The Rev. John Smeaton, . . 239
The Rev. John Laurie, . . . 176
The Rev. Adam Welch . . . 171
Charles Ferme, Factor, Blackhall, . 137

Finds that, in these circumstances, the name of Dr William Erskine must be substituted for the name of Mr Andrew Cree Stephen; and that the Board now consists of The Rev. John Smeaton, The Rev. John Laurie, The Rev. Adam Welch, William Erskine, Doctor of Medicine, and Charles Ferme, Factor, Blackhall: Finds no expenses due to either party, and decerns.

"*Note.*—The principal objection of the petitioners, and that affecting the greatest number of votes, was to the rejection by the Returning Officer of all votes where the crosses or figures by which they were expressed were inserted, not in the space to the right-hand of the ballot-papers marked "Space for the insertion of figures or crosses"—but in the portion of the ballot-paper containing the names of the candidates. There is no doubt this space referred to at the right-hand of the ballot-paper was intended as the place for the insertion of the figures or crosses, and for the convenience of the voter in making such insertion; but in the rules and directions for taking votes (Sched. A, sec. 5, par. 2) no express reference is made to the said space, and the voter is merely directed, either in figures or by crosses, secretly to insert, *opposite the names of the candidates for whom he votes*, the number of votes he gives to each. Now, in the cases in question, where the votes have been rejected, the crosses or numbers, although in the same part of the paper where the names of the candidates are inserted, are opposite the names of the candidates. The intention of the voter to vote for the candidates opposite whose names they had inserted the crosses or figures is indubitable, and the Sheriff cannot think the votes are invalid in consequence of their insertion there instead of in the space left for convenience further to the right of the voting paper.

"The next most important objection was to the admission by the Returning Officer of votes marked, not by crosses, but by perpendicular strokes—thus I I I. The words of the regulations are that the voter shall express his votes either "in figures or by crosses." The Sheriff considered himself bound to give a liberal interpretation to these words. There is nothing said as to whether the figures shall be according to the Arabic or the Roman symbols of notation, and the Sheriff thinks the strokes in question may be taken as a rude and hurried expression of the Roman figures according to the Roman system of notation—I., II., III. This applies to those who voted by insertion of one, two, three, and even four strokes. Beyond that number, however, there is difficulty, for the number "five" is never expressed, according to the Roman method, by five strokes, but by the letter V. In one case, therefore, where the voter had expressed his vote by five strokes, the Sheriff has rejected the vote as not expressed either by a cross or by figures, according to the ordinary signification of that word.

"The other objections—some upon both sides—were what were argued to be contrary to section 7 of Sched. A of the rules and directions, that "anything written or marked by which the voter can be identified shall be invalid and not counted." Some of these consisted of a cross or figure inserted in the space for names of candidates, and scored out and afterwards inserted in the space to the right-hand of the paper. Others in a slight stroke or dash at the end of the figure inserted, which is a very common practice in writing anything. The Sheriff thinks it would be too stringent to hold these as marks by which the voter can be identified, and therefore he repelled the whole of these objections."

COURT OF SESSION.

Tuesday, May 13.

SECOND DIVISION.

[Lord Mure, Ordinary.

WHITE *v.* M'EWEN'S TRUSTEES.

Suspension—Process—Dean of Guild Court—Clerical Error.

In a process before the Dean of Guild Court of Glasgow, an interlocutor "appointing the pursuer to produce an account of his expenses" after having been officially issued was altered by the town clerk so as to change the word pursuer into respondent. Subsequently the Dean of Guild decerned for expenses against the pursuer. Suspension of a charge for the taxed expenses on the ground of the alteration—*refused.*

This is a suspension of a charge given by the trustees of the late James M'Ewen, portioner in Parkhead, to John C. White, pipe manufacturer and merchant in Glasgow, to make payment of £34, 14s. 10d., being the charger's amount of taxed expenses in a proceeding before the Dean of Guild Court in Glasgow. The complainer in 1868 applied to the Dean of Guild Court for leave to erect an additional storey upon a small property he had acquired adjoining his pipe work. Leave was granted, but subsequently, finding that the additional storey could not be put up without taking down the old building, the complainer removed it, and made new erections. The respondents intervened, and complained of an "encroachment," and a proceeding between the parties arose in the Dean of Guild Court. After a variety of procedure, the Dean of Guild pronounced an interlocutor in the following terms:—

"*Glasgow, 22d November* 1870.—Having resumed consideration of the case, with the amended plan produced by the pursuer, and having heard parties, Approve of the plan of the intended erections as now amended, and line the boundaries of the petitioner's property in terms of said plan and his title-deeds, and decerns: Ordains the petitioner (complainer) to find caution in common form, and to comply with the relative provisions of 'The Glasgow Police Act, 1866,' but not to have the use of any portion of the streets of the city for the depositation of his building materials; and before disposing of the question of expenses, appoint the pursuer (complainer) to produce an account of the expenses incurred by him, and remit to the Auditor to tax the same according to the lowest scale of taxation, and to report, reserving to consider what modification should, in the circumstances of the case, be made in the amount thereof, after the Auditor's report is lodged, if any.

ALEXR. EWING, D.-G."

In terms of this interlocutor the complainer lodged a bond of caution, and proceeded to complete the buildings. He was also in course of preparing his account of expenses when his agent received from the Town-Clerk a letter in the following terms:— "*Glasgow, 2d December* 1870.

"Dear Sir,—*D.-G. case, J. C. White* v. *M'Ewen's Trustees*,—In the interlocutor pronounced in this case on 22d November last, a clerical error crept in as to the matter of expenses. The interlocutor should read, 'and before disposing of the question of expenses, appoint the 'respondent,' and not the 'pursuer,' as stated in the copy interlocutor in process, 'to produce an account of the expenses incurred by them,' &c. The interlocutor is now corrected as above, and you will please hold the copy supplied as corrected to the above extent.—Yours truly,

p. A. TURNER, *Town-Clerk.*
DON. HAMILTON."

The respondents thereafter proceeded to have their account taxed, on the footing of a clerical error having occurred in the interlocutor of 22d November; and on 9th February 1871 the Dean of Guild pronounced the following interlocutor:—

"*Glasgow, 9th February* 1871.—Having resumed consideration of this case, and that the petitioner has failed to appear with the report by the Auditor on the respondents' account of expenses, Finds that the said expenses as taxed amount to the sum of £34, 14s. 10d. sterling, for which sum decern against the petitioner John Charles White, in favour of the respondents James M'Ewen's trustees, and of James Graham, writer in Glasgow, agent, factor, or doer for the said trustees.

ALEXR. EWING, D.-G."

The trustees charged the complainer to make payment of the amount decerned for, and he brought a suspension.

The pleas in law for the complainer were—"(1) The Dean of Guild having appointed the complainer to produce an account of the expenses incurred by him, it was incompetent and unwarrantable for the clerk of court to alter the word 'pursuer' to the word 'respondents,' and it is incompetent to proceed upon an interlocutor so vitiated, and the charge and whole proceedings following thereon should be suspended. (2) Even supposing that the Dean of Guild had authorised the alteration of his interlocutor, it was incompetent for him to do so after the lapse of time which had occurred, and after the interlocutor had been duly intimated to the complainer. (3) There having been no remit to the Auditor to tax the respondents' expenses, the taxation of and decerniture for the said expenses were unauthorised, illegal, and null. (4) The respondents not having been found entitled to expenses, the decree decerning for the same was incompetent and null. (5) The proceedings complained of having been unauthorised, unwarrantable, and illegal, suspension should be granted, with expenses."

The Lord Ordinary, after a proof, pronounced the following interlocutor:—

"*7th September* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, refuses the note of suspension, and finds the letters orderly proceeded, and decerns; finds the respondents 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 is, in the opinion of the Lord Ordinary, clear upon the evidence in this case that the interlocutor of the 9th of February 1871, on which the charge which is now sought to be suspended proceeds, embodies the judgment which the Dean of Guild had all along intended to pronounce upon the question of expenses of process in the Dean of Guild Court. The Lord Ordinary would, however, notwithstanding this, have been disposed to hold that the interlocutor was not one upon which diligence could competently proceed, had it been itself open to the objection taken to the interlocutor of 22d of November 1870, viz., that it had been altered after it had been signed and issued officially, by substituting the word 'respondents' for 'pursuer' in that part of it which deals with the question of expenses. Because, although this alteration upon the interlocutor of the 22d of November was one which, having regard to the decisions in the cases of *Duguid*, June 4, 1824; *Wright*, December 6, 1832; *Kerr*, December 17, 1835; and *Walker*, June 11, 1858, may be said to fall within the category of what are called clerical errors, which have in the Court of Session been corrected *de recenti* in presence of the parties, the Lord Ordinary is not aware of any authority for holding that such an alteration may be made upon an interlocutor after it has been signed and issued at the judge's own hand outwith the presence of parties, and without any formal motion having been made to that effect; and were any such practice to be sanctioned in the inferior courts, it might, he conceives, tend to create a prejudice against the administration of justice in those Courts in material respects. For the alteration of an interlocutor after it has been signed and issued is at all times a very delicate matter, and has in the ordinary case been supposed to be competent only *ex nobili officio* to the Supreme Court. In the Court of Session, accordingly, a Lord Ordinary is authorised to alter interlocutors, but only 'of consent of both parties,' and that by minute duly signed by counsel—Act of Sederunt July 1828, sec. 63. And although it is made competent by the 20th section of the Act 16 and 17 Vict., cap. 80, for Sheriffs 'to correct any mere clerical error' before the proceedings were transmitted to the Court of Review, but not later than seven days from the date of that judgment, that Act does not apply to proceedings in Burgh Courts. So that if the alteration in the present case had been made within seven days from the date of the interlocutor, which is in the opinion of the Lord Ordinary not proved, the proceedings in question could not, it is thought, have been supported by the provision of that statute, especially in a case where the interlocutor had been officially issued; and it is pretty plain from the evidence of the Dean of Guild that he signed the alteration in the belief that the interlocutor was still under his control, and that he would not have signed it had he known that the interlocutor had been already issued.

"It was therefore, in the view the Lord Ordinary takes of the case, an irregular proceeding so to alter an interlocutor; and it was not, he conceives, in the present case necessary to do so in order to carry out the object in view, viz., to award expenses to the party in whose favour it was intended that expenses should be given. For the interlocutor of the 22d of November contains no decree or finding for expenses. It merely appoints an account to be given in 'before disposing of the question of expenses'; and it was not until the

9th of February that any decree for expenses was pronounced, and that by the interlocutor upon which the charge under suspension proceeds. There would therefore, as the Lord Ordinary reads the interlocutor of the 22d of November, have been no incompetency, notwithstanding the terms of it, in the Dean of Guild, upon the mistake being discovered, rectifying the matter by allowing the respondent to lodge an account of his expenses, upon a motion made to that effect, and thereafter proceeding to dispose of the question of expenses, upon the accounts being taxed. But this, in the view the Lord Ordinary takes of the matter, was substantially what occurred in the present case. For although no other interlocutor was pronounced between the 22d of November and the 9th of February 1871, the respondents' account of expenses was submitted to the auditor for taxation, due notice having been given to the complainer's agent of that having been done; and it was not until after three diets for taxation had been fixed, of all which due notice was sent to the complainer, but at none of which he appeared, that the account was taxed, and a decree pronounced on the 9th of February 1871 for expenses in favour of the respondents.

"Now, this interlocutor contains an *ex facie* good decree for expenses, pronounced after taxation of the account by the proper officer of Court. It is proved that it is framed in conformity with the opinion which was formed by the Judge at the time he heard parties on the question of expenses, and that it carries out the instructions relative to expenses, on which the clerk proceeded in drafting the interlocutor of the 22d of November. It is therefore an interlocutor which is calculated to carry out the substantial justice of the case; and as it bears no express reference to, and is not necessarily dependent upon, the interlocutor of the 22d of November, the Lord Ordinary has come to the conclusion, though not without hesitation, that he would not be warranted in suspending the charge proceeding upon it simply because of the irregularity which occurred in dealing with the interlocutor of the 22d of November."

The complainer reclaimed.

Authorities cited—16 and 17 Vict. c. 8, sec. 20; A.S. 1839, sec. 63; *Miller*, 12 D. 964; *Fell*, 8 S. 543; *Palmer*, 10 S. 252; *Ker*, 14 S. 180: *Drew*, 1 D. 467; *Gray*, 2 D. 128.

The Court unanimously adhered, and found the respondents liable in expenses, subject to modification.

Counsel for Reclaimer—Scott. Agents—Rhind & Lindsay, W.S.

Counsel for Respondents—Watson and Balfour. Agents—Graham & Johnston, W.S.

Tuesday, May 13.

SECOND DIVISION.

MAGISTRATES AND MINISTER OF KINTORE *v.* TAIT'S EXECUTORS.

Trustee—Liability — Legacy — Discharge — Mutual Agent.

A, as trustee for a sum of money left to the minister and corporation of a burgh for charitable purposes, to meet the legacy uplifted an heritable bond through his agents (who also acted for the minister and corporation). A discharge was granted, signed only by the minister. The money remained in the agents' hands, and on their bankruptcy a question arose between A's executors and the corporation and minister. *Held* that the former were not liable, in respect that the latter had by their action acquiesced in the intromissions (1) of the mutual agent, (2) of the minister.

This case came up on appeal against the interlocutor of the Sheriff-Depute (J. GUTHRIE SMITH) confirming that of the Sheriff-Substitute (COMRIE THOMSON). By trust disposition and settlement executed by George Mackay, formerly merchant in the burgh of Kintore, dated 8th February 1831, he gave, granted, and disponed to and in favour of John Smith, merchant in Aberdeen, his nephew James Blaikie, advocate in Aberdeen, and Thomas Tait, farmer in Crichie, and the survivors and survivor of them accepting, as trustees for the purposes therein mentioned, his whole estate and effects of every kind; and he declared the said trust to have been granted, *inter alia*, "in the fourth place, in payment to the Magistrates and Town Council of the burgh of Kintore, and the Minister of the parish of Kintore, all for the time being, of the sum of £400 sterling, which sum the said Magistrates and Minister shall lay out on good security, and divide the yearly interest thereof amongst the poor of the said burgh and parish, one half being paid to the poor of the burgh, and the other half to the poor of the parish." It is thereby also declared that the legacy should be payable on the first 20th day of June or December after the death of Mrs Nicholas Mackay or Smith, the truster's sister, "with interest thereon after, during the non-payment." This lady died on the 7th September 1853, and consequently the legacy became payable on the 20th day of December 1853. Thomas Tait was at the time of Mrs Smith's death in possession, and had the control of the funds set apart for the legacy as the sole surviving acting trustee of George Mackay, and he uplifted a heritable bond of £700 belonging to him as trustee, for the purpose, *inter alia*, of paying the legacy.

On the death of Mrs Smith, a claim to the legacy having been made by the Parochial Board of the parish of Kintore, a submission was entered into, and George Moir, Esq., advocate, by his decree arbitral of 25th July 1854, found as follows:—"I find that the foresaid legacy of £400, left by the said George Mackay to the Magistrates and Town Council of the burgh of Kintore, and Minister of the parish of Kintore, for behoof of the poor of the said burgh and parish, one half being paid to the poor of the burgh, and the other half to the poor of the parish, is not transferred to the Parochial Board of Kintore by the operation of the 'Poor-Law Amendment Act" of 8 and 9 Vict. cap. 83, but that the same remains with, and falls to be administered and applied by, the said Magistrates and Town Council and Minister of Kintore, in terms of the trust disposition and settlement of the said George Mackay: I find that they, as the parties entitled to uplift and administer the said fund, are bound, on payment, to grant a regular and valid discharge to the said Thomas Tait, as sole surviving trustee of the said George Mackay, of the said sum of £400, with any interest which may have accrued, or may accrue, thereon; I find