*Wednesday, February 2.*

CHRISTIE'S TRUSTEES *v.* MUIRHEAD.

(*Ante*, vol. vi, 642.)

*Bill—Stamp—Acknowledgment of Debt—I. O. U.* J. M., in return for a loan of £50, granted a document in the following terms:—"I acknowledge having received the sum of Fifty pounds sterling from my sister A. M. Should it ever be in my power to repay her this sum I will do so if required. Received the sum of £50 stg. James Muirhead;" the body of the document being in the handwriting of A. M., while the words "Received," &c., were holograph of J. M., and were written over a receipt stamp. *Held* that the document was not a bill, and did not require a stamp. It was an acknowledgment of debt, and obligation to repay; and was an I. O. U.

This was an action by the marriage-contract, trustees of James Christie and Agnes Muirhead, Hailes, East Linton, to recover a sum of £50, alleged to have been lent by the female pursuer before her marriage to her brother James Muirhead, poulterer and fishmonger, 79 Queen Street, Edinburgh. It appeared that the defender Muirhead desired to leave this country for Australia in the month of March 1863, and the money for this purpose, amounting to £250, was advanced in bills on Melbourne by his father and other relations. The pursuer alleged that £50 of that sum had been advanced by her in loan, and that on 14th March 1863 he granted and delivered to her a document in the following terms:—

"79 Queen Street, March 14/63.

"I acknowledge having received the sum of Fifty pounds sterling from my sister Agnes Muirhead. Should it ever be in my power to repay her this sum I will do so if required.

"Received the sum of £50 stg.

"JAMES MUIRHEAD."

the body of the document being in the handwriting of Mrs Christie, and the words "Received the sum of £50 stg., James Muirhead," being holograph of the defender, and written over a receipt stamp. The defender pleaded that the document had never been granted by him; that the signature was not his, or, if it were, that the preceding words had not been written when he signed his name. Further, that the document was a bill, and, not being stamped, could not be the foundation of action; or, if it was not a bill, it was not probative and could not instruct the debt sued for.

The defender afterwards, in 1866, returned from Australia and purchased the business of 79 Queen Street from the pursuer for £1700.

The Lord Ordinary (JERVISWOODE) allowed the pursuer a proof of her averments, and his interlocutor was adhered to by the Court (*ante* vol. vi., 642). Thereafter, on 23d November 1869 he pronounced the following interlocutor—"The Lord Ordinary having heard counsel and made avizandum, and considered the proof adduced and whole process, Finds, as matter of fact, that the words—'Received the sum of £50 sterling,' and the signature—'James Muirhead,' on the document, No. 6 of process, are holograph of the defender; that these words and the said signature were by the defender appended to the words which now precede them on the said paper; and that the said document was delivered by the defender to his sister Agnes in its present state: Finds, as matter of law, with reference to the preceding findings, that the defender is liable to make payment to the pursuers of the sum of £50, with interest of the same, as libelled, and therefore decerns in terms of the conclusions of the summons; and finds the defender liable in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report."

The defender reclaimed.

MILLAR, Q.C., and NEAVES, for him, quoted *Fair* v. *Hunter*, 5th November 1861, and *Millar* v. *Farquharson*, 29th May 1835.

SOLICITOR-GENERAL and CATTANACH, in answer, quoted *Vans*, January 1675, M. 16,885; *Allan* v. *Murray*, 15 S. 1135; *Thomson* v. *Geikie*, 6th March 1861, 3 D. 683.

After hearing the opinion of the Lord Probationer (GIFFORD), before whom the reclaiming note was argued—which was in favour of the pursuer,—the Court adhered, being of opinion that the Lord Ordinary was right, both in matter of fact and of law.

The document was not a bill and did not require a stamp; it was an acknowledgment of debt, and an obligation to pay in a certain event, and partook of the nature of an I. O. U.

Agent for Pursuer—R. Denholm, S.S.C.

Agent for Defender—D. Curror, S.S.C.

*Wednesday, February 2.*

## SECOND DIVISION.

CALEDONIAN RAILWAY CO. *v.* MEEK.

*Statute — Consolidation Act—Construction — Poor Rates—Exemption.* Terms of a clause in a Consolidation Act under which *held* that an exemption from poor rates conferred by a repealed statute was not meant to be abolished.

The question in this case was whether the Caledonian Railway Company enjoyed an exemption from poor-rates in respect of certain subjects now belonging to them, which had formed part of the original undertaking of the Forth and Clyde Canal. The amount at stake was £353 per annum, and the question turned upon the construction of certain Acts of Parliament, and in particular on the construction of an Act passed in 1841 consolidating the various Acts relating to the Forth and Clyde Navigation.

The first Act was the original Act incorporating the "Company of the Forth and Clyde Navigation," and passed in 1767. By that Act it was provided (sec. 5) "that the said company of proprietors shall not be chargeable with any part or portion of the land-tax, minister's stipend, poor-rates, or of any other public burdens or taxations whatsoever, for the lands which shall be so set out, ascertained, and purchased to and by them for the use of the said navigation by virtue of the powers given them by this Act as aforesaid; but that all such taxations and public burdens shall be chargeable upon the lands remaining with the vendor or vendors after such partial alienation to the said company of proprietors as aforesaid, and shall be levied from them, their heirs and successors in the said lands, in the same manner as if such partial alienations had never been made; and the said vendor or vendors and all other person or persons interested in the lands so sold to the company of

proprietors, as superiors or otherwise, shall be entitled to the same rights and privileges from the remaining parts of these lands as if such sale or sales to the said company of proprietors had never been made."

The second Act was an Act passed in 1836. It authorised the taking of land for additional works, "provided always that the provision contained in the said first-recited Act (being the said Act of 1767), exempting the said company from poor-rates from the lands belonging to them, shall from henceforth cease and determine in so far as regards the lands hereafter to be acquired, or buildings to be erected on such lands by the said company."

The third and remaining Act was the Consolidation Act before referred to, passed in 1841. This Act is entitled "An Act to Consolidate, Amend, and Enlarge the Powers and Provisions of the Several Acts Relating to the Forth and Clyde Navigation." The preamble, after narrating various statutes (including the statutes of 1767 and 1836), some of which related entirely to the Forth and Clyde Navigation, and others referring also to other matters, went on to say,—"and whereas it is expedient that the subsisting powers of the said recited Acts in any manner relating to the said company, or to the canals, cuts, and other works belonging to them, or which they are authorised to carry into effect should be confirmed, amended, and enlarged, and that further powers should be given to the said company for the maintenance, support, and management of the said navigation; and it would be productive of great convenience and advantage if such subsisting powers were repealed, and instead thereof amended, enlarged, and further powers and provisions were granted and consolidated in one Act of Parliament." On this preamble it is enacted (sec. 1) "that the said company of proprietors of the Forth and Clyde Navigation . . . . . shall be and the same is hereby dissolved, and all the powers, provisions, penalties, matters, and things, contained in the said recited Acts, so far as they relate to the said Forth and Clyde Navigation and the company of proprietors thereof, shall be and the same are hereby repealed." By sect. 2 the proprietors of the dissolved company are re-united into a company for maintaining the canals, &c., made "by virtue of the said recited Acts so repealed as aforesaid." Sections 11 and 12 also referred to the recited Acts as repealed. Section 122, which dealt with the matter of taxation, is in the following terms:—"And with respect to the lands set out, ascertained and purchased to and by the said company for the use of the said navigation, by virtue of the powers given them by the said recited Act, except in cases where they have purchased the whole of the land of the original proprietor, be it enacted that the said company shall not be chargeable with any part or portion of the land-tax, minister's stipend, or of any other public burdens or taxations whatsoever for the lands which have been so set out, ascertained, and purchased, but that all such taxations and public burdens shall be chargeable upon the lands remaining with the vendor or vendors after such partial alienation to the said company as aforesaid, and shall be levied from them, their heirs and successors in the said lands, in the same manner as if such partial alienations had never been made; and the said vendor or vendors and all other person or persons interested in the lands so sold to the company of proprietors as superiors or otherwise shall be entitled to the same rights and privileges from the remaining parts of these lands as if such sale or sales to the said company had never been made; provided always that nothing herein contained shall be held to limit or affect any liability which by law does or may attach to the said company or to the property now belonging to or occupied by, or which may hereafter belong to or be occupied by them, to be rated or assessed for the relief of the poor, nor to impose any such liability for any such rate or assessment upon any lands remaining with any vendor or vendors after any partial alienation to the said company as aforesaid."

It was maintained by the complainers that, under the first two of these statutes, the lands acquired for the original undertaking of the Forth and Clyde Navigation were exempted from poor-rates, and that that exemption was not removed by the provision above quoted of the Consolidation Act. The respondent, on the other hand, maintained that by the Consolidation Act all the previous statutes were repealed, and the liability for poor-rates was left to the operation of law.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"Sustains the first and second pleas in law for the complainers, and repels the pleas stated on behalf of the respondents, in so far as inconsistent therewith; and, before further answer, appoints the cause to be enrolled, that parties may be heard on the application of the present interlocutor; reserving meanwhile the matter of expenses.

"*Note.*—The point with which, as the Lord Ordinary understands, he was alone expected to deal in the present stage of this cause, may perhaps involve greater difficulty than the Lord Ordinary has experienced in disposing of it; but as it has appeared to him that the construction of the terms of the 122d section of the 4th and 5th Vict. cap. 55, for which the respondent contends, cannot be maintained to the extent of holding that it operates a repeal of the exemption from liability for the payment of poor-rates, which is expressly enacted under the terms of the 5th section of the previous statute of the 8th Geo. III. cap. 63 (No. 5 of process), it follows that the pleas in law, which are specifically dealt with in the prefixed interlocutor, must be sustained by the Lord Ordinary."

The respondent reclaimed.

FRASER and BURNET for him.

WATSON and JOHNSTON in answer.

At advising—

LORD COWAN—The question at issue between the parties under the record relates to the construction of section 122 of what is called the Consolidation Act, obtained in 1841 by the Forth and Clyde Navigation Company. The Caledonian Company are now, under an Act passed in 1867, in the full right of the Canal Company; and it is not alleged that any privilege or exemption under the Consolidation Act 1841 which could be pleaded by the Canal Company is not vested in, and may not be competently pleaded by, the Caledonian Company.

The claim made against that Company is for certain poor-rates alleged to be chargeable upon their whole undertaking, including all the lands and property originally held by the Canal Company. The validity of this claim, and of the relative warrants for the recovery of the rates, is the subject of this suspension; the complainers maintaining that for certain of these lands they possess a statutory exemption from poor-rates which is

fully recognised by the Consolidation Act according to its sound construction; and while, of the whole sum charged against them (£1120, 5s. 9d.) they are willing to pay £767, 5s. 9d., they are not liable to pay, in respect of the exemption, the remaining sum of £353.

The Lord Ordinary has sustained the plea of the complainers, and in doing so has, in my opinion, taken a correct view of the question at issue.

The clause is set forth at length in the 5th statement for the complainers. It provides, with respect to lands purchased by the Canal Company under their recited Acts (except in cases where they have purchased the whole of the lands of the original proprietor) "that the said Company shall not be chargeable with any part or portion of the land-tax, minister's stipend, or of any other public burdens or taxations whatsoever for the lands purchased, but that all such taxations and public burdens shall be chargeable upon the lands remaining with the vendor or vendors" as if no partial alienations had been made to the Company. The construction of a clause of exemption or relief expressed in these terms does not admit of doubt. It has been ruled authoritatively that under the words following the specific burdens mentioned, "any other public burdens or taxations whatsoever for the lands," poor-rates are included. The exempting clause applies to the whole lands purchased at any time under their successive statutes by the Canal Company; and had there been nothing else in this section it is free of doubt that no poor-rates could have been exacted from the Canal Company before the purchase of that undertaking by the suspenders in 1867, or could now have been chargeable against the complainers.

The section, however, proceeds to set forth a *proviso* by which the generality of the exemption is guarded against in reference to poor-rates,—"provided always that nothing herein contained shall be held to limit or affect any liability which by law does or may attach to the said Company, or to the property now belonging to or occupied by, or which may hereafter belong to or be occupied by, them to be rated or assessed for relief of the poor, nor to impose any such liability for any such rate or assessment upon any lands remaining with any vendor or vendors after any partial alienation to the said Company as aforesaid." It is clear, in the *first* place, that this *proviso* has been inserted to limit and qualify the universal exemption from poor-rates, which would otherwise have been held conferred by the enacting clause. A *proviso* is something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactment, and providing specially for them. This is the doctrine stated by Dwarris, and it is strictly applicable to the question of construction here at issue. Any liability which by law attached to the Company out of their property to be assessed for poor-rates was not to be limited or affected by the enactment; farther, no liability for such assessment was to be held imposed by the enactment upon the lands remaining with the vendors after the partial alienation to the Company. The real meaning of this plainly is, that, so far as regards poor-rates, the matter of liability was to remain as it legally stood when the Consolidation Act was passed. Assuming that the Company did enjoy a legal exemption from poor-rates at that date as regards a certain portion of their lands, but were liable for poor-rates for all the rest of their property, that state of matters was not to be affected by the general enactment of exemption. And in like manner, assuming that the owners of the remaining lands (portions of whose property had been taken by the Canal Company) were liable for the assessment upon the portion of the lands purchased by the Company, but were exempt from liability for the assessment as regards all the other lands purchased by the Company, that state of matters also was left untouched. This appears to me very clearly to be the meaning of the *proviso* read along with the general exemption. And the whole question is, Whether, anterior to the Consolidation Act 1841, the legal position of the parties was not such as I have assumed it to be in giving this construction to the section of the statute?

The statutes of the Canal Company which were consolidated in 1841 were, among others, those of 8 Geo. III., c. 63 (1767), and of 6 Will. IV., c. 43 (1836). These are more particularly the Acts, to which it is necessary in this case to refer, that are recited in the Consolidation Act, and repealed in respect of the Act 1841 being passed; but the whole works, heritages, rights, and privileges which were vested in the Company under the repealed Acts, were of new absolutely vested in the Company of new established under the same name. Now, under the original Act of 1767, by the 5th section, cited in Statement II. for the complainers, it was provided that the proprietors "shall not be chargeable with any part or portion of the land tax, minister's stipend, poor-rates, or of any other public burdens or taxations whatsoever," for the lands purchased by them, "but that all such taxations and public burdens shall be chargeable upon the lands remaining with the vendor or vendors after such partial alienation." Again, by the subsequent Act of 1836, which empowered the Company to make other works and to purchase other lands, it was provided—that the provision contained in the Act 1767, as above, "exempting the said Company from poor-rates from the lands belonging to them, shall from henceforth cease and determine, in so far as regards the lands hereafter to be acquired, or building to be erected on such lands by the said Company." The exemption from poor's-rates is left entire as relating to the lands purchased under the first Act 1767, but it is taken away and declared to cease with regard to lands acquired subsequently to this second Act 1836 and under it. This was the legal condition of the rights of the Company when the Consoldation Act was passed, and section 122 was, as I think, obviously expressed in the terms in which it is, on purpose to preserve this *status quo*. Nothing contained in it was to limit the liability of the Company for poor-rates which at the time legally attached to their property, and to that extent the general exemption in the enacting clause was qualified by the *proviso*. No liability is imposed on the Company to the destruction of the partial exemption which their lands enjoyed; and all lands acquired by them under the powers in the second statute (1836), or to be acquired thereafter, were left subject to the liability for poor-rates. Such seems to me the sound construction of this statutory provision, and I humbly think that any other view of it would do violence, not less to its true import than to the clear intention of the parties who concurred in obtaining the enactment.

On these grounds, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD BENHOLME concurred.

LORD JUSTICE-CLERK—Although at the debate I had a strong impression that under the Consolidation Act all previous exemption from poor-rates was abolished, I have now come to be of opinion with your Lordships that such abolition was not intended by the Legislature.

Agents for Complainers—Hope & Mackay, W.S.
Agents for Respondent—Milroy & Hampton, S.S.C.

## *Thursday, February 3.*

### A. *v.* B.

*Husband and Wife—Separation—Custody of Children—Access.* Circumstances in which *held* that no case had been made out for interference by the Court with a father's natural right to the custody of his children.

This was a petition by a husband against his wife for custody of the children of the marriage. The parties were being separated, the separation being at the instance of the husband, and having been caused by incompatibility of temper. The wife maintained that the Court should not order her to deliver up the children except upon provision being made for her reasonable access, and maintained that she was entitled to have this security provided for her at sight of the Court. She further insisted on her right to retain the children until she had finally settled with her husband the terms of aliment to which she was to be entitled. The husband having stated that he proposed to board the children with a family in Ayrshire, and that he was willing and had always offered to secure all reasonable access to the mother, the Court granted the application, and refused to insert in the interlocutor any conditions, leaving it to the wife to come to the Court for redress if she was denied the access which the husband promised.

SHAND for petitioner.

WATSON in answer.

The LORD JUSTICE-CLERK observed that there might very well be a case where a husband, by refusing to live in family with his wife, and assigning no reason for such refusal, would justify the Court in refusing him the custody of his children; but the general rule was that the right of custody was with the father, and it would require very special circumstances indeed to justify a departure from it.

Agent for Petitioner—W. Mitchell, S.S.C.
Agents for Respondent—M'Ewen & Carment, S.S.C.

## *Thursday, February 3.*

### MARSHALL *v.* PENDER.

*Expenses — Tender — Modification.* An innkeeper sued a candidate at an election for £112, 9s. 6d., on account of carriages, horses, &c. supplied. The defender disputed several entries in the account, but in his defences tendered £79, 7s. 6d. After a proof, the Lord Ordinary decerned in favour of the pursuer for £90, 8s. 6d., and to this finding the Court adhered. *Held*, on the question of expenses, that the pursuer's decree being in excess of the tender, the pursuer was entitled to expenses, but these modified in respect in some points the pursuer had been unsuccessful.

This was an action brought by Alexander Marshall, hotel-keeper and horse-hirer, Bo'ness, against Mr Pender of Middleton Hall, late candidate for the County of Linlithgow, to recover payment of an account for £112, 9s. 6d., alleged to be due for the hire of cabs and carriages on the occasion of the recent Linlithgowshire election. The defender disputed a number of the items in the account, which he alleged to be grossly overcharged, and tendered in all £79, 7s. 6d.

After a proof, the Lord Ordinary (JERVISWOODE) found the pursuer entitled to £90, 8s. 6d., but found him liable to the defender in the expenses subsequent to the allowance of proof, and *quoad ultra* found no expenses due to either party. His Lordship added the following—

"*Note.*—The Lord Ordinary has dealt with the present case with a desire to arrive at a conclusion under which, with due regard to the interests of the defender, the pursuer will receive fair remuneration in relation to the subject matter of his claim, having in view the whole circumstances out of which it has arisen.

"That on the occasion of a contested election, the polling for which now takes place on one day, there may be difficulty in recording with precision every item of charge included in such employment as that in which the pursuer was engaged on behalf of the defender, is sufficiently obvious; but notwithstanding this, and giving full weight to the special circumstances out of which the claim of the pursuer thus arises, the Lord Ordinary has come to the conclusion that, as respects the carriages supplied to the defender, and other expenses entered in the pursuer's account under the date of 21st November, the charge as there stated has not and cannot be fully supported, and the Lord Ordinary has consequently reduced the sum to the extent to which he thinks the weight of the evidence points.

"The Lord Ordinary has hesitated as to how far he was justified in limiting the finding of expenses of process in the manner provided for in the present interlocutor; but as he is of opinion that the pursuer ought not to be subjected in the whole expenses, it has appeared to him that the most expedient course is to give effect to this view while the whole subject matter of the litigation is under his consideration.

"As the defender has expressly stated on the record his readiness to pay the whole account of the pursuer, with the exception of the items referred to in the first head of the statement of facts on his (the defender's) behalf, the Lord Ordinary has thought it due to the defender to refrain from giving decree for the sum which remains as yet upaid to the pursuer."

The pursuer reclaimed.

SHAND and PATERSON for him.

WATSON and LANCASTER in answer.

The Court adhered to the Lord Ordinary's interlocutor on the merits, but altered on the question of expenses. As the defender's tender was below the sum for which the pursuer had got decree in his action, the defender must be held liable in expenses, according to the ordinary rule determining such liability. At the same time, the pursuer after litiscontestation had insisted upon some points in which he had been