

the Lord Ordinary. With regard to the other objection a question of some nicety is involved, viz., how far the Sheriff Court Act of 1853 repeals or affects the Act of Sederunt of 1839. Upon this point the suspender has offered a very ingenious argument. I cannot, however, agree with the view he submitted. It appears to me that the fair meaning of section 16 of the Act of 1853 is that in every appeal contemplated as being taken under the Act, in the case of interlocutors mentioned and dealt with in the Act, seven days should be allowed. There are three classes of interlocutors mentioned and dealt with—(1) interlocutors upon the merits; (2) those not on the merits, but specially allowed to be appealed against under section 19; and (3) all interlocutors which can't be directly appealed against, but which may be brought up when an appealable interlocutor is obtained. The Act deals with no other interlocutors, and not with such as are pronounced after the merits of the case are disposed of, and therefore not with such as the one now in question. If that be so the 51st section of the Act does not affect the 109th section of the Act of Sederunt of 1839, for it only repeals that Act of Sederunt "in so far as may be necessary to give effect to the provisions" of the Act of 1853. It is not in the least necessary to give effect to the provisions of that Act to hold that section 109 of the A. S. of 1839 is repealed. They may quite well stand together. If that be so the objection stated is bad, for it is that the extract was found prematurely. The extract was not issued for three days, and was competent after forty-eight hours. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord COWAN—I quite agree with your Lordship's observations upon both of the objections argued to us. Upon the latter of these I had no difficulty whatever. With regard to the former, though more difficult, I am satisfied that one date, the date of the decree, is enough in a charge, there being no legislative enactment requiring a double date.

Lord BENHOLME—I am of the same opinion.

Lord NEAVES—I concur. With regard to the second objection pleaded I think it was the plain meaning of the Legislature in the Act of 1853 to leave the special case of the approval of an auditor's report and decerniture for the amount to the regulation of the A. S. of 1839. It is an interlocutor of a very special kind, with regard to which special provision is therein made. With respect to the first objection, I should not like to say with regard to every extract that it should not mention the date at which the extract was given. In certain cases time must be allowed to elapse before an extract can be issued, and as here questions may arise as to what that time is, and I should be sorry to say that it was not a thing intended to be kept up that extracts should bear a date. But that does not solve the present question. For here the extract contains both the dates of the decrees and that of the signing of the extract; and the question is, is it a nullity in the charge that it does not specify the latter? Now, there is no statutory legislation upon the subject, and the question just comes to be, has the officer sufficiently communicated to the person charged the thing to be done, and the authority upon which he proceeded? Time is given to fulfil the requirements of the charge, and the party can go and see whether everything is regular. Therefore, though it might have been better that the charge had given the date of the extract, it would be out

of the question to hold that the charge is bad because it has not done so.

The Court therefore refused the reclaiming-note with additional expenses, and remitted to the Lord Ordinary to decern for the same.

Agent for Suspenders—John Walls, S.S.C.

Agent for Charger—John Leishman, W.S.

Friday, July 20.

FIRST DIVISION.

RIDDELL *v.* CUNLIFFE'S TRUSTEES
AND OTHERS.

Entail—Obligation—Provision to Younger Child.

An entailed proprietor, in respect of a consent to disentail for the purpose of burdening with debt, granted a personal obligation to execute a new deed of entail. The new deed contained a power to burden the lands with provisions to younger children. In a question betwixt the marriage trustees of his daughter, to whom he had granted a provision in virtue of this power to the extent of £6000, and the next heir of entail—held that the provision was not challengeable on the ground that it was a breach of the personal obligation, the provision having been granted for an onerous cause to a third party and having been followed by infetment, and there being no *mala fides*.

In the year 1784 Sir James Riddell, Baronet, executed a deed of entail of the lands of Ardnarmurchan and Sunart. By this deed the heirs of entail in possession were empowered to make provisions for younger children, not exceeding £2000 to one, £3000 to two, and £4000 to three or more, which provisions should be secured only by way of infetment in security, or by assignment to the rents of the said lands.

In the year 1797 the late Sir James Milles Riddell succeeded as heir of entail to the said lands, and continued to possess them as such down to the year 1850. In that year, in consequence of his affairs having become embarrassed, he entered into an arrangement with the three heirs of entail then entitled to succeed after him, with the view of effecting a disentail of the lands, and re-entailing them after burdening them with debts to the extent of £100,000.

The three next heirs of entail were his son, the pursuer Sir Thomas Milles Riddell, his brother Mr Campbell Drummond Riddell, and his nephew Mr Thomas Milles Stratford Riddell.

The agreement made by Sir James was embodied in a deed of obligation which he executed on 4th February 1850, and which, after narrating that his son and brother had been requested by him to give their consent to the proposed disentail, on the understanding that a new entail would be executed after the estates were burdened as aforesaid, thus proceeded:—

"Therefore, in the event of the said consents being given by the said Thomas Milles Riddell and Campbell Drummond Riddell, I do hereby bind and oblige myself, and my heirs, successors, and representatives whomsoever, that I shall, immediately upon the said disentail being carried through, and upon the said estates being thus acquired by me in fee-simple and burdened as aforesaid, execute a deed of entail thereof in favour of myself and the heirs-male of my body, whom failing in favour of the said Campbell Drummond Riddell, Esq., and the heirs-male of his body;

whom failing in favour of such of the other substitute heirs of entail called in the destination contained in the present entail, as they the said Thomas Milles Riddell and Campbell Drummond Riddell shall think fit, and under express prohibitions against altering the order of succession, and against selling, alienating, or further burdening the estates, and such other conditions, provisions, and restrictions as they shall think proper: Providing always, as I hereby bind myself and my foresaids, that in the substitutions of heirs of entail, after the heirs-male of the body of the said Campbell Drummond Riddell, to be inserted in the said deed of entail to be executed by me, and on the conditions, provisions, and restrictions to be contained in such deed of entail, all the descendants of the said Campbell Drummond Riddell shall be placed in as favourable a position as they would have held under the existing entail if it had remained in force: And I engage that the said new deed of entail shall be executed by me in the terms and to the effect before-mentioned, at the sight and to the satisfaction of Richard Mackenzie, Esq., W.S., and John Ord Mackenzie, W.S., or either of them, immediately upon the said disentail being completed, and the estate burdened as aforesaid: And further, I hereby bind and oblige myself, upon the disentail being completed, to assign and make over to and in favour of the said Thomas Milles Riddell and Campbell Drummond Riddell, in trust for themselves and the said heirs of entail, the sum of £20,000 sterling, for which my life stands insured in different insurance offices, for the purpose of being applied by them in extinction of the like sum of £20,000, part of the said sum of £100,000, so that the said estate shall only be burdened to the extent of the remainder, being £80,000, at the time of the succession opening to the next heir of entail succeeding me therein."

The lands were thereafter disentailed, and under the burden of debt to the extent of £100,000, and a further sum of £3850, which was arranged to be paid for his consent to the curator *ad litem* of the minor heir Thomas Milles Stratford Riddell, a new deed of entail was executed on 12th July 1851, and recorded on 10th September 1851.

This deed of entail recited the foresaid deed of obligation *ad longum*, and contained a prohibition against contracting debt qualified as follows:—"And with this exception, that it shall be lawful to me, the said Sir James M. Riddell, and the said heirs of entail, by bonds affecting the fee and rents of the estate, to provide my or their children who shall survive me, or the granter, other than the heir who shall succeed to the estate, in competent provisions, bearing interest from the day of my death, or of the granter's death, and divisible at the pleasure of the granter, or failing no appointment by him, divisible in equal portions; but under this declaration, that I, or the heir in possession, shall have no power to burden the estate with children's provisions to a greater extent than £6000 sterling, and that the estate shall not be burdened at any one time with such provisions to a larger amount than £6000; it being declared, however, that provisions granted in excess of the power and amount competent at the time shall not be void, but subject only to suspension, restriction, or abatement until prior provisions shall have been extinguished in whole or in part; and that if any competent provision shall be granted in the marriage-contract of a child, it shall not be void by the predecease of such child before the granter."

Miss Mary Augusta Riddell, the only other child of Sir James besides the pursuer, was married in November 1862 to the Rev. Henry Cunliffe. Sir James was a party to her antenuptial contract of marriage. By that deed Sir James, on the narrative of the new deed of entail, and of the power above quoted with reference to provisions in favour of younger children, bound and obliged himself and his heirs succeeding to him in the lands of Ardnamurchan and Sunart, to content and pay to his said daughter, her heirs and assignees, the sum of £6000 sterling, payable on his death, and the legal interest thereof from the day of his death during its non-payment, and for further security to her of said provision he disposed to her the foresaid lands and estates in real security. Mrs Cunliffe was thereafter infeft in security, and her sasine was recorded on 30th March 1853. On the same day as the antenuptial contract of marriage was executed there was executed a marriage settlement in the English form to which Sir James was also a party. By this deed Mrs Cunliffe assigned the said provision to certain trustees for the benefit of herself and her husband and their children.

Sir James M. Riddell died on 28th September 1861, and in 1864 the pursuer, his son, raised the present action in order to reduce (1) the said deed of entail in so far as it pretended to confer a power to make the said provision in favour of Mrs Cunliffe; (2) the said marriage-contract in so far as it made the provision; and (3) the instrument of sasine following thereon. The action was directed against the marriage-contract trustees, and Mr and Mrs Cunliffe, and also against Rodney Stuart Riddell and Hubert Augustus Hay Riddell, the two next heirs of entail after the pursuer. The ground of action stated generally was that the power in the new entail in regard to provisions to younger children was contrary to the terms of the deed of obligation granted by Sir James M. Riddell, and a violation of the obligation thereby undertaken by him, and in consideration of which the pursuer gave his consent to the disentail of the estates.

The action was defended by the Cunliffes and their marriage-contract trustees; and they pleaded (1) that the provision having been granted for onerous causes, and within the powers conferred by the deed of entail, it was not reducible; (2) that their rights could not be affected by the deed of obligation; (3) that the pursuer could not set aside the title on which he possesses the estates or any provisions made in conformity therewith; (4) that the deed of entail had been adjusted at the sight of Mr John O. Mackenzie as provided by the deed of obligation; (5) that the deed of entail was in conformity with the deed of obligation; and (6) that the pursuer had acquiesced in the provision, and homologated it.

The Lord Ordinary (Jerviswoode) assolized the defenders, and the pursuer reclaimed. After a debate in February last the Court allowed the parties a proof of their averments, and the case was then again debated.

YOUNG and MACKENZIE were for the pursuer.

CLARK and HOPE for the defenders.

At advising—

The LORD PRESIDENT—This is a reduction at the instance of Sir Thomas Milles Riddell against certain parties who are trustees under the marriage-contract of his sister and her husband Mr Cunliffe, and against Mr and Mrs Cunliffe, and also against certain persons who are called as heirs of entail. The object of the action is to reduce

and set aside a certain power in a deed of entail executed in 1851, and a proceeding under that power whereby a sum of £6000 was provided by Sir James Riddell to his daughter Mrs Cunliffe. The parties who have made appearance are those interested in supporting the provision in favour of Mrs Cunliffe. The provision is constituted first by a Scotch deed, whereby Sir James binds himself, and the heirs of entail succeeding him, to content and pay to his daughter at his death the sum of £6000, and disposes to her in real security the entailed lands; and also by an English deed, whereby Mrs Cunliffe, with consent of her father, assigned the said provision to certain trustees. The ground upon which the pursuer says this provision cannot be sustained is this. He says there was a transaction for the disentail of the estate whereby he consented to the disentail on condition that a new deed of entail should be made, and that the estate should be burdened with £103,850, and no more; that this was the substance of the arrangement, no power being given to burden with provisions to younger children; and that notwithstanding a power was inserted in the new deed of entail to make provisions for younger children to the extent of £6000. He says that this was unauthorised and contrary to the agreement which he made, and is therefore ineffectual; and he says further that the parties who got the benefit of the provision knew, or must be held in law to have known, that his father had no power to make the provision, because the deed was a registered one, and it showed on the face of it that under the agreement he was to have no such power. On the other hand, the defenders say that this was an onerous transaction, and that they contracted with Sir James under a power which was given him on the face of the deed of entail, and that having transacted with him in *bona fide* the rights which they so acquired are not destroyed because of any arrangement betwixt the parties to the previous agreement. It is further said in Art. 12 of the Condescendence that the pursuer, sometime previous to the marriage, wrote Mr Cunliffe that his sister's portion would be a sum of £5000 secured on a policy of insurance, and that his father, in settling a pension on his daughter, would very probably undertake obligations which he could not perform. I think, in the first place, it is very clear that parties transacting in this way are in perfect safety to do so, and that the rights which so transacting they acquire cannot be challenged if they act in *bona fide*. They were not bound to look beyond the title. But was there sufficient on the face of the deed of entail to disclose that the power was granted in contravention of the agreement alleged? I think not. I don't think the parties were bound to speculate on considerations of that kind. But anything that is disclosed on the face of the deed of entail pointed, I think, in an opposite direction. The agreement sets forth that there were to be the cardinal prohibitions against contracting debt, but the deed contains other provisions of considerable importance not mentioned in the agreement; and then it provides that the new deed of entail shall be executed at the sight and to the satisfaction of Richard Mackenzie, W.S., and John Ord Mackenzie, W.S., or either of them. There were to be or might be other conditions introduced into the deed of entail. Sir Thomas Riddell was a party to the nomination of Mr Mackenzie. The deed was prepared at his sight, and the inference is that it was prepared at the sight of the parties, and to their satisfaction. Then, does it appear

that there was any *mala fides* on the part of Mr and Mrs Cunliffe or their marriage trustees? I think there is no trace of that at all. I may notice that Mr Mackenzie was not the agent of Sir James Riddell. He was the agent for Mr Campbell Drummond Riddell, and I think it was a fair thing to leave the matter to him. So far as he could have any bias (which I don't think he had) in the matter, it would be all the other way. I see from the proof that every person concerned who has been examined as a witness states that there were to be powers to introduce provisions of some kind, and the obligation bears that there are to be in the deed "such other conditions, provisions, and restrictions, as they shall think proper." What then does it come to but a matter of amount, and where is it said that that was not agreed to? It does not appear on the face of the title. Then, was there any intimation made to the marriage-contract trustees that it was not agreed to. Sir Thomas Riddell does not say so. He objected to the amount. He understood there was to be a power to provide for younger children similar to the power in the former entail. I am satisfied therefore that the right acquired by the defenders is unassailable. There remains the interest of the other heirs of entail who are called as defenders, but who have not appeared. I give no judgment as to them.

Lord CURRIEHILL—The ground on which this provision is challenged is that it is contrary to the rights of the heirs of entail succeeding Sir James Riddell, not that it is a contravention of the deed of entail. It is not struck at by the prohibitions in the entail, because, although there is a prohibition against contracting debt, there is an exception in favour of granting such a provision as this. Nor is it challenged as in contravention of any prohibition in the previous investiture. The ground of challenge is that the maker of this entail was under a personal obligation to his son and his brother, who were both heirs of entail, to insert certain clauses, and that that obligation was contravened by granting this provision. I assume that that is a right construction of the personal obligation. In that view this is a competition betwixt a personal and a real creditor. The right obtained by the defenders is a real one. In the usual case a real creditor in such a competition is preferable. To meet that rule of law it is here alleged that the defenders were in *mala fide*, because they were in the knowledge of the prior personal obligation. That is a matter of fact which depends on the evidence. The proof is said to be that in the deed of entail itself the personal obligation is narrated *verbatim* and *ad longum*. The question, therefore comes to be, whether it contains any such information. I don't think it does, because it does not contain a statement of all the provisions which were to be inserted in the deed of entail. It falls very far short of this. If the entail had been confined to the clauses specified in the obligation there would have been no irritant or resolutive clauses. But this is not all. The parties contracted that it should be adjusted at the sight of Mr Mackenzie. What were his functions? He was to see the deed executed to his satisfaction. His functions were those of a referee to whom the parties entrusted the seeing of everything embodied in the deed of entail. Now, when Mrs Cunliffe and her advisers came to transact with Sir James they had to look at the deed of entail to see what its provisions were, and they were entitled to assume that all the parties were satisfied. The only other

thing they could have done was to have gone to Mr Mackenzie, and we know from the proof what they would have been told if they had done so, namely, that everything was done to the satisfaction of all parties. It is therefore impossible to believe that these defenders can have been in *mala fide*. Even in a question with the other heirs of entail I am by no means clear that there has been any contravention, but I purposely abstain from offering any opinion on that matter.

Lord DEAS—I shall take this case on the footing that the clause in the entail is reducible at the instance of the other heirs, because it is in contravention of the deed of obligation. But taking it so I think that the provision is unobjectionable. The new deed of entail was executed in 1851, recorded in the register of tailzies on 13th January 1852, and in the register of sasines on 24th March 1852. The marriage-contract was not executed till November 1852, eight months after the entail had been feudalised. The infettment on the marriage-contract was recorded in March 1853. Therefore it is undoubtedly preferable to any personal obligation, unless it can be shown that there was bad faith. Was there such? Did the defenders know anything that ought to have induced them to suppose that the deed of entail contained a power which ought not to have been there? I see no proof of that. I think the contrary is proved. It is very clear that the defenders had no notice of it in point of fact, but it is maintained that they had in point of law. That raises the question whether a person reading the deed of obligation could see anything on the face of it to make it necessary to suppose that this provision was a thing which it did not allow. No doubt there was to be a large debt, and there was to be an express prohibition against "further burdening the estates." I am not satisfied, even if the sentence had stopped there, that that would have prevented Sir James Riddell making this provision for his daughter, but it goes on to say—"and such other conditions, provisions, and restrictions as they (that is, the pursuer and his uncle) shall think proper." It must be assumed that the parties were looking after their own interests, and if they allowed a deed of entail to be executed and afterwards feudalised, the fair presumption in the case of onerous third parties is that it was done with their knowledge. Then it was to be executed to the satisfaction of Mr Mackenzie. The meaning of that was, Mr Mackenzie being the agent for the next heir after the pursuer, that he was named as a sort of arbiter bound to see to the interests of all parties. It is not by any means clear that the defenders were bound to inquire whether Mr Mackenzie had done his duty; they were entitled to assume that he had. But supposing they were, nobody doubts that the deed was executed at his sight. Third parties had nothing to do with the question whether he did his duty rightly. From what we know of him we know that he would do so, but third parties had nothing to do with that. The pursuer states in Cond. II that he "relied upon Mr Mackenzie as an intelligent and conscientious man of business discharging the duty which he had undertaken;" and when examined as a witness he says—"I took it for granted that Mr Mackenzie, though not acting for me, would see that the new entail was in terms of the obligation, and in accordance with the old entail. If I had not put this trust in Mr Mackenzie I probably should have employed some one to act on my behalf." According, therefore, to the pursuer's own showing he trusted Mr Mackenzie, and how

is it possible to say that third parties should not do so also? Supposing, then, the defenders had seen the obligation—and I think they were bound to see the register of sasines at all events—I am clear that that would not touch this contract of marriage, which is as onerous as any deed can be. What we are now doing does not decide the question whether this clause is to stand permanently in the deed of entail. I doubt if we could decide that in this action. I think the proper parties are not called so as to entitle us to do so. But we are not asked for a decision of this general question.

Lord ARDMILLAN—In stating my concurrence in the opinion expressed by your Lordship I shall make only a few remarks. I am clearly of opinion that the pursuer's argument in support of one of the alternative views which he presented to the Court is not well founded. I am quite unable to arrive at the conclusion that on a fair construction of the deed of obligation it was the intention of the parties or the effect of the deed to deprive the heirs of entail of *all* power to provide for younger children by deeds affecting the estate. Such an intention is not expressed, and is not to be presumed, and as appears from the statements of the pursuer did not exist. I think the words "further burdening the estate" in the deed of obligation, occurring in the prohibition to be inserted in the new entail, must be read in connection with the previous and the succeeding parts of the deed, and that so read the words do not apply to the "provisions" which the consenters "may think proper," but to debts previously declared to be "burdening the estate." I have no doubt that it was in the power of Sir James Riddell, with concurrence express or fairly implied of the consenting heirs, to grant reasonable "provisions" for younger children over the estate. I think that is the fair and legitimate construction of the deed of obligation, and it is very plain that that was the meaning attributed to it by all the parties engaged in the preparation of the entail, and particularly by Sir Thomas Riddell himself, as appears from his own testimony. In the next place, if there was to be a power of making and securing provisions to younger children according as the same should be adjusted and inserted in a new entail executed at the sight of Mr John Ord Mackenzie, W.S., then I am of opinion that this new entail was executed at sight and to the satisfaction of Mr Mackenzie, a gentleman selected by the parties, and a gentleman of the utmost respectability and the highest professional position, and there is no reason to suppose that the interests of the pursuer were neglected. He himself says that he trusted to Mr Mackenzie, and that if he had not done so he would have employed another agent. Mr David Smith was the pursuer's agent at the time in other matters, but as in the preparation of the new entail he acted for Sir James Riddell he did not act also for the pursuer, but considered the pursuer's interests to be safe in the hands of Mr Mackenzie. On the whole I think that, looking to the terms of the deed of obligation and to the proceedings in adjustment and execution of the new entail, the pursuer is not entitled to reduce the clause in the deed of entail which contains this power to grant bond of provision. I think the whole procedure was fairly and reasonably taken in the manner contemplated by the deed of obligation, that the new entail was executed as intended, and that the sum of £6000, though considerable, was within the power of the parties, and was not objected to by the pursuer or his advisers for several

years. It appears that the pursuer wished after his father's death to induce his mother Lady Riddell to abate her provision of £1000 a-year. For this purpose a memorandum was prepared by Mr Barstow on the part of and with the knowledge of the pursuer; and in that "memorandum of rental and burdens," immediately following "Lady Riddell's jointure £1000," is "Mrs Cunliffe—interest of £6000, at 9 per cent., £240." This view of the "burdens" was intended to induce, and actually did induce, Lady Riddell to relieve the pursuer by abating £400 a-year of her provision. I cannot for a moment imagine that either Mr Barstow or the pursuer intended to deceive Lady Riddell into compliance by representing as a burden what they knew was not a burden. On the contrary I am satisfied that they believed the £6000 to be really a burden, as being a good provision to Mrs Cunliffe, well secured on the estate by the new entail. Therefore if the first and most extreme view stated by Mr Mackenzie is put aside as untenable, as I think it ought to be, there is in the conduct of the parties and the nature and circumstances of the procedure enough to show that the clause giving power to make provision to the extent of £6000 was fairly and effectually introduced into the new entail. But a second question arises. The deed complained of here is a marriage-contract, a deed of a peculiarly onerous character. At the date of this contract the former entail was at an end, and the estate stood on the investiture under this deed of entail. The marriage-contract, with the provision for the daughter of Sir James Riddell of £6000, was not in contravention of that entail. Nay, more, it was in accordance with its intent and its provisions. I am quite satisfied of the *bona fides* of the marriage-contract trustees and of Mr and Mrs Cunliffe. They were parties to this mutual contract, they accepted the provision, and became onerous creditors in the obligation, holders of a feudalised security. On what ground can that provision for a child, granted under circumstances which render it especially onerous, be reduced? Is it because the estate was entailed? Nay, but the entail permits it. The entail does not fetter beyond the prohibitions, and this provision is not prohibited. I say nothing in regard to a case of fraud or *mala fides* such as has been in the argument supposed. These defenders were in *bona fides*, and they are onerous creditors. It is not justice to their case even to illustrate it by putting the case of fraud or *mala fides*. There is nothing of the kind here. Accordingly I am, apart from the separate question in regard to the entail, of opinion that the provision of £6000 in the marriage-contract of Mr and Mrs Cunliffe cannot be reduced on the grounds here stated, and thus the defenders, who alone have appeared, ought to be assolized.

The Court recalled the Lord Ordinary's interlocutor, and in place thereof assolized the defenders who had appeared, with expenses; and in respect the pursuer did not insist on any judgment in regard to the absent heirs of entail, dismissed the action *quoad* them.

Agents for Pursuer—Hamilton & Kinnear, W.S.
Agents for Defenders—Hope & Mackay, W.S.

SECOND DIVISION.

PETITION—SCOTT.

Process—Divorce—Oath of Calumny. Circumstances in which the Court remitted to a com-

missioner to take a pursuer's oath of calumny in an action of divorce before the summons was called.

The petitioner, who was a sailor, brought a divorce against his wife. The action was not yet called in Court. He was about to proceed on a voyage which was likely to be of one year's duration, and would accordingly not be in the country when his oath of calumny would fall to be taken. In these circumstances he craved the Court to allow the oath to be taken during vacation before the Lord Ordinary on the Bills, or to appoint a commissioner before whom it might be taken, the deposition to lie *in retentis* until the case was duly called and enrolled.

J. A. CRICHTON supported the prayer of the petition, and relied on the cases of *A. B. v C. D.*, 16 S. 1143, and *Potts*, 2 D. 248, as authorities in respect of which it should be granted.

At advising—

The LORD JUSTICE-CLERK—There are two objections to the taking of this oath of calumny in the manner proposed—(1) that it is premature; and (2) that it is proposed to take it before some other person than the Lord Ordinary in the divorce process. Now, as to the second objection, the case reported in the 16th vol. of *Shaw* is a good authority, because there the objection was taken that the Lord Ordinary shall administer the oath of calumny, but notwithstanding the Court granted a commission, the party being resident in India. The other objection is that the proposed step is premature, the case not being in shape according to statute. But there is authority in the case of *Potts* for that also. No doubt the oath was there taken before the Lord Ordinary who was to be the Lord Ordinary in the divorce process, but it might readily have been otherwise. Taking these authorities together, I think we may grant a commission to take this oath that it may lie *in retentis* until the action is called before the Lord Ordinary, due notice being first given to the defender, and proof that such has been given produced before the commissioner.

The other Judges concurred.

The Court accordingly appointed a commissioner in terms of the prayer of the petition.

Agents for Petitioner—Webster & Sprott, S.S.C.

Thursday, July 12.

MACVICAR v. THE HERITORS OF MANOR.

Teinds—Minute of Surrender—Decree of Valuation. A surrender of teinds by an heritor in a process of locality refused to be sustained in respect the amount of his teinds was not ascertained by the decree of valuation on which he founded, and could not be ascertained without a process of division.

This is a question in a process of augmentation and locality at the instance of the minister of the parish of Manor against the heritors of the parish. In the process Mr Tweedie of Quarter made the following condescendence and surrender:—

1. The condescender, the said James Tweedie, is heritable proprietor of the lands of Hallmeadow, town of Manor, Glenrath, Hallmanor, Castlehill, Welshhouses, and mill lands of Manor, lying in the said parish of Manor, together with the teinds, parsonage and vicarage thereof, conform to—(1) Extract registered disposition and assignation by the trustees of his father the late Thomas