tion of character, and that there is a different rule to be applied to an action of that kind than that which would be applicable in a case of personal injury. I don't think that this is an action for vindication of character. Slander, no doubt, under the canon law, and still in England, may be the subject of penal prosecution before the Commissary Court, and, I believe, in our old forms the Procurator-Fiscal was wont to intervene in an action of that kind. In the second place, although not in a penal form, it might be the subject of an action for vindication of character. I mean, if that form were adopted which was introduced, of concluding for a palinode or retractation. That was a proper action for vindication of character. But when a party sues in the civil court he does not conclude for vindication of character, but concludes for that which he wants, viz., a sum of damages in reparation of the injury; and however the injury arose, whether from injury to character, or person, or substance, is of no moment. The nature of the action is an action of damages for reparation of an injury, and for nothing else. And, therefore, I don't think that it is a sound distinction in such a case that this is an action for vindication of character, as distinguishsd from an action of damages for reparation of a wrong. The present action, however, is an action for the reparation of a specific wrong, which is said to have been carried through and effected by means of slanderous imputation; and in that respect, perhaps, it stands somewhat differently from an ordinary action purely for vindication of character. I see that this question may come up again in the course of the investigation of this case, and possibly may present itself in a very different aspect, or at least in a different aspect, and therefore I wish not to indicate or express any opinion except as far as these principles are applicable to this specific plea. I can conceive considerable difficulties in holding that a pure action of defamation so transmits to executors, that executors or creditors having no connection with the deceased at all, except the fact that they are executors, would be entitled to raise it after an interval of time. That is a question I don't think we need go into. But this is an action for the specific damage suffered by Dr Auld in being excluded from the Chair of Humanity by means of slanderous imputations made to the patron; and if these be a relevant ground of action, and sufficient proof of the ground of action which would have enabled Dr Auld to have recovered damages during his lifetime, I cannot doubt that the present pursuer is entitled to insist in that action.

I have only one word to say on the cases of *Smith* v. *Stoddart* and *Milne* v. *Gauld*, because I think the case of *Smith* v. *Stoddart* was pressed rather further than the thing decided will bear, or that the Judges that decided it intended. They decided nothing but this, that where there are imputations made upon the character of a married woman, she has, whether married or a widow, a right and title to vindicate her own character. That does not conflict in any degree with the right passing to the husband to this effect, that the husband may sue for injury done to his wife—which I take to be a proposition not to be contested—or that his executors might have right to damages which the wife might recover, and one of the Judges expressly saves that. I may mention for the information of parties that on turning to Voet, 47th Book of the Pandects, title 10, section 6, there will be found a decision of the Dutch Courts exactly applicable to that matter, coming to this, that while the husband beyond all question has a right to vindicate as an injury done to himself the character of his wife against aspersions, she also, if her character be personally involved, is entitled to sue on her own account. I have nothing further to add upon this matter except to say that the question of proof, and also the question in regard to the legal right of the Principal to continue to hold this office for the purpose of excluding Dr Auld, are questions of great difficulty, and pure questions of law; and I concur in thinking that while we sustain the title to sue it would be well to put the case in a position to be investigated otherwise than by sending it to a jury; but that is for the parties to consider; and we shall now repel the first plea in law, and appoint the parties to be further heard.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Principal Shairp against Lord Gifford's interlocutor of 30th June 1874—Adhere to said interlocutor in so far as it repels the first plea in law for the defender, and appoint parties to be further heard, and *in hoc statu* reserve all questions of expenses."

Thereafter, on January 14th, 1875, the Court heard counsel on the question and relevancy, and deeming that the law and fact were inextricably involved in one another, pronounced an interlocutor as follows:—

"The Lords having further heard counsel in the cause—in respect the parties express their willingness that the Court shall determine the mode in which the facts shall be ascertained, before answer allow to both parties a proof of their respective averments; and allow the pursuer to add the word "maliciously" to the 8th article of her condescendence, the proof to be taken before one of the Judges of this Division of the Court, and continue the reservation of the question of expenses."

Counsel for Principal Shairp—Dean of Faculty (Clark), Q.C., and Lancaster. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mrs Auld—Solicitor-General (Watson) & Smith. Agent—Thomas Spalding, W.S.

[*I.*, Clerk.

Friday, January 8.

SECOND DIVISION.

[Lord Shand, Ordinary.

TRUSTEES OF SIMPSON'S ASYLUM *v.* JAMES GOWANS.

(*Ante*, vol. xi., p. 309.)

Lease of Minerals—Lordship—Construction.

Terms of mineral lease held to embrace the entire freestone of a quarry under the classes of ashlar and rubble stone, so that all shaped stone sold by measurement fell under the former category, while all unshaped stone sold solely by weight fell under the latter.

This was a suit at the instance of the Trustees of Simpson's Asylum, against James Gowans, contractor, Edinburgh, for payment of a sum of £475, with interest, in respect of lordships in the freestone wrought and removed by the defender during the year ending at Candlemas 1874 from the quarry at East Plean held by him in lease from the pursuers. By tack, dated 10th May and 2d June 1864, the pursuers let to the defenders all and whole the freestone quarry in and under certain portions of the lands of East Plean. The lordship clause was as follows:—"For the whole freestone thereby let the sum of £200 sterling of fixed money rent yearly, or, in the option of the proprietors, the following lordships or royalties, *videlicet*, for each ton of ashlar or cubic stone a lordship or royalty of sixpence, and for each ton of rubble stone a lordship or royalty of one penny, and the proprietors shall declare their option of said fixed rent or alternative royalties at the term of Candlemas in each year for the year preceding such term, and the half-year's fixed rent payable at the term of Lammas preceding shall be held as payment to account, and at Candlemas the next half-year's fixed rent shall be paid, or, in the option of the proprietors, the lordships for the whole year byegone, under deduction of sum paid to account at term of Lammas preceding, beginning the first term's payment of said fixed rent at the term of Lammas 1864, and that for the half-year preceding that term, and the next term's payment of fixed rent or optional royalties as aforesaid, at the term of Candlemas 1865, and so forth half-yearly and termly thereafter during the currency of this tack." The main question between the parties came to be whether stones classed as rybats, coursers, and scuncheons, sold by the defender at the quarry, were to be classed as ashlar, and charged for at a rate of 6d. per ton, or as rubble, and charged for at a rate of 1d. per ton.

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

"*Edinburgh, 10th August* 1874.—Having considered the cause, Finds that the defender was due to the pursuers the sum of £380 at Candlemas 1874 in respect of lordships in the freestone wrought and removed by him during the year ending at that term, from the quarry at East Plean held by him in lease from the pursuers, and decerns against the defender for said sum, with interest at the rate of 5 per cent. per annum on £100 thereof from 1st August 1873, and on the balance, being £280, from 3d February 1874 till payment: Finds the pursuers entitled to two-thirds of their expenses: Allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The witnesses are all agreed that the clause providing for the payment of lordships in the lease entered into between the parties, which has given rise to the present dispute, is unlike any lordship clause they have previously known. The rent or lordship clause in such a lease usually provides for payment to the landlord for the stone excavated, according to its measurement in the ground, allowing so much for waste or unworkable quality of stone, or for payment of a certain percentage on the tenant's sales. The subject of the present lease is the freestone in the lands, and the royalties payable are 'for each ton of ashlar or cubic stone a lordship or royalty of sixpence, and for each ton of rubble a lordship or royalty of one penny.' The lordships are payable according to the weight of the stone sent off, without reference to the fact that the lessee of a quarry sells great part of the produce of the quarry not by weight, but at prices estimated by measurement, or in stones of a particular description, according to the numbers supplied, charging so much for each. The lease contains no rule by which the weight of the stones thus sold by measurement or by numbers shall be ascertained, and one of the various questions which have arisen in this and a former litigation between the parties, is as to the proper rates of conversion to be taken in fixing the weight of stones not sold by weight, for ascertaining the amount of lordship—a difficulty which is not lessened by the fact that the weight of all stones sent by railway is to be taken according to the railway company's books, and that each cart-load is to be taken as a ton.

"As will be seen from the price lists for the sale of stone at the quarry, in addition to stone sold under the name of ashlar (including cube blocks) and rubble respectively,—the former being charged for by measurement, and the latter by weight,—the defender sells particular stones, known by those engaged in the business of quarrying and of building as rybats, coursers, and scuncheons. The main question which has arisen between the parties in the adjustment of the amount payable as lordships for the year ending at Candlemas 1874, is, whether stones sold under these respective names are to be classed as ashlar or rubble, and so to be charged for at 6d. or at 1d. per ton. If stones of these particular descriptions do not properly fall under either of these terms or divisions, and so have not been provided for by the lordship clause, then it becomes necessary, with reference to the rates of lordships which have been fixed, to determine what is a reasonable and proper rate for these particular classes of stone.

"The gross produce of the quarry for the year, according to the evidence of Mr Bruce, taking his rates of conversion for stones sold by measurement and numbers, was 28,206 tons. The particular items making up this total amount are the following:—

	Tons.	
Stone sold as rubble, . . .	9,868	
Founds admitted as rubble, . .	789	
	10,757	
Add 10 p. cent. for quarry allowance	1,075	
Total rubble,		11,832
Ashlar, ...	3,641	
Cube stones, ...	6,492	
Rybats, ...	3,478	
Scuncheons, ...	1,404	
Coursers, ...	1,335	
Backs, ...	24	
Total charged as ashlar,		16,374
Gross produce of the quarry for the year, ...		28,206

Lordships, 1d. per ton on 11,832,	£49	6	0
... 6d. ... on 16,374,	409	7	7
Making the sum claimed,	£458	13	0

"The matter which formed the subject of dispute at the close of the proof was the classification of scuncheons, coursers, and backs. The last of these involves an amount of about 10s. a year, and the parties agreed that stones sold as backs (used

for the backs of chimneys) might be treated as in the same category as scuncheons, which are used for the inside building of the corners of windows, and for other corners and arches inside of buildings. These stones are always covered up by the exterior masonry. The amount in dispute for scuncheons (taking Mr Bruce's rates of conversion) is about £29, and for coursers about £28, making in all about £57.

"The lease, so far as regards the clauses relating to the ascertainment of lordships, has been very loosely expressed, and the questions to which these clauses have given rise are obviously better fitted for the determination of one or more men of skill as arbiters than for the Court. It is to be regretted that the parties have not been able to agree to a reference to some one of practical knowledge, who might settle not only the amount due for last year, but fix a rule to guide them during the future years of the lease. As the case has been presented to me on the proof, I can only say that I have found it to be attended with great difficulty, arising from the nature of the lordship clause, the great conflict of professional opinion, and the unsatisfactory reasons on which many of the opinions rested. The view which I have ultimately adopted, agreeing with that of Lord Gifford in the former litigation between the parties, is that the clause relating to lordships, which is singular and without precedent in its terms, has been adopted without due consideration, and while professing to exhaust all the produce of the quarry under the heads of ashlar stone and rubble stone, has omitted to provide for a class of stones to which neither of these terms is properly applicable.

"If I could adopt the view of the pursuers, that everything which is not rubble (under which head they include founds, however,) is to be classed as ashlar, there would be little difficulty in the case; but this view is met with the contention on the other side, that everything not sold as ashlar or cube stones should be classed as rubble, which, in the statement of it, is *prima facie* equally reasonable. Each of these contentions presumes that the classification into ashlar or cube stone and rubble stone is exhaustive of the freestone, which forms the subject let. I am duly sensible of the importance of the view, that there is a very strong *prima facie* presumption that the parties meant to include all stone under one or other of these heads, and that if the expressions used will reasonably admit of this the clause should be construed as having that meaning and effect. But having regard to the evidence, I have come to the conclusion that certain classes of stones do not properly fall under either of the terms used, and that it would be unjust to one or other of the parties to hold that they do. Many of the witnesses explain that, according to their views, scuncheons and coursers are in certain points specified more like rubble than ashlar, or the converse, and rank them accordingly under one or other of these heads. The preponderance of the evidence, including the testimony of these witnesses, is, however, that such stones cannot in any proper sense be classed either as rubble or as ashlar; and it is only when pressed under examination to put them under one category or the other, that, guided by certain points, as to which they are often not very consistent either with each other or with themselves, they make a choice between the two classes. The Court is asked to consider these points, and so to classify each particular kind of stone accordingly. It appears to me, however, that this was not the meaning of the parties in entering into the lease, but that the truth is, that in the unusual terms they adopted they omitted to fix lordships which would really suit all the different classes of stones to be wrought, and be exhaustive of these; and if this be so, the parties cannot expect the Court to interpret the contract as if no such omission had been made.

"The evidence has failed to supply any definition of ashlar and rubble stones respectively which admits of being reasonably applied to every class of stone sent off. The examination for the pursuers was conducted in the view of eliciting that all hewn stone—that is, stone dressed, however roughly, at the quarry—comes within the description of ashlar, but it cannot be said that the witnesses adopted this view. The evidence of Mr Clunas, architect, and Mr Wilson, builder, on which the pursuers must mainly rely for professional opinion, is not to this effect; and the views of these gentlemen are not in harmony with each other. Besides, if the mere fact that a stone had been dressed, however roughly, were a determining element, founds which are of considerable size would at times have to be classed as ashlar.

"If it be assumed, or indeed held, as I think it may be in the view I take of the case, that the term rubble in the lease will properly cover only what is mentioned in the price lists as 'large sized rubble' and 'common rubble,' and sold at 1s. 6d. and 1s. 3d. per ton, I think it would be stretching the term ashlar or cubic stones beyond its true meaning to hold that it included not only stones sold under the names of ashlar and cube, but all other stones, though small in size, however inferior in quality, and whatever may be the purpose to which they are to be applied.

"In the building trade, and consequently in the trade of the quarrier, with whom the builder deals, the purpose for which the stone is to be used seems to be the element which determines whether it is ashlar or not. A stone must be of a given size and of good quality to be ashlar: and so stones classed in the price list as ashlar,—rybats, which are under the same class, and must in size correspond with ashlar, to be worked in with it, and which must be of good quality, suitable for outside and front work in building—and cube stones and blocks, are all ashlar. I am unable to hold with the pursuers that scuncheons, backs, and coursers, or any of them, are ashlar, either according to the understanding of the trade or in any proper sense. Scuncheons are no doubt roughly dressed or shaped; they are, however, entered in the price lists after ashlar stones of the different kinds have been enumerated, and immediately following rubble stone; are of much smaller dimensions; are used for the interior of buildings, and covered up, and so are not dressed as ashlar usually is; and, what is perhaps of as much importance as any of these considerations, they cannot, like ashlar, be rejected by the purchaser because of flaws or inferiority of stone. Such stones are often taken out of common rubble as supplied from the quarry; and it is not unimportant to observe the statement of Mr Bruce, that 'some years ago' (and so presumably at the date of the lease in question) 'they were very often taken out of rubble,' though not so often now. The observations just made all apply to

coursers, with this exception, that these stones are used for outside work. I do not think that this circumstance makes them ashlar within the meaning of the lease.

"If the evidence leads to the result I have now stated, I cannot adopt a different view because of the significations or definitions of the term 'ashlar' to be found in certain English dictionaries, to which reference was made by the pursuers. The definitions or meanings of the words ashlar and rubble are by no means uniform, and ought not, I think, to outweigh the testimony of architects, builders, and practical men speaking to the known every-day use of terms in the trade in which they are engaged, and with reference to which the parties to the present lease must be held to have contracted.

"Holding, therefore, that the lease does not provide a lordship for stones sold as scuncheons and coursers, it becomes necessary to fix a fair rate to be paid for such stones which have been wrought. They appear to occupy a middle position between ashlar and rubble, to differ from rubble sold in the mass, and so far to resemble ashlar, because they are roughly dressed and sold by numbers and measurement, and again to differ from ashlar in the particulars already mentioned, and so far to resemble rubble in their character and the uses to which they are applied. I think a lordship between that fixed for ashlar and for rubble respectively in the lease, viz., 3½d. per ton, is a fair and proper lordship for such stone. I have accordingly taken that as the rate I have allowed. At Mr Bruce's rates of conversion, the result is, that for scuncheons, backs, and coursers, the return is about £40, in place of about £69.

"As to (1) the amount to be estimated for quarry allowance, and (2) the rates of conversion, there is a conflict of evidence; and it would not, I think, be right to adopt Mr Bruce's rates as conclusive. On the whole, I am of opinion that justice will be done between the parties in fixing the total lordships for the year at £380, on the basis of a lordship of 3½d. on the particular classes of stones above mentioned.

"As to expenses, the defender made no tender or admission as to the sum due, and the different states given in by him bring out sums considerably below what has been allowed. The pursuers are thus entitled to expenses; but as they have failed in a material part of their contention, and as they, as well as the defender, are responsible for the loose terms of the lease, which have caused the litigation, I think the expenses should be modified to two-thirds of their amount."

The defenders reclaimed.

At advising—

LORD JUSTICE-CLERK—The questions in this case have arisen upon the terms of a lease of a quarry granted by the pursuers to the defender, Mr Gowans. Mr Gowans is the tenant, and the question is,—What are the lordships which are payable to the landlord in respect of the output of the quarry? The terms of the lease upon which the question turns are at page 76. There is a fixed rent, or, at the option of the proprietor, the following lordships or royalties, videlicet, for each ton of ashlar or cubic stone a lordship or royalty of sixpence, and for each ton of rubble stone a lordship or royalty of one penny. There is then a provision for ascertaining the weights in respect of which this lordship is to be payable; and the provision is this,—"And in order to ascertain correctly the quantities of freestone produced in virtue hereof, and the amount of lordships or royalties to be paid yearly, it is agreed that in respect of all stone sent off by railway, the weights for which carriage is charged shall be held to be the correct weights, and in respect of other stone, that each cart-load shall be held to be one ton weight." There is a further provision upon page 78 in regard to furnishing stone for the purposes of the landlord, fixing certain prices, which has some bearing upon the question between the parties. In this way the lordship was payable upon two qualities of stone as specified in the lease, the first being ashlar or cubic stone, and the second being rubble. The question is what these two classes comprehend; and the difficulty which arises is very clearly brought out by the price lists which are appended to this print; because there we find that instead of ashlar and rubble being the only descriptions of stone sold in the quarry, in what may be called the retail dealing there are a great variety of stones under certain specific heads. There are ashlar, rybats, cornice and cope, cube blocks, coursers, scuntions, large size rubble, and common rubble. Now, the question is, whether the intermediate qualities between ashlar, which is the most valuable, and rubble, which is the least, are comprehended under the first class, on which 6d. a ton is to be paid, or under the second class, on which a penny a ton is to be paid. On that there has been a great deal of evidence, and apparently conflicting evidence, although I am not sure that it is really conflicting; but without going into the elaborate evidence on this matter, I shall state shortly the results to which I have come. It is a question to a large extent of the practice of trade—of skill in the trade of quarrying: but, as very often happens, the mere opinions of the parties of skill differ so much that we must look at it with the lights that we have as a question on the construction of the lease, and, I think, the common sense applicable to it.

Now, I am of opinion, in the first place, that these two classes, ashlar or cubic stone in the one, and rubble in the other, were intended to cover the whole output of the quarry. About that there cannot be the slightest donbt, looking to the terms of the lordship clause in the lease, which is this,—for the whole freestone thereby let the sum of £200, or, in the option of the proprietors, a lordship. Therefore I am of opinion that the whole of the freestone must fall either under ashlar and cube stone on the one hand, or under rubble on the other. And therefore I cannot accept the Lord Ordinary's view, by which he holds that there is an omission here, and that these terms do not cover the whole output of the quarry, and finds himself obliged to ascertain a middle term, viz., what would be a reasonable lordship for the intermediate qualities of stone not covered either by the one or by the other. I am quite satisfied that the lease does not offer us the material or the means of coming to any such conclusion, and that in one way or other we must find the obligations in the lease to be applicable to all the descriptions of stone put out from the quarry. In the second place, I am of opinion that one or other of the terms in the lease are not used in their trade or retail sense, but are used in their generic sence, otherwise it would be impossible to bring all these qualities of stone

under one or other, which, I think, is essential. Either ashlar or cube stone embraces the inferior qualities, or rubble embraces the superior qualities. In the third place, I should say that, *prima facie* and without any evidence, it was more likely that the superior qualities of the stone should be embraced in the ashlar than that they should be embraced under rubble. Rubble is admittedly the rubbish or refuse of the quarry, or, at all events, the least valuable part of the output. The stone in dispute—the rybats, the scuntions, the coursers, and the backs—comprehend about a third of the whole output of the quarry; and I think it very unlikely, in the first place, that the landlord should use the least profitable term in regard to the stone which he was letting; and, in the second place, I think it unlikely that he should have put the lower lordship on the rubble, intending to comprehend the whole of the superior stone with the exception of the very best—that is to say, the ashlar. Now, unquestionably upon the evidence it is not very easy to find a specific definition of ashlar; but if we get a definition of one or other of these classes the other necessarily follows; and I am of opinion that the definition of rubble comes out in the evidence perfectly precise and clear, and without the slightest difference of opinion, as far as I can find, among any of the witnesses. Rubble seems to be defined thus:—That quality of stone which is not shaped by the hammer or chisel, and which is not intended to be or calculated to be so shaped, and which is sold without any regard to size or dimension, solely by weight. Now, those two qualities seem to me to be the definition of rubble as given by the witnesses on both sides—in the first place, that the stones comprehended under rubble are not intended to be, and are not calculated to be, and are not in point of fact, shaped by the hammer or chisel; and, in the second place, that the rubble is sold solely by weight, without any regard to size or dimension. And these two qualities arise simply from this, that the rubble is, as I have said before, substantially the refuse of the quarry. I find that Mr Gowans the defender gives us that definition quite distinctly. He is is asked at page 19, C D, "What is rubble according to your view of it?" and he replies, "Rubble is stone that wont make a sized stone." Now, that is perfectly candid, and perfectly precise. All the other stones, as we shall see immediately, do make sized stones; and rubble is what won't make a sized stone. Now, the only thing that is suggested in the evidence against that view is this, that scuntions and sometimes coursers are taken out of stone which would otherwise be classed as rubble—which only means this, that a big stone is sometimes found in the rubble, and that then the quarrymen take it out of the mass and form it by the hammer or chisel into what is called a scuntion, and, I presume, charge their customers accordingly—not the price of rubble, but the price of scuntions. I shall come to the prices immediately, for they are very material. Sometimes it appears that rubble is sold to builders, and that builders find these large stones among the rubble and make them into scuntions. That means that they have bought the rubble at the price of rubble, and, I presume, they charge their customers for scuntions at the price of scuntions. But all that does not make the slightest difference on the definition of rubble. On the contrary, it rather illustrates the definition, because, when these large stones are taken and shaped and dressed by the hammer they cease to be rubble. They are called scuntions, they are charged for as scuntions, and there is no distinction drawn in the price lists between the scuntions that are found thus in the rubble and the scuntions that are taken from the superior stone. Now, there is nothing at variance with this definition, but when we come to look at the price lists they give a very important corroboration to what I have suggested; for they bear out the result that, excepting as regards rubble, all the other stones are sold by size and dimension. Ashlar is sold at so much a lineal foot; rybats, twelve heads so much; long stones are sold by the lineal foot; cornice and cope at certain prices, and so on; coursers at 4½d. per foot, and scuntions at 10d. each; and when we come to convert these prices into a rate per ton, we have it in Mr Bruce's evidence that scuntions are worth 8s. 4d. a ton; rybats, 11s. a ton; coursers, 9s. a ton; and that ashlar, the best quality, is worth about 18s. a ton—that is to say, the lowest is 8s. 4d. and the highest is 18s., while rubble is only 1s. 3d. a ton, showing quite clearly that the stones that are so sold are the most valuable part of the quarry, and are clearly distinct in point of value from the stones that are sold as rubble. There was a vain attempt in the evidence, which did not commend itself to my mind, to show that the difference between 8s. 4d. and 1s. 3d. was caused entirely by the very partial dressing which the scuntions had from the hammer or chisel before they were sold. It is quite obvious that that was an exaggeration for which there could have been no foundation whatever. The result is simply this, that the distinction is between stones that are meant to be dressed, that are sold by size, on the one hand, and stones that are not meant to be dressed, and are sold by weight, on the other. The only other observation that I think it necessary to make is, that the mode in which the weights are to be ascertained under the lease had reference to the weights used by the railway at the time, and that it seems to be proved in the evidence that at that time the Caledonian Railway Company had two separate rates of charge, under one of which they included rubble, and under the other of which they included all the stones in dispute in this action. Therefore, upon the whole matter, without going further into it, I have come to the conclusion that ashlar and cube stones really include all those stones that I have mentioned which are sold by size or measurement, and which are dressed or intended to be dressed by the hammer; and that, on the other hand, the definition of rubble is quite distinct, viz., that it comprehends stones only which are not intended to be so dressed, and which are not sold by weight. In that view, we must alter the interlocutor of the Lord Ordinary. He has, I have no doubt, taken an equitable enough view, provided the foundation of the interlocutor was correct, viz., that there was an omission in the lease. I myself don't believe that there was any omission in the lease at all, and I have a strong impression on the evidence that the terms were more intelligible to those conversant with the trade than they can possibly appear to us.

Lord Neaves—I entirely concur in the opinion which has been expressed by your Lordship. The interlocutor of the Lord Ordinary is an attempt to make an equitable arrangement between the

parties, but it is impossible not to see that it is actually an alteration of the contract. It is making a new contract for the parties, and that is a thing which the Court cannot do. Our duty is to construe the contract as it exists, and not to make a new contract upon the ground of a *casus improvisus*, when it is really impossible that a condition of that kind should not have been foreseen by professional persons on the one hand letting the quarry, and on the other taking it on lease, who must have known what it contained and how it should be let. Now, endeavouring to construe the contract as it stands, and declining to make a new contract for the parties, I am perfectly satisfied that the two descriptions of stone—viz., ashlar and rubble—are the counterpart and the complement of each other, and that every stone that comes out of the quarry must be classified under the one or other of these two heads; and that is shown by the surrounding circumstances of the case. The great discrepancy between the lordships—viz., 6d. and 1d.—shows that they were classified as distinguished from each other, and it is impossible that the parties could have overlooked the division into which they would thus run. Other circumstances go to support that, and particularly the practice of the Railway Company at the time. Therefore, being satisfied that whatever is not rubble must be dealt with as ashlar or cube stone, I have no hesitation in adopting what your Lordship proposes. The result, I suppose, will be that we adopt the claim made by the pursuer, but the parties will give us the result in figures.

Lord Gifford—I am of the opinion which your Lordship in the chair has stated, and I have come to be of that opinion latterly, I must say, without much difficulty. In the first place, I think this lease of the stone in this quarry is a lease of the entire freestone. The whole freestone is let by the pursuer to the defender as the tenant. In the next place, everything has to be paid for. The tenant is not to get anything for nothing. Everything is to be paid for, and paid for according to the measure prescribed by the lease, calculated on the lordships therein mentioned. There is a considerable difficulty in this respect, and it pressed upon me in the earlier part of the argument more than latterly, that the description of the thing on which lordship is to be paid does not exhaust the actual output of the quarry. It describes the best part of the product and the worst part; and there was great force in the argument of Mr Darling that the lease had really omitted the fact that scuntions and other descriptions of stone were not mentioned for lordship at all. On that point there is a great deal of evidence to which at first I was disposed to attach a good deal of weight. We have the evidence of men of skill, who come forward to say that a scuntion is not ashlar, but that it is a scuntion and nothing else; and it has been argued that as the parties have omitted to deal with part of the product of the quarry, we must necessarily take a middle course. But that is just asking the Court to make a bargain for the parties which they have not made for themselves. They have made a bargain by which they are to pay a certain specified sum for the whole produce of the quarry, and that lays on the Court the necessity of interpreting the lordship clause in the best way they can. Now, as to the mode of interpretation, I entirely concur with the very able argument submitted by my friend Mr Mackintosh. You must in some way or other reach this, that you are to divide the product of the quarry into two classes and only two; one, in the sense of the lordship clause, is to be considered rubble, and the other, in the sense of the lordship clause, is to be considered ashlar or cube stone. The question is, under which of these categories do the disputed stones, the scuntions, and the backs, and the coursers, and so on, fall. Mr Mackintosh argued that, looking to the whole circumstances of the case—placing ourselves as much as we can in the position of the parties—they must be held to have understood—the lessors on the one hand, and the lessee on the other—that the disputed stone fell under the first category, and not under the second,—I mean under the ashlar category and not under the rubble category. I reach that without any difficulty, for every characteristic brings them under the first and not under the second. For example, the one class is all hammered stone,—I mean that they are touched by either hammer or chisel. They are shaped stones to some extent. They are big stones generally speaking, in opposition to small stones. They are stones of a particular shape; there is a particular purpose to which they are dedicated, and they are not like the rubble unshaped stones, of any form, as they happen to be broken in the quarry. We have also to consider the element of the price; and, on the whole matter, I think we are driven by the necessity of the case to divide the product of the quarry into two classes, and to hold that all hewn or shaped stone or stones sold by measurement or by cubic contents, belong to the higher class, while the others belong to the lower. That brings us to the question what the parties had in view at the time the lease was entered into. I don't mean to say that the Railway Company were the judges as to which were rubble and which ashlar, but the fact is extremely material that at that time the Railway Company were in the habit of charging a lower rate of carriage for rubble and a higher rate for all hewn stone. I think that is what the lessors' agents must have had in view—not perhaps very familiar with these technical words—in stipulating that the railway weights were to be taken. No doubt that is not conclusive, but it reaches what was in the mind of the parties in regard to the distribution of the produce of the quarry into two classes, just as the Railway Company were in the habit of doing; and the Railway Company's servants say that they counted all the hewn stone ashlar, and the rough stone rubble. Therefore, I concur in thinking we cannot take the middle course which the Lord Ordinary has taken, but must construe this lease; and that on the whole the contention of the pursuers is well founded, that for the whole of these specially described stones the ashlar rate must be taken. This is a simple petitory action for a half-year's rent, but I suppose the parties will have no difficulty in bringing out the figures in that sense.

Lord Ormidale was absent, but the Lord Justice-Clerk stated that he concurred in the judgment.

The Court decerned, in terms of the summons for £461, 3s. 6d.

Counsel for Reclaimer—Dean of Faculty (Clark

and Darling. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Respondent — Solicitor-General (Watson) and Mackintosh. Agents—Webster & Will, W.S.

Friday, January 8.

SECOND DIVISION.

CHAPMAN *v.* BALFOUR.

Mandatory—Expenses—Auditor's Report.

An action having been brought by Chapman, who resided in England, against the trustees of Lloyd, of whom Balfour was one, on a bill for £800, Chapman was sisted as mandatory. The defence was that the bill had been obtained by fraud. The trial was fixed for the 22d of July, on which day the mandataries lodged a minute in process withdrawing from acting as mandataries, and the pursuer did not appear, nor was any new mandator sisted. The jury was impanelled, and returned a verdict for the defender. When the Auditor's report came to be approved of, Chapman moved that the expenses of the jury and witnesses, and of applying the verdict, be disallowed as against him. *Held* that these items formed valid charges against the mandataries, on the ground that they were the natural sequence of what was in motion at the time the mandataries lodged the minute of withdrawal.

Case cited—*Martin*, 5 S. 783.

Friday, January 8.

FIRST DIVISION.

[Sheriff Court of Fifeshire.

KERMACK *v.* KERMACK.

(*Ante*, p. 105.)

Process—Abandonment—Competency—A. S., 11th July 1828, § 115,—*A. S., 10th July* 1839, § 61.

In a case in which the long negative prescription was said to have been interrupted by payments of interest upon the debt, the Court held that proof *prout de jure* was incompetent, but as it was alleged that receipts for the payments of interest were extant, they allowed the pursuers to lodge a specification of any documents which they desired to recover by diligence. The specification having been lodged, the Court granted commission and diligence for recovery thereof, the commission to be reported on a fixed day. The pursuers allowed that day to go past without executing the diligence, and then put in a minute abandoning the action. *Held* that it was competent for them to do so, no interlocutors of absolvitor, or necessarily leading thereto, having been pronounced.

A. S., 10th July 1839, § 61.

Opinion—That the words "interlocutor of absolvitor" in the 61st section of the Act of Sederunt of 10th July 1839 included an interlocutor necessarily leading to absolvitor.

In this appeal, which is reported *ante*, p. 105, the defender pleaded the long negative prescription, while the pursuers averred interruption thereof by payments of interest upon the debt. The Sheriff-Substitute, and the Sheriff on appeal, allowed the pursuers a proof *prout de jure* of their averments as to payment of interest, and to the defender a conjunct probation.

On appeal to the Court of Session the First Division pronounced, on 27th November 1874, the following interlocutor:—"The Lords having heard counsel on the appeal, record, and proceedings, recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated the 5th May and 25th and 30th June 1874: Find the proof allowed by these interlocutors to be incompetent, but allow the pursuers (respondents) to lodge a specification of any documents which they desire to recover by diligence."

On 16th December the Court pronounced this further interlocutor:—"The Lords having considered the specification of writings and documents for the respondents, No. 16 of process, and heard counsel thereon, disallow articles 1 and 3 of the said specification; grant diligence at the instance of the respondents against havers for recovery of the documents mentioned in the 2d article, as amended, of the said specification, and grant commission to Henry Johnston, Esq., Advocate, Edinburgh, to examine the havers, and receive their exhibits or make excerpts therefrom, to be reported by the second sederunt day in January next."

The diligence was not executed and the pursuer now proposed to put in a minute abandoning the action, which was opposed by the defender upon the ground that the interlocutor of 27th November, or at all events that interlocutor when taken in connection with that of December 16, was an interlocutor of absolviter within the meaning of the Act of Sederunt of 10th July 1839, and that it was therefore competent for the defender to abandon the action.

The pursuer argued—(1) This case was under the Act of Sederunt 1839, and not under that of 1828. The provisions of these two Acts differed, for while the latter made it competent to abandon an action before an interlocutor had been pronounced "assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor," the former made it competent for the pursuer to abandon before any "interlocutor of absolvitor is pronounced,"—clearly meaning an interlocutor which assoilzies the defender and decerns. The interlocutor in this case did not do so. (2) Even if the Act of Sederunt of 1828 applied, this interlocutor was not one leading necessarily to absolvitor, but merely limiting the kind of proof. The time fixed by interlocutor for recovering the documents had undoubtedly expired, but the Court might have granted an extension of the time.

The defender argued—The provisions of the Act of Sederunt of 10th July 1839, sec. 61, and of Act of Sedurunt of 11th July 1828, sec. 118, must be read as meaning the same thing, viz., that it was incompetent to abandon an action after an interterlocutor had been pronounced which necessarily led to absolvitor. Such an interlocutor had been pronounced here, for the judgment of the Court was practically this, that unless the pursuer could prove his allegations by writ the defender was entitled to absolvitor. But the pursuer