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."

The second ground of complaint—in regard to these examinations—was that they were not for the benefit of the sequestrated estate, but for the benefit of third parties in London, and in particular of Smith & Co. The averment in support of this statement was that the bankrupt had contracted large debts to these parties for fitting up a ship which he had bought, and that when the ship was sold under mortgage these parties had lost their accounts, and that the object of the examinations was to enable them to make out claims against the mortgager and his broker the said Edward Gellatly. It was also averred that the examinations were for the further purpose of supporting a case depending in the Court of Queen's Bench, at the instance of Smith & Co., for recovery of claims which they had for furnishings of the ship as above mentioned, and that there was an agreement that the respondent was to get commission from Smith and the other contractors on what was recovered from Gellatly.

The petitioner therefore prayed his Lordship "to ordain the respondent to insert copies of said examinations into the Sederunt Book, and to make said Sederunt Book, containing said copies, patent to the petitioner, or at least to make said examinations or copies thereof patent to the petitioner. As also to ordain the respondent to desist and cease from using his powers as trustee foresaid, or employing the funds of said sequestrated estate, in assisting or furthering the claims of the said John Smith and the other contractors before mentioned. Farther, to censure said respondent in the premises, in such way and manner as to your Lordship may seem meet, and to prohibit him charging the expenses of the foresaid examinations, or any expenses connected with or arising out of the same, against the said sequestrated estate."

In answer, the respondent objected, in the first place, to the competency of the petition and complaint, and, in the second place, averred that in examining the persons in London, the trustee had acted in discharge of his duty, and for the behoof of creditors.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 29th October* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the petition and complaint, and answers thereto—Dismisses the petition; Finds the petitioner liable to the respondent in expenses, of which allows an account to be given in; and remits the same to the Auditor to tax and report."

In a note to the interlocutor, the Lord Ordinary, *inter alia*, said "that such an application to the Lord Ordinary on the Bills is not competent under the Bankrupt Act, and that the proper form of procedure is that prescribed in the 159th section of that Statute. By that section it is provided that the Accountant in Bankruptcy shall take cognisance of the conduct of the trustee and commissioners; and 'in the event of their not faithfully performing their duties, and duly observing all rules and regulations imposed on them by Statute, Act of Sederunt, or otherwise, relative to the performance of those duties; or in the event of any complaint being made to him by any creditor in regard thereto, he shall inquire into the same, and if not satisfied with the explanation given,' he shall report to the Lord Ordinary in time of vacation, or to either Division of the Court in time of session, who, after hearing 'and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require.' It seems to the Lord Ordinary that the petitioner's complaint (which is not presented at common law with the concurrence of the Lord Advocate, but under the Statute) is one of those which by the Statute falls in the first instance within the cognisance of the Accountant in Bankruptcy, and that the Court in time of session, or the Lord Ordinary in time of vacation, is not entitled to decide, and cannot decide thereon, unless the Accountant shall not be satisfied with the explanations of the respondent as trustee, and shall report the matter for decision."

The petitioner reclaimed.

It was argued for the respondent, that as the petition was of a penal nature—the whole of the application being laid upon the delinquency of the trustee,—it was not competent either under the statute or at common law, and should therefore be dismissed—*Bell* v. *Gow*, Nov. 28, 1862, 1 Macph. 84.

For the petitioner, it was proposed to amend the petition by withdrawing that part of the prayer asking for censure of the trustee. In support of this proposal it was argued, that the application had two perfectly separate purposes—(1) to enforce against the trustee a statutory duty, and to obtain for the petitioner a statutory right; and (2) for censure of the trustee. The first of these two purposes was the principal one, and quite distinct from the conclusion for censure, and it was only this latter conclusion which contained anything of a penal nature, and therefore by withdrawing it the respondent's objection would be entirely removed.

The respondent opposed the proposed amendment on the ground that the whole of the application was of a penal nature.

Lord President—To strike out the conclusion for censure would be to alter the whole character of this proceeding. The charge against the trustee here is of a most serious nature, for he is accused of employing the funds of the sequestrated estate, not for the benefit of the estate, but for private purposes. There is no grosser offence than this, and it is aggravated by the allegation of a bribe in the shape of commission. Now, if this petition had not concluded for censure, it would have been most inconsistent, and the censure of the trustee is of the essence of the petition. I am therefore of opinion that we cannot allow the alteration proposed.

Lord Deas—The ground of this petition is the misconduct of the trustee. It is stated that the examination here complained of was not for the benefit of the estate, but of Smith, in order that he might make out a claim; and the alleged motive for the trustee acting in this dishonest way is the commission which he is to receive. Then, in the prayer of the petition there are, in addition to the conclusion for censure, other conclusions of a penal nature, for it is asked that the trustee should be ordained to desist and cease from using his powers in the improper and dishonest way narrated in the body of the petition. So there is no doubt that this is a penal complaint throughout, and it is impossible to convert a penal complaint into a civil action merely by striking out the punishment. I have therefore no doubt that we must refuse the amendment.

LORD ARDMILLAN—I concur with your Lordships. The proposed amendment would not exclude all considerations of criminality. I think, however, that we ought to hear further argument as to the competency of the petition, on the ground that the amendment is refused.

The Court therefore refused to allow the amendment.

It was then argued for the petitioner that the petition was competent. For § 86 of the Bankruptcy Act, 1856, provides that "the trustee shall be amenable to the Lord Ordinary and to the Sheriff, at the instance of any party interested, to account for intromissions and management, by petition served on him." Now, the statute here provides a remedy by petition, and it follows from that that such a petition is competent. Again, the trustee is bound to do certain things for the creditors, and the creditors have the right to compel him to do these things. A petition is the most simple form in which this can be done, and is the way contemplated by the statute, as is apparent from the provisions of § 86.

LORD PRESIDENT—This application is not authorised by statute, nor is it competent at common law. It is not authorised by statute, for neither the 84th nor the 86th nor any other section of the Bankruptcy Act authorises a petition of this sort. Then it is not competent at common law, because (1) it is not presented to a competent court, the Bill Chamber having no jurisdiction in a cause of this sort; and (2) because the application, being of a penal nature, requires the concurrence of the Lord Advocate. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS—I am of the same opinion. It is neither right nor equitable that the trustee should be pulled up to answer to a penal complaint without some previous inquiry.

LORD ARDMILLAN concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the petitioner—The Solicitor General and Scott. Agent—John Walls, S.S.C.
Counsel for the Respondent—Watson and Asher. Agents—Millar, Allardice & Robson, W.S.

Monday, November 18.

TEIND COURT.

[Lord Gifford, Ordinary.

REV. JAMES CAMPBELL, PETITIONER.

(*Ante*, p. 22.)

Glebe Lands (Scotland) Act, 1866 (29 *and* 30 *Vict. c.* 71), § 17—*Conterminous Proprietor—Right of Pre-emption—Price.*

Circumstances in which the Court fixed the price to be paid by a conterminous proprietor purchasing part of a glebe, under the 17th section of the Glebe Lands (Scotland) Act, 1866, at twenty-five years' purchase of the minimum feu-duties, as fixed by the Court.

In an application made by the Rev. James Campbell, minister of the parish of Balmerino, for authority to feu part of the glebe of the said parish, under the Glebe Lands (Scotland) Act, 1866, the Court held that the building value should be taken as the basis for fixing the minimum feu-duties, and fixed them at the rates proposed by the Lord Ordinary (reported *ante*, p. 22). Subsequently, a conterminous proprietor, Miss Duncan Morison of Naughton, in terms of the 17th section of the said Act, intimated her willingness to buy the part of the glebe proposed to be feued, at twenty-two years' purchase of the feu-duties, or at such other rate as the Court should think proper.

The LORD PRESIDENT said that the Court were of opinion that the price should be twenty-five years' purchase of the feu-duty, at the minimum rate already fixed by the Court, and that the reason of this decision was, that this price, invested at 4 per cent., would give the minister the same return as he would have obtained from the feu-duties. It would also enable him, if he liked, to have the same security, for the price was sufficient to enable him to buy feu-duties of the best sort, giving him as good a return as the feu-duties which he would otherwise have received from the lands.

Counsel for the Petitioner—Thoms. Agent—G. B. Smith, S.S.C.

Tuesday November 19.

SECOND DIVISION.

[Sheriff G. Bell, Lanarkshire.

WALLACE. *v.* TODD.

Agreement—Construction.

Under an agreement with B, A was bound to supply dross and pay certain wages until coal should be put out and access to the working faces of a coal-pit should have been obtained—B undertaking to clear the pit of water. After two months A ceased to supply the dross, alleging want of due expedition, and also that coals were being put out of the pit—*Held* that no want of expedition had been proved; and, further, that the meaning of the agreement as to out-put of coal had reference to access to the ordinary working faces.

This was an appeal arising out of a petition in the Sheriff-court on an agreement entered into between the parties in 1868 by which *inter alia* Todd agreed to pay to Wallace—"*First*, the whole expenses incurred by him in the submission, as these may be taxed, if necessary, and that by bill at three months from the last date of this agreement; *second*, to supply to the said William Wallace, as he may require the same, and that continuously, as much good dross as he may require for the engines to pump the water from the workings in Solsgirth, and that until access to the working faces shall be obtained, declaring always that the said William Wallace shall be bound to use all due expedition in getting said access, and that in any event the obligation to supply said dross and pay said wages shall cease whenever coals are put out from the said pit, being No. 2 Solsgirth, and *third*, to pay to the said William Wallace weekly, the wages of the enginemen during the foresaid operations." Wallace in return to be held bound, on the full implement of the agreement, to assign formally to Todd his claim in the sequestration of James Gardner, coalmaster, under certain specified exceptions.