defenders and appellants, and the action has been raised for the purpose of recovering the contents of the bonds. The ground of action is, that by the disposition under which the defenders and appellants acquired the property, they entered into an agreement with the disponer that liability for the heritable bonds should be transmitted against them, the case in this way falling under the provisions of the Conveyancing (Scotland) Act 1874, sec. 47. That Act provides that if there be such an agreement the creditor in the bonds may proceed against the disponee of the property, but this agreement must appear *in gremio* of the disposition. Now, all that is said of the disposition to the defenders relative to the bonds is that the property was disponed under burden of the bonds. There is nothing else appearing in the deed by reference to which an agreement may be predicated. It appears to me to be plain that a disposition of property under burden of bonds does not involve an agreement that the disponee is to be liable in payment. This would have been my opinion of the case even apart from the recent decision in the case of *Carrick, &c.* v. *Rodger, Watt, & Paul*, but the decision there is decisive on the present occasion, and had it been pronounced before judgment was given by the Sheriff there is no reason to doubt that his judgment would have been, not in favour of the pursuers, but in favour of the defenders.

The pursuers further contend that even if they are not entitled to sue the defenders for the full contents of the bonds, they are entitled to recover the £450 which were received by the defenders after they became proprietors. This also, I think, is an unfounded contention. The £450 was paid, not under a contract with the defenders—for there was no contract with them—but was the instalment of that loan which the pursuers had agreed to give to Mellis, the granter of the bonds. The defenders in the taking of this money were in reality only the hand or representatives of Mellis, and the only thing on which the pursuer relied when he consented that the balance in bank should be drawn upon to this extent was the certificate that work of this value had been put upon the houses which were the subjects of the security. There is no averment that the pursuers trusted to the credit of the defenders. Even if there had been, there is no evidence of the averment, and in these circumstances it appears to me that the ground of action as regards the £450 is not better established than that upon which payment of the full contents of the bonds is sued for by the pursuers.

On the whole matter, I concur in thinking that the interlocutor of the Sheriff ought to be recalled, and judgment for the defenders pronounced. I only say further that the Sheriff has misapprehended the import of the statute referred to, when in place of limiting himself to the consideration of an agreement within the four corners of whether there is any evidence of the disposition, he refers to circumstances in the conduct of parties which subsequently occurred. The Act is precise ; if there is an agreement such as is sufficient to transfer liability, that agreement must appear in the disposition itself, otherwise the case will not be brought within the operation of the statute.

The Court recalled the interlocutor of the Sheriff and assoilzied the defenders.

Counsel for Appellants—D.-F. Kinnear, Q.C. — Murray. Agent — J. Gillon Fergusson, W.S.

Counsel for Respondents—Trayner—Dickson. Agents—Duncan & Black, W.S.

Friday, December 16.

FIRST DIVISION.

SPECIAL CASE — ROYAL INFIRMARY OF EDINBURGH AND OTHERS *v.* MUIR AND OTHERS (MUIR'S TRUSTEES).

Succession—Will—Legacy—Cumulative or Substitutionary.

Where two sums of equal amount are given to the same legatee in two distinct testamentary papers, both equally formal and complete, the presumption is that the legacies are cumulative.

A testator, by formal trust-disposition and settlement dated October 1877, left his whole moveable estate in trust for certain purposes, and, *inter alia*, "in payment of any legacies or bequests which I may hereafter bequeath by any codicil or signed memorandum, however informal, expressive of my intention." This trust-disposition was on the truster's death found in an iron box in which he kept his private papers, enclosed in an envelope along with two holograph testamentary writings, dated respectively the 23d and 30th April 1880. In the same box, but within the folds of the disposition of a house, another holograph writing was found, dated 2d February 1880. The truster left no other papers of a testamentary nature. By the writing of 2d February there were bequeathed four legacies of £1000 each, one of £500, seven of £250 each, one of £50, and one of £10—in all fourteen legacies, of the aggregate amount of £6310. By the writing of 30th April the four legacies of £1000, the legacy of £500, the seven legacies of £250, and the legacy of £50, being thirteen out of the fourteen, were given in the same terms and to the same persons respectively as in the earlier paper, but there were two new legacies of £250 each, two new legacies of £10 each, and the former £10 legacy was increased to £20, making in all eighteen legacies of £6840. The words of bequest in the two papers were substantially identical. *Held* that the legacies in the later testamentary paper was intended to be cumulative, not in substitution of those contained in the original bequest.

This was a Special Case to which the Royal Infirmary of Edinburgh and certain other charitable institutions were the parties of the first part, and the trustees of the late William Muir of Inistrynich were the parties of the second part. The following were the material statements in the Case: — The late William Muir of Inistrynich, Argyleshire, who resided at 7 Wellington Place, Leith, died on 30th May 1880, leaving moveable

property of the value of £176,914, 18s. 9d., as estimated in the confirmation. After the death of Mr Muir an iron box, in which the deceased kept most of his private papers, was searched for testamentary writings. The following were found together in the box, enclosed in one envelope, and the second parties caused them to be recorded in the Books of Council and Session on 4th June 1880, viz. :—(1) Disposition and trust-settlement by Mr Muir, dated 16th October 1867; (2) testamentary writing holograph of Mr Muir, dated 23d April 1880; (3) testamentary writing holograph of Mr Muir, dated 30th April 1880. Thereafter, when the remaining papers in the said box were being examined for another purpose, it was found that a disposition of a house in Leith contained within its folds a testamentary writing holograph of Mr Muir, dated 2d February 1880. The said box was usually kept in a closet off the deceased's dining-room in Wellington Place, Leith, from which it was removed to the Commercial Bank for safe custody when Mr Muir shut up his Leith house in summer and went to live at Inistrynich. Shortly before his death, when he thought of going to Inistrynich, the box was sent to the bank, where it remained till the time of his death. About thirteen months or thereby preceding his death Mr Muir was attacked for the second time by paralysis, which affected chiefly his left side. His mind during the said thirteen months was not affected. He did not consult his legal adviser in the preparation of any of the said testamentary writings, other than the said disposition and trust-settlement.

By the said disposition and trust-settlement Mr Muir conveyed to the trustees therein named, the second parties hereto, his whole moveable estate, in trust for certain purposes, and, *inter alia*, "(*tertio*) in payment of any legacies or bequests which I may hereafter bequeath by any codicil or signed memorandum, however informal, expressive of my intention."

The holograph testamentary writing of 2d February was in the following terms :—"I hereby bequeath to the institutions and persons undernoted the respective sums stated for each, to be paid by my trustees free of legacy duty within twelve months after my decease :—

Royal Infirmary, Edr.,	£1000
Leith Hospital,	1000
Leith Ragged Industrial School,	500
Destitute Sick Society, Leith,	250
House of Refuge, Edr.,	250
Magdalen Asylum, Edr.,	250
Industrial Home for Fallen Women, Alnwick Hill,	250
Deaf and Dumb Asylum, Edr	250
Blind Asylum, Nicolson St.,	250
Society for the Relief of Indigent Gentlewomen, Ed.,	250
Schemes of Established Church of Scotland,	1000
William Smith, Thomson's Place, Leith,	1000
Agnes Nicol, servant, 7 Wellington Place,	50
Dugald M'Killop, at Inistrynich,	10
	£6310

"2*d Febry.* 1880.

WILLIAM MUIR."

The holograph testamentary writing of 30th April was in the following terms :—"I hereby bequeath and direct my trustees to pay out of my estate, within twelve months after my decease, to the undernoted institutions and others, the sums undernoted, viz. :—

Royal Infirmary, Edinbg.,	£1000
Leith Hospital,	1000
Leith Ragged Industrial School,	500
Destitute Sick Society, Leith,	250
House of Refuge, Edinbg.,	250
Original Ragged & Industrial School, Edinbg.,	250
United Industrial School, Edinbg.,	250
Magdalen Asylum, Edinbg.,	250
Industrial Home for Fallen Women, Edinbg.,	250
Deaf and Dumb Asylum, Edinbg.,	250
Blind Asylum (Dr Johnston), Edinbg.,	250
Society for Relief of Indigent Gentlewomen, Edinbg.,	250
Schemes of Established Church of Scotland	1000
William Smith, Thomson Place, Leith,	1000
Agnes Nicol, my cook, Wellington Place,	50
Dugald M'Killop, Inistrynich,	20
Nicol M'Intyre, Hayfield, do.,	10
Duncan Macfarlane, do.,	10
	£6840

All free of legacy duty, which duty is to be paid by my trustees out of my estate. (Signed) WILLIAM MUIR. *Leith, 30th April* 1880."

The first parties, the legatees, maintained that they were entitled to payment of the legacies bequeathed to them by the testamentary writing of 2d February 1880, and also of the legacies bequeathed to them by the testamentary writing of 30th April 1880. The second parties maintained that the said last-mentioned legacies were not in addition to, but were in substitution for, the legacies of corresponding amount contained in the writing of 2d February 1880.

The following was the question upon which the opinion and judgment of the Court were requested :—"Whether the legacies bequeathed to the first parties hereto by the testamentary writing dated 2d February 1880 are payable to them in addition to those bequeathed to them by the testamentary writing dated 30th April 1880?"

Authorities—*Stirling* v. *Deans*, June 20, 1704, M. 11,442; *Elliot* v. *Lord Stair's Trustees*, February 27, 1823, 2 S. 250; *Horsbrugh* v. *Horsbrugh*, January 12, 1847, 9 D. 329, and March 1, 1848, 10 D. 824; *Baird* v. *Jaap and Others*, July 15, 1856, 18 D. 1246; *Grant* v. *Stoddart*, February 27, 1849, 11 D. 860, and H. of L. June 28, 1851, 1 Macq. 161; *Kippen* v. *Darley*, May 21, 1858, 3 Macq. 203; *Kippen* v. *Kippen's Trustees*, July 10, 1874, 1 R. 1171; *Tennent* v. *Dunsmure*, November 8, 1878, 6 R. 151; *Moggridge* v. *Thackwell*, May 8, 1792, 1 Ves. Jun. 473; *Lee* v. *Pain*, January 21, 1844, 4 Hare 201; *Coote* v. *Boyd*, 1789, 2 Br. Chanc. Ca. 521; *Wilson* v. *O'Leary*, March 7, 1872, L.R. 7, Chanc. App. 448.

The Lords made avizandum.

At advising—

LORD PRESIDENT—The parties before us are the trustees of the late William Muir of Inistrynich on the one side, and certain charitable institutions, legatees under that gentleman's settlement, on the other, and the question which we

have to determine is, whether these charitable institutions are entitled to legacies under two different codicils, the one dated 2d February and the other 30th April 1880, or whether they are entitled to the legacies bequeathed to them by the latter of these codicils only. Mr Muir on the 16th October 1877 executed a general settlement of his estate very much in the usual form of a conveyance to trustees for certain purposes of trust, and amongst other purposes "in payment of any legacies or bequests which I may hereafter bequeath by any codicil or signed memorandum, however informal, expressive of my intention." The next paper which he executed was the holograph writing of 2d February 1880. The words of bequest of that writing are—"I hereby bequeath to the institutions and persons undernoted the respective sums stated for each, to be paid by my trustees free of legacy duty within twelve months after my decease." There are in this writing four legacies of £1000 each, one of £500, seven of £250, and two small legacies to servants, making in all fourteen legacies of an aggregate amount of £6310. There is next another holograph testamentary writing, dated 23d April 1880, but that has no direct bearing on the question before us. Then comes the codicil of the 30th April, which is also holograph of Mr Muir, and contains words of bequest very much resembling those of the testamentary writing of the 2d February. The testator intimates that "I hereby bequeath and direct my trustees to pay out of my estate, within twelve months after my decease, to the undernoted institutions and others, the sums undernoted, viz.," and he adds at the end, "All free of legacy duty, which duty is to be paid by my trustees out of my estate." Now, in this codicil of the 30th April the four legacies of £1000 are given again in the same terms, and to precisely the same persons, and so is the legacy of £500, but the legacies of £250 are now nine in number in place of seven, the Original Ragged and Industrial and the United Industrial Schools each receiving a legacy of £250, whereas in the previous codicil they were not mentioned at all. There is also an addition to a £10 legacy, which is now raised to £20, and there are two new legacies of £10 each, so that in this second paper there are in all eighteen legacies of an aggregate amount of £6840, being four legacies and £530 more than were bequeathed by the writing of 2d February. In these circumstances the question comes to be, whether the Royal Infirmary—to take the leading name in this Special Case—is entitled to £1000 under each of these codicils, or to £1000 under the latter only?

Now, it seems to me that the rules upon which cases of this kind are to be determined are very well settled both in England and Scotland. Indeed it has been more than once remarked in the Courts of both countries that there is no difference as regards questions of this description between the laws of Rome and of Scotland and England. One of these rules, which I think is very well settled by a series of authorities, is this, that when the same amount is given twice in the same paper to the same legatee, the presumption is that the repetition has occurred through mistake or forgetfulness, but where sums of equal amount are given to the same legatee in two distinct testamentary papers, both equally formal and complete, both legacies are payable unless it can be shown from the settlement of the deceased, or by other competent evidence, that the intention of the testator was to give one legacy only. Applying this rule here, we have two legacies of the same amount given to the same legatees in two distinct and separate papers, both valid testamentary papers holograph of the deceased. The inquiry therefore is, whether there is any competent evidence to show that it was not the testator's intention that both these papers should receive effect?

Mr Muir had a very large moveable estate, amounting, it is stated, to about £176,000, and there is no reason to suppose that this estate was not gradually increasing at the time when these papers were executed. There is no presumption therefore arising from the condition of his affairs to indicate any purpose of either restricting the amount of any legacies which he had given, or of not enlarging them if he saw fit to do so; but we are asked to infer an intention on the part of Mr Muir to give only one of these legacies, although he has *de facto* given both, from the circumstances under which the paper of the 2d February was found. The statement on this subject is, that after the death of Mr Muir an iron box, in which he kept most of his private papers, was searched for testamentary writings, and the following were found together in the box, enclosed in one envelope, and were afterwards recorded, viz.:—(1) The disposition and trust-settlement of 16th October 1877; (2) the holograph testamentary writing of 23d April 1880; and (3) the holograph testamentary writing of 30th April 1880. "Thereafter, when the remaining papers in the said box were being examined for another purpose, it was found that a disposition of a house in Leith contained within its folds a testamentary writing holograph of Mr Muir, dated 2d February 1880." Now, the inference which I understand the trustees are desirous to draw from this circumstance is, that when Mr Muir wrote the testamentary paper of 30th April he had forgotten the existence of the paper of 2d February, or that it had been mislaid; and that as that earlier codicil was not along with the trust-disposition and settlement, he had written the paper of the 30th April to come in place of the paper which had been mislaid or forgotten. There is a good deal of conjecture in all this certainly. In the first place, can we say with any confidence that when Mr Muir wrote the second paper the existence of the first was not present to his mind even if he had mislaid it? He may have mislaid it—that is not at all unlikely—but that circumstance does not of necessity make him forget its existence; and looking to the dates of the two papers it is not at all probable that when he wrote the second he had forgotten the existence of the first. But if the existence of the first was present to his mind when he wrote the second, I am afraid that the inference to be drawn, instead of being favourable to the trustees, is exactly the reverse, and that when he wrote the second he could mean nothing else than that both papers should receive effect. If he did not intend that, he had a very plain way of preventing all mistake by making the second paper contain an express revocation of the first, a proceeding that would at once have occurred to an intelligent man of business like Mr Muir. Even supposing that he thought he had destroyed or had irrecoverably

lost the first paper, still he would surely have said something about it, knowing that such a paper once existed. But he makes no allusion to it whatever, either in the way of revocation or otherwise. It appears to me that these circumstances—and they are really the whole evidence on which the trustees rely—afford ground for nothing but the merest conjecture as to the possibility of Mr Muir's intention, and I do not think that any amount of conjecture, even although it should be a great deal more probable than what is suggested here, would be sufficient to overcome the rule of law that when two legacies of the same amount are left to the same person in different testamentary writings both writings are to receive effect unless the testator can clearly be shown to have had a contrary intention. It has been well observed that the Court in dealing with a question of this kind is not to conjecture what the intention of the testator may have been, but to read the papers which he has left behind him, and say what their meaning is. I cannot read these papers here without saying that in my opinion, according to the established rule of law, it was Mr Muir's intention to give £1000 to the Royal Infirmary by the codicil of the 2d February, and to give another £1000 by the second codicil of 30th April, and the same observation applies to all the other legatees who are mentioned in both codicils. I am therefore for answering this question in the affirmative.

Lord Mure — These questions as to double legacies are generally attended with some difficulty, and the proper way of dealing with them has been the subject of anxious consideration in several cases, more particularly in the well-known cases of *Horsbrugh* v. *Horsbrugh* and *Lady Baird Preston*. In each of these cases some of the legacies were held to be merely substitutional, while others were held to be cumulative. I have again gone over the opinions in both cases, and I cannot say that the result of my examination has been to leave any very distinct idea on my mind as to the precise rule on which the Court went in disposing of the questions before them, beyond this, that we must gather from the documents themselves, and the surrounding circumstances, what the intention of the testator really was. Lord Justice-Clerk Hope, in his opinion in *Horsbrugh's* case, gives short extracts from the opinions of English Judges, which all seem to me to resolve this question, What was the intention of the testator? But as regards the way by which we are to arrive at his intention there was a difference of opinion on the bench in *Horsbrugh's* case. The Lord Justice-Clerk says—"I take the general principle to be that two writings, and gifts in each, bestow two gifts—that each writing is to receive effect *per se* till that is shown to be against the will and intention of the maker." Then I see that it is also laid down by Lord President Boyle that when two legacies of the same sum are given to the same person in two documents, both sums are payable to the legatee unless it appears from the writings that the testator intended that one legacy should be substituted for the other. But in the same case I see that some of the Judges state the rule to the exactly converse effect, viz., that the presumption is in favour of substitution unless it is expressly directed otherwise in the document. But notwithstanding this difference of opinion the majority distinctly laid it down that the presumption in such cases was for double payment. That being the rule, and applying it to this case, I am of opinion that these documents do not contain any evidence that it was not the intention of Mr Muir to give both these legacies to the beneficiaries, and I therefore agree with your Lordship in thinking that both legacies should be paid. At first sight I was struck with the fact that the earlier deed was found put up with a document belonging to Mr Muir which had no reference to his testamentary matters, and if it had been found in a separate box from his other testamentary writings, or in a different room, I confess I should have had great difficulty as to what inference ought to be drawn in the circumstances, because I think that in *Lady Baird Preston's* case the locality in which a document was found was held to be an element at which the Court might look. But here the earlier deed was found in the same box as the other testamentary writings, and I do not think that we can draw any inference either way from the fact that it was not found in the same envelope.

Lord Shand—Your Lordship in the chair has so fully and so carefully stated the principles of law applicable to this case that I shall content myself with adding a very few words. There is no question here as to whether both codicils are good testamentary writings. They both expressly bear to be documents bequeathing legacies. One of them, no doubt, was not found in precisely the same place as the rest of Mr Muir's testamentary papers, but it was found in the same box, and I cannot doubt that we must deal with them both as good testamentary writings. That being so, the only question is, whether it was the intention of the deceased that both should receive effect? On that question it appears to me that we are simply called on to ascertain what is the meaning of the words of the documents. Both have been left by the deceased, and both must receive effect unless it appears from something on the face of them, or of some other part of Mr Muir's testamentary writings, that the earlier paper is to be set aside. The argument which was addressed to us ranged over a very wide field, and the Court was asked to consider the probabilities as to Mr Muir's intention to be drawn from the general state of his affairs, and from the locality in which the earlier paper was found. Now, I think an observation of Lord Justice James in the case of *Wilson* v. *O'Leary* is strictly applicable to this case. He there said—"I would only add this, that I cannot help feeling that this case has occupied more time than it would have done if I had throughout confined myself strictly to that which is my legitimate duty—that is, if instead of endeavouring to find out what the testator meant, I had confined myself to endeavouring to ascertain what was the meaning of the testamentary papers which he left behind him." That passage, I think, explains very clearly what I understand to be the duty of the Court. What we have to do is to ascertain the meaning of these testamentary papers, taking them along with Mr Muir's other testamentary writings. That being so, I think both legacies must receive effect unless it appears from the terms of the testamentary writings as a whole that the testator had a different intention. Now, I cannot find any expression of an intention that the one paper should supersede the other, or was to be treated as a mere copy of the other. I may

say, looking to the fact that the legacies here are so much a mere repetition of one another, that a slight indication that the one was intended to be the mere duplicate of the other would probably have been sufficient to displace the presumption for cumulation. But there is no such indication to be found here. In *Lady Baird Preston's* case the legacy to Miss Rennie forms a very strong contrast to the present, because the second document founded on was in these terms—"The enormous expenses into which I have been led by lawsuits having circumscribed very much my funds, I have this day altered my list of legacies." The inference to be drawn from this evidently is that the later document was intended to alter the earlier, and so here, if there had been any similar indication that Mr Muir intended to alter his legacies, I should have been very ready to adopt that view, but finding nothing of the kind, I think that the Court are shut up to the view that each writing gives a separate legacy. To hold otherwise would be to run the risk of defeating instead of giving effect to the testator's intention.

The Court answered the question put to them in the affirmative.

Counsel for First Parties (Royal Infirmary and Others) — Trayner — Thorburn. Agents—A. & G. V. Mann, S.S.C.

Counsel for Second Parties (Muir's Trustees) —D.-F. Kinnear, Q.C.—Pearson. Agents—Boyd, Macdonald, & Co., S.S.C.

Friday, December 16.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

MURRAY *v.* BROWN AND PORTEOUS.

Reparation—Damages—Sheep-Worrying — Culpa —26 *and* 27 *Vict.*, *c.* 100, *sec.* 1.

Question—Whether in an action under the Statute 26 and 27 Vict., c. 100, sec. 1, it is necessary for the pursuer to aver and prove fault on the part of the owner of the dog?

Opinion (*per* Lord Mure) that it is.

Reparation—Damages—Liability of Joint-Delinquents in solidum.

Held that the owners of two dogs which had worried sheep were liable each for the whole damage, on the ordinary rule applicable to joint-delinquents.

William Brown, farmer, Burnton, in the parish of Laurencekirk, brought an action in the Sheriff Court of Aberdeen and Kincardine against David Scott Porteous, Esq., of Lauriston, and William Murray, farmer, Stoneydale, concluding for decree against the defenders, jointly and severally, for £250 in name of damages for the loss of a number of pursuer's sheep and lambs which he alleged to have been destroyed and injured by two dogs belonging to the defenders respectively.

The pursuer averred—"(Cond. 2) During the night of Saturday the 24th or morning of Sunday the 25th of July 1880, or about that time, a dog, the property of the defender Mr Porteous, and another dog, the property of the defender Mr Murray, having been culpably and negligently allowed to go at large and unsecured in any way, invaded the pursuer's said grazings, and set upon, attacked, and worried, or otherwise ran down, destroyed, and killed, seventy lambs and nine ewes belonging to the pursuer, and so disturbed, frightened, and exhausted the remainder of the flock by pursuing them that they were greatly deteriorated in value, all to the serious loss, injury, and damage of the pursuer."

The dog for which Mr Porteous was alleged to be responsible was an old collie which belonged to the tenant of one of his farms, who having been obliged, owing to embarrassed circumstances, to vacate his farm at Whitsunday 1880, had left the dog there. Mr Porteous was informed by his steward of this fact, and being told that the dog was not troublesome, he allowed it to remain at the farm, where it was fed at his expense. Both defenders denied the guilt of their respective dogs.

Proof was led before the Sheriff-Substitute (Comrie Thomson). The case against both dogs depended mainly on the testimony of a witness named Paterson, who deponed that he saw the sheep worried by them. Some evidence was led with a view of impugning Paterson's credibility as a witness. On behalf of Murray's dog there was some evidence in support of a plea of *alibi*, the Murray family swearing that the dog slept in the house on the night in question. With regard to the pursuer's allegations of fault on the part of the owners, there was evidence to show that Mr Porteous' dog had been known to handle sheep harshly, that neither dog was in use to be tied up at nights, that the two dogs had frequently been seen in company together, sometimes at night, and that Murray's dog was of a ranging disposition. There were also witnesses who spoke to the previous good character of both dogs.

The Statute 26 and 27 Vict., c. 100 (an Act to render owners of dogs in Scotland liable in certain cases for injuries done by their dogs to sheep and cattle, 1863) provides—"Sec. 1. In any action brought against the owner of a dog for damages in consequence of injury done by such dog to any sheep or cattle, it shall not be necessary for the pursuer to prove a previous propensity in such dog to injure sheep or cattle. Sec. 2. The occupier of any house or place or premises in which any dog which has injured any sheep or cattle has been usually kept or permitted to live or remain at the time of such injury shall be liable as the owner of such dog, unless such owner can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or place or premises without his sanction or knowledge."

The Sheriff-Substitute (Comrie Thomson) found the case proved as against the dog belonging to Mr Porteous, but that it was not proved that the dog which accompanied it was the defender Murray's dog; assoilzied Murray accordingly, and found Porteous liable in damages, assessed at £75.

In the note appended to his interlocutor, after referring to the remarks of the Lord President in the case of *M'Intyre* v. *Carmichael*, 8 Macph. 570, quoted by Lord Shand in his opinion *infra*, he proceeded thus—"Accordingly in that case the Court varied the terms of the interlocutor under review, and in place of finding merely that the damage was caused by the defender's dogs, they also found that the damage was occasioned through the defender's fault. I do not, however, read that judgment as settling that there must be