relief has not arisen. But the minister's claim for stipend has been made, and of this Lady Rothes undertook to relieve Mr Murray. The words seem to me clear. Lord Rothes said "I will relieve you of any claim by the minister, and you relieve me of any claim by the Crown for the annuity." The disponee has fulfilled his part of the bargain, and I think he is entitled to fulfilment of that of his author.

LORD NEAVES—I am of the same opinion. I can only regard this deed as a conveyance of the *universitas* of the teind under a certain burden. Now, a man is entitled if he can get rid of such a burden to do so in any way in which he is able, and once it be got rid of, the person who had to bear the burden is the person who must be benefited, and is in right to possess the estate free from the burden—when an augmentation was made that encroached on the burden he became entitled to relief.

I could have understood the plausibility of an argument that the augmentation which took place was entirely the result of the action of the disponee; but that view is not taken or maintained. Therefore I hold that the burden has been abolished for the benefit of the party who abolished it. I think that the augmentation was one upon the *universitas* of the teind.

LORD ORMIDALE—I am also of the same opinion. We have here an action, not raised by the Countess of Rothes, but at the instance of Mr Murray, who does not conclude for any payment of King's annuity or taxations subsequent to the date of the deed, but concludes merely for relief from augmentations. The defenders, however, raise the disputed question by maintaining that they are bound in relief of augmentations only subject to the exception not only of the stipend due at the date of the obligation founded on, but also of stipend or teind equivalent to the amount of the King's annuity, although they have never paid or been asked to pay any such annuity, and cannot now be troubled on the subject. I can see no ground for this defence. On the contrary, for the reasons stated by Lord Neaves, which meet with my entire concurrence, I consider it to be quite untenable. We must therefore look to the terms of the contract, which appear to present no room for difficulty or doubt in the matter. There is contained therein an undertaking by Lord Rothes, the disponer, to relieve the disponee of all future augmentations, and not only that, but of all future impositions *except* the annuity and taxations. That this obligation is binding in the present instance is clear, I think, under the only admissible construction of the contract.

LORD GIFFORD—I have come to the same result. The true question is, what did the parties mean and contract in the disposition of sale of 1632? In particular, what is the precise meaning and effect of the obligation of relief undertaken by the seller? Now, the subject sold was the whole teind, not the teind after deduction of the King's annuity. This teind was under several burdens or liabilities. It was subject to the existing burden of the stipend and of the King's annuity, and also of course of augmentations of stipend and of any taxations to be imposed, if any there should be. Now, we find in the disposition a bargain as to all these. In the first place, the existing stipend was payable by the purchaser; secondly, future augmentations were payable by the vendor; and thirdly, the purchaser undertook the burden of the King's annuity, and of taxations if imposed. All these burdens are variable, and it so happens that one of them has not only gradually diminished, but has entirely vanished, and therefore the purchaser, who was to run the risk of its growing greater, gains the benefit of its disappearance. In reality, I think that the existing burdens in 1632 were not intended to be a rule of guidance. It appears to me that each of these burdens must be taken as of uncertain or variable amount, and the parties respectively take their chance of their incidence, and so the King's annuity is treated as a tax subject to increase and equally to decrease; and if it diminishes or disappears the benefit inures, not to the party who had nothing to do with it, but to the heritor who assumed the burden.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Joseph Murray against Lord Shand's interlocutor of 17th August 1874,—Recal said interlocutor, and decern in terms of the conclusions of the summons in so far as regards the obligation of relief; and in respect the pursuer does not now insist in the conclusion for security for implement of said obligation, assoilzie the defender from the same, and decern: Find the pursuer entitled to expenses, and remit to the Auditor to tax the same, and to report."

Counsel for the Pursuer and Reclaimer — Solicitor-General (Watson), Q.C., and Kinnear. Agents—Murray & Falconer, W.S.

Counsel for the Defender—Dean of Faculty (Clark), Q.C., and Adam. Agents—Tods, Murray, & Jamieson, W.S.

[*R.*, Clerk.

Thursday, November 19.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ALEXANDER BAIRD *v.* WILLIAM BRUCE MOUNT.

Lease—Miscropping—Pactional Rent—Discharge.

A tenant was bound by his lease to pay additional rent in the event of his miscropping, payable at the same terms as the ordinary rent. He miscropped during the last three years of his lease, and for the first two of these years received a discharge for the ordinary rent.—*Held* that the landlord's claim for additional rent for these two years was barred.

This action was raised by a landlord for the purpose of recovering from an agricultural tenant certain sums in name of pactional rent, said to be due on account of miscropping during the last three years of the lease. The clauses in the lease on which the action was founded were as follows—"That during the last three years of the lease there shall never be more than two-fifth parts of the whole lands let in crops of corn, nor less than two-fifth parts thereof in one and two year old grass, one-fifth at least being two year old, the

remaining fifth part of the farm being to be in green crop, to which, and to the sowing down to grass corn crop, the whole manure made from the preceding crop shall be applied. . . Not only immediately to restore such part of the lands as may be so miscropped to the rotation and course of cropping applicable thereto under this lease, but likewise to pay to the proprietor an additional rent of £5 for every imperial acre which shall be cropped differently from the rotation above laid down, during any year other than the last year of this lease; and if the deviation shall take place during the last year of the lease, then the additional rent shall be at the rate of £10 for each imperial acre cropped differently from the rotation above provided for, and that over and above the rent stipulated for the whole lands as aforesaid; and the said additional rent shall not be considered penal or be subject to modification, but shall in each case be deemed the actual agreed on rent or value to be paid by the tenant for the benefit to be derived from the deviation; and even though there be consent by the proprietor or his factor to the departure from the rotation, the additional rent shall nevertheless be paid, nothing liberating the tenant but the written consent of the proprietor or his factor, agreeing in explicit words to the departure without payment of extra rent."

The sums claimed were £45, £180, and £120.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 16th June* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, Assoilzies the defender from the conclusions of the action, and decerns; Finds the defender entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

"*Note.*—The question in this case is, Whether the pursuer is entitled to exact, and the defender bound to pay, penal but pactional extra rent, in respect the defender has 'deviated from the mode of cropping described and agreed upon' in the lease between the parties? The case involves several points of some difficulty and nicety.

"The Lord Ordinary was favoured with an able and instructive argument, as to how far pactional rent of a penal nature, such as that stipulated for in the present lease, was subject to equitable modification by the Court; and how far there was room for the equitable interposition of the Court to restrict the pursuer's claim. The Lord Ordinary is of opinion that, if the pursuer can clearly establish the contravention or miscropping, the Court has no power to restrict the liquidated or pactional damages which the parties themselves have fixed and ascertained under the name of additional rent. This doctrine seems to be quite established by a long series of decisions, both in this country and in England. [See the cases collected in Hunter on 'Landlord and Tenant,' vol. ii. p. 265, 3d ed. One of the leading cases is *Miller* v. *Lord Gwydir*, 26th May 1824, affd. H. L., 3d March 1826, 2 W. & S. 52; but there are many other cases to the same effect.] The principle is, that where the parties themselves have agreed upon and liquidated the damages, the Court cannot interfere to modify, for this would be setting aside the deliberate bargain of the parties themselves. The terms of the lease in the present case are exceedingly explicit that the penal rent shall not be subject to modification, and although, notwithstanding such a clause, the inherent equitable power of the Court may not be excluded, and exceptional cases for interference may arise, the present does not seem one which can be made an exception from the general rule. [See *Forrest & Barr* v. *Henderson*, 26th Nov. 1869, 8 Macph. p. 187.]

"But while the Lord Ordinary is of opinion that the pactional rent is not subject to modification by the Court if it can be shown that it has been really incurred, he feels that it is a demand of a highly penal nature, and great strictness must be applied in considering whether it has been really incurred or not. The whole proper rent stipulated in the lease has been paid. It was hardly pretended on the part of the pursuer that the defect in the amount of grass of a particular age, of which alone he complains, had led to injury anything like the penal rent claimed, and no attempt was made to prove actual damage from deficiency of grass. In short, it was conceded, at least in argument, that if the tenant was found liable it would be an exceedingly hard case; and no attempt was made to show that the pursuer's demand was to any extent founded in equity. In such circumstances, and where the landlord's severe demand is founded on the precise words of the lease, he cannot complain if a strict interpretation is applied to that lease in ascertaining whether it supports his plea. In short, while the Court will not modify the penal rent, they will equitably consider whether penal rent at all has been incurred. Certainly on this last point equity is not excluded, but imperatively called for.

"Now, on considering the whole structure and terms of the lease, and applying them to the facts established in evidence, the Lord Ordinary has come to be of opinion, though not without difficulty, that the pursuer has failed in sufficiently establishing 'miscropping' in the fair sense of the lease, or that the defender has 'deviated from the mode of cropping above described and agreed on.'

"The lease is a long and complicated document, and it is a little difficult to read from it what in many respects were the precise duties of the tenant. The clause stipulating for penal rent is not confined, as the pursuer suggested, to the last three years of the lease. On the contrary, it is quite general, and applies to the whole currency of the lease; so that, if incurred, it might have been enforced the very first year, and it is expressly stipulated that the penal rent shall be exigible at the same terms of payment as 'the ordinary rent.' The clause for penal or pactional rent is in these terms:—'And the said Patrick Birrell (the defender's author) binds and obliges himself and his foresaids to labour, manure, and crop each division successively during the currency of the lease, without any departure from the rules above written; and in case the said Patrick Birrell and his foresaids shall deviate from the mode of cropping above described and agreed upon, either in opposition to his landlord or by his tacit consent, he shall be bound, as he hereby binds and obliges himself and his foresaids, not only immediately to restore such part of the lands as may be so miscropped to the rotation and course of cropping applicable thereto under this lease, but likewise to pay to the proprietor an additional rent of £5 for every imperial acre which shall be cropped differently from the rotation above laid down,' and so on.

"The first observation which occurs is, that although this penal clause speaks of 'rotation' and 'rotation above laid down,' the lease does not provide any particular rotation or shift of cropping. It does not require a four year shift, a five, six, or eight year shift, or any other shift. The lease confines itself to specifying certain restrictions, and under these restrictions the tenant may follow any shift he pleases. Now, it is at least an awkward thing for the landlord to rely upon a penal clause providing penalty for deviation from a rotation of cropping when no particular rotation is prescribed.

"The next point is that the tenant is taken bound to crop each 'division during the currency of the lease without any departure from the rules above written.' What is meant by 'division'? The landlord says it is the set or series of fields which constitute a break, being a fifth, a sixth, or other aliquot part of the farm. The tenant says 'division' simply means field, the farm being completely divided into separate fields by permanent fences. The Lord Ordinary inclines to the tenant's view as most consistent with the restrictive structure of the lease. It is difficult to suppose that 'division' means a new laying out of the farm into exact fifths or sixths, which would necessarily imply new permanent fences. The skilled evidence, so far as competent, confirms the Lord Ordinary in the view that 'division' simply means 'field.'

"But the main point relied upon by the tenant is, that the farm being a completely enclosed farm, consisting of a definite number of fields separated from each other by permanent fences, it is not possible to lay it out into exact fourths, fifths, or sixths under any of the known shifts or rotations. This really happens in every arable farm; and when, for example, a five shift is stipulated, this merely means that each field must follow the shift, and that the farm shall be approximately divided into fifths as nearly as the fences will allow. This is universal practice, and quite equitable; for although the tenant under a five shift may have rather more than two-fifths in white crop one year, he will have so much less the next, and so on.

"The present lease stipulates that there shall never be more than one-half of the farm in crops of corn during the first sixteen years. This seems to point to a four-shift rotation; and it is thought in equity that it would be implemented if the farm were divided into four equal breaks as nearly as the size of the fields would permit, so that, though there might be a few acres too many one year, there would just be so many less the next.

"Now, apply this to the last three years of the lease, the only years complained of by the landlord. The landlord's complaint is, that the tenant had not enough of grass. Two-fifths of the arable part of the farm is as nearly as possible 166 acres, and two-fifths are required to be in two years' and one year's old grass the three last years of the lease. The complaint is that the tenant in 1871 was 9 acres short; in 1872, 36 acres short; and in 1873, 12 acres short of two years' old grass, although he had in all 187 acres, being an excess of 21 acres of one year's old grass. It seems proved in evidence that this was as near as the divisions of the field would admit, unless, indeed, the tenant had gone back a good many years, and cultivated his farm under greater restrictions than the lease imposes. It is proved also that there was no miscropping and no scourging of any one field on the farm; and it further appears from the evidence that whereas the tenant was not bound to have grass more than two years old, he had, during the last three years, considerable quantities of grass three and four years old.

"Now, in these circumstances, the Lord Ordinary has come to be of opinion, though he cannot say without difficulty, that there has been substantial implement of the lease. He cannot modify the penalty, but he can equitably consider whether any penalty has been incurred or not according to the fair reading of the instrument. The skilled evidence is all one way; for example, Mr Goodlet says that he thinks there has been no substantial deviation from the terms of the lease; and, speaking of the last three years, he says:—'If you take an average of the three years, the tenant had 166 acres in each crop. He did not have it every year, but what he wanted in one year he made up for in another. If you go to the green crop, again, he ought to have had 83 acres each year in green crop; but, on an average of the three years, he had 97 acres in green crop, so that there was an excess of 14 acres in green crop on the whole. That is not considered bad management. It would have been worse if it had been 14 acres of oats or grain crop. Again, he had in grass in those three years altogether 160 acres each year on an average. He was bound to have had 166 acres, so that he had a deficiency during three years of about 18 acres. The deficiency was in grass, and the excess was in green crop; and, according to the way in which he was bound to farm, the one would about make up for the other, so that, practically, there was no substantial injury.'

"The other skilled witnesses speak to the same effect; and it would be the hardest possible construction against the tenant to hold that, while, for example, in 1871 he had 102 acres in old grass three and four years old, whereas he was only bound to have 83, he is to be subjected in a penal fine because he was 9 acres short upon the one year's grass to make up the full quantity of 166 acres. The year 1872 is a more difficult year, for here there was a deficiency of 36 acres in all, although there was 93 acres of old grass instead of 83; but then in 1873 there was a surplus of 20 acres, so that on the whole there is only a deficiency of 6 acres per annum, and much of the grass was three and four years old, whereas the tenant was only bound to have it two. The Lord Ordinary thinks that on this point of the question he is entitled to look to substantial compliance, and if so the tenant's defence is complete.

"It is really vain to say that the tenant was bound to run up temporary fences, and leave the fields cultivated in patches. It is proved that this would have led to great embarrassment, and disconcerted the fair cultivation of the farm. It would have done more injury than 6 acres per annum shortcoming in grass. The total arable acreage is 415 acres.

"There is some force in the defender's plea founded on the discharges for rent. No doubt, the landlord's mere silence, or not stating objection, would not be enough; but, seeing that the penal rent is due year by year, and was not reserved when the ordinary rent was received and discharged, each discharge may fairly imply a passing from the penal claim. This defence was expressly sustained in *Hunter* v. *Broadwood*, 2d Feb. 1854, 16 D. 441; but perhaps there were specialties which may found a distinction. On the whole, the Lord

Ordinary thinks that the landlord has failed to make good his claim."

The pursuer reclaimed, and pleaded—"(1) The defender having, contrary to the terms of the lease, deviated from the mode of cropping therein prescribed, without the written consent of the proprietor or his factor, is liable in the additional rents stipulated in that event to be paid by the tenant. (2) As the lease itself provides that nothing shall liberate the tenant from the duty of following the rules agreed upon for the cultivation of the farm but the written consent of the landlord or his factor, and the additional rent stipulated in the event of a departure therefrom being expressly declared not to be penal or subject to modification, the defences stated are irrelevant, and ought to be repelled."

The defender pleaded, *inter alia*,—"(2) The pursuer is barred from insisting in the present claim, by *mora*, taciturnity, and acquiescence. (3) The pursuer cannot insist in the present action, in respect, 1, he discharged the defender by the receipts granted, and his other actings; and 2, he approved of and acquiesced in the cultivation now complained of. (4) The cultivation of the farm of Castleton by the defender having been, in the respects founded on by the pursuer, consistent with the lease, and in fulfilment of obligations contained therein, the present action cannot be maintained. (5) No damage having been sustained by the pursuer, the defender should be assoilzied. (6) *Separatim*, the sum sued for being exorbitant and unconscionable in the circumstances, decree cannot be obtained for the same."

At advising—

Lord President—In this action the landlord claims additional rent for the three years 1871, 1872, 1873, which were the last three years of the lease, and he does so on the ground that in each of them a mode of cropping was pursued which entitles him to make that claim. What he is suing for is not damages, but liquid rent, and the clause under which he sues is very stringent. It provides "that during the last three years of the lease there shall never be more than two fifth parts of the whole lands let in crops of corn, nor less than two fifth parts thereof in one or two year old grass, one fifth at least being two years old, the remaining fifth part of the farm being to be in green crop, to which, and to the sowing down to grass corn crop, the whole manure made from the preceding crop shall be applied." And then, further, the tenant is bound, if he miscrops or violates the provision which I have just read, "not only immediately to restore such part of the lands as may be so miscropped to the rotation and course of cropping applicable thereto under this lease, but likewise to pay to the proprietor an additional rent of £5 for every imperial acre which shall be cropped differently from the rotation above laid down, during any year other than the last year of this lease: and if the deviation shall take place during the last year of the lease, then the additional rent shall be at the rate of £10 for each imperial acre cropped differently from the rotation above provided for, and that over and above the rent stipulated for the whole lands as aforesaid; and the said additional rent shall not be considered penal or be subject to modification, but shall in each case be deemed the actual agreed on rent or value to be paid by the tenant for the benefit to be derived from the deviation; and even though there be consent by the proprietor or his factor to the departure from the rotation, the additional rent shall nevertheless be paid, nothing liberating the tenant but the written consent of the proprietor or his factor agreeing in explicit words to the departure without payment of extra rent."

This clause is very stringent, and it makes it quite clear that the payment demanded is rent and nothing else. Now, for all the years except the last the rent has been paid and received in full; that is quite plain from the excerpts from the books which are before us; and it seems to me impossible, after the case of *Hunter* v. *Broadwood*, to hold that the landlord's claim for those years is not barred. With regard to the last year, it is practically conceded that there has been miscropping, and that the penal, or rather the pactional, rent is due. In 1873 there was somewhat more grass than the required minimum, but the proportion of old grass to the whole was too small. Now, if it could have been shown that this was an inevitable consequence of the tenant's rotation, and that that rotation was not illegal in terms of the lease, there might have been some justification for the tenant; but that is not the case. The simple fact is, that he breaks up the grass in order to put money into his own pocket by means of a corn crop. That is a clear case of violation of the lease, and it is impossible not to hold that the penal, or rather pactional rent is due. I am therefore disposed to say that the tenant is liable for the miscropping of the last year, but not for the other years, on the ground that the rent for those years has been settled.

Lord Deas—I agree with your Lordship in holding that the landlord is barred by the decisions from claiming for the former years. The pactional rent is not subject to any modification as a penal rent would be, but it is nevertheless rather different from ordinary rent. It is payable in respect of deviations from the rules of cropping. Now, while the claim for additional rent ought, I think, to be sustained to its full amount for one year, it is necessary to deal with it so that it shall not be made an instrument of great oppression. Suppose the deviation had been of great benefit to the farm, and had been allowed by the landlord to go on for a long series of years, it would be very unjust if at the end of the term the landlord were to be entitled to exact additional rent for all those years to which he had never made any objection. That being the nature of the case, it becomes necessary to deal with it on a principle which shall prevent oppression. If, after seeing what the tenant has been doing, the landlord accepts the ordinary rent for that year, he cannot be allowed to go back afterwards and demand the pactional rent in addition. It must be remembered that we are dealing here with an agricultural lease, which has to do with the surface of the ground—not like a mineral lease, the operations under which are carried on below ground and out of sight. I am quite of your Lordship's opinion that the acceptance and discharge of each year's rent bars the landlord's claim.

Lord Ardmillan—This estate is managed by a factor, who represents Mr Baird. The pactional rent is payable at the same time as the ordinary rent, and so the rent for the year includes all rent whether pactional or ordinary. What was paid as *rent* was received and discharged as *rent*. I think

when pactional rent is payable at the same time as ordinary rent, a discharge for the one will cover the other. The landlord attempts to explain the matter by a reference to the factor's letters, but on the first part of the case I have no hesitation in agreeing with your Lordships. On the other part I am quite as clear. There has obviously been miscropping, and for the benefit of the tenant, and I think the landlord is entitled to his additional rent for the last year.

LORD MURE—I am of the same opinion. It is quite clear that the tenant deliberately miscropped for the last year, and it is quite as clear that he has been discharged for the rents of 1871 and 1872, and I do not think that the factor's letters at all weaken his case.

Counsel for Pursuers—J. Guthrie Smith and Mackintosh. Agent—W. J. Shiress, S.S.C.

Counsel for Defenders — Solicitor - General (Watson) and Robertson. Agent—Neil M. Campbell, S.S.C.

Monday, November 23.

SECOND DIVISION.

[Lord Mure, Ordinary.

SIMPSON AND OTHERS *v.* RAMSAY AND OTHERS.

18 *and* 19 *Vict. c.* 63—*Friendly Society—Executive Council — Suspension — Jurisdiction — Title to Sue.*

Where the executive council of the Ancient Order of Foresters suspended an affiliated society for disobedience of a majority of its members to the order of the District Court, and by a new dispensation authorised the loyal minority to hold a Court of Ancient Foresters under the same name and number as the Society suspended.—*Held* that the Trustees of the Society suspended had no *status* to sue for recovery of securities and documents belonging to the Society.

The summons in this suit, at the instance of the Trustees of the Court Royal Archer, No. 1544, Ancient Order of Foresters' Friendly Society, Greenock, against John Ramsay and others, claiming to be trustees of the same Friendly Society, concluded for declarator that the pursuers are the trustees of Court Royal Archer, 1544, Ancient Order of Foresters Friendly Society, Greenock, and are entitled to all the rights of such trustees, and in particular to the custody of certain documents, consisting pass books, bills, &c., specified in the summons.

The question in this case was whether the pursuers had a right to represent the Court Royal Archer, a subordinate court of the Ancient Order of Free Foresters, or, if not, to sue as trustees of a separate association. The main facts of the case, and the dispute out of which the action arose, are sufficiently set forth in the following interlocutor of the Lord Ordinary (MURE)—

"24*th April* 1874—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds that the case, as disclosed in evidence, resolves into and depends upon questions as to which the jurisdiction of this Court is excluded: Therefore dismisses the action, and decerns; Finds the defenders entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note*—This action has been raised by the pursuers as 'Trustees of the Court Royal Archer, No. 1544, Ancient Order of Foresters Friendly Society,' in order to have it declared that they possess that character, and, as such, are entitled to the custody of the monies, securities, and documents belonging to that Society; and it concludes against the defenders, as erroneously alleging themselves to be trustees of the Society, for delivery of those monies, securities, and documents. It is founded on certain clauses of the Friendly Societies Act 1855 (18 and 19 Vict., cap. 63), by which it is provided that all the estates, real and personal, of any such Society, shall be vested in the trustees for the time being; and by the 19th section of which the trustees are authorised to take proceedings in any court of law or equity concerning the property of the Society for which they are trustees.

"*Ex facie* of the summons, therefore, the action appears to be one which this Court has jurisdiction to entertain, and there is, accordingly, no plea to jurisdiction specially stated in defence. But the defence consists of a denial of the pursuers' statement that they are trustees of the 'Court Royal Archer, No. 1544, Ancient Order of Foresters' in question; and in the statement of facts for the defenders they enter into an explanation of certain disputes which arose between the members of the Society, including the pursuers and defenders, in the years 1869 and 1870, at a time when the pursuers were not the trustees of the Society, which resulted in the suspension of the Society as originally constituted, and the granting of a new dispensation by the Executive Council of the Ancient Order of Foresters. The effect of this, the defenders contend, was to abrogate and supersede the Society as originally constituted, and to substitute, by the new disposition, under the name 'Court Royal Archer, No. 1544,' the Society of which the defenders are trustees, in its place.

"The defenders' allegations as to the suspension and reconstruction of the Society having been denied by the pursuers, a proof was allowed; and at the discussion which took place upon the proof the question of jurisdiction was distinctly raised by the defenders, and after repeatedly considering the evidence applicable to the nature of the disputes which led to the suspension and reconstitution of the Society, and the present relative position of the pursuers and defenders, the Lord Ordinary has come to the conclusion that the plea to jurisdiction is well founded, because the right and title of the pursuers to maintain the action depends mainly on the legality of the suspension and proceedings following upon it, which are challenged by them. For if the suspension was a valid act on the part of the Executive Council, the pursuers can scarcely, it is thought, maintain that they are trustees of the Society, in as much as the order of the Executive Council by which the Society was suspended, and was for all practical purposes in abeyance, had been issued prior to the month of June 1870, in which the pursuers allege that they were elected trustees. And if the new dispensation, by which those of the original Society who