailich or Carbris Know Locuch and certain stones to the point first aforesaid, where the burn of Corrienafiole joins the burn of Alcorrynacoulach?

No. XII.

Duffus v. *Feuars of Wick*,—*7th July* 1829.

It being admitted that the pursuer is proprietor of the lands of Wick, Papigo, Millton, and Newton, all in the parish of Wick,

Whether for forty years and upwards, or for time immemorial, the pursuer and his predecessors and authors, have had exclusive possession of the Hill of Wick, as part and pertinent of the said lands of Wick and Papigo?

Whether for forty years or upwards, or for time immemorial, the pursuer and his predecessors and authors, have had exclusive possession of the Moss of Kellin or Hayland, as part and pertinent of the said lands of Newton?

Whether for forty years or upwards, or for time immemorial, the pursuer and his predecessors and authors, have had exclusive possession of the Moss of Brenzie, as part and pertinent of the said lands of Millton?

No. XIII.

Ross v. *Tulloch*,—*26th January* 1847.

Whether the wall forming the south gable of the pursuer's house, situated in Church Street of Inverness, has for time immemorial, or for forty years and upwards prior to 1839, been possessed by the pursuer, his predecessors and authors, as the common and mutual property of him and of the proprietors of the premises situated to the south of the said gable?

No. XIV.

Christison v. *Hope*,—*20th November* 1847.

Whether the pursuer and his predecessors, in virtue of their titles in process, have for forty years and upwards, or from time immemorial, enjoyed the exclusive possession of a piece of ground or sea greens, near the village of Aberlady, and extending from the Turnpike road leading from Aberlady to North Berwick on the south, to the sea on the north?

PART XXIV.

HERITABLE RIGHTS.

CHAPTER II.

SALMON-FISHING.

A Right of Salmon-fishing is established either by express grant, or by a grant of "fishings," with proof of possession of salmon-fishing for the prescriptive period. In the former case, an Issue may arise of wrongful fishing by the defender, as in Example No. V; or the question for the Jury may be the limits of the place, such as a particular bay over which the right extends, as in No. I. In the latter case, the Issue for the Jury is on the question of possession for forty years, in virtue of the title, as in Nos. II, III, and the defender's Issue in No. I. It has been held that a right of salmon-fishing cannot be constituted by a grant "*cum piscationibus*," and proof of prescriptive use of taking salmon by means of rod fishing only, *Sutherland* v. *Ross*, 14 Sh. 960; in which case, as the averments amounted to no more, an Issue on possession was refused to the defender. In *Mackenzie* v. *Davidson*, Feb. 27, 1841, in which the Issues in Example No. I. were settled, it was held that an express grant of salmon-fishings over a particular locality, gave the right without proof of prescriptive possession, even *ex adverso* of another proprietor's lands, unless stopped by an adverse right estab-

lished by that proprietor. On the form of the Issues, Lord Moncreiff observed, "I do not think that it much signifies whether the word 'continuous' is inserted in the alternative Issue or not. I believe it is not usual. Forty years possession implies 'without interruption.' I should have thought 'immediately' right, but probably the case of *Mercer* v. *Reid* (Feb. 1, 1840) decides against it. I have had doubts whether the mode of fishing should be inserted. But I rather think it is sufficient without that. It will be implied in the words that it must be fishing by a mode which is in law sufficient to make prescriptive possession. Fishing by spear, rod, or hand-net will not do, looking to the case of the *Duke of Sutherland* v. *Ross*." In settling the Issue in *Ramsay* v. *Duke of Roxburghe*, Feb. 9, 1848, the Judges of the Second Division agreed that the exact words of the Statute 1617, c. 12, should be taken as the best formula for an Issue as to the possession to be proved in order to give a prescriptive title. It does not appear that the use of the word "exclusive" is necessary in the Issue, as there cannot well be a right of salmon-fishing established in two parties in common, although a grant to one might be qualified by an express and specific reservation, such as by rod-fishing, in favour of another; see Lord Mackenzie's note in *Sutherland* v. *Ross*, *ut supra*; and trout-fishing, which requires no grant, may be common, as in a loch, *Macdonald* v. *Farquharson*, 15 Sh. 259; and *M'Kenzie* v. *Rose*, 8 Sh. 816.

Damages may be sought not only for illegal fishing, but for any operation which interferes with, or injures the pursuer's salmon-fishing, such as floating wood, or building a dam-dyke; see 2d Issue in Example No. II, and *Forbes* v. *Leys*, *Masson & Co.* 5 Murr. 287, 9 Sh. 933, and 5 W. and Sh. 384. In *Mackenzie* v. *Magistrates of Dingwall*, 16 Sh. 1305, an Issue went to trial in a petition and complaint for breach of Interdict, Whether the defenders wrongfully fished, in violation of the interdict, above a certain line delineated on a plan in process? It is held, that a right to

fish trout *ex adverso* of his lands is inherent in a proprietor, without proof of possession; but if he use it so as to injure the salmon-fishing of another, a Jury question may arise, *Forbes* v. *Earl of Kintore*, 4 Sh. 650; *Mackenzie* v. *Rose*, 8 Sh. 816; affirmed on Appeal, 10 Sh. 862.

A class of cases of great importance arises under the Statutes prohibiting the use of certain machinery in particular situations for the taking of salmon. The question for the Jury may be principally the nature of the machinery, as in No. VI, and the 2d Issue in No. VII; or it may, as more frequently occurs, be Whether the place where it is situated is one of those coming under the prohibitions of the Statute? as in Examples Nos. VIII, IX, and X; in the Cromarty Case, *Mackenzie* v. *Horne*, July 10, 1838, and on Appeal M'L. & Rob, 033. In another branch of this case, *Mackenzie* v. *Renton*, June 12, 1840, it was held that no length of prescriptive possession could give a right where the mode of fishing was illegal. It has been held that a proprietor of salmon-fishings has a title to prevent the use of unlawful machinery in any situation where it may affect his own fishings, but not to pursue a Declarator that another has no legal right to fish at all at a place where he does not allege that he himself has a right of fishing, *Mackenzie* v. *Gilchrist*, 7 Sh. 297, and *Mackenzie* v. *Houston*, 8 Sh. 117. In *Munro* v. *Ross*, July 7, 1846, an Issue was refused where the pursuer was proprietor of fishings in the sea, and the defender was alleged to have made a weir in a neighbouring river, without proper openings, to the damage of the pursuer. On the other hand, the proprietor of fishings in a river is not entitled to object to the use of stake-nets by a proprietor of fishings in the sea, whose grant is of fishing by net and coble,—stake-nets not being illegal in the sea, and its consistency with the grant being a question only between the Crown and the grantee; *Earl of Kintore* v. *Forbes*, 8 Sh. 641, 3 W. & Sh. 261.

The subject of the right Issue under the Statute 1563, c. 68, regarding unlawful machinery, underwent considerable discussion in the House of Lords in the case of *M'Whir* v. *Oswald & Maxwell*, 11 Sh. 552; 14 Sh. 82; 1 Sh. & M'L. 393; 15 Sh. 873. An Issue had been prepared for trial, but the parties agreed to a special case on which the Court gave judgment. The Lord Chancellor, in directing the case to be sent to trial under a new Issue, observed that the question was, Whether the defender had brought himself under the exception of the Statute which did not extend to "cruives and yairs being upon the water of Solway?" and the Issue sent had been, Whether the defender "in the river Nith, or on the sands and shoals within the bounds thereof, where the water ebbs and flows," wrongfully erected, or caused to be erected, or used, or caused to be used stake-nets, to the loss, injury, and damage of the pursuer? not Whether he used them in the water of Solway? which was really the question of fact. By the case agreed to as a special verdict, certain findings were presented to the Court to this effect: "The fishery is in the Nith, and we leave you to find Whether, in point of law, it is in the Solway?" The error was in the frame of the Issue, which gave colour for saying that there was matter of law involved, by the use of such words as "wrongfully" and "injury," and by putting the question as to the Nith in place of as to the Solway. He further observed, that if a finding as to the Nith were necessary, the previous Issue might be used, but with the omission of words "wrongfully," "loss," and "injury," as well as "caused to be erected," and "caused to be used;" for "if a man causes a certain thing to be done, in law he does that thing;" and with the addition of Issues, Whether the stake-nets were used within the water of Solway? and Whether the place on which they were used, if within the bounds of the Nith, was within or without the bounds of the Solway? The case was ultimately tried on the Issue

directed in the judgment of the House of Lords, and in which the defender in the action stood as pursuer,—"Whether the places in which, during the years 1822, 1824, and 1825, stake-nets, or other fixed machinery were placed and used for fishing salmon by the said Richard Alexander Oswald, or John Pagan his tenant, are within the water of Solway?"

EXAMPLES.

No. I.

Mackenzie v. *Davidson, &c.—2d March* 1841.

It being admitted that the pursuer is proprietor of certain lands on the shores of the Bay of Gruinard, "cum acquis et salmonum piscatione in lie Bay de Gruindzaird," and that the defender is proprietor of lands on or near the said shores "*cum piscationibus*,"

Whether the Bay of Gruinard, referred to in the titles of the pursuer, extends from Greenstone Point to the Point of Stataig? or what are the limits of the said Bay?

Whether, during the years 1835 and 1836, or any of them, the defenders, or either of them, wrongfully fished for salmon in the said Bay, to the loss, injury, and damage of the pursuer?

Or,

Whether for forty years and upwards, or for time immemorial, prior to the 25th day of July 1836, the defender and his predecessors and authors, proprietors of the said lands, have fished for salmon opposite his said lands, between Greenstone Point and Stataig aforesaid?

No. II.

Stewart v. *Campbell*,—*27th February* 1840.

Whether the pursuer, in virtue of his titles produced, had for forty years, or for time immemorial, immediately prior to the 21st day of June 1838, uninterrupted possession of the right of salmon-fishing in all or any part of the Lake of Ballemahaldine or Fasnacloich, and in the Lower Crenan, flowing from the said loch? and

Whether, from the 1st day of July 1838 to the 31st day of August 1848, or during any part of the said period, the defender wrongfully floated certain quantities of timber on the said loch and lower part of the said river, or either of them, to the injury of the pursuer?

No. III.

Earl of Wemyss v. *Greenhill*,—14*th February* 1828.

It being admitted that the pursuer, his authors and predecessors, have been infeft in the lands of Hatton, and in "fishing of Cordon, and pertinents of the same," since the year 1717;

It being also admitted that the defenders, their authors and predecessors, have been infeft in the lands of Cordon, "with the mills, woods, fishings, parts, pendicles, privileges, and whole pertinents thereof," since the year 1669,

Whether the pursuer, his authors and predecessors, have had exclusive, peaceable, and uninterrupted possession of the salmon-fishings in the river Earn *ex adverso* or opposite the said lands of Cordon, or any, or what part thereof, for forty years and upwards, or for time immemorial?

Or,

Whether the defenders, their authors and predecessors, have had exclusive, peaceable, and uninterrupted possession of the salmon-fishings *ex adverso* of the said lands of Cordon, with the exception of the station called Gordonhole, or any, or what part thereof, for forty years and upwards, or for time immemorial?

No. IV.

Ramsay v. *Duke of Roxburghe,—9th February* 1848.

It being admitted that the pursuers are proprietors of certain lands lying on or near the south bank of the river Tweed, with fishings, as described in the charter in favour of Walter Ker, No. 5 of process, and subsequent titles,

Whether the pursuers, and their predecessors and authors, have by themselves, or others authorised by them, exercised and possessed the salmon-fishings on the south side of the river Tweed opposite to the defender's lands of Maxton, called Govans Land, or any part thereof, for forty years prior to 23d February 1844, continuously and together, peaceably, and without lawful interruption therein?

No. V.

Campbell's Trustees v. *Macalister's Trustees,—19th February* 1841.

It being admitted that the pursuers, as trustees of the late General Campbell of Menzie, are proprietors of the lands of Fawnans, and that the defender, as trustee for Mrs Macalister, of Innistrynich, is proprietor of the lands

of Hayfield or Innistrynich, both on the south-side of the river Awe,

Whether, prior to 18th July 1839, the defender, by himself or another, or others, wrongfully fished for trout on the said river opposite the said lands of Fawnans?

No. VI.

M'Kenzie v. *Gilchrist*,—*5th February* 1830.

It being admitted that the pursuer is proprietor of certain fishings in the river Shinn, which flow into the Firth of Dornoch,

Whether, during the year 1827, the defenders, or either of them, wrongfully fished for salmon, or caused the same to be fished for in the said Firth, opposite the lands of Spinningdale, by means of stake-nets or other engines of that description, to the injury of the pursuer?

No. VII.

Duke of Atholl's Trustees v. *Bell*,—*20th December* 1833.

It being admitted that the pursuers are proprietors, and trustees for proprietors of salmon-fishings in the River Tay, and that the defender is tenant of a salmon-fishing in the River, Frith, or Water of Tay, at places where the tide ebbs and flows,

Whether, during the year 1831, the defender, as tenant aforesaid, wrongfully fished for or caught salmon by means essentially and substantially the same, with cruives, yairs, stake-nets, or other fixed machinery, to the loss, injury, or damage of the pursuer?

No. VIII.

Sutherland v. *Gilchrist*,—1*st June* 1838.

Whether the defender Dugald Gilchrist, Esquire, by himself or by his tenants, wrongfully fished for salmon in the waters opposite to the lands of Spinningdale during the year 1836, or during any part thereof, by means of stake-nets, bag-nets, yairs, or other engines, placed in situations prohibited by Statute?

No. IX.

M'Whir v. *Wilson*,—25*th June* 1842.

Whether, during the years 1837, 1838, and 1839, or any of them, the defender wrongfully used a stake-net or stake-nets, or other fixed machinery, calculated for, or having the effect of taking salmon in the river Nith, or on the banks thereof, opposite to the lands of Mr Oswald of Auchincruive, above Burranpoint, where the said river joins the Solway Firth at low water?

No. X.

Duke of Sutherland v. *Ross*,—6*th July* 1842.

Whether the defender has wrongfully fished for salmon opposite his lands of Cambuscurry, Tarlogie, and others, in the years 1841 and 1842, or either of them, by means of stake-nets, or other fixed machinery, placed in a situation or situations prohibited by Statute?

PART XXV.

SERVITUDES.

In this Chapter are given examples of the Issues taken to establish servitudes of various kinds, on the ground of use or possession for the prescriptive period. The form of the Issue generally speaking is simple, Whether for forty years, or for time immemorial prior to the commencement of the litigation, the particular use was had, or privilege exercised by the party asserting the servitude? An alternative Issue is taken sometimes on wrongful trespass on the one hand, as in Examples No. VI and XVII, or wrongful obstruction on the other, as in No. IX and others of the Examples. Occasionally, as in *Anderson* v. *Gardner*, M'F. *J. R.* 69, the leading Issue is one of exclusive property, with the question of servitude in an alternative Issue. Such of the minuter features of the Issue as have been the subject of judicial decision or remark may be noted here.

In the case of *Rodgers* v. *Harvie*, 4 Murr. 25, 5 Sh. and D. 917, and 3 W. and S. 251, which went to the House of Lords on a Bill of Exceptions to the Judge's charge, it was held that where there had been a series of interruptions, not acquiesced in, for twenty-five years before the raising of the action, and the witnesses spoke to a period of thirty-four years before the first interruption, that being as far back as the memory of the oldest could go, forty years uninterrupted use was to be implied

previous to any interruption. On the ground of the principle thus established, the Court of Session in the case of *Mercer* v. *Reid*, Feb. 1, 1840, Example No. VI, would not allow the Issue in a case of footpath to be limited thus, "Whether for forty years, or time immemorial *immediately* preceding 12th August 1836?" and struck out the word "immediately." In another branch of the latter case, the Issue No. VII, was settled, in which the pursuer is allowed to found on the possession of the other inhabitants of the village, in which he was a portioner, but from which the words "and other places in the neighbourhood" were struck out; *Mercer* v. *Rutherford*, Feb. 18, 1840. In *Thorburn* v. *Charteris*, Dec. 4, 1841—a question of use of drawing water from a mill-dam, see Example No. XIX—the words "and the other inhabitants of the said street or neighbourhood," were inserted, on the ground that the pursuer was entitled to found on the possession of these other parties in support of his own right, although not to ask decree for behoof of the other inhabitants. In deciding these two cases, the Court had fully in view the case of *Aikman* v. *Duke of Hamilton*, 8 Sh. 943; reversed on Appeal, Sh. Supp. 12, where apparently the opposite rule was laid down.

On the Issue, No. VIII of the Examples, Lord Moncreiff observed, that he doubted "whether this was a correct form of Issue as relative to a right of way, in so far as it did not define the places from whence and to which the road led;" *Fergusson* v. *Shirreff*, July 18, 1844. The Lord Chief-Commissioner observes, that the Issue in *Rodgers* v. *Harvie*, No. III, although it had been subjected to examination in all the Courts without objection, was yet not perfect, as not having the words "or for time immemorial," which are now invariably inserted. Example No. VI is given by him as an Issue of style in a case of servitude road, as distinguished from public ways. On the subject of the servitude of road, reference may also be made to *Mackenzie* v. *Ross*, 2 Murr. 11; *Oswald* v. *Laurie*, 5 Murr. 6; *Smith*

v. *Knowles*, 3 Sh. 652; and *Marshall* v. *Linning*, 13 Sh. 701.

In *Fergusson* v. *Shirreff*, July 18, 1844, a servitude of public footpath by the banks of a trouting stream was established; but the Court refused to allow proof of a use of fishing for trout by the inhabitants of a neighbouring village, and by the public, for the prescriptive period, as being irrelevant to establish any right.

In *Carnegie* v. *Mactier*, July 18, 1844, the Issues in a case of servitude of pasturage are reported. In *Steele* v. *Oliver & Boyd*, 10 Sh. 857, and in Example No. XX, are Issues in the servitude of eavesdrop. In *Berry* v. *Wilson*, Dec. 1, 1841, Example No. X, the servitude was of fishing salmon, and mooring boats and drawing nets opposite the defender's lands. There was also another Issue as to a road, and alternative Issues on acquiescence. The Lord Justice-Clerk observed, "that when Issues are once fixed, and have a distinct meaning, it is incompetent to go back upon the Record in order to affect or control the meaning of the Issues, even at the trial and before a verdict has been returned and applied." The trial is reported M'F. *J. R.* p. 91.

In *Brand* v. *Charteris*, Jan. 3, 1842, Issues went to trial on a servitude of use by the proprietors of a tan-work, of steeping hides in the run of a mill-dam adjoining; but an alternative Issue in regard to a dam erected in the mill-run by the pursuer was observed by the Lord Justice-Clerk to be objectionable, as improperly throwing a burden on the defender. It was held in *Cameron and Gunn* v. *Ainslie*, Jan. 21, 1848, that fishermen having, by Statute 29, Geo. II. c. 23, a right of using the sea-shore for the purposes of their trade, could not be allowed an Issue to establish a servitude of drawing their boats and drying their nets on the shore, the use and possession they had had being properly ascribable to their most patent title, the Statute. Three other Issues were proposed in the case, two of which were refused for want of title in the pursuer,

and the third modified to the form given in Example No. XII.

In cases of thirlage, the action may be one for abstracted multures, as in *Clark* v. *Hill*, 4 Murr. 200, 6 Sh. 659, where the only Issue was one of wrongful abstraction, Example No. XXIII; the astriction and amount of dues being admitted, and the defence resting on the insufficiency of the mill to serve the thirl. It may be a declarator of the existence and extent of the thirlage, giving rise to such Issues, as Examples No. XXI, XXII, and XXIV, on the amount of dues, and nature of grain subjected to them, during the prescriptive period. The declarator may be one of immunity from thirlage, as in *Cochrane* v. *Wallace*, 2 Murr. 294, where tenants claimed it under the terms of their leases, and where a Counter-Issue on prescriptive payment of dues was taken by the defender.

EXAMPLES.

No. I.

Waldie, &c. v. *Jerdan*,—*23d November* 1831.

It being admitted that the defender Jerdan, is proprietor of certain houses and an area or back court in the town of Kelso, and that there is a passage through the said houses and area from Bridge Street to a road round the churchyard, in the said town,

Whether for forty years or upwards, or for time immemorial, the public have had uninterrupted possession of the said passage, as a public passage from the said street to the said churchyard?

No. II.

Donald, &c. v. *Glen*,—21*st December* 1827.

It being admitted that the defender, John Glen, is proprietor of certain houses and a tan-yard in the town of Dumbarton, and that there is a close leading from the street of Dumbarton alongst the east side of the said houses and yard to the River of Leven;

It being also admitted that the pursuers, Jean Donald and others, are proprietors of certain houses and a garden immediately to the east of the said close,

Whether the said Jean Donald and others, pursuers, or their predecessors and authors have, for forty years and upwards, had uninterrupted use or possession of the said close as a passage from the said house (the property of the pursuers), and from the said street to the said river?

Whether for forty years or upwards the public have had uninterrupted use or possession of the said close as a public passage from the said street to the said river?

No. III.

Rodgers, &c. v. *Harvie*,—3*d June* 1825.

Whether for forty years and upwards, prior to the 1st day of November 1822, there existed a public footpath or footroad along the right bank of the River Clyde, from the city of Glasgow, from the place called the Green to the village of Carmylie, situated on the said bank of the said river?

No. IV.

Colquhoun, &c. v. *Douglas*,—*18th July* 1834.

It being admitted that Archibald Douglas, Esq. (held defender) is proprietor of the estate of Mains,

Whether for forty years and upwards, or for time immemorial, prior to the 13th day of August 1833, William Colquhoun, Alexander Campbell, Peter Campbell, and Archibald Macmillan (held pursuers), and their predecessors and authors, have possessed and used as a public road, an avenue or road from near Mains Mill, passing immediately to the north of the mansion-house of Mains to where the said road joins the road from Drymen to Glasgow?

No. V.

Dauney v. *Moir*,—*9th March* 1830.

It being admitted that the lands of Grandholm, in the county of Aberdeen, are contiguous to the lands of Scotstown, in the said county,

Whether the said lands of Grandholm were by the late John Paton, Esq. conveyed to the pursuers as trustees?

Whether for forty years and upwards, or for time immemorial, the said John Paton and his predecessors, proprietors of the said lands of Grandholm, or their tenants, have possessed a road leading through the said lands of Scotstown, by the Mains of Scotstown, from Grandholm commutation road to the old road from Aberdeen to Old Meldrum?

No. VI.

Reid v. *Mercer*,—19*th June* 1839.

It being admitted that the defender is proprietor of Lowood, situate between the town of Melrose and the village of Bridgend,

Whether, on one or more occasions, on or about the 12th day of August 1836, the pursuer, or a certain number of members of his family, wrongfully trespassed on the said lands of Lowood, or wrongfully broke down a fence between the said lands and the property of George Rutherford, to the loss, injury, and damage of the defender?

Or,

Whether for forty years, or for time immemorial, preceding the 12th day of August 1836, the defender and his predecessors and others, portioners of Bridgend, were in possession of a footpath through the property of the pursuer along the banks of the Tweed, from the village of Bridgend towards the town of Melrose?

No. VII.

Mercer v. *Rutherford*,—21*st February* 1840.

It being admitted that the defender is proprietor of certain land, situated between the town of Melrose and the village of Bridgend,

Whether for forty years, or for time immemorial, preceding the 12th day of August 1836, the pursuer and his predecessors, and the other inhabitants and portioners of Bridgend, have possessed as a footpath, a path or footroad, through the lands of the defender, along the south

bank of the river Tweed, from the said village of Bridgend towards the town of Melrose?

No. VIII.

Shirreff v. *Fergusson*,—16*th March* 1843.

Whether for forty years, or from time immemorial, preceding the 9th of June 1841, there has existed a public road or footpath along the north bank of the river Tyne, running through the property of the defender?

No. IX.

Oswald, &c. v. *Lawrie, &c.*—27*th June* 1828.

Whether for time immemorial, or for forty years and upwards, there has existed a public road or highway for carriages and horses, along the south bank of the river Clyde, from the south end of the old bridge leading from Glasgow to Gorbals, to the south end of the new or Broomielaw Bridge, between the houses in Carlton Place and the said river, or nearly so? And whether the defenders have wrongfully and unwarrantably shut up or obstructed the said road, by placing a gate across the same, at or near the south end of the said new bridge?

No. X.

Berry v. *Wilson*,—7*th July* 1837.

It being admitted that the pursuer is proprietor of the lands of Tayfield, and also proprietor of the lands of Causewayhead, formerly the property of Robert Dalgleish of Scotscraig, with the right of a salmon-fishing called Greenside, in the river or frith of Tay;

1. Whether the pursuer, and his predecessors and authors, proprietors of the said salmon-fishing, have for forty years and upwards, or for time immemorial, in the exercise thereof, been in the possession of the right of fishing for salmon, mooring their boats, and drawing their nets employed therein, on or opposite, or adjacent to the lands of Craighead, the property of the defender; and whether during the years 1832 and 1833, or either of them, the defender executed certain operations on or near his said property, whereby the pursuer was obstructed or impeded in the exercise of his said rights or any of them, to the loss, injury, and damage of the pursuer?

It being admitted that a foot-road existed from Newport to Ferry-Port-on-Craig through the property of the defender and others,

2. During the said years, 1832 and 1833, or either of them, the defender wrongfully shut up or obstructed the said foot-road, to the loss, injury, and damage of the pursuer?

3. Whether for forty years and upwards, or for time immemorial, prior to the year 1832, the pursuer, or his predecessors and authors, have possessed or used a cart-road from Newport through the said lands of the defender, to a point opposite Drybraehole; and whether during the said years 1832 and 1833, or either of them, the defender wrongfully shut up or obstructed the said cart-road, to the loss, injury, and damage of the pursuer?

Or,

Whether the pursuer or his authors consented to, or acquiesced in the said operations on or near the said property of the defender?

Whether the pursuer consented to, or acquiesced in the shutting up of the said cart-road or foot-road, or either of them?

No. XI.

Forrest v. *Paterson's Trustees*,—16*th February* 1847.

It being admitted that the pursuer is proprietor of all and whole the nine enclosures on the north side of the village of Tarbolton, formerly called Sandgate, and Gedshole, now called Smithfield, and that the defenders are proprietors of the estate of Coilsfield, now called Montgomery, and that there is a portion of ground in dispute between the parties, lying between Cockhill and the village of Tarbolton, used as a road,

Whether the said portion of ground, or any part thereof, used as the said road, is part of the pursuer's said property, and comprehended within the boundaries set forth in his titles; or has been possessed as such by the pursuer and his authors, for time immemorial, or forty years prior to the 13th day of April 1846?

Or,

1. Whether said road is a public road, and has been used as such for time immemorial, or at least for forty years prior to the said 13th day of April 1846?

2. Whether the defenders and their authors, as proprietors of the lands of Coilsfield, or any part thereof, have had access to, and have used the said road for time immemorial, or at least for forty years preceding the said 13th day of April 1846?

No. XII.

Cameron, &c. v. *Ainslie,—25th January* 1848.

It being admitted that the pursuer Sir Duncan Cameron, stands infeft in all and whole the burgh of barony of Inverlochy, called Gordonsburgh, and now called Fort-William, with the whole parts, pendicles, and pertinents of the same, and that the said burgh includes the feu after mentioned, called Chisholm's feu;

It being also admitted that the pursuer Donald Gunn, is an inhabitant of the said burgh, and is infeft in a dwelling-house in the Middle Street of said burgh, holding under the pursuer Sir Duncan Cameron, conform to Instrument of Sasine dated and registered in September 1836;

It being also admitted that the defenders are proprietors of a piece of ground or feu, called Chisholm's feu, lying within the said burgh of barony, which, down to 6th October 1838, was possessed by the defenders, their predecessors and authors, in virtue of a contract dated in 1785, whereof No. of process is a copy, and which describes the said piece of ground as "lying on the north-side of said High Street, bounded on the south by said street; "on the west by the road leading from the High Street to "the shore; on the north by the sea-beach; and on the east "by the burn called the Spoutburn;" of which piece of ground or feu, one *pro indiviso* half continues to be possessed under the said contract, and the other *pro indiviso* half is now held under a feu-charter of date 6th October 1838, granted by Sir Duncan Cameron, containing a similar description of the said piece of ground, and reserving to him and his heirs, and "the inhabitants of the said burgh deriving right from "us, not only free access and passage by all the streets, "roads, and lanes thereof, as presently enjoyed and used, "but also the full, free, and unlimited use and exercise of

" the sea-beach and sea-shore, and free access thereto,—
" all which is expressly reserved from, and noways included
" in these presents,"

Whether for forty years or upwards, prior to the year 1833, there existed a public cart-road, or horse-road, or foot-road, from the low street of Fort-William, running through Chisholm's feu aforesaid, and along or near to a low wall or fence which forms, or lately formed the north fence of a garden on said feu, belonging to, or occupied by the defenders or either of them; and whether the defenders have erected a coach-house, and have erected or commenced to erect a wall or walls, and have performed other operations, all upon the *solum* or ground lying to the north of the said low wall or fence; and whether, by the said operations, or any of them, the defenders have wrongfully obstructed or encroached upon the said road, to the loss and damage of the pursuers, or either of them?

Or,

Whether the pursuers, or either of them, or others acting for them or him, homologated or acquiesced in the said operations of the defenders or any of them?

No. XIII.

Magistrates of Crail v. *Inglis*,—*9th March* 1830.

It being admitted that the pursuers are Magistrates of the burgh of Crail, in the county of Fife, and that the defender is proprietor of the lands and barony of West Barns, comprehending the lands of Kirkmay, to the west and south of the said burgh, and that during the year 1819 the defender planted up a road or path called the Ware-path, leading from the shore to the king's highway from Crail to Anstruther,

Whether for forty years and upwards, or for time immemorial, the pursuers and their predecessors, Magistrates of the said burgh, burgesses, inhabitants holding burgage property, or any of them, have exercised the exclusive and undisturbed right of taking sea-ware, stone, and other minerals from the shore between the harbour of the said burgh on the east, to the point called Almond Rock on the west?

Whether for forty years and upwards, or for time immemorial, prior to planting the said trees in the year 1819, or until interruption by the sea, the pursuers and their predecessors, Magistrates of the said burgh, burgesses, inhabitants holding burgage property, and feuars of the said burgh, or any of them, exercised the undisturbed use of the said path as a road?

No. XIV.

Freebairn, &c. v. *The Duke of Hamilton,—24th June* 1830.

It being admitted that the pursuers, Dr Charles Freebairn and James Brysson, surgeon, are feuars and burgesses in the burgh of Hamilton, and that the pursuers, John Fairley and Robert Thomson, are feuars in the said burgh,

Whether the said Dr Charles Freebairn and his predecessors and authors, proprietors of the said feu, by themselves or by other persons having right to feus within the said burgh, or their tenants, have for forty years and upwards, or for time immemorial, had uninterrupted possession of the right of taking sand and gravel from the shore or banks of the river Clyde, not arable or lying in pasture, on both sides of the said river or either of them, and from the bed of the said river, or from any of them, for building and repairing tenements, or for laying, form-

ing, or repairing the roads, footpath, or garden-walks, and generally for every necessary purpose within the said burgh; and further, of taking water from the said river for using in building operations within the said burgh, and in seasons of drought for the domestic purposes of themselves and their families, from the junction of the said river with the river Avon at or near Hamilton Bridge to a place called the Old Coalford, and of the right of access for these purposes?

[Three similar Issues for the other pursuers.]

No. XV.

Aikman v. *Duke of Hamilton*,—*25th June* 1833.

It being admitted that the pursuer is proprietor of the lands of Ross, in the parish of Hamilton, and of certain houses and gardens in the town of Hamilton,

Whether for forty years and upwards, or for time immemorial, the pursuer and his predecessors and authors in the said lands of Ross, or their tenants, have been in the use of taking sand and gravel from the banks and channels of the river Clyde, between its junction with the river Avon above, and the Hamilton Burn below, for the use of the said lands.

Whether, during the said period, the pursuer and his predecessors and authors, proprietors of the said lands, or their tenants, have used roads or obtained access to the said banks and channels from the public road at or near the sides of the Hamilton Bridge over the said river, or at or near the Coalford, across the said river?

Whether for forty years and upwards, or for time immemorial, the pursuer and his predecessors and authors, proprietors of the said houses and gardens, or their tenants,

have been in the use of taking sand and gravel from the said banks and channels of the said river, for the use of the said houses and gardens?

Whether for forty years and upwards, or for time immemorial, the pursuer and his predecessors and authors, proprietors of the said houses and gardens, or their tenants, have used roads or obtained access to the said banks and channels of the said river, from the said public road at or near the end of the said bridge, or at or near the Coalford aforesaid?

Whether, on or about the , the defender wrongfully prevented the pursuer or his tenants from taking sand or gravel from the said banks or channels, or wrongfully shut up the said roads or access, or prevented the pursuer and his tenants from passing along the same, to the loss, injury, and damage of the pursuer?

No. XVI.

Smellie v. *Brown*,—12*th June* 1835.

It being admitted that the pursuer is proprietor of a house and garden near the sea-shore, in the town of Stromness,

Whether, for forty years and upwards, or for time immemorial, the pursuer and his predecessors, proprietors of the said house and garden, or their tenants, have possessed for the purpose of landing boats and other vessels, or as a dock for drawing up boats or vessels upon, and other similar purposes, all or any part of a piece of ground upon the sea-shore, extending about 25 feet or thereby in breadth, lying between and bounded by the street of the said town on the west, the sea on the east, the pier of the Britan-

nia Inn on the north, and by the smithy next the house belonging to the defenders, and a straight line from thence to the sea, nearly parallel to the said pier of the Britannia Inn on the south?

Whether for forty years and upwards, or for time immemorial, the public have possessed the said ground or any part thereof, for the purposes aforesaid, or any of them?

No. XVII.

Macalister v. *Campbell's Trustees*,—*6th June* 1837.

It being admitted that the pursuer Alexander Macalister of Loup, is proprietor of the lands of Drumnalia, and Ballivean and others, situate on the sea-coast, in the county of Argyle, and that the lands of which the defenders are proprietors, or on which they are trustees or tenants, lie in the same district with the said lands of the pursuer,

Whether the pursuer, his predecessors and authors, by themselves or their tenants, have been, along with the Duke of Argyle, in the immemorial and uninterrupted use of taking the sea-ware or wreck and shell-sand from the sea-shore, or part thereof, opposite to the pursuer's lands, or part thereof, without being interfered with by the defenders, or any of them? and Whether, during the years 1832, 1833, and 1834, or any of them, the defenders or their tenants, by themselves or others, wrongfully carried off sea-ware or wreck and shell-sand, or either of them, from the said shore or part thereof, to the loss, injury, and damage of the pursuers?

Or,

Whether for forty years and upwards, or for time immemorial, the defenders or any of them, have been in the

uninterrupted use of taking sea-ware or wreck or shell-sand, or any of them, from the said shore or part thereof?

Damages laid at £1,000.

No. XVIII.

Lennie v. *Stirling*,—*27th January* 1843.

It being admitted that the pursuer is proprietor of the lands of Ballochneck, the mill and mill-lands of Gartenstarry, of the Half or Middle Cashlie, commonly called Redlandstone, and has a right of warrandice over the other half of the lands of Middle Cashlie, through part of which lands the burn of Ballochneck runs; and that the pursuer is also proprietor of the lands of Woodend, comprehending Offerance of Woodend and Kepstone; and that the defender is proprietor of the manor-place of Garden, the lands of Mill of Wester Garden and pertinents, the lands of Middle Garden, the lands of Blairfeuchan, and of part of the lands of Wester Mye, lying lower down the said burn, and that through part of the said lands the water of the said burn passes,

1. Whether for forty years and upwards, or for time immemorial, prior to 3d March 1837, the pursuer and his predecessors and authors, or their tenants, have been in the use of drawing off a portion of the water of the said burn without returning the same to the channel of the said burn, before it entered the lands of the defender?

2. Whether, during the years 1837, 1838, and 1839, or any of them, the defender wrongfully interfered with, troubled, and molested the pursuer in draining off the said portion of water of the said burn, to the loss, injury, and damage of the pursuer?

No. XIX.

Thorburn v. *Turner*,—*7th December* 1841.

Whether for forty years and upwards, or for time immemorial, preceding the 1823, the pursuer and his predecessors and authors, proprietors of a house in Millhole or Mill Street of Dumfries, or their tenants and the other inhabitants of the said street or neighbourhood, have been in the use of having access to and drawing water from a mill-dam or mill-run, in or near the said street? and Whether, since the said time, the defender wrongfully obstructed the pursuer and others aforesaid, or prevented them from having access and drawing water from the said mill-dam or mill-run?

No. XX.

Brown v. *Stewart*,—12*th February* 1824.

It being admitted that William Stewart is proprietor of a tenement of houses and ground upon the Castle Bank in the city of Edinburgh, and that James Brown is proprietor of ground immediately to the east of the said tenement;

It being also admitted that in the year 1815, the said James Brown erected a house or building immediately to the east of the ground belonging to William Stewart, with windows towards the property of the said William Stewart, and with the eaves drop from the roof of the said house falling into the property of the said William Stewart,

Whether, previous to the erection of the said building complained of, there stood on the property of James Brown, upon, or nearly upon the site of the said building, a house or houses, the face of the west wall of which ran in a line as far west as the face of the west wall of the

building complained of, and which said ancient house had a window in the said wall towards the pursuer's property, the eaves dropping of which fell into the property of the said William Stewart?

No. XXI.

Magistrates of Jedburgh v. *Madder, &c.*—18*th March* 1842.

It being admitted that the pursuers are the proprietors of the mills called the flour or east mill, and the Abbey mill, situated in the suburbs of, or near to the burgh of Jedburgh;

It being also admitted that the defenders are bakers and meal dealers, and indwellers in said burgh,

1. Whether from time immemorial preceding the year 1837, or from and after the year 1777 till the year 1837, or at least during the period of forty years, between 1777 and the year 1837, the pursuers and their predecessors in office, as proprietors of the said mills, and in virtue of a right of thirlage thereto belonging, or their tacksmen therein, have been in the constant and uninterrupted use of levying from the inhabitants of the burgh of Jedburgh, directly or by composition, intown multures, knaveship, and other dues and emoluments on wheat, oats, barley or bear, pease, beans, rye and malt, or any of them, ground by them at the said mills, and then brought within the said burgh?

2. Whether during the period aforesaid, the pursuers and their predecessors, as proprietors aforesaid of the said mills, and in virtue of a right of thirlage thereto belonging, or their tacksmen aforesaid, have been in the constant and uninterrupted use of levying from the said inhabitants, directly or by composition, intown multures,

knaveship, and other dues and emoluments on flour and meal of every description brought into the said town, the produce of wheat, oats, barley or bear, pease and malt, or any of them, the property of the said inhabitants; excepting the flour brought in by the inhabitants other than the bakers, for the proper use of their own families?

3. Whether during the period aforesaid, the pursuers and their predecessors, as proprietors aforesaid of the said mills, and in virtue of a right of thirlage thereto belonging, or their tacksmen aforesaid, have been in the constant and uninterrupted use of levying from the said inhabitants, directly or by composition, interim multures, knaveships, and other dues and emoluments on flour and meal of the aforesaid descriptions, or any of them, purchased and brought by them into the said burgh, excepting the flour brought in by the inhabitants other than the bakers, for the proper use of their own families?

4. Whether said multures, knaveship, and other dues and emoluments which the pursuers and their tacksmen have been in the use of levying as aforesaid, were of the amounts, or any part of the amounts set forth in the schedule hereunto annexed?

No. XXII.

Ogilvie v. *Martin & Co. &c.*—*6th June* 1840.

It being admitted that the pursuer is, and has been tenant since 1832 of certain mills, the property of the burgh of Brechin, and that by an Act of Thirlage, the tenor whereof is proved by the decreet No. 38 of process, certain malt and other grain are liable to the mills therein referred to for payment of certain restricted multures,

Whether, for forty years and upwards, or for time immemorial, immediately preceding the year 1824, the pursuer and his predecessors and authors, proprietors and tenants of the mills, the property of the burgh of Brechin, now possessed by the pursuer, have, under the said Act of Thirlage, collected and taken for the said mills from persons within the liberties of that burgh of Brechin, the following rates or sums as restricted multures and mill dues on malt, viz. from 7½d. to 9d. per boll when certain services were given by the tacksmen, and 11d. per boll when no service given? and Whether, during the period from 22d November 1832 to 22d November 1839, or during any part of the said period, the defenders wrongfully obstructed the multures and mill dues on all or any of the quantities of malt specified in the schedule hereunto annexed, to the loss, injury, and damage of the pursuer?

No. XXIII.

Clark's Trustee v. *Hill & Others*,—*27th February* 1827.

It being admitted that the pursuer is trustee on the sequestrated estate of Alexander Clark, and that during the year from Martinmas 1823 to Martinmas 1824, the said Alexander Clark was tacksman of the mills of Baldovan, the property of the town of Dundee, on the water of Dighty;

It being also admitted that the defenders are bakers in the said town, and are astricted to the said mills, and bound to grind or manufacture all the grain intended to be ground into flour or meal for use and consumption within the burgh of Dundee and liberties thereof,

Whether, during the said year, the defender James Hill did wrongfully abstract from the said mill 1,500 bolls of

wheat, or about that quantity, to the loss, injury, and damage of the pursuer?

[Four similar Issues with other defenders.]

No. XXIV.

Anderson & Miller v. *Kinloch*,—*5th July* 1831.

It being admitted that the pursuer Anderson, is proprietor of the lands of Upper Chapelton, and of Chapelton of St Fink, and that the pursuer Miller, is proprietor of the lands of Tullyfergus, and it being alleged by the pursuers that they have established by prescription an immunity from thirlage to the mill of the defender Kinloch, of *omnia grana crescentia*,

Whether, for forty years or upwards, or for time immemorial, the pursuer Anderson, or his predecessors, proprietors of the said lands of Upper Chapelton of St Fink, have paid multure to the said mill, only on all grain which he or they had occasion to grind, and not on all grain growing on the said lands of St Fink?

Whether, for forty years or for time immemorial, the pursuer Miller, or his predecessors, proprietors of the said lands of Tullyfergus, have paid multure to the said mill only on all grain which he or they had occasion to grind, and not on all grain growing on the said lands of Tullyfergus?

Or,

Whether during the pursuer's alleged possession of immunity, the proprietors of the said mill or any of them, were years in minority, so as not to leave forty years of such possession independent of or deducting said minority?

PART XXVI.

BURGH ELECTIONS—CUSTOMS—TOLLS.

In this Chapter are collected some Examples of Issues in questions of burgh and corporate rights, and the right to levy dues and tolls. No. I is the Issue in *Hope* v. *Magistrates of Selkirk*, 4 Murr. 390, which is adduced by the Lord Chief-Commissioner with approbation, as a precedent in questions regarding the election of Magistrates. He remarks that such questions will always turn on specialties; but that in this Example a general question is put on each special point of the cause. In the case of *Angus* v. *Magistrates of Edinburgh*, 4 Murr. 339, 6 Sh. 586, where the Issue, Example No. VIII, went to trial, it was held that Magistrates of a burgh have no right to levy additional market dues, unless by the sanction of Statute or immemorial usage. In *Scott* v. *Wilson*, 5 Murr. 52, the Issue, Example No. IX, put the question of wrongful levying dues on barley purchased beyond and brought into the burgh, a case not especially included by the terms of the Charter. The defenders led a proof of usage, and the Lord Chief-Commissioner put the case to the Jury, that the defenders were only entitled to levy the dues on such barley under a proof of usage, which was the question for the Jury to consider. It would almost appear necessary, however, in such a case, to take a Counter-Issue on the defence of usage for the prescriptive period.

When a grant refers to use and wont in giving a right, such as that of Custom in passing a river, the question of fact arises for a Jury, what the use and wont has been, as Whether for forty years dues have been levied at any particular ford or passage? *Mitchell* v. *Town of Linlithgow*, 1 Sh. 575, Example, No. XI. Under a grant of harbour the question may be the extent of the locality named in the grant, and the usage as to the nature and amount of dues levied; *Magistrates of Campbeltown* v. *Galbreath*, December 14, 1844, Example No. XIII.

EXAMPLES.

No. I.

Hope, &c. v. *Magistrates of Selkirk,—6th July* 1827.

It being admitted that on the 15th day of September 1825, Thomas Inglis, Andrew Inglis, Alexander Inglis, William Mercer, Thomas Scott, John Douglas, James Anderson, and Andrew Walker, tendered their votes in returning a leet or list to the Magistrates of Selkirk, with a view to the election of a deacon of the Incorporation of Hammermen, and that the said pursuer voted for a leet or list, which was shortened by the Town-Council by striking off a certain number of names; and that at a meeting on the day of September 1825, for the purpose of electing a deacon of the said Incorporation, the said individuals tendered and gave their votes, under protest, for the leet or list so shortened by the Council;

It being also admitted that a majority of the said trade of hammermen, excluding the said persons, returned another leet or list, which was rejected by the said Council, and that Andrew Guthrie, then the deacon of the said Incorporation, voted for the leet last aforesaid, but did not tender or reserve his right to a casting vote,

Whether the said Thomas Inglis, Andrew Inglis, Alexander Inglis, William Mercer, Thomas Scott, John Douglas, James Anderson, and Andrew Walker, or any of them, were wrongfully admitted to vote for the said leet adopted by the Council as aforesaid?

Whether the said majority of the Incorporation of Hammermen, excluding the said individuals, did meet on or about the 16th day of September, and did shorten the said leet or list rejected by the Town-Council? and Whether a deacon has been duly elected from the leet so shortened by the Incorporation?

Whether, by the constitution and usage of the burgh of Selkirk, the said Andrew Guthrie, deacon as aforesaid, must be held as having given his casting vote for the said leet rejected by the Council, provided the number of qualified votes should prove to be equal?

No. II.

Gardner v. *Magistrates of Kilrenny*,—13*th December* 1827.

It being admitted that the sett of the burgh of Kilrenny, in the county of Fife, (as recorded in the books of the Convention of Royal Burghs, bearing date the 5th September 1710,) in so far as regards the election of the bailies of the said burgh is, "that the bailies give in a leet of nine persons, whereof they themselves are always three, and of which they (the burgesses) are to choose the three bailies for the year ensuing,"

Whether any, and what usage, different from the said sett, has prevailed in the said burgh for forty years and upwards in respect to the election of the bailies thereof, and

at what period such usage commenced and terminated? And

Whether such different usage did not prevail at the election of bailies at Martinmas 1823.

No. III.

Baird, &c. v. *Ralston, &c.—27th June* 1828.

It being admitted that on the 3d day of October 1826, at the meeting for the election of Magistrates of Pollockshaws, the defender John Ralston was declared provost of the said burgh by the majority of the Town-Council thereof,

Whether at the said meeting, under the laws and regulations of the said burgh, the said defender Ralston was not duly elected to the said office? and Whether at the meeting aforesaid, under the said laws and regulations, the pursuer Thomas Baird was duly elected to the said office?

No. IV.

Tailors of Aberdeen v. *Munro, &c.—28th June* 1829.

It being admitted that the pursuers are the deacon and members of the Incorporation of Tailors in the City of Aberdeen,

Whether, at several times between the 2d April 1824 and 2d April 1828, in violation of the privileges granted to the said Incorporation, the defenders, or any of them, by themselves or their workmen, wrongfully exercised the trade of tailors within the said city or liberties thereof, to the loss, injury, and damage of the pursuers?

Damages laid at £500.

No. V.

Johnstons v. *Magistrates of Kilrenny*,—*8th July* 1823.

Whether that part of the lands and parks of Kilrenny, now called Renny Hill, and the mansion-house of Renny Hill, situated therein, the property of the pursuers, which lands are bounded on the west by what is called the Hilly or Haly Hiegate road; on the north partly by a road running eastward from the said Hilly Hiegate road opposite to Kilrenny Mains farm-house to a piece of waste ground called the Commonty of Kilrenny, and partly by the said waste ground; on the east by a road running southward along the bounds of the lands of Innergelly; and on the south partly by a street of the town of Kilrenny and partly by Brown's feu, are not situated within the limits of the burgh of Kilrenny, and have not paid cess or other town's burdens or taxes exigible in said burgh, for the period of forty years previous to the 10th day of May 1820?

No. VI.

Magistrates of Aberdeen v. *Fraser, &c.*—*9th March* 1844.

1. Whether the lands, grounds, streets, or other heritages specified in the annexed Schedule, and situated within and nearer to the town-head of Aberdeen than a line running, &c.—form part of, and are comprehended within the royalty of the royal burgh of Aberdeen? or Whether any, and what portions of the said lands, grounds, streets, and other heritages, are part of, and comprehended within the said royalty?

2. Whether, for forty years prior to 25th March 1841, the pursuers and their predecessors, in virtue of the titles

libelled on, and within the foresaid lands, grounds, streets, or other heritages, or any of them, the same being always parts of the royalty as aforesaid, have been in the use and practice of levying, according to a Table promulgated in 1707, as thereafter modified, altered, and explained by Acts of Council, 26th November 1757 and 3d May 1790, and Table promulgated in 1798 (of which Nos. 79, 91, 90, and 80 of process respectively, are copies, and annexed hereto), and according to the rates therein specified, customs and duties on the commodities and articles chargeable therewith, brought or imported for sale or consumption within the said royalty and the foresaid lands, grounds, streets, or other heritages, or any of them, the same being always parts of the royalty as aforesaid?

Or,

Whether the pursuers and their predecessors have been in the use and practice of levying the said customs or duties on commodities and articles chargeable therewith, brought or imported for sale or consumption within the ancient royalty or burgh of Aberdeen only?

No VII.

Magistrates of Glasgow v. *Dawson & Mitchell*,—
26th January 1831.

It being admitted that the Magistrates of Glasgow are entitled to collect within the streets or continuous buildings of the city of Glasgow a certain duty or tax called ladle-dues, on grain brought within the said limits, and sold or used in manufacture there;

It being also admitted that the said Magistrates have not collected the said duty on grain brought within the said limits, and again exported within two months without breaking bulk, or on grain imported by burgesses on their own horses and carts for the use of their own families;

It being also admitted by the defenders that the ground on which the distillery of the defenders, Dawson & Mitchell, is situate, is within the royalty or territory, but beyond the said limits,

Whether for forty years and upwards prior to the 27th day of January 1815, or for time immemorial, the said Magistrates have been in the practice of collecting the said dues on all grain except as above, brought within the territory or royalty, but beyond the said limits?

No. VIII.

Angus & Others v. *The Magistrates of Edinburgh and their Tacksman*,—13*th June* 1827.

It being admitted that the pursuers are unfreemen fleshers who attend the Fleshmarket of Edinburgh, and that the defenders are Magistrates of the said city, and are entitled to collect the Custom or Duties payable by butchers attending the said market;

It being also admitted that the Custom or duties levied from such unfreemen fleshers attending the said market, prior to the year 1782, is specified in the Table No. 11 of process;

It being also admitted that certain alterations were made in the said market-place during the said year, and that a new Table of Customs, being No. 12 of process, was issued by the Magistrates during the same year;

Whether during the year 1782 or subsequent thereto, the Magistrates of Edinburgh have unwarrantably and wrongfully raised the rates of Customs or duties upon the unfreemen fleshers selling meat in the market of Edinburgh, and to what extent?

No. IX.

Scott v. *Wilson & Others*,—13*th June* 1828.

It being admitted that in the year 1823, and prior to the 25th day of April in the said year, the pursuer brought into the town of Hamilton 100 bolls of barley purchased beyond the limits of the said burgh, for the purpose of being converted into malt, and used in the brewery of the pursuer,

Whether the defender wrongfully exacted, or wrongfully caused to be exacted from the pursuer the sum of £0 : 8 : 4, or any part thereof as Custom upon the said 100 bolls, and the sum of £13 : 8 : 5 of expenses, and £2, 15s. sterling as dues of extract, or any part of the said sums, to the loss, injury, and damage of the pursuer?

No. X.

Bell & Others v. *Berry & Brand*,—4*th March* 1831.

Whether, from the 29th day of March 1826 to the 29th day of March 1827, the defenders wrongfully exacted and received certain sums of money as shore dues on goods conveyed in the ferry-boat across the river Tay, at the ferry betwixt Dundee and Newport, and Seamills, in the county of Fife, or either of the said places?

No. XI.

Mitchell, &c. v. *Town of Linlithgow*,—29*th June* 1820.

Whether, it being admitted that the defenders have levied Custom at the bridge of Linlithgow on horses, cattle

carts, and all other carriages conveying merchandise, and at Torphichen mill, ford or bridge, and at the west bridge, on cattle going to and coming from Falkirk Tryst, the defenders have not been in the general practice, for forty years and upwards, prior to the 26th day of January 1813, of levying Custom upon horses, cattle, carts, and all other carriages conveying merchandise, passing the river Avon from the west bridge to the mouth of the said river?

Whether the defenders have not been in the general practice for forty years and upwards, prior to the 26th day of January 1813, of levying Custom at the ford of Jinkabout, on the said river Avon?

Whether the said defenders have not been in the general practice of levying Custom, for forty years and upwards, previous to the 26th day of January 1813, from the tenants and others residing upon the estate of Kinneil, the property of the Duke of Hamilton, passing the said river Avon at the ford of Jinkabout?

No. XII.

Fairley v. *Gibson, &c.*—14*th January* 1821.

It being admitted that the defenders are trustees on the turnpike roads in the county of Edinburgh, and that on the 27th day of March 1827, the pursuer became tacksman of the toll-bar at Whitehouse, in the said county, for the period of a year from and after the 25th day of May 1827, in terms of a lease dated the day of , and the Articles of Roup therein referred to,

Whether, from the 31st day of August to the 12th day of December 1827, or during any part of the said period,

the defenders wrongfully, and in violation of the agreement of the parties, exacted or caused to be exacted, toll-duties at one or both of two check-bars within the district of Calder, and county of Edinburgh, on the road leading from Edinburgh to Mid-Calder, the one situate to the east and the other to the west of the loan immediately to the east of Gorgie Mills, commonly called Gorgie Loan, to the loss, injury, and damage of the pursuer?

No. XIII.

Magistrates of Campbeltown v. *Galbreath*,—*12th July* 1843.

It being admitted that a Royal Charter was granted in the year 1700, conferring certain rights, powers, and privileges upon the Magistrates and burgh of Campbeltown, and in particular conferring on said Magistrates and burgh a right of harbour, as expressed in said charter;

It being also admitted that the Magistrates and Council of the said burgh did, at different times, and more particularly in November 1757, September 1795, and September 1799, pass certain Acts and Minutes of Council containing certain schedules or tables of dues, being No. 6, 7, and 8 of process;

And it being further admitted that the defender David Stewart Galbreath, is proprietor of the lands of Ballygreggan and Dalintober and others, on which the quay of Dalintober has been built,

1. Whether the said quay of Dalintober is situated within the limits or boundary of the said grant of harbour in favour of the Magistrates and burgh of Campbeltown?

2. Whether the Magistrates and Town-Council of Campbeltown, by themselves or their tacksmen have, under the

said Charter, and in virtue of the said Act of Council, levied the various duties, taxes, and customs set forth in the said schedules, or any of them, upon the goods enumerated in the said schedules, or some of them, shipped or landed at the quay of Dalintober, and that for upwards of forty years, prior to January 1840?

3. Whether the said Magistrates and Town-Council of Campbeltown, by themselves or their tacksmen have, under the said Charter, and in virtue of the said Acts of Council, levied the various duties, taxes, and customs set forth in the said schedules, or any of them, upon the goods enumerated in the said schedules, or some of them, shipped or landed at the quay of Campbeltown, and that for upwards of forty years prior to January 1840?

PART XXVII.

PROPINQUITY AND SUCCESSION.

SOME doubt was at one time entertained whether, after a verdict of a Jury on a brief of inquest, it was competent in a reduction of the service to remit for Jury trial; *Anderson*, 12 Sh. 729, where additional evidence was allowed to be taken on commission. In *Gifford* v. *Gifford*, 13 Sh. 1042, there had been a competition of brieves, and the Court refused to admit in a reduction new evidence at all, unless some peculiar ground, such as *res noviter veniens*, were shewn for it. In *Officers of State* v. *Alexander*, 13 Sh. 1044, where there had been no competition of brieves, and the evidence was documentary, additional proof was allowed to be taken on commission. About the same time the House of Lords, in the case of *Watson* v. *Watson*, 7 W. & S. 535, where two parties had served and raised counter-actions of reduction of each other's services, remitted to frame Issues for a Jury to try the question of propinquity of both parties; Example No. II. Accordingly, in *Anderson* v. *Wighton*, Dec. 1843, the Court of Session held a remit to a Jury in a reduction of a service to be competent, although in the circumstances, they considered it more expedient to take it on commission. Subsequently the case of the *Officers of State* v. *M'Lean*, 5 Bell's Appeals, 60, where the Court of Session had reduced a service on the evidence which had been before the inquests, went to the House of Lords, and was remitted "with instruc-

tions to direct the following Issue to be tried before a Jury, in terms of the Acts of Parliament and Act of Sederunt establishing Trial by Jury in Scotland, viz:—'Whether the appellant Alexander M'Lean, is nearest and lawful heir in general to Archibald M'Lean, road contractor in Aberdeen, deceased?'" In the subsequent case of *Woods* v. *Farrell*, May 27, 1846, and March 2, 1847, the Court followed the course pointed out by the House of Lords in the case of M'Lean, and sent the Issue, Example No. I, to a Jury.

Questions of Legitimacy may be sent to a Jury, as in *Bell* v. *Bell*, 2 Murr. 130, and Example No. IX.

In a reduction of a service of terce, the pursuer was ordered to stand pursuer of the Issue, Example No. XI, the *onus* of proof being on him, although the widow admitted that the marriage was dissolved within year and day, her allegation being that a living child had been born; *Paxton* v. *Johnstone*, June 13, 1840.

The question of vitious intromission was sent to a Jury in *Kerrs* v. *Penman*, 5 Murr. 143, Example No. XII; and in *Boswell* v. *Montgomerie*, 14 Sh. 378, 681, 16 Sh. 395, 1086, and M'L. & Robb, 136, where the question was, Whether a son had intromitted with his father's property? the House of Lords held that it was a proper case for trial by Jury, reversing the decision of the Court of Session, who, owing chiefly to the numerous documents in process, had viewed it as ill adapted for that mode of proof. The Issue No. XIII, was then prepared for trial. In *Seath* v. *Taylors*, January 21, 1848, Example No. XIV, the Court sent the question to a Jury, where an action of accounting was raised after the lapse of thirty years, the plea of taciturnity having been repelled, and the parties being at issue both as to the amount of the estate and the nature and extent of the representation incurred. In actions against a husband for his deceased wife's property or share of the goods in communion, such Issues as Nos. XV and XVI may arise.

EXAMPLES.

No. I.

Woods v. *Farrell*,—*11th July* 1846.

Whether the pursuers Mrs Anne Wood or Willox, and Mrs Elizabeth Wood or Pope, are the nearest lawful heirs-portioners of Alexander Wood of Woodburnden, deceased?

No. II.

Watson v. *Watsons*,—*20th January* 1836.

The First Division of the Court of Session, by Interlocutor dated the 17th day of November 1835, having directed an Issue or Issues to be framed to try the propinquity of the parties respectively to the deceased Alexander Watson, town-clerk of Port-Glasgow,

1. Whether the defenders Ann and Isobel Watson are related, and in what degree of propinquity they are related to the deceased Alexander Watson, sometime town-clerk of Port-Glasgow?

2. Whether the pursuer Alexander Watson, weaver in Houston, is related, and in what degree of propinquity he is related to Alexander Watson, town-clerk of Port-Glasgow aforesaid?

No. III.

Johnstone v. *Goodinge*,—*5th July* 1843.

[Goodinge being appointed to stand pursuer of the Issue, and Johnstone defender.]

Whether the said John Henry Goodinge otherwise Johnstone is related, and in what degree related to the Honourable John Johnstone, younger brother of William first Marquis of Annandale?

No. IV.

Traills v. *Thomson*,—*9th March* 1844.

It being admitted that the late George Traill, Esquire of Skaill, in Orkney, and surgeon in Crieff, died in February 1841, unmarried and intestate,

Whether the pursuers Jane Traill or Adams, John Traill, and Thomas Traill, are next of kin of the deceased George Traill, Esquire?

No. V.

Lyons v. *Lyon*,—10*th July* 1845.

It being admitted that the deceased William Lyon, smith in Edinburgh, executed the deed of settlement, of which No. of process is an extract, and also the post-nuptial contract, of which No. is an extract, and that he had a son named William who went to America,

Whether the pursuers Mary Anne Lyon, William Lyon, and Catherine Lyon, or any of them, are the lawful children of the said William Lyon, Junior, son of the said William Lyon, Senior, smith in Edinburgh?

No. VI.

Livingstone's Trustees (Creditors of the deceased James Dason, Church-Officer, Huntly) v. *Lawson and Others*,—*26th November* 1845.

Whether the defenders are the next of kin of the said James Dason?

No. VII.

Smith, &c. v. *Thomson*,—*7th March* 1839.

Whether the defender is not the lawful son, or nearest lawful heir of the late John Thomson, who resided at Ramsay Cottage, Maxwelltown, Dumfries, and died there on the 8th day of January 1837?

No. VIII.

Miller, &c. v. *Fraser*,—*12th May* 1825.

It being admitted that the late Simon Fraser, Esquire of Dominica, executed a will or testament, dated 29th May 1842, containing the following clause "*Item*" &c.; and it being also admitted that the said Simon Fraser, Esquire, died on the 2d day of July 1802,

Whether the pursuer Mrs Miller was, and is the only lawful child of Mrs Catherine Fraser or Robertson, wife of Duncan Robertson, late tacksman of Wellhouse?

Whether the said Mrs Catherine Fraser or Robertson was the person meant and intimated by the testator in the aforesaid bequest?

Whether the said Mrs Catherine Fraser or Robertson survived the 2d day of July 1802?

No. IX.

Norris v. *Gilchrists*,—*12th February* 1841.

Whether the pursuer Ann Crichton Gilchrist or Norris, is the legitimate daughter of the late James Gilchrist, mason in Edinburgh, the brother of the defenders?

No. X.

Stewart's v. *Campbell's Trustees*,—*5th December* 1826.

It being admitted that the pursuer Mrs Stewart, is the daughter of Captain John Campbell, Boreland, sixth son of William Campbell of Glenfalloch, and that Miss Ann Campbell is the youngest child of the marriage between the said Captain John Campbell and Mrs Janet Butter, now deceased,

Whether the said Miss Ann Campbell was born prior to the 10th day of the month of November 1801?

No. XI.

Paxton v. *Johnstone*,—*23d June* 1840.

It being admitted that the late William Paxton was infeft in a share, or one-half of the twenty shilling land of Burn,

Whether, on or about the 26th day of July 1839, the defender, by the service of terce, of which No. 7 of process is an extract, was wrongfully served and cognosced to a terce or third part of the said lands?

No. XII.

Kerrs & Co. v. *Penman*,—*3d July* 1829.

It being admitted that the late Robert Penman died on the 1st of February 1828, and at the time of his death, the said Robert Penman was indebted to the pursuer in the sum of £90 : 16 : 7, contained in a bill dated 1st October 1827, and the sum of £61 : 10 : 9, contained in another bill dated 28th November 1827, and that the sums contained in said bills have not since been paid,

Whether, subsequent to the death of the said Robert Penman, the defenders, or any of them, vitiously intromitted with the funds and effects of the said Robert Penman?

No. XIII.

Montgomerie v. *Boswell*,—*3d July* 1839.

It being admitted that the pursuer is an arresting creditor of Mr Alexander Boswell, writer to the signet, and that the defender is eldest son and heir of entail of the late Sir Alexander Boswell, Bart.,

1. Whether, at the time of his death on 27th March 1822, the said Sir Alexander Boswell was indebted to the said Mr Alexander Boswell in the sum of £2,794 : 10 : 8, or any part thereof? and Whether the defender took pos-

session of all or any part of the unentailed lands, or intromitted with the rents or produce thereof, or intromitted with the moveable property of his father, and thereby has incurred a passive title, and is indebted and resting-owing to the said Mr Alexander Boswell in the said sum, or any part thereof, with interest thereon?

2. Whether, by the writing No. 83 of process, dated 8th August 1828, the defender agreed or undertook to pay to the said Alexander Boswell a composition of 8s. in the pound on the said debt of the late Sir Alexander Boswell? and Whether the defender is indebted and resting-owing to the said Alexander Boswell in the sum of £1,117 : 16 : 3, as the said composition, or any part thereof, with interest thereon?

3. Whether the said Mr Alexander Boswell, during the years 1822, 1823, and 1824, or any of them, executed for the defender all or any of the business charged for, or advanced all or any of the sums of money stated in the accounts Nos. 687, 688, 689, 690, 691, 692, and 693 of process? and Whether the defender is indebted and resting-owing to the said Alexander Boswell in the sum of £230 : 4 : 6, or any part thereof, with interest thereon, in payment or satisfaction of the said account?

No. XIV.

Seath v. *Taylors*,—14*th July* 1847.

It being admitted that the deceased James Taylor died in the month of October 1812, and that the deceased Robert Taylor, the father of the defenders, was his only surviving son, and the pursuer's late wife Ann Taylor, and Margaret Taylor now Foote, were his only surviving daughters;

It being also admitted that the said James Taylor executed the disposition and settlement No. 5 of process, bearing date the 11th day of April 1808, and that the defenders represent the said Robert Taylor,

Whether the said deceased James Taylor was, at the period of his death, possessed of moveable means and estate to the extent of £3,000, or thereabouts? and Whether, on the death of the said James Taylor, the said deceased Robert Taylor, without confirmation or other legal process, took possession of, and intromitted with the said whole moveable estate? and Whether the defenders, as representing the said deceased Robert Taylor, are indebted and resting-owing to the pursuer in the sum of £500, provided to his wife in the said settlement, and interest thereof, or any part thereof; and in the sum of £666 : 13 : 4, and interest, or any part thereof, in respect of his share of the remainder of the estate of the said deceased James Taylor?

No. XV.

Wylie v. *Mackies*,—*6th February* 1846.

It being admitted that the late James Wylie of Gallowberry had a sister married to the late James Mackie of Fullwood; that she died on the 27th January, in the year 1833, without issue, and that her husband, the said James Mackie, died in January 1839;

It being further admitted that the pursuer is the relict of, and has obtained a decree-dative as executrix *qua* relict of the said James Wylie, also now deceased; and that the defenders, as raisers of the present process of multiplepoinding, are executors of, and have intromitted with the estate and effects of the said James Mackie,

Whether the defenders are indebted and resting-owing to the pursuer in the sum of £600, or any part thereof, as the share of the goods in communion between the said James Mackie and his wife at the time of her death, belonging to the said James Wylie, Mrs Mackie's brother, and now to the pursuer, as his executrix, with interest from the 27th day of January 1833 till payment?

Or,

Whether the promissory-note, No. 9 of process, dated 16th February 1838, for the sum of £450, payable one day after date, was granted to the pursuer by the said James Mackie, in consideration and satisfaction, in whole or in part, of the claim competent against him in respect of the said goods in communion? And

Whether the pursuer, in terms and by virtue of an interim decree pronounced in the conjoined processes, and dated 13th June 1844, has received payment of the said sum of £450, contained in the said promissory-note, with bank interest thereon, in whole or in part?

No. XVI.

Haig v. *Walker*,—12*th June* 1844.

It being admitted that the defender was married to the late Mrs Janet Haig or Walker in August 1817, and that on entering into the said marriage the defender renounced, by an ante-nuptial contract, No. 21 of process, all claim to the property of his said wife,

Whether the deceased Mrs Walker, at the period of her death in February 1839, was possessed of the sum of £900 sterling, or of property to that amount or value, or part thereof? and Whether the defender obtained possession of the same, and is resting-owing the same to the pursuer?

PART XXVIII.

MISCELLANEOUS EXAMPLES.

THE first nine of the annexed Examples are Issues regarding particular facts, which have been sent for ascertainment by a Jury in the course of a cause. To use the words of the Lord Justice-Clerk in the case of *Anderson* v. *Wighton*, December 20, 1843, "the Court, as a part of the ordinary administration of the Court of Session, have full and unlimited power, in all cases before them, to send such Issues to be tried, the answers to which they think may aid and form a satisfactory ground for their own ultimate judgment in the cause." Thus, in an action by the Marquis of Queensberry against the executors of the late Marquis, for granting a lease in violation of the prohibitions, a remit was made to the Jury Court to try an Issue, Whether the deceased Marquis had been *lucratus* or not by the violation? *Marquis of Queensberry*, 7 Sh. 765. In *Balfour* v. *Lyle*, 10 Sh. 854; 11 Sh. 906 and 2 Sh. and M'L. 1, the Issue No. I was sent to trial, to ascertain whether the defender knew of a subtack of certain lands, when he acquired them. In *Spence* v. *Howden*, 2 Murr. 167, where an interdict was sought against admitting the defender as a member of the Incorporation of Goldsmiths, the Issue No. II was sent to trial. The case of *Cleland* v. *Weir's Representatives*, March 10, 1848, was an accounting, and an Issue animadverted on in the House of Lords, *vide supra*, p. 272–3, having gone to trial as to wrongful keeping possession of property for a certain time, the Jury returned a special verdict, finding certain facts, which the Court applied as affecting the accounting.

In actions of proving the tenor, as in *Harley*, 1 Murr. 296, and *Findlay* v. *Findlay*, Example No. V, an Issue may be directed, although in *Dow* v. *Henderson* it was truly observed that these are more frequently cases for the Court. Sometimes the Court remits to a Jury to determine the genuineness of a document founded on by one of the parties, as in *Fraser* v. *Pattie's Trustees*, March 9, 1847, and Examples No. VI and VII; and in the noted case of *Buchan* v. *Harper*, 6 Sh. 865; 5 W. and S. 785; 10 Sh. 486, 838, the House of Lords remitted to try by a Jury the identity of the letter produced, with the one referred to in the will as signed of the same date; and the Issue, Example No. VIII, was prepared.

These remits approach in form very nearly to the Issues sent to be tried by Courts of Equity in England, and which were kept in view at the institution of Jury Trial in Scotland.—Adam on J. Tr. Pref. p. viii. Sometimes they were stated in short general questions, as in the case referred to by the Lord Chief-Commissioner, *Lord Bute* v. *Grindal*, 1 Term. Rep. 338,—Whether the defendant was liable to be rated to the relief of the poor in respect of certain lands, &c. defined in the Issue?—but more frequently in the form of a wager, of which examples are given in Tidd's Practical Forms, p. 241, and Chitty's Forms, 285. This feigned Issue is best explained in the words of Blackstone:—"If any matter of fact is strongly controverted, this Court is so sensible of the deficiency of trial by written depositions that it will not bind the parties thereby, but usually directs the matter to be tried by Jury; especially such important facts as the validity of a will; or whether A is the heir-at-law to B; or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as no Jury can be summoned to attend this Court, the fact is usually directed to be tried at the bar of the Court of King's Bench, or at the Assizes, upon a feigned Issue. For (in order to bring it there, and have the point in dispute and that only put in Issue) an action is feigned to be brought, wherein the pretended plaintiff declares

that he laid a wager of £5 with the defendant that A was heir-at-law to B, and then avers that he is so, and brings his action for the £5. The defendant allows the wager, but avers that A is not the heir to B; and thereupon that Issue is joined, which is directed out of Chancery to be tried; and thus the verdict of the Jurors-at-Law determines the fact in the Court of Equity. These feigned Issues seem borrowed from the *Sponsio Judicialis* of the Romans, and are also frequently used in the Courts of Law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause;" 3 Black. Comm. 452–3. The 19th section of the Act 8 and 9 Vict. c. 109, substitutes for the feigned Issue a simple form of writ for trying questions of fact. When damages are found due, and the amount is disputed, a "writ of enquiry" is directed to the Sheriff, who sits as Judge, and tries by a Jury, subject to nearly the same laws and conditions as the Trial by Jury at *nisi prius*, what damages the plaintiff has sustained. Stewart's Blackstone, III. 452-3, and App. No. II, § 12.

The remaining Examples X to XVI, are miscellaneous questions of resting-owing, arising out of various special circumstances or situations of parties, where the enquiry has appeared to the Court appropriate for investigation by a Jury. Reference may also be made to the Issue in *Taylor* v. *Commercial Bank*, M'F. *J. R.* 62, where a claim was made for a reward offered on the apprehension and conviction of robbers.

EXAMPLES.

No. I.

Balfour v. *Lyle*,—*28th February* 1832.

Whether or not Archibald Lyle defender, when he accepted a renunciation by George Graham of the lease of the

lands of Drum, knew the fact of the transference and assignation of one hundred pounds due under the sub-tack of these lands to Robert Balfour, pursuer?

No. II.

Spence v. *Howden*,—12*th July* 1819.

Whether John Spence the charger, served an apprenticeship to his father as a goldsmith, for the period of seven years from and after the 19th May 1804, in terms of the regulations of the incorporation of goldsmiths?

No. III.

Elliot v. *Wilson*,—1*st December* 1831.

It being admitted that the pursuer and defender were, at 9th July 1829, *pro indiviso* proprietors of a mill in the town of Hawick, with the carding, spinning, and other machinery therein,

Whether, after the said 9th July 1829, and in the course of July or August of that year, the defender agreed that each party should possess separately one-half of the machinery in the said mill, with the exception of the carder for country wool, and that said agreement was to have effect from the said 9th day of July 1829, or from what other date?

No. IV.

Findlay, &c. v. *Findlays*,—24*th February* 1841.

Whether, on or about the month of November 1829, or on or about the month of November 1830, the defender John Findlay, granted to his brother the late James Findlay, a bill of exchange for the sum of £1,000?

Whether, from the day of November 1834 to the 9th day of February 1835, or during any part of the said

period, the said James was in a state of imbecility, and incapable of transacting business during the said period? and Whether the defenders, or either of them, during the period last aforesaid, or after the death of the said James, did fraudulently abstract the said bill from the custody or repositories of the said James, or did fraudulently obtain possession of and destroy the same?

No. V.

Bryson v. *Chalmers*,—1*st February* 1834.

Whether the name of William Crawford, inserted and subscribed to the letter No. 2 of process, are the true and genuine subscription and proper handwriting of the late William Crawford, feuar in Lochee?

Whether the words "I agree to the above," at the bottom of the said letter, are holograph of the said William Crawford?

No. VI.

Fraser's Trustees v. *Pattie's Trustees*,—29*th May* 1846.

Whether the name P. Pattie, bearing to be adhibited as a signature to the document in process No. 181, is the genuine signature of the late Peter Pattie?

No. VII.

Buchan v. *Harper*,—8*th December* 1831.

It being admitted that the late Margaret Mathieson, on the 15th of May 1826, executed a latter will, constituting

the defender her sole executor, containing the following clause, viz.—" Subject," &c.

Whether the letter bearing date Edinburgh, 15th day of May 1826, No. 30 of process, and purporting to be a letter from the said Margaret Mathieson to James Harper, Esquire, and by which the said James Harper is directed to pay William Inglis, Esquire, W.S. or his heirs, £1000 sterling, and to Miss Anne Buchan the sum of £300 sterling, was signed by the said Margaret Mathieson on that day, and is the letter referred to by the will of the said Margaret Mathieson?

No. VIII.

Liddell, &c. v. *Moncur*,—*9th July* 1844.

It being admitted that the pursuers are the Trustees of the deceased Richard Young,

Whether, on or about the 4th and 5th days of May 1843, the defender wrongously took possession and carried off from the brewery belonging to the said trust estate, situated in the South Back of Canongate, certain copper boilers and copper pipes, the property of the said Trustees?

Or

Whether the defender obtained possession of the said effects as purchased from Robert Cramond Young, one of the said Trustees, and then ostensibly in possession of the same, and ostensibly acting as factor for the said Trustees?

No. IX.

Gibson v. *Pollok*,—19*th July* 1848.

[Issue in the process of *M. P.* A. Graham, in which J. Gibson stands as pursuer, and A. Pollok, Jun. as defender.]

It being admitted that at the Caledonian Coursing Meeting, held near Lanark in March 1845, a picture by Mr Richard Ansdell, which forms the subject *in medio* in the said process, was run for as a prize; and it being also admitted that the said prize was won by a greyhound of the name of Violet,

Whether the said prize was run for and won by the said greyhound Violet on behalf of the pursuer?

No. X.

Dougall v. *The Renfrewshire Banking Co.*—
26*th January* 1830.

It being admitted that the pursuers are representatives of the late Captain James Dougall of Gourock,

Whether, on or about the 28th day of July 1827, there was in the bank of the defenders at Gourock, on deposit-account, the sum of £900, the property of the late Captain James Dougall? and Whether the defenders are indebted and resting-owing the pursuers in the said sum of £900?

No. XI.

Wilsons v. *Wilsons*,—19*th February* 1836.

Whether, on or about the 31st day of May 1831, the defenders, or any of them, without the knowledge and con-

sent of the late William Wilson, wrongfully uplifted all or any of the sums contained in the schedule hereunto annexed, belonging to the said William Wilson, and thereafter wrongfully appropriated all or any of the said sums to themselves, or any of them, and are indebted and resting-owing to the pursuers, or any of them, in all or any of the said sums or sum of money?

No. XII.

Cargills v. *Muir*,—21*st February* 1837.

It being found by the Second Division of the Court of Session that the pursuers are *pro indiviso* superiors of a certain portion of land at Portobello, in the county of Edinburgh, and of a mill erected thereon, and that the late James Smith, merchant in Leith, was vassal in the said property;

And it being admitted that by two deeds of disposition, dated 18th December 1831 and 30th July 1832, Nos. 20 and 21 of process, the said James Smith conveyed his said property to the defenders, as trustees for his creditors, and that the iustrument of sasine, No. 22 of process, is an instrument taken by the defenders in virtue of the precept of sasine in the said deed of disposition of 30th July 1832,

Whether, in virtue of the said deeds, or either of them, the defender was in possession of the said property during the years 1831, 1832, 1833, 1834, 1835, and 1836, or any of them? and Whether the defender is indebted and resting-owing to the pursuers in the sum of £110 sterling, or any part therof, as the feu-duty of the said property for the said years or any of them, and the sum of £22 sterling, or any part thereof, as the sum due to the superiors for the duty of a singular successor?

No. XIII.

King v. *Hamilton*,—*28th January* 1837.

Whether, on or about the 19th day of January 1836, the suspender became purchaser at a public roup of certain tenements exposed to sale by the charger, and became bound to find caution for the price under a penalty of £200? and Whether the suspender failed to find caution in terms of the articles of the said roup, to the damage of the charger? and Whether the suspender is indebted and resting-owing to the charger in the said sum, or any part thereof, with interest thereon?

No. XIV.

Bell v. *Bell*,—13*th July* 1841.

Whether, on or about the days of January or February 1834, the defender promised and agreed to convey to the pursuer a piece of ground, extending to about 18 poles 12 yards and 4 feet, at Broughty Ferry? and Whether during the summer 1834, on the faith of the said promise, the pursuer erected a house on the said ground and expended on the same the sum of £270, or part thereof, and Whether the defender is indebted and resting-owing to the pursuer in the said sum of £270 or any part thereof, with interest thereon?

Whether the defender homologated or acquiesced in the said expenditure by the pursuer, and is indebted and resting-owing to the pursuer in the said sum, or any part thereof, with interest thereon?

No. XV.

Dougall v. *Marshall*,—*29th January* 1833.

Whether the defender Robert Marshall fraudulently acted in concert with his brother John Marshall, so as to deceive the pursuer and his constituents, or any of them into the belief that the said John was proprietor of a piece of ground in the village of Dunning, with the houses and buildings thereon, and thereby induced the pursuer and his constituents, or any of them, to pay or advance to the said John all or any of the sums of money stated in the schedule hereunto annexed, or any part thereof? and Whether the said Robert Marshall is indebted and resting-owing to the pursuer or his constituents in all or any of the said sums of money, or any part thereof?

No. XVI.

Young v. *Baillie*,—*17th June* 1835.

Whether, on or about the 4th day of July 1825, the defender James Baillie carried away, or caused to be carried away from the Omoa Iron Works a quantity of cast-iron rails the property of the pursuer and in his lawful possession? and Whether the defender is indebted and resting-owing to the pursuer in the sum of £84 sterling, or any part thereof, with interest thereon, as the value of the said railing?