yearly payments from the respective dates on which the same fall due till paid, and a fifth part more of liquidate penalty in case of failure, beginning the first payment of said annuity on the second day of April 1876 for the half-year preceding, and so forth half-yearly and proportionally thereafter during all the days of the life of the first party.' In order to carry out the agreement two deeds were executed in favour of the defenders—the first a disposition by the trustees of the Lochruan Distillery Company, whereby they conveyed over that distillery to the defenders; and secondly, an assignation by William M'Kersie in favour of the defenders, whereby he assigned to them the lease which he had of the Albyn distillery. Under these two deeds the defenders became the proprietors of the Lochruan Distillery and the tenants of the Albyn Distillery.

"The question has now been raised, whether succession-duty is payable by the defenders under the 7th section of the Succession-Duty Act, on the ground that by the death of William M'Kersie, the father, the defenders obtained thereby an increase of beneficial interest in the property conveyed to them? and this question the Lord Ordinary answers in the affirmative.

"On the death of William M'Kersie, the father, the defenders undoubtedly obtained an increase of beneficial interest, in respect that their obligation to pay the annuity of £1150 then ceased. But this is not enough in all cases to entitle the Crown to judgment. There is one exception expressly specified in the Act, within which the defenders contend their case comes. If the transaction be a *bona fide* sale, then no duty is exigible, and there may be such a *bona fide* sale although the money may not be payable until the death of a certain person, as was decided by the Master of the Rolls in the case of *Fryer* v. *Morland*, 3d August 1876, L.R. 3 Ch. Div. 675. Now, was this a *bona fide* sale? Or was it, as the Lord Ordinary holds it to have been, simply a gratuitous transference by the father to his two sons, reserving to himself the interest of the value of the property which he conveyed? No doubt the transference was irrevocable. But still the transaction was one whereby the transferer reserved to himself, not in express words, the liferent of the estate, but he did so in effect. Dealing with this 7th section the Master of the Rolls in the above case of *Fryer* says of it—'The object is plain enough; it was to prevent a man conveying the fee, reserving to himself a life interest.' Now, this is as effectually done, in the mode astutely adopted in the present case, by taking a bond from the transferees for the interest at the rate of four per cent. on the money value of the property conveyed. The defenders paid down nothing in the shape of money or money's worth, and therefore there is absent in this case the first characteristic of a sale, viz., a price paid out of the pockets of the purchasers.

"The agreement does not deal with the case as one of sale at all. The property is handed over to the defenders, not as purchasers for valuable consideration given by them, but as in anticipation of the share of residue of their father's estate bequeathed to them by his will. They were in the meantime to obtain the use of the money and property conveyed, the father reserving to himself 'a benefit' from the fund, on the ceasing of which the defenders obtained a succession within the meaning of the Act by an 'increase of beneficial interest,' on which they must pay duty."

Counsel for Pursuer—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.
Counsel for Defenders—G. Burnet. Agents—Murray, Beith, & Murray, W.S.

Tuesday, February 21, 1882.

FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING *v.* NORTH OF SCOTLAND BANKING COMPANY.

(*Ante*, p. 4, October 20, 1881.)

Process—Expenses—Appeal—Where Respondent unsuccessfully assails Competency of Appeal, but succeeds on the Merits.

Where a respondent unsuccessfully assailed the competency of an appeal, but was subsequently successful on the merits, the Court *found* no expenses due to or by either party.

This appeal, in which the sole question was whether the Sheriffs had dealt rightly in the matter of the expenses, having, as previously reported, been held competent and sent to the roll, counsel was subsequently heard on this question, and the Lords, without calling on the respondents' counsel, refused the appeal.

Respondent's counsel having moved for expenses, the appellant submitted that the respondent having occasioned the expense of the argument as to the competency of the appeal, in which he was held to be wrong, should not be found entitled to expenses in respect of his success on the merits—*Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 688.

The Lords refused the appeal, and found no expenses due to or by either party.

Counsel for Appellant—Rhind—Baxter. Agent—Robert Menzies, S.S.C.
Counsel for Respondents—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, February 2.

SECOND DIVISION.

MURPHY OR COLLINS AND OTHERS *v.* THE EGLINTON IRON COMPANY.

Factor loco tutoris—Appointment de plano—Nobile officium — Administration of Sum awarded in Action of Damages.

In an action brought under the Employers Liability Act of 1880, by the widow and six children of a certain James Collins, against the Eglinton Iron Coy., for damages in consequence of the fall of a roof in one of the ways of the defenders' pit, by which Collins lost his life, the Court (on appeal from the Sheriff Court of Ayrshire) found for the pursuers. The damages were assessed at £120, payable in the following proportions,

viz., to the widow £50 sterling, to Alexander and Margaret Collins £5 each, to Susan £10. to Thomas £15, and to each of Mary and Jemima Collins, £17, 10s. The children being all in pupillarity, application was verbally made to the Court for the appointment *de plano* of an uncle of the children to the office of factor *loco tutoris*, the fund being so small that the expense of an appointment in the ordinary way by petition in the Outer House was, it was pleaded, to be avoided if possible. The Court, when the application came before them on the Single Bills, *granted* the motion and made the appointment as craved.

Counsel for Pursuers—J. C. Smith. Agent—John Macmillan, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, February 22.

SECOND DIVISION.

M'AVOY *v.* YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY.

(*Ante*, pp. 61 and 137.)

Judicial Factor — Appointment de plano *— Administration of Sum awarded in an Action for Damages.*

In this action the jury returned a verdict in favour of the pursuers, assessing the damages at £240. The defenders having obtained a rule on the pursuers to show cause why a new trial should not be granted, on the ground that the verdict was against the weight of evidence, the Court after hearing parties discharged the rule and applied the verdict, finding the pursuers entitled to their expenses in the cause. The pursuers' counsel then moved that in order to avoid the expense of an application for a judicial factor, the sum of £160, being that apportioned to the minor pursuers, be paid over to their uncle by marriage, to be administered by him for their behoof, he finding caution for the amount. The Court, following the case of *Collins*, *supra*, granted the motion.

Counsel for Pursuers—D-F. Macdonald, Q.C. —G. Burnet. Agent—John Macpherson, W.S.

Counsel for Defenders — Lord Advocate (Balfour, Q.C.)—Strachan. Agent—T. F. Weir, S.S.C.

Wednesday, February 22.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'GREGOR *v.* CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Time and Place of Trial— 13 *and* 14 *Vict. c.* 36 (*Court of Session Act* 1850), *sec.* 40.

In an action against the Caledonian Railway Co. for damages sustained in an accident at Pennilee, near Glasgow, on their line, issues were adjusted before the Lord Ordinary on 31st January. Notice of trial was on 1st February given by the pursuer for "next Glasgow Circuit," which was in point of fact the Circuit subsequently held there on 21st February and following days. On 4th February the pursuer countermanded this notice. On 8th February the defenders enrolled the case to have a day fixed for trial before the Lord Ordinary. His Lordship was at that time unable to give parties a day, and the motion dropped. On 10th February the pursuer gave notice of trial for Glasgow Spring Circuit. The defenders then renewed their application to the Lord Ordinary to fix the trial before his Lordship, who found himself able to give the 10th of March for that purpose. The pursuer would not agree to this proposal, and the Lord Ordinary accordingly reported the case to the First Division.

The pursuer contended—There could be no allegation of urgency in this case, the accident at Pennilee occurred in September 1880, and the pursuer's injury was concussion of the spine, producing a diabetic affection, and the action, in which the summons was not signeted till 15th December 1881, was delayed until his condition should have time to manifest itself. Pursuer's notice of February 1st was meant for Glasgow Spring Circuit, it being at least a doubtful point whether the case could competently be tried at the intermediate Circuit, and hence his countermand on 4th February. The proposed day (10th March) was too soon, as a deposition would have to be taken at San Remo by commission on interrogatories, which were not yet adjusted, and as to place pursuer preferred Glasgow. He had never lost his original lead—*Macpherson* v. *The Caledonian Railway Company*, 6th July 1881, 8 R. 901.

The defenders argued—The trial should be before the Lord Ordinary on 10th March. There was urgency here, though the pursuer had already caused great delay. The company were desirous of having the claims arising from this action settled as soon as possible, as a special suspense account had to be kept in their books till such settlement was effected. The pursuer had lost his lead by countermanding his notice of 1st February. The policy of the statute was in favour of speedy despatch of business—*Moffat* v. *Lamont*, Jan. 7, 1859, 21 D. 212; *Campbell* v. *Caledonian Railway Company*, Dec. 15, 1881, 19 Scot. Law Rep. 187.

The Lords appointed the trial to proceed before the Lord Ordinary on 10th March, the Lord President remarking—"The point has been stated by my brother Lord Mure in a single sentence; it is a question between three weeks and three months, and I am for the three weeks."

Counsel for Pursuer — Mackintosh — Shaw. Agents—Cumming & Duff, S.S.C.

Counsel for Defenders—Johnstone. Agents—Hope, Mann, & Kirk, W.S.
