tion by the bankrupts to deliver the animals, and not to insist further in their defence against the the petition—that is, to allow the defender to vindicate his demand for the whole subjects sold, to the prejudice of the other creditors (*Wilson* v. *Drummond* 16 D., 275). It appeared to the Lord Ordinary that the question as to reducing the decree was attended with more difficulty. He did not think the decree itself was a document to which the Act 1696 could be held to apply. If the letter was struck at by the Act the carrying out of the transaction by the bankrupts not resisting the petition, and the defender obtaining decree by default, seemed to be a proceeding for the purpose of giving effect to an illegal preference which the common law will set aside.

The defender reclaimed.

SHAND and HALL for him.

CLARK and LAMOND in answer.

At Advising—

LORD JUSTICE-CLERK—In this case the pursuer seeks to have a letter reduced, and a decree under which the Sheriff-substitute decerned against the pursuers, in terms of the prayer of a petition. Now, the first question we have to decide is, Whether the transaction in question is of such a nature as to pass the property of the subjects sold to the bankrupts. The sale took place on the day of a public auction, some of the things were sold by auction, and some of them by private bargain. Possession of some of these articles was actually taken, and possession of some of them was taken by the fact that the bankrupts came into possession of the farm. So far as the sale was concerned, there was a stipulation that the parties were to forfeit their purchases unless they paid for them or gave bills for three months with approved cautioners for the price. Now, so far as the cattle were concerned, the bankrupts got possession without granting a bill or being asked for the price—possession of the cattle was taken on the day of the sale, and continued till the 5th of January without any demand on the part of the exposers. Mr Beveridge was made aware of the fact that possession had been taken of the cattle about Martinmas, but he must have known it from the first, for he was the person who would have had to provide food for them if they had not been delivered. The first demand for payment was made by Mr Beveridge in a letter dated 5th January 1865, in which he says, "This should have been settled ere now, and I hope you will do so on Tuesday first." This letter is conclusive evidence that the transaction of sale was complete. He seeks payment without any allegation about any unwarrantable delay having taken place. Now that being the case, proceedings are afterwards instituted on the ground that there had been a violation of the articles of sale. The bankrupts have entered on possession of the farm. They actually use the thrashing-mill, and the manure is there for use. They get all the possession that was possible. Mr Beveridge thus becomes an ordinary creditor for the price, and the bankrupt's ordinary debtor. Then Mr Beveridge asks restitution extra-judicially. Mr Laurie refused to give up the articles, as he knew himself to be insolvent at the time, and I think he acted quite properly in doing do. After this, proceedings were instituted in the Sheriff-court, and the letter which is sought to be reduced was written by the bankrupt. Now there is evidence to connect the granting of this letter with the decree, for the letter is produced in the process. Decree might perhaps have been obtained without the letter, but I cannot but regard this letter as an attempt to obtain an undue preference, and it is certain that it was used with this effect. The statement in the letter is, "we have withdrawn our defence, and you may have the animals by sending for them," and the animals were immediately sent for. Under the circumstances, I think that this decree was an attempt by one of the creditors to obtain on undue preference over the other creditors, and I think that it, as well as the letter, is reducible both at common law and under the statute 1696.

The other judges concurred.

Agents for Pursuer—White-Millar & Robson, S.S.C.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Friday, December 6.

FIRST DIVISION.

CAMPBELL, PETITIONER.

(*Ante*, vol. iv., p. 84.)

Proof—Commission—Haver—Search for Documents—Suspension and Interdict.

Donald Campbell, designed as some time of 20 Devonshire Terrace, Hyde Park, in the county of Middlesex, late lieutenant in Her Majesty's 57th Regiment, and residing in Port-Glasgow, presented this petition to the Court, craving an order upon the trustees and law agents of the late Marquis of Breadalbane to search for and exhibit before Mr J. M. Duncan, advocate, examiner appointed by the Court of Chancery, a number of documents relating to the first Earl of Breadalbane and his family; and, if the Court should think it necessary, a diligence for recovery of the documents, and a warrant to cite the late Earl's trustees and law agents, as havers, to produce the same. The case has been already before the Court on several occasions. In May last the petitioner presented a petition to the Court in virtue of the Act 22 Vict., c. 20, and in pursuance of an order by the Court of Chancery, in a suit at the petitioner's instance for perpetuating testimony, craving an order upon the late Earl's trustees and law agents to appear before the examiner for the purpose of being examined as witnesses for the petitioner in the said suit, and of producing certain documents mentioned in the petition. The Court pronounced an interlocutor appointing the parties named to appear for examination as witnesses, and *quoad ultra* superseded consideration of the petition. In October last Lord Jerviswoode, one of the trustees, appeared for examination, and stated that he had none of the documents called for; and that the trustees would not search for or exhibit the documents called for without judicial authority. Mr Syme, one of the agents of the late Earl's trustees, stated that he had not searched for the documents, not being authorised to do so by the trustees, or ordered by the Court. Mr Cosmo Innes, one of the principal Clerks of Session, was also examined, and stated that he had been in the charter-room in Taymouth Castle, and that from the documents he saw there he considered it very probable that an account of the descendants of the first Earl down to the eighteenth century might be made out. This petition was then presented, and was partly heard on 27th ult., and continued

till 5th December. Along with this petition there was heard a note of suspension and interdict, which had been presented by the petitioner against J. A. G. Campbell of Glenfalloch, on Saturday, 30th November, craving interdict against the respondent entering or interfering in any way with the charter-room at Taymouth Castle, or with the titles and other documents therein contained relating to the Earldom or the family of Breadalbane, at least without the consent of the trustees of the late Earl. The note of suspension and interdict was presented to the Lord Ordinary in consequence of intimation having been sent by Glenfalloch's agents to the agents for the trustees of the late Marquis, that if the trustees did not consent along with Glenfalloch to go into the charter-room, and make an inventory of the documents therein, and that by Monday the 2d December, Glenfalloch would direct the charter-room to be opened on his own responsibility. When the suspension and interdict was presented to the Lord Ordinary, his Lordship, after hearing parties, and on the assurance of Glenfalloch's agents that nothing would be done in the matter complained of until the note and answers were disposed of, appointed answers to be lodged. Parties were afterwards heard before his Lordship, and he reported the note and answers to the Court, because of its bearing on the petition for recovery of documents.

Counsel were heard on the petition.

Solicitor-General (Millar), Moncreiff (Dean of Faculty), and Mair for petitioner.

Reid for John Campbell, elder brother of petitioner.

Clark and Adam for Glenfalloch.

Watson for trustees.

In accordance with a suggestion from the Bench, it was arranged that Glenfalloch should obtain access to the charter-room at sight of the trustees; and, in respect of that arrangement, the suspension and interdict was refused, and, on the motion of the petitioner Donald Campbell, the Court superseded, *hoc statu*, consideration of the other petition.

Agents for Petitioner—J. & W. C. Murray, W.S.

Agents for Glenfalloch—Adam, Kirk, & Robertson, W.S.

Agents for Trustees—Davidson & Syme, W.S.

Friday, December 6.

BRODIE, PETITIONER.

Entail—Provisions to Children—Aberdeen Act—Entail Amendment Act. Held that when an heir of entail in possession of an entailed estate has, in virtue of the Entail Amendment Act, charged the fee of the estate with children's provisions, constituted under the Aberdeen Act, the sum charged is no longer to be dealt with as a *provision*, in calculating the amount to which a succeeding heir may grant children's provisions, but only as a *debt*, the interest of which alone falls to be deducted in estimating the free rental of the estate.

This was a petition at the instance of James Campbell John Brodie, Esq. of Lethen, heir of entail in possession of the entailed estates of Lethen and others, in the counties of Nairn and Moray, for restriction of the provisions payable to the children of his predecessor in the estates, and for warrant to charge the estates therewith. On the death of Thomas Stewart Brodie (the petitioner's brother and predecessor), his widow and children became entitled to certain provisions out of the entailed estates, so far as authorised by statute. The petitioner, in stating the deductions to be made from the gross rental in bringing out the net rental upon which the amount of the provisions was proposed to be calculated, stated certain provisions to younger children which had been granted by his father when previously heir in possession of the estates, and which had been made a charge thereon, under the provisions of the Entail Amendment Acts, as a burden or encumbrance, the interest of which diminished to that extent the income of the heir in possession. The amount of these provisions so charged was £2300; and accordingly the sum of £92, being the interest at 4 per cent. on that sum, was stated as a deduction along with the other burdens which were stated against the rental. This course was adopted on the principle that the amount of these provisions had ceased to form a charge as such against the heirs of entail under the provisions of the Aberdeen Act, 5 Geo. IV., c. 87, and had, by the exercise of the powers as to charging the estates therewith, conferred by the Entail Amendment Act, been rendered simply heritable securities affecting the lands, and the sums obtained for which had been applied in the payment and discharge of the said children's provisions. After the petition was presented to the Court, the petitioner lodged a minute suggesting that these provisions ought to be treated as still subsisting provisions, and not as forming merely a burden on the estates. This view was founded on the 6th section of the Aberdeen Act, which provided that when provisions had been granted by former heirs in possession to the full extent allowed by the Act, it should not be in the power of any heir in possession to grant further provision to his child or children, except to the extent to which the power to grant provisions had not, having regard to the rental, been exhausted by the provisions already granted, or to the extent to which any part of them might have been previously paid or extinguished. The difference in result in the present case, according as the one or the other principle was adopted, would be considerable. According to the first principle, what would be deducted from the three years' free rental allowed to be granted for children's provisions was only £276, being three years' interest of the said sum of £2300; while, on the other principle, the whole sum of £2300 would be deducted from the three years' free rental, and only the balance remaining after that deduction would be held within the power of the petitioner's predecessor. Mr Kermack, to whom the Lord Ordinary remitted to report upon the petition, gave no opinion upon the question, but reported it to the Lord Ordinary (Mure), who reported it to the Court.

Clark and Rutherfurd for petitioner.

G. Dundas and Spens for younger children.

Lord President—This petition, at the instance of James Campbell John Brodie, is presented to us under the 7th section of the Aberdeen Act, for the purpose of settling the extent to which provisions made by his immediate predecessor are to be set against the rents of the estate. But a question of considerable importance is raised, not depending on the details of the case, and in order to decide the question it is necessary to attend precisely to certain Acts.

The father of the petitioner was at one time heir