among other things, that the conditional substitution in favour of Mr Dunn Pattison comes into operation. It appears to me that this proceeds upon a false construction of the settlement of William Dunn. The event of Alexander's dying intestate, as a condition of the substitution, seems to me to mean dying intestate as regards each of the special subjects respectively destined to the different substitutes. (His Lordship here read the clause in William Dunn's deed in support of this construction). It surely cannot be maintained that if Alexander had availed himself of his right so far as to have sold a separate subject belonging to William Dunn, that that would have evacuated the other substitutions. But, in the second place, it is contended that Alexander Dunn did not die intestate, but left a deed disposing of his whole heritable and moveable estate. If William Dunn intended to confer, and did confer, on his brother Alexander a power of defeating these substitutions by a deed *in lecto*, that is a good argument. But if no such power was conferred, I cannot see any good in the argument, because a deed executed *in lecto* is inoperative against an heir of provision; and it is absurd to say that an unavailing deed shall be a good objection to the pursuer's title to sue. That is just reasoning in a circle. But if William Dunn intended to confer, and did confer, on Alexander a right to defeat these substitutions by a deed executed on deathbed, the defender must prevail. That question must be answered by a reference to William Dunn's deed; and certainly this is clear on the face of William Dunn's deed, that notwithstanding his desire to make a substitution in favour of the persons named, he was most anxious to preserve his settlement from even the appearance of derogating from the full right of *dominium*, vested in Alexander. It was intended that Alexander should have unlimited powers, not special powers, but it was not intended that he should be exempted from any law that was applicable to other fiars. His Lordship proceeded to say that it was unnecessary to consider how far any person could abrogate the public law of deathbed—that if, in addition to the four conditions mentioned in William Dunn's deed, William had given Alexander the power of evacuating the substitutions on deathbed, he might have done so; but there was no evidence that he intended the exercise of any such special powers, and he had certainly not conferred them.

The other Judges concurred.

The Court accordingly repelled the defender's objection to the pursuer's title to sue, and sustained the latter. All the defenders, who maintained the objection to the pursuer's title, were found liable in expenses to the pursuer. At the close of the advising, Mr Shand, for Mr Dunn Pattison, moved the Court, on the ground of the distress that was prevailing in the village of Duntocher, by reason of the subsistence of the litigation, and the consequent continued interruption of the working of the mills, to take up the remainder of the cause without remitting it back to the Lord Ordinary to dispose of the other pleas on the merits; and in the special circumstances the Court assented to the motion, and promised a hearing in May.

Saturday, March 10.

FIRST DIVISION.

ORMOND *v.* BORRIES.

Cautioner—Bond of Presentation—Liberation. A person having been apprehended under a *meditatione fugae* warrant, the petition for which stated that the claim was for the aliment of a natural child which was conceived in *August* 1864, and the cautioner being afterwards sued on the bond under a summons in which the child was said to have been conceived in *July* 1864, held (aff. Lord Kinloch) that this variance did not liberate the cautioner.

Counsel for Pursuer—Mr J. G. Smith and Mr R. V. Campbell. Agent—Mr H. Forsyth, W.S.

Counsel for Defender—Mr William Thomson. Agent—Mr David Milne, S.S.C.

The pursuer gave birth, on 11th March 1865, to an illegitimate child, of which she alleged that one of the defenders, a lad of about sixteen years of age was the father. In November 1864, having been informed that he was about to emigrate to Australia, she presented a petition to the Sheriff of Forfarshire against him as *in meditatione fugæ*. In this petition she expressly averred that the intercourse which afterwards resulted in the birth of a child took place "on various occasions between the 8th and 27th days of August 1864." Under this application he was apprehended, but afterwards liberated on his father, the other defender, granting a bond of presentation for him.

After the birth of the child the pursuer raised this action against the alleged father, and also against his cautioner, founding on the bond of presentation. The intercourse was now alleged to have taken place "on the 11th and subsequent days of July 1864." The cautioner pleaded that in consequence of this variance he was not liable under the bond, the conception of the child, in regard to which he became bound to present his son, having taken place in August 1864. This plea was repelled by the Lord Ordinary (Kinloch), and the cautioner reclaimed. He argued that he had granted the bond in consequence of the statement in the petition that the child was conceived in August, which he knew could not be true if his son was its father. The variance was therefore material. He founded upon Campbell *v.* Hamilton, 20th January 1789 (Hume 82), and M'Neill *v.* Stewart, 18th November 1823 (2 S. 439 N. E.). The Court, without calling for a reply, adhered.

Lord CURRIEHILL—The objection stated comes to this—the debt sued for is not the debt in respect of which the cautioner became bound. I think that cannot be maintained. The debt was a claim for the aliment of a natural child of which the pursuer was at the time pregnant. That is just what is now sued for. I think therefore the identification is sufficient. If it should turn out that the other defender is not the father of the child, then the cautioner will be free. But that is all reserved.

Lord DEAS—The question is whether the bond applies to the debt in dispute. I think it does. The mention in the petition of the date of the intercourse was a superfluity. The two cases founded on were quite distinguishable from the present.

Lord ARDMILLAN concurred. He thought the defence was an attempt to take advantage of what was a manifest error.

The Lord PRESIDENT was absent.

SECOND DIVISION.

SCEALES *v.* SCEALES AND OTHERS

(*ante, p.* 109).

Proof—Declarator of Marriage—Judicial Examination of Party. Circumstances in which a motion for the judicial examination of a pursuer of a declarator of marriage (aff. Lord Ormidale) *refused.*

Counsel for Pursuer—Mr Scott. Agent—Mr A. P. Scotland, S.S.C.

Counsel for Defenders—Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

In this action of declarator of marriage, the defenders, who are the representatives of Stewart Sceales, to whom the pursuer says she was married by habit and repute, made a motion to the Lord Ordinary (Ormidale) to ordain the pursuer to be judicially examined before fixing any diet for proof. The Lord Ordinary refused the motion,