Friday, January 24.

AIKMAN *v.* AIKMAN'S TRUSTEES.

Reference to Oath—Consignation. Circumstances in which a reference to oath after final judgment *sustained*, only on condition of consignation by the party referring, within eight days, of the amount of expenses in which he had been found liable.

This was an action at the instance of William Aikman, flesher in Lanark, against the trustees of his father, the late John Aikman, some time inspector of poor at Lanark. The pursuer's claims related chiefly to arrears of wages, which he alleged were due to him for assisting his father in his business as flesher and grazier. The action also contained a claim for damages on account of the defenders having failed to keep a certain drain in proper repair. The action was raised in November 1865. After various procedure, the defenders, on 20th December last, obtained decree of absolvitor from the whole conclusions of the action, and were found entitled to expenses. Decree was pronounced for the taxed amount of expenses on 11th curt. The pursuer now proposed to lodge a minute referring his whole claims to the oath of the defenders. The case appeared in the single bills.

JOHN MARSHALL, for defenders, submitted that the motion ought only to be granted on consignation by the pursuer of the expenses in which he had been found liable, on the ground that the motion of the pursuer was merely to cause delay. He cited *Conacher*, 1 Mar. 1859, 21 D. 597; and *Sayer's Assignee*, 10th June 1841, 3 D. 1005.

PATTISON, for pursuer, in reply, cited *Wallace*, 7th Dec. 1839, 2 D. 204; and *Nisbet*, 19th Nov. 1840, 3 D. 332.

LORD PRESIDENT—I have seldom seen a party less entitled to favourable consideration from the Court than this pursuer. This is not the first time he has been before us, and now he comes with this proposal to refer the matter to the oath of the defender in circumstances that satisfy me that it is entirely for the purpose of delay. It is out of the question that he can have any hope of establishing his case by the oath of these trustees. The question is one for the discretion of the Court. There may be some weight in the point which was suggested, that the mode of proof introduced and sanctioned by the Act 1679 is somewhat different from a general reference to oath, and in a certain sense the pursuer may be held entitled to make this reference, but I have no doubt that it is within the discretion of the Court to allow a reference in this case, only on condition of payment or consignation of the expenses for which the defenders have obtained a decree, dated the 11th of this month. We shall make it a condition of sustaining this reference that these expenses are consigned within eight days.

LORD CURRIEHILL—I think it is clearly established that the allowing a reference to oath after a final judgment, and the terms on which it shall be allowed, are matters entirely within the discretion of the Court. And that discretion will be exercised with regard not merely to the nature of the case, but more particularly with regard to the conduct of the parties. Looking to the interlocutors which have been pronounced in this case, and which we have now before us, I entirely concur with your Lordship.

LORD DEAS—I have no doubt, on the one hand, that in general a party has a right to refer to oath even after a final judgment, and, on the other hand, that the Court may annex such conditions as they think fit. And there is no stronger case for imposing conditions than when it is apparent that a party has been causing delay in an action. The reference may be reasonably supposed to be for delay too. If any unfair use were attempted to be made of it, the Court might refuse it altogether.

LORD ARDMILLAN—It is very well settled that the right of reference to oath is not an absolute right. The Court has, and has exercised, the discretionary power of refusing to allow it when plainly it is sought for the purpose of delay. But there is a remedy within that, and that is, that the reference shall only be allowed on condition of consignation.

Agent for Pursuer—William Mackersy, W.S.

Agents for Defenders — Mackenzie, Innes, & Logan, W.S.

Friday, January 24.

NAPIER *v.* ORR AND OTHERS.

Heritable and Moveable—Collation—Heir—Next of Kin. Circumstances in which *held*, by the whole Court, that the effect of collation by an heir was not to change the character of the property collated, but merely to give the other children a right to share in the heritage as such. Opinions, that in some circumstances the character of a subject collated may be changed from heritable to moveable.

Heir of Line—Heir of Conquest—Collation. Held that the right acquired in consequence of collation by the heir, by one of the other children, goes to the heir of line, and not to the heir of conquest. Opinions, by the majority of the Court, that the ground of this rule is, that such a right is not capable of completion by sasine in the person of the creditor, and therefore cannot descend to the heir of conquest in competition with the heir of line. Opinions, by the minority, that such a right is vested in the executor by a proper succession to the ancestor.

"In 1844 the late Mrs Janet Knox or Napier, the maternal grandmother of the several claimants in this multiplepoinding, by irrevocable disposition, conveyed the lands of Letham and others in favour of her eldest son, John Knox Napier, the pursuer of the multiplepoinding.

"By this conveyance, and the infeftment which followed upon it in the person of the disponee, there were constituted the following real burdens, in favour of the disponee's daughter Mary Orr (wife of Robert Orr), the mother of the claimants:—a sum of £1000, payable, the one-half at the first term of Whitsunday or Martinmas after the disponer's death, and the other half at the first term of Whitsunday or Martinmas occurring ten years thereafter; as also a sum of £300, payable at the first term of Whitsunday or Martinmas occurring twelve months after the disponer's death.

"The disponer, Mrs Janet Knox or Napier, survived till November 1861, by which time not only

her daughter Mary Orr, the original creditor in these provisions, was dead, but also her granddaughter Mary Orr or Burns, upon whose death in 1860 the succession opened, out of which the present questions have arisen. The original creditor, Mary Orr, married Robert Orr, designed of Blantyre Works; and it has been finally decided that, by her marriage contract, she effectually conveyed to her husband these heritable debts. Mary Orr died in 1848. Her husband survived till 1857. On his death his succession, heritable and moveable, opened to his children, four in number, whose names and order of birth were as follows:—Robert (who is mentioned in the pleadings as Robert Orr junior); Mary (the wife of William Burns), whose succession is now in question; James; and Margaret Jane.

"After the death of the disponer Mrs Knox, in 1861, when the first instalment of the heritable debt of £1000 became payable, two actions were raised—an action of reduction, declarator, and payment, at the instance of Robert Orr junior, and an action of multiplepoinding, at the instance of the debtor Mr Knox Napier. These actions having been conjoined, a record was made up in the conjoined actions; consisting of claims by the surviving children of Mr and Mrs Orr, and by Mr Burns, the widower of the daughter Mary, deceased.

"By interlocutor in the conjoined processes, dated the 18th November 1864, the First Division of the Court recalled a judgment pronounced by the Lord Ordinary on the 16th February 1864, and *inter alia*, found—'*Primo*, That in virtue of the provision contained in the disposition of the lands of Letham and others, granted by Mrs Janet Knox or Napier, dated 21st August 1844, and of the infeftment following thereon, there was legally vested in the granter's daughter, Mrs Mary Napier or Orr, spouse of Robert Orr, Blantyre Works, right to the sum which forms the fund *in medio* in this process of multiplepoinding; and that that right, having been created a real burden upon the said lands, was a heritable right; *Secundo*, That the said right was carried to and vested in the said Robert Orr in virtue of the general conveyance granted in his favour by the said Mrs Mary Napier or Orr, contained in their antenuptial contract of marriage, dated the 29th day of March 1837 years; *Tertio*, That on the death of the said Robert Orr, the said right descended to his eldest son, Robert Orr junior, as his heir-at-law: *Quarto*, That the said Robert Orr junior collated the heritage of his father with the next of kin of the latter, viz., the claimant James Orr, and Margaret Jane Orr, and the now deceased Mary Orr or Burns; and that the fund *in medio* now belongs, in equal shares, to the said Robert Orr junior, James Orr, Margaret Jane Orr, and the party or parties in right of the said deceased Mary Orr or Burns.' Their Lordships, by the same interlocutor, dismissed the action of declarator and reduction, and remitted to the Lord Ordinary to proceed with the cause in conformity with the said interlocutor.

"This interlocutor virtually disposed of the whole matters at issue in the conjoined actions, with the exception of a single remaining question in the multiplepoinding, in regard to the one-fourth share of the fund *in medio*, which, by the terms of the interlocutor, was found to belong to 'the party or parties in right of the said deceased Mary Orr or Burns.'

"When the cause came to depend before the Lord Ordinary under the foregoing remit, three different parties claimed to be preferred to the one-fourth share of the fund in question as in right of the late Mary Orr or Burns. These parties were:—(1) The claimant Robert Orr, who, on the footing that the fund was heritable on the one hand, and conquest *quoad* the succession of his sister on the other, claimed right thereto as the immediate elder brother and heir of conquest of the deceased; (2) the claimant James Orr, who asserted his right to the fund as the only younger brother and heir of line of the deceased; and (3) the claimant William Struthers Burns, who claimed as the husband of the deceased.

"After hearing parties in support of the pleas severally maintained by them, the Lord Ordinary (Ormidale), upon the 4th March 1865, pronounced an interlocutor, by which he "Finds that the fund *in medio* was, by interlocutor of the First Division of the Court of date 18th November 1864, found to belong in equal shares to the claimants Robert Orr junior, James Orr, Margaret Jane Orr, and the party or parties in right of the deceased Mary Orr or Burns: Finds that the only disputed question remaining to be disposed of is, who is the party or parties in right of the deceased Mary Orr or Burns, and entitled to the share of the fund *in medio* which pertained to her: Finds that the claimant James Orr is the party in right of the said Mary Orr or Burns, and entitled to the share of the fund *in medio* which pertained to her.'"

His Lordship added this note:—"The circumstances in which the only disputed question now determined by the preceding interlocutor has arisen are set out and explained in a former judgment in the case (3 M'Pherson, p. 57). In consequence of that former judgment, there neither was nor could have been any dispute as to who was entitled to three-fourths of the fund *in medio*. Accordingly, the discussion before the Lord Ordinary at the recent debate was confined entirely to the question who was entitled to the remaining fourth, as in right of Mrs Mary Orr or Burns; and, in order to cure some defects in the record in regard to this question, the statements contained in the joint minute, No. 43 of process, were of consent, and on the motion of all the parties, added to and made part of the record. The share of the fund *in medio* which pertained to Mrs Mary Orr or Burns was claimed—(1) By Robert Orr, on the assumption that it was real estate, as the heir of conquest of his sister Mrs Mary Orr or Burns. (2) By James Orr, on the assumption also of its being real estate, as the heir in heritage or heir-at-law of his sister Mrs Mary Orr or Burns. (3) By William Struthers Burns, the surviving husband of Mrs Mary Orr or Burns, on the assumption of its being moveable or personal estate, and of its having been, as such, transferred to him *jure mariti*. This last claimant has also put forward an alternative claim in the record as amended, which, however, he did not attempt to support, on the assumption of the fund being heritable in respect of the law of Australia, where he says his wife died domiciled. And (4) all the parties claimed alternatively an equal share of the disputed fund, on the assumption of its being moveable or personal estate. The leading question is, Whether the fund *in medio* is to be considered heritable or moveable as it existed in the person of Mrs Mary Orr or Burns? That it was in its own nature heritable has been already found by the Court. But then it was maintained by the claimant William Struthers Burns that, in consequence of the collation of Robert Orr, through which his wife

Mrs Mary Orr or Burns came to have right to it, that it became moveable, and so was transferred *jure mariti* to him. A question is thus raised which, so far as the Lord Ordinary is aware, has not hitherto been *in terminis* decided. He has been unable, however, to discover any sound principle for holding that the mere act of collation changes, in regard to succession, the heritable estate to moveable any more than the moveable to heritable. Here it is assumed, and it neither was nor could have been disputed, that the subject in dispute was heritable in Robert Orr. It was just because it was so that it came to him as heir of his father, Robert Orr senior, and that he collated it with the next of kin, his younger brother James, and his two sisters, Margaret and Mrs Burns. But the effect of collation is not, in the Lord Ordinary's opinion, to alter the nature either of the heritage or the executry. In the language of Mr Erskine (3, 9, 3), collation is merely a renunciation by the heir of his exclusive claim to the heritage; and the result of it is to bring the whole succession, heritable and moveable, into one mass, to be shared equally by the heir and the next of kin. In other words, the result of the collation is to place the heir and the next of kin in the same place and right as regards both heritage and executry, but without altering the nature of the subjects of the succession. Although, as already mentioned, the Lord Ordinary is not aware of any direct authority on this point, the views now expressed by him appear to have been those of the majority of the Court in *Dick* v. *Gillies*, 4th July 1828, 6 Sh. 1065, where it was incidentally and collaterally considered and dealt with. And, in the more recent case of *Kennedy or Hannay* v. *Kennedy and Others*, 15th November 1843, 6 D. 40, it appears from the report to have been assumed by all the learned judges that proper collation—distinguishing it from a special transaction or contract such as there occurred—does not change the nature of the subjects, and thereby affect the succession of the parties. Nor does the Lord Ordinary think that the case of *Fisher's Trustees* v. *Fisher and Others*, 5th December 1850, 13 D. 245, which was cited and relied on before him to show that, in consequence of collation, the subject in question must now be treated as executry, has any such effect. All the Court decided in that case was, that the heir who had collated could not, on the call merely of one of the next of kin, be compelled to convey over the heritage *pro indiviso* to all the parties having any interest in it, but that he might, especially with the concurrence of the others who were next of kin, pay its value into the common fund. The principle upon which this result was arrived at seems to have been that no party is bound to continue to hold *in forma specifica* property to which he and others have a joint or *pro indiviso* right, but that he is entitled to insist on its being sold and its price realised, or its value otherwise ascertained, and divided amongst all interested. But that case cannot, in the Lord Ordinary's view of it, be considered an authority to the effect that the mere act of collation of a heritable subject converts it at once, and before its price has been realised, or its value ascertained and paid into the common fund, into moveable estate as regards the succession of the parties who have right to it. The Lord Ordinary must therefore hold that the subject in dispute cannot be considered as anything but a heritable subject which belonged to Mrs Mary Orr or Burns; and if so, it follows that it could not have been transferred *jure mariti* to her husband, the claimant William Struthers Burns. Neither can it, on the assumption of its having been heritable estate in Scotland pertaining to his wife, now belong to him *ab intestato* by the law of Australia, or any other foreign law. It was maintained, however, for the claimant Robert Orr, that the fund, although heritable estate, was, through the act of collation, conquest in Mrs Mary Orr or Burns, and so must now be held to belong to him as her heir of conquest. This view was maintained on the assumption that collation is of the nature of a transaction, and accordingly must be held to have been acquired by singular title, and not by succession. The Lord Ordinary considers this to be an erroneous view of collation, which he holds cannot, on any sound principle, be looked upon as a transaction at all, but rather the opposite, as is well illustrated by the case of *Kennedy or Hannay* v. *Kennedy's Trustees*, already noticed. It is unnecessary, therefore, to inquire whether a real burden, such as that in dispute in the present instance, can in itself, and having regard to its peculiar nature, passing as it does by simple assignation, and its transmission not requiring sasine to perfect it, belong or does not belong to the class of subjects which are conquest as distinguished from proper heritage. The result is that, in the opinion of the Lord Ordinary, the claimant James Orr is entitled, as the heir of line of Mrs Mary Orr or Burns, to that share of the fund *in medio* which belonged to her, and he has been preferred accordingly."

Reclaiming notes were presented against this interlocutor.

Nevay for Robert Orr.

J. C. Smith for W. S. Burns.

D.-F. Moncreiff and Watson, for James Orr, in reply.

Cases were ordered, and sent to the judges of the Second Division, and to the permanent Lords Ordinary, in order to obtain the written opinion of the consulted judges on the questions—1st, Whether the subject of the present competition, being the one-fourth which belonged to the deceased Mrs Burns of the fund *in medio* in the multiplepoinding, was heritable or moveable in the person of Mrs Burns *quoad* the succession to her? 2d, If heritable, whether it descended to her heir of line or to her heir in conquest?

The Lord Justice-Clerk, Lords Cowan, Neaves, and Jerviswoode returned an opinion in which, after a statement of the facts, they held that the right in question remained heritable in the person of Mary Orr or Burns, "after collation was intimated, as much as it had been in the father's person. The legal effect of the act of collation was simply to confer on each of the next of kin a *pro indiviso* equal share of that heritable right which the eldest son might have taken exclusively to himself. Collation could not alter the legal character of the right collated in questions of succession. And as this was her position at the date of her marriage to Mr Burns, his claim *jure mariti* cannot be sustained. The subject fell to be treated in any question regarding her succession, on her death in November 1860, as heritable in her person; and the party in her right, under the interlocutor of 18th November 1864, is therefore her heir. The right in Mary Orr or Burns, although heritable in succession, was not feudal in its nature, not being capable of completion by sasine in her person, and, therefore, not within the class of rights to which her heir of conquest can lay claim. We do not concur in the view taken by the Lord Ordinary, as explained in the note to his

interlocutor of 4th March 1865, preferring the heir of line. It is on the ground of the subject in competition not being in its nature conquest, that we hold the heir of line entitled to be preferred."

Lord Benholme returned this opinion (after the narrative quoted above)—1. The first question is, "Whether the subject of the present competition, being one-fourth which belonged to the deceased Mrs Burns of the fund *in medio* in the multiplepoinding, was heritable or moveable in the person of Mrs Burns, *quoad* the succession to her." In considering this question, it is to be remembered—that on the death of Robert Orr senior in 1857, his eldest son took his share of his father's executry, and thus collated his heritage at a time when his sister Mary was unmarried; that Mary was married (according to her husband's statement) in the latter part of 1859; that she died in 1860, within a year of her marriage, in minority, without issue and intestate; that the heritable debts, to a share of which she had a claim by reason of her brother's collation, were not, to any extent, payable for some time after her death; and that at that time it was utterly uncertain when they would become payable. What, then, was the nature of Mrs Burns' right in reference to these debts? It was evidently founded exclusively upon her brother's collation, and upon no right of succession in her own person, either to her father or mother. It was a claim or *jus actionis* against him to make up titles to his father's heritage, and to communicate that heritage to her and to the other executors of her father. It was not a right to demand from him a sum of money. No such right ever vested in her during her life. It was merely a right to a conveyance of a share in an heritable debt, payable at a future time. She had a right not merely to a share of the heritable debt, but to such a conveyance as would make available to her the real subject, by which its value was secured. This is a case, then, in which the rights of the parties, arising out of collation, remained in *nudis finibus obligationis*. Nothing had taken place to alter, or to carry out, to transact, or to convert that obligation.

In these circumstances there is a general concurrence of all our authorities that the obligation of the heir is to convey the heritage, and not merely to account for its value. The passages quoted or referred to in the pleadings from Stair, Erskine, Bankton, Balfour, and Bell, agree in establishing this point. And the opinions of the Court in the cases quoted speak the same language. (*Murray* v. *Murray*, 23d July 1678, M. 2374; *Chancellor* v. *Chancellor*, 2d Dec. 1742, M. 2379.)

The claimant Burns disputes this doctrine, upon the ground that it implies a power on the part of the heir, by collating, of altering the succession of the executor; inasmuch as he thereby forces the executor to receive a share of heritage instead of a share of moveables. But it is to be remarked that in the matter of collation the heir merely follows out his own rights. He is an executor by blood, as much as the other nearest of kin. He takes what is his own, by right of succession; the condition being that his exclusive title to the heritage must be employed as the means of communicating the heritage to his co-executors. The opinion of the judges in the case of *Hannay* v. *Kennedy and Others*, 15th Nov. 1843, 6 D. 40, ascertains in the clearest manner the effect of proper collation, which is spoken of as the act of the heir alone, which the executor cannot resist, and as a contingence which, *per se*, and in the first instance, necessarily affects the succession of the executor. But many cases may occur, and some have occurred, in which the original obligation of the heir collating has been converted or transacted, so as to render moveable what, *in nudis finibus*, would have been heritable.

In one noted case (*Fisher's Trustees* v. *Fisher*, Dec. 5, 1850, 13 D. 245), the Court intervened in settling a dispute between the majority of the executors and the heir, on the one hand, and a dissenting executor on the other, by determining that in such cases of conflicting interests, equity required that the original quality of the heir's obligation should be modified. Special circumstances, and the conflicting desires of the parties interested in that case, required that, in discharging the obligation, its original quality should be superseded by a fair equivalent. The present case stands in strong contrast with the case of *Fisher*. In that case, there had been a long course of management and of dealings with the subject of the collation, by which the interests of the parties were affected, and the wishes of the majority of them put in conflict with one recusant party. In the present case, the heritable debts in question having not been payable, were not, and could not be dealt with; and the only other portion of the heritage (being a house said to be worth £1000) has been dealt with as belonging to the executors *pro indiviso*, by sharing its rents amongst them, since the succession of their father opened. The doctrine of conversion in other branches of our practice has been appealed to by the claimant Burns; but with signal want of success.

Cases of trusts frequently occur in which the succession of beneficiaries as to the heritable subjects falling under the trust may be affected by the expressed or implied will of the truster. A direction to sell, or to divide, may have the effect of rendering moveable the interests of the beneficiaries in the heritable trust-estate. The conversion takes place from the will of the truster, even although the trust-estate remains unsold at the death of the beneficiary; the principle taking effect, that what a truster directs to be done, must be held to have been done, in reference to the interests and the succession of the beneficiaries.

The case of *Fullarton* v. *Scott* (15th Nov. 1757, M. 5491), has been referred to by the claimant Burns as resembling the present in essentials, "as closely as two cases can resemble each other." I must say I cannot see the resemblance. The case is reported in the Folio Dictionary (iii., p. 267) under the following summary—"A moveable debt being due to a wife, if the husband and she concur to take an heritable security for it in the wife's name, this does not so far alter the nature of the debt as to impart an exclusion of the husband's *jus mariti*; or, after the wife's death, to transmit the debt to her heir in prejudice of her husband."

It is to be observed as to this case, that Agnes Scott, in whom the moveable debt (originally a proposed legacy by her father) vested, was married at the time of her father's death. The debt thus fell under the husband's *jus mariti*. And it was held that no heritable security subsequently superinduced upon the debt could deprive the husband of his right to it. The contrast between that case and the present—for contrast it appears to me, and not resemblance—consists in this, that in the present case Mary Burns was unmarried at the time of her father's death, and at the date of the collation by her brother; and that her right to the debt which

forms the fund *in medio* never was moveable, but heritable *ab initio*. It is not the case of an heritable security being superinduced upon a moveable debt, but belongs to a totally different category—viz., to that of heritable debts never transacted or converted.

The two cases of *White* (28th June 1860, 22 D. 1335), and *Scott* (25th June 1846, 8 D. 892), referred to by the claimant Burns, are illustrations of the rule that a fund or debt originally moveable cannot, by the mere act of the debtor, be rendered heritable, so as to alter the succession of the minor creditor. Upon the whole, I am clearly of opinion that the interest of the deceased Mary Burns in the fund *in medio* was of an heritable nature.

2. The second question upon which our opinion is asked is, Whether, the subject of the present competition being heritable, it descended to her heir of line, or to her heir of conquest? The ground of the Lord Ordinary's judgment upon this question, as explained in his note, opens a general view of the law of collation in which I cannot concur. His Lordship seems to hold in general that the heritage, or share of heritage, to which an executor acquires right by the collation of the heir is vested in the executor by a proper succession to the ancestor, and not by singular title from the heir. The application of this view to a part of the heritable succession of Robert Orr (not now in question—viz., the house mentioned in the pleadings) would be to give to the heir of line of Mary Burns, and not to her heir of conquest, all the interest in this house conferred upon her by collation.

But can it be said with any legal propriety that she succeeded to her father in regard to this subject? She had no title in her own person to any part of her father's heritage. The situations of the heir and of the executor in regard to succession are quite different. The heir *has a right* to take a share of the moveables; whilst the executor *has no right* to take the heritage, or any part of it, by succession. The heir may confirm; the executor cannot serve. The executor, in case of collation, takes interest in the heritage through the heir, and solely through his act of collation. The heir, even when collating, must take up the succession by service, for the very purpose of enabling him to carry out his option of collation. He does not repudiate the succession. He asserts his right to it. He acts upon that right, and follows his act of service and succession by a conveyance in favour of the executor. To whom does the executor succeed as to the heritage? To the father? Surely not; since the subject has passed out of the father's *hereditas jacens* by the service of the true heir. To her brother? This supposition is still more inadmissible. It is excluded by the maxim *nemo est heres viventis*. It is excluded by the very nature of the title by which the executor's right is constituted, which is a conveyance, and not a service. Nor does the case of *Kennedy* v. *Kennedy's Trustees*, to which the Lord Ordinary refers, appear to support his view. In that case it was, no doubt, held that proper collation does not not alter the nature of the subject, which remains heritable, unless by a transaction such as occurred in that case, conversion might be inferred. But although in proper collation the subject remains heritable, it does not follow that the nature of the executor's derivative title to it is of the same character as the primary title of the heir.

I have stated my dissent from the Lord Ordinary's view, not from its being necessary to support his judgment, but because it seems to bear upon a general point of the law of collation.

The Lord Ordinary's judgment may, I think, be supported upon another and a very clear ground—viz., that the subject of this competition is not one which falls under the law of conquest.

Mary Burns had right to a real burden which, though secured by infeftment in the person of the debtor, was incapable of infeftment in the person of the creditor. Such a class of rights pass by assignation; are taken up by general service; and in no case descend to the heir of conquest in competition with the heir of line. The law upon this point is authoritatively stated by Stair, Hope. Erskine and other modern authorities.

The question of heritage and conquest is discussed with great learning in the noted case of *Earl of Selkirk* v. *Duke of Hamilton*, 8th January 1740, reported by Lord Elchies (Heritage and Conquest, No. 3) very fully in his notes; in which it is stated that some high authorities consider teinds to be excepted from the law of conquest for this reason—that, because of their own nature, they require no infeftment.

If modern authority were necessary upon so clear a point it is to be found in the recent case of *Miller* v. *Brown*, 8th February 1820, Hume, p. 540.

I am of opinion, in reference to the two questions upon which our opinions are asked—1st, That the subject of the present competition was heritable, *quoad* the succession of the late Mrs Burns; 2d, that it descended to her heir of line.

Lord Kinloch returned this opinion—I. I am of opinion that, where the heir collates, the effect of the collation is not to change the character of the property collated from heritable to moveable. It is merely to give the other children a right to share in the heritage as such. The result of collation is simply to destroy the distinction between the heir and the other children, and to give to all an equal participation in the succession of the deceased, heritage and moveables; each in its respective legal character. I am therefore of opinion, in answer to the first query, that the subject of the present competition being the one-fourth which belonged to the deceased Mrs Burns of the fund *in medio* in the multiplepoinding, was heritable in the person of Mrs Burns, *quoad* the succession to her.

II. I am of opinion that the heritage, to which the other children obtain right by the collation of the heir, is of the proper legal character of succession in their person, and does not fall within the category of property flowing by a singular title. The right is not created by any deed of conveyance by the heir, however useful this may be for its completion; it is produced by the mere extinction of the difference between the heir and the other children, making all equally, and to the same effect, successors to the deceased parent. I consider the heritage obtained by the other children to be as much succession in their person as the moveables through their contribution of which this heritage has come to them. I am therefore of opinion, in answer to the second query, that the subject of the present competition descended to Mrs Burns' heir of line, and not to her heir of conquest.

Lord Ormidale concurred in the opinion of Lord Kinloch, and on the grounds stated by him, as well as in the note to the interlocutor under review.

Lord Barcaple returned this opinion—1. I am

of opinion that the subject of this competition, being the one-fourth which belonged to the late Mrs Burns of the fund *in medio* in the multiplepoinding, was heritable in the person of Mrs Burns, *quoad* the succession to her.

The entire fund, of which Mrs Burns had right to one-fourth, was, down to and after her death, unquestionably heritable *sua natura*, being the subject of a real burden. It constituted part of the heritable succession of the late Mr Orr, the father of Mrs Burns, and she aquired right to her fourth share of it by her elder brother, the heir-at-law, collating with her and the other younger children. Such was the position of the fund, and the nature of Mrs Burns' right to her share of it. The whole fund undoubtedly remained heritable *sua natura*, and Mrs Burns held a direct right to one-fourth of it in that state, although the formal title fell to be taken up by the heir-at-law, for the benefit of himself and the other next of kin with whom he had collated it. To that extent she held the benefit of the real burden, and she must have suffered the loss caused by a deficiency in the value of the subjects burdened if it had been necessary to have recourse to them in order to realise the fund. It does not appear to me that the fact that this right was obtained through collation, derogates from the rule of law that such a right is heritable as to the succession of the party holding it. Nor do I think that it can interfere with the heritable nature of the right, that in order to make it practically beneficial, the parties interested may require to realise it, and divide the proceeds. What they hold in the meantime, is, in my opinion, a direct right to the collated subject, though, in order to make it practically available, it may be necessary that it should be turned into money and divided. In the present case, there was no specialty in the mode in which collation was carried out which can be founded on as preventing the shares of the heritage acquired by the younger children from continuing to be heritage in their persons *quoad succession.*

2. I am of opinion that Mrs Burns' share descended to her heir of line.

I think this results from the peculiar nature of the right in the present case, which does not require or admit of seisine in the person of the creditor, or proprietor of the real right. It is therefore unnecessary to inquire whether the right of the next of kin to collated heritage is in any case conquest; or whether the substantial right is to be looked upon as taken by way of succession, though the formal title is originally in the heir, and can only be acquired from or through him. On this point I give no opinion.

Lord Mure concurred in the opinion of Lord Barcaple.

At advising—

Lord President—On the first question there is no difference of opinion, and I entirely concur in the answers returned by the consulted judges. I think the fund was undoubtedly heritable in the person of Mrs Burns, and went to her heir.

As to the other question, I am also of opinion, with all the consulted judges, that the subject descended to her heir of line. But, I think it right to say that my opinion as regards that matter rests on the grounds adopted by the majority of the consulted judges—*i.e.*, that it is not a feudal subject capable of infeftment, and therefore not one of those subjects which go to the heir of conquest. As to the other ground of judgment, that the right coming to the executor by collation is succession, I think that that is unsound in law, and I agree on that point with Lord Benholme, with whose opinion I entirely concur.

Lord Curriehill—I concur in the opinion of Lord Benholme.

Lord Deas—I concur. As regards collation, the only qualification I put on the opinions is, that I think it is a question of circumstances, and that what is collated is not necessarily heritable. Here I agree in the result of the opinions.

Lord Armillan—I agree with Lord Deas that the subject collated by the heir is not necessarily in every case heritable. It is possible that the proceedings may have gone on so far with a view to to sale and distribution as to change the character of the subject, and make it moveable by destination; but I agree with all the judges that here, looking to the state of progress which the collation had reached, there was no such change of character.

On the second question, I think that the subject goes to the heir of line, on the ground that it was not capable of being feudalised, and therefore not properly within the category of conquest, and therefore I agree with Lord Benholme.

Agent for Robert Orr—Wm. Milne, S.S.C.
Agents for W. S. Burns—Ferguson & Junner, W.S.
Agents for James Orr—Murray, Beith, & Murray, W.S.

Friday, January 24.

HANDYSIDE'S TRUSTEES *v.* SCOTT AND OTHERS.

Trust — Law-Agent — Trustee — Acquiescence. Circumstances in which the Court sustained charges for law agency by a trustee.

Handyside's Trustees brought an action of multiplepoinding, calling, among other parties interested in the fund *in medio*, William Scott, residing in Australia. On 24th May 1856 an interlocutor was pronounced in absence of Scott, approving of the fund *in medio*. Thereafter William Scott appeared, and lodged a note of objections to an accountant's report on the fund, but it was held that these objections were excluded by the interlocutor approving of the condescendence of the fund. He then brought an action to reduce that and another interlocutor. In this reduction he stated various objections, the principal of which were (1) that various sums of money had been paid to Mr Andrew Scott, one of the trustees, as law agent of the trust; and (2) that there had been a general mismanagement of the trust, causing loss to the beneficiaries.

The Lord Ordinary (Barcaple) sustained the first of these objections, holding that Mr Andrew Scott, being a trustee, was not entitled to charge for remuneration for business done by him as law agent of the trust, but only for outlay. In the note to his interlocutor the Lord Ordinary, referring to this objection, said—"The pursuer also objects to the sum of £177 or thereby, for business accounts incurred by the trusees to Mr A. Scott, as law-agent of the trust.