

issue of a diligence which can only competently issue under the authority of the Supreme Court, or jurisdiction to interdict a litigant from applying to a Supreme Court for diligence which the Supreme Court can alone issue? Now, I agree that the Sheriff Courts have no jurisdiction to do this. As inhibition can only issue under authority of the Supreme Court, I think the Supreme Court alone has jurisdiction to stop its own warrants or to suspend its own diligence. No doubt to certain limited effects the Sheriff Court by special statute can suspend diligence or execution on certain decrees of registration where the sum does not exceed £25; but this exception only strengthens the rule that to suspend or stay diligence issuing from the Supreme Court the Supreme Court itself in the Bill Chamber must be resorted to. The case referred to by your Lordship of *Thom v. The North British Bank* seems conclusive that the Sheriff Court is incompetent to deal by interdict with the negotiation of or the diligence upon an ordinary bill of exchange for £2500. In that case the application for interdict was refused as incompetent and as being in effect simply a suspension.

This ground alone is sufficient for the determination of the present appeal, and I am rather averse to go further and to express any opinion upon what may properly be called the merits of the application. I cannot help saying, however, that I regard the question raised as one of very great difficulty, and I agree with the Sheriff-Principal in thinking the application a novel proceeding. There may be special cases where *ab ante* an alleged creditor may be interdicted from using inhibition or arrestment in security upon the dependence of an action which he has raised; but I think it would require something very special and very peculiar, and something capable of instant verification, to interdict diligence in security upon an action which has not yet been raised. I do not see how the Court are to ascertain what the true nature and terms of the action will be, and how they are to fix by anticipation what shall be the conditions upon which diligence on the dependence shall be interdicted. The statutory provisions also which entitle the pursuer of any action to obtain as a matter of course and as his absolute right warrant of arrestment upon the dependence, and warrant of inhibition upon the dependence, rather point in the direction of the Sheriff-Principal's observation that instant recal, with or without consignation or caution, is the true remedy, with an action of damages if the diligence has been used wrongfully, oppressively, or maliciously. But on all these questions I decline giving any opinion, as their decision is not necessary for the disposal of the present case.

LORD JUSTICE-CLERK*—I agree entirely with Lord Ormisdale's opinion. I should not have been prepared to affirm, as a general proposition, that a competent Court cannot stop by interdict the threatened oppressive and malicious use of diligence. Of course the cases are rare in which malice and oppression can be instantly verified so as to operate by way of interdict. But the malicious use of diligence is as clear a wrong as any other illegal act, and for that reason the man who uses it is liable in damages, which no man

*This opinion was read by Lord Ormisdale in the absence of the Lord Justice-Clerk.

can be who only uses a legal right. The cases quoted to us were entirely misunderstood and misapplied. They were cases which decided that the use of diligence to be the ground of an action of damages must be alleged and proved to be malicious, and that therefore the man who maliciously uses it does not use but abuses his legal right. This I think clear, although of course the cases are rare in which the malicious and oppressive intent can be instantly proved. I should have been inclined to hold in the present case that the intent was sufficiently established. No excuse has been stated for the threat of using inhibition when full security by consignation had been offered. But I fear there is no doubt, on the grounds stated by Lord Ormisdale, that the Sheriff cannot interpose to stop procedure of any kind, especially diligence which takes place under an action in the Supreme Court.

I think we should adhere, and am inclined to give no expenses to either party.

LORD YOUNG, not having been present at the debate, did not deliver any opinion.

The Court adhered.

Counsel for Appellant—Asher—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondent—Trayner—Strachan. Agent—W. Sutherland, L.A.

Tuesday, July 20.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—
(LIQUIDATORS' REMUNERATION CASE)
—JAMIESON AND HALDANE *v.* ANDERSON AND OTHERS.

Public Company—Liquidation under Supervision—Remuneration of Liquidators.

The total debts, secured and ordinary, of a banking company of unlimited liability which was being wound up under the supervision of the Court were £12,855,560, 3s. 6d. Of the ordinary debts £8,928,214, 10s. 5d. were paid during the first year and a-half of the liquidation, £7,396,940 being paid during the first year; and during the whole period secured debts to the amount of £1,724,342, 2s. 6d. were also paid. In these circumstances the Court allowed remuneration to the liquidators at the rate of three-eighths per cent. on the ordinary debts paid during the first year, and of a half per cent. on those paid in the remaining half-year.

Public Company—Liquidation—Apportionment of Remuneration among Liquidators.

In the liquidation of a company, where there are several liquidators, there is a presumption for equality in the apportionment of the remuneration: Circumstances in which the remuneration was divided unequally.

This was the sequel of the case reported March 19, 1880, *supra*, p. 483. In terms of the inter-

locator then pronounced each of the liquidators lodged a statement of the work he had done in connection with the liquidation, and as far as possible of the time occupied therein. The substance of these statements appears sufficiently from the judgment of Lord Shand, *infra*.

The case was advised without further argument, the opinion of the Court being delivered by

LORD SHAND—The Court has now to determine the remuneration to be paid to the four gentlemen who have been engaged since 22d October 1878 in the liquidation of the City of Glasgow Bank, and what portion of the gross amount is to be allowed to each of these gentlemen respectively.

The matter is one of considerable difficulty and delicacy, and very careful consideration has been given to the conflicting views of the parties as contained in the printed papers given in by them respectively. The Court has also had the benefit of information of great value and use obtained from the Accountant in Bankruptcy and the Auditor of Court. These gentlemen have at our request supplied us with particulars regarding the general expense of the liquidation, apart from the remuneration of the liquidators, and regarding the legal expenses, a great part of which was incurred in settling questions with contributories, and have also furnished details as to the remuneration which has been given both in Scotland and in England to liquidators or trustees who have been engaged in administering and winding-up, judicially or voluntarily, large banking or mercantile companies.

It is unnecessary to attempt any recapitulation of the various duties which have necessarily devolved on the liquidators in the conduct of a liquidation which has certainly involved, as they state, "a very large and exceptional amount of labour, anxiety, and responsibility." The joint statement by the liquidators, of 14th May last, gives an accurate and by no means exaggerated account of these duties. It will be convenient, and is indeed necessary, however, to state shortly the extent of the pecuniary intrusions which the liquidators have had, and with regard to which their remuneration must now be fixed.

At the commencement of the liquidation, as appears from the accounts, the total liabilities of the bank, secured and ordinary, were

£12,855,560 3 6

The payments which have been made to the creditors are as follows, viz.—

During the first year of the liquidation—	
Secured debts paid	£1,617,982 6 8
Dividends on ordinary debts paid	7,396,940 1 4
	<hr/>
	£9,014,922 8 0

From 22d October 1879 to 19th March 1880—	
Secured debts paid	
£106,359 15 10	
Dividends on ordinary debts paid	
931,274 9 1	
	<hr/>
	1,037,634 4 11
	<hr/>
	10,052,556 12 11

Leaving liabilities at 19th March 1880 amounting, exclusive of interest due, to	£2,803,003 10 7
On 23d March 1880 (four days after the close of the account) a fifth dividend of 1s. per £ was payable to the ordinary	

Brought forward, £2,803,003 10 7	
creditors, for which the liquidators had an available balance provided of about	600,000 0 0
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Thus reducing the liabilities, exclusive of interest, at 23d March 1880, to	£2,203,003 10 7
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It will be seen from the above statement that the liquidators have made the following payments towards extinction of the ordinary debts:—

During the first year	£7,396,940 1 4
From 22d October 1879 to 19th March 1880	931,274 9 1
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	£8,328,214 10 5

And that at 19th March 1880 they had a balance in hand available to pay off an addition of, say,	600,000 0 0
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Making together	£8,928,214 10 5
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The parties differ widely as to the amount of remuneration to be allowed. From the note of 23d February of this year for Mr Jamieson and Mr Haldane, and answers for Mr Anderson of 5th March thereafter, it appears that these gentlemen indicated that in respect of the first three dividends which were paid during the first year of the liquidation a payment in all of £37,248 should be made as the liquidators' remuneration, being at the rate of $\frac{3}{4}$ ths per cent. on the amount of the first two dividends, and $\frac{3}{4}$ ths per cent. on the third dividend; and it is right here to observe that a committee of the shareholders on 30th June 1879 intimated that as regards the gross amount of the first and second dividends they had resolved, after mature deliberation, to fix $\frac{3}{4}$ ths per cent. as a fair and reasonable remuneration. In the figures given above there is further included a fourth dividend amounting to £931,274, 9s. 1d., and a sum of £600,000 realised and laid aside to pay a fifth dividend, which was paid on 23d March 1880 as already mentioned. Commission on these sums at the rate of $\frac{3}{4}$ ths per cent., being the rate claimed on the amount of the third dividend, amounts to about £11,474, and if this amount be added to the above sum of £37,248, the sum to be fixed as due to the liquidators, giving effect to their views as contained in the printed papers already mentioned, in respect of their intrusions with the funds received and paid to unsecured creditors to the extent of £8,928,214, 10s. 5d. would be £48,722; besides which they indicate that they might have a claim to a further commission, of course at a very greatly reduced rate, on the sums paid to secured creditors, amounting to about £1,725,000. The rate of commission thus suggested is somewhat above $\frac{1}{2}$ (or $\frac{3}{4}$ ths) per cent. on the total amount paid to ordinary or unsecured creditors. On the other hand, the respondents James Alexander and others, being thirty-three of the remaining solvent shareholders of the company, maintain that if the remuneration is to be by way of commission it should not exceed $\frac{1}{4}$ (or $\frac{3}{4}$ ths) per cent., and that on the amount only received and paid to the ordinary creditors, which would thus reduce the remuneration to a sum slightly below one-half of the amount asked. But they maintain in the first instance that remuneration by commission calculated by percentage is inapplicable to the large sums dealt with by the liquidators, and that

the remuneration should be fixed on the basis of the time occupied by each liquidator, and according to a scale sanctioned by the Lord Chancellor in England, leaving it to the Court to say whether any addition should be made owing to special circumstances.

The respondents acknowledge the industry and professional ability with which the liquidators have discharged their duties, and the Court having in the constant supervision of the liquidation had frequent opportunities of knowing the conduct of the general business, cannot speak too highly of the energy, tact, and skill which the liquidators have shown throughout. The result has been to save large sums to the estate, by means of arrangements made with the assistance of the banks in Scotland, by which a great number of the creditors, in respect of present payment of their debts, were induced to forego their claims for interest, and also by effecting judicious compromises with the representatives of companies and individuals with whom the bank was deeply involved, whereby protracted and expensive litigation has been avoided and important securities for the benefit of the bank have been retained. The remaining business of the liquidation has also been brought into a comparatively small compass in a remarkably short time. The liquidation is one in which the remuneration should certainly be fixed on the footing that the work has been done extremely well and with remarkable expedition, having regard to the many large and complicated transactions in which the bank was engaged not only in this country but abroad.

The Court is satisfied there is no good reason for holding that the remuneration should be fixed according to the time occupied by each liquidator in the performance of his duties, and on the application of any scale of charges, such as that referred to by the respondents as applicable to liquidations of an ordinary nature in the Courts of Chancery in England. From the information furnished to us by the officials already named, with whom we have communicated, we have reason to think that this mode of remuneration applies only or mainly to official liquidators acting directly under the control of the Court; but however this may be, the reason or expediency of applying such a system in all cases is certainly open to question, and especially where the remuneration is to be given to liquidators selected by a large body of shareholders in an undertaking so important as the City of Glasgow Bank, where necessarily the peculiar qualifications for the delicate and important duties to be performed were in the view of the shareholders who made the appointment. And it must also be borne in mind that charges by time only, or where time occupied is the main element in determining the remuneration, are apt to lead to the result that the man of business who is slow in his work is better paid than one who is active, and there is an inducement to prolong the proceedings.

The Joint-Stock Companies Act of 1862 contemplates that a rate of commission shall be fixed as the ordinary mode of remuneration of liquidators who do not hold their appointments on salary, for it provides by section 93d "that there shall be paid to the official liquidator such salary or remuneration by way of percentage or other-

wise as the Court may direct;" and the important, anxious, and responsible nature of this liquidation is a sufficient reason for saying that the remuneration should be by commission, and not according only to the time occupied by the liquidators respectively.

As to the amount on which the commission should be fixed, there seems to be no doubt that, in accordance with ordinary practice, the amount intromitted with, exclusive of the payments to creditors on secured debts, should alone be regarded. There is no reason in this case for adopting a different rule. It is no doubt reasonable and proper, in fixing the rate of commission to be allowed on the amount realised and paid to ordinary creditors, to bear in mind that besides that amount there was a further sum paid to creditors holding securities over that part of the funds on which they had a first charge; but this further sum ought not to be itself included in the amount on which the commission at the fixed rate shall be charged. Thus, in the present case, while giving a certain rate of commission on the sum of £8,928,214 of sums realised and paid to the ordinary creditors, it must certainly be kept in view that the liquidators had the trouble also of realising and distributing about £1,725,000 amongst creditors who were secured.

The difficult matter in this case is to fix the rate of commission which ought in the whole circumstances to be given. It is obvious that the remuneration to be divided amongst the four gentlemen who from October 1878 to March 1879—a period of a year and five months—devoted themselves to the arduous duties of the liquidation, and had intromissions of so great amount, must be correspondingly and exceptionally large; while, on the other hand, as a very slight increase in the rate of commission on a sum of nearly nine millions would produce a very large difference, the rate to be allowed ought not to be high, or at all on the same scale as in the case of an estate of ordinary though large amount. The rate of commission to be allowed is always a matter depending on circumstances. No fixed rule or principle can be laid down, but keeping in view the rates in practice allowed in ordinary cases where the trouble and responsibility and the extent of the sums intromitted with are not in any way remarkable, such a case as this liquidation must be dealt with on its own merits, bearing in mind on the one hand the exceptionally anxious and arduous nature of the liquidators' duties, and on the other the very large amount on which any given percentage will fall to be charged.

Taking all the circumstances into account, keeping in view that the amount is to be divided amongst four professional men of high standing, and proceeding also on their own personal knowledge of much even of the detail of the leading business of the liquidation, the Court has come to the conclusion that for the first year of the liquidation the rate of commission to be allowed as a reasonable and proper remuneration to the liquidators should be $\frac{3}{4}$ ths per cent. on the ordinary debts paid, amounting to £7,396,940, 1s. 4d.; and that for the later period down to the close of the account now before the Court the rate should be somewhat increased, and be fixed at $\frac{1}{2}$ th higher, being $\frac{3}{4}$ ths (or $\frac{1}{2}$) per cent. on the sums of £931,274, 9s. 1d. paid as a fourth divi-

dend to the ordinary creditors, and £600,000 provided for a fifth dividend, and paid to the ordinary creditors on 21st March last—these two sums amounting together to £1,531,274, 9s. 1d. The commission on the dividends for the first year will thus amount to £27,738, 10s. 6d., and on the first two dividends of the present year to £7656, 7s. 5d., that is, to the sum of £35,394, or say £35,400 in all—the rates being calculated on intromissions to the extent of £8,928,214, 10s. 5d., but keeping in view that with the sums paid to secured creditors the gross intromissions amounted to £10,652,556.

The opinion arrived at by the Court, entirely on their own view of the special circumstances of the liquidation, that $\frac{3}{4}$ ths per cent. is a suitable remuneration to the four gentlemen who acted as liquidators for the first year of the liquidation, is strongly confirmed by the fact that the committee of shareholders originally intimated that after mature deliberation they had resolved to fix that rate as fair and reasonable on the amount of the first two dividends; and it is worthy of notice that a rate of $\frac{3}{4}$ ths, if applied throughout the whole period embraced in the accounts, would strike almost precisely a medium between the contentions of the parties respectively. With regard to the third dividend paid last year and the two dividends paid this year, we have allowed rates amounting only to one-half of those suggested in the liquidators' printed notes already referred to. But, on the other hand, as regards the latter two of these dividends, we think the rate of commission ought to be increased by $\frac{1}{4}$ th (making an addition of £1914), because the intromissions in respect of which these dividends were paid are very much smaller in amount than those of the previous year, and the business connected with them—as is generally the case in such liquidations after the largest and first available assets have been received—was attended with more difficulty and trouble.

It is only further to be observed that in fixing the total amount of remuneration of the liquidators for division amongst them, we have had fully in view the information obtained, as already referred to, in regard to cases of bankruptcy and liquidations, judicial and voluntary, in this country and in England, including the cases of *The Western Bank of Scotland*; *Overend, Gurney, & Co., Limited*; *Agra & Masterman's Bank*; and *The Northumberland and Durham Bank*. We do not find, however, that these cases give any assistance except in the most general way; for, as already explained, the amount of remuneration is necessarily dependent on the special and peculiar circumstances of each case. In some of the cases—as, for example, that of *The Western Bank*, in which there was a long-pending litigation against certain of the directors—the liquidations necessarily lasted over a long period of time, and the remuneration had relation to that circumstance. It has been pointed out to us that in the case of *Overend, Gurney, & Co.* a sum of nearly £60,000 was paid to two liquidators, with the approval of the Vice-Chancellor (Malins). Of this sum £40,000 was allowed in respect of funds realised and paid to creditors amounting to £4,913,136, 7s. 6d., being at a rate of over four-fifths per cent; and £19,639, 18s. 2d. was allowed on funds realised and repaid to the shareholders amounting to £414,192, 10s. 3d. The

total remuneration—£59,639, 18s. 2d—was over one and one-ninth per cent. on the total payments to creditors and repayments to shareholders of £5,327,328, 17s. 9d. Again, in the case of *The Northumberland and Durham Bank*, in which the amount received was £2,205,708, commission at the rate of 2 per cent. was allowed or sanctioned by the same learned Judge. In both of these cases the liquidation lasted, and we presume necessarily lasted, over ten years, and there must have been very special circumstances to justify the very large remuneration allowed. Thus, in the case of *Overend, Gurney, & Co.* we have been informed that the labours of the liquidators included a careful supervision of the realisation of securities amounting to above £14,000,000, and that very considerable sums were realised through their instrumentality and paid direct to creditors without passing through the liquidators' accounts, and that these services were taken into consideration in dealing with the question of remuneration; and in the later stages of the liquidation the Vice-Chancellor gave effect to a recommendation by a committee approved of by a meeting of certain shareholders. We certainly cannot follow these cases as precedents for fixing the rate of commission in this case. The rate we are to allow is much more nearly the same in result as in the case of *Agra & Masterman's Bank*, decided by Vice-Chancellor Giffard (L.R., 7 Chan. 102), in which the period embraced in the account was from June 1866 to June 1868, and where a sum of £9000 was allowed on gross receipts to the extent of £3,700,000. That was the very peculiar case of a bank carried on by one liquidator only with a view to its reconstruction, and the remuneration was fixed in a great measure by a calculation of the time occupied by the liquidator and his assistants, and a sum added to the amount thus brought out—a course which, for the reasons already stated, we cannot adopt in this instance.

The very special circumstances of this liquidation, and the fact that four professional men have been engaged as liquidators in the work, are quite a sufficient reason for fixing a rate or percentage which yields a somewhat higher sum in proportion to the assets realised than was there given; but, on the other hand, the amount to be given is certainly moderate if compared with the remuneration given in certain of the English cases that have been referred to.

The statute empowers the Court further to direct in what proportions the amount fixed as remuneration shall be distributed amongst the liquidators. On this matter it is unnecessary to enter into details. In ordinary circumstances, as stated in the opinions of the Court in the advising of 19th March last, there is a presumption for equality in the apportionment of the remuneration amongst several liquidators; but having considered the detailed statements, with information as to the duties performed by each of the gentlemen in this liquidation, we think it would not be right or equitable to make an equal division. Mr Anderson, who has been for a considerable time at the head of a firm of high standing in Glasgow largely engaged in general business, particularly in business arising out of important mercantile bankruptcies, has, with the constant assistance of his son and partner, and

the occasional assistance of another partner Mr Muir, taken what may be called, with all due regard to the important services of Mr Cameron (including the arrangements made by him in America by which a very favourable realisation of certain important securities was obtained), the leading part in the liquidation work performed in Glasgow, where most of the trading firms who were the largest debtors of the bank had carried on business. Mr Jamieson, again, with the frequent assistance of his partner Mr More, took the more immediate charge of important negotiations with the other banks to assist in the general working of the liquidation, to conclude the arrangement made with the Caledonian Bank, and to enable the liquidators to arrange for payment to the large creditors, chiefly in England, of the principal sums due to them, by which claims of interest amounting to about £250,000 were given up. He also conducted in London the negotiations for settlement with the trustees of the bankrupt firms of James Morton & Company; Smith, Fleming, & Company; William Nicol & Company; Glen, Walker, & Company; and others—debtors to the amount of upwards of £5,000,000—the successful conclusion of which has saved properties and securities of very great value to the bank; and otherwise, like Mr Anderson, he took what may justly be described as a leading part in the liquidation. We do not doubt that Mr Cameron and Mr Haldane, although themselves constantly engaged in the general work of winding-up the business of the bank connected with the respective offices in Glasgow and in Edinburgh, and in arranging for surrenders and settlements with contributories, and otherwise, would themselves acknowledge that the more important and difficult matters were, generally speaking, under the more immediate management of Mr Anderson and Mr Jamieson, and, at all events, we are satisfied that this was the case. In these circumstances we are of opinion that while these last-mentioned gentlemen should be placed on the same footing, they should both have a larger part of the remuneration than their fellow liquidators. Accordingly we are of opinion, and now determine, that of the total amount of £35,400 the sum of £10,500 shall be paid to Mr Anderson, and the same sum to Mr Jamieson, and that the balance of £14,400 shall be divided equally between Mr Haldane and Mr Cameron, thus giving to each of them £7200. This division or apportionment gives to Mr Anderson and Mr Jamieson practically and in round numbers three-fifths of the gross amount to be divided equally between them, and one-fifth to each of Mr Cameron and Mr Haldane.

We think it right to add that the present decision leaves entirely open all questions in regard to the rate of remuneration to be allowed in respect of actings and intrusions later than those included in the account on which we have proceeded, and that this judgment is intended to apply to the personal services only of the liquidators, including the services of any partners who have aided them in their work. A sum of £668 has been paid to clerks of Messrs Jamieson & Haldane, and the salaries of a number of clerks and officials of the bank who were continued in the service of the liquidators at the head office in Glasgow have been regularly paid. If there be

any sums due to the clerks of Mr Anderson's firm for similar work done by them, it is not meant to affect the claim for remuneration to this extent, nor to affect the claims of Mr Anderson's partner Mr Muir for the special business mentioned at the close of Mr Anderson's statement of 22d May last, excepting the claim for assistance in preparing the first balance-sheet of the liquidators as at 31st December 1878, all charges for which are included in the remuneration now allowed to Mr Anderson.

The interlocutor of Court will fix the remuneration of the liquidators for the period in question at the sum of £35,400, to be distributed amongst them in the proportions above stated, and will authorise the liquidators to take credit for that sum in their accounts; and the expenses of the parties on this question of remuneration, including the fees and outlays due to the Accountant in Bankruptcy and the Auditor of Court in respect of their inquiries and information given to the Court will be allowed as charges in the liquidation.

LORD PRESIDENT—The interlocutor will be pronounced in terms of the judgment now delivered; and it is only necessary to add that for the work done by the two officials, the Accountant in Bankruptcy and the Auditor, we propose to allow them thirty guineas each for their trouble, besides outlay, and the liquidators will be authorised to pay these sums out of the funds in their hands. The expenses of the whole parties are to be paid out of the estate in liquidation.

Counsel for Messrs Jamieson and Haldane—Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Mr Cameron—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for Mr Anderson—Mackintosh. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Shareholders—Dean of Faculty (Fraser, Q.C.)—Moncreiff. Agent—James W. Moncreiff, W.S.

Tuesday, July 20.

FIRST DIVISION.

[Lord Adam, Ordinary.]

DUKE OF ATHOLE v. THE LORD ADVOCATE AND ANOTHER.

Process—Proving the Tenor—Teinds.

In an old sub-valuation in the teind-office one word or figure representing the valuation in bolls of the teinds of certain lands was obliterated by a tear in the paper. An action to prove the tenor of the last figure was raised by the owner of the lands, who brought as ad-minecles certain documents produced in a former process of augmentation in the parish, which showed that the lost figure was 10. The Teind-Clerk having reported on a remit, the pursuer asked decree on that report without further proof, and the Court *decerned* accordingly.