his rent. It does not follow that every alleged deviation from incidental stipulations in the contract will entitle a tenant to resist the demand of the landlord for the liquidated rent; and questions have often occurred in regard to caution or consignation as the condition of allowing the tenant to defend or suspend the demand on such grounds. But by a series of decisions it is well fixed that if the lessor by his own act withhold from the tentant in whole or in any material part the subject of the lease, the tenant may resist payment, to the extent at least of what he has suffered. But, of course, the tenant's averments must be proved; and what we have now to consider is, whether the averments in this case have been proved or not.

LORD COWAN—It has been strongly pressed for the pursuers in this case that the defence is not relevant, and should not have been sustained, that therefore the Sheriff ought not to have allowed a proof; and that the interlocutor by which he did so was erroneous. But that interlocutor, which embraced all the allegations as to the withholding of the ammoniacal liquor, &c., was acquiesced in by both the parties, and thus what might otherwise have been a difficult question to deal with has been removed. I quite concur in the general views urged for the pursuers by Mr Watson. A liquid claim for rent is not to be met by an illiquid claim for damages, but there must be a liquid claim for damage, or at least a claim capable of immediate liquidation. But the defence, as I understand it, is not a counter and illiquid claim of damage, but the defence that the landlord has not maintained the tenant in possession of the subject leased, but has withheld from him certain subjects which under the lease he was entitled to; and this is a perfectly relevant defence to a claim of rent.

LORD BENHOLME and LORD NEAVES concurred.

The Court repelled the objections to the relevancy of the defence, and affirmed the judgment of the Sheriff.

Counsel for the Appellants — Solicitor-General and Moncrieff. Agents — M'Ewen & Carment, W.S.

Counsel for the Respondent — Watson and Guthrie. Agents—Duncan & Black, W.S.

Thursday, November 14.

SECOND DIVISION.

[Lord Gifford, Ordinary.

BURT *v.* ARNOTT AND DRYSDALE

Testament — Forgery—Signature of Witnesses—Record—Court of Session Act, 1868, § 29.

Circumstances in which *held* that a deed did not constitute the completed will of a testator.

Adam Wilson of Auchengownie and Tannerhall died unmarried, without issue, on 25th June 1871. He left two deeds of settlement, one dated 25th December 1865, with codicil dated 7th October 1870, the other dated 9th February 1871. The deed of 1865 was regularly signed and attested, and was kept in the custody of Messrs J. & J. Miller, solicitors, Perth, the law agents of Mr Wilson. The estate of Auchengownie was disponed by this deed to John Arnott, farmer, Hatchbank, and the estate of Tannerhall to David Drysdale, draper, Milnathort; and Arnott and Drysdale were nominated executors. The bequest to Arnott was burdened with a yearly annuity of £40 to Helen Wilson, sister of the testator, who survived him. The residue was destined by the codicil to James Hutton, overseer, Hallgreig.

The deed of 1871 conveyed the whole of the testator's property to Catherine Burt, who was appointed sole executrix and universal legatory, and it contained no provision for the sister of Mr Wilson. This disposition was drawn out by Mr Blair, writer, Dunfermline, from instructions given by Catherine Burt, and bore to be signed by the testator on 9th February 1871 before these witnesses—David Burt, farmer, Deuglie, and David A. Burt, physician and surgeon, Aberdour. This deed was produced by Catherine Burt on 4th August 1871, in consequence of Arnott and Drysdale having obtained confirmation as executors to Wilson. In these circumstances, and on 16th November 1871, Arnott, Drysdale, and Hutton raised a summons of reduction of the deed of 1871, and their original plea in law was that the subscriptions of Adam Wilson were false and forged.

On 16th January 1872, the Lord Ordinary pronounced an interlocutor closing the Record, and allowing a proof under the Evidence Act, 1866. This proof was accordingly taken, and was closed on 12th March 1872. On 2d March 1872, and during the course of the proof, the following minute was tendered by the Counsel for pursuer:—"Assuming the signatures to the disposition and settlement, dated 9th February 1871, to be the signatures of Adam Wilson, which is denied, the said disposition and settlement is null and void, not having been tested or executed according to law, or with the requisite solemnities. In particular, neither the said David Burt nor David Abercromby Burt, whose names appear on the said disposition and settlement as witnesses to Mr Wilson's signature, subscribed it in the capacity of witnesses to Mr Wilson's signature. They were neither called to act, nor did they act, as witnesses to Mr Wilson's alleged signature, nor were they intended by the said Adam Wilson to be witnesses to such signature. They did not sign their names to the disposition and settlement till a considerable time after Mr Wilson's death, and when they so signed their names, neither the said David Burt nor David Abercromby Burt knew or had the means of knowing that the document signed by them was the document alleged to have been signed by the said Adam Wilson at Deuglie on 9th February 1871."

On same date, the Lord Ordinary pronounced an interlocutor opening up the Record, and allowing the amendment, reserving all questions of expenses.

On 27th March 1872, the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record as amended, proof adduced, and whole process, Finds that the pursuers have failed to prove that the deed under reduction, No. 19 of process, is false or forged, and assoilzies the defender from the conclusions of the action so far as laid on the ground of forgery; but finds that the said deed, No. 19 of process, was never completed by the deceased Adam Wilson, and was never intended by him to receive effect as his final and completed settlement; therefore reduces, retreats, rescinds, and annuls the said deed, No. 19 of process, and decerns and declares the same to have

been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect in judgment or outwith the same in all time coming, and decerns in the reduction accordingly: Finds no expenses due to or by either party, and decerns.

"*Note.*—The two great questions raised in this action are (first) Whether the deed of settlement founded on by the defender, bears the genuine subscription of the testator, or whether it is not a forged and fabricated deed? and (second) Whether, assuming the signature to be genuine, the deed is properly and legally tested, or rather, whether the deed was signed by the testator as his completed deed?

"But before approaching either of these two questions, it is impossible to avoid remarking that the deed in question, assuming the subscription to be genuine, is exposed to the strongest possible suspicion, and the circumstances in which it was prepared and executed cannot be left out of view in considering and determining the two questions which are submitted for the decision of the Court. The testator was, at the date of the deed in question (1871), a very old man, apparently nearly ninety years of age. The solicitor who prepared the deed never saw the testator, and never received any instructions from him, either oral or written. No draft of the settlement was ever communicated to the testator, or approved by him. The testator's ordinary agents were not consulted on the subject. The instructions to prepare the settlement were given, as from the testator, by Miss Burt, the defender, the sole beneficiary under the deed. To no human being, excepting the defender, were the testator's intentions ever communicated. The deed was not read over aloud to the testator; and, although he had an opportunity of reading it himself, it is not shown that he understood its nature and import. The instrumentary witnesses to the deed were the defender's father and brother, but even they had no conversation with the testator on the subject-matter of the deed; and, lastly, after the deed was signed, the testator acted in a manner inconsistent with the deed, and on his deathbed referred his friends to previous settlements in the hands of his agents, Messrs Miller, as the final and subsisting testamentary settlements of his affairs. The details connected with all these circumstances are fully brought out in the proof, and even if there had been no question of forgery, and no question regarding the testing or completion of the deed, the Lord Ordinary cannot help entertaining the gravest doubts whether such a settlement could receive effect.

"There is a most salutary jurisdiction in Courts of Equity to set aside, on grounds of general or public policy, deeds obtained gratuitously by a donee standing in relations of confidence towards the testator or donor, in circumstances which create a presumption that undue influence had been exercised. The principle is of the widest application. It extends to all the relations of life, but each case necessarily depends on its own peculiar circumstances. (See a great variety of such cases collected in 'Tudor's Leading Cases in Equity,' vol. ii., p. 528, in a note to *Huguenin* v. *Basely*.) A familiar illustration of the application of the principle occurs when a law-agent takes a settlement from his client in favour of himself; and in such cases it has been held that there is a presumption against the deed which the grantee must overcome by evidence, otherwise the deed will be set aside. (See the recent case of *Grieve* v. *Cunningham*, 17th December 1869, 8 Macph. 317.) In this case, Lord Barcaple observed, and his observation was approved of by the Court, that 'in many, perhaps in most cases, the presumption against the deed created by the mere circumstance that the party favoured is the law agent who prepared it, will supply the want of all other elements of fraudulent impetration. It never can be a proper course, in any ordinary circumstances, for a law agent so to act, and the Lord Ordinary conceives it will always lie upon him to show that the making of the settlement in his favour was the free and uninfluenced act of the testatrix, deliberately entertained, and carried through with an entire knowledge of its effect.' The case of a beneficiary who prepares a deed in his own favour may be more favourable, but still it is analogous; and the circumstances of the present case seem to make Miss Burt's position almost as unfavourable as if she herself had written out the deed. The employment of Mr Blair goes for nothing. He was merely the defender's hand, and had nothing whatever to do with the testator, and it is in evidence that the defender had an influence over the aged testator which might very easily be improperly used. In the present case, however, the deed is not challenged on the ground of undue influence, and it is unnecessary further to consider this aspect of the case. The Lord Ordinary has only referred to it, because, in his view, it has a bearing, and perhaps not an unimportant bearing, on the two questions on which the parties have joined issue. To these questions, the Lord Ordinary will now shortly advert.

"1. Are the signatures 'Adam Wilson,' affixed to the deed No. 19 of process, the genuine signatures of the late Mr Wilson; or have the said signatures been forged and fabricated? After very carefully weighing and perusing more than once the mass of evidence which has been adduced, the Lord Ordinary, acting as a jury, is of opinion that the pursuers have failed to prove that the subscriptions are forged or fabricated. He thinks, on the whole, that the subscriptions must be held to be the genuine subscriptions of the testator, although he has not come to this conclusion without considerable hesitation. The evidence relied on by the pursuers as establishing forgery, may be said to consist (avoiding all detail) of (1) evidence as to the handwriting; (2) evidence as to the date of the deed; (3) evidence derived from the conduct of the testator; and (4) evidence derived from the conduct of the defender. The evidence as to the handwriting is certainly very strong against the deed, and if it stood alone might suffice to set it aside. But evidence as to the character of handwriting, whether given by those familiar with the testator's writing, or obtained *ex comparatione literarum*, must always yield to positive proof that the testator did, in point of fact, with his own hand, actually adhibit the signatures in question. Now, the Lord Ordinary could not hold the signatures to be forged without holding at the same time that the defender Miss Burt, her brother Dr Burt, and her father, Mr David Burt, are each and all of them deliberately perjured on a point entirely within their own knowledge, and as to which they cannot but have known that what they solemnly deponed was untrue; nay, farther, if the signatures are forged, it would be difficult to avoid the conclusion that the boy James Robert Burt, and the defender's sister Margaret Burt, are also perjured, for, although they did not see the signing, they depone to the

meeting when the signature was affixed, and they corroborate, in minute but most important particulars, the evidence of the leading witnesses. Accordingly, the Lord Ordinary understood the counsel for the pursuers boldly to charge the whole Burt family with daring and direct perjury. It was necessary to do so for this part of the case. Now, this raises the most momentous issue possible, and involves three persons at least, and probably five persons, in the gravest criminal charge. If there is proof of it, the Court would not shrink from its duty, but very strong proof will be required—in substance, the same proof as would convict at the bar of Justiciary. The Lord Ordinary cannot think that such proof has been submitted. The defender, her father, brother, and sisters, were subjected to a most severe and searching cross-examination, conducted with very great skill, and yet no material discrepancies or inconsistencies were elicited. Even in minute details, in which preparation or pre-arranged concert was impossible, the challenged witnesses in substance corroborated each other. The Lord Ordinary watched as closely as he could the demeanour and bearing of the witnesses, and he cannot say that he detected anything which would lead him to infer that they were conspiring to tell a false and a fabricated story. He scarcely thinks it possible that, if their evidence as to the signatures had been false, they would not have broken down under one or other of the tests which were applied. No doubt the signatures differ in various particulars from Mr Wilson's ordinary subscription; but this may be accounted for in various ways, some of which are suggested on the evidence; and it is an obvious remark that, if the deed had really been a forgery, the forger (who certainly had the means of doing so) would have formed Mr Wilson's characteristic capital 'A,' and not have so bungled his work as to expose it to detection, as Mr Miller says, on the first glance. It would be a serious matter to infer forgery merely from the character of a signature, as all signatures, however genuine, are apt to vary from untraceable accidents of time, place, and circumstances—the paper, the pen, the ink, the posture of the writer, and a hundred other incidents, especially when the writer is an old man who comparatively seldom has occasion to write. The falsity of the date which the deed bears was strongly insisted in by the pursuer as instructing the forgery. The Lord Ordinary thinks, on the whole, it is proved that the deed could not be signed on the 9th February, the date the deed bears. It seems that that day was Thursday, the evening of a certain 'Struie party,' and that the testator was at home unwell all that day. But holding this to be proved, it is not fatal to the deed in the circumstances in which the testing-clause was filled up. The testing-clause was not filled up for six months—that is, till August 1871—and as no note of the date of signing had been taken, the date (9th February) was reached only by a calculation made by the defender and her brother Dr Burt. The Lord Ordinary inclines to think that they have miscalculated, and have mistaken a week back or forward. He thinks it probable that, assuming, as he now does, that the deed was actually signed at Deuglie, it was so signed on the 2d of February, to which date no objection would apply, for it would be too much to go on the evidence of the school roll kept by the witness John Young. A mistake in filling up the date of a testing-clause, though it may be a suspicious circumstance, will not vitiate an otherwise unobjectionable deed. The date of such a deed is not essential. If there was doubt, the month alone would have been sufficient. The conduct of the testator on the one hand, and of the defender on the other, were much founded on as pointing to forgery. The Lord Ordinary cannot so read the evidence. He thinks the conduct referred to is explicable in perfect consistency with the subscriptions to the deed being genuine. Indeed, in another view, the defender's conduct is unaccountable if she or some one for her really forged the deed. No forger ever proceeded as she is said to have done. For example, she laid aside the deed as useless, believing it to be invalid because it had not been signed by witnesses, and it was only at an accidental meeting—a meeting clearly proved to be accidental—that, in consequence of advice from third parties, she got the deed completed and made a claim thereon. So in other particulars the defender's proceedings are quite different from those of a forger. On the whole, therefore, and on the question of forgery, the Lord Ordinary finds for the defender; but—

"2. Is the deed duly tested? or rather, was it signed by the testator as a completed deed, and with the intention that, without any further act on his part, it should receive effect as his settlement? This is a most important and a most delicate question, and one on which, perhaps, there is no direct precedent. It was not raised on the record as originally closed, but only came out in the course of the proof, and led to the amendment which, after full discussion, was allowed by the Lord Ordinary by interlocutor of 2d current. The Lord Ordinary thought it right to allow the amendment, because, in conformity with the recent statute, all questions really arising between the parties, and within the conclusions, should be determined in the present action, instead of remitting the parties to a new suit. He reserved the question of expenses, and to this reservation he has given effect in the present judgment. In considering the question raised by the pursuers' amendment and additional plea, the Lord Ordinary assumes the entire truth and accuracy of the depositions of the defender, her father, and brother. His judgment proceeds upon the facts as stated by the defender's own witnesses, corroborated by the conduct of the testator, and by the real evidence in the case. According to the evidence of the defender, her brother, and father, it appears that Dr Burt objected to signing as instrumentary witness, on the ground of relationship to the defender, an objection in the circumstances most natural and proper. The objection, though not stated by or for the father, was equally applicable to him, and he was never asked to sign as witness. The testator yielded to Dr Burt's objection; and although he signed the deed, he did so on the footing that neither Dr Burt nor the father were to be the instrumentary witnesses, but that he, the testator, should come to Aberdour some other day, and there acknowledge his subscription before two witnesses who were 'no relations.' It was upon this footing that the signed deed was retained by the defender and taken to Aberdour. It is impossible to dispute upon the evidence that this was the arrangement upon which the deed was signed and left with Miss Burt. Dr Burt and his father were not to be witnesses, but the testator was to come to Aberdour and acknowledge his subscription before two independent witnesses there. No doubt this arrangement was made to obviate Dr Burt's objection; but the important fact is, that the objection was assented to

by all parties, particularly by the testator, who left upon the understanding, indeed upon the express agreement, that Dr Burt and his father were not to be witnesses at all. Now, the testator never went to Aberdour, he never acknowledged his subscription before two independent witnesses, or before any witnesses at all, and the question is, Was he not entitled to conclude that the deed was an incompleted deed, and to act accordingly? Or, to put the question in another way, Were Dr Burt and the father, after declining to be witnesses, after having their declinature admitted by the testator, and after allowing the testator to leave the deed on the footing that other witnesses were required, entitled at their own hands, behind the testator's back, *ex intervallo*, and after the testator's death, to change their mind, and to complete the deed which the testator thought could not be completed without an acknowledgment to be made by the testator himself?

"The question thus arising on the evidence of the defender's own witnesses is extremely important, and it must be kept in view that that evidence is entirely and very strongly corroborated by the conduct of the testator himself, as well as by the conduct of the defender and her brother. The testator, as is proved by Mr Menzies and others, evidently thought that he had completed no new settlement inconsistent with that of 1865, in the hands of Messrs Miller, and the defender and her brother admittedly thought that the deed of 1871 was worthless, the same never having been completed, and they acted upon this footing for a considerable time.

"There seems no direct authority applicable to circumstances like the present. The recorded case most nearly in point is that of *Home* v. *Dickson*, June 1830 (Mor. 16,898), where a mutual contract was left in the hands of one of the parties incomplete and unsigned by witnesses. At the instigation of the party in whose hands the deed was left the witnesses afterwards signed, but it was found that the imperfect deed could not be thus completed without the consent of both the contracting parties. The true ground of judgment, as explained by Professor Menzies (Conveyancing, p. 119), and by Professor M. Bell (i. 49), was that the parties had not completed the deed when they broke up, and that it could not be in the power of witnesses to complete a contract which the parties themselves had left imperfect. If the deed itself was really completed, it is no objection that the witnesses sign *ex intervallo*. This is of everyday occurrence, and is established by many cases. Nor does the Lord Ordinary think there is any reasonable doubt as to the identity of the deed signed by the witnesses in August, with that which the testator signed in February preceding. The true, and in the Lord Ordinary's view, the only point is, that the testator did not sign the deed, and did not leave it with Miss Burt as his final and completed will. In point of principle, it seems clear that, if the testator did not intend to complete the will, any two persons who happen to see him sign could not, in spite of his intention, make it complete. Most of our writers lay it down that instrumentary witnesses must be called as such, either expressly or by implication. It is not a mere accidental sight of the signing that will make an instrumentary witness. Suppose the testator had expressly prohibited Dr Burt and his father from signing or from acting as witnesses, could they, in spite of his prohibition, act and sign as such, especially after the testator's death? Or, suppose that the testator, knowing that instrumentary witnesses were necessary (the deed not being holograph), should sign in the privacy of his own room, could two persons, who had stealthily or accidentally seen him sign by looking in at his window, complete and validate the deed without his knowledge? It is thought not, and the Lord Ordinary, while admitting the novelty, and, in many respects, the delicacy of the question, has really little hesitation in holding that, if it be once proved in point of fact that the testator did not really mean to complete his deed by signing it, then it can never be completed by the mere act of the witnesses.

"The result is, that while in the Lord Ordinary's opinion the deed is not reducible on the ground of forgery, it must be set aside as never having been completed by the testator. As the pursuers have failed in the whole original grounds of action, and have only succeeded on the new grounds introduced on amendment, the Lord Ordinary has found neither party entitled to expenses. He has hesitated whether some expense should not be awarded to the defender, who has been successful in repelling the accusation of forgery. But the defender was so much to blame in the manner in which the deed was got up, that substantial justice is done by allowing each party to pay their own expenses."

The defender reclaimed against the interlocutor of 27th March, on the merits, and of 2d March, which admitted the foresaid minute for the pursuers.

On the first point, the admissibility of the minute, the reclaimers contended that the real question at issue under the original summons was —Whether the deed was forged? and that, under the Court of Session Act, 1868, § 29, it was incompetent, after the record was closed, to add new grounds of action and new pleas to the record, which could not have been extracted from the original summons. Upon the merits, they contended that the deed was signed by the testator at Deuglie on the 2d or 9th of February 1871, and that the witnesses who signed the deed saw the testator adhibit his signature; that the Act 1681 made it necessary for the witnesses to sign, but no time was specified; that the deed was delivered to the beneficiary; and that the question, Whether it was a completed deed? was not raised on the record.

Authorities cited—*Gelot*, 8 Macph.; *Frank*, M. 16,824, 5 Paton's Appeals, 278; *Trail*, M. 15,955; *Greig*, M. 16,296; *Rait* v. *Primrose*, 21 D. 965; Duff on Deeds, p. 16; *Leeds Banking Company*, 14 S. 332; *Hill* v. *Harper*, 9 Macph. 223, Craig, ii, 424; *Beveridge*, 5 Adolphus and Elchies, 703; *Yeats*, 11 S. 915; *Forbes*, 7 Macq. 96; *Brown*, F.C. 1809; *Naismyth* v. *Hare*, 1 Shaw's Ap. 65.

At advising—

Lord Justice-Clerk—I think the defenders were entitled to have the minute added to the record. In the case of *Forbes* it was clearly too late when the case was substantially terminated. In the case of *Gelot*, your Lordships, even after the verdict of a Jury, opened up the record, and added a new ground of action, and I think that here it is quite competent under the Act, on certain conditions as to expenses. On the merits, I think three questions arise—(1) Was the deed a forgery? (2) Was it, if genuine, invalid, because the interval of six months elapsed between the time when the testator signed the deed and the filling up of the testing clause, or because the death of the testator occurred before the witnesses adhibited their signatures? (3) Was the deed invalid, as not being

completed by the testator, and not being intended by him to be his last will? On the question of forgery, I am not prepared to say it has been made out, because, in my opinion, that depends entirely on comparison of handwriting—of all evidence the most fallacious. On the effect of an interval elapsing between the signature of the principal party and the instrumentary witnesses, I should not be prepared to say that the mere fact would invalidate a deed, but there must be a reasonable cause for the delay, and an absence of suspicion, and the party producing the deed must be able to explain the circumstances. On the effect of the death of the testator I do not think it necessary to dwell. I think, from a view of the whole evidence, that it is proved that the testator died under the belief that something required to be done to complete the deed of 1871, and that the prior deed of 1865 was his completed testament.

Lord Cowan—I consider the case of *Gelot* a direct authority on the competency of admitting new matter after the closing of the record, even after the verdict of a Jury. I make no observation on the question of forgery. I consider it not proven. Neither do I found my opinion on the interval that elapsed, although I must say that the interval here is much greater than any that has previously occurred, and I rather agree with the view of Mr Duff that the intention of the statute was that the signature of the party and witnesses should be *unico contextu*. The real ground of decision I think is, that the testator left the world under the conviction that he had no other valid settlement but that of 1865, and I think the evidence of Menzies, who saw him on his deathbed, is conclusive on the point.

Lord Benholme—I give no opinion on the question of forgery: it is unnecessary to do so; but, taking the evidence in the case as unexceptionable, I think Wilson died believing he had executed no complete settlement, and that until he took an ulterior step it would not be complete—which step he never took, and that therefore at the time of his death he understood his will to be expressed in the deed of 1865.

Lord Neaves—I substantially concur. The pursuer of a reduction is in the position of an inverted defender, and the style of summons has always been peculiar, the conclusions being different from ordinary petitory conclusions of a summons. It has always been competent before closing the record for the pursuer of a reduction to add new reasons of reduction, because, until the deed was produced, he might not know all the grounds of objection. I understand this to be allowed by the Act of 1868, and that it is now just as competent to make the amendment after the record is closed as before, on certain conditions as to expenses.

I think the forgery is not made out, and the shape of the case renders it unnecessary to go into the other grounds of objection. It is clear the ulterior proceeding of going to Aberdour and getting other witnesses to sign was never carried out by the testator, and, in such a question, the animus of a testator is of the very greatest importance, as is strongly brought out in the case of *Naismyth* v. *Hare*, where the excision of a seal by a party was held to annul a testament.

The Court adhered, and, on the question of expenses, they gave the defenders expenses up to the date of lodging the minute of amendment, and the pursuers the expenses after that date.

Counsel for Reclaimer—Sheriff Crichton and D. Crichton. Agent—Thomas White, S.S.C.

Counsel for Pursuers—Solicitor-General (Clark) and Æneas Mackay. Agent Alex. Howe, W.S.

Saturday, November 16.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PATERSON *v.* ROBSON.

Process — Petition and Complaint — Competency— Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79).

A petition and complaint was presented in the Bill Chamber, at the instance of a creditor who founded on alleged wilful misapplication of the funds of the sequestrated estate, and other misconduct on the part of the trustee. In the prayer of the petition the Lord Ordinary on the Bills was craved, *inter alia*, to censure the trustee. The Court *refused* to allow the petition to be amended to the effect of withdrawing the conclusion for censure, on the ground that the application was of a penal character throughout; and *held* that the petition was not competent either under the Bankruptcy Act 1856, or at common law.

This was a petition and complaint raised in the Bill Chamber by William Paterson, stationer and merchant in London, against George Robson, accountant in Glasgow, trustee on the sequestrated estate of George Lambie, grocer and wine merchant, Glasgow. The petition narrated that the respondent had obtained an order from the Sheriff of Lanarkshire to examine certain persons in London, and, among others, Edward Gellatly. In regard to these examinations the complaint was, in the first place, that in contravention of the 84th section of the Bankruptcy Scotland Act 1856, the respondent had not recorded any of these examinations in the Sederunt Book, and had not proved them to be signed by the Judge and witness in the Sederunt Book, according to the invariable usage in Scotch sequestrations, and had refused even to make the examination patent to the petitioner as part of the sequestration papers. The 84th sec. of the Bankruptcy Act here founded on provides that "the trustee shall keep a Sederunt Book in which he shall record all minutes of creditors and of commissioners, states of accounts, reports, and all the proceedings necessary to give a correct view of the management of the estate; and he shall also keep regular accounts of the affairs of the estate, and transmit to the Accountant in Bankruptcy before each of the periods herein assigned for payment of a dividend, a copy certified by himself of such accounts, in so far as not previously transmitted, and such copies shall be preserved in the office of the Accountant, and the Sederunt Book and accounts shall be patent to the commissioners, and to the creditors or their agents, at all times, provided always that when any document is of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors on the estate), the trustee shall not be bound to insert it in the Sederunt Book, or to exhibit it to any other person than the commissioners."