An ingenious argument was submitted to us, based upon the correspondence, but the actual point is one beyond doubt, for it is clear that Glasgow made the demand for relief, and stated the particulars of the case. It is also reasonable to presume that Eastwood made all the inquiry deemed necessary previously to making the admission. The pauper had, however, ceased meanwhile to be chargeable, and yet in face of a second notice that the chargeability had been renewed this admission was made. The letter of 10th August is the answer of Eastwood to the claim from Glasgow. On a reference to the terms of that letter it is evident that Eastwood wished to know whether the liability was still continuing. Why should they do this if not liable? The whole question really is, Whether this letter was or was not an admission of liability. It is in fact a question of construction of the letter aided by the circumstances under which it was written.

Two points for inquiry occur to me in this view—Firstly, what did the inspector of Eastwood mean by his letter? As to this we learn from the minutes of the parochial board of Eastwood that they had directed him to "admit to Glasgow." Secondly, what did Glasgow understand by this letter? I think it is clear that throughout Glasgow regarded this letter as an admission of liability, and that they referred to it in their correspondence as such. Now the inspector of Eastwood knew well enough that he could only follow out the orders of his board, and whatever reservation was made must have been in his own mind. Till 1873 the matter fell out of sight, but in April of that year it was revived—still nothing can get over that letter of August 10, 1870. Throughout the correspondence the inspector of Eastwood never said that he did not mean to admit liability—that position was never taken up until July 1877. That being so, the principle of *Beattie* v. *Arbuckle* seems to apply. To me such a principle appears very necessary in order to check litigation. In cases like the present the parties are, as it were, playing at litigation, for those who contest them have really no personal interest in the matter. The object of the rules laid down upon this branch of our law is to facilitate settlements and prevent such legal contest. I am of opinion that the interlocutor of the Sheriff should be recalled and the appeal sustained.

Lord Ormidale—There are two points in this case—(1) was the admission made? (2) if made, has it been waived or effectually retracted?

Now, as to the first point, I am clear that the admission of liability was made by the inspector of Eastwood in his letter of August 10, 1870.

Then, as to the second, it is said that there was rather a waiver than a retractation. But I cannot think we have enough even for this. The mode adopted by Eastwood was to answer no letters, and accordingly the correspondence erelong died out; but that is not sufficient. I concur with your Lordship in the opinion that this appeal should be sustained.

Lord Gifford—I concur. I think the authorities absolutely establish the doctrine that an admission once asked and obtained cannot be gone back upon. Of course it is possible to imagine exceptions in cases of fraud and so forth, but here we have nothing exceptional of that nature. Such an admission of liability is held by the law to be a conclusive bargain in all time coming between the parties with reference to the particular pauper to whom the question has arisen. Both the Sheriff and Sheriff-Substitute have treated this point as of small importance, whereas in reality it is the turning point in my opinion of the case. We cannot permit a parish by the use of vague expressions to evade a reply to the statutory demand for an admission of liability. Now the admission if made for a certain amount of liability was an admission for all, provided there had been no charge of circumstances. Here there was no change. Glasgow plainly relied on the first admission, and the fact that owing to Eastwood's silence the matter dropped for seven years should offer no bar to the effectual nature of the admission.

The Court pronounced this interlocutor:—

"Find that by the letter of 10th August 1870, No. 7 of process, the parish of Eastwood admitted liability for the support of the pauper: Therefore sustain the appeal, recal the judgment appealed against, and decern against the defender and respondent for payment to the pursuer and appellant in terms of the conclusions of the action; Find the pursuer and appellant entitled to expenses in both Courts, under deduction of the expense of the second day's appearance in the appeal, and remit to the Auditor to tax the expenses and to report."

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson) — Trayner. Agents — W. & J. Burness, W.S.

Counsel for Defender (Respondent)—Asher—J. P. B. Robertson. Agents—Carment, Wedderburn, & Watson, W.S.

Saturday, November 30.

SECOND DIVISION.

[Lord Young, Ordinary.

STEPHEN *v.* THE LORD ADVOCATE.

(*Cf. Sharp* v. *The Lord Advocate*, October 31, 1878, *ante*, p. 49);

Lease—Where Tenant of Crown Fishings Incurred Expense in Defending Small Debt Action—Right of Relief against Crown where Eviction did not follow.

In a small-debt action brought by a proprietor against a Crown tenant of salmon-fishings claiming rent for the use of his land in the prosecution of the fishing, decree was given against the tenant. The Crown, while willing to give him advice, had warned him to expect no relief. Subsequently in the Court of Session the Crown established a right to use the land in question for the purposes named. *Held* that the tenant had no right of relief against the Crown for payment of the sum decerned for in the small-debt action, nor for the expenses incurred therein.

Prior to 26th March 1875 Robert Stephen, the

pursuer of this action, had been lessee of the salmon-fishings *ex adverso* of the estate of Clyth under a lease from Mr Sharp, the proprietor, but the Crown having established its right to the fishings as against Mr Sharp, Stephen at that date became the lessee of the Crown. He carried on his fishings at the two stations of Occumster and Whalligoe, both on the Clyth estate, as these were the only points at which the right of fishing could be profitably worked. On the ground that neither the Crown nor its tenant were entitled to use his lands or any portion of them for any purposes connected with the fisheries without payment, Mr Sharp sued Stephen in the Small-Debt Court for payment of £10 for such use in the case of each station, and the Sheriff gave decree for £8 and expenses. For these sums, and his own expenses in defending that action (of which due intimation had been made to the Crown), £112, 14s. 11d. in all, Stephen in this action sued the Crown on the ground that they were expenses necessarily incurred by him in defending the Crown's right. The Crown was subsequently successful in an action, which it brought in the Court of Session against Mr Sharp (*ante*, p. 49), of declarator of right to use the lands in so far as necessary to the proper exercise of the right of fishing. In the correspondence between the pursuer and the Crown in reference to the Sheriff Court action, the Crown had from the very outset guarded itself against any claim for expenses of the kind sued for. It had at the same time professed willingness to aid the defender in every way by advice. In one letter, in reply to a communication from the pursuer's agent intimating that he would look to the Crown to relieve him of loss, the Crown's agent said—"If the Sheriff decides against your client it must be because he has exceeded his rights, and of course the Crown would not countenance such a proceeding; if, on the other hand, the decision is favourable to him, the Sheriff has power to award expenses against the pursuer, and Mr Howard remarks that it will be for you to see to this."

The Lord Ordinary (YOUNG) sustained a plea against the relevancy of the action, and dismissed it. He added this note:—

"*Note.*—The pursuer's case is a hard one, and I should gladly give him relief if I could. The Sheriff's judgment in the Small Debt Court was, I think, in excess of his jurisdiction, or at least certainly not in what I should esteem the discreet exercise of it. The action was, in form, for a claim in money, but it was manifest that its validity depended on a question of heritable right, regarding which the Crown and the proprietors of Clyth were (and still are) in controversy. It was so obviously unsuitable and inconvenient that the Sheriff should adjudicate on this question in the Small Debt Court, even to the extent of deciding a claim for money which exactly depended upon it, that I must express some surprise at the view which the Sheriff took of his jurisdiction and duty. That he decided erroneously is an accident on which I do not dwell, especially as in the meantime that proposition stands only on my own decision of the question of right. He clearly ought not to have decided at all, but allowed the case before him to stand over to abide the decision by the proper Court of the question of right on which it depended.

"I do not much wonder that the proprietor of Clyth should be indignant with the Crown officials for their conduct in the matter of the fishing, which he had established at his own expense and risk, and that he should afford them no facilities which he may lawfully deny. I am nevertheless unable to commend such petty warfare on the subject as the small-debt action is an instance of—I hope the only one. He has obtained an accidental, and I think erroneous, success at the hands of an inferior judge in a Small Debt Court, with considerable hardship to an innocent man, and without any effect on the Crown officers. It is probable that a private proprietor would have defended his tenant under such circumstances, and relieved him of the hardship which he had innocently, so far as he was concerned, incurred from a dispute with a neighbouring landowner. I should have thought that (right feeling apart) motives of interest, guided by intelligence, would have prompted a landlord to defend his tenant and keep him harmless under such circumstances, but this is not a consideration that will found a claim for relief in a court of law. I am constrained to decide that the facts disclosed show no ground of action against the Crown."

The pursuer reclaimed, and argued—The judgment of the Small-Debt Court being founded upon want of title, and being the decree of a Court of final jurisdiction, the pursuer suffered what was equivalent to eviction, and accordingly the Crown were bound to relieve him.

Authorities — Hunter, ii, 266; *Bell* v. *Duke of Queensberry's Executors*, Dec. 18, 1824, 3 S. 416.

At advising—

LORD JUSTICE-CLERK—No question of want of jurisdiction on the part of the Sheriff seems involved in this case. The pursuer of the action before him made a demand on the Crown tenant of the fishings for rent for the use of roads belonging to the pursuer. The tenant might or might not defend himself on the ground that he had a right to use them, but as far as the purposes of that action were concerned I am not prepared to say that the Sheriff was not entitled to decide the case. I do not think that matter enters as an element here.

The ground of my opinion is simply this, that the tenant was distinctly told by the Crown authorities that, while they would assist him with their advice, he must defend himself at his own risk and expense. That they made that quite distinct is certain on the correspondence; and the tenant entered on and continued the litigation on that footing, and no other. This is an action solely for the expense incurred in these proceedings; and on the ground I have stated I think the Crown is not liable in any part of them.

I entirely concur in the general remarks of the Lord Ordinary on the character of the defence.

LORD ORMIDALE—I am of the same opinion. The proprietor of Clyth made Stephen pay in the Small Debt Court, and it must be admitted that if he is not to have relief his position is a hard one. But then the Crown in their very first letter refused to undertake any part of the expenses of his defence.

Had the Crown been shown to have no title to

the fishings, and had there been complete eviction the matter would have been a very different one. But that is not so here—indeed the facts are just the opposite way. The Crown's title has been found to be perfect. All the authorities, which may be found in Hunter on Landlord and Tenaut, say, that only on eviction from any defect in the landlord's title can the tenant have any claim against the landlord. The failure here arose from a miscarriage of justice and not from any fault of the Crown. I think there could not be eviction unless the title of the landlord had been impugned and found defective.

However good in one sense this claim may be, I do not think it can be maintained in Court.

Lord Gifford—I sympathise much with Mr Stephen. We are, however, bound by the rule of law. Two grounds there are on which relief might have been claimed. The first of these is agreement or implied agreement. But of this there is no sign; on the contrary, the Crown warned the pursuer to expect no relief. The second ground of relief is at common law. Is there any relief in such a case as between landlord and tenant? No doubt the landlord's title was assailed, but it was assailed in vain. This is not a claim against the Crown for not giving what it ought to have given, or for warranting what it could not maintain for its tenant.

On the question of the sum recovered against Mr Stephen in the Small Debt Court I have more difficulty. Suppose the case had been one of interdict and not of an award, I should have been inclined to stretch the law so as to cover it, and even possibly to have held it an eviction, but there is no ground for that in the present case.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Wallace. Agent—A. Morison, S.S.C.

Counsel for Defender (Respondent)—Solicitor-General (Macdonald)—Ivory. Agent—D. Beith, W.S.

Tuesday, December 3.

SECOND DIVISION.

SPECIAL CASE—MACKAY'S TRUSTEES.

Trust—Postponed Period of Division—Annuity—Vesting—Winding-up of Trust where Annuity Secured.

A truster directed his trustees to invest his means, and "from the free annual proceeds thereof" to pay a certain annuity; further, upon the death of the annuitant, to "divide my whole means and estate into seven shares," to be paid to certain beneficiaries, who were named. There was a substitution in the event (which did not happen) of any of the beneficiaries predeceasing the testator. The annuity did not exhaust the income. *Held* that, as the estate vested *a morte testatoris*, the sanction of the Court might be given to an arrangement between the beneficiaries and the annuitant under which the estate was to be divided on satisfactory security being given to the annuitant

John Mackay died on 18th April 1875 leaving a trust-settlement, in which, after certain other provisions, which had all been implemented, he directed his trustees "to invest the entire balance of my means and estate in such security as they may see best, in their own names, as my trustees, and to pay from the free annual proceeds thereof to my sister Mrs Sinclair, presently residing in Glasgow, the sum of £50 sterling per annum, payable half-yearly and in advance; and on the death of my said sister Ann Sinclair, my said trustees shall divide my whole means and estate into seven shares of equal amount," and pay these to certain named residuary legatees. There was also a substitution, but it was only to operate in the event of any of the residuary legatees predeceasing the testator, which event did not occur. The residuary legatees proposed that the estate should be divided at once, the annuitant for her interest consenting to this being done "upon the understanding that the trustees provide for the annuity of £50 bequeathed to me by my brother under his settlement either by purchasing an annuity from some responsible assurance company, to be approved of by me, or by retaining a sum in their hands sufficient to meet my annuity."

The trustees presented a Special Case to the Court, in which they asked an answer to the following question:—"Are the trustees entitled during the lifetime of the said Mrs Ann Mackay or Sinclair, the annuitant, and with her concurrence and consent, on an annuity being provided for her as above mentioned, to divide the remainder of the estate among the beneficiaries entitled to share in it after her death?"

Argued for the second and third parties, who were respectively the annuitant and beneficiaries,—The fund had vested; and the fact that the death of the annuitant was made the period of division was not enough to prevent the Court's anticipating the period if it was not inconsistent with the testator's intentions.

Argued for the trustees—They did not dispute the vesting. There seemed no reason why the truster had postponed the term of payment save that of making the annuity secure. And the direction to divide at that specified postponed time was clear. The case of *Jack* much resembled this.

Authorities—*Jack and Others*, November 5, 1874, 12 Scot. Law Rep. 42; *White's Trustees* v. *Whyte*, 4 Rettie 786; *Kippen* v. *Kippen's Trustees*, November 24, 1871, 10 Macph. 134.; *Pretty* v. *Newbigging*, March 1, 1854, 16 D. 667.

At advising—

Lord Justice-Clerk—In this case the parties are substantially agreed, and I do not see why the authority of the Court should not be interponed and sanction given to the proposed arrangement. In general when an annuitant or liferenter is *sui juris*, and where there is no limitation upon his or her right (as, for example, would be the case where it is made alimentary), the annuitant or liferenter together with the residuary legatee may come to any agreement as to the capital fund. I think therefore that where, as in the present case, the result is to remove an intermediate burden with the consent of the person in whose favour it is created, a division may at once be made. It is, however, quite a different matter where the person in right of the burden or incumbrance is in-