that there are only three, Clark, Grierson, & Co., as a company being one party. The Lord Ordinary (Jerviswoode) held that the obligation of Robert Bland Clark and William Grierson, as individuals, was superadded therein to the obligation of Clark, Grierson, & Co., as a company.

To-day, after argument, the Court made avizandum with a reclaiming note for the defenders.

Thursday, Nov. 9.

FIRST DIVISION.

KELLER *v.* ROBERTSON AND OTHERS.

Counsel for the Advocator—The Lord Advocate and Mr F. W. Clark. Agents—Messrs Lindsay & Paterson, W.S.

Counsel for the Respondents—Mr Patton and Mr Gifford. Agents—Messrs Dalmahoy, Wood, & Cowan, W.S.

This was an advocation from the Sheriff-Court of Perthshire. An action of removing had been raised in 1859 at the instance of the Rev. Alexander Stewart Robertson, James Mailler, and Alexander Frazer, three of the members of the kirk-session of the Free Church congregation at Burreltown, for the purpose of having the advocator removed from the schoolhouse at Burreltown known as the "Woodside Institution." The removing was opposed by Mr Kiellar, and had been depending in the Perthshire Court from 1859 to 1864.

It appeared from the advocator's statement that a vacancy had occurred in the mastership of the school in the year 1845. The patronage was then in the hands of the kirk-session of Coupar-Angus. Candidates were advertised for, and several applications were made, but Mr Kiellar did not apply. He was, however, asked by the patrons if he would accept the appointment; but, as he alleged, he declined it on the ground that a permanent appointment was not offered. He said that it was thereafter arranged that he should accept the appointment on the understanding that his tenure of office should be for one year certain, upon trial, and that if he gave satisfaction during that period his appointment thereafter should be permanent. This statement was denied by the pursuers, who alleged that the appointment was one from year to year. Unfortunately the correspondence embodying this arrangement, except one letter from a Mr Clark to the advocator, as well as the minutes of the kirk-session of Coupar Angus, had gone amissing. Mr Kiellar was thereafter inducted into office. In 1846 he was made an elder of the church, and he continued in office until 1858, when he was dismissed, on the sole ground that his continuance in office was "not for edification." There was no charge made against him. As stated by Sheriff Gordon in his note—"It must be distinctly kept in view that the pursuers have prevailed solely in respect of their legal right to terminate the defender's engagement without reasons assigned, and not in respect of any misconduct on his part, proved, or even alleged, by the pursuers." Mr Kiellar appealed to the Presbytery against the judgment of the kirk-session dismissing him, but the appeal was dismissed. He then went to the Synod, where the Presbytery's decision was reversed by a majority of 17 to 2. The case then went to the Assembly, where it was held that the superior Church courts had no jurisdiction in the matter, and the judgment of the Presbytery, in so far as it dismissed the complaint, was affirmed. Mr Kiellar was thereupon of new dismissed, and an action was raised to have him removed from the schoolhouse. A long proof was led as to the terms of Mr Kiellar's appointment. Sheriff Barclay held that it was not proved that the appointment was one *ad vitam aut culpam*, or anything but an annual one. Sheriff Gordon adhered; and Mr Kiellar was ordained to remove.

It was argued for the advocator (1.) that his appointment was a permanent one in this sense, that unless something were alleged and proved against him he could not be summarily removed; and (2.) that the church courts were entitled and bound to deal with the matter; and that the judgment of the Synod having been in favour of the advocator, and the Assembly not having altered it, the advocator was still entitled to the office. He argued that he had proved by parole the terms of his appointment, which he had been prevented from proving otherwise by the kirk-session not having preserved his letter of acceptance and the minute of his appointment, which undoubtedly existed at one time.

On the other side it was contended that unless the advocator could prove a special contract to the contrary, he only held his appointment from year to year, and that he was removable at pleasure without cause assigned. The Burreltown kirk-session had only existed since 1853, and the documents, the loss of which was complained of by the advocator, were the documents not of the Burreltown kirk-session, but of that of Cupar-Angus, and the pursuers were not therefore responsible for the loss of them.

After full argument the Court to-day affirmed the judgment of the Sheriffs.

The LORD PRESIDENT, who delivered the opinion of the Court, stated that the point of this case lay within a comparatively small compass, although it had been spread over a very long proof. The question was whether Mr Kiellar had a permanent appointment or not. What he contended for was a somewhat peculiar kind of appointment, but it was quite intelligible. He said that he was not to be dismissed except for some disability. Now the only letter on the subject was the one from Mr Clark to Mr Kiellar. It was there stated that the appointment was to be "certain for one year, and to be put on a *more* permanent footing if after that trial both parties are pleased." As his Lordship read that letter, it was not a proposal for such an appointment as was contended for by Mr Kiellar. It was to be gathered from the evidence that Mr Kiellar had said something about a permanent appointment, but what he exactly said was not known. It also appeared that Mr M'Arthur, one of the kirk-session of Cupar-Angus, had made some proposal to the same effect. It does not appear when it was made, but it seemed clear it had not been given effect to. The question then was whether Mr Kiellar accepted office in terms of Mr Clark's letter, or whether he proposed other terms essentially different which were agreed to. That would require to be very distinctly proved, but it has not been satisfactorily established. It rather appeared that Mr Kiellar had written a letter in answer to Mr Clark's, but it has gone amissing. It was not clear that the kirk-session of Burreltown are responsible for the loss. Mr Clark's letter implied that something was to be done at the end of the year, but the matter stood over, and nothing was ever done. The judgments of the Sheriffs are therefore substantially right. They have allowed expenses subject to modification, which must be considerable in the circumstances.

MILNE HOME AND OTHERS *v.* ALLAN AND OTHERS.

Counsel for the Pursuers—Mr Gordon and Mr Millar. Agents—Messrs Adam & Sang, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Gifford. Agent—Mr James Renton jun., S.S.C.

Mrs Milne Home of Wedderburn, proprietor of the lands and barony of Eyemouth, with consent of certain proprietors of houses and other heritable property in Eyemouth, raised this action against the defenders, who are trustees of the harbour of Eyemouth under the Act of Parliament 2 Vict., c. 36, to have it declared that the defenders had no right to carry away sand, shingle, gravel, rock, stones, or

other materials from the sea beach or sea shore of the bay of Eyemouth, extending from the mouth of the harbour of Eyemouth northward to the Fort of Eyemouth. The defence was that under their Act of Parliament the trustees were entitled to take ballast from the sea shore for the purposes of navigation, as had been done from time immemorial.

Lord JERVISWOODE held that, as the parties were at issue in regard to facts material for the decision of the case, there should be a proof allowed. Against this interlocutor the pursuers reclaimed, and contended that the facts as to which the parties were at issue were not material, the question being one dependent solely on the construction of Mrs Home's titles and the defenders' Acts of Parliament.

To-day, after hearing Mr Millar for the pursuers, the Court adhered to the interlocutor of the Lord Ordinary, with this variation, that the proof to be allowed should be before answer, and under reservation to both parties of all questions of title. The pursuers were found liable in expenses since the date of the Lord Ordinary's interlocutor.

SECOND DIVISION.

SUSP. AND INTER.—THE DUKE OF PORTLAND *v.* MESSRS W. BAIRD AND CO.

Counsel for the Duke of Portland—Mr Patton and Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

Counsel for the Messrs Baird—The Solicitor-General, Mr Gifford, and Mr Hope. Agents—Messrs Horne, Horne, & Lyell, W.S.

Counsel for Trustee—Mr Gordon and Mr Lamond.

This suspension and interdict is directed by the Duke of Portland against the Messrs Baird of Gartsherrie, and its object is to have them prevented from working the seams of coal and the ironstone in certain lands forming part of the estate of Kilmarnock, which were let by the complainer by a tack or lease, dated 29th and 30th November 1852, to Mr Lancaster and Mr Cookney. By the lease of the mineral field in question, the field is let "to the said William Lancaster and James Thomas Cookney, and their heirs and successors, or to their assignees and sub-tenants, but under this condition always, that if the tenants shall desire to assign this lease, or to subset the premises thereby let, the assignation or the subtack shall be, and shall only be, with the written consent of the proprietor, or his successors; and the tenants herein, and their heirs and successors, shall notwithstanding of any assignation or subtack continue bound, along with the assignees and sub-tenants, for the rent or loyalties, and implement of the whole stipulations of this lease." Lancaster & Cookney having carried on the business for some time, dissolved it, and assigned the lease, with consent of the landlord, to Messrs Lancaster & Freeland. This firm having got into difficulties, handed over their interest to a trustee for behoof of their creditors, who assigned the lease to the Messrs Baird—the present respondents. The Duke of Portland refuses to take them as tenants except upon a condition which the Messrs Baird decline—that they shall ship all the iron which they make to Troon, the Duke's port; and the question that arises in the case is whether, under the right which the landlord reserved to himself of withholding his consent in the original lease, he is entitled to annex such a condition as that which the Duke of Portland proposes to impose on the Messrs Baird.

The Lord Ordinary (Kinloch) found that, according to the sound legal construction of the deed of lease in question the consent of the landlord is a necessary condition precedent to any assignation of the lease taking effect; and that the landlord is entitled to give or withhold such consent at pleasure, and without assigning reasons, or having any reason of refusal subjected to the review or control of the Court.

The Messrs Baird reclaimed; and after argument, the case was advised to-day, the Court adhering to the judgment of the Lord Ordinary.

Friday, Nov. 10.

FIRST DIVISION.

CAMPBELL *v.* BERTRAM'S TRUSTEES.

Counsel for Pursuer—The Lord Advocate and Mr Tait. Agents—Messrs Tait & Crichton, W.S.

Counsel for Defenders—Mr Gifford and Mr Thoms. Agents—Messrs Scarth & Scott, W.S.

This action was raised by Sir Archibald Islay Campbell of Succoth, against the trustees of the late James Bertram, engineer and millwright in Edinburgh, for the purpose of declaring the irritancy, under the Act 1757, of a feu-contract of certain subjects in Leith Walk, in respect of the defender's failure to pay feu-duty for two years. The defenders pleaded *inter alia* that the pursuer had no title to sue the action, and the question thus raised was one purely of conveyancing.

It appeared that Alexander Wight, W.S., held the subjects in question under a charter from the town of Edinburgh, as trustees of Trinity Hospital, and that in 1796 he granted a sub-feu to a person named Cooper, and that the defenders were the successors of Cooper. But in 1811 Wight, being then the debtor of a person named Howie to the extent of £600, granted to Howie a deed by which, it was said by the pursuer, he had transferred his right of mid-superiority. If he had divested himself, then it was clear that the superiority had passed to Howie, whose successor Sir Archibald Campbell now was. Lord Jerviswoode repelled the objections to title, and the defenders reclaimed. To-day the Court altered the Lord Ordinary's interlocutor, sustained the objections, and assoilzied the defenders, with expenses.

LORD CURRIEHILL delivered the judgment of the Court. He said that the whole question turned on the nature of the deed of 1811. There was no question that this deed was granted in security of debt; but a person granting a conveyance in security may do so in two ways. He may either grant an absolute conveyance—receiving a back letter or other writing—or he may grant a deed which forms an incumbrance on his property, the radical right remaining in himself. The deed in question differs from the ordinary bond and disposition in security because it contains no personal bond and no power of sale. But it contains a full recital of a debt due by the granter to the grantee. On the narrative of that debt, and in consideration of the creditor agreeing to supersede payment of the debt till 1812, the deed states that the granter had agreed to grant the "disposition and assignation in security underwritten." Then the deed proceeds to sell, alienate, and dispose the subjects to the grantee, but *in gremio* of the dispositive clause are the words, "but under redemption by payment making of the aforesaid sums in manner underwritten." This refers to and incorporates with the dispositive clause a declaration in the precept of sasine that the subjects were to be held redeemably. This is, therefore, a qualification of the dispositive clause. Consequently this is not an absolute disposition, but a qualified one. The words "in security" do not occur in the dispositive clause, but I do not think they are necessary there as a *vox signata*. The obligation to infeft and the procuratory of resignation also refer to the redeemable nature of the right. Mrs Howie was infeft on this disposition so qualified, and that right was confirmed by the superiors. The question therefore is this—Had Wight, when he granted the deed of 1811, ceased to be the vassal of the town of Edinburgh, and the superior of Cooper, or did his right still continue, but burdened with this incumbrance? I am very