

"Lastly, the Lord Ordinary thinks that the decree of 1863, being in point of fact unchallenged and unreduced, he must give effect to it in settling the final locality in the present process. It is just possible, though the Lord Ordinary does not think it likely, that 40 years' prescriptive payment prior to 1863 might have been a good defence in the valuation against the value being struck at a less amount. But this was not pleaded, and final decree of valuation was pronounced. The Lord Ordinary cannot by way of exception set aside the final decree of valuation as he is now asked to do.

"The view now taken supersedes all the other questions raised on record. These questions relate chiefly to the years which must be reckoned in making up the prescriptive period, and in particular whether certain minorities are to be deducted, and whether the full sum was paid in certain other years. The question of minority is rather a difficult one, the absolute title being taken by the minor's tutors or curators in their own name, and the lands being so held by them for a time, and then conveyed to the minor. The Lord Ordinary inclines to think that as it appeared on the face of the title, though not in the dispositive clause, that the lands were really held for the minor, the exception of minority would apply. The present judgment does not, however, rest on this ground, but solely on the decree of valuation of 1863 as above explained.

"The Lord Ordinary has modified the expenses awarded, on the ground that the heritor has been unsuccessful in the discussion on the interim locality, the minister having succeeded in maintaining the interim locality at £40 per annum."

The minister reclaimed.

Authorities cited—1 Connell, 253, 458; *Madderty*, July 9, 1817, F. C. 371; *Baird*, 10 S. 752; *Locality of Row*, July 4, 1871; A. S. July 5, 1809; 1633, c. 15; *Magistrates of Edinburgh v. Learmonth*, 20 D. 202.

The Court adhered.

Counsel for Reclaimer—Watson and Trayner.
Agents—M'Ewen & Carment, W.S.

Counsel for Respondent—Kinrear and Mackay.
Agents—Murray & Falconer, W.S.

Friday, January 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

STEUART v. PADWICK AND STEUART.

Deathbed—Sale, Agreement of—Reduction.

A executed an agreement of sale of heritage and died twenty-five days afterwards. It was proved that at the date of executing the deed, and at his death, his heart was not free from disease, but that the immediate cause of death was congestion of the lungs, arising from bronchitis, and not caused by, or connected with, disease of the heart. The Court held that when he executed the deed he was not labouring under the disease of which he died, and repelled the plea of deathbed.

This was an action brought by Sir Archibald Douglas Steuart, against Mr Henry Padwick and Mr Franc Nichols Steuart, for reduction of a minute or agreement of sale of the estates of Grand-

tully, Murthly, and Strathbraan, Perthshire, entered into between Mr Padwick and the deceased Sir William Drummond Steuart, on the ground that it was executed on deathbed. Sir Archibald Douglas Steuart raised the action as heir next called to the succession of the said estates in certain deeds of entail, and Mr Franc Nichols Steuart appeared as defender as universal disponee and executor to Sir William Drummond Steuart, in virtue of a deed of settlement executed by him. Sir William Drummond Steuart executed the said agreement of sale, by which he sold the estates to Mr Padwick for the sum of £350,000 on the 3d of April 1871, and he died on the 28th of April in the same year. The pursuer averred that at the date of execution of the deed Sir William Steuart was labouring under the disease of which he died, and therefore brought this action of reduction, on the ground that the deed was executed on deathbed.

A proof was led, the result of which will be seen from the Lord Ordinary's Note and the opinion of Lord Ardmillan.

The Lord Ordinary pronounced the following interlocutor and subjoined Note:—

"*Edinburgh*, 30th May 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process—Finds that the late Sir William Drummond Steuart of Grandtully and Murthly died at Murthly on 28th April 1871: Finds it is not proved that, on 3d April 1871, being the date on which Sir William Drummond Steuart executed the minute or agreement of sale sought to be reduced, he was labouring under the disease of which he died; assoilzies the defenders from the conclusions of the libel, and decerns; Finds the defenders entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note*.—The deed sought to be reduced, being an agreement for the sale of the Murthly estates to the defender Mr Padwick at the price of £350,000, was executed by the late Sir William Drummond Steuart on 3d April 1871. He had spent several months of the preceding winter in Edinburgh, and he returned to Murthly in January 1871, where he remained until his death on 28th April 1871—that is, twenty-five days after the execution of the said agreement. While in Edinburgh Sir William went to consult Dr Warburton Begbie with reference to an affection of the urinary organs on 8th September and 18th November 1870. Dr Begbie, observing that the temporal artery was tortuous, that the radial artery, where the pulse is usually felt, was rigid, and that there was a marked *arcus senilis* below the eyes, examined his chest by means of the stethoscope, and was led to infer that the heart, though not enlarged, was somewhat feeble in its action, that there probably existed some little dilatation at the mouth of the aorta, which is not unusual in old people, and that the semi-lunar valves at the mouth of the aorta were then competent for their functions. Dr Begbie advised him to avoid exposure to cold and damp, as when degenerative change is in progress, such as he had detected in the vascular system, the nutrition of the body is impaired, and exposure to cold and damp is likely to prove a serious exciting cause of inflammatory disease, particularly in the lungs.

"During his stay in Edinburgh, and on his return to Murthly, Sir William continued apparently

to enjoy, down to 8th April 1871, the ordinary good health of a man of seventy-six or seventy-seven years of age, with the exception of an attack of giddiness about 23d March, for which he consulted Mr Murray, surgeon, Dunkeld, his ordinary medical attendant, who prescribed for him and applied a blister to the back of his head, which removed the giddiness in a few days. He drove and walked about a good deal in all weathers, and no symptoms occurred to lead his ordinary medical attendant, Mr Murray, his servants, or his visitors at Murthly, to consider that he had any affection of the heart. In particular, he went up and down stairs, did not avoid the ascents in the Murthly grounds, took long walks for a man of his years, and did not complain, and was never seen to suffer from breathlessness prior to 8th April 1871. In particular, Mrs Alston Stewart, who was on a visit to the Castle from 27th to 31st March, states that he was then taking his usual exercise, that he appeared to be in fair health, and that she observed nothing the matter with him. And his agent, Mr James Auldjo Jamieson, who went to Murthly on 1st April to get the deed executed which is now sought to be reduced, and who remained there until 3d April, thought him looking as well as he had ever seen him. After the deed was executed he was out both driving and walking until 8th April, although the weather was very cold.

"On the morning of the 8th of April he was out walking for about an hour and a-half after breakfast, and in the course of that day he was seized with pain in the right side of the chest below the shoulder-blade, for which Mr Murray was called in. Mr Murray considered that he was labouring under an attack of pleurisy and bronchitis, and treated him accordingly. On 13th April Mr Murray found the pain and the symptoms of bronchitis gone, and that he was quite himself again. On 16th April he was, Mr Murray thought, in his usual state of health, and he would have gone out in his carriage but his coachman was unable to drive him, having broken his collar-bone. In this state he continued until 22d April, when he was seized with a pain on the left side of the chest, and Mr Murray treated him for pleurisy and bronchitis, under which Mr Murray considered he was again labouring. On Wednesday the 26th Mr Murray thought him so much recovered that he told him he would not return until Friday. About two o'clock in the afternoon of Thursday, 27th April, Sir William began to breathe heavily, and became so alarmingly ill that Mr Murray was sent for, and, on arriving, found him in a dying state. He continued in the same state during the night, and died about six o'clock on the following morning.

"In these circumstances, the pursuer, who is the brother and heir of entail of Sir William Drummond Stewart, has raised the present action, in which he concludes for reduction of the foresaid agreement of sale, on the ground that the said deed was executed by Sir William while he was on deathbed and labouring under the disease of which he died, being disease of the heart, terminating fatally by congestion of the lungs, within sixty days thereafter.

"Two *post mortem* examinations of the body of the deceased were made; the first of these on 4th May, by Drs Absolon and Buist of Perth, at the request of the Procurator-Fiscal, for the purpose of ascertaining the cause of death; and the second of these on 8th May, by Professor Spence and Dr. Gillespie

of Edinburgh, on the employment of the agents of the defenders, for the purpose of ascertaining whether Sir William had died from natural causes, as certain rumours were prevalent regarding the cause of death. These two sets of examiners had no communication with each other, and they each prepared separate reports, which differ from each other in regard to the morbid appearances in the heart and lungs and the cause of death,—Drs Absolon and Buist being of opinion that death was caused by fatty degeneration of the heart and diseased aortic valves, and passive or mechanical congestion of the lungs as the result of that heart disease; while Professor Spence and Dr Gillespie are of opinion that the cause of death was active or inflammatory congestion of the lungs, arising from, or following upon, bronchitis, a separate and supervenient disease. The report of the latter gentlemen is much more detailed than that of the former, and they had the advantage of making their examination by daylight, while the first examination was made by candle and gaslight. The only point on which, as regards the condition of the heart and lungs, these examiners concur, is, that there was calcareous deposit on the aortic valves, and that these valves were slightly incompetent. On all other points they differ. Drs Absolon and Buist consider that there was fatty degeneration of the heart; that there were none of the appearances of bronchitis, and that the morbid appearances in the lungs showed that the congestion was passive or mechanical; while Professor Spence and Dr Gillespie are positive that there was no fatty degeneration of the heart; that distinct morbid appearances of bronchitis were present, and that the other morbid appearances in the lungs shewed that the congestion was active or inflammatory, an independent and supervenient disease not caused by the heart, which inflammatory congestion had run its course in several places into consolidation and red hepatization of the lung, in consequence of the effusion of lymph, one of the products of inflammatory action.

"The contradictory evidence in the cause does not stop here. The pursuer adduced two medical witnesses, Professor Sanders and Dr Rutherford Haldane, and the defenders adduced other two medical witnesses, Dr Grainger Stewart and Dr Heron Watson, to give their opinions as to the cause of death, on a consideration of the two *post mortem* reports, and of the evidence of the witnesses, other than themselves, which they heard given during the course of the proof. The two skilled witnesses for the pursuer differ entirely from the two skilled witnesses for the defenders, the former being clearly of opinion that the cause of death was heart disease, producing passive or mechanical congestion of the lungs, which heart disease must have been in existence many months before the death, and the latter being just as strongly of opinion that the cause of death was broncho-pneumonia, that is bronchitis followed by pneumonia, the result of active or inflammatory congestion of the lungs, which was not caused by the affection of the heart, but was an entirely separate and independent inflammatory disease.

"The Lord Ordinary has carefully considered the proof led by the parties, and in particular the evidence of all the medical witnesses. These witnesses were examined with much care and skill, and at great length, and they have fully stated the grounds on which they gave their evidence. It is

unnecessary for the Lord Ordinary to refer particularly to that evidence. After full consideration it appears to him to be impossible to reconcile the evidence of the pursuer's witnesses with that of the defenders' witnesses, and he is unable, in the face of the evidence adduced by the defenders, and in particular, of that of Professor Spence and Dr Gillespie, who made a very careful *post mortem* examination, and saw the morbid appearances, and who are skilled and competent pathologists, to come to the conclusion that the deceased was, at the date of the deed sought to be reduced, ill of the disease of which he died. As this must be established by the proof in order to entitle the pursuer to obtain decree of reduction, and as it is not so established, the defenders are, in the opinion of the Lord Ordinary, entitled to be assioziled from the conclusions of the summons, with expenses."

The pursuer reclaimed.

It was argued for him, upon the evidence, that it was proved (1) that Sir William Stewart was suffering from heart disease at the time when he executed the deed; and (2) that he died of congestion of the lungs caused by disease of the heart. It was further argued, in law (1) that if a grantor of a deed dies within sixty days, and it is proved that at the date of the deed he had a mortal disease, the law presumes that he died of that disease, and the *onus* is thus thrown on the party supporting the deed, to prove a distinct cause of death; (2) If a mortal disease is proved at the date of the deed, convalescence must be proved, and it is not sufficient to show that another disease existed at time of death; (3) Supposing a mortal disease at the date of the deed—in order to elide the plea of deathbed the other disease averred must be proved to have had no connection with the first. *Regiam Majestatem*, 2, 18, 7; *Craig*, 1, 12, 36; *Act 1696*, c. 4; *Stair*, 3, 4, 28, and 4, 20, 38, 41, and 44; *Mackenzie's Inst. b. 3, t. 8*; *Ersk.* 3, 8, 95 and 96; *Urquhar*, *Elchies*, *voce* "deathbed," 14; *Primrose*, M. 3300; *Hiddleston*, 2 *Murray*, 120; *Mackay*, Jan. 17, 1828, 6 S. 367; 2 *W. and S. (H. L.)* 210; *Bell's Com.* 1, 87; *Tomison*, 2 *D.* 239; *Hardy v. M'Call*, Feb. 18, 1847, 9 *D.* 698.

It was argued for the defenders that the cause of death was active congestion of the lungs, not due in any degree to heart disease. It was also argued, in law, that the party seeking to reduce a deed on the ground of deathbed must prove (1) That the grantor was ill of a mortal disease when he executed the deed; (2) that there was no convalescence; and (3) that he died of the disease of which he was ill at the time of granting the deed.

At advising—

LORD ARDMILLAN—This action is brought by Sir Archibald Douglas Steuart to reduce on the head of deathbed a deed executed on the 3d of April 1871 by the late Sir William Drummond Steuart, conveying to the defenders his large landed estates. Sir William Steuart died on the 28th of April 1871.

The law of deathbed does not now exist in Scotland. But at the date of the deed, and at the date of Sir William Steuart's death, it did exist; and we must dispose of the cause according to the law of Scotland then existing, to which, notwithstanding the recent change in the law, the pursuer appeals, and is entitled to appeal.

The Scottish law of deathbed had, I think, its origin partly in a wholesome dread of influence

over weak minds, but also, and perhaps chiefly, in the feudal favour for landed property, and the desire to prevent the alienation of land, and to secure its transmission to heirs-at-law.

In the case before us, no doubt is at present raised of the capacity of Sir William Steuart; and the deed sought to be reduced is not now challenged on any other ground than that of deathbed. We have therefore no other question before us than—Whether at the date of the deed Sir William Steuart was on deathbed?—in other words, as the pursuer states it on record, whether he was, at the date of the deed, "labouring under the disease of which, within twenty-five days, he died;" and that disease he alleges to be heart disease.

This is the allegation which the pursuer has made, and which he must prove. He is *in petitorio* as pursuer—he is pursuing a reduction on an averment in point of fact, an averment which requires proof, and the proof of which is necessary to success; and there can be no doubt that the burden of proof rests, in the outset, on him. The general law of deathbed, as explained by our best authorities, and recognised by many decisions, does not admit of dispute. I scarcely think that it has been here disputed. The pursuer must prove, first, that Sir William Steuart was, at the date of the deed, 3d April 1871, suffering from heart disease; and, secondly, that Sir William Steuart died on the 28th of April of the disease under which he was labouring when he executed the deed. The pursuer states that Sir William was labouring under "disease of the heart, terminating fatally by congestion of the lungs within sixty days;" and that he must prove. It is not necessary to refer to the older authorities on the law of deathbed. The decision of this Court and of the House of Lords in the case of *Mackay v. Davidson*, 17th January 1828, H. of L. 25th March 1831, where the authorities were carefully considered, is most instructive, and for the purposes of the present case sufficient. I do not think that any question of difficulty arises in point of law, apart from questions which may occur in dealing with special points of evidence.

On one point, strongly urged by the pursuer's counsel, I must make an observation before proceeding further. I appreciate the force of the remarks made, and the argument so ably urged, on the subject of presumption arising in the event of the pursuer's proving the existence of heart disease of some kind and to some extent at the date of the deed and also at the date of the death. Assuming, as I must do in order to do justice to the pursuer's argument on this point, that he has succeeded in proving this fact, then there may arise, to a certain extent and effect, a presumption in favour of the pursuer,—not necessarily a strong presumption, for that may depend on the nature of the disease and the history of the case. This presumption being the inference or implication of a fact from the existence of other facts, and not resting on a rule of law, may be termed a *presumptio facti*. It is truly a presumption, which, under the circumstances proved, the law, or the judge, or a jury, may draw in regard to the fact. It is not a *presumptio juris et de jure*. It is not absolute. It is not conclusive. It may be more or less powerful,—it may be more or less reasonable. It may be met, or redargued, or over-powered by contrary presumption arising from the facts and circumstances disclosed on the proof. I by no

means leave it out of view. But I do not think that it can entitle the pursuer to take his stand on the presumption, and, in respect thereof, to call on the Court to hold his case proved. It is simply one of many elements of evidence.

The defenders, in whose favour the deed challenged was executed, deny that Sir William Steuart was at the time of its execution on death-bed. Their case is that he died of congestion of the lungs, caused by inflammatory action, and more particularly by inflammatory bronchitis, or broncho-pneumonia.

We must therefore proceed to consider the whole of the proof, which certainly presents an ample field for discussion, and peculiar difficulties in solution.

It is obvious that if we had no other materials for opinion than the symptoms of disease during the life of Sir William Steuart, and the manner and circumstances of his death, we could scarcely find adequate and satisfactory grounds for coming to a conclusion on the question now raised.

The important facts on which our opinion in point of law must be founded, are to a large extent to be ascertained from consideration of the reports before us, made on *post mortem* examination. One of the reports is dated Perth, 4th May 1871, and signed by Dr Absolon and Dr Buist, both physicians in Perth of experience and skill in the profession, and quite competent to discharge the duty entrusted to them. The second report, dated Edinburgh, May 10th 1871, is signed by Professor Spence and Dr Gillespie of Edinburgh, and sets forth the result of their examination of the body of Sir William Steuart, made at Murthly Castle on the 8th May 1871. These gentlemen are well known to be professionally eminent and experienced, and there can be no doubt that they are well qualified to conduct such an examination.

It is our duty—certainly no easy duty—to compare these reports and to form the best opinion we can on the state of the facts as disclosed on dissection and examination of the body.

The object and immediate purpose of both reports was not to ascertain minutely and pathologically the cause of Sir William Steuart's death as between disease of the heart and inflammatory bronchial disease, but to ascertain whether his death was attributable to disease of any kind, to any natural cause, or to a very different cause,—at one time, but no longer, suggested. Now, it is plain that the ascertainment of any disease within the body sufficient to cause death, whether that alleged by the pursuer, or that alleged by the defenders, would meet the purpose and satisfy the intention of their examination. This point was pressed by Mr Watson, on the part of the defenders, against the report by Dr Absolon and Dr Buist. But it is equally applicable to both reports,—the immediate object and intention of both being substantially the same.

The first examination has the advantage of being conducted earlier, and when the body had been undisturbed; and it may be that some degree of embarrassment and inconvenience in the second examination was created by that which preceded it. On the other hand, the first examination was conducted by gas and candle light, and the second examination was conducted in daylight; and there does appear to be some degree of advantage in this circumstance of daylight examination, in so far as regards the more delicate parts of the examination,

particularly where the precise ascertainment of colour was important. I do not however rely much on these points of difference, although, since they were urged at the bar, I have not overlooked them.

I have carefully studied both reports. The first, by Dr Absolon and Dr Buist, attributes the death of Sir William Steuart to heart disease, and more particularly to "fatty degeneration of the heart and congestion of the lungs," by which I understand them to mean congestion of the lungs consequent on, and the result of, the heart disease. The second report, by Professor Spence and Dr Gillespie, attributes Sir William Steuart's death to "congestion of the lungs arising from bronchitis."

In comparing these reports, I am of opinion that fatty degeneration of the heart, which Dr Absolon and Dr Buist mention as one of the causes of death, is not satisfactorily proved as matter of fact. There is difference of opinion on the question whether fatty degeneration may or may not have existed. But that is only conjecture; and, as microscopic examination was the best and the fitting test, and was not resorted to, I have no difficulty in coming to the conclusion that we have no sufficient evidence of fatty degeneration. Indeed, I do not think that, in the very able argument for the pursuer in favour of the first report, the existence of fatty degeneration was maintained to be proved, or that this cause of death was seriously relied on. It is however true, on the other hand, and it was strongly urged for the defenders against the first report, that Drs Absolon and Buist do specially enumerate fatty degeneration of the heart as one of the causes of death, and do not enumerate as one of the causes of death valvular disease, or incompetence of the semi-lunar valve, though that fact is mentioned in the earlier part of the report. I am quite aware that these two medical gentlemen, who sign the first report, explain in their testimony what they now consider an inaccuracy, by stating that the omission to specify the valvular disease as one of the causes of death arose from inadvertency. I am therefore by no means disposed to place much reliance on the criticism, though it was strongly pressed, and does not seem to be altogether without foundation. It does appear singular that if they intended to refer the death to the valvular disease rather than to fatty degeneration, they should have stated as the cause of death the disease on which, in their subsequent evidence, they placed least reliance, and omitted the disease on which, in their subsequent evidence, they placed most reliance. After all, this is a criticism on the report rather than on the testimony of these gentlemen, who do in their evidence take their stand mainly on the disease of the aortic-valves.

Some important facts are proved by both reports, and, so far we can proceed on ground which is not disputed. I think that structural disease in the semi-lunar valves, amounting to some degree of what is called incompetence of the valve, was ascertained on both examinations; and I assume that some degree of valvular incompetence from structural disease is a fact proved in the case. As I understand the expression incompetence, as applied in this case to a valve, or to a vessel or an organ of the human body, the word does not mean absolute incompetence to sustain life, but incompetence to perform its appropriate function, or to sustain healthy action. This distinction is important in regard to some of the arguments urged. A man

may have an incompetent leg, and yet be able to walk; incompetent lungs, and yet live and breathe for years; or an incompetent aortic valve, acting probably for years—certainly for months,—not, indeed, soundly or healthily, but so as to sustain life. There are among us men walking about and transacting business, who are known to have heart disease, and who must have some organ incompetent for its proper function. In short, it is well known that a man may have a disease of the heart for years—an organic disease which implies incompetency,—perhaps a disease which, increasing and extending, must prove ultimately fatal if he lives long enough and no other disease interposes, and yet the structural incompetence of the organ may not be inconsistent with continued life, and the man may live for a long time, and die of another complaint. Dr Grainger Stewart speaks of “the degree of incompetence,” and his construction of the report is, that “there was slight incompetency of the aortic valves”; and Dr Watson says—“I assume that there was no great extent of incompetency.” Professor Sanders says that incompetency of these valves may exist for a long time without being detected; and I understand Dr Rutherford Haldane, another eminent witness for the pursuer, to be of the same opinion. There are apparently degrees of what is termed incompetence. But, taking the term as used by all the medical men—reporters and witnesses—in this case, I think that it does not mean the absolute or entire incompetency of the valve to sustain life. Professor Spence and Dr Gillespie, while stating that there was some incompetency of the semi-lunar valve, are both of opinion that it was not serious.

While I thus assume as proved some degree,—and perhaps, though not certainly, some considerable degree,—of incompetence in the semi-lunar valves, I have, on the other hand, been led to the conclusion—I think the unquestionable conclusion—that congestion of the lungs and of the bronchial tubes—from whatever cause arising, and whether passive or active in character—has been proved by both reports, and by the testimony of all the medical gentlemen who made the examinations. This congestion is, I think, clearly proved to have affected both lungs to a very considerable extent—the left lung to a great extent. I hold it also proved that this congestion of the lungs was the cause of death. It is, I think, the opinion of all the medical witnesses that, whatever may have caused the congestion of the lungs, that congestion was the cause of death. The seat of the disease which was directly and immediately fatal was in the lungs.

The question whether this congestion of the lungs was active, as the result of inflammatory action, or passive, as the result of the structural disease of the valves causing obstruction or regurgitation, and operating mechanically to produce congestion, is the true turning question in the present case. I think it has been so treated, and very ably treated, in argument on both sides; and the difference between active congestion produced by inflammatory action, and passive congestion produced by the disease of the heart, was well explained in the very able speech of Mr Balfour, and is clearly and beautifully illustrated by the medical witnesses, and particularly by Professor Sanders.

This question has been to me one of extreme interest, delicacy, and difficulty. I have applied my mind to it with the utmost anxiety; and I have

formed the opinion that, notwithstanding the presence of some degree of structural disease of the aortic valves, the congestion of the lungs was active, and caused by inflammation, and particularly by the complaint known as inflammatory bronchitis, sometimes called broncho-pneumonia.

In coming to this conclusion I have been influenced partly by the consideration of the reports on *post mortem* examination, and partly by consideration of the symptoms during life.

We have the evidence of two medical gentlemen who attended Sir William Stewart, or were consulted by him, during the last six months of his life. One of these gentlemen, Dr Warburton Begbie of Edinburgh, whose high abilities and great skill in diagnosis are well known, was consulted by Sir William on the 8th of September and on the 18th of November 1870. On the first of these occasions he carefully examined Sir William, using the stethoscope, and it is interesting to observe, though in the case of Dr Begbie not surprising, that he anticipated danger to Sir William Stewart from both the quarters where disease was afterwards discovered on *post mortem* examination. His opinion was that the heart, though not altogether sound—and the indications of unsoundness being in the quarter where structural disease was afterwards ascertained,—was not seriously affected, and the organ not enlarged. He saw no distinct indications of existing valvular disease, but he thought such disease might probably arise. He was also of opinion that Sir William was liable to inflammatory attack from exposure to cold, and that from what was observed in regard to the heart there might be predisposition to inflammatory attack, and additional danger of inflammatory action in the region of the chest and lungs. The same remark is made by Dr Watson, who gives his opinion that the ascertained disease in the valves would predispose to inflammatory affection of the lungs. Dr Begbie did not think that the valves of the heart were at the time of his examination incompetent, and he saw no symptom of fatty degeneration. On his second examination of Sir William, on the 18th of November 1870, Dr Begbie appears to have observed no change, and to have adhered to his former opinion. It is important to notice that to Dr Begbie there was no indication of valvular incompetence.

The other medical gentleman who attended Sir William Stewart was Dr John Murray, surgeon in Dunkeld. I see no reason to doubt that this gentleman was a respectable and intelligent medical practitioner, competent to note and judge of symptoms, and particularly the symptoms of bronchitis, with which he must have been familiar. I shall have occasion to refer briefly to his evidence in regard to the history of Sir William Stewart's complaint, the symptoms during life, and the circumstances immediately preceding his death. At present, however, I have to observe that his opinion, as the medical man in immediate personal attendance—an opinion stated by him at the time, recorded in his return to the Registrar, and repeated in his evidence in this cause—is, that Sir William Stewart died of bronchitis succeeded by pneumonia. He gives that opinion without doubt, according to the best of his judgment, and it is to be observed that he is the only medical man who was in personal attendance, and that he was present at both *post mortem* examinations.

I do not mean to enter into the details of the

evidence which have led me to the conclusion that the symptoms during life, and the circumstances attending the death, are, on the whole, more consistent with the theory of inflammatory action causing active congestion, than with the theory of serious valvular disease of the heart causing passive congestion.

I do not think that much reliance can be placed on the symptom of giddiness. I think it did occasionally occur, but it is not proved to have been frequent, or very alarming,—indeed I think it occurred very seldom; and Dr Rutherford Haldane, in attributing some weight to the symptom of giddiness, is under the necessity of saying, as he does with great candour, that the proof of giddiness is not sufficient, and that to support the theory that it was a symptom of heart complaint, it is necessary to assume frequent instances of giddiness, which he thinks may have occurred, but which have not been proved. On the few occasions when giddiness is proved, it may have arisen from a different cause. Then I am of opinion that chronic difficulty of breathing, as distinguished from, and existing apart from, the irritation produced by cold caught about the 5th or 6th of April 1871, is not proved; and that after the date when Sir William Steuart certainly caught cold, about the 5th or 6th of April, the proof of breathlessness or difficult breathing—short breathing, or breathing with a catch in it—is quite in accordance with the theory of bronchial inflammation. After first catching cold he got a little better; then, after the 8th of April—a very cold day—his breathing became again affected; then he got better again, and on the 15th April he seems to have breathed more freely; on the 22d or 23d he again got worse, and his breathing was short; it got still worse on the 26th and 27th, when serious dyspnoea appeared, and he died on the morning of the 28th. That he did catch cold, complained of it, and suffered from it, is beyond doubt, and these symptoms of short and difficult breathing during the time between the attack and his death are quite consistent with the course of inflammatory action.

But besides the symptom presented by this affection of his breathing, I think it proved that after he caught cold he had some degree of cough, and some degree of expectoration, and, as might be expected, mucus was, on dissection, discovered in the bronchial tubes. On more than one occasion, on and after the 10th of April, coughing was observed by Makepeace, the valet, and Mr Nichols Steuart, and also to a smaller extent by Dr Murray; and Mr Steuart particularly describes an occasion on, I think, the 25th April, when Sir William coughed very severely, and brought up phlegm streaked with blood. Dr Murray thought there was pleurisy, which perhaps there may have been, but Dr Murray leaves no doubt of his opinion of the existence of bronchitis, for he says so expressly, and adds that he heard distinctly the r le or gurgle in the bronchial tubes. He was personally in attendance; and quite competent to judge of the matter. The symptoms which he noted led him to that opinion, and Dr Grainger Stewart and Dr Watson have, on hearing his evidence, and all the evidence, formed the same opinion.

Now, these symptoms during life I cannot overlook in balancing the conflicting theories of passive congestion from heart disease, and active congestion from bronchial inflammation.

That death ultimately took place without a

struggle, or, in other words, in syncope, has been strongly and legitimately founded on by the pursuer as indicating heart disease. It is said that this quiet passing away is what might be expected from failure of the heart's action arising from the valvular disease. To some extent the remark appears to me to be well founded, and I fully appreciate its importance. If a quiet death in syncope were a result excluded in the case of congestion of the lungs when caused by bronchitis, the pursuer's argument from that manner of death would be very strong. But I am satisfied on the evidence that the manner of Sir William Steuart's death, taking into consideration his age, his growing infirmity, and the previous symptoms, may well be reconciled with the existence and effect of bronchial inflammation causing active congestion of the lungs, and reacting upon the circulation.

This is the opinion of Dr Watson, and also of Professor Spence, who states that he found mucus in the bronchial tubes, and inflammation of the substance of the lungs; and Dr Grainger Stewart, who was made quite aware of the fact that death occurred in syncope, firmly adheres to his opinion, as the result of the whole proof, that the cause of death was bronchitis.

Leaving the consideration of symptoms, and coming to the reports of *post mortem* examination, I am of opinion that there is no proof of real dilatation of the heart, and no proof of hypertrophy, or enlargement from excessive nutrition, which would have been the results of any considerable amount of mechanical congestion, caused by obstruction or regurgitation; and that, although some amount of structural disease in the semi-lunar valves is proved, the absolute or entire incompetency of these valves is not proved, and that no incompetency of the mitral valve has been ascertained.

On the other hand, I think that reliable indications of inflammatory action in the lungs and in the bronchial tubes—of such action as might have been anticipated from the history and symptoms of the case—have been proved.

The evidence presented by the reports, to the effect that the congestion of the lungs was due to inflammation, is to me more satisfactory than the evidence which ascribes it to heart disease. Dr Absolon, whose report is the foundation of the pursuer's case, says that his belief that the congestion which he observed was not due to inflammation, was a belief not founded on anything stated in his report. This is not quite satisfactory. But, if the materials for opinion are to be sought elsewhere than in his report, then we have the clear and eminently candid opinion of Dr Rutherford Haldane, one of the pursuer's leading witnesses, that "if it is to be assumed that Mr Spence and Dr Gillespie are right in the report which they have given of the *post mortem* appearances, then the opinion which he, Dr Haldane, had given of the cause of death, is necessarily wrong." It is, accordingly, only by trusting absolutely to Dr Absolon's report that Dr Haldane forms his opinion. Yet, within that report Dr Absolon cannot find grounds for his own opinion to the same effect.

More particularly, I am of opinion that it is sufficiently proved in evidence that congestion of the lungs had passed into consolidation, and that, to some extent, consolidation had passed into real hepatization, which is undoubtedly a reliable indication of inflammatory action. Even Professor Sanders admits that, if there was hepatization, it

was "due to a supervening disease." But I cannot avoid the conclusion that hepatization is proved. Professor Spence positively affirms as a fact that he observed "red hepatization,"—"true hepatization,"—in the lungs, the consequence, as he then believed, and still believes, of inflammatory action. Dr Gillespie is of the same opinion. He says, "I am quite certain of the existence of consolidation;" and he says, "both lungs had a certain portion of them hepatized." I am aware that there is a conflict of evidence on this point, and that Dr Absolon and Dr Buist express a different opinion. To estimate aright these conflicting reports and opinions is a very difficult duty; and no point in the comparison can with propriety be omitted from consideration. After doing all in my power to reach a right result in such comparison, I cannot help thinking that the report of Professor Spence and Dr Gillespie affords the safest foundation for opinion. On careful comparison of these reports I think that not only congestion, but consolidation and true hepatization, is sufficiently proved. The testimony of Professor Spence, reporting and explaining the results of his personal observation, is distinct and positive. He is a skilled and competent dissector and observer, a surgeon and anatomist of great reputation, and a witness altogether reliable; and he is corroborated by Dr Gillespie, who, though not a professed pathologist, is a competent observer, and an eminent and experienced surgeon.

Now, I understand that the existence of true hepatization is, in the question before us, of the greatest importance as a proof of inflammatory action; and, speaking with the utmost deference, I must say that the views so clearly explained by Dr Grainger Stewart and Dr Watson have satisfied me that the ascertainment of the existence of true hepatization of a portion of the lungs, with more general congestion of the lungs, and congestion of the bronchial tubes, tends very powerfully to support the theory of death by active congestion of the lungs caused by inflammatory bronchitis. To the same result I think we are brought by consideration of the *post mortem* report, as by consideration of the symptoms during life.

A different theory—not suggested by the reports, or, I think, maintained by the Perth reporters,—has been started, referring the death to what is termed "cardiac pneumonia." The suggestion seems hazardous, for it assumes pneumonia, which I rather think implies inflammatory action, and consequently active congestion. It would not become me to express any decided opinion on the subject of the theory of cardiac pneumonia, beyond saying that the suggestion of the theory in this case appears to me more ingenious than satisfactory, and to turn on a distinction which is one of nomenclature rather than of true pathology. Dr Rutherford Haldane says that cardiac pneumonia "is not a well accepted medical term," and Dr Grainger Stewart says that hepatization is not the result of cardiac disease. "True hepatization only arises from inflammation." Dr Watson says that "the symptoms of what is called cardiac pneumonia are essentially chronic non-inflammatory." The introduction of the new term does not vary the question. If there be proof of active inflammation the result is the same, whatever terms are used.

has occurred to me, though the Counsel on both sides seemed to shrink from it, that the combination of two agents in producing the fatal re-

sult is a theory explanatory of death which is within the bounds of reasonable probability, and must therefore be considered. I do not much rely on it, but I do not think it right to overlook it. There was, as I assume, some degree of valvular disease of the heart, not amounting, however, to absolute incompetence of the valves. There is also, as I think, satisfactory proof of inflammatory action. Let it be supposed that, in consequence of the state of the heart, the normal amount of resistance to the attack of inflammation, in the form of bronchitis or broncho-pneumonia, was not presented, and that death ensued from the combination of the sharpness of the attack and the feebleness of the resistance—from the severity of the inflammation in the region of the lungs, and the deficiency of restorative power in the action of the heart.

I humbly think that, in point of law, such a state of facts—such a conjunction of acute attack and weak resistance—would not sustain this reduction on the head of deathbed. The active disease was new, and did not exist at the date of the deed; nor, of course, could the combination then exist. Where the heart disease, to the extent proved, is not inconsistent with continued life, and where, on the assumption I am now making, it appears in the closing scene not as the agent assailing life but as an agent failing adequately to resist the attack of a new disease, I arrive at the conclusion, that the proof in support of the pursuer's averments in point of fact is not complete. The new disease—an active and assailing agent—is the true cause of death. Where the second disease is not a development or sequel of the first disease, and where the first disease did not induce the second, I think it not enough that it may perhaps have predisposed to it. This is the opinion of Lord Pitmilly and of Lord Alloway in this Court, and of Lord Brougham in the House of Lords, in the case of *Mackay v. Davidson*. Predisposition is not sufficient; Lord Brougham says—"The predisposition may be the remote cause, the disease is the proximate cause." Where the second disease is new, separate, independent, and active, I think it not enough to sustain a reduction on the head of deathbed that the patient's power of resistance to the attack of the new disease may have been diminished by the first disease.

In the wonderful construction of the human body the process of tracing and ascertaining causation is attended with great difficulty; and the pathology of this case, where eminent medical authorities are divided in opinion, must, to a non-medical man compelled by duty to consider it, be a matter of great anxiety and perplexity. I have felt it to be so. I have done my best to arrive at the truth; and I have only to add that, for the reasons which I have explained, I concur in the result of the Lord Ordinary's interlocutor. I think that the pursuer was bound to make out his case; and that he has not done so. On the contrary, the preponderance of evidence is against the pursuer's case.

The other Judges concurred.

The Court adhered to the interlocutor reclaimed against.

Counsel for the Pursuer—Shand, Balfour and Mackay. Agents—Dundas & Wilson. C.S.

Counsel for the Defender—Solicitor-General, Watson and Keir. Agents—Tods, Murray & Jamieson, W.S.

Tuesday January 21.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

MACPHERSON v. CLERK AND OTHERS.

Schoolmaster — Dismissal — Parochial and Burgh Schoolmasters (Scotland) Act 1861—1 and 2 Vict. c. 87.

Held—The provisions of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, are not applicable to the dismissal of Parliamentary Schoolmasters.

On 10th August 1871, at an adjourned meeting of the heritors of the parish of Kilmallie, held at Fort William, a resolution was passed dismissing Duncan Macpherson from the office of Schoolmaster of the Oinich Parliamentary School; declaring the said school to be vacant; and requiring the schoolmaster to remove within fourteen days from the date of intimation, from the said school, schoolmasters house, and pertinents. The summons in this action was raised by the schoolmaster, and concluded for reduction of said resolution, and declarator that he was still schoolmaster.

The pursuer's first plea in law was that the 19th section of the Parochial and Burgh Schoolmasters (Scotland) Act 1861 has no application to schools founded under the Act 1 and 2 Vict. c. 87.

The defenders' second plea was—that they ought to be assolized, in respect their proceedings were competent and regular in terms of the Act 24 and 25 Vict. c. 107.

The Lord Ordinary pronounced the following interlocutor:—

“*Edinburgh, 25th June 1872.*—The Lord Ordinary having heard parties procurators, and having considered the closed record and whole process—Finds, reduces, decerns, and declares, in terms of the reductive conclusions of the summons, in so far as the writs called for affect the pursuer or his status and position as schoolmaster of the Parliamentary school of Oinich. Further finds, decerns, and declares, in terms of the declaratory conclusions of the summons, and interdicts and prohibits the defenders from taking any steps towards carrying the resolutions and minutes now reduced into effect, and decerns; Finds the pursuer entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

“*Note*—The Lord Ordinary has found the question in this case to be attended with a good deal of difficulty. The question is, whether the provisions contained in the 19th and 20th sections of ‘The Parochial Burgh Schoolmasters (Scotland) Act 1861’ apply to the case of the pursuer, who is not a parochial or burgh schoolmaster strictly so called, but who is the schoolmaster of a Parliamentary school, established under and in virtue of the Act 1 and 2 Vict., cap. 87, being the Parliamentary School Act of 1838. The Act 1696, cap. 26, ordains that there be a school established and a schoolmaster appointed in every parish in Scotland, and provision is made for providing the school and for the salary of the schoolmaster. This Act only applies to proper par-

ish schools. The Act 43 George III., cap. 54 (1803) was passed for making better ‘provision for the parochial schoolmasters, and for making further regulations for the better government of the parish schools in Scotland.’ This Statute, which was the governing Statute till the Act of 1861, contains a great variety of provisions regarding the salaries of the schoolmasters, the provision for schools and schoolmasters’ houses, and for the establishment of side schools in large and detached parishes. The whole Statute, however, refers only to parish and burgh schoolmasters, whose salaries are provided by the heritors or magistrates. The Act under which the pursuer of the present action was appointed is 1 and 2 Vict., cap. 87 (1838), entitled ‘An Act to facilitate the foundation and endowment of additional schools in Scotland.’ The Statute recites the Act of 5 Geo. IV. for building additional places of worship in the Highlands and Islands of Scotland. It narrates that churches had been provided and districts erected into *quoad sacra* parishes, and it empowers the Commissioners of Her Majesty’s Treasury to set aside from sums voted by Parliament for education in Scotland funds for providing a schoolmaster’s salary in such new *quoad sacra* districts as might be found necessary, the heritors of the parish ‘or district,’ providing the school-house and schoolmaster’s house. Schools established under this Act are known as Parliamentary schools, and the great distinction between them and parish schools, or side schools, is that the schoolmaster’s salary is not paid by the heritors, but is wholly provided from the Parliamentary fund. By special provisions, however, the Act of 1696 and the Act of 1803 are made applicable to Parliamentary schools, and are declared part of the Act of 1838, and ‘to be construed and carried into force and effect along therewith, in all respects as if the same were re-enacted and repeated therein.’ The Lord Ordinary is of opinion that, in virtue of this enactment, the provisions for the suspension or deprivation of schoolmasters by libel before the Presbytery contained in the Act of 1803, would be applicable to Parliamentary schoolmasters. But then comes the Act of 1861, which creates the present difficulty. This Act does not in its rubric or general clauses expressly apply to Parliamentary schoolmasters, although they are mentioned in several of the special provisions, and the question is whether the enactments of sections 19 and 20, which introduce a new mode of dismissing, suspending, or enforcing the resignation of certain schoolmasters, apply to the schoolmasters of Parliamentary schools.

“The Lord Ordinary with some hesitation has come to be of opinion that they do not, and that Parliamentary schoolmasters must be proceeded against by libel under the provisions of the Act of 1803. (1.) The title of the Act of 1861 does not apply to Parliamentary schoolmasters, excepting to relieve them from the test. The rubric is ‘An Act to alter and amend the law relating to parochial and burgh schools, and to the test required to be taken by schoolmasters in Scotland.’ The plain meaning of this title is, that while all schoolmasters in Scotland are to be relieved from the test, it is only in the case of parochial and burgh schoolmasters that the law is to be amended. (2.) This reading of the rubric is in entire accordance with the enactments of the Statute, for while section 12, in abolishing the test, expressly mentions not only parochial schoolmasters, but schoolmasters under 1 and 2 Vict. 87—that is, Parliamentary schoolmasters—most of