estates. The claim or proceeding to which the action is said to be accessory is a petition by the pursuer claiming the Breadalbane Peerage, which was referred by Her Majesty to the House of Peers, and which the House referred to the Committee of Privileges on 26th June 1865. It is not said that the House of Peers during the period, upwards of three years and a-half, that the petition has been before them, has made, or been asked by the pursuer to make, any order in regard to the production as evidence of the writs which are the subject of this action. Nor is it said that the House may not make an effective order as to that matter.

"The pursuer's interest and title to bring this action depends entirely upon his having preferred a claim to the Peerage. He claims as being heir-male of the body of Duncan Campbell, eldest son of the first Earl of Breadalbane, but not his successor in the Peerage, which, in the exercise of a power conferred by the patent, the Earl destined to his second son. The pursuer alleges, (Cond. 16) that, upon the death of the third Earl, in 1782, the title devolved upon Duncan Campbell, the pursuer's grandfather, who was the grandson of the first Earl's eldest son, Duncan Campbell. Thus, according to the pursuer's statement, the title ought to have been taken up by his grandfather in 1782. But it was taken up by John Campbell of Carwhin, fourth Earl, descended from an uncle of the first Earl, who took it under the patent as nearest lawful heir-male of the first Earl. The pursuer, apparently in explanation of his grandfather not having asserted a claim, says that he had been concerned in the Rebellion of 1745, and was subject to attainder and to forfeiture of the title and family estates. If he was actually attainted, which could alone interfere with his right to succeed if he was the next heir, it would seem equally to exclude the right of the pursuer to take through him. The title was held by the fourth Earl, afterwards first Marquis of Breadalbane, from 1782 till his death in 1834, and by his son, the second Marquis, till his death in 1862.

"The pursuer does not produce a service or evidence of any kind in support of his demand in this action. His claim rests entirely upon his own assertion, which is denied; and his statement as to the marriage of Duncan Campbell, the eldest son of the first Earl, is expressly denied.

"The question which thus arises is, Whether the pursuer has set forth a case to entitle him, merely on his own assertion that he is heir-male of the body of Duncan Campbell, and therefore heir-male of the body of the first Earl of Breadalbane, which is denied, to have the defenders now ordained to deliver up to the Clerk of Court for custody the large number of deeds and writings to which the conclusions of the summons relate? This Court cannot judge directly of the right to the Peerage; and as little, it is thought, can it judge of it for the purposes of an action which is merely incidental to the direct claim to the peerage itself. The Lord Ordinary does not think that the pursuer can be allowed a proof of his averments in support of his title in this action, which would be substantially a proof of his claim to the peerage. As the matter stands just now, the pursuer's case is not different from what might be presented by any other party who should claim the title through the same line of descent, or through any other line, resting their claim entirely upon their own bare assertion. It is met by the fact that the alleged claim has never hitherto been asserted, though it emerged in 1782. The Lord Ordinary is of opinion that there is no authority in the law of Scotland, and no principle, for giving affect to an action of this kind, when brought in such circumstances."

The pursuer reclaimed.

GORDON, Q.C., MILLAR, Q.C., and MAIR for reclaimer.

Solicitor-General (YOUNG, Q.C.) and ADAM for Glenfalloch.

WATSON for Breadalbane's Trustees.

The Court adhered.

LORD PRESIDENT—My Lords, I confess I am not disposed to enter into technical grounds on which to rest the decision of this case, because there is one broad and obvious ground on which to rest our judgment. The only interest which the pursuer has to have the documents produced, or to have them made available in evidence, is as petitioner before the Committee of Privileges of the House of Lords. The defender is also a petitioner before the same Committee. Both are therefore subject to the House of Lords in every matter connected with these claims. Though the Committee may not have power to order the production of the documents, it is not suggested that the House of Lords could not make an order for their production. In the absence of any such suggestion, the competency of the action is doubtful, and, until a case of necessity is made out, it would not be becoming in this Court to entertain it; and I am therefore of opinion that the action should be dismissed.

The other Judges concurred, Lord DEAS observing, that even if it were expedient to comply with the demand of the pursuer, the action was not so laid as to enable the Court to give effect to his demand, for if the documents were delivered to the Clerk of Court he would be bound to retain them, and they would never get to the House of Lords.

Agents for Pursuer—J. & W. C. Murray, W.S.

Agents for Glenfalloch—Adam, Kirk, & Robertson, W.S.

Agents for Breadalbane's Trustees—Davidson & Syme, W.S.

COURT OF JUSTICIARY.

Saturday, May 15.

HIGH COURT.

(Before the Lord Justice-Clerk, Lord Cowan, and Lord Neaves.)

M'GARTH AND OTHERS *v.* BATHGATE.

Suspension—Criminal Trial—Adjournment of the Diet—Custody of the Jury—Interlocutor—Conviction—Sheriff. Sentence upon three panels to a term of imprisonment, following a verdict of the jury, *quashed*, in respect the judge who presided, in adjourning the diets of Court, rendered necessary by the protracted character of the proceedings, did not by interlocutor place the jury under custody, nor pronounce any warrant against their becoming separated.

The complainers were, on the 7th of April last, indicted before the Sheriff of Peeblesshire (NAPIER) and a jury, charged with the crime of culpable homicide, by furiously driving through the streets of Peebles and bringing a gig into contact with a woman, and thus causing her death, which proved

to be instantaneous. Before the trial commenced, the counsel for the panels moved the Sheriff for a separation of trials, to the extent of trying the case of the driver of the gig apart from that of the other two, with the view of giving the latter the benefit of the former's evidence to the effect of showing that there was no combination among the panels whereby they could all be held guilty of the crime libelled. The Sheriff refused the motion, and the case proceeded to trial. The proceedings lasted until half-past seven of the 7th of April, when the diet was adjourned by the following interlocutor: —"The Sheriff at this stage adjourned the diet until the morning of the 8th current, at ten o'clock." The jury were then taken to the Tontine Hotel, Peebles. The Court assembled next day at ten o'clock; but at that hour, instead of taking up the adjourned diet against the panels, the Sheriff proceeded to the hearing of a civil cause, which lasted about half an hour. The proceedings again lasted till ten o'clock at night, when the evidence was closed. The Procurator-Fiscal then addressed the jury. He was followed by the counsel for the panels, when, about one in the morning of the 9th, a juryman became ill. After some delay and consultation with a medical man, it was ascertained that the juryman could not go on without injury to his health; and the Sheriff, without asking the consent of the panels, adjourned the diet until half-past ten of the same day. Before this event the jury had expressed a desire to go on till the case was finished. The second interlocutor of adjournment was in similar terms, there being added, as the cause of adjournment, the illness of a juror. The case was afterwards concluded; and the panels having been found guilty, they were sentenced—one to be imprisoned for twelve calendar months, and the other two for nine months each. Before the sentence was pronounced a motion was made on behalf of the panels in arrest of judgment, on the ground of various irregularities in the procedure, which, however, the Sheriff refused.

The following minute was put in and entered on the record in arrest of judgment:—"The verdict of the jury having been recorded, the Procurator-Fiscal moved for sentence, whereupon 'Brown, for the panels, stated, in arrest of judgment, that the Court having adjourned on Wednesday the 7th of April 1869, until Thursday the 8th of April, at ten o'clock A.M., and the jury having returned to Court, the diet against the panels was not then called, but the Court, to the prejudice of the panels, proceeded to the hearing of a civil cause, on the conclusion of which the adjourned diet against the panels was for the first time called. He further stated, in arrest of judgment, that, one of the jurors having become unwell during the course of the trial, the Court a second time adjourned the diet of 8th April until half-past ten o'clock A.M. of the 9th, instead of discharging the jury, as required by law. He further stated, in arrest of judgment, that, in adjourning both diets against the panels as above stated, the jury were not put under the custody of any officer of Court specially sworn *de fideli administratione officii*, and became separated, and had communication with some of the witnesses for the prosecution.'"

The panels now brought a bill of suspension and liberation, in which they pleaded—"(1) In the circumstances libelled, it was oppressive on the part of the public prosecutor to try the complainers under the same libel, and the Sheriff should have granted the motion for separation of trials to the limited extent to which it was asked. (2) The Sheriff having adjourned the diet of 7th April until ten o'clock of the following morning, it was incompetent for him at that hour to take up any other case than that of the complainers; and he having done so, the adjourned diet fell in consequence. (3) It was incompetent for the Sheriff to adjourn the diet against the panels after a juror had become unwell, and his duty was to discharge the jury. (4) The whole proceedings after said adjournment were inept, null, and void. (5) The whole proceedings are inept, null, and void, in respect the jury were not placed under the custody of a proper officer of Court, nor one specially sworn *de fideli administratione officii*. (6) The whole proceedings are inept, null, and void, in respect the jury became separated, and had communications with witnesses for the prosecution. (7) The proceedings complained of being, in the various particulars above referred to, illegal, incompetent, and irregular, the sentence under review ought to be suspended, and the complainers liberated."

GORDON, Q.C., and W. A. BROWN in support of the bill.

CLARK and H. J. MONCREIFF in answer.

At advising—

LORD JUSTICE-CLERK—This bill of suspension is founded upon several distinct grounds of objection to the procedure which terminated in the sentence by which the suspenders were subjected to imprisonment. The first is, that a motion was made, and refused, that the trials of the three panels should be separated, in order that the panels Anderson and Murray might have the benefit of the evidence of the third panel M'Garth. I am of opinion that this ground of suspension cannot be sustained. The matter is one very much in the discretion of the judge; and, unless in a case in which it was made clear that there has been a palpable failure of justice, arising from such a defective exercise of the discretionary power as would amount to oppression, we could not annul the proceedings. In this case, the sole ground for separating the trials stated was one equally open to be made in any case in which there is more than a single panel. I see no reason to think that the Sheriff did wrong in refusing the motion. My view is, that no ground was shown for any interference with the ordinary course of procedure.

The second objection is, that the Sheriff, having adjourned the case till ten o'clock on the 8th April, proceeded before calling the diet against the panels at ten o'clock, to hear and dispose of a civil cause, which occupied twenty minutes. There appears to me to be no validity in that objection. If the failure to call the diet at ten o'clock would, as is admitted, fail to affect the regularity of the procedure, the Sheriff being or not being occupied in trying a civil case during the twenty minutes which elapsed between ten o'clock and the taking up of the case cannot make any difference in the case. No prejudice can be affirmed to have resulted to the panels with any show of reason or probability.

The third objection is, that the Sheriff had no power to adjourn the case; because the cause of adjournment was the illness of a juryman—the contention being that the only course open where proceedings have been interrupted by the illness of a juryman, is the discharge of the jury and a new trial. This objection is founded upon a misconception of the cases of *Smith*, and those other cases

where a juryman was seized with such violent illness, as in the opinion of the Court on medical evidence to render it impossible or perilous to the juryman, to continue to exercise his functions till the end of the case, and where the jury was discharged, and the trial proceeded with *de novo*. If the illness be of such a character as to lead the Court to believe that an interval of rest, with or without medical treatment, may perfectly restore the juryman, and not put his health in peril by resuming consideration of the case and disposing of it, that is one of the best conceivable reasons for a temporary adjournment. It would be a strange law if a juror fainting from the heat of an overcrowded Court, who is perfectly restored after an interval of an hour or two, but where a temporary interruption of proceedings is necessary, should have the effect of rendering anything done up to that time void. In this case the proceedings, commencing at twenty minutes past ten in the morning, were proceeding about one in the morning, when a juror was taken ill; the medical gentleman called in to attend the juryman reported, as the bill says, "that it would be prejudicial to the health of the juror if the proceedings were protracted to a much longer period;" which leads to the clear inference that an adjournment would prevent that anticipated prejudice, which it, from anything that appears, must be held to have done. It would be of serious prejudice to panels did any such rule exist. To subject them without any real necessity to the cost and anxiety of another trial, by reason of the temporary illness of a juror, would be a matter attended with great hardship, and there certainly is no such rule of law.

Another objection is, that the jury, after the adjournment of the morning of the 9th April, separated and had communication with various parties, among whom were two witnesses for the prosecution. The statement is denied. Additional statements to those made in the bill are tendered by the panels as to the extent of the separation and of the communications had with parties other than jurors, and the whole of these allegations are denied by the respondent. Had the case required that this ground of objection should have been gone into, we should have required to have had additions to the record, and to have considered the relevancy of the averments, in the first place, and their truth, if relevant, in the second, on evidence to be led on that subject. As the case stands—that is, according to any admitted condition of the facts—that ground of objection, as a separate and substantive ground of suspension and liberation, does not appear to be in *hoc statu* sustainable.

But an objection occurs to the proceeding appearing upon the record, and is insisted on as fatal to the procedure, upon which it appears to me that we are in a condition to pronounce judgment, and this objection involves considerations in the conduct of criminal trials of the gravest importance. The Sheriff twice adjourned the trial, and he did so on both occasions by interlocutors which simply adjourned the case, and which contained none of those conditions and directions which have hitherto invariably qualified such interlocutors of adjournment, so far as appears, in all the criminal courts of Scotland, certainly in the High Court of Justiciary and on the Circuit.

Where an interlocutor is pronounced adjourning a criminal case, the interlocutor of the Court, in the first place, proceeds upon a statement of the impossibility or the great inconvenience of bringing the case to a conclusion during the course of the actual sederunt. Second, it ordains all parties to attend at the adjourned diet. Third, it grants warrant for the confinement of the panel during the period of adjournment and his being brought up again to the bar of the Court. Fourth, it proceeds to place the jurors under the charge of parties named in the interlocutor; and when these parties are not proper officials of the Court within whose functions that of the attendance on the jury is included as part of their official duty, and is under the sanction of their oath of office; they are sworn to be faithful in their exercise of the duty imposed on them, and that fact is set out in the interlocutor. Finally, the jury are ordained to proceed to the place provided for their accommodation, and ordained to remain under the charge of these officers, and to be kept strictly secluded from communication with any person on the subject of the trial—access being given to the macers appointed, or to the Clerk of Court, and liberty of communication given to them, but only in regard to their personal or private affairs, if that be necessary. We have had before us the recent interlocutors in these cases in the record, and the forms, as then in use, are given in Swinton and Broun's Reports—the first in 1838, in the well-known case of the cotton spinners; the second in the case of the Culsamond rioters in 1842.

In this case, the interlocutor of Court appointing the first adjournment assigns no reason for the act of adjournment; it contains no order on parties, or jurors, or witnesses, to attend at the adjourned diet; it fails to place the jurors under the charge of any one; it contains no directions as to the inclosure of the jury, or their remaining separate or secluded; no restriction is imposed on their freedom of intercourse or communication on the subject of the trial, or on any other subject—the interlocutors simply adjourn the case.

The proper legal effect of a simple unconditional adjournment of the case is a discontinuance of the proceedings at the actual sederunt, and an order to resume proceedings at the diet to which the case is adjourned. This, as it appears to me, leaves the jury legally entitled to leave the box, to go, each juror whither he pleases. The adjournment may imply an order to appear at the adjourned diet, but till that diet arrives I hold that he is entirely free in his course of acting and proceeding, so far as the judicial act of the Court is concerned. If, after the jury has been charged with the case, and during its progress, there has been a time at which, by a judicial act, their inclosure has been made to cease, and they are set free under an obligation—or rather an understanding without any obligation specially imposed—that they will resume their places in the jury-box at the adjourned diet, it appears to me that there is a radical and incurable defect in the procedure. No such adjournment is legal. If actual separation had taken place under such an interlocutor, no one can contend that the proceedings could stand. The case of *Ronald* is conclusive on that matter. If the jurors under the two interlocutors here were placed in a situation in which they had the right to separate, and were under the legal charge or custody of no one, shall the process be good because, though they were legally relieved from being inclosed, they were not *de facto* separated? I think not.

My view is, that a simple unconditional adjournment in the middle of a criminal trial is incompetent. A criminal trial may be adjourned where

there is a necessity for such adjournment, and where the interlocutor provides for and secures the continuance of the seclusion of the jury,—which is of the very essence of our system of criminal law. An adjournment *prima facie* puts an end to the judicial proceedings for the time. The condition of continued inclosure seems to me to be essential to secure fulfilment of the requirements of the law in the due conduct of criminal proceedings; its absence seems to me to be fatal.

If jurors by the interlocutor are under no restraint —if no one has any legal right to interfere with them or control them, and any attempted interference might be warrantably repelled; if, without disobedience to any order of Court, or incurring the penalties of contempt, they could freely mingle with the world—it appears to me that the legal position of such jurors is inconsistent with that of a jury charged with the inquiry into the commission of a crime which is in the course of being investigated. This is the position in which, I think, the jury stood under the adjournment in this case, and consequently I hold the proceedings to be bad.

The respondent proposes to prove by parole that the Sheriff told the sheriff-clerk to look after the jury, and that he told the jury to go to and remain at a particular hotel till the proceedings were resumed. I am of opinion that an offer to prove verbal statements by the Judge, to the effect of adding to or qualifying an interlocutor, so as to give validity to the interlocutor, if the interlocutor *per se* is bad, is quite inadmissible. In so far as relates to the custody of the jury, I may, moreover, remark that the statement goes no farther than to the fact of a verbal direction being given to the sheriff-clerk — it is not said that the three other parties who are admitted to have been in communication with the jury, and said to have taken charge of them, received any such instruction; or that these persons were actually put into communication with the jury by the sheriff-clerk without the knowledge of the Court, or under any direction from it as to the nature of the communication to be held, or any sanction to secure the performance of their assumed duty.

It was argued in the able pleading of Mr Moncreiff that the form should not be so rigorously required in Sheriff-court procedure as in the Supreme Court, and that the form of adjournment in the Supreme Court had itself of recent years been modified, showing that a mere deviation from an established form should not be held fatal, and that the rigour of adjournment, as at the time of their introduction in 1838, no longer prevailed. I think Mr Gordon's answers were sound; that the necessity of precaution to secure the purity of the jury are even more requisite in small county towns than in the seats of the ordinary criminal Courts, and that there is no reason why the Sheriff should be ignorant of the forms given in the ordinary reports; and further, that in jury trials the Sheriffs are, by Act of Adjournal, bound to observe the forms of the Supreme Court; and, even in summary causes without a jury, bound to set out the cause of adjournment in the interlocutor by which the adjournment is directed As to the modification in the form of the interlocutor of an adjournment—which only goes to omit reference to the panel's consent and to the administration of an oath to parties already bound under their oath of office—the very fact of the limited nature of the alteration shows that, while the attention of the Court must have been specially directed to the matter, what was really immaterial was rejected, what was considered to be essential was retained.

It has been pressed upon us that the objections to the interlocutors come too late, upon the supposed analogy of the case of *Luke*, where an objection that a juryman had gone home while the case was proceeding was not entertained, because known to the panel's counsel during the progress of the trial, but not stated till it formed the ground of a motion in arrest of judgment.

It seems to me sufficient to say that the statement of the fact, in that case held back, was the statement of a fact not only extrinsic, but in apparent opposition to the record. I am of opinion that where in the High Court we find on a record of criminal procedure evidence of a departure from a fundamental rule of criminal procedure, it is our duty to give effect to it, though in the Inferior Court itself no objection on that ground had been raised. Believing the record here to establish such an objection, I have to propose that we pass the bill and grant warrant to liberate the panels.

LORD COWAN—As I have formed a clear opinion on one of the objections to the validity of the conviction in this case, and the sentence which followed on it, in favour of the suspender, it is not necessary that I should do more than notice the other objections that were made the subject of argument.

With regard to the alleged oppression on the part of the Sheriff in refusing the motion for separation of the trials, no relevant ground whatever is set forth by the suspender on which this objection can be even plausibly argued.

And as to the second objection stated to the regularity of the procedure, viz., that at the adjourned diet on the 8th September the Sheriff did not at 10 of the clock proceed with the case, but delayed for half an hour before requiring the continued diet to be called, engaging meanwhile in the disposal of civil business—the mere statement of the plea carries with it so clearly its own refutation as to require no observation.

A third ground of objection was taken, which, although I think no less groundless, requires more specification,—I mean the alleged want of power in the Sheriff in any circumstances, and under whatever precautions, to adjourn the diet.

Hume, vol. ii, p. 415, says, "In the modern practice, so much is the importance felt of maintaining a strict reserve in this particular, that even in a case of interruption owing to unavoidable accident, such as the sudden illness of a juryman or the panel, there still can be no adjournment of the sitting, nor any continuation of the trial with the same assize. The course is, in that event (so the situation requires), to discharge that assize, and renew the trial with another. This point was settled in the case of *Janet Ronald*;" and, p. 417, "another reason may sometimes be urged for an adjournment, namely, the great compass of the case and the unavoidable length of the proof, if it be such as the assize cannot dispatch without difficulty in a single sitting. . . . . There is but one instance of such a proceeding, in the noted trial of *Provost Stewart*, and there it is entered in the record that the adjournment was allowed in respect of the consent of the panel, and of His Majesty's Advocate, and the necessity of the case. The motion came from the assize themselves, who represented that they had sitten upwards of forty hours, and were some of them unable to sit any longer;

several of the witnesses also had given notice to the Lord Advocate to the same effect." But he is referring to cases where, on adjournment, the jury would have been allowed to disperse. In that event he says there can be no adjournment, but the jury must be discharged. In the case of *Ronald* the decision of the Court was, "That after the jury was sworn and charged with the panel, the trial ought not to have been adjourned, but that, from the necessity of the case, the jury ought to have been discharged, and the panel subjected to a new trial, and therefore, as in this case, the trial was adjourned, and the jury *separated after they had been sworn or charged with the panel*, and that the jury did thereafter return a verdict; they found the proceedings null and void." And so, in the cases of *Wallace* and *Macgibbon*, mentioned by Hume (vol. ii, p. 415), an adjournment was made, and the jury were allowed to disperse. These cases had no reference to adjournments where proper precautions were taken as to the seclusion of the jury. Therefore I am led at once to the main objection, viz., the competency of general interlocutor of adjournment.

We must keep in view the nature of and procedure in this case. It was a complaint for culpable homicide, or, at all events, for culpable driving with the effect of injuring the lieges. The case went to trial, evidence was led, and this interlocutor was pronounced:—"The Sheriff at this stage adjourns the diet until the morning of the 8th current at 10 o'clock." Well, it so happened that the jury did make their appearance at ten o'clock, and more evidence was led, and then the following interlocutor was pronounced:—"The prosecutor addressed the jury. The panel's counsel was engaged in addressing the jury when, in consequence of the indisposition of one of the jurymen, the Sheriff adjourns the diet until the morning of the 9th current at half-past ten." Now, I apprehend that interlocutor was unprecedented, illegal, and incompetent. It is very curious, and I have been at some pains to investigate this power of adjournment. But let me in the first place say that, under the Act of Adjournal to which Mr Gordon referred, trials by jury before the Sheriff are to be conducted according to the same rules as in the High Court of Justiciary. This modern practice of adjournment may be held to have had its origin in the case of the *Cotton Spinners* in 1838, reported in Swinton, p. 71. But in the previous case of *Provost Stewart* (State Trials, vol. xviii, p. 1011), it is material to observe what was done. It was there moved by some of the jury that they should have leave to make a motion, and on leave being given, and the hearing of the motion, which was one for adjournment, Mr Archibald Stewart, panel, and his counsel, consented to the adjournment, and an interlocutor was pronounced, and in it the assizors were taken bound under a penalty of £500 to make appearance at the next diet. They were not inclosed at all. And I find that in another case, viz., that of *Colonel George Mackenzie and Others*, (Hume ii, p. 417, note ,) where the proposal of adjournment came from the Court at two in the morning, the assizors enacted themselves to attend at eleven o'clock of the same day under a penalty of £500, and a written consent of both parties was entered on record.

The necessity of consent in these cases was palpable. Whether consent would have held good to enable the jury to disperse is very doubtful.

Consent was first dispensed with in 1853. When there was no locking-up, consent was required, but the necessity for it ceased when the jury were locked-up and separated from the rest of the world, and it was accordingly abolished. In *Luke*'s case, which occurred in Dundee, and where a juror had escaped from the macer, I got a consent before adjournment, and my only regret is that the juror who escaped from the macer was not brought before the Court and punished with a severe fine.

Now, that is the only change which has taken place. All the other requirements have been kept up until this case in Peebles the other day. But in it we have no warrant to bring up the prisoners, and no order on any party to keep the jury under their charge. I look on that last as a most important point. The constables in charge of the jury had no oath administered to them, and there was not even any specific duty laid on the clerk or on them to take proper charge.

I agree with the observation made in the discussion, that the clerk of court does not require to be put on oath as to the particular part of his duty of looking after the jurors, as he may be sworn at the entry of his office to perform his whole duty; but then these assessors, called in to assist him, did require to be put on oath; and, on looking into the Act of last year (Court of Session Act 1868), I am satisfied they were in no way judicial officers.

Now, then, I am of opinion that these interlocutors cannot be sustained. A simple adjournment, so as to leave the jury at liberty to disperse, is incompetent, and that is fatal to this case. I do not know if there is any part of our criminal administration which has been so carefully attended to as this, protecting the jury from influences from without. In every case the jury must be kept sacred; and so particular are our rules as to this, that the very place where they are to be lodged is stated in the interlocutor of adjournment.

As to the defence, that this is an error of form and not of substance, it may just as well be said that the omission altogether of an interlocutor adjourning would be an error of form. It is not an error of form but of substance. Then, as to the offer of proof that the Sheriff verbally told the sheriff-clerk to look after the jury, I cannot agree that verbal instructions would be sufficient, or that such a matter can be proved by parole.

Lord Neaves—I place no importance on any of the objections, except on the omission to provide for the seclusion of the jury; but that omission is fatal. The law and the history of adjournments of criminal diets have been so clearly stated by both of your Lordships that it would be a work of superogation in me to say anything more. I concur, and may add that all the requirements of this form of adjournment have been constantly observed in the history of our law. Criminal diets are peremptory. That implies that the diet of citation shall be to a day fixed, without continuation of days, as in civil cases. When the diet is called, an adjournment is competent within certain limits, but the forms of the Court are very limited. Unlimited adjournment is wholly unknown, and might be very oppressive. On the other hand, some adjournment is indispensable, but it is to be allowed only when necessary, and the seclusion of the jury must be provided for. When they are out of view of the Court and of the panel, stringent means must be taken to protect them from influence; and in our later practice when there have been ad-

journments, the most specific regulations have been inserted in the interlocutors. So much is that the case, that the very place to which the jury are to repair is named and made for the time a portion of the premises of the Court; and then there are special appointments as to surveillance, by which the parties naming the charge are for the time raised to the position of functionaries of the Court. Consent is sometimes given, but it is not necessary, therefore there is no impropriety, but the reverse, in leaving it out; but every adjournment ought to be rested on the necessity of the case as appearing on the face of the interlocutor.

I agree that the omissions in the interlocutor of adjournment here are fatal. The very beneficial effects of the safeguards of liberty make people forget how much they owe to them, but if we come to support such interlocutors as we have here, I would anticipate very great laxity. All that we see from them is, that the jury are left to go free wherever they pleased, and that they appeared next morning just as in a civil case. Then, although the panels were out in bail, and the bail bond evacuated by them, appearing at the first diet, no more bail bond was taken or no warrant granted to commit them to prison.

The sentence was accordingly quashed, and a warrant issued for the liberation of the complainers.

Agents for Complainers—Jardine, Stodart, & Frasers, W.S.

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

FIRST DIVISION.

Wednesday, May 12.

CITY OF GLASGOW BANK *v.* JACKSON AND OTHERS.

Promissory Note—Proof— Writ or Oath. Held that an averment by the granters of a promissory note in favour of a bank, that it was granted in payment of certain over-drafts, and not as a continuing security for cash advances, could only be proved by writ or oath.

The pursuers sued the defenders, William Jackson, Alexander Blane, John Kelly, and Alexander Kelly, for payment of £700, contained in their promissory note dated 26th December 1864, and payable one day after date. The said Alexander Kelly was agent of the City of Glasgow Bank at Girvan, and at the end of 1864 he had overdrawn his account to the extent of £670, 10s. 9d. He then delivered the note sued on to the bank, who thereupon closed his old account, and opened a new account with him, in which he was debited with £700, the amount of the note, and credited with £29, 9s. 3d., the difference between it and his debt. He continued to operate on this account, and at various times paid in sums amounting to upwards of £900. The defenders maintained that the note was to be held as extinguishing the debt of £670, 10s. 9d., and that the sums subsequently paid by Kelly must be imputed to the payment of the note. The bank contended that, according to custom, and as was evident from the form of the new account, the note was meant only as a collateral continuing security for a future fluctuating account between Kelly and the bank, and that the original debt was kept up.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"*Edinburgh, 18th July* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—Finds that the defenders' averment, that the promissory note sued on was granted by them in payment of a balance due by Alexander Kelly on his account-current with the pursuers when said promissory note was handed to the pursuers, can only be proved by writ or oath: Finds that Nos. 14 and 15 of process are admitted to be correct excerpts from the books of the bank: Finds that the defenders do not ask further probation by writ: Repels the defences; decerns against the defenders, William Jackson, Alexander Blane, and John Kelly, in terms of the conclusion of the libel: Finds the said defenders liable in expenses; allows an account thereof to be given in, and when lodged remits the same to the Auditor to tax and report.

"*Note.*—The pursuers, the City of Glasgow Bank, admit that no present value was given for the note sued on, and that they held it merely as a security for the fluctuating balance on Alexander Kelly's cash account. On the other hand, the defenders allege that it was given and received as a security for a specific amount of over-drafts due by Alexander Kelly on his account at the date when the note was handed to the bank. If the former was the true nature of the transaction, the defenders, as granters of the note, are liable to the bank for its amount, which it is not disputed is less than the balance due by Alexander Kelly at the close of the account. *Pease* v. *Hirst*, decided in the Queen's Bench, 10 B. and C. 122, was such a case, in which it was held that the liability under the note for the ultimate balance of the account was not discharged by the existence at an intermediate time of a balance in the hands of the bank equal to the amount of the note. But the proposition, that an obligation which is intended by the parties to operate as a security for a fluctuating balance is not satisfied by intermediate payments into the account, if there is an ultimate balance due to the bank, is too plain to require authority. If, on the other hand, the note was merely a security for a specific amount of overdrafts due by Alexander Kelly to the Bank when it was handed to them, it is clear, on the authorities both English and Scotch, including the judgment of the House of Lords in the *Royal Bank* v. *Christie*, 2 Rob. Ap. 118, and the later case of *Lang* v. *Brown*, 22 D. 113, that the liability is extinguished to the extent of the subsequent payments made by Alexander Kelly into his account. The mere fact that the Bank went through the form of closing the account and opening it anew in their books cannot change its character, as being truly one account in regard to a continuous series of transactions.

"It is maintained by the Bank that they are entitled to the privileges of the holders of a promissory note, and that the defenders' averment as to the footing on which the note was granted can only be proved by writ or oath. The Lord Ordinary thinks that this is the only point of difficulty in the case. But he is of opinion that the contention of the Bank is well founded. They are the holders of a note, with the legal presumption of value in their favour, which in the ordinary case can only be rebutted by writ or oath. It is true that this rule has been equitably and beneficially relaxed in some cases, where there was something suspicious or irregular appearing on the face of the