ness of the decision were in my opinion doubtful, I should give effect to it, although pronounced in a proceeding *ex parte*. But the case was very carefully considered, and although one of the learned Judges differed, I see no reason to change the view I entertained in the application to disentail the estates, and which was adopted by a majority of the Court.

"It was further urged that the validity of the title is at least open to such doubt and risk of future objection that the defender is not bound to accept it, even if the Court should be of opinion that the doubt is not well founded, and reference was made to the case of the *Duke of Devonshire* v. *Fletcher*, June 19, 1874, 1 Rettie 1056, and the other cases there mentioned in the opinion of Lord Ardmillan. That case was so special in its circumstances that it would be difficult, I think, to use it as an authority of general application. But however that may be, the present case differs from it and the other authorities referred to, in so far as the question said to raise a doubt in reference to the title has been expressly decided against the defender's view. This is a state of matters entirely different from the case which has hitherto occurred, in which a point of difficulty as to the title which the Court must consider and decide for the first time arises in the very litigation in which the question of the purchaser's liability to complete the contract of sale is raised. It appears to me that it cannot be properly represented that the question of validity of the title is doubtful, where, as here, there is a standing decision in a previous proceeding that the title was good; and on this point it cannot, I think, make any difference that the decision was in accordance with the view of a majority of the Judges only.

"Apart from this ground, which is, I think, sufficient to dispose of the defence, the case of *Dunlop* v. *Crawford*, 11 D. 1062, and 12 D. 518, seems to be a precedent directly in the pursuer's favour. In that case the Court gave an opportunity to all the persons called as heirs of entail to appear and oppose the sale of the property, and none of them having appeared, decree was given as concluded for. The pursuer having called all the heirs of entail, and taken decree against them, is in the same position as the pursuer in that case, and is entitled to decree, unless the defender, who has appeared, can succeed in showing that the title is bad."

The defender reclaimed.

At advising—

Lord Justice-Clerk—In this case I think that the judgment of the Lord Ordinary should be adhered to. I am of opinion that the word "dated" in the 3d section of the statute and in other sections means "bearing date," and that that is the only meaning which it can have; therefore the date of the deed is the date of the entail. I might have been tempted to shew how that meaning is the essential one—looking to the other sections of this Act, and to other statutes upon the same subject—but this has been done so fully by the Lord President in the former case that I would only be repeating what was then said.

Lord Neaves—I am of the same opinion. Were we to hold that anything but the date of the deed was intended it might give rise to much trouble. It would be necessary to find out the date of the granter's death, and this might often be extremely difficult or impossible. The date of the deed fixes a certain period, and I must hold that that was the intention of the statute.

Lords Ormidale and Gifford concurred.

The Court adhered, with expenses from the date of the Lord Ordinary's interlocutor.

Counsel for Pursuer—Rankine. Agent—John Romanes, S.S.C.

Counsel for Defender—Adam—Kinnear. Agent—George Bruce, W.S.

Saturday, June 24.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WARDROPE *v.* THE DUKE OF HAMILTON AND OTHERS.

Master and Servant—Culpa—*Damage*—*Responsibility*—*Relevancy.*

Two gamekeepers were alleged to have fired at a man and his dog upon the high road, killing the dog and wounding the man. In an action for damages against the keepers and their employer, it was averred that the former were acting with the authority, or at least for the behoof, of the latter. —*Held* that this averment was not sufficient to infer liability, and that there was no relevant ground for an issue against the employer.

Observed (*per* Lord Deas) that where the act of a servant whereby damage is caused to any one is of a criminal nature, it is necessary to state something very specific indeed to infer liability against the master.

This action was brought by the pursuer, a tailor in Stonehouse, against the Duke of Hamilton and two of his gamekeepers, James Wood and John Tait, concluding for £200, as reparation for loss, injury, and damages for personal injuries and for the value of a greyhound belonging to the pursuer. He averred that the defenders Wood and Tait, then in the employment of the Duke of Hamilton, and acting with his authority, or at least for his behoof, fired at him (the pursuer) on the turnpike road near Stonehouse, killing his dog and wounding him.

The defenders Wood and Tait denied the pursuer's averments, and required the pursuer "to specify which one of the defenders he alleges fired the shot libelled, and to condescend upon the acts by which it is alleged that the defenders aided and abetted each other."

The Duke of Hamilton pleaded—"(1) There being no sufficient averment that the present defender either did the acts complained of or gave any instructions or authority to the other defenders to do them, the action, so far as directed against the present defender, is irrelevant. (2) The act complained of being, and being alleged to be, of a criminal character, the present defender cannot be made liable therefor merely on

the ground that the other defenders were in his employment as gamekeepers, or without proof of special instructions. (3) The defenders at the time complained of not having in point of fact been employed in performance of their duties as the present defender's gamekeepers, nor at the time alleged on his estates, there are no grounds for the conclusions directed against him."

The Sheriff-Substitute (SPENS) pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators on the preliminary pleas, sustains the preliminary plea stated for the Duke of Hamilton, in respect there are no averments stated relevant to infer liability as against him, and assoilzies him from the conclusions of the action."

On appeal the Sheriff repelled the preliminary pleas for the Duke of Hamilton, reserving them in so far as they might affect the merits, allowed a proof, and added to his interlocutor this note—"The summons is not framed on the best model, but the Sheriff thinks that it is sufficient to raise the issues (1st) whether either of the defenders Tait and Wood did the wrong in question; (2d) whether the other aided or abetted him in it; and (3d) whether in so doing they acted by the instructions or with the authority of the Duke of Hamilton. If such joint actings or co-operation is proved against Wood and Tait, and instructions or express authority to them so to act is proved against his Grace, it is difficult to see why the pursuer should not obtain decree against all the defenders."

The pursuer appealed to the First Division, and proposed these issues—"(1) Whether, on or about the 5th day of November 1875, and on, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, in the county of Lanark, the defenders James Wood and John Tait, or one or other, and which of them, wrongfully shot at the pursuer's dog, 'Dolly Varden,' whereby the said dog was killed and the pursuer wounded, to the pursuer's loss, injury, and damage? (2) Whether, on or about the 5th day of November 1875, and on, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, in the county of Lanark, the defenders James Wood and John Tait, or one or other of them, acting in the employment of the defender his Grace the Duke of Hamilton and Brandon, wrongfully shot at the pursuer's dog 'Dolly Varden,' whereby the said dog was killed, and the pursuer wounded, to the pursuer's loss, injury, and damage. (3) Whether, on or about the 5th day of November 1875, and on, at, or near the turnpike road leading from Glasgow to Carlisle, about a mile distant from Stonehouse, in the county of Lanark, the pursuer's dog 'Dolly Varden' was killed, and the pursuer wounded, through the fault of the defenders his Grace the Duke of Hamilton and James Wood and John Tait, or one or more, and which of them, to the pursuer's loss, injury, and damage? Damages laid at £200." No objection was made to the first of these by the defenders Wood and Tait, but it was argued that there were not any averments made on record sufficient to ground the second and third issues against the Duke of Hamilton.

At advising—

LORD PRESIDENT—It is necessary to consider and dispose of the first plea in law for the defender the Duke of Hamilton, viz.—"There being no sufficient averment that the present defender either did the acts complained of or gave any instructions or authority to the other defenders to do them, the action, so far as directed against the present defender, is irrelevant." The question here is—Is there an averment here that in shooting this dog and wounding the pursuer these men, or whichever of them did it, was acting by the authority of the Duke of Hamilton? The only statement in the record with regard to the Duke of Hamilton is that "the defenders James Wood and John Tait being in the service of the other defender his Grace the Duke of Hamilton, and acting with his authority, or at least for his behoof, did fire at or in the direction of the pursuer and his greyhound bitch known by the name of 'Dolly Varden,' all wrongously, illegally, wantonly, and maliciously, and did shoot and kill the said animal (which was of the value of £70 or thereby), and did shoot and wound the pursuer;" and that is construed in the second issue as meaning that "the defenders James Wood and John Tait, or one or other of them, acting in the employment of the defender his Grace the Duke of Hamilton and Brandon, wrongfully shot at the pursuer's dog 'Dolly Varden,' whereby the said dog was killed and the pursuer wounded, to the pursuer's loss, injury, and damage." Now, I am quite clear that that is not sufficient to infer liability against the Duke of Hamilton, and therefore I think that the second and third issues must go out.

LORD DEAS—The Duke of Hamilton's first plea has been called preliminary in the margin of the record; the second, which is marked as being on the merits, is substantially the same. The Sheriff-Substitute, I see, repels the preliminary plea. Now, an objection to relevancy is not properly a preliminary plea, and it is unsatisfactory that it is so dealt with, although it may be advisable to dispose of it at that stage. If what these men are said to have done be true, it amounts to a criminal charge; if their act was reckless, that is sufficient to found such a charge. My brother Lord Mure and I had to consider such a charge in the Circuit Court at Aberdeen, where a landed gentleman, firing at a hare, as was stated in defence, killed a horse; that gentleman was tried in the Criminal Court and convicted. If, then, this is a good criminal charge, it is necessary to state something very specific indeed to infer liability against the Duke of Hamilton. It must amount to this, that he was art and part with his servants in this act. There is no such averment; to hold him liable would be to introduce a responsibility of a master for the acts of his servants wholly unknown in the law of Scotland, and one that should never be sanctioned.

LORD ARDMILLAN—I agree with your Lordship: a master is not responsible for his servant's crime. If the servant commits a careless act in the execution of his employment the master is responsible; but if the element of crime is brought in the master is no longer liable. If a particular direction had been given to shoot any dogs found at that place, it would have been a

different case. That is not alleged, nor is it alleged that there were any general instructions given by the Duke of Hamilton to his keepers to kill dogs. What is alleged is that "the defenders James Wood and John Tait, being in the service of the other defender his Grace the Duke of Hamilton, and acting with his authority or at least for his behoof, fired at or in the direction of the pursuer and his greyhound bitch known by the name of 'Dolly Varden,' all wrongously, illegally, wantonly, and maliciously, and shot and killed the said animal, which was of the value of £70 sterling or thereby, and shot and wounded the pursuer, to the great effusion of his blood and injury of his person," and these allegations are not sufficient to infer any liability against the Duke of Hamilton.

LORD MURE concurred.

Counsel for Pursuer—Rhind. Agent—George Begg, S.S.C.

Counsel for the Defender the Duke of Hamilton—Dean of Faculty (Watson)—Gloag. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders Wood and Tait—J. P. B. Robertson. Agents—Bruce & Kerr, W.S.

Tuesday, June 27.

FIRST DIVISION.

PETITION—HUME.

Expenses—Petition—25 and 26 Vict. cap. 89, secs. 82 and 92.

On the application of a creditor of a company for a judicial winding-up under 25 and 26 Vict. cap. 89, with suggestion of an official liquidator, the directors of the company lodged answers merely for the purpose of suggesting another person as liquidator.—*Held* that the respondents were only entitled to the expenses of appearance by counsel to make a statement at the bar.

This was a petition presented to the Court under the Companies Act 1862 (25 and 26 Vict. cap. 89) for the winding-up of the Highland Peat Fuel Company, Limited. The petitioner was a creditor for the amount of £545, 7s. 5d. constituted by a promissory note which fell due on 19th January 1875. The company were charged to make payment thereof to the petitioner, and on the expiry of the *inducice* of the charge he presented this petition in terms of the 80th and 82d sections of the Act of 1862, and suggested Mr T. A. Molleson, C. A., as liquidator to be appointed under the 92d section of the said Act. Answers to this petition were lodged by the directors of the Company, in which they stated that a majority of the shareholders were in favour of the appointment of Mr J. H. Balgarnie, C.A. as liquidator. They had no other objections to the petition.

Mr F. B. Anderson, C. A. was appointed liquidator by the Court.

When the Auditor's report came up—

The LORD PRESIDENT said—These claims for expenses are very important in the administration of the law under the Companies Acts, and I am extremely anxious that everything should be regularly done, so as to establish a fixed rule. There can be no doubt that the petitioner is entitled to the taxed amount of his expenses out of the estate, because the proceedings initiated by him have enured to the benefit of the estate; but as regards the claim of the respondents, I think that they are not entitled to the taxed amount of their expenses as it is now before us. The only objection they had to the petitioner's application was to the name of the person suggested as liquidator. Now, it would have been quite sufficient that counsel should have appeared and stated their objection at the bar. If they had taken this course it is clear that the expenses would have been very much less. We must therefore send this account back to the Auditor to be taxed on this footing, that the respondents were only entitled to appear by counsel at the bar and make a verbal suggestion.

The Court pronounced the following interlocutor:—

"The Lords having considered the report on the account of expenses incurred by the petitioner William Hume, No. 108 of process, and heard counsel for him, Approve of the said report, taxing the said expenses at the sum of Fifty-five pounds nineteen shillings and elevenpence sterling, and appoint the said taxed amount of the said expenses to be paid out of the estate of the Highland Peat Fuel Company (Limited): And as regards the account of expenses incurred by the respondents, the Directors of the said Company, and John Baxter and Others, No. 109 of process, remit of new to the Auditor to tax the said account on the footing that the said respondents were not entitled to lodge answers for the purpose of stating their objection to the person proposed as liquidator in the petition, but were only entitled to appear by counsel on the calling of the petition, and object verbally to the appointment of the person so proposed, and to report."

Counsel for Petitioner—Pearson. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents—Strachan. Agent—G. C. Banks, S.S.C.

Tuesday, June 27.

SECOND DIVISION.

M'CLELLAND *v.* ROBERTSON.

Feu-Contract—Obligation of Feuar—Clauses of Repayment and Indemnity.

A feued certain steadings of ground under an obligation to pay to the superior one-half of the expense of forming and constructing such common sewers or drains as the superior might have already formed, or which he might thereafter form, in a street *ex adverso* of his feu; and to repay to the superior one-half of the price of the formation of said streets so far as already formed. The sewer