

the construction that the fee must have been meant to vest under the circumstances which occurred.

But it has been contended that there is another clause of this deed which operates adversely to the idea of vesting, *i.e.*, the clause which provides for the overplus of the rents and produce of these lands during the minority of the person entitled to receive the same. Now, if that clause applied to the case of fiars, I should think there was great force in that argument, though even then there would be a difficulty in reconciling it with other clauses. But I am satisfied that that clause is applied exclusively to liferenters under this deed, and this is clear if you take in connection with this particular clause that which precedes it; "and farther declaring that the said James Clark, and the other persons named in their order shall have it in their option either to draw the rents and produce of the said lands of Furth-head, Dalmonyside and Netherlyett, through the hands of my said trustees, or to enter to the natural possession and occupation of the same on their attaining the foresaid age of twenty years complete." It is clear that the only persons contemplated under that clause are liferenters. They are the only persons subject to the disability which is to be removed by the attainment of the age of twenty years. These are also the only persons who shall benefit by this option. It is immediately following on this that the deed declares that the lands shall be burdened with an annuity to John M'Michan, and declares that the overplus of the rents and produce of the said lands shall, during the minority of the person entitled to receive the same, be accumulated by the trustees, and be payable to such person on his attaining the age of twenty years complete. The same idea runs throughout. That being so, I think that clause does not interfere with the construction in favour of vesting.

I shall only say, in conclusion, that this is a pure case of construction of the words of a settlement according to their natural and ordinary meaning. There are no technical meanings, no authoritative rules of construction to guide us. My simple ground of judgment is, that I believe from the words of the testator that he intended that vesting should take place.

LORD CURRIEHILL concurred.

LORD DEAS—I agree that if the pupil has no right to the fee, he has no right to the rents; and also that that clause commented on by your Lordship applies to liferenters only. On the question whether the fee has vested in the pupil, I differ. There is nothing in the deed to give the fee to the pupil, unless that is done by the direction to pay to him and his heirs and disponees when he attains majority. There is no direction to hold for him, and no right given to him at all, except such right as may be supposed to be implied in the direction to convey to him on attaining the age of twenty-one. But the direction is not to convey to him on majority, but to convey to the lawful heir of James Welsh junior on his or her attaining majority. It is clear, therefore, that unless this pupil attains majority there can be no conveyance of the estate to him. The estate still remains with the trustees. There may be found in other parts of the deed such indications of intention that the fee shall vest in the pupil, as to lead to the result that the fee has vested. But the natural construction of such a clause is, that the period of granting the convey-

ance is the period when vesting shall take place, unless there is some clause to show otherwise. In the recent case of *Campbell* we held that the fee had vested, but that was with difficulty, and only because in other parts of the deed there were such strong and conclusive indications of intention. That case we held to be an exception to the general rule. I don't say that here there is nothing indicative of intention in the mind of the maker of the deed in favour of vesting, but there is nothing strong enough to overturn the general rule. Your Lordship has stated several reasons in support of vesting; but they are not sufficient to my mind. One of these reasons is that if this fee has not vested there will be intestacy, because the destination to the Muirheads has been evacuated by James Welsh having heirs of his body, I agree with this construction, but I don't see that the consequence is that, because the estate has not vested in the pupil, there must be intestacy. The direction is to convey to the heir of James Welsh junior on his or her attaining majority. If this heir dies there might have been a number of other children. There is here another child, a daughter, who would be entitled to get the estate if not already vested. Another reason is that the rents would be given to nobody if the fee were not vested. If that were so it would not be conclusive, but I am not prepared to hold that it is so. The party on attaining majority is to get a conveyance of the lands with the rents. It may be that the fair result of that would be to carry the rents from the date of the death as well as the estate. A third reason is, that there would be nobody to pay the annuities if the fee were not vested. That is not of much force to my mind. The £30 was only to be paid if James Clark died before attaining twenty years of age. But that event has not happened and cannot happen. James Clark did not die before twenty. The result is that we have here no right given to the issue of James Welsh junior, but what may be implied in the direction to convey the estate to that one who shall attain majority.

LORD ARDMILLAN concurred with the Lord President.

Agents for pursuer—Ronald & Ritchie, S.S.C.
Agent for defenders—Wm. Kennedy, W.S.

Saturday, November 23.

STEPHEN v. ANDERSON AND ANOTHER.

Suspension—Caution—Decree for Expenses—Sheriff-court Act. A suspension of a Sheriff-court decree for expenses, on the ground of incompetency in the procedure, *refused*, the note being presented without caution, and the grounds of suspension not being *prima facie* sufficient to move the Court in the exercise of its discretion to pass the note.

This was a note of suspension and interdict, presented by James Stephen, shipmaster, Fraserburgh, against Robert Anderson, writer, and A. B. Henderson, shoemaker, in Fraserburgh, craving suspension of a decree for expenses obtained by the respondents against the complainer in the Sheriff-court of Aberdeenshire, and also craving interdict against a poiding and sale of his furniture and other effects. The note was presented without caution.

It appeared that on 2d October 1866 the complainer presented a petition in the Sheriff-court of Aberdeenshire against the respondents, craving delivery of certain documents. On 10th October a minute of defence was lodged by the respondents' agent. Thereupon the Sheriff, holding that the petition and minute sufficiently met each other, closed the record, the pursuer's agent objecting to sign the minute of defence on the ground that condescendence and defences were necessary. On 6th November the Sheriff allowed both parties a proof of their averments. No progress in the action was made, however, for some time; but on 14th February 1867 a joint minute was lodged for the parties, consenting that the diet of proof should be prorogated to the 2d of March. Thereafter a proof was led, and various procedure took place. The complainer, after the proof for the respondents was concluded, moved for a conjunct proof, but the Sheriff refused the motion. On 2d May the Sheriff sustained the defences, and found the complainer liable in expenses.

The grounds upon which the complainer now sought to suspend the decree for expenses were, that no proceedings having been taken by either party in the action for three consecutive months from 6th November 1866, the action stood, *eo ipso*, dismissed under the statute 16 and 17 Vict., c. 80, sec. 15; and no revival of the action having taken place in the manner provided by the statute during the subsequent period of three months, such dismissal became final; that the mode in which the record was made up, and the refusal to the complainer of a conjunct probation, were wrongous and illegal. He also objected that no notice was given him when the account of expenses came before the auditor for taxation.

The Lord Ordinary (BARCAPLE) refused the suspension, recalled the interdict which had been granted *ad interim*, and found the complainer liable in expenses.

The complainer reclaimed.

The Sheriff-Court Act, 16 and 17 Vict., c. 80, enacts, sec 3, "When the defender intends to state a defence he shall enter appearance by lodging with the Sheriff-Clerk, at latest on the day of comparison, a notice in the form of Schedule (C.) annexed to this Act; and on the first Court-day thereafter, or on any other Court-day to which the diet may be adjourned, not being later than eight days thereafter, the Sheriff shall hear the parties in explanation of the grounds of action, and the nature of the defence to be stated thereto, and if satisfied that no farther written pleadings are necessary, he shall cause a minute in the form of the Schedule (D.) annexed to this Act, to be written on the summons, setting forth concisely the ground of defence: which minute shall be subscribed by the parties or their procurators, and the Sheriff shall thereupon close the record by writing under the said minute 'Record closed,' and signing and dating the same; but if the Sheriff shall be satisfied that the record cannot properly be made up without condescendence and defence, he shall pronounce an order for the same," &c. Section 15 provides, that where neither party in action takes any steps for three consecutive months the action shall, *eo ipso*, stand dismissed, without prejudice to either of the parties within three months after the expiration of such first period of three months, to revive the action on showing good cause, to the satisfaction of the Sheriff, why no procedure has taken place, or &c.

D. MACKENZIE for reclamer.

Campbell v. Blackwood, 7th Nov. 1862, 1 Macph., 1; *Mackintosh v. Mackintosh*, 10th Nov. 1864, 2 Macph., 48; *Stewart v. Grant*, 29th March 1867, 5 Macph., 787, and M'Glashan's Sh. C. Pr. 199, were cited.

CLARK and W. M. THOMSON for respondent, were not called on.

LORD PRESIDENT.—The important question to be kept in mind in dealing with all these points is that this is a suspension of a decree for expenses, presented without caution. Now that involves a question of discretion, and it is not necessary in dealing with this note to decide all the points raised by the complainer. The question is, Whether he has presented such a case as, in our discretion, he ought to be allowed to try on a passed note without caution? I think he has not. He has not brought the merits under review, but has acquiesced in the finding on the merits, and all he seeks is to suspend this decree for expenses, and to enable him to resist that decree against him in a cause in which he is, by his own admission, wrong, he raises these nice points about the competency of the proceedings. And the first point he takes up is that the cause had come to an end under the provisions of the 15th section of the Sheriff-court Act. This, no doubt, is a formidable objection if well founded, and if it could have been shown that this cause actually stood dismissed, and could not be, or was not revived, I should then have been disposed to pass the note to enable the complainer to get redress against a decree which must in that case have been pronounced by a judge having no jurisdiction. But this objection is unfounded in itself. The 15th section of the Sheriff-court Act provides, that when in any cause neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein, the action shall, at the expiration of that period, *eo ipso*, stand dismissed. But then that is subject to the qualification that it shall be competent to either party within three months after the expiration of such first period of three months, to revive the action on showing good cause to the Sheriff why no procedure had taken place, or upon payment to the other party of the preceding expenses. Now, on a strict construction of the Act, no procedure ought to be permitted, unless strictly in accordance with the forms pointed out in the clause of the Act, but it is impossible to adopt a strict construction after the cases already decided. It was held by the Court in the case of *Mackintosh* that consent of the parties to a revival of the cause was of itself a sufficient reason for the Sheriff reviving proceedings; and in the case of *Stewart* it was farther held that when the parties consented by a joint-minute it was not necessary for the Sheriff to pronounce an interlocutor, but the cause stood revived by the joint-minute. In this case it is impossible for one of two parties to a joint-minute, such as here, to attempt to go back on proceedings taken with his consent under that joint-minute, and to say that, notwithstanding such consent, he is entitled to have the whole proceedings regarded as null and void. That being so disposed of, I confess I am not much troubled by the other points. It may be of importance in practice in Sheriff-courts whether a Sheriff is entitled to close a record unless the minute be signed by both parties or their agents. It appears from a book of practice that the Sheriff usually takes care to get the consent of both parties before closing the record, and if he does not get it he

orders a condescence. But I am not prepared to say that there is anything in the 3d section to prevent closing the record on summons and defences if a party improperly refused to sign the minute. I give no opinion on that, but I am clear that, in our discretion, that is not a good ground for sustaining the present suspension. So with the questions as to conjunct probation, and whether sufficient notice was given previous to the auditor taxing the account of expenses. These are matters which the Court ought, in a case like this, to disregard in a note of suspension presented without caution.

LORD CURRIEHILL—This is entirely a question of discretion. It is a suspension of a decree for expenses. The merits are not here at all. The note is presented without caution, and it is always a matter of discretion in the Bill Chamber whether suspension of final decree shall be given without caution. I am clear in the whole circumstances that we ought not to pass this note without caution. Where we do so, that does not prevent a note of suspension being presented on caution. The complainer may also bring the merits before the Court on finding caution, although we refuse the present note; and we may be called on afterwards to consider this question on its merits; and I am not inclined to prejudice any of these questions.

LORD DEAS—In such cases the Court always look to the *prima facie* grounds which are pleaded, and, if they are strong, the note may be passed. But any opinion on this stage is only an opinion of that kind—that, *prima facie*, there is not such a strong case stated as to pass the note. Taking it in that view, I agree as to the main ground of suspension, viz., that the acting had ceased to exist. If there had been good *prima facie* grounds for that objection the note might have been passed; but I think there were no good *prima facie* grounds, but all the other way. What took place here was within the six months, and the only question is, Was that a revival? As to the second point—that about closing the record without consent of parties—I am not at present inclined to go along with the complainer. I don't think there is any such probability that the Sheriff will be found to be wrong, or that that is a point so clear in favour of the suspender that we should pass the note without caution. At present I am inclined to think that the Sheriff acted within his power. As to anything touching on the merits, the suspension is incompetent certainly when presented without caution.

LORD ARDMILLAN concurred.

Adhere.

Agent for Complainer—James Bell, S.S.C.

Agent for Respondents—Alexander Morison, S.S.C.

Saturday, November 23.

SECOND DIVISION.

**M'CULLOCH BROTHERS AND BANNERMAN
v. GRIEVE AND OTHERS.**

Shipping—Culpa—Overload—Deal Cargo—Perils of the Sea—Record—Ground of Action. Circumstances in which held (1) that the owners of a vessel were in fault in sailing with a deal cargo and with an overload, and owners held

liable on the full amount of damage which was sustained to a cargo of wheat during the voyage; (2) that when owners are in fault at the commencement of the voyage, they must prove an alleged contributing cause of damage in addition to those relied upon to have been in actual operation, and to what precise extent; (3) that it is incompetent to set up a ground of defence which is inconsistent with the defence alleged on the record.

The pursuers in this action are M'Culloch Brothers, merchants in Montreal, and David Bannerman, corn factor in Glasgow, their mandatory; and the defenders are the registered owners of the ship or vessel called the Sir John Moore, of Glasgow. The summons concludes for £1286, 8s. 5d., which, the pursuers say, is the amount of damage done to a cargo of wheat which they shipped at Montreal in that vessel in the month of August 1864, which damage was caused by the overloading of the vessel and her carrying a deck cargo. A long trial took place before Lord Ormisdale last session, and from the facts then disclosed in evidence, it appeared that the Sir John Moore, having taken a cargo of wheat at Montreal in August 1864, proceeded to Quebec, where she filled up with deals in her 'tween decks, and over and above that load took a deck cargo of deals. She left Quebec on the 29th of August. In the course of the voyage the vessel experienced unusually tempestuous weather, her quarter-galleries being carried away, and much water being made. On arrival of the vessel in Liverpool, in the end of September, it was found that out of a cargo of 19,000 bushels of wheat, 17,000 had been more or less damaged. The pursuers then brought this action against the owners of the ship, alleging that the damage had been caused by the overload of the ship and the deck cargo, which caused the ship to strain, thereby opening up the seams and covering ways, hull, and topsides, by which the water got into the hold and injured the wheat. They also said that the deals which were put in at Quebec in the between decks were saturated by rain, and that the planking of this deck had been left defective, which enabled the wet from the deals to get access to the wheat. In defence, the defenders pleaded, the 'act of God and the perils of the sea.' They said that their vessel was not overloaded; that a deck cargo was not an unusual, and was quite a lawful thing; and that all the damage had been caused by the stormy weather which the ship encountered on her voyage across the Atlantic. In the course of the proof, which was partly taken by commission in Montreal and in Quebec, and partly before the Lord Ordinary, a great deal of evidence was led by the pursuers with the view of showing that the taking of a deck load was a reprehensible practice, and that any master who did so took it at the risk of the ship and not of the shipper. On the point of the overload of the ship, the pursuers put in evidence a certificate granted to the master of the Sir John Moore by the Port Warden of Montreal, authorising him to load up to a certain draught of water, and they said that that draught had been exceeded at Quebec after the pursuers' cargo was shipped. A more special point was raised by the defenders at the trial. On going down the St Lawrence from Montreal to Quebec the ship, while under tow of a steamer, grounded for about two minutes, and when she was examined upon her arrival at Liverpool, it was found that the scarphs of her