second party and his foresaids purging the irritancy at the bar." Now it is admitted that upwards of two years' ground-annual had fallen into arrear, and that admission brings into play, if the superior think fit, the provision of the contract. It was maintained that it was a good defence that the pursuers having failed to put the defender into possession of a material part of the subjects, the defender was not bound to pay the ground-annual. I am of opinion that that plea, as an answer to a demand for payment of ground-annual, is not a good defence, because the claim which it involves is illiquid. This is fixed by the cases of Dun *v.* Craig (November 12, 1824, 3 S. 193) and Dods *v.* Fortune (February 4, 1854, 16 D. 478), and the rule is quite settled. If this had been a suspension of a charge for payment of ground-annual, the same plea, if stated, would have been equally unfounded. But then this is an action of declarator of irritancy. I do not think that the nature of such an action is that it is merely a mode of compelling payment. It is one of two alternative proceedings which a superior may resort to, and its true object is to bring the contract to an end. This was deliberately considered in the case of the Magistrates of Edinburgh *v.* Horsburgh (May 16, 1834, 12 S. 593), in which Lord Balgray begins his opinion by saying—"I had persuaded myself that there were some points fixed and settled in the law of Scotland beyond the power of challenge. But I find I have been mistaken at least as to one of these, for the question is now raised whether a superior who has taken a declarator of tinsel of the feu can also demand arrears of feu-duty from the vassal. It was the opinion of Lord Justice-Clerk Miller that he could not. I have heard Lord Justice-Clerk Braxfield and Lord Justice-Clerk Rae confirm that opinion, and after these authorities, especially the first, who was one of our greatest feudal lawyers in modern times, I am not disposed to treat the matter as an open question or one upon which the law admits of change." Therefore, I think, that when a party brings an action for declaring the forfeiture, he is selecting a most severe remedy, and I think he must set up his title not altogether at the cost of his opponent. The plea of the defender was, I think, a bad plea; but then, dealing with the question of expenses, I think the pursuers took a severe course, and looking to the nature of the pleas, I am disposed to suggest that the defender should be found liable in expenses, but subject to modification.

Lord CURRIEHILL concurred.

Lord DEAS also concurred in the result, but expressed an opinion that the pursuers had selected the proper and most suitable remedy.

Agents for Pursuers—A. G. R. & W. Ellis, W.S.
Agent for Defenders—William Muir, S.S.C.

Saturday, Feb. 23.

SECOND DIVISION.

M'LEAN AND HOPE *v.* FLEMING.

Process—Evidence (Scotland) Act, 1866*—Commission—Witnesses abroad—Jury Trial.* Held that under this Act it is only competent to grant commission to take the whole evidence in a cause where there is either an interlocutor of the Court to that effect or a consent of parties, and interlocutor of Lord Ordinary granting commission for the examination of certain witnesses abroad recalled, in respect it did not recognise the existing practice adopted in jury trials.

In this action, which is one of the enumerated causes that falls under the 47th section of the Act of 1850, Lord Kinloch pronounced the following interlocutor. He had previously pronounced an interlocutor appointing the proof to be taken before himself:—"The Lord Ordinary, having heard parties' procurators, in respect it is stated by the defenders, Messrs M'Lean & Hope, that there are a number of witnesses in Constantinople, and on the coast of the Mediterranean Sea, whose evidence is of great importance in the case, and that there is danger of its being lost owing to their residence abroad, and their not being likely to come within the jurisdiction of the Court, grants commission to the British Consul-General, or to the Vice-Consul at Constantinople, to examine such witnesses as shall be adduced by the defenders on the subject-matter of the closed record in the conjoined actions, with the exception of the conclusion for damages in the action at the instance of George Fleming, which has been abandoned, due notice being given to the pursuers, to the satisfaction of the said commissioner, of the time and place fixed for the witnesses' examination before such examination proceeds, and appoints the depositions of the witnesses to be reported by the third sederunt day in May next."

The pursuer reclaimed, and asked the Court to remit to the Lord Ordinary to appoint a day for taking the proof under the Evidence (Scotland) Act 1866.

At the discussion the defender departed from the interlocutor of the Lord Ordinary and made a motion that the whole of the evidence in the cause should be allowed to be taken on commission.

To-day the Court unanimously recalled the interlocutor, holding that under the Evidence Act it was only competent to grant commission to take the whole evidence in a cause when there was either an interlocutor of the Court to that effect or a consent by parties, but the Court could not entertain this motion under the reclaiming note. As to the power to grant commission to examine witnesses abroad, that could only be done under reference to the existing practice of making affidavit and adjusting interrogatories, and that practice was entirely disregarded by the Lord Ordinary.

The interlocutor, therefore, was recalled as incompetent, and expenses were granted to the reclaimers.

Counsel for Reclaimers—Mr Clark and Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Respondent—Mr Young and Mr Mackenzie. Agents—White-Millar & Robson, S.S.C.

Tuesday, Feb. 26.

Lord Glencorse, late Lord Justice-Clerk, this day presented her Majesty's letter appointing him Lord Justice-General of Scotland and Lord President of the Court of Session, and having taken the customary oaths, his Lordship took his seat on the bench as Lord President.

Wednesday, Feb. 27.

FIRST DIVISION.

ANDERSON AND WATT *v.* SCOTTISH N.-E. RAILWAY CO. (*ante*, vol. i. p. 116).

Diligence—Arrestment—Validity. An arrestment by a railway company of stock and dividends belonging to an alleged debtor reduced as

inhabile, in respect it was used in their own hands.

Cedent and Assignee—Title to Insist. Circumstances in which held that an assignee who had been sisted as pursuer of an action had no title to insist in certain of its conclusions, and action *quoad* them dismissed.

This was an action of reduction of an arrestment of railway stock, on the ground, *inter alia*, that it was used by the railway company in their own hands. There were also conclusions for declarator that the defenders were bound to make payment to the pursuer of the bonuses, dividends, or profits which have accrued and arisen and been declared, and which may accrue, arise, and be declared on the said stock, and for an accounting in regard to the said bonuses, dividends, and profits, and payment of the amount ascertained to be due.

The defences stated were (1) that the defenders had at the date of the arrestment a lien over the share and dividends in security of sums due to them by the pursuer for carriages, and were entitled to retain the same till payment thereof; and (2) that the arrestment was effectual.

The action was originally raised by John Anderson, on 2d June 1863. The record was closed on 4th December 1863. Alexander Watt was sisted as a party to the action on 15th January 1864, it having been stated in a minute that Anderson had sold his stock to Watt. Watt's transfer was never recorded in the books of the company.

On 16th November 1864, the Court, recalling an interlocutor of the Lord Ordinary (Jerviswoode), sustained the first plea in law for the defenders, in so far as the same is urged as a defence against the petitory conclusions, but repelled it in so far as urged as a title to exclude the declaratory and reductive conclusions, but without prejudice to the defenders' right to plead retention in another action and in competent form.

On 20th January 1866, the Court, recalling an interlocutor of the Lord Ordinary, found that Watt had a title to insist in the action (*ante*, vol. i., p. 116).

The case having returned to the Outer House, parties were heard, and the Lord Ordinary on 6th June 1866, pronounced the following interlocutor:—

"*Edinburgh, 6th June* 1866.—The Lord Ordinary having heard counsel and made avizandum, and of new considered the record and whole process, decerns in favour of Alexander Watt, as pursuer, in terms of the reductive conclusions of the summons, and finds, declares, and decerns under the declaratory conclusions thereof, but only to the effect that the defenders are bound to make payment to the pursuer, Alexander Watt, from and after the 30th November 1863, and so long as he continues in right of the stock mentioned in the said conclusions; and with reference to the petitory conclusions of the summons, appoints the defenders to lodge within ten days from the date hereof a state of any bonus, dividends, or profits which have accrued, arisen, or been declared upon the stock referred to, from and after the 30th November 1863, reserving meanwhile the question of expenses. CHARLES BAILLIE."

"*Note.*—In this anxiously-contested case the Lord Ordinary has been again called on to pronounce judgment in regard to the right of the defenders to maintain to its full extent the plea of retention as set forth on their behalf, in defence against the petitory conclusions of the summons, as the same is now insisted in at the instance of Alexander Watt, who has been sisted as pursuer.

"It was argued, on the defenders' behalf, that under various authorities, but more especially with relation to the judgment of the Court in the case of Hotchkis *v.* the Royal Bank, as decided in the House of Lords, 28th November 1797, 3 Paton's Appeals, p. 618, that the plea of retention of the share itself is competent to the defenders. But as the Lord Ordinary reads the report of the case, it differs from this in respect to particulars which must have been deemed material, and most important in the consideration of it. In that case, not only was there no statutory enactment, the terms of which could interfere with the operation of the common law, but the latter was supported in relation to its application to the particular case, by the provision in the bye-laws framed under the powers of the charter of the bank, by which the directors were enabled, if they thought fit, to stop a transfer of stock until the proprietor should find security for what he owed to the bank.

"Here, as the Lord Ordinary reads the provisions of the Companies' Clauses Act which bears upon this matter, the stock of the company is transferable by the holder to a purchaser at all times, with the exception only of the periods specially provided by the statute, during which it is lawful for the directors to close the register of transfers. C. B."

The defenders reclaimed, and prayed the Court "to recal and alter the said interlocutor, except in so far as it decerns in terms of the reductive and of the first declaratory conclusions of the libel, and to repel the pursuer's fourth plea in law, and sustain the defences founded on the plea of retention as regards the remaining declaratory and the petitory conclusions of the libel, in so far as the same have not been sustained by your Lordships' interlocutor of 16th November 1864, and to assoilzie the defenders, with expenses."

CLARK and BIRNIE were heard for the defenders.

THOMS for the pursuer Watt.

At advising,

The LORD PRESIDENT—The only difficulty that has arisen in this case is caused by the appearance of Watt, the purchaser of the stock belonging to Anderson the original pursuer. He came into the process by a minute in which he stated that Anderson had sold his stock to him, and moved the Lord Ordinary to sist him "as a party in the action as in right of the said stock." Now, there is no doubt that Mr Watt as transferee had not obtained himself registered, nor had he got the secretary of the company to receive and acknowledge the transfer as valid and effectual so as to give him the rights of a transferee. But he had a substantial interest to appear in the action, and therefore he was sisted as a party on 15th January 1864. It does not, however, follow that because a party is sisted as an assignee he has as good a right to follow out every conclusion of his cedent's summons as the cedent himself, and accordingly it is not disputed that there are some conclusions within this summons which Watt could not follow out. But the Court, on 16th November 1864, pronounced an interlocutor in which they, in the first place, "sustain the first plea in law for the defenders, in so far as the same is urged as a defence against the petitory conclusions of the action for payment to the pursuer of any bonus dividend or profits accruing on the stock of the railway company." That put an end to the petitory conclusions of the action, for it necessarily leads to an absolvitor or a dismissal of the action. In the second place, the Court

"repel the said plea, in so far as urged as a title to exclude the declaratory and reductive conclusions of this action;" and so Mr Watt was enabled to go on after that for a judgment reducing the arrestment. There is a reservation of the "defenders' right to plead retention in another action." Whatever action that was intended to apply to does not affect the question. We are all agreed that the first part of the interlocutor reclaimed against is well founded. His Lordship thereby reduces the arrestment, and so decides that the diligence was inhabile. But then he goes on to find, declare, and decern, under the declaratory conclusions, that the defenders are bound to make payment to Watt of the bonuses, dividends, and profits arising on the stock, so long as he continues in right thereof. He does so, however, to this effect only, that the defenders are to be bound to make payment to him only from and after 30th November 1863—that is the date of the transference. Now, I think his Lordship must have forgotten that the petitory conclusions were in November 1864 finally disposed of. With regard to the declarator he has given, the great objection is that Mr Watt has not any active title to demand payment. No person can demand payment of dividends until he has become a shareholder, and no person can be a shareholder till he appears in the books of the company. But this gentleman's transfer was returned because the company refused to recognise the right of Anderson to assign, and declined to register the transfer. Whether in so acting the company was right or wrong I don't know, because the point is not raised on this record, and indeed could not be raised; and nothing could be more inconvenient, if indeed it is not altogether incompetent, than to decide in this action whether Mr Watt is entitled to be registered, or whether the company is entitled to refuse to receive any purchaser. That question must form the subject of another action.

The other Judges concurred, Lord Deas remarking that in so far as the Lord President's observations seemed to imply that a shareholder cannot insist for payment of dividends until he is registered, he wished to express no opinion on the subject at present.

The arrestment was therefore reduced as inhabile, and *quoad ultra* the action was dismissed, reserving to the parties all pleas which they may urge in another action.

Agent for Pursuer—Wm. Officer, S.S.C.
Agent for Defenders—James Webster, S.S.C.

Thursday, Feb. 28.

Edward Strathearn Gordon, Esq., late Solicitor-General, this day presented to the Court her Majesty's commission in his favour as Lord Advocate of Scotland, and the customary oaths were administered to his Lordship.

Friday, March 1.

FIRST DIVISION.

LORD BLANTYRE AND OTHERS *v.* THE CLYDE TRUSTEES.

Foreshore—River—Injury to Banks—Reparation—Statutory Powers. An action at the instance of a riparian proprietor against statutory trustees of a public river for declarator that they were bound to raise the foreshore to the level which existed prior to the execution of certain operations performed by them under powers from Parliament, and for damages, dismissed as irrelevant.

This is an action at the instance of Lord and Lady Blantyre and the Master of Blantyre against the Clyde Trustees in reference to certain operations of the defenders on the river Clyde and its banks. The Lord Ordinary (Barcaple) dismissed it as irrelevant in so far as the first four conclusions were concerned, and ordered issues in regard to others. The nature of the conclusions, and the Lord Ordinary's mode of dealing with them, are fully explained in his Lordship's

"*Note.*—The conclusions of the summons are divided into eight heads. Those contained in the first four heads relate to operations upon the foreshore of the Clyde between the pursuers' lands and the main channel, and to injury to the pursuers' lands. This, which is much the largest portion of the case, is distinct from the remaining conclusions, which relate to the East and West Ferries of Erskine, and to beacons or perches erected by the Clyde Trustees in the river opposite the pursuers' property.

"The first-mentioned portion of the summons, contained within the first four heads, consists of declaratory conclusions for declaring the obligations alleged to lie upon the defenders in regard to the matters there referred to—conclusions *ad factum præstandum*, to have the defenders ordained to execute certain works—and lastly, conclusions for damages or compensation for injury done to the pursuers' property by the operations of the Clyde Trustees.

"1. The first conclusion is for declarator that the defenders are bound to make up the foreshore to the level of the adjoining grounds belonging to the pursuers, or to such a level above high water mark of spring tides as will prevent the foreshore from being overflowed by the water of the river. The pursuers represent the peculiar condition of the foreshore, calling, as they allege, for this remedy, to have been caused by the statutory operations of the Clyde Trustees in deepening the main channel, and erecting training walls along each side of it. The pursuers state (Condescendence VI.) in regard to these training walls, that 'it was part of the scheme and plan, in conformity with which they were erected, and partly the object of their erection, that the intervening ground or space between them and the river bank should be filled up by silting, and by the deposit of dredgings, so as to bring the river banks forward, and render the channel permanent.' The purpose of the conclusion now under consideration is to have this accomplished, so far as regards the foreshore opposite the pursuers' lands, by operations to be performed by and at the expense of the river trustees.

"The raising the level of the foreshore, and its gradual conversion to dry land, may possibly have been contemplated as a result of the operations authorised for the improvement of the navigation; but there is no provision in any of the statutes laying upon the trustees a substantive obligation to undertake operations for that purpose. It is not disputed that they were authorised to perform the operations which are said to have caused the mischief complained of. Indeed, they are the most important part of the works for the execution of which the river trust has been constituted. If these statutory operations have had a deleterious effect upon any portion of the bed of the river, within its original banks, and if there is no pro-