advantage of his condition, caused him to make his will in their favour, to the exclusion of the pursuers, his father, brothers, and sister. It was admitted for the defenders that the deceased was afflicted with "paralysis of the insane;" that he was at one time of unsound mind, but that he so far recovered, bodily and mentally, as to be perfectly able to conduct his business, and to be quite competent to execute such a disposition as that in reference to which the action was raised. It was denied on their behalf that the defenders used any means to circumvent the deceased; and evidence was led to show that he had formerly expressed an intention to make a will in favour of his wife and her daughter. The following are the issues which were sent to the jury:—

It being admitted that the deceased James Anderson, farmer and carrier at West Fountainhall, Golspie, died on the 10th January 1867, and that the pursuers are the next of kin and nearest heirs:

"1. Whether, at the date of the said general disposition and settlement, the said James Anderson was in a weak and facile state of mind, and easily imposed on.

"2. Whether the defenders, or any of them, taking advantage of the said James Anderson's weak and facile state of mind, did, by fraud or circumvention, obtain from him the said general disposition and settlement to his lesion."

Shand and Asher for pursuer.

D.-F. Moncreiff and Macdonald for defender.

The Jury after being absent for six hours, returned with a verdict of 7 to 5.

Lord Barcaple intimated that he could not accept such a verdict, and he had no alternative but to discharge the jury.

Agents for the Pursuer—Renton & Gray, S.S.C.

Agents for the Defenders—Horne, Horne, & Lyell, W.S.

Saturday, January 25.

SECOND DIVISION.

CAMERON *v.* MENZIES.

(*Ante* vol. iv., p. 235.)

New Trial—Contrary to Evidence—Lease—Submission—Decree-Arbitral—Corruption—Failure to Hear Parties. Verdict of the jury for the pursuer set aside upon the first issue as contrary to the evidence, but sustained upon the second.

In this action, which concluded for reduction of a certain decreet-arbitral pronounced by Alexander Duncan, farmer, Pusk, as oversman in a reference between the pursuer and defender, as incoming and outgoing tenants of the farm of Bullions, the following issues had been sent to the jury:—

"1. Whether the said oversman acted corruptly in pronouncing the said decreet-arbitral?

"2. Whether the said decreet-arbitral was wrongfully pronounced by the said Alexander Duncan without hearing the pursuer in the matters thereby depending?"

The jury, at the last July sittings, found for the pursuer on both issues. The defender moved for a new trial on the ground that the verdict was contrary to evidence.

Clark and Watson for defender.

Shand and Asher for pursuer.

The Court granted a rule, and, having heard counsel (the Lord Justice-Clerk dissenting), set aside the verdict upon the first issue; but (Lord Benholme dissenting) refused to set it aside as regards the second issue. The result is that the pursuer may, if he pleases, proceed to a new trial on the first issue, or may give up the first issue, and claim decree of reduction in virtue of the second. In the meantime, all questions of expenses were reserved.

Agents for Pursuer—Adamson & Gulland, W.S.

Agents for Defenders—Curror & Cowper, S.S.C.

Tuesday, January 28.

LAING, PETITIONER.

Recal of Inhibition—Diligence on the Dependence—Discharge of Diligence—Decree of Absolvitor—*Extract Decree—Extrajudicial Discharge—Register—Keeper—Expenses. Held,* approving a report of the Auditor to whom a remit had been made to report upon the practice as to the recal of diligence used on the dependence of an action, and as to the party by whom the expense of the discharge was borne, (1) That a party using diligence on the dependence of an action, must himself bear the expense of discharging it if he has been found wholly unsuccessful. (2) That an extract decree of *absolvitor* will not authorise the keeper to score the inhibition on the register, and that it is necessary for that purpose to produce to him either an extrajudicial discharge or a warrant of the Court.

In April 1860, the Parochial Board of Denny raised an action of count and reckoning against Mr James Laing, writer, Denny, claiming a sum of £2000, or such other sum as should be found due to them as the balance on his intromissions as Inspector of Poor of Denny from September 1845 to August 1858. On the dependence of this action inhibition was used, attaching a considerable amount of heritable property belonging to the defender; and arrestments on the dependence were also laid in the hands of many persons his debtors. After a remit to an accountant in the said action, the Lord Ordinary (Kinloch), on 23d January 1867, pronounced an interlocutor finding the defender entitled to *absolvitor* with expenses, and, after taxation of expenses, another interlocutor (20th March 1867) assoilzing and decerning for expenses. These judgments having become final, the defender Mr Laing applied to the Parochial Board for a discharge of the inhibition, which the Board refused to grant, except at his expense. He therefore presented this petition, praying the Court to recall the inhibition, to grant warrant to the keeper to mark the same as discharged in the register, and to find the Board liable in the expenses of the application. The Court, on 25th June last, before answer, remitted to the auditor of Court, as a man of business, to report at whose expense, according to the understanding and practice of the profession, the proceedings necessary to clear the record of an inhibition used by the pursuer, on the dependence of an action in which the defender has obtained decree of *absolvitor* with expenses, should be taken; and, in particular, to report (1) Whether an extract of the decree *absolvitor* presented to the keeper of the register of inhibitions will enable the defender to obtain the inhibition to be scored on the record; and, in that case

at whose expense the necessary procedure, including the extracting of the decree, should be taken? And (2) whether, in the event of the inhibition being discharged extrajudicially, the expense of the deed of discharge, and its presentation to the keeper of the register, and relative marking in the record, is chargeable against the pursuer or defender; or, if not wholly payable by one or the other, in what proportion it is chargeable?

The auditor made the following report:—

"First, The auditor cannot, either from his own experience, or from the inquiries he has made, report any general understanding or practice of the profession as to the party at whose expense "the proceedings necessary to clear the record of an inhibition used by the pursuer on the dependence of an action in which the defender has obtained decree of absolvitor with expenses, should be taken." The auditor understands the expenses referred to in this part of the remit to mean the expense of a voluntary and extrajudicial discharge. Cases of the kind supposed are so rare, that it is not surprising that, in regard to such cases, there should be difficulty in discovering anything entitled to the name of professional understanding and practice. The question which has been raised may, therefore, it is thought, be regarded as an open one. It is of considerable importance that, if possible, it should be disposed of in such a manner as to regulate future practice.

The parties have referred the auditor to various decisions as supporting (by analogy, if not directly) the views maintained by them respectively. The authorities relied on by the petitioner are the following cases:—

1. *Earl of Stair*, 21st Dec. 1822; Session cases (N.E.), 2, 100.
2. *Livingston*, 21st Feb. 1824; Session cases (N.E.), 2, 611.
3. *White* } 5th March 1824; Session cases
4. *Muckarsie* } (N.E.), 2, 640.
5. *Kyd*, 11th March 1826; Session cases (N.E.), 4, 557.
6. *Pedie*, 11th March 1830; Session cases, 8, 710.
7. *Sheriff*, 22d Jan. 1842; Session cases (2d series), 4, 453.

The respondent has referred to the following cases:—

1. *Gordon*, 12th May 1827; Session cases (N.E.), 5, 564.
2. *Rennie*, 5th March 1829; Session cases, 7, 545.

The reporter has carefully examined these cases, and he may shortly state the import of each as understood by him.

I.—Cases cited by Petitioner.

1. *Earl of Stair.*—Here an inhibition was recalled on caution, with expenses; the Court "considering the inhibition under all the circumstances of the case to have been unnecessary and vexatious."
2. *Livingston.*—In an action at the instance of *Learmonth & Company* v. *Livingston* (the petitioner's father), inhibition was used on the dependence. Livingston was assoilzied. An application for recal was presented by Livingston's son, but was opposed by Learmonth & Company, on the ground that they were entitled to insist in their claim without raising a new action. The Court recalled, with expenses.
3. *White.*—In this case an inhibition was recalled, and the respondent found liable in expenses. The rubric runs thus—"A defender who has been assoilzied from an action, is entitled, on the refusal of the opposite party, to apply to the Court for recall of an inhibition on the dependence."
4. *Muckarsie.*—In this case a pursuer, after a verdict in his favour, used inhibition against the defender; but the latter had intimated his intention to pay expenses. The pursuer refused to discharge the inhibition, although a sum was consigned to meet the expenses, and the Court recalled the inhibition "chiefly on the ground that the inhibition was nimious after the offer of payment."
5. *Kyd.*—In this case the respondent and his agent were both found liable in the expenses of the recall of inhibition, on the ground that the inhibition had "been used nimiously and oppressively by an agent, without a mandate from his client;" the Lord Justice-Clerk (Boyle) remarking that he "never saw a more unjustifiable use of diligence."
6. *Pedie.*—This was an application for recal of an inhibition, on the ground that it was "nimious and oppressive." The Court recalled on special grounds (although the Lord Ordinary's interlocutor dismissing the action, on the dependence of which the inhibition had been used, was subject to review), and found the petitioner entitled to expenses.
7. *Sheriff.*—In this case no answer had been returned by the respondent to the petitioner's extrajudicial application for discharge of the inhibition. In the petition to the Court, the petitioner pleaded both that the action had been dismissed, and also that the inhibition "was at first unwarrantably used without a mandate from the pursuer." Answers were lodged expressing the respondent's willingness that the inhibition should be recalled, but objecting to the petitioner's claim for expenses, on the ground that the petitioner had taken the most expensive mode of getting the inhibition removed, and that an extract of the decree dismissing the action was sufficient, or that the petitioner might have enrolled that action before the Lord Ordinary, "and obtained his Lordship's authority to get the inhibition scored in the register." The Court recalled the inhibition with expenses, "except those of an appendix of correspondence, which was considered unnecessary."

II.—Cases cited by the Respondent.

1. *Gordon.*—In this case inhibition had been used on the dependence of an action, which was dismissed under reservation of the pursuer's right to bring a new action. The inhibition was recalled of consent; but the expense of the application was refused, on the ground "that as the diligence fell by the dismissal of the summons, on the dependence of which it was executed, it was only necessary to register a discharge in order to clear the record, and that he" (the petitioner) "had never made any extrajudicial application for a discharge."
2. *Rennie.*—This case is very shortly reported, thus:—"This was an application for recall of inhibition in which the sole question related to the expenses. The Court refused them."

The session papers (to which the reporter was referred by the respondent) show that in this case the respondents were willing to grant a discharge at the expense of the petitioner.

The inhibition had been used on the dependence of an action of count and reckoning, which was conjoined with a counter-action. The conjoined actions were ultimately submitted to arbitration. The referee disposed of the reference by a finding for a small sum in favour of the petitioner; but each party was ordained to pay his own expenses. The case had been one of mixed success on the merits; and, in the circumstances, the Court refused the expenses of the judicial application, holding apparently that the respondents, although bound to discharge the inhibition, were not liable for the expense of the discharge.

The conclusion at which the reporter has arrived from his examination of these authorities is, that, except in cases where the use of diligence was to be regarded as nimious and oppressive, or at all events as improper, the expenses of discharging inhibitions has been thrown on the party requiring the discharge, and that beyond this no rule of general application has hitherto been adopted by the Court.

It is for the Court to determine as to the expediency of continuing to dispose of each case of the kind under consideration on its own special merits, or laying down a general rule as to the expense of discharging diligence used on the dependence of actions. The reporter has some hesitation in offering any remark on such a question, and he trusts that, in bringing under the notice of the Court the views which have occurred to him bearing upon it, he will not be regarded as transgressing his proper limits. The Act of Sederunt of 19th December 1835 contains a provision in those terms:—"In order that the expense of litigation may be kept within proper and reasonable bounds, it is hereby declared that in taxing accounts between party and party only such expenses shall be allowed as are absolutely necessary for conducting it in a proper manner, with due regard to economy." The effect of this rule as hitherto acted upon has been to lay upon parties successful in litigations a very considerable portion of the expenses incurred by them in conducting their cases; but, by prudent management, litigants have the amount of this burden to a considerable extent in their own power. The expense, however, which may be laid upon a litigant ultimately successful, during the course of an action, by the use of diligence on the dependence, is in a position altogether different. He cannot in any way control such expense, which in many instances forms a considerable addition to the expenses not recoverable by him from his opponent as expenses of process. It is for the consideration of the Court whether the use of diligence on the dependence of an action (while the issue is uncertain), should not be wholly at the risk of the party availing himself of the privilege which the law gives him for his security; and it humbly appears to the reporter that much uncertainty and expense would be saved to parties were it understood that, in ordinary cases, the expense of discharging diligence on the dependence of an action, in which the party using such diligence is wholly unsuccessful, must be borne by him, and not by the opposite party who has prevailed in the litigation.

Second. The reporter has already exhausted the remit made to him in so far as relating (whether generally or particularly) to the party by whom the expense of discharging the inhibition shall be borne. It only remains for him to report upon the question, "whether an extract of the decree *absolvitor* presented to the Keeper of the Register of Inhibitions will enable the defender to obtain the inhibition to be scored on the record.' On that point he has to report in the negative. The keeper of the record requires as his warrant a specific recall of the diligence either by the extrajudicial act of the party who used the diligence, or by a warrant of the Court; reference in either case being made to the inhibition by the date of its registration. It seems to be competent for the Court, when pronouncing *absolvitor*, to recal the diligence, and to grant warrant for scoring the inhibition on the record if moved to do so. In the present case no such motion was made. In the case of *Sheriff*, already referred to, the omission to move for a warrant in similar circumstances does not seem to have prevented the Court finding the petitioner entitled to expenses.

The reporter thinks it right to state that he has examined the discharge, No. 16 of process, which, from its date (June 13, 1867), appears to have been executed subsequent to the boxing of the petitioner's application to the Court. It discharges the inhibition, and also the arrestments used by the pursuer on the dependence, and authorises a marking to be made on the margin of the record; but the discharge is not, in the opinion of the reporter, duly stamped, being written on a receipt-stamp. Not being an acknowledgment for money, and containing a warrant of registration, it ought, he thinks, to have been impressed with the proper deed-stamp duty of 35s. It is, however, proper to explain that in practice the keeper of the record of inhibition receives and registers discharges written on receipt-stamps, not regarding it as his duty to consider the sufficiency of the stamp; and that a considerable number of the discharges presented to him for registration in his record are engrossed not on deed stamps but on receipt-stamps."

The report having been lodged, the respondents withdrew their opposition; and accordingly, in respect of no appearance, the Court recalled the inhibition with the expenses as craved.

Counsel for Petitioner—Mr Maclean. Agent—William Miller, S.S.C.

Counsel for Respondents—Mr Scott. Agent—W. Wotherspoon, S.S.C.

COURT OF TEINDS.

Wednesday, January 29.

MINISTER OF PENICUIK, PETITIONER.

Manse—Glebe—Petitioner—Glebe Lands Act. The proper party to present an application to the Court under the 17th section of the Glebe Lands (Scotland) Act 1866, is not the minister, but the party wishing to purchase the land.

The 17th section of the Glebe Lands (Scotland) Act 1866 provides that, when the Court has, by an order or interlocutor, granted authority to feu in terms of the Act, any conterminous proprietor may, within thirty days of that order, intimate his willingness to feu, lease, or purchase such part of the glebe, and at such feu-duty, rent, or price as the Court may authorise; and after the price, in the case of sale, is fixed, the Court shall pronounce a decree of sale in favour of the heritor, on which he shall be entitled to obtain a charter from the Crown;