party, instead of enforcing payment by personal diligence, is seeking to enter into possession of the property of his debtor.

The right to demand an assignation rests entirely upon considerations of equity as to the position of parties. A discharge is all that, in strict law, can be demanded; but where an assignation in favour of a third party who advances the money necessary to pay the debt, while it benefits the debtor, does no harm to the creditor, and the creditor is insisting upon implement of his obligation, the Court will intervene in the debtor's favour. The same considerations of equity which cause the strict law to be varied in favour of the debtor, precludes its application in cases where the creditor would suffer injury. A creditor receiving payment of his debt is not held to be under any obligation to assign, if the assignation shall be to his prejudice. He cannot, of course, be called upon by a debtor who himself pays his debt, to grant any such deed.

The demand for an assignation here is met by two answers. In the first place, it is urged upon us that the trustee is truly no more than a representative of the debtor, and reference is made to the case of *Ewart and Latta*, and to the opinion of Lord Westbury, who says in that case, that the trustee can maintain no higher ground in reference to his demand than the debtor himself could do.

The trustee does no doubt represent the bankrupt in a certain sense, but he is, in virtue of his confirmation, an adjudging creditor. The right of an adjudger in implement, and the right of an adjudger for debt, warrant legal reversion. He is administrator of the estate for the interest of all the creditors, and an assignation would plainly be an auxiliary in his administration. In the case of *Latta*, the observation of Lord Westbury was made in reference to a state of the fact in which a trustee claimed an assignation on payment, not of the debt due, but of 7s. 6d. in the pound of that debt. The assignation was offered by the creditor if his whole debt was paid; the argument was, that the debtor could not, on payment of 7s. 6d. in the pound, have asked an assignation; and a trustee could not exercise a privilege in reference to a partial payment. I do not think that this objection is good.

The creditor farther pleads that he has a second debt and security, and that the assignation of his right to the first security will prejudice his remedies under that security. Had that security been held by the creditor anterior to the sequestration, I should have been disposed to think the objection valid. It would present some difficulty if the acquisition had been made subsequent to the sequestration. It seems to me to present none at all, seeing that it was acquired after the application was made for entry into possession, and simultaneously with an order for condescendence. It is, I think, impossible for us to hold that a party can plead against a demand judicially made—a prejudice arising from the voluntary acquisition of the debt, in reference to which debt so acquired prejudice is averred pending the litigation. The only prejudice which he can plead as to this debt, and the circumstances of its acquisition, seem to me to exclude all equity in reference to it. To the equitable demand of the trustee he must show counter-equity, and if all the equity which he can urge is the effect to be produced upon a debt to which he had no right until the judicial demand for an assignation was made and actually under discussion, I cannot see that he presents any case for our equitable interference. I do not think that he can be heard to plead prejudice to a right only acquired plainly for the very object of raising the plea. I therefore agree with the Lord Ordinary, with whose views, as expressed in his note, I generally concur.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Reclaimer—Hagart & Burn Murdoch, W.S.

Agents for Respondents—Murdoch, Boyd, & Co., W.S.

Thursday, June 13.

FIRST DIVISION.

FRASER *v.* YOUNGER & SON.

Reparation — Culpa — *Unfenced Machinery* — *New Trial—Bill of Exceptions.* Motion for new trial, on the ground that the verdict was against evidence, refused. Bill of Exceptions sustained, on the ground that the first direction excepted to was ambiguous, and the second unsound.

In this case, in which Mrs Margaret Fraser, widow of James Fraser, provision dealer and cowfeeder in Alloa, was pursuer, and George Younger & Sons, brewers in Alloa, were defenders, the following issue was sent to a jury in April 1867:—

"Whether the pursuer's daughter, Ann, died in consequence of injuries sustained on or about the 10th of April 1866, from an unfenced shaft in the mash-house of the defenders' brewery at Alloa, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

Damages laid at £1000.

The jury unanimously returned a verdict for the defenders. The pursuer moved for a rule on the defenders to show cause why the verdict should not be set aside as contrary to evidence, and also presented a bill of exceptions to the judge's charge.

The presiding judge (Kinloch) had charged the jury, *inter alia*—(1) That if they were satisfied on the evidence that Ann Fraser ought not to have been in the mash-house of the defenders on the occasion in question, the defenders were entitled to a verdict. (2) That the act of the servants of the defenders in allowing the deceased Ann Fraser to come within the mash-house would not affect the defenders if the jury were satisfied on the evidence that their doing so was in contravention of a direct order of the defenders. To these directions the pursuer had excepted at the trial.

Fraser and J. C. Smith for pursuer.

Gifford and John Hunter for defenders.

On the motion for a rule, the Court held that there was no ground for granting it on the footing that the verdict was against the evidence, whatever might be said as to the law. Supposing no law had been laid down, or that the law laid down were sound, the Court were all of opinion that the verdict was fully justified by the evidence, and that the evidence led to this, that the girl killed did, by her own fault and recklessness, contribute to her own destruction.

On the bill of exceptions.

Lord President—In this case it is necessary, in the first place, as it is in considering any bill of

exceptions, to look to the terms of the issue; but, in the second place, it is necessary, in considering a bill of exceptions like this—where the exceptions are taken to the directions given after all the evidence has been led on both sides—to look to the case attempted to be made on the evidence by the pursuer and defenders respectively. The Court is not entitled to consider the evidence with the view of coming to a conclusion in point of fact itself, but for seeing, on the one hand, what is the nature of the case which the pursuer tried to make; and, on the other hand, what is the nature of the case of the defenders. Now the question raised in the issue was, whether—[reads issue]. And, as in many such cases, the whole question in dispute arose on the words, "through the fault of the defenders."

On the one hand, the pursuer contended that she had shown that the fault which led to her daughter's death was attributable entirely to the fault of the defenders or their servants; that the mash-house was the place where persons came to purchase draff, and that the mash-house was dangerous because of the shaft being unfenced. On the other hand, the defenders contended, as matter of fact, that the mash-house was not the proper place for such persons to come; that they were not allowed to come into the mash-house, and that the deceased was well aware of this rule, and came there notwithstanding. Now what is the direction given by the judge in these circumstances? He tells them, under that head of his charge excepted to under the first exception, that—[reads]. The chief objection, and the only serious one to it is, that it is equivocal and ambiguous, and therefore calculated to mislead the jury, or calculated to lead different jurymen in different directions, according to the meaning they might attach to the words. "Ought not to have been in the mash-house," implies the existence of fault somewhere, but that might be either entirely in the deceased herself, or it might be entirely in the defenders' workmen, or partly on the one side and partly on the other. Now, according to what may be the state of the fact on the evidence, a different result will follow. If it was entirely the fault of the deceased herself, the defenders are entitled to a verdict. If entirely the fault of the defenders or their servants, the pursuer will be entitled to a verdict. If partly the fault of both, the legal result is, that the defenders are still entitled to a verdict. And the jury had, in digesting this evidence, this most misleading direction, that if they were satisfied that the deceased ought not to have been in the mash-house on the occasion in question, the defenders were entitled to a verdict. And the difficulty is aggravated when you come to consider that one part of the jury may have thought it all the fault of one, a second part of the jury may have thought it all the fault of the other, while a third part may have thought it the fault of both, while yet they might all coincide in the verdict, which they certainly ought not to have done if they entertained these different views of the evidence. That is my reason for thinking it impossible not to allow the first exception. Then as to the second exception, I look on it differently, for that is a false proposition in law. It is—[reads]. Now it does not matter in what connection with the evidence you consider this proposition, nor under what circumstances, because the gist of this direction is, that the act of the servants of the defenders, which would otherwise and in the ordinary case have made the defenders liable, would not do so if the act were done in contravention of the defenders' order. Now this is unsound, because the act, whether done in contravention of the defenders' order or not, has nothing to do with the legal liability of the defenders.

The second exception, therefore, must also be sustained. But I cannot conclude without saying that I am exceedingly sorry to be driven to this conclusion, because we have seen the state of the evidence, and one cannot help seeing that the case is not sufficient to affix liability on the defenders; and that, if that evidence is repeated to a jury, the pursuer cannot get a verdict, because fault is disclosed on the part of the deceased herself, which is quite sufficient to free the defenders. But we cannot travel out of the bill of exceptions, and must deal with them as I have indicated.

The other judges concurred.

Exceptions allowed, and new trial appointed, reserving all questions of expenses.

Agent for Pursuer—W. R. Skinner, S.S.C.

Agents for Defenders—Morton, Whitehead, & Greig, W.S.

Thursday, June 13.

SECOND DIVISION.

LINDSAY AND LONG *v.* ROBERTSON AND OTHERS.

Mussel Fishings—Barony—General Title—Jus Publicum—*Possession—Agreements—Leases—Interim Interdict.* Circumstances in which interim interdict granted, pending the trial of the question as to rights of parties to mussel scalps situated on the shore between high and low water mark.

This is an action of suspension and interdict brought by Sir Coutts Lindsay and Colonel Long, proprietors of land on the River Eden, the object of which is to interdict the fishermen of St Andrews from gathering mussels from the mussel-scalps on the north side of the river. The suspenders found upon a barony title with a general clause of fishings, which, they maintain, is a title upon which they can prescribe a right to mussels; and they found upon certain leases which, they say, are evidence of their possession, and of theirs only. The respondents, on the other hand, say they have a right to take mussels there, and anywhere else, between high and low water mark, or on the shores of navigable rivers, because it is *juris publici*, a right which inheres in every member of the State, merely as such, and forms no part of the hereditary revenues of the Crown which the Crown can gift to a subject. They further rely upon a grant of lands, with the mussel-scalps adjoining, made to the magistrates and community of St Andrews, which, they say, entitles any of the inhabitants, as beneficiaries under the grant, to take mussels from the adjoining scalps; and they contend that that grant carries them to any of the mussel-scalps on the river, because they form one continuous connected estate. The respondents also say that they have had possession of the scalps on the northern side of the river as well as the complainers. The complainers, besides their title and possession, found upon a compromise fixing the Eden as the boundary agreed to in a litigation between the town and the proprietors in the Sheriff-court in 1805. The complainers' predecessors, on the one hand, renounced their right to take mussels from the south side of the river, being that adjacent to the lands