use words that are offensive to others—may have views of a scientific and philosophical description that may be thought very profane by some; and if these are to be made the subject of prosecution under the Summary Procedure Act, it will prove fatal to the liberty of speech, and destructive of the liberty of the subject. This whole thing is too delicate and too grave to be classed with the cases to which the Summary Procedure Act is applicable.

Agents for Complainers—Ferguson & Junner, W.S.

Agent for Respondent—David Milne, S.S.C.

COURT OF SESSION.

Friday, December 9.

SECOND DIVISION.

HANNA *v.* DE LISLE'S EXECUTORS.

Cash Credit Bond—54 Geo. III., cap. 137—Inhibition—Subsequent Advances. Held that a bond and disposition in security for a cash credit, granted under the sanction of 54 Geo. III. cap. 137, § 14, was valid and effectual, not only for advances by the bank made prior to the date of certain inhibitions, but for those subsequently made. *Plea repelled*, that each advance constituted a debt heritably secured as of its date, and that therefore every advance made subsequent to date of inhibition was made *spretâ inhibitione.*

This was an action of multiplepoinding brought by the trustee for behoof of creditors of the estate of the late Patrick Forbes of St. Catherines. The fund *in medio* consisted of about £6000, and as this sum was not sufficient to pay all the creditors in full, the present action was brought to decide the priority of their claims. The first claimants were the executors of the late Robert de Lisle, Esq. of Acton. These gentlemen, in the year 1862, had invested the trust funds in their hands to the amount of about £5700, in certain heritable securities over the estate of St Catherines. One of these was a bond and disposition in security for £3000, granted by Forbes to Mrs Boyd in the year 1832. The next was a bond for £500, dated in 1834; and the third was a bond of cash credit and disposition in security for £2000, recorded in the General Register of Sasines in 1852, granted by Forbes to the National Bank.

The claimants alleged—"By the said bond and disposition in security, which was granted on the consideration that the bank had agreed to allow Mr Forbes credit on a current account to be kept in the books of the bank in his name, to the extent of £2000, he, the said Patrick Forbes, bound himself to repay to the bank or their assignees the said principal sum of £2000, or whatever portion thereof might appear to be due to said bank on balancing the said current account, and also whatever monies the said bank had advanced or might advance, or had or might become engaged or liable for on his account, or on the faith of his name, or that of any company firm of which he might happen to be or become a partner, on or by bills or promissory-notes, letters of credit, guarantees, or other obligations, already accepted, granted or discounted, or to be accepted, granted, or discounted, or in any other way whatever, such advances and engagements not exceeding in all the said sum of £2000 beyond what might be at his credit in said current account, and in general to refund to the said bank whatever loss and expense, not exceeding said sum of £2000, they might sustain or incur through their banking transactions with him, and that whenever the same might be demanded, after six months from the date of the bond, with interest at such rate as said bank might lawfully stipulate for on all such monies from the time of the same being advanced or becoming due till repayment, with penalty in common form, but under the declaration that a stated account made out from the books of the bank, and signed by the manager, secretary, or accountant thereof for the time, with reference to said bond, should be sufficient to constitute a balance and charge against the said Patrick Forbes, his heirs, executors, and representatives, and under the farther declaration that the interest on said current account, so far as heritably secured, should be limited to £300 beyond the principal, and the principal and interest together to the sum of £2300. At 18th November 1862 a stated account was made up from the books of the bank, and signed by the chief accountant of the bank, showing that the full balance of principal and interest then due by the said Patrick Forbes under said bond, amounted to £2201, 11s. 11d. The claimants accordingly paid said sum of £2201, 11s. 11d. to the bank, and obtained from them an assignation, dated 2d and 6th, and recorded in the General Register of Sasines, 20th December 1862. The stated account referred to was indorsed upon the assignation, which was granted with the consent of the said Patrick Forbes, who also thereby acknowledged that the said balance due on the foresaid current account amounted, as at 18th November 1862, to the sum of £2201, 11s. 11d., and admitted the same to be justly due by him as at the said date. The securities thus acquired by the claimants are prior in date, and preferable to the securities of all the other creditors, and to the inhibitions used by any of the said creditors."

The claim of De Lisle's executors was not disputed to the extent of the two bonds and disposition in security with the unpaid interest, but the principal question in the case had regard to the bond for the cash credit for £2000. It was contended by James Stevenson and others, who were creditors of Forbes, and produced letters of inhibition, of date 6th October 1855, and also decrees for £2700 and interest, dated in 1861, that under these documents they were entitled to rank before De Lisle's executors for the sum claimed in respect of the cash credit bond.

They pleaded—"3. The present claimants are entitled to be ranked for the whole sum claimed by them, in preference to De Lisle's executors—(1) Because the bond and disposition in security in favour of the National Bank founded on by them merely secured over the lands of St Catherines such sums as might be advanced by the National Bank to Mr Forbes under the same, and the whole amount claimed by De Lisle's executors, as secured by the said bond and disposition, was advanced to him by the bank subsequent to the date of the inhibitions against Mr Forbes, founded on by the present claimants. (2) Because the said bond and disposition was held by the bank merely as a security for the said balance of £935, 10s. 3d., due by the Countess of Buchan, with interest, the whole of which has since been repaid, until the said

agreement between Mr Forbes and the National Bank was entered into in December 1858, after which the said bond was solely under and by virtue of the said agreement held by the bank, and operated upon by Mr Forbes as a cash credit bond for the amount therein stated. (3) Because the whole sums claimed by De Lisle's executors, as secured by the said bond, were advanced to Mr Forbes solely under and in respect of the said agreement between him and the bank, entered into after the date of the present claimants' inhibition. 4. The whole sums claimed by De Lisle's executors, as secured by the said bond, must be held to have been advanced subsequent to the date of the present claimant's inhibitions, in respect of the sums paid by Mr Forbes, after the date of the said inhibitions, to the credit of the account kept with the National Bank, under the said bond, more than extinguish the balance which stood at its debit at the date of these inhibitions. 5. In any view, De Lisle's executors are not entitled to be preferably ranked, in respect of the said bond, for any sum beyond the balance which had been advanced by the bank under the same at the date of the inhibitions by the present claimants, with interest."

The Lord Ordinary (MURE) pronounced this interlocutor and note:—"17*th August* 1870.—The Lord Ordinary having heard parties' procurators and considered the closed record and productions, —Finds that the claimants, De Lisle's executors, are entitled to be ranked on the fund *in medio primo loco* and preferably for payment (1st) of the sum of £593, 6s. 6d., being the arrears of interest due on the two bonds for £3000 and £500 referred to in the record, the principal sums in which bonds have already been paid, with interest on the said arrears till paid, but under deduction of any payments which may be shown to have been made to account; and (2d) for the amount of the cash-credit bond for £2000 referred to in the record, and the interest, not exceeding £300, which was due thereon at the date when the claimants acquired right to the bond by assignation from the National Bank; and appoints the case to be put to the roll, that parties may be heard as to the farther amount of interest for which the said claimants are entitled to be preferred; and as to the proof to be allowed with reference to the facts on which the other competing claimants are at issue—reserving in the meantime all questions of expenses.

"*Note.*—The Lord Ordinary has examined the record and productions in this case, with a view to the disposal of such of the leading questions raised in the competition as admitted of being decided without putting the parties to the expense of proof. But after repeated consideration of those questions, and the relative productions, he does not think that it would be right to dispose of them to any further extent than has now been done, until either probation has been renounced or the facts on which parties are at issue are cleared up by proof.

"1st. With reference to the sums for which the Lord Ordinary has held that De Lisle's executors are entitled to be preferred, as in competition with all the other parties, he did not understand it to be disputed that the claims of these executors was good to the extent of the arrears of interest due upon the bonds for £3500, which have already been paid, and he has therefore preferred them to that extent, under deduction of such interest as may have been paid to account.

"2d. With reference, again, to the cash-credit bond for £2000 which was acquired by De Lisle's executors from the National Bank in the year 1862, it is contended on the part of the claimant Stevenson and others (1st) that that bond, though of an earlier date than the inhibitions founded on by them, is good to the extent only of such sums as were advanced by the bank prior to the date of these inhibitions; and (2d) that as the greater part, if not the whole, of the advances now claimed were made by the bank subsequent to an agreement alleged to have been entered into between Mr Forbes and the bank in the year 1858, in virtue of which Mr Forbes was for the first time authorised to operate on his own account upon the cash credit, the claim of De Lisle's executors made upon this bond will fall to be repelled. The Lord Ordinary has, however, been unable to find any sufficient ground for giving effect to these pleas.

"(1) The bond in question bears to be granted in the terms authorised by the 14th section of the statute 54 Geo. III. cap. 137, which was passed with the express object of sanctioning the granting of securities by infeftment, for payment of future balances arising upon cash accounts, and makes it lawful to grant such bonds, provided the principal and interest which may become due upon them is limited, as has been done, to a certain definite sum not exceeding the amount of the principal sum in the bond, and three years' interest thereon at five per cent. When a bond is so granted, the statute provides that it shall be lawful for the person to whom such cash-credit is granted to operate upon the same from time to time, and that the 'sasines or infeftments taken upon such heritable securities shall be equally valid and effectual as if the whole sums advanced upon the said cash account or credit had been paid prior to the date of the sasine or infeftment taken thereon;' and a similar provision is repeated in the 7th section of the 19th and 20th Vict. cap. 31.

"Now it was not disputed, and it cannot, it is thought, admit of doubt, that a claim upon an ordinary heritable bond is preferable to one made upon a debt, with reference to which inhibition has not been used till after the date of the infeftment on the bond. And as sasines taken upon cash-credit bonds granted under authority of the statute are thus declared to be as effectual for advances made subsequent to their date as they would have been if the whole advances had been made before the date of the infeftment, the Lord Ordinary can see no sufficient ground for refusing effect to the bond here claimed on, as in competition with the inhibitions founded on by the other claimants.

"(2) With respect to the special plea founded upon the dispute alleged to have taken place between the Bank and Mr Forbes, relative to his right to operate upon the cash-credit on his own account, and the adjustment of that dispute in 1858, there are not, as the Lord Ordinary reads the record, any averments that these proceedings on the part of the Bank were known to De Lisle's executors; and as the latter are assignees for onerous considerations, the allegations on which this plea is rested are not, in the opinion of the Lord Ordinary, relevant in a question with a party who has dealt with the Bank on the faith of the records."

Mr Stevenson reclaimed.

The SOLICITOR-GENERAL and ASHER for him.

DEAN of FACULTY, MARSHALL, TRAYNER, and GLOAG, for the other claimants, in answer.

The Court unanimously adhered.

Agents—Morton, Whitehead, & Greig, W.S.; M'Ewen & Carment, W.S.; Goldie & Dove, W.S.; A. & A. Scott, W.S.

Tuesday, December 13.

DUNN'S TRUSTEES *v.* BARSTOW AND OTHERS.

Trust — Reduction — Multiplepoinding — Fund in medio. A truster died, leaving to certain trustees large property, heritable and moveable, for certain purposes. A great number of claims having been made against the trustees, both under the trust-deed and at common law, the trustees brought an action of multiplepoinding, in which the fund *in medio* embraced the whole estate of the deceased. Thereafter the heir-at-law of the truster brought an action of reduction of the trust-deed *ex capite lecti*, in so far as it disposed of a certain estate. He was successful in this action, and thereafter brought an action of count and reckoning against the trustees for the rents of said estate during the time they had administered it. *Held* that the proper course was to take the estate in question out of the fund *in medio*, as not being part of the trust-estate of which the trustees were administrators, and to proceed with the accounting in the action of count and reckoning, and not in the action of multiplepoinding.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agent for Defenders—Wm. Ellis, W.S.

Wednesday, December 13.

TRAQUAIR'S TRUSTEES *v.* HERITORS OF INNERLEITHEN.

Assessment—Annual Real Rent or Value—Heritors —Long Lease— Valuation-Roll. A heritor of a parish possessed lands let upon long leases for £80 per annum of *cumulo* rent, while the estimated annual rent or value of the lands was entered in the valuation-roll at about £1100 per annum. *Held* that an assessment laid upon the heritors of the parish for the purpose of rebuilding the parish church, according to the real annual rent or value of their lands, must be levied, not upon the actual rent received by the heritor under the long leases, but upon the estimated real annual rent or value as appearing from the valuation-roll.

This was an action of declarator at the instance of the trustees of the late Earl of Traquair against the whole other heritors of the parish of Innerleithen, for the purpose of having it judicially declared that the pursuers were not liable to be assessed for rebuilding the parish church of Innerleithen to a greater extent, in respect of certain lands belonging to them and let upon long leases, than the actual rent received by them under these long leases. The pursuers alleged—"A considerable portion of the village or town of Innerleithen, which has now become a place of large population, and is an important seat of the woollen manufactory in Scotland, consists of dwelling-houses and other buildings erected on ground held on leases of ninety-nine years, some of which are renewable for ever, and on ground held on leases of longer duration, some being for 999, and some for 1000 years, granted from time to time in the course of the present and the latter part of the last century by the said Charles Earl of Traquair and his predecessors. No grassums were paid, and the rent stipulated for and now payable was that which at the time was taken to be, and was in fact, the true annual value of the subjects leased as building ground. Buildings, consisting partly of houses and similar structures, and partly of mills and public works, have been erected by the tenants on the lots of ground leased as aforesaid. The present yearly values of the said subjects largely exceed in every instance the rents payable to the pursuers. The tenants under said leases are proprietors of the subjects according to the provision in sect. 6 of the 17 and 18 Vict. c. 91, entituled 'An Act for the Valuation of Lands and Heritages in Scotland.'"

In the valuation roll the pursuers are entered as of the lands let on long leases, and the rents payable to them are set forth. The roll also contains the yearly rent or value of the said subjects. The *cumulo* rents paid for the subjects to the pursuers amounted to £80, while the estimated *cumulo* annual rent or value, as entered in the valuation, amounted to £1100. The question was, which of these sums was the "real rent" upon which the pursuers fell to be assessed for the re-erection of the parish church?"

The Lord Ordinary (MURE) pronounced the following interlocutor and note:—

"2*d June* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions in the conjoined actions: Sustains the first plea in law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds them entitled to expenses, of which appoints an account to be given in; and remits the same when lodged to the auditor to tax and report.

"*Note.*—It has been settled in the case of *M'Laren*, 17th November 1865, that tenants under leases for upwards of twenty-one years, even when entered in the valuation roll as proprietors, are not liable in assessment for the building of a parish church imposed upon heritors according to the real rent, because they are not heritors in the sense of the enactments under which such assessments are authorised to be made. Now it is not disputed that in the present case the assessment in question has been legally imposed according to the real rent; and the pursuers are admittedly heritors in the parish of Innerleithen, who are liable in that assessment. In these circumstances, the only question which appears to be here raised for determination is, whether the defenders, as contended for by the pursuers, have done wrong in assessing the pursuers in respect of ground given off under long leases upon 'the yearly rent or value' of that ground, as appearing from the valuation roll in force at the time, instead of upon the amount of rent actually drawn under those long leases, and which is entered in the valuation roll under the head of 'rent payable under such lease.'

"Upon considering the provisions of the statute, the Lord Ordinary has come to a conclusion adverse to the view thus maintained on the part of the pursuers. It may be that there are strong grounds in equity for holding that a proprietor,