Thomson, physician in Perth; Young or Richardson, wife of Dr Richardson, physician or surgeon in the Honourable East India Company's Service in Bengal; and Eliza Young, lately residing in Perth, now wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs Elizabeth Donaldson or Young, equally or share and shares alike, and to their respective heirs or assignees; declaring that if any of the residuary legatees shall die without leaving lawful issue before his or her share vest in the parties so deceasing, the same shall belong to, and be divided equally or share and share alike, among the survivors of my said grandnephews and grandnieces equally." Another grandnephew, Thomas Young, was afterwards added to the number of those thus specifically called. Thomas Young died before the widow, leaving a son, John Sawford Young; and whilst it was held that by force of the *conditio si sine liberis* the son became entitled to his father's own proper share, it was decided that the share of another grandnephew, William Macdougall, who had predeceased without issue, went by force of express destination to the survivors at the date of the widow's death. It was so determined in conformity with a series of previous decisions, of which some Judges doubted, but which was held to fix the point beyond the reach of argument.

The more recent case of *Graham's Trustees* differed as to the terms of the deed, which were very peculiar; but involved the same specialty of a destination to parties called *nominatim*, with an express conditional institution in favour of the survivors.

In the present case there is nothing of this kind. The provision is not in favour of individuals called *nominatim*, with an accretion expressly declared in favour of survivors at a particular date. It is in favour of a class, and of the survivors of that class alive at a period mentioned. The survivors take in their own right, not by virtue of any declared accretion of a predeceaser's share. The predeceasers without issue were simply in the position of never having right at all under the terms of the instrument. Thus, Alice Wright, who predeceased her mother, had no right given her by the deed, and no right accresced from her to any one. Whether she survived any of her brothers or sisters or not seems to me utterly immaterial, for the survivorship of the deed was not of one of the brothers or sisters over the others during the life of the mother; it was survivance of the mother herself. The death of Alice gave no right to her surviving brother and sisters. They only acquired right by surviving the mother, and their right was then a direct one in their own persons by virtue of such survivance. All this, I think, arises directly out of the terms of the deed; and it is by these, I think, the case must be ruled, as I think it is on the difference of phraseology in these material respects that the decisions in the other cases must be held rested. The difference of phraseology is, in such a case, the all in all. The present case, as I view it, does not comprise any question as to the share of a predeceaser without issue, for no such share ever existed. The entire question lies between the survivors taking in their own right and the children of predeceasers claiming to take in room of the parent. Whenever the children are found entitled to take, there is, to my mind, no doubt as to what it is they shall take. It is just the equal share which the parent, if surviving, would have taken with the actual survivors. There is no question as to an accresing share, for no accresing share has existed.

In this view, I think the second question should be answered to the effect of declaring that the fund must be divided into seven shares, equally appropriated to the four surviving children, and the issue *per stirpes* of the three who predeceased leaving children.

Agent for the First Parties—John Auld, W.S.
Agent for the Second Parties—John T. Moubray, W.S.

Friday, December 22.

JAMES WYLIE *v.* THE HERITABLE SECURITIES INVESTMENT ASSOCIATION (LIMITED).

Process—Sheriff-court — Removing — Competency — Bond and Disposition in Security—Rights of Creditors—Power to Remove.

Where there were inserted in a bond and disposition in security two clauses, the one entitling the creditors, upon any of the monthly instalments of the loan falling into arrears for two months, to remove the debtor and his tenants from the possession and occupancy of the subjects, and to enter into possession of them themselves, and that one month after intimation of their intention to do so, made by letter under the hand of their manager, without any warning or legal process whatever; and the other clause, declaring that upon the same failure to pay for two months, and one month intimation, as aforesaid, "all interest in and right and claim to the said property competent to the debtor should be forfeited *ipso facto*," and the creditors should be entitled to sell forthwith, "without farther premonition or other process of law," any law or practice to the contrary notwithstanding:—

Held (diss. Lord Ardmillan), on appeal, in a summary petition for removing in the Sheriff-court, founded upon the first of these clauses, against the debtor, who was in the natural possession of the subjects, that the action was incompetent in the Sheriff-court, because decree in the removing could not be given without deciding that the obligation in question was valid and effectual, and without determining several other questions of heritable right which were proper subjects of a declaratory action in the Court of Session; and because it was incompetent for private parties to invest a judge with a jurisdiction against the law.

Opinion by Lord Cowan, that it is illegal for parties by private paction to dispense with the established executorials of the law, and that therefore the clause in question was illegal and invalid.

Opinion by Lord Benholme, that the action was incompetent in the Sheriff-court as an "extraordinary removing."

On April 18, 1867, James Wylie, grocer and spirit merchant in Armadale, near Bathgate, granted to the Heritable Securities Investment Association (Limited) a bond and disposition in security over his premises there for the sum of £550 sterling. By this bond and disposition he bound himself, his heirs, executors, and successors

whomsoever, to repay to the Association, within their office in Edinburgh, "the sum of £9, 1s. 6d. sterling, each and every month during the period of six years from and after the date of delivery of these presents, and that in full repayment of the said sum of £550, and interest thereon, provided the said monthly instalments are regularly paid on the dates when they respectively become payable, said monthly payments or instalments being always due and payable on the first Monday of each month from and after the date hereof, beginning the first payment or instalment on the first Monday of May 1867, for the sum due betwixt the date of delivery hereof and the 31st day of the said month of May; the next monthly instalment, being £9, 1s. 6d., on the first Monday of June 1867, and that for the month ending 30th June 1867, and so on thereafter on the first Monday of each month respectively, until the end of the said period of six years, together with interest as after mentioned in case of failure in the punctual payment of the said monthly instalments, viz., interest on each instalment, at the rate of five per cent. per annum, for any period less than one month that the same remains unpaid, and at the rate of ten per cent. per annum for any period exceeding one month, and less than six months, that the same remains unpaid, and at the rate of fifteen per cent. per annum for any period exceeding six months that the said monthly instalment remains unpaid, with one-fifth part more of each monthly instalment of liquidate penalty, in case of failure in the punctual payment thereof."

The said bond and disposition thereafter proceeded—"And further declaring that nothing herein contained shall be held to affect the right and power of said Heritable Securities Investment Association (Limited), in the event of one full monthly instalment remaining at any time unpaid, to take all proceedings against me or my successors competent by the law of Scotland, by diligence or otherwise, for enforcing payment of whatever sum, whether the whole or a balance, may at the time be due of said principal sum and interest then due, and thereafter to become due thereon; and it is further hereby declared that the amount, whether the whole or a balance, then due and payable as aforesaid, shall, for the purpose of such proceedings, be competently ascertained by a certificate under the hand of the manager for the time being of said Association; and I accordingly bind and oblige myself and my foresaids to make payment to the said Heritable Securities Investment Association (Limited), or their foresaids, of whatever sum may appear by said certificate to be so due aud payable, with the interest thereafter to become due thereon; and in security of the personal obligations before written, I dispone to and in favour of the said Heritable Securities Investment Association (Limited), and their successors and assignees whomsoever,"—(*Here followed the disposition of the subjects conveyed in security, with an obligation to insure and maintain in repair, &c.*)

There then followed the clauses upon which this case more particularly depended:—"And I assign and convey to my said disponees the rents of the said subjects, with power to them and their foresaids, in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of said subjects, and to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that one month after a letter, under the hand of the manager or law-agents of the said Association for the time being, has been addressed to me intimating the intention of the said Association to remove me, as aforesaid, without any warning or legal process whatever, and a certificate under the hand of the said manager or the law-agents for the time of said association, that such letter was delivered to me or put into the post-office bearing my own address, shall be legal evidence of said intimation, declaring that my said disponees, in the event of their entering into possession of said subjects, shall not be liable for waste rents or insolvent tenants, or be bound to do exact diligence; and I also assign to my said disponees the writs and title-deeds, and I grant warrandice, and on giving two months' notice to the manager for the time being of said Heritable Securities Investment Association (Limited), it shall be competent to me, at any time during the currency of said six years, to redeem the said subjects by making a single payment to the said Association of the whole sum, and interest due and payable at the time, as the amount of such single payment may be specially arranged with the said directors, all in terms of the rules of said Association, a printed copy of which is subscribed by me of equal date herewith, as relative hereto; but declaring always, as it is hereby specially provided and declared, that if at any time I shall allow one monthly instalment to remain unpaid for two months after the date of payment thereof, then, and in that event, on the expiry of one month after notice shall have been sent to me by the manager or law-agents of said Association, all interest in and right and claim to the said property hereby disponed competent to me shall be forfeited, *ipso facto*, which failure or neglect to pay to said extent shall be held to be fully and legally instructed by a certificate under the hand of the manager of the said Association for the time being, and a similar certificate under the hand of the said manager shall be legal evidence of the foresaid notice having been sent to me; and the said Association, or the directors thereof, shall then be at liberty, without any further premonition to me, or other process of law, forthwith to advertise the subjects above disponed for public sale in such newspaper or newspapers, and for such number of times as the directors of said Association shall think fit, and thereafter to sell the said subjects for whatever price the same may bring, any law or practice to the contrary notwithstanding, and my said disponees are hereby authorised to execute articles of roup, to adjourn the sale from time to time, giving such advertisement as said directors shall think proper, and to grant absolute and irredeemable dispositions to the purchasers of said subjects, binding me in absolute warrandice; Which articles of roup and disposition and conveyance shall be held as valid and effectual as if executed by myself, but I bind and oblige myself to concur therein if required."

The said James Wylie allowed the monthly instalment of £9, 1s. 6d., due and payable by him to the Heritable Securities Investment Association on the 7th day of October 1867, to fall into arrear, and remain unpaid, and also the monthly instalments of £9, 1s. 6d., each due and payable by him to the Association upon the following dates respectively—4th November 1867, 2d December 1867, 6th January 1868, 3d February 1868, and 2d March 1868, to fall into arrear and remain unpaid for more than two months after they respectively became payable, and all subsequent instalments of

the said debt remain due and unpaid. On the 23d day of January 1869 Andrew Paterson, manager and for behoof of the Association, intimated to the said James Wylie, by despatching to him through the post office a letter addressed to him at his residence at Armadale, that unless the arrears of said instalments then due by him should be paid by the end of one month subsequent to the said last mentioned date, the Association intended to remove him from the possession of the foresaid subjects disponed by him to them in security as aforesaid, and themselves to enter into possession of said subjects, to let the same, and draw the rents thereof, and that without any other warning or legal process whatever, and thereafter sell the said subjects for whatever price the same might bring. The said James Wylie was sequestrated on 15th January 1868; and William Roberts, auctioneer in Bathgate, was, after the usual steps of procedure, confirmed trustee on his estate on 4th February thereafter. The Association made intimation to the trustee of the existence of the said bond and disposition in security, and of Wylie's failure to pay the foresaid instalments, but the trustee declined to have anything to do with the subjects disponed in security to the Association, as there could be no reversion therefrom to the creditors. They also intimated to the said William Roberts their intention to remove Wylie from the subjects in question. The said James Wylie was discharged under the said sequestration, but he has not been retrocessed into his estate. As Wylie remained in the occupancy of the premises, which consisted of his shop and dwelling-house, and refused to remove from the same, the Heritable Securities Investment Association, in June 1870, presented to the Sheriff of Linlithgow a petition, directed against the said James Wylie and his trustee William Roberts, setting forth the circumstances and the terms of the bond, and craving the Sheriff to grant warrant for "summarily ejecting and removing the said James Wylie, respondent, his wife, bairns, servants, and dependents, goods and gear, furth and from the said dwelling-house, situated in Armadale aforesaid, occupied by the said James Wylie as aforesaid, and forming part of the said subjects conveyed in security as aforesaid, to the effect that the petitioners may deal therewith in terms of the said bond, and to find the respondent the said James Wylie, and also the said William Roberts, in case of his opposing the prayer hereof, liable in expenses, and to decern therefor; or to do otherwise in the premises as to your Lordship shall seem proper."

The petitioners pleaded—"(1) The respondent James Wylie having failed to pay the monthly instalments at the dates when they respectively became due, as stipulated for and agreed to in said bond and disposition in security, the petitioners were entitled to remove the said James Wylie and his tenants from the occupancy and possession of the foresaid subjects, to enter into possession thereof themselves, to let the same, and draw the rents thereof, in the manner prescribed by the said bond, and herein set forth. (2) The respondent James Wylie having been sequestrated and not retrocessed into his estate, all interest in the said subjects belongs to the trustee on his sequestrated estate for behoof of his creditors, and the trustee having declined to interfere with the subjects of security, decree ought to be pronounced in accordance with the prayer of the petition."

The respondent, besides several pleas founded on an alleged state of matters disproved by the evidence, also pleaded—"(4) This removing, being of an extraordinary nature, is incompetent in the Sheriff-courts; and (5) This action involves questions of heritable right, and is therefore incompetent in the Sheriff-court."

The Sheriff-Substitute (HOME) on 9th December 1870 pronounced the following interlocutor:—"In respect that the removal sought for in this action is grounded upon a conventional irritancy contained in a disposition to land, and involves the question, not only as to the right to possess said land, but also as to the property of the same, and requires solemn investigation into whether said irritancy has been incurred, and declarator of the same, Finds that the action is incompetent in this Court, and sustains the defender's pleas in law thereanent: Finds also that the clause in said bond and disposition referred to does not give the petitioners the power of ejecting the respondent *de claro*, but only removing him therefrom if the said irritancy has been incurred, and that therefore the action should have been one of removal in ordinary form: Therefore, on these two grounds, dismisses the action—reserving to the petitioners to bring their action against the defender as accords of law.

"*Note.*—The Sheriff-Substitute was inclined to think at first that this removal was competent in the Sheriff-court, as being one founded only on a conventional irritancy contained in an ordinary agreement between the parties, and there is no doubt that the said parties themselves meant that the obligation should be enforced in as summary a way as possible. On farther consideration, however, he is of opinion that the irritancy is so connected with an heritable deed, and relates so closely to the depriving of the defender, not only of the possession, but of the property also, of the lands in question, and therefore in a high degree penal, that something like a declarator thereof, or a finding at least, after a solemn and regular investigation as to whether the irritancy has been incurred or not, where this is denied, as in this case, is necessary, and consequently, that the action of removal thereon must either be raised in the Supreme Court, or, if in the Inferior Court, that it must be not in a summary way by petition, but by way of an ordinary action and summons, although now-a-days not so much stress is laid on the difference between the one form of action and the other. See case of *Nisbet*, Jan. 12, 1866; and, on the whole matter, Barclay's M'Glashan, p. 40."

The petitioners appealed to the Sheriff (MONRO), who, upon 21st December 1870, pronounced the following interlocutor:—"Recals the said interlocutor: Repels the plea that the petition as laid is not within the jurisdiction of this Court: Finds that the summary petition is a competent form of raising the present action: Allows the parties a proof, before answer, of their respective averments on record, so far as not admitted, and to each party a conjunct probation: Grants diligence against havers to both parties for recovery of writings in support of their respective averments, and remits to the Sheriff-Substitute to proceed with the said proof and whole cause.

"*Note.*—The question above decided is one of very general application, and is of considerable importance. The power of removal of the debtor in the event of his falling into arrear of his instalments is commonly inserted in bonds granted to such Associations as that of the pursuers; and, unless a summary procedure in the Sheriff-court is

competent, the power can scarcely be promptly and effectually exercised. The Sheriff has jurisdiction to enforce agreements as to the possession of heritage; and the present action is raised to enforce a conditional agreement to remove. There is no irritancy of the proprietary right. The foregoing intent does not affect any question of jurisdiction which may emerge in the course of the cause.

"The following cases are important, both on the question of jurisdiction and as to the summary form of action:—*Nisbet* v. *Aikman*, Jan. 12, 1866, 4 M'Ph. 284; *Williamson* v. *Johnston*, Dec. 23, 1848, 11 D. 332; *Gordon* v. *Grant*, June 22, 1848, 10 D. 1385.

After a proof was led in terms of this interlocutor of the Sheriff, the Sheriff-Substitute found that the defender had forfeited his right to retain any longer possession of premises as against the petitioners under the said condition of the bond, and that the petitioners, on the other hand, had acquired right by the same to remove him summarily therefrom, and to take possession themselves. He therefore decerned in the removing against the defender James Wylie, and against the other defender William Roberts, as trustee on the said James Wylie's sequestrated estate, in absence, as not having entered appearance in the action, from the premises in question, in terms of the prayer of the petition; and failing their so removing therefrom within fourteen days from the date of the interlocutor, he granted warrant to eject the said defenders James Wylie and William Roberts, as trustee foresaid, with all the defender's goods and effects, in terms also of said prayer.

The Sheriff adhered on appeal, and the respondent appealed to the First Division of the Court of Session.

The case was argued at the close of the Summer session, but on November 3d the Court intimated that they intended to put it out for argument before seven Judges, as it was a case of importance and contained points of novelty and difficulty, which had not been sufficiently noticed in the previous debate. These points were stated to be in particular—1st, As to the irritancy in the bond—whether it was one of those irritancies which the Court was bound to enforce in its terms, the competency of the Sheriff-court to declare it being of little importance compared with the competency of the irritancy itself; 2d, as to the preferable execution attempted to be given to a particular creditor,—whether such preference was lawful?

The case was accordingly reheard by the First Division, with the assistance of Lords Cowan, Benholme, and Neaves.

Fraser, Scott, and Strachan for the appellant.

Solicitor-General and Kinnear for the respondents.

Argued for the appellants—1. The provision in the bond, upon which the respondents found, is an irritancy. 2. It is one which the Court ought not to enforce, looking at the deed itself, and to the rights of other parties, for it cannot be looked upon as a matter personal to the debtor and creditors, but the object is to give the creditor a right against the world, and all other creditors whatsoever. If this was upheld, what more oppressive power could be devised, and what chance would other creditors have of fair competition? 3. At any rate it is an irritancy which the Sheriff is not competent to enforce.

Authorities—Bell's Lectures, p. 1075; *Forsyth* v. *Aird*, Dec. 13, 1853, 16 D. 197; *Blair* v. *Galloway*, Dec. 21, 1853, 16 D. 291; *Waterston* v. *Mason*, June 30, 1846, 8 D. 944; *Macfarlane* v. *Campbell*, March 4, 1857, 19 D. 623; *Williamson* v. *Johnston*, Dec. 23, 1848, 11 D. 332; *Miller* v. *Carrick*, March 29, 1867, 5 Macph. 724; *Nesbit* v. *Aikman*, Jan. 12, 1866, 4 Macph. 284; *Forrester*, June 27, 1815, F.C. (Lord Meadowbank's opinion); *Campbell of Blythswood*, May 28, 1823, 2 S. 341, 6 S. 679, and 1 W. and S. 690; *Heriot's Hospital*, M. 12,857, 3 Paton 674; Stair iv, 18, 3, i, 13, 14, and iv, 5, 7; 31 and 32 Vict. 101, § 13.

Argued for the respondents—The portion of the subjects of which the Heritable Securities Investment Association propose to take possession is in the natural occupation of their debtor. They propose to do so in virtue of the clause of removing in their bond. The security and rights of a heritable creditor depend upon the contract with the debtor. In the case of a bond and disposition in security, conceived in the ordinary form, the creditor has certain known remedies. The creditor has a debt by reason of the bond and disposition, which is made a *debitum fundi*. He has also an assignation to the rents, and a power of sale. The first gives him the ordinary execution competent to a creditor in a *debitum fundi*, *i.e.*, he may poind the ground. This is the only way of ordinary diligence by which he can proceed when the debtor is in the natural possession of the subject. But when the subjects are in the possession of tenants, then the creditor has another right in respect of the assignation to rents. That entitles him to an action of maills and duties. The third and most important right or remedy is the power of sale in the event of non-payment. This was thought at one time a power inconsistent with the ordinary rule of law. It has since been upheld as a legal power enforceable by the Court.

All these remedies are limited in this respect, that though you may attach the rents and sell the property, you still cannot reach, except by poinding of the ground, the subjects which are in the natural possession of the debtor. That being so, the debtor and creditor here have entered into a special stipulation applicable to that emergency. The creditor has stipulated that as part of his security he shall have a right to the possession of the property in the natural occupation of his debtor immediately on demand. If any part of the subjects is let, he must proceed by maills and duties in the ordinary way. But in respect to that portion occupied by his debtor he may surely deal with him thus—He may say to his debtor, I will not lend to you, because a large part of your property is in your own possession. What I stipulate for is, that if I am to lend to you at all, I shall, at the time the loan is made, be put in possession of the subjects, so that I may have, not a mere *debitum fundi*, but the actual possession and administration of the property. It is quite intelligible that a creditor might refuse to deal on any other footing with some debtors. But, then, it may not be convenient to the borrower to part with possession at the time. He may say, however,—I will give you a stipulation binding me, that when I am in arrear with my interest I will go out of possession and surrender it to you. There is nothing very unusual or out of reason in this. It is not easy to see why, if a creditor can sell as mandatory or commissioner of his debtor, and thus effectually put him out of possession, he should be debarred from stipulating that, instead of selling, he should be entitled to enter into possession himself. The

idea involved in such a stipulation is not half so illegal and oppressive as that involved in the power of sale. The next step in the argument, however, is this—It is said to be an extravagant power conceded to the creditor, and one which the Court must not enforce, that the amount due or in arrear should be settled by a certificate under the hand of the creditor's manager. But this is not an unusual condition in such bonds. It is not supposed to be absolutely conclusive against the debtor. The condition of its coming into play is that certain instalments should be overdue, and the evidence whether or no this be so is in the hands of the debtor. The Sheriff has immediate means of verifying whether the certificate is true or not. Even if any malpractice did escape notice, the whole can be set right by reduction. The whole object of the obligation being to secure the possession, not to interfere with the property, there is nothing unreasonable either in the stipulation itself as to the possession, or in that as to the ascertainment of the amount due.

With regard to the clause of forfeiture of the property, any contention that it could be enforced in its terms must be disclaimed. What is contended for, namely, that the lender is to obtain possession in an event which has happened, does not imply any forfeiture of property, and is quite independent of that stipulation.

But how is this obligation to be enforced by the creditor? There is no way except by petition presented to the Sheriff. If declarator of irritancy were required, the Court of Session would be the only Court competent. But no such declarator is required, for it is not contended that any forfeiture of property has been incurred. The debtor is bound, at the demand of the creditors, to quit possession. He has declared in the bond that, to the extent at least of the creditor enforcing his security to this effect, every right of his is irritated on a certain event. What, then, is the creditor to do to get possession. He cannot proceed at his own hand without warrant. He must take the aid of the law. So far as possession goes, every right of the debtor is irritated. He has just put himself in this position, that when the creditor chooses to enforce his right he is to be dealt with as having no title to possess at all. It is a matter which can settled by agreement, and the debtor cannot plead his title as proprietor against the creditor in this obligation. The application to the Sheriff was therefore competent, and not only so, but the only means competent to the creditor to obtain his end.

At advising—

Lord Cowan—This is a petition to the Sheriff of Linlithgow, as Judge Ordinary, for the summary ejection and removal of the appellant from subjects of which he is the undoubted feudal owner, and which are in his own occupancy.

The petitioners are heritable creditors, holding a real security over the subjects for an advance of £550, declared to be payable by instalments of £9, 1s. 6d., each and every month during the period of six years. It is in the exercise of their alleged power under this bond that they seek to have judicial authority and warrant for "summarily ejecting and removing" the appellant, "his wife, bairns, servants, and dependants, goods and gear, forth and from the" subjects occupied by him, "and forming part of the said subjects conveyed in security as aforesaid." The application is directed, not merely against the debtor in the bond (the appellant), but also against the trustee on his sequestrated estate—whose right to the subjects, and the possession of them for behoof of the general creditors of the bankrupt, is, by the terms of the petition, brought directly under challenge.

The heritable bond contains the usual executorial clauses in the event of non-payment of the stipulated sum at the terms when due, with a power of sale; but, farther, it contains two clauses or conditions altogether novel and unexampled in such securities.

One of these clauses confers power on the creditors, "in the event of any of the said monthly instalments falling into arrear for two months, to remove *me* or my *tenants* from the possession or occupancy of said subjects, and to enter into possession thereof themselves, to let the same, and to draw the rents thereof; and *that* one month after a letter, under the hand of the manager or law-agents of the said Association for the time being, has been addressed to me, intimating the intention of the said Association to remove me as aforesaid, *without any warning or legal process whatever;* and a certificate, under the hand of the said manager or the law-agents for the time of said Association, that such letter was delivered to me or put into the post office bearing my known address, shall be legal evidence of said intimation; declaring that my said disponees, in the event of their entering into possession of said subjects, shall not be liable for waste rents, or insolvent tenants, or be bound to do exact diligence."

The other clause declares that, upon the lapse of the same period of two months without payment of one monthly instalment, and the expiry of one month after intimation,—precisely as provided in the first clause,—"all interest in and right and claim to the said property hereby disponed competent to me shall be forfeited *ipso facto;*" and the creditors are declared to be then at liberty, "without farther premonition or other process of law," forthwith to advertise the subjects for sale, and to sell the same, "any law or practice to the contrary notwithstanding."

It is under the first of these clauses that the present application is professedly brought; and the warrant craved is for the removal of the appellant from a part of the subjects not let to tenants, but in his own occupancy.

In reference to preliminary pleas stated for the appellant to the competency of the procedure and jurisdiction of the Court, the Sheriff-Substitute, by his interlocutor of 9th December 1870, dismissed the action on two grounds, afterwards noticed; but this interlocutor was recalled by the Sheriff on 21st December 1870. The cause was subsequently disposed of on its merits by interlocutors adverse to the appellant.

In the argument addressed to the Court under this appeal, various important questions, affecting the competency of the summary procedure thus resorted to by the respondents, appear to me to arise for judicial consideration.

The first of these questions is the legality of parties, by private paction, dispensing with established law and practice, in reference to the enforcement of the real security constituted by their bond, *i.e.*, dispensing with action of maills and duties where the subjects are in possession of tenants, and with poinding of the ground where the owner himself is in possession; and in either case with the process of adjudication; and arranging for themselves a mode of procedure hitherto unknown

to the law or in practice, for immediate executorial action. Even where the debtor alone is interested in the issue, the law will not sanction severe and penal provisions for enforcement of debt, contrary to established rule, and amounting truly to conventional irritancy of the debtor's right to possession and enjoyment of his property. Nor has the consent of the debtor been held sufficient, in a certain class of cases, to support such an arrangement when stipulated for by the creditors, and I apprehend no more severe or penal condition could well be inserted in a bond than that, instantly on non-payment and intimation by the creditor, the debtor may be ejected and dispossessed of his property, and his family and his tenants also.

The deeply-seated constitutional principles on which this doctrine was held applicable in the case then before the Court were fully explained in the case of *Forrester*, June 27, 1815, F.C., and especially in the opinion of Lord Meadowbank. The Bank of Scotland had there stipulated that the debtor should not be entitled to his legal remedy of suspension, except on consignation of the amount due by the bond, to be certified by their cashier or accountant. The debtor had consented to this; but the Court held it to be an illegal stipulation, interfering with the usual course of legal procedure. Other instances of the same kind have occurred, and been similarly dealt with by the Court. Mr Bell, in his Commentaries (vol. i, p. 382, last edition), referring to the decision in the case of *Forrester*, which he says was very deliberately considered, states that the provision that no suspension should be competent, unless upon the consignation of the balance, "is not a legitimate or an effectual stipulation." And in the subsequent case of *Gilmour*, 9 S. P. 907, Lord Moncreiff (Ordinary), whose interlocutor was adhered to, states in his note—"The Lord Ordinary considers it to be a settled point that such a clause is not effectual." Now, it is surely a grave question, requiring deliberate consideration by the Supreme Court, whether the stipulation here sought to be enforced, by the most summary of all procedure, does not fall under the principle which ruled this class of cases, and within the maxim commented on by Lord Stair (b. i, t. 17, § 14), *pacta privatorum non derogant juri communi.*

More especially must the necessity of this course be apparent, when it is remembered how greatly the interest of other parties, creditors of the debtor, may be affected by this private consensual arrangement, and how far that equality among creditors doing diligence against their debtor's estate, provided for not less by statute than at common law, may be disturbed, if not destroyed. No publicity is to be given to the defalcation of the debtor, or to the intimation made to him by his creditor; and no process or procedure at law whatever is to be followed. While other creditors are prosecuting their diligence in due course, the creditor in a bond with such a provision as this is to be entitled to dispossess the owner at once and *de plano*. That is the basis of this application. It is made to the Judge Ordinary only because the debtor has not complied with the private requisition made on him to get out of the premises. And with this view I am the more impressed because of the petition having been directed against the trustee for the general creditors of the bankrupt, against all of whom this consensual arrangement is asked to be enforced. It does not matter that no appearance was made for the trustee, and that he is decerned against in absence. The application in its prayer is demonstrative of its true nature and proposed effect.

Again, this clause relates to property, but in substance there is really no difference had the consent been with regard to the attachment of the debtor's person. For example, a consensual stipulation that the debtor should go to prison on the day when payment should have been made; so that the creditor, on the last of the days of grace where the debt is constituted by bill, or on the very day of a bond becoming due, might have instant warrant of incarceration of his debtor. Say that it was matter of arrangement that this should be in the creditor's power, without any charge for payment on letters of horning and caption—would such a clause be held binding? Yet that is the kind of case raised by this application.

These views lead me to observe, that when the Sheriff-Substitute, who refused to entertain the application, found that the removal sought involved the question, not only as to the right to possess, but as to the property of the subjects, and required solemn investigation by the Supreme Court, and was therefore incompetent before him,—he formed a just appreciation of the true nature of the application. A summary ejection process before the Judge Ordinary is the remedy open to a *proprietor* against parties who have taken possession of a subject without right or title, and are in truth mere squatters. The petitioners are not in the position of owners in any sense so as to justify such an action—unless indeed it is to be held that, under the second clause in this bond to which I have referred, there was, on account of the defalcation of the debtor to pay for two months and the intimation of one month longer, *ipso facto* forfeiture of his whole interest in, and right and claim to, the property,—which, however, the counsel for the petitioners was at pains to disclaim as not at all within the argument. Still, it does appear to me,—although this view may not be necessary for our present decision,—that by that there is great room for contending that the one clause in this bond cannot be dissevered from the other; and that a question of irritancy arises, not merely of the debtor's right to possess, but of his right to and interest in the subjects themselves; and if this be so, then, as involving the effect of the clauses imposing such conventional irritancy, the Supreme Court alone is the Court to which recourse must be had for its enforcement, assuming the provision in itself to be entitled to legal effect. No Inferior Court can give effect to a conventional irritancy.

On all these grounds, I am of opinion that the interlocutor of the Sheriff should be recalled, and that of the Sheriff-Substitute, of 9th December 1870, substantially adopted, finding the petition incompetent, at all events in the Sheriff-court; and this result appears to me to be supported by the decision in the very analogous case of *M'Farlane* v. *Campbell*, March 4, 1857, 19 D. 623.

Lord Deas—The Investment Company, who were petitioners in the inferior court, are heritable creditors of the respondent. It is quite settled, I take it, that if the petitioners had held a bond and disposition in security over property in the ordinary and every-day form with which we are all acquainted, they could not have taken possession of this property except by means of a poinding

of the ground, so far as the property was in the natural possession of the debtor, and by means of an action of maills and duties so far as it was in the hands of tenants. The ordinary form of a bond and disposition in security contains an assignation to the rents, and to the writs, in these terms:—"I, the said A. B., do hereby assign, convey, and make over not only the whole writs and evidents, rights, titles, and securities of and concerning the lands and others before disponed . . . . but also the whole rents, maills, and duties of the lands and others above disponed, that shall fall due from and after the date hereof, and in all time coming during the not redemption, with the tacks and rentals of the said lands, and all action, diligence, and execution competent or which might have been competent to me thereon, surrogating and substituting the said C. D. and his foresaids in my full right and place of the premises for their security and repayment of the sums of money," &c. Now, notwithstanding the express terms of that assignation, it is perfectly settled that the creditors holding such a security can only proceed either by poinding the ground or by an action of maills and duties. The object of the novel, and hitherto in our practice unexampled, clauses which are introduced into this bond was undoubtedly to obtain a greater and different power from that which an ordinary heritable creditor, under such a deed as I have read the style of, could exercise.

The deed by which the property is conveyed is set forth in the petition to the Sheriff. The condition of the loan was that the debtor was to have six years to repay the money by monthly instalments, but there is a clause to the effect that if he fails to pay any one of these monthly instalments for a period of two months, certain consequences are to follow.

There is to be 5 per cent of interest paid upon the arrears for the first month, 10 per cent if the period is between one month and six months, and 15 per cent if the period is allowed to run for more than six months; and there is a condition, moreover, that, failing payment within two months, the creditor is entitled to give a written notice of one month, and, at the expiry of that time, to enter into possession of the subjects whether in the natural possession of the debtor or let to tenants, for that is plainly the import of that part of the clause to which I am now referring—"I assign and convey to my said disponees the rents of the said subjects, with power to them and their foresaids, in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of said subjects, and to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that one month after a letter, under the hand of the manager or law-agents of the said Association for the time being, has been addressed to me, intimating the intention of the said Association to remove me as aforesaid, without any warning or legal process whatever." The further consequences are to be—"If at any time I shall allow one monthly instalment to remain unpaid for two months after the date of payment thereof, then, and in that event, on the expiry of one month after notice shall have been sent to me by the manager or law-agents of said Association, all interest in, and right and claim to the said property hereby disponed competent to me shall be forfeited, *ipso facto*, which failure or neglect to pay to said extent, shall be held to be fully and legally instructed by a certificate under the hand of the manager of the said Association for the time being, and a similar certificate under the hand of the said manager shall be legal evidence of the foresaid notice having been sent to me." Now, the petition which was presented to the Sheriff is founded upon the narrative of this bond; and it was set forth that these instalments were still due, and being still due and unpaid, "the said petitioners gave the intimation prescribed by the said bond to the respondent the said James Wylie, and exercised the powers of entering into possession of the foresaid subjects, in respect of the non-payment of said arrears, as aforesaid, all in terms of the said bond, which is herewith produced and specially referred to, and also the certificate of intimation to the said James Wylie, respondent, under the hands of Andrew Paterson, manager of the said Heritable Securities Investment Association (Limited), dated 14th May 1870, also herewith produced."

Your Lordships will observe that what is set forth there is, that the power of entering into possession had been exercised. There is no prayer in this petition to be authorised to exercise the power. The statement is that the powers have been exercised by entering into possession; and what the prayer asks is not to confer any power, but to give the petitioner the aid of the officers of the law in keeping them in their possession, and enforcing the possession which they have taken at their own hands; and which, if they were right at all, they were entitled to take at their own hands. The petition goes on to say—"That the said James Wylie wrongfully and unwarrantably remains in the occupancy of the shop premises forming part of the said subjects, and of the dwelling-house above said shop premises, being part of the subjects conveyed in security by him as aforesaid, and refuses to remove from the same, although he has no right to remain therein; his right to possess the same has terminated under the foresaid clause of said bond and subsequent intimation, and the present proceedings have been rendered necessary;" and the prayer of the petition is—"May it therefore please your Lordship to appoint a copy of this petition, and of the deliverance to follow hereon, to be served on the said James Wylie and the said William Roberts, trustee foresaid, and thereafter to grant warrant for summarily ejecting and removing the said James Wylie, respondent, his wife, bairns, servants, and dependents, goods and gear, furth and from the said dwelling-house, situated in Armadale aforesaid, occupied by the said James Wylie as aforesaid, and forming part of the said subjects conveyed in security as aforesaid, to the effect that the petitioners may deal therewith in terms of the said bond, and to find the respondent the said James Wylie, and also the said William Roberts, in case of his opposing the prayer hereof, liable in expenses." It is therefore an application upon the footing that the petitioners have done things which they were entitled to do, and they call in the aid of the officers of the law summarily to eject the respondent, to the effect that he be dealt with in terms of the bond, which undoubtedly, according to the words of it, includes forfeiture, not only of his right of possession but of his right of property. It follows that the Sheriff was called upon to consider the whole questions that might arise under this bond, and the whole consequences which might result from this exercise of the power

which it is said the petitioners had exercised, and it would only be if the Sheriff thought some of these things were within his competency, and some not, or that some of them ought to be granted, and some not, —it would only be on a view of the whole matter that he would make any restriction upon the prayer of this petition; and even at this hour, after all the pleading at the bar, it has not been suggested that there is to be any restriction with regard to the forfeiture of the possession; and although the Solicitor-General disavowed the notion of forfeiture of the property, he expressly refused to disavow the forfeiture of possession further than this, that if the debtor were to pay the whole debt, interest, and expenses, he might then be allowed to resume possession; but he did not concede that anything short of that could ever again get him into the possession of which he was turned out. That is the sort of case with which the Sheriff was required to deal; and there occur two important questions, to both of which Lord Cowan has referred; in the first place, as in a question with the respondent, the proprietor of the subjects, how far is this a stipulation that can be enforced summarily before the Sheriff. I need hardly say that the question really is deeper than a question of jurisdiction. It is not properly a question of jurisdiction at all. The question is whether this stipulation can be summarily enforced; and not merely summarily enforced, but enforced at their own hand? Can they enforce these stipulations at their own hand? if they can enforce them at their own hand, or get the summary aid of the officers of the law, it is under the jurisdiction of the Sheriff alone they can get it. We have no summary jurisdiction of that kind, and the question therefore necessarily is whether these are stipulations that can be summarily enforced or not? Now it is a very important question to the respondent himself whether clauses of that kind can be enforced. It is not the case of an agreement between a borrower and a lender at the outset, and before contracting the debt that the borrower shall allow the lender to get into possession of the subjects. Whatever may be said about that case, this is not that case, and cannot be likened to it. This is a case in which the debtor gets into possession on the footing of a loan of £550 for six years, to be repaid by monthly instalments during that period, but with clauses of irritancy and forfeiture if he failed to pay a single £9 at the end of a single month. The debtor naturally supposes that he will be able to pay the money, and does not anticipate any difficulty. In this case he is in the natural possession of part of the subjects, and it is from that part only that the creditors are seeking to remove him; but if they can do that at their own hands, they can take possession and let to tenants at their own hands, the words being "to remove me and my tenants." In this case the respondent is carrying on a grocery shop, but it might have been a shop filled with valuable goods, jewellery, or other goods, or it might have been a trade, the interruption of which might have been total destruction to him and his personal creditors, and every person concerned. But in all these cases the principle must be that they, at their own hands, in consequence of such a stipulation, can come in and turn a man to the street with his wife and family, and goods and gear. I have the greatest possible doubt as between debtor and creditor whether that can be done. I am clearly of opinion that if it can be done at all it cannot be done summarily before the Sheriff without decree of declarator or any previous inquiry, and I think that would be a sufficient objection to the competency of this petition. But when we look at it in reference to third parties, it becomes more formidable, because it just comes to this, as was put by Lord Meadowbank, whether a debtor pressed by his necessities can make a condition with one particular creditor, more particularly a heritable creditor, by which he is to stand in a different position from all the other creditors, to dispense with the diligence of the law, with poinding of the ground, and with maills and duties. If he can dispense with all that, I do not see, any more than Lord Meadowbank, how he may not dispense with horning and caption; and the other diligence of the law. Although third parties are not here, that tells two ways. It increases the difficulty. The trustee is called no doubt for the personal creditors, but we all know that it generally happens that the loan exceeds the value of the heritable property, and consequently the trustee refuses to interfere. The interests of personal creditors may be deeply affected for all that. If they were looking to his future prospects in trade for payment of their debts it would affect them. But as regards the other heritable creditors, who are not here at all, this is one of the most general questions that can be agitated. If it were decided in one way, it must cut off the rights of all the heritable creditors in the kingdom. If the debtor chose, after he has got all the money he can by legitimate loans, to get a heavy loan over and above the value of the property, on the footing that he shall pay it off in a certain way, he may leave his prior creditors in the lurch by agreeing to allow his last creditor to take possession and to levy the rents, while the others can do nothing until they go through the forms of the law by poinding of the ground or maills and duties. These are very serious consequences, and I am very clearly of opinion that they cannot be allowed to follow in a proceeding of this kind at the creditor's own hand. It would be a very different thing if it were an action of declarator to declare what is legal and what is not legal, and what can be enforced and what cannot be enforced. If we were to come to the conclusion that some of these things, even the most stringent of them, could be enforced, that would be very different from holding that this is so perfectly good on the face of it that the parties are entitled to act at their own hand, and that the Sheriff has nothing to do but interpone the aid of the officers of the law, which means that they, having *brevi manu* taken possession, he shall send the officers of the law to support them. I am not prepared to go that length.

Lord Benholme—I have arrived at the same result, and I think it of great consequence to our decision, as a precedent, that it should be put upon a clear footing, and not involved in any obscurity. I do not agree with Lord Cowan in thinking that the clause of irritancy contained in this bond has anything to do with a litigation in the inferior courts, or with our decision upon it. It is quite clear that the clause upon which the petition is founded for possession is totally separate and distinct from the clause of irritancy of the property. The one of these things is not founded on or necessarily connected with the other. The petition itself, whilst it sets out the clause as to possession, does not say one word as to the clause of irritancy The petition does not proceed upon any idea of

irritancy of the property, and I am anxious to state my view as to this, because I think our decision, if it be placed upon that footing, will be one of a much clearer nature than if it be supposed that the clause of irritancy is involved in the decision. If it were supposed that the clause of irritancy was necessarily involved, nobody could doubt that it was incompetent in the inferior court; and my objection to the Sheriff-Substitute's interlocutor, adhered to by the Sheriff, is, that it does seem to suppose that that clause of irritancy is necessarily involved in the prayer of the petition. That is certainly not my view, and I think, in justice to the petitioner, we must hold that he founds upon no part of this bond except the clause as to the possession.

Now, that being the real nature of this petition, the question is, Whether a petition that asks for possession against a debtor in a heritable bond, who is the proprietor in the natural possession of the subjects, is one that can be supported in the inferior court? In considering this question of jurisdiction (for such I think this case ought to be considered), it does not fall to us to decide by anticipation whether, if an action similar to this were brought in the superior court, it would be a good demand; and I do not mean to say one word about that. If a declarator were brought, or some other mode of bringing it before us were resorted to, I think it is matter of indifference to the present question whether that would or would not be a legal demand. The point for our consideration is whether such demand can be made in the inferior court. My opinion is that such a demand is not competent in the inferior court. I think it is a pure question of jurisdiction. I do not anticipate what the effect of this unusual clause might be if it was brought before the superior Court in proper form. It certainly is a very unprecedented form of procedure, and I don't know that there has been any heritable bond of exactly the same kind brought under the notice of the Court. But I think it is a question of pure jurisdiction, and as such I shall consider it. I think it very plain that this is of the nature of an extraordinary removal. It is extraordinary in this respect, that it is unprecedented; but further, it is extraordinary in the extreme severity of the precedure. The effect of this petition, if it had been acceded to, would be to authorise those parties to enter into possession and to remove the proprietor, and to enable them to let the subjects and draw the rents; for these are the consequences, that I think are referred to in the prayer of the petition as to dealing with the lands in terms of the bond. I don't think the words mean that they are to deal with the subject as having changed its property, but merely that the possession shall be changed, and that the right of letting to new tenants shall be held to have been given to the new possessor. Now, that is a very serious matter, and I take leave to observe that the clause in the original bond, although it is not insisted in exactly to the extent to which it goes, gives them power to remove tenants, which I should say is utterly illegal. A tenant has a nineteen years' lease, and in consequence of the failure of his landlord to pay the interest on the bond, it is supposed that the creditor may turn him out. That is a very extraordinary result. The petition does not enforce that claim against any tenant; it confines it to the proprietor. But the clause itself goes that length, and although it is restricted merely to the natural possessor—viz., the proprietor, this clause certainly takes a very extraordinary power to itself in asking it against him. But an extraordinary removing undoubtedly in the ordinary case belongs to the Court of Session, and my view upon that matter has been very much strengthened by the case of *Macfarlane* v. *Campbell*. I had some doubts originally, but they have been entirely dispelled by referring to that case. It differed from the present case in regard to the conception of the clauses in the bond. The clause in that case did not entitle the creditor, upon the default of his debtor, to remove the proprietor; it was a clause which gave him power to remove possessors; and the argument was, that that must apply not only to tenants or squatters without any good title of possession, but also to the proprietor himself, although he had a good title. An argument was urged that such a clause did not even *ex facie* entitle the creditor to extrude the proprietor; but the Court proceeded upon the footing that the clause might be held to extend to the proprietor, the natural possessor; and, in short, that the clause in that bond might be interpreted to mean that which the clause in the present bond bears on its face. The decision in the case of *Macfarlane* went upon the footing of supposing that the clause was intended, and might be interpreted to extend to the proprietor as the natural possessor. The decision was not put upon any want of words in the clause; it was not put upon this—that the clause was of a doubtful character, and consequently that it ought not to be enforced. The view was this—supposing it is a clause that extends, at least by interpretation, to the proprietor, as in the natural possession, the Court are of opinion that it is not competent in an inferior court. The opinions of the Judges bring that out very distinctly. The Lord Justice-Clerk stated that he adhered to the Lord Ordinary's interlocutor, on the ground that a summary action of removing against a proprietor who was feudally infeft was clearly incompetent In the Sheriff-Court:—"I limit myself to that ground." Now, this plainly assumes that the clause had been as imperative and as unmistakeable as the clause in the present case; but his Lordship says, without reference to that question, he confines himself to the ground of decision that a summary action of removing against a proprietor who was feudally infeft was clearly incompetent in the Sheriff-Court. Lord Murray concurs; Lord Wood was absent; and Lord Cowan was content to acquiesce in the ground of judgment proposed. Now that case is quite enough for me. I think it is a very clear and authoritative judgment, and it commends itself to my mind upon the ordinary principles of law. I am therefore fortified in the opinion that I now express, not merely from a somewhat difficult consideration of the principles of law on this matter, but by the decided precedent I have before me, which I think cannot be said not to be applicable to the present case.

Lord Ardmillan—I have the misfortune to differ from the opinion which has been expressed. The diffidence which I naturally feel in such a position, and my reluctance to dissent from the views of those for whom I entertain unfeigned respect, has led me to reconsider this question again and again, and indeed to endeavour, if possible, to arrive at a result in accordance with your Lordships' opinion. I have been unable to do so.

I concur in the result of the judgment of the Sheriff in so far as regards the question of ejection. It is therefore my duty to state, with great respect, but with candour, the opinion which I have conscientiously formed.

The respondent in this action, James Wylie, grocer and spirit-dealer in Armadale, Linlithgow, borrowed from the petitioners £550, and on receiving that money he granted to the petitioners a bond and disposition in security, dated 18th April 1867, by which he conveyed to them in security certain heritable subjects; and by which he obliged himself and his heirs, &c., to pay to the petitioners the said sum of £550 so borrowed by him, by monthly instalments of £9, 1s. 6d. per month, for six years, till the whole sum was repaid. By that deed James Wylie, in security of the said debt, also assigned and conveyed to the petitioners, the lenders of the money, the rents of the subjects; and he expressly conferred on them power, on the said monthly instalments falling into arrear for two months, to remove him from the possession or occupancy of the subjects, and to enter into possession themselves, and to let the same and draw the rents thereof, one month after a letter under the hand of the manager or law agents of the Association has been addressed to him, intimating their intention to remove him. This removal he expressly consents shall be "without warning or legal process;" and he also consents that a certificate by the manager or law agents that such letter was delivered to him, or posted to his known address, shall be legal evidence, by which I understand legal *prima facie* evidence of such intimation. There is no difficulty and no question in regard to the construction of this bond. The terms and the meaning of the bond are perfectly clear. There is no doubt in regard to them. The respondent Wylie borrowed and received the money, and subscribed the bond.

The obligations which he undertook as to payment by instalments, as to removing without warning or legal process on getting one month's notice, and as to the acceptance of a letter as sufficient notice, are clearly expressed; indeed, the meaning of them is not questioned, and they form the conditions or consideration in respect of which he received the money borrowed. Now, if nothing has been done but that to which he has expressly assented—his assent being part of the consideration for which the money was lent him —what right has he to complain? *Volenti non fit injuria.* In point of fact, Wylie, the debtor in this bond, having received the money on this consideration, did fail to pay the monthly instalments; and these instalments fell into arrear to a much greater extent than two months. A letter of notice, duly posted, was addressed to him at his residence, on 23d January 1869; and this was followed by formal certificate of intimation on 14th May 1870, ample time being given to the debtor; and in June 1870, after every opportunity had been given for payment, the petitioners presented an application to the Sheriff of the county praying for the summary ejection of Wylie, in terms of his obligation in the bond. The prayer of the petition is simply for warrant to eject. There has been no attempt and no desire to act without warrant, and there is no attempt to enforce any other stipulation than the obligation to remove. It was clearly explained by the Solicitor-General that nothing more than a question of possession is here raised, that nothing more than removal is here craved, and that no demand is now made for forfeiture of the right of the respondent. It is essential that there be no misapprehension on this point.

Before proceeding further in the consideration of the case, it is right to guard against misunderstanding on another point. I have therefore to observe that this question arises exclusively between the two parties to the bond. There is no third party here. It appears, indeed, that Wylie was sequestrated, but he had no funds—he has been discharged without composition. The trustee does not appear, but declines to appear. There is no interest of any third party now involved. The borrower of the money, who received it under certain clearly expressed conditions, is occupying the subjects, retaining the money, and repudiating the conditions on which he obtained it. His defence on record in this action is in all respects false and groundless in point of fact, and not only false and groundless in point of fact, but the falsehood is in regard to matters of fact, within his own knowledge. I have no hesitation in saying that, apart from the point of law to which I shall now shortly advert, the defences put on record are without truth or honesty.

It may however be that we are compelled to give effect to a defence in point of law, even though it be plainly contrary to the equity and good faith of the transaction. That, however, must be a very clear point of law, bringing with it a very imperative duty of enforcement, which, in a question of possession, in a case between creditor and debtor, and with the interest of no third party involved, can compel a court of justice to give a triumph to dishonesty. In my opinion there is no such point of law here.

The respondent's plea was presented at the bar, and has, I think, been considered by your Lordships under two respects.

First. It is said that this obligation on the debtor, if he falls into arrear, to remove without warning or legal process, on getting a month's notice by letter, is an obligation which the law will not recognise—which cannot be enforced at all in any court or by any action. I cannot accept that proposition. I see nothing to prevent a court of justice recognising and enforcing this obligation. Generally speaking, every clearly expressed obligation granted deliberately on just and true consideration, if not illegal or *contra bonos mores*, is to be recognised and enforced in a court of justice. Is this obligation an exception? I think not. It was the consideration in the bond; it was the condition on which the money was given and received. The lender might have said, "I will not lend the money unless you (the borrower) *unico contextu* convey the subjects to me, retaining a power to redeem on payment." That would not have been unlawful if the borrower agreed to it. The lender might also have said, "You shall repay me the whole sum within three years, or you shall then convey to me your estate that I may draw the rents, pay myself, and account for the balance;" or he may, as here, stipulate for payment by instalments, and, on failure to pay instalments, stipulate for the power of removing on a month's notice, without other warning, and without legal process, the debtor having a power of redemption, and the creditor being bound to account, and in any view being entitled to no more than his just debt. Any one of these modes of arranging the relations of debtor and creditor in the bond is legitimate, if

clearly expressed and mutually agreed to, and if there be no fraud or deception. No fraud on the part of the creditor is suggested here; no doubt can exist on that point, and no doubt is suggested as to the creditor's good faith, or as to the meaning of the deed. On the part of the debtor there has been a failure to pay. On the part of the creditor all the conditions have been fulfilled. He lent the money; he waited till the instalments had fallen more than sufficiently into arrear; he acted with no harshness or pressure, or sharp procedure. He afforded full opportunity for payment; he amply gave the stipulated notice, and in the stipulated manner, and he craves from the Sheriff of the county warrant to enforce the obligation to remove, and to enforce it according to its plain meaning. It is said that every consentual obligation is not enforceable. That may be so. But such cases are exceptional. The general rule is that a consentual obligation is enforceable. It is vain to say, as has been argued here, that the right of the defender to demand legal process before removing cannot be relinquished even in express terms. It has often been relinquished by tenants, and summary removing has been sustained. In a case of notice on a bill of exchange, which is a most important matter, it is settled that such notice can be waived, and effect has been frequently given to such a waiver. But the right to demand legal process before removal, the right to refuse to be satisfied with a month's notice to quit given by letter, is surely not less susceptible of distinct waiver than the right to demand notice of dishonour of a bill.

I do not doubt that there may be, in a bond, a clause so unfair and oppressive that a court of justice would refuse to enforce it. It might be equivalent to the surrender of liberty or of honour. It might be so cruel and grasping that equity recoils from it; or so immoral that justice rejects it. There is nothing of the kind here. No wrong is done or proposed by this creditor; and the principles of morality are certainly not favourable to this debtor. On the contrary, in my humble opinion, viewing this case as between the debtor and the creditor (for no other interest is now involved), the equity and the honesty of the case is with the creditor. The good faith of the transaction is with the creditor, and in dealing with a consentual obligation that is of the utmost importance. The *incorrupta fides* is truly the *justitiæ soror*. I should regret their separation. It would be to me matter of great regret if the law compelled us to decide against the honesty of the transaction, and to refuse a remedy which good faith requires.

On the first point, therefore, I am of opinion that Wylie's obligation to remove without legal process, and without other warning than a month's notice by letter, is an obligation which the Court cannot justly refuse to recognise, or refuse to enforce.

The next question is, Can this obligation be enforced in any court by summary procedure? I am of opinion that it can. The plain meaning of the obligation is, to remove on a month's notice without legal process. To avoid protracted legal procedure was the aim and intention of both parties. To insist on the legal process of a declaratory action at the creditor's instance would surely not be in accordance with the meaning of the parties, or with the stipulation in the bond. That cannot be maintained. The plain and honest meaning of the bond is clearly to the contrary. Where there is no obligation to remove without warning or legal process, a different course of procedure must be pursued, for there the grounds for removing must be cleared; but here the failure to pay, the falling into arrear, is not disputed, and is proved in the manner agreed on; and the acceptance of a substituted notice, and the obligation to remove without warning or legal process, is, when clearly expressed, sufficient in law to sustain a summary action for removal. Effect has often been given to a waiver of notice in the negotiation of a bill. In many other cases a legal objection has been held to be waived. This clear and express obligation to remove without legal process is surely a waiver of the right to demand legal process. This has been repeatedly recognised in cases between landlord and tenant; and in my opinion the rule and principle of law is, in this case, quite the same. In the case of *Brown* v. *Peacock*, Feb. 27, 1822, 1 Shaw, 359, the tenant bound himself to remove at the end of the year without warning or process of removal. The landlord applied to the Sheriff for warrant for summary ejection. The Sheriff sustained the defence that there was no warning; but the Court, adhering to the judgment of Lord Gillies (Ordinary), recalled the Sheriff's interlocutor, and remitted to him to decern in the ejection. This decision is of undoubted authority, and referred to by our more recent writers; and the law and practice in Scotland, in regard to the removal of tenants, is in accordance therewith.

I may also mention the case of *M'Laren* v. *Marquis of Breadalbane*, Dec. 17, 1831, 10 Shaw, p. 163, where the decision in *Brown* v. *Peacock* was referred to by Lord Moncreiff, whose judgment was adhered to by the Court.

But not only in actions against tenants has this law been applied. In the case of *Nisbet* v. *Aikman*, Jan. 12, 1866, 4 Macph., 284, a summary removing was sustained and enforced against a person who was not a tenant, and between whom and the proprietor there was no contract of lease or otherwise. In that case of *Nisbet* the defender had no title to maintain his possession. He was an intruder. In this case the defender Wylie has no right to maintain his possession. He has bound himself to remove. In *Nisbet's* case the defender objected to the summary procedure for ejection and removal. The Court, however, sustained the competency of the summary procedure, and the defender was ejected accordingly.

I have carefully considered the authorities on this point, and I have found no decision to prevent my taking the next step in this course of reasoning. I think that if this obligation to remove on a month's notice without legal process, is such as a court of justice can recognise and enforce at all, then it can be enforced by summary procedure. An heritable creditor cannot remove the owner of heritable subjects by summary procedure, unless there be a distinct obligation so to remove. But the man who has bound himself to remove without warning, except the month's notice which he has got, cannot demand other warning. The man who has bound himself to remove without legal process cannot insist for legal process before removing. There is, in my opinion, no authority to support such a demand by the party who has given such an obligation, and who has received and retained the money which he got in return for the obligation.

The remaining question is, If summary procedure to enforce ejection is competent, is it competent before the Sheriff?

I think it is. Nay, more, I think that a sum-

mary procedure for ejection on an obligation to remove is appropriately and peculiarly within the jurisdiction of the Sheriff. The regulation of possession, and the enforcement of obligations in regard to possession, is well understood to be the special province and function of the Sheriff. There is no question of competing heritable right here involved. The bond and disposition in security is very clear in its terms, and is registered in the Particular Register of Sasines at Edinburgh. The right of the petitioners to enforce every legal obligation there contained is therefore unquestionable, and is not disputed. The obligation to remove without process of law is also clear beyond the possibility of dispute. The creditor has fulfilled and instructed all the conditions which entitle him to remove the debtor from the possession which he undertook to quit. At this stage of the argument it must be assumed that the obligation so to quit possession is not illegal, and is enforceable, and is enforceable by summary procedure. I need not remind you that our law, like the Roman law, recognises *jurisdictio in consentientes*, or prorogated jurisdiction. A consent that removal shall be without process of law, is just an obligation to surrender possession on the warrant of the judge competent in questions of possession. If so, I really must say, with the greatest respect to your Lordships, that the petitioner's application to the Sheriff of the county, the Judge-ordinary of the bounds, the fit and appropriate arbiter in questions of possession, was, in my humble opinion, competent and legitimate, and that the Sheriff had jurisdiction to grant warrant of ejection as craved.

The case of *Blair* v. *Galloway* was quite different. The creditor held only an ordinary heritable bond, with power of sale, but no obligation to remove, and in that case the debtor was removed.

The case of *Macfarlane* v. *Campbell*, in 1857, is not of authority on this point, for the facts were very different. In that case there was no express undertaking by the debtor to remove, there was no obligation there, as there is here, to cede possession on getting into arrear, and to cede possession on a month's notice, without warning or legal process, This is pointed out in the note of the Sheriff, who was the late Lord Barcaple, and it is an important distinction between the two cases.

The observation of the Lord Justice-Clerk in the case of *Macfarlane* is indeed authoritative as applied to the case before him, or to a case where the facts are similar. But it is not applicable to this case, which is quite different, and no case of authority has been quoted to us where in the question of possession effect has been refused to a clear obligation in a bond such as we have here. I venture again to repeat, because it is of the greatest importance, that no question but a question of possession is now raised.

Our law has always recognised the jurisdiction of the Sheriff in questions of disputed possession; and, in cases of conventional obligation to remove from possession it is according to the law and practice of Scotland that the Sheriff can exercise that jurisdiction summarily. This has been recognised in many cases as between landlord and tenant, and in the case of *Nisbet*, to which I have referred, a person who was not a tenant was summarily ejected by the Sheriff, and the ejection was sustained by the Court. The form of this bond is new. We cannot expect direct precedents. The form has not been introduced by grasping creditors. It has been framed to meet the wants and wishes of persons of small means, desiring to acquire heritable subjects by purchasing with borrowed money to be repaid by instalments. It would be, on every ground, most unfortunate, if, in such a transaction, a breach of good faith should be successful.

Questions have been suggested which it is said may arise in regard to some of the other clauses in this bond, but which are not now before us. I reserve my opinion on these. It may be that the clause of forfeiture of the right is not clearly expressed. It may be that it is not effectual. No attempt is now made to enforce it. The present question relates not to the permanent right, but only to the obligation to remove or to cede possession, so that the creditor may take possession as stipulated, and obtain payment of his just debt. I think there has been some misunderstanding about this. But it was clearly explained by the Solicitor-General. I shall not detain your Lordships longer. I regret that I am compelled to dissent from this judgment. I would not have done so if I had not felt that a great principle of justice and equity is involved. To my mind it appears—1st, that to refuse to recognise this obligation to remove on the part of the borrower, who got his money on the strength of that obligation, is against the equity and good faith of the transaction; 2dly, that the enforcement of the obligation by summary procedure, and without other process of law, is according to the plain meaning of the obligation, and is the necessary consequence of its judicial recognition; and lastly, that the procedure for summary ejection or removal is competently and appropriately within the jurisdiction of the Sheriff.

I repeat that there has been no attempt, and there is no averment of attempt, on the part of the creditor to act without warrant. The debtor states on record that he was in possession of the subjects when the petition for warrant to remove him was presented to the Sheriff, and that is the fact. The question is, whether the law will refuse him the warrant which he asks? I am of opinion that he is entitled to remove Wylie from possession, and to that effect is entitled to the warrant which he craves.

Lord Neaves—I concur in the result of the opinions that have been delivered, and I shall state shortly the grounds upon which I do so. In such questions as this, the first point always to be looked at is the jurisdiction of the Court, and the competency of the application in reference to that jurisdiction. In this case I have come to be of opinion that the application made was incompetent in the Sheriff-court, that the Sheriff had no jurisdiction to give effect to the prayer of the petition, and that, in substance, the interlocutor of the Sheriff-Substitute was the correct interlocutor to pronounce in the circumstances, though some remark may possibly be made on certain of the grounds referred to in his note. The jurisdiction of the Sheriff-court depends partly, no doubt, upon statute, but a great deal of it depends upon custom; and in the conflict of jurisdiction between it and the Court of Session there are undoubtedly cases which do not belong to the Sheriff-court but to the Court of Session, and on this point we must look a great deal to practice. Now, the present case is a very peculiar one. I see it suggested that the true ground of application is a personal agreement on the part of the appellant to remove in a certain event, and it is pleaded as if the feudal or dispositive clauses of the deed were of no consequence to that question, and

that, if a man grant a letter or an I.O.U., and puts at the end of it, "If not paid within a month after so and so, as certified by your clerk, you shall enter into possession of my house and premises," that personal agreement can be enforced in the Sheriff-court. Now, I entirely demur to that, and for this reason among others, that I am not aware of any instance or example of such a proceeding. A case of that kind comes to this, that a man, without even the shadow of a heritable right, but with a mere personal obligation from a proprietor who still remains the true proprietor, can ask the Sheriff to turn that true proprietor out of his possession. I never heard of such a case, and I do not believe in any circumstances that has ever been attempted. The case referred to by Lord Benholme shews that even in more favourable circumstances that has not been attempted. That is on the footing that there is nothing but the personal obligation to be founded on, which is said to be the thing here sought to be enforced. It is a bargain independent of all right of a heritable nature; the owner has bound himself to walk out of these premises in a certain event, and that event has occurred, and therefore he must go in the most summary way possible. The clause, as framed, indeed, empowered the creditor to put him out without any process. Now, I think it very necessary to distinguish a case of that kind from the case of removing tenants or possessors who are not proprietors. What is requisite there is, that the pursuer of that removing, on the one hand, shall have some title of property as against the possessor, which being established is a title to pursue the removing; and then the only parties that are to be removed in the shape of tenants or squatters, are either those who never had a title to possess at all, or those who have had a temporary title, but which title has come to an end, either by the arrival of its natural ish, or by the operation of some reasonable stipulation in the deed, which brings the title of possession to an end. The party having no title of possession may be immediately ejected, subject to the consideration which prevails in several cases where warning is required, in order to give a tenant the usual time provided for by Acts of Parliament. That has no application to the present case. Here the condition of parties is the reverse, so far as title is concerned. It cannot be doubted that the proprietor has a title to possess, and the pursuer here has no feudal nor heritable title of any kind, and only sues *ad factum præstandum* on a personal obligation, which he seeks to enforce summarily in this way, to the effect that he shall bring to an end the most valuable part of a proprietor's privileges in his property, viz., that of possession, in a way which is unprecedented in the Sheriff-court. Supposing this pursuer has a heritable right to fall back on, and that he endeavours to dovetail the two together, it might give rise to very nice questions in regard to a competition between the heritable right of the actual proprietor and the heritable right acquired under this bond. It is admitted that there are things stipulated for in this bond that can never be enforced. That was explained by the judicious concession of counsel. It is one of the conditions of the bond which the respondent signed, that on being in arrear a certain number of amounts his interest in the property should entirely cease. Upon the failure to pay £9, 1s. 6d., these parties, by the letter of the bond, are entitled, of their own authority, to walk into possession, and they stipulate that they shall be exempted from a liability either for waste rents or for the insolvency of tenants. These are certainly most severe penalties, and they are an additional reason why no such result should be declared by a court like the Sheriff-court, which ought not to interfere as to indulgences in regard to penalties, or to equitable relaxations of the law but ought only to act where the letter of the law, is clearly enforceable. Further, the question, what is to happen when possession is entered into, appears to require clearing up. Are the instalments to run on and be due with their 10 and 15 per cent., and with additional interest if the bank raises its rate; or is the debt to be converted into the principal sum already advanced? All these are difficulties left over. There is a power of redemption, but it is on payment of a single sum "as may be arranged" with the creditors, who I suppose, have the power to refuse any terms they choose. The respondent is to be ousted from his property, and it is to go into the hands of these parties without any obligation to do exact diligence. No one can tell the maximum due by the bond. All these are questions that must be faced in order to extricate the rights of parties here, and it would be most inequitable to turn this proprietor out of the property and put the other into possession with all these clauses lying behind, on which, I conceive, the Sheriff cannot adjudicate. I hold the stipulation now sought to be enforced to be to a great extent a penal irritancy or forfeiture of his most important privilege of possession, and no such penal result can be imposed in any other than this Court. It is not like the ordinary stipulation that a tenant shall remove when certain natural events occur which are plainly equitable and reasonable between his landlord and him; but it is a hard and severe stipulation, by which a property, worth it may be hundreds of pounds, is taken away, thus inflicting very great loss on the party. The Sheriff in his interlocutor deals with it as a case of irritancy and forfeiture. I do not think these are terms which, if they are rightly applicable to the case, as I think they are, are such as the Sheriff has power to pronounce upon. When the matter is brought here we will consider it. I refrain from saying anything more as to the questions raised, except that the very nature of these questions frequently enters into the point of jurisdiction. In many cases there may be a very good jurisdiction *prima facie*, but on the appearance of the other party, and the statement of his pleas, it may cease to be competent before the Sheriff, from its involving competitions of heritable and real rights, of which the Sheriff is not a competent judge. I cannot help thinking that the parties here have tried to put too much into their bond in order to secure what they wished; and a man may, by attempting too much, succeed in getting much less. Vaulting ambition by rising too high may not get seated in the saddle, but fall on the other side; and I think it would have been better if the parties here had tempered their conditions a little more, and endeavoured to stand on conditions which they could *in terminis* enforce.

Lord Kinloch—I am of opinion that this process was incompetent before the Sheriff-court, and was rightly dismissed, in the first instance, by the Sheriff-Substitute, although I am not prepared to adopt all the expressions of his interlocutor and note,

The question arises on a heritable bond and disposition in security of a very peculiar and stringent character. With some of its most remarkable clauses, such as those irritating the right of property of the debtor in a certain event, we are not now directly concerned, and on these I desire to offer no opinion. The clause with which we have to deal is that which gives power to the creditors, "in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of the said subjects, and to enter into possession thereof themselves, to let the same and to draw the rents thereof; and that one month after a letter under the hand of the manager, or law agent of the said Association for the time being, has been addressed to me, intimating the intention of the said Association to remove me as aforesaid, without any warning or legal process whatever." The provided notice is said to have been given; and the debtor having failed to go out, the petition with which this process commenced was presented to the Sheriff for summary warrant of ejection.

The object of these proceedings is to recover from the subjects and their rents the instalments due on the heritable bond. And an argument at once arose, of great strength and cogency, that in the ordinary case such recovery could not be made except by means of the well known diligences of maills and duties, and poinding of the ground; and that parties could not competently contract to dispense with such diligence, and to give the creditor right to make the same levy at his own hand, without any process whatever, and so to assume a position of great advantage over all other creditors, who were left to the ordinary diligence of the law. The answer was, that parties were entitled, as between themselves, to contract as they pleased; and whatever might be urged by third parties, that the debtor could not fly in the face of his own contract. The rejoinder was, that the law did not permit parties to contract as they pleased, where the object was to supersede and set aside forms and proceedings laid down by the law on considerations of public policy, and for the general good of the community.

I do not feel called on to decide at present whether the creditor in the bond can, by virtue of the contract, enter into possession of the subjects without the usual forms of diligence—as, for instance, by a process of declarator and removing before the Supreme Court. It is enough for the disposal of the present case to decide, as I concur in doing, that the creditor could not competently enforce his right by a summary process of ejection before the Sheriff-court. On this point I entertain a clear opinion. The object of the process is, by virtue of a conceived heritable right, to turn out of possession the feudal proprietor of the subjects. The Sheriff cannot decern in the removing without deciding a preliminary question of heritable right—that is to say, deciding that a contract to the effect in question, as to a heritable subject, is a valid and effectual contract. Certainly the proposed removing may, in the strictest sense, be called extraordinary. To such a proceeding I think the Sheriff-court incompetent, according to our best settled principles and most familiar authorities. Whether the right may be enforced by a process of declarator and removing before the Supreme Court it is unnecessary at present to inquire. It is enough that this summary process of ejection is inadmissible.

If, as it is contended, the contract of the parties sanctions this proceeding before the Sheriff-court, I have no hesitation in holding that the contract is one which cannot be legally enforced to that effect. There is great latitude given to parties to contract away their private rights. But they cannot contract away the established rules of courts of law, nor confer jurisdiction on courts to which the law says jurisdiction does not belong. This is what the parties have, on the assumption now made, attempted to do. They have not only contracted that the creditor should, without the usual forms of diligence, enter on the land for recovery of his heritable debt; but further, *ex hypothesi*, that if the debtor refuse to give effect to the contract, the Sheriff shall enforce it by a summary warrant of ejection. This, I am of opinion, no contract of parties can render admissible or effectual.

Lord President—The granter of this bond acknowledges to have received in loan the sum of £550; but the leading obligation which he undertakes is not the ordinary obligation to repay that sum with interest, but it is to pay the sum of £9, 1s. 6d. sterling "each and every month, during the period of six years, from and after the date of delivery of these presents, and that in full repayment of the said sum of £550 and interest thereon." All the rest of this bond—every clause of it—is intended either to secure the payment of these instalments or to enforce payment; and the clause with which we are more immediately concerned—the clause of removing, as it is called—is to come into operation as soon as one of these monthly instalments has fallen into arrear for two months, and a notice has been given by the Company that they intend to enter into possession. Now the first question which arises is, whether, upon the occurrence of these events, the creditor in this bond can lawfully enforce the clause of removing against the debtor; and that involves the question whether such a clause is effectual to a party possessed only of a temporary and redeemable title against another party who is feudally vested in the estate in absolute property. That is a question of considerable importance, and it is one upon which I am not going to give an opinion. But it appears to me very clearly not to be a question that can be competently tried in the Sheriff-court. And yet, according to my view of the case, it stands upon the very threshold of the dispute between these parties. Another question which will inevitably require to be considered before possession can be given under this clause of the bond, is to what effect that possession can be given and taken; and this general question involves a number of very difficult particulars. Is that portion of the bond which provides that the creditor entering into possession of the subjects shall not be liable for waste rents or insolvent tenants, or be bound to do exact diligence, binding between the parties? It appears to me that, before any course of possession can be begun under this clause, it is of the utmost importance to settle whether that is one of the conditions of the possession. But again, to what effect is this possession to be had and continued? Is it to the effect only of taking payment out of the proceeds of the estate as they fall due, as much as will keep down the monthly instalments of £9, 1s. 6d. as they fall due? or, supposing the produce of the estate to be more than sufficient for that pur-

pose, to what is it to be applied? Is it to be applied to reduce the principal sum of £550, which there is no obligation to repay except by the prescribed monthly instalments? or is it to be paid over by the party in possession to the proprietor of the subjects? Again, how long is this possession to last, and how may it be brought to an end? There is a clause which provides that the debtor, on giving two months' notice to the manager of the Company, may, at any time during the currency of the six years, redeem the subjects upon certain conditions. Does that mean that he cannot redeem the subjects upon any other condition? Does it mean that he cannot redeem the subjects, and re-enter into possession himself, upon paying up all that is due? Does it or does it not mean that? And again, does it mean that, after the six years have expired, the debtor is then to be entitled to re-enter into possession? or does it mean that he is never to re-enter into possession if he allows the six years to expire? All these are possible constructions of this clause; and it seems to me that it would be against all precedent and practice to allow possession to be taken under a bond of this kind, in virtue of this unprecedented clause, without defining what are the rights of the possessor under a possession so to be taken. Now, that is the proper subject of an action of declarator, and I am not aware of any other form of process by which these rights and powers can be defined; and for that reason, again, it appears to me that this proceeding is entirely incompetent in the Sheriff-court. No doubt the debtor has bound himself to flit without any warning or legal process whatever: but then, if such a removal necessarily presupposes the decision of the questions that I have now been considering,—if it necessarily presupposes that it is clear law that the irredeemable title shall in this matter yield to the redeemable, and that every one of the most unfavourable suppositions which I have suggested as to the meaning of this clause is clearly the right one against the debtor—then I say that it is impossible for a party to bind himself to this effect; nay, if he had said in so many words, "And when this occurs I shall submit to be summarily ejected by warrant of the Sheriff,"—I should have held that to be an incompetent obligation not binding upon the debtor. It is exactly the same thing as if the parties had contracted thus:—"And instead of this obligation being enforced by a declaratory removing in the Court of Session, to which otherwise it would be necessary to resort, we consent that that process shall be had in the Sheriff-court." That is an obligation of no effect. It is an attempt to create a jurisdiction against the law, and no parties can do that. No parties can vest the Sheriff with a jurisdiction to entertain a declarator of property. They may, indeed, make the Sheriff arbiter in a particular event or case. That is a different affair. But they cannot vest him with judicial power to entertain a declaratory process, or pronounce a declaratory judgment affecting questions of real property. For these reasons I come to the conclusion, with all your Lordships, that this petition in the Sheriff-court of Linlithgowshire was incompetent; and I purposely abstain from giving any indication of an opinion as to what the result of a declaratory action in this Court, with conclusions for removing, may be if it shall be resorted to.

The Court accordingly recalled the interlocutors appealed against, and found the petition incompetent.

Agent for Appellant—David Miln, S.S.C.

Agents for Respondents—Murray, Beith, & Murray, W.S,

Saturday, December 23.

MACKNIGHT (CLERK TO THE WATER OF LEITH SEWERAGE COMMISSIONERS) *v.* W. & D. MACGREGOR.

Assessment—Edinburgh and Leith Sewerage Act, 1864. A proprietor whose premises had, subsequent to the construction of the sewers authorised by the Edinburgh and Leith Sewerage Act, 1864, been connected therewith, *held* not entitled to resist payment of the assessment fixed by the Commissioners under the Act as a reasonable sum for the use of the sewers, on the ground that the assessment was unreasonable in amount, and that the expense of construction had been already defrayed.

By section 18 of the Act 27 and 28 Vict. c. 153, it is enacted, that it shall be lawful for the Commissioners to construct and maintain the sewers and works therein enumerated in the burgh of Edinburgh and Leith. By section 65 of the said Act the Commissioners are empowered to estimate and fix the sums which may be necessary from time to time for constructing the works thereby authorised; and also to apportion the same between the Corporation of Edinburgh and the Corporation of Leith.

To meet the expense of construction thus laid upon them, the Corporations are, by section 68, empowered to levy an assessment, not exceeding 2s. 6d. per pound of yearly value, on the owners of lands and heritages within the districts benefited by the works.

Section 87 contains a similar provision for meeting the expense of maintenance.

Section 47 provides—"The owners of all lands, houses, or other property, any sewer, outfall, or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the Commissioners of a reasonable sum of money for the use of the said main or branch sewers and works, which the Commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property: Provided always that such lands, houses, or other property shall not have been assessed for the expense of making such main or branch sewers or works; but if such lands, houses, or other property shall have been so assessed, and shall have been built upon, enlarged, or altered after the assessment for making such main or branch sewers or works was imposed and levied, the owners thereof shall be liable in payment to the Commissioners of such reasonable sum of money as aforesaid."

Section 85 provides for the disposal of any surplus funds in the hands of the Commissioners by apportionment between the Corporations of Edinburgh and Leith.

The defenders W. & D. Macgregor, who are builders in Edinburgh, are the proprietors of certain buildings recently erected, situated in Balfour Street, Leith, and Valleyfield Street, Edinburgh.