Mr Russell. The sale was reported, and an interlocutor pronounced, finding what the proceeds were, and finding a balance due. These proceedings occupied till the end of July 1851. It seems while these proceedings were going on—in the midst of these proceedings—and soon after their commencement, that this lease of 29th April 1851, if granted at all, is said to have been granted. It bears to be a lease granted by Russell to his previous tenants, Bishop and Weir, upon terms rather peculiar. It was granted for a lordship alone. There was no fixed rent. It appears that soon after this lease was got by Bishop, he removed to somewhere else. No workings took place after May 1851. After that time Bishop and Weir did not work the colliery at all. Bishop removed to some other place and engaged in other occupations. Weir died in 1852. It appears that after this Russell died, and subsequently his representatives granted a lease to Simpson in 1859. When Bishop first made a claim for damages under the lease of 1851 is not distinctly proved. He says he made an observation to that effect at the time the lease was granted to Simpson. That is not corroborated. The earliest authentic evidence we have is in January 1864. Bishop hears that Simpson was working the pit; and in these circumstances he claims damages, and says it was to his great loss and injury that Simpson worked the coal. It is remarkable that he did not do anything previously. He admits that he had not means to work the coal in 1852. But, on the one hand, it is singular that Bishop should have made no use of the lease; and it is singular, on the other, that Russell should have granted a lease for fifty years to a person who was under no obligation to work the coal. It is also a singular circumstance that in May 1851 there is a letter from Weir, the partner of Bishop, asking for a lease from Russell, and asking it to be granted on more favourable terms than the first lease—not a thing very consistent with the existence of the lease granted in 1851. But Bishop explains this. He says that he and Weir had taken into their partnership a person named M'Kean, and that they were desirous of getting rid of him; and in order to do this there was a pretended quarrel got up as to their lease—viz., that of 1850—and that one was to pretend to carry on the work while the other was objecting, and so matters were to get into a state of confusion; that Russell was a party to this; and that all this was a concoction to get rid of M'Kean. That was apparently not a very honest proceeding. I think in his examination Bishop admits this; and it is under the circumstances of having been suggester and actor in this concoction that Bishop now comes forward to support this lease of April 1851. It was said that no work had been done under the new lease, and that the letter of renunciation of 3d April 1851 was an exercise of the right to renounce under the old lease, and that any work up to that time was under the old lease. But Russell accepted the renunciation immediately and at once. It would have been desirable to have seen Mr Russell's letter. Russell says that he accepted on the express condition that it was to take effect in six months after intimation, in terms of the stipulation of the lease. Bishop, who is in possession of the document, is called on to produce it, and does produce it; but it is torn and mutilated, except the last words, "in terms of the stipulation in the lease," and that provision about the six months does not appear. The statement of the pursuer about this lease of 1851 is that it is not the original lease, but a copy of the lease for the tenant upon unstamped paper; that it was signed by all parties; and that this was done in Bathgate on the date the lease bears, in a certain tavern. Bishop himself was there and says that he saw all the parties adhibit their signatures. Other witnesses were examined, who said that the parties mentioned in the lease were all there, and that a document was exhibited and signed by them. The document so signed has not been very well identified. It bears to be a copy of the lease, and states that it is written "on this and the preceding page of stamped paper by William Storry," but it is upon three pages of paper not stamped, or stamped since, as the date is April 1866 on the stamp. These people don't profess to identify the document except as to its tenor. In addition to this, persons are adduced who know the handwriting of Russell and Storry, and swear that it bears their signatures. There are also produced documents that are genuine signatures, and these parties say as to them, that they see no difference between them and the challenged signatures. In further corroboration, there is produced the original, or, at least, duplicate lease of 1850. The defenders say that also is a forgery; and a curious circumstance about it is that the testing clause is said to be written by the brother of Clark, who wrote the testing clause in the deed of 1851; but he says he never wrote it. It may be a copy of something he wrote, but he never wrote it. But the question here is not as to the authenticity of that lease. On the other side, there is the evidence of the relations of Russell and of persons acquainted with the handwriting of Clark, and they say that it is not their writing. In like manner there is evidence as to the signature of Storry. It appears to me that the means of knowledge of these parties are superior to those of the witnesses adduced by the pursuer. There is another kind of evidence which has been somewhat resorted to, but not much. I mean the evidence arising from the comparison of the genuine signatures with the signatures said to be forged. In some cases this may be very important; but I have gone through that matter; I have compared all the challenged signatures with those admitted to be genuine, and I must say I have no doubt or hesitation in concluding that all the three signatures are not genuine signatures.

It is said William Storry filled up the testing clause, but that testing clause seems to be written with the same pen and in the same ink as the body of the deed; and I further think that the man who wrote the words, "William Storry, witness," and the man who wrote "George Clark, witness," are one and the same person.

The DEAN OF FACULTY, for the defenders, moved that the Court should ordain the clerk to retain the deed in his custody, and not to deliver it to the pursuer or anyone else; and an order to this effect was pronounced.

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

Agents for Russell and Others—J. & A. Peddie, W.S.

Thursday, Nov. 15.

SECOND DIVISION.

ANDERSON *v.* KERR.

Title to Sue—Next of Kin—Co-executors—Factor.

Held that a survivor of two co-executors was entitled to call a factor appointed by them and the next of kin of a deceased party to account, he having intromitted with the estate.

This is an action of count, reckoning, and payment at the instance of Mrs Anderson, sole surviving executrix-dative *qua* nearest in kin decerned and confirmed to the deceased Andrew Dalgairns, Esq., against Christopher Kerr, conjunct town clerk of Dundee, factor and commissioner for the executry estate of the said deceased Andrew Dalgairns. Mr Dalgairns died in 1840, and on 22d April 1841, the pursuer and her brother were confirmed executors of the deceased. The pursuer and her co-executor, with consent of the other next of kin, executed a deed of factory in 1841, in favour of the defender, who, in consequence, intromitted with the estate. The present action is brought by the pursuer to call the defender to account. The other executor is now dead. Several points of a special nature are raised in the record, but the only point on which the judgment of the Court turned is raised by the fifth plea in law for the defender, which is to the following effect :—"The survivor of two executors-dative is not entitled to sue actions against parties who acted for or transacted with both." The Lord Ordinary (Jerviswoode) repelled this plea, and remitted the defender's accounts for examination and inquiry by an accountant. His Lordship added the following note to his interlocutor :—

. . . . "The fifth plea is, however, in the opinion of the Lord Ordinary, of a more formidable character ; and although he has repelled it, he is sensible of the importance and difficulty of the question it raises.

"The argument in support of it is, as he understands, rested mainly on an analogy between the office of executors-dative and tutors-dative.

"As respects the latter class, it has been finally determined by the judgment of the House of Lords in the case of Scott *v.* Stewart, 7th November 1834 (7 Wilson, S. and Maclean, p. 211) that the office of tutors-dative, constituted by gift in favour of three persons, terminates by the death of one of them.

"If, then, the principle thus established has application to the case of executors-dative, it would follow that the death of one of the executors, and in this case that of the late Peter Dalgairns, had operated so as to cut down the title to sue, which is here alleged on the part of the pursuer. But the Lord Ordinary is not satisfied as to the precise correspondence between the two offices, as respects the characteristics which can alone have a relevant bearing on the point now raised.

"Tutors have charge of the person of the pupil, and consequently the direction of his or her education and upbringing. But, as respects the office of executor, the characteristics now adverted to, which appear to have weighed so much in the estimation of the Lord Chancellor in disposing of the case of Scott, are altogether awanting.

"Accordingly, it is laid down by Lord Stair (3, 8, 59), 'Amongst co-executors the office accresceth to the survivors, who are in the same case as if the defunct executor had not been named, only in so far as the testament was executed before that executor's death his share is transmitted to his executors, and accresceth not, but is transmitted *cum onere debitorum defuncti pro rata*.' And, again (3, 8, 9), that 'if any of the executors be dead, the office accresceth to the survivors, and they are liable and convenable alone,' and so forth.

"The statement of the late Professor Menzies, in his lectures (page 488), is on this point to the effect that, 'when several executors die, the entire office accrues to the survivors,' and it may therefore be assumed, as the Lord Ordinary has seen no adverse judgment in the reported cases, that the doctrine of Lord Stair is that which, as respects this matter, has been acted on in practice during a period long subsequent to the judgment of the House of Lords relative to the office of tutor-dative, to which the Lord Ordinary has adverted, and on which the defender so strongly founds." . . . .

The defender reclaimed.

WEBSTER, for him, was heard in support of the reclaiming note.

MILLAR, for the pursuer, was not called upon.

At advising,

The LORD JUSTICE-CLERK—This case presents no difficulty. It does not appear to me to be necessary to decide the abstract question, What is the power of the survivor of two executors-dative ? because the title of the pursuer stands entirely clear on the face of the deed of factory to Kerr the defender. The pursuer has by that deed a contract right to sue an action of accounting. The provisions of the deed are unambiguous. From them it appears to me beyond doubt that the pursuer, as a party to the deed and as the employer of Mr Kerr, has a right to call for an account of his intromissions as factor, and that is all the length we need go. We need not decide as to the pursuer's right to sue for payment. It may be that under this action she may not be entitled to get decree for payment at all. I am, therefore, of opinion that the 5th plea in law, stated as an abstract proposition, is quite applicable to the present case, and therefore ought to be repelled ; but I think it right to say that the question raised by it is entirely different from that decided by the House of Lords in Scott *v.* Stewart, and I think it would be a bad plea under any circumstances. But it is not necessary to decide that, as the pursuer has a good title to sue otherwise.

Lord Cowan and Lord Benholme concurred.

Lord NEAVES—On the general question which has been raised it is not necessary to give any opinion, but I concur in thinking that there is no foundation for such a doctrine. The office of executor-dative is confirmed by the decree of a judge, and it is quite different from such an arbitrary paternal thing as a gift of tutory, and when I see it laid down by Dune and again by Erskine, that there is no distinction in this respect between executors-nominate and executors-dative, I should hesitate and require a strong reason to say that the office of executor-dative falls on the death of one of those who were originally confirmed.

The Lord Ordinary's interlocutor was accordingly adhered to.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defender—Morton, Whitehead, & Greig, W.S.

Friday, Nov. 16.

SECOND DIVISION.

WESTERN BANK *v.* PEDDIE (BROOMFIELD'S CURATOR).

Bank—Partner—Curator bonis. Held, in conformity with the judgment of the House of Lords in Lumsden *v.* Buchanan, that a *curator bonis* who had acquired shares in a bank on behalf of his ward had by the transfer made himself a partner of the bank, and was therefore personally liable in calls.