settled general rule of law that where an inhibitory order is obtained from a judge on an *ex parte* statement of the facts, the applicant is responsible for the truth of the statements on which he obtains the order. He cannot defend himself by alleging that he acted in good faith, or that the circumstances made his story reasonable or probable. I think that the cases relating to wrongous interdict establish this doctrine; and if this be the criterion of responsibility where a party is merely interdicted from making a particular use of his property, it must in principle apply to proceedings for taking the possession out of his hands altogether. To say that a tenant is liable to be deprived of his farm because he takes a month's holiday in the autumn, is a proposition that carries absurdity on the face of it; and I do not think the proposition is much improved by the averment that the landlord or his agent thought that the tenant was going to abscond. The tenant's right of possession cannot, as I think, be determined or interfered with upon a mere opinion of the landlord, and, as a matter of fact, the pursuer had done nothing of which the defender was entitled to complain.

I cannot help thinking that the pursuer has been unfortunate in his choice of a remedy for the wrong which was done to him, for if he had gone to a jury on an issue of damages, he might have avoided the legal difficulties which have caused the failure of his case.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender — Dickson — Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 6.

SECOND DIVISION.

[Sheriff of Dumfriesshire.

DINWOODIE'S EXECUTRIX *v.* CARRUTHERS' EXECUTOR.

Succession—Deposit-Receipt—Effect of Destination to Survivor—Donation.

A brother and sister placed £400 in an English bank on deposit-receipt, which was issued in their joint names, repayable "to them or survivor of them," on 15th July 1895, and bearing interest at 5 per cent. per annum. Of the £400, £350 was contributed by the sister and £50 by the brother. The sister, who kept the deposit-receipt in her possession till her death, died before the date of repayment, survived by her brother.

Held that the deposit-receipt did not operate as a testamentary conveyance or as a donation by the sister in favour of the brother, and that accordingly £350 of the sum contained in the deposit-receipt formed part of the sister's executry estate.

Conflict of Laws—Deposit-Receipt—Deposit-Receipt Issued by English Bank to Scottish Depositors.

Where two persons resident and domiciled in Scotland invest a sum on deposit-receipt, to which they have contributed jointly, in an English bank, all questions between the depositors or their representatives as to their rights under the deposit-receipt fall to be determined by the law of Scotland, and not by the law of England.

On 15th July 1892 David Dinwoodie, merchant, Townhead, Lochmaben, acting on behalf of himself and his sister Mrs Mary Dinwoodie or Carruthers, residing in Princes Street, Lochmaben, invested £400 on deposit-receipt with the National Bank of New Zealand, Limited, London, in his own name, to be repaid to him with interest at the rate of 5 per cent. per annum on 15th July 1895. Of the £400, £50 was contributed by Mr Dinwoodie and £350 by Mrs Carruthers.

On 20th September 1892 Mrs Carruthers having objected to the deposit-receipt being in the name of Mr Dinwoodie alone, this deposit-receipt was cancelled, and in lieu thereof a new deposit-receipt was issued in the following terms:—

"*The National Bank of New Zealand, Lmtd. London, 20th September* 1892.

"£400. *Deposit-Receipt.*

"Received of Mr David Dinwoodie, grocer, Lochmaben, and Mrs Mary Carruthers, Lochmaben, N.B., the sum of Four hundred pounds stg. as a deposit with the National Bank of New Zealand, Limited, to be repaid on the 15th July 1895 to them or survivor of them, and bearing interest at the rate of five per cent. per annum from the 15th July 1892.'

The deposit-receipt was handed over to Mrs Carruthers, and remained in her possession till her death.

Mrs Carruthers died on 17th January 1895, and Mr Dinwoodie died on the 21st of the same month.

Mrs Carruthers left a trust-disposition and settlement dated 26th February 1894, in which she appointed James Wright, flesher, Lochmaben, her trustee and executor, and, *inter alia*, stated that she was in possession of the deposit-receipt, that the sum of £350 contained in it was her exclusive property, and that it never was her intention that the deposit-receipt should be made repayable to her brother and herself or survivor of them. He had obtained the receipt in these terms without her knowledge.

Mr Dinwoodie also left a trust-disposition and settlement dated 11th January 1895, in which he appointed his wife his sole trustee and executrix.

After the death of Mrs Carruthers the deposit-receipt was found among her papers, and was taken possession of by Mr Wright.

Mrs Dinwoodie, as her late husband's executrix, maintained that as he had survived his sister the whole £400 contained

in the deposit-receipt belonged to him, and called upon Mr Wright to deliver up the deposit-receipt. This Mr Wright refused to do.

Thereafter Mrs Dinwoodie, as sole trustee and executrix of her late husband, raised an action in the Sheriff Court at Dumfries against Mr Wright as trustee and executor of Mrs Carruthers, in which she prayed the Court "To ordain the defender to deliver to the pursuer, as sole trustee and executrix foresaid, a deposit-receipt for £400 sterling by the National Bank of New Zealand, Limited, numbered 6982, and dated 20th September 1892, in name of David Dinwoodie, grocer, Lochmaben, and Mrs Mary Carruthers, Lochmaben, repayable to them, or survivor of them, on 15th July 1895, and failing his doing so within such period as the Court shall appoint, to ordain the defender to pay to the pursuer the sum of £420."

The pursuer pleaded—"(1) Said deposit-receipt being repayable to the survivor of Mr Dinwoodie and Mrs Carruthers, the pursuer, as sole trustee and executrix of the survivor, is entitled to delivery thereof. (2) Mr Dinwoodie and Mrs Carruthers having made a contract that the survivor of them should receive said deposit-receipt and contents thereof, the pursuer, as sole trustee and executrix of the survivor, is entitled to delivery of said receipt. (3) The pursuer being legally entitled to the possession of said deposit-receipt, decree should be granted as craved, with expenses. (4) The pursuer, as sole trustee and executrix of the survivor of the persons named in said deposit-receipt, is entitled to administer the sum therein, and she is therefore entitled to delivery of the receipt. (5) The late Mrs Carruthers not being of sound disposing mind at the date of said pretended will, that document is of no effect. (6) In any event, the terms of said deposit-receipt being of the nature of a contract between Mrs Carruthers and Mr Dinwoodie, cannot be affected by an *ex post facto* declaration in Mrs Carruthers' pretended will. (7) The National Bank of New Zealand, Limited, being an English institution, all questions arising out of the form of said deposit-receipt and the obligations of the bank fall to be determined by English law, and according to it the pursuer, as executrix of the survivor of the persons named in the receipt, is entitled to delivery thereof."

The defender pleaded, *inter alia*—"(2) Said deposit-receipt having been issued in the joint names of the late Mr Dinwoodie and Mrs Carruthers without the sanction or consent of the latter, and the statement in said deposit-receipt that the amount was 'to be repaid to them, or survivor of them,' having been inserted therein against the wishes of the late Mrs Carruthers, the terms of said receipt are in no way binding on her executor. (4) The said late Mrs Carruthers having never donated the said sum of £350, or parted with her right of property therein, and by her last will and testament, executed subsequently to the date of said deposit-receipt, having specially directed the defender as her executor to administer said amount, he is entitled to do so, and for that purpose to retain the custody of said deposit-receipt. (5) Possession of said deposit-receipt having been retained by the late Mrs Carruthers, and it having been found in her repositories after her death, the defender, as her executor, is entitled to retain the same with a view to uplifting that portion, viz., £350, which forms part of her executry estate. (6) In any event, the last will and testament of the late Mrs Carruthers operates as a cancellation of the terms of said deposit-receipt, and the defender, as her executor, is entitled to the custody thereof."

Proof was led before the Sheriff-Substitute (CAMPION). The evidence of two Carlisle solicitors was taken, who deponed that in their opinion, according to the law of England, the destination in a deposit-receipt regulated the succession on death, and that the amount contained in a deposit-receipt in the same terms as the one in question belonged wholly to the survivor.

On 26th July 1895 the Sheriff-Substitute pronounced the following interlocutor:—"Finds (1) that the pursuer is sole trustee and executrix of her husband, the late David Dinwoodie, merchant, Lochmaben, and that the defender is trustee and executor of the late Mrs Mary Dinwoodie or Carruthers, who resided there; (2) that on or about 15th July 1892 the late David Dinwoodie and Mrs Carruthers—who were brother and sister—invested in name of David Dinwoodie a sum of £400 on deposit-receipt with the National Bank of New Zealand, Limited, an English institution, having its head office in London—£50 of this sum being contributed by Mr Dinwoodie and £350 by Mrs Carruthers; (3) that on or about 20th September 1892 said deposit-receipt in name of Mr Dinwoodie was cancelled, and a new deposit-receipt issued by said bank in the joint names of Mr Dinwoodie and Mrs Carruthers, 'repayable to them, or survivor of them,' on 15th July 1895; and (4) that Mrs Carruthers died on 17th January 1895, when said deposit-receipt was found among her papers and taken possession of by the defender or his agent, and that Mr Dinwoodie survived his sister only for four days, having died on 21st January 1895: Finds that said deposit-receipt being repayable to the survivor of Mr Dinwoodie and Mrs Carruthers, the pursuer, as sole trustee and executrix of the survivor, is entitled to delivery thereof: Therefore sustains the pleas-in-law stated for the pursuer: Repels those put forward by the defender, and ordains him to deliver up said deposit-receipt to the pursuer, in terms of the first portion of the prayer of the petition, and decerns."

The defender appealed to the Sheriff (VARY CAMPBELL), who on 7th October 1895 pronounced the following interlocutor:—"Recals the judgment of the Sheriff-Substitute: Finds that the sum of £400 invested in the deposit-receipt of date 20th September 1892 was contributed by the late David Dinwoodie to the extent of £50, and by his sister, the late Mrs Carruthers,

to the extent of £350: Finds that by the terms of the receipt, as issued by an English company having its head office in London, the whole money was on the death of either to be paid to the survivor: Finds that Mrs Carruthers died on 17th January 1895, survived by her brother David Dinwoodie, who died on 21st January 1895: Finds that by her last will and testament, dated 26th February 1894, Mrs Carruthers revoked this special destination to the survivor, and directed her share of the investment to fall under the general settlement of her affairs contained in her last will and testament: Finds that her last will and testament is valid and effectual: Therefore finds the pursuer, as trustee and executor of the late David Dinwoodie, entitled to £50 with corresponding interest, in so far as the said interest may be still unpaid, and finds the defender, as trustee and executor for Mrs Carruthers, entitled to the balance, principal and interest, of the deposit-receipt: Appoints payment to be made accordingly by the Clerk of Court out of the proceeds of the said deposit-receipt, when consigned with him, in terms of the first interlocutor of 1st October last."

The pursuer appealed, and argued—(1) If this deposit-receipt fell to be dealt with by the law of Scotland, then it was not in the same position as a deposit-receipt in a Scottish bank. A Scottish deposit-receipt was merely a convenient mode of banking money; the bank was the custodier of the money, which was held for the convenience and at the call of the depositor; there was no obligation on the part of the bank to pay at a certain period, or to give a fixed rate of interest. The deposit-receipt in question was not in the same category as the deposit-receipt in *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849, or *Watt's Trustees* v. *Mackenzie*, July 1, 1869, 7 Macph. 930. The rule of Scottish law that a deposit-receipt payable to two persons *nominatim* and the survivor did not operate as a destination, was not to be extended to other documents—*Miller* v. *Miller*, June 27, 1874, 1 R. 1107, opinion of Lord Neaves, p. 1110; *Macdonald* v. *Macdonald*, June 11, 1889, 16 R. 758, opinion of Lord Young, p. 766. The present deposit-receipt was in the nature of a personal bond by the bank to pay at a certain date a loan of the same kind as that in *Ritchie* v. *Ritchie's Trustees*, July 20, 1888, 15 R. 1086. It came under the class of cases in which special destinations in bonds and similar documents had been sustained—*Walker's Executor* v. *Walker*, June 19, 1878, 5 R. 965; *Buchan* v. *Porteous*, November 13, 1879, 7 R. 211; *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175. (2) If the deposit-receipt fell to be dealt with by the law of England, there was evidence to show that according to that law a destination in a deposit-receipt carried the contents to the survivor. As the deposit-receipt was payable in England, it must receive effect according to the interpretation which the law of that country gave it. (3) Mrs Carruthers' will did not affect the question, because (*a*) she did not revoke the deposit-receipt in her will, (*b*) there being a valid mutual destination in the deposit-receipt, a contract had been entered into which could only be rescinded by consent of both parties, and (*c*) Mrs Carruthers was of unsound mind when she made her will.

Argued for the defender—If the law of Scotland governed this case, as the defender maintained, the deposit-receipt in question was not in the nature of a personal bond, but was in the same position as a deposit-receipt in a Scottish bank. A whole series of cases conclusively demonstrated that this Court will not give effect to a destination in a deposit-receipt—*Cuthill* v. *Burns*, *supra*; *Kennedy* v. *Rose*, July 8, 1863, 1 Macph. 1042, opinion of Lord Curriehill, *Watt's Trustees* v. *Mackenzie*, *supra*; *Miller* v. *Miller*, *supra*. There was no authority for converting a deposit-receipt into a testamentary document, and the nature of the document was not altered by the fact that it was payable at a certain date—*Milne* v. *Grant's Executors*, June 5, 1884, 11 R. 887—or that a special rate of interest was mentioned. If this deposit-receipt was taken out of the class of mutual testaments, then, if it was a contract at all, it was simply a contract of wager, and could receive no effect. (2) The law of England had no bearing on the case. Both depositors were Scottish, and the Scottish law ruled their disposal of moveable estate in Scotland. (3) The deposit-receipt was revoked by Mrs Carruthers' will, and even if the destination in the deposit-receipt was held to be good, it was capable of being recalled in a general settlement—*Lang's Trustees* v. *Lang*, July 14, 1885, 12 R. 1265. There was no sufficient evidence that Mrs Carruthers was of unsound mind when she executed the trust-disposition and settlement.

At advising—

LORD YOUNG—The facts of this case are few, and I do not think that I need take long to state them so far as they are material to the judgment we are to pronounce. It appears that a sum of £400 was deposited in a bank in London in 1892 by Mr David Dinwoodie of Lochmaben. He died on 21st January 1895, and his sister Mrs Carruthers died on the 17th of the same month, and when she died there was found in her repositories the deposit-receipt for £400 dated 20th September 1892. That receipt bears that the money was received from Mr David Dinwoodie and Mrs Mary Carruthers, and that it was to be repayed on 15th July 1895 to them or the survivor of them, and bearing interest at the rate of 5 per cent. Neither Mr Dinwoodie nor Mrs Carruthers survived that date. The petitioner here is the executrix of Mr Dinwoodie, and the petition is directed against the executor of Mrs Carruthers, the question being, which is entitled to have the deposit-receipt or the contents thereof? The prayer of the petition is in these terms —"To ordain the defender to deliver to the pursuer, as sole trustee and executrix foresaid, a deposit-receipt for £400 sterling." . . .

And failing his doing so within such period as the Court shall appoint, "to ordain the defender to pay to the pursuer the sum of £420," &c.

Now, the facts necessary to be attended to are these. In the first place, what is quite candidly and truly stated by the petitioner in the third article of her condescendence, the original deposit was made on 5th July 1892, Dinwoodie then taking the deposit-receipt in his own name for £400, but of that sum £50 was contributed by him and £350 by Mrs Carruthers. The terms of this receipt were thought unsatisfactory, and so it was returned to the bank, and in lieu thereof a new deposit-receipt—that I have referred to—was handed to Mrs Carruthers. On these facts the petitioner, as executrix of Mr Dinwoodie, who by a few days survived his sister, claims to be entitled to have the £400. It is admitted that £350 of this £400 belonged to Mrs Carruthers to begin with, but the contention is that the £350 on her death ceased to be part of her estate, and became the property of her surviving brother. Whether this was so or not is the only question we have got to decide.

It seems quite clear that if this £350, originally Mrs Carruthers' property, ceased to be so, and became Mr Dinwoodie's, that must have been either by gift, by contract, or by will. There is no other way in which the property could pass. Therefore the question comes to be, whether we have before us evidence of gift, contract, or will. I am of opinion that we have not. Looking to the transaction, to the terms of the original receipt, and of the one substituted for it, I think that there is no evidence of gift. I am also of opinion that there is no evidence of contract, or of any transaction or arrangement between Mrs Carruthers and Mr Dinwoodie which could make property pass from her to him. I think that it was conceded that according to the authorities a deposit-receipt cannot operate as a will, but even if this was not conceded, I am of opinion that it cannot so operate, and of course a testamentary conveyance cannot be proved by parole evidence alone. Therefore I am of opinion in fact that there is no evidence of gift, contract, or will to pass the property from Mrs Carruthers to her brother, or to take it from its natural destination.

Now, in point of law a deposit-receipt does not operate as a gift or a contract, and I have already said that it does not operate as a will. But it was contended that by the law of England it does operate —it was not distinctly stated how, whether as a gift, contract, or will—to pass property from one person to another.

I am of opinion that the law of England has no application here. If I thought otherwise I should take other means of finding out what the English law is than by the evidence of solicitors from Carlisle. I think that the law of England would have to be applied to determine the bank's obligation, but there is no question as to that. The question is, who is to have the beneficial interest after the bank's obligation has been determined by payment? Now, the law of England has nothing to do with the beneficial interest in the money which has been paid. Really the true meaning of this deposit-receipt is that to avoid questions of probate, confirmation, &c., the bank would pay the money to the survivor. It so happened in this case that there was no survivor, and whether the money belonged to one or the other was a question that could not arise on the terms of the receipt at all. It might have been anybody's; it might have been trust money. The original property was not changed by the deposit in the bank or by the terms of the receipt; therefore it must continue—£50, the property of Mr Dinwoodie, and £350, the property of Mrs Carruthers, passing on her death to her estate.

In the view which the Sheriff took, proceeding on what he thought was evidence of English law, that a deposit-receipt in such terms operated as a will by the predecessor in favour of the survivor, the defender here pleads that as a will it was revocable and was revoked by the will executed by Mrs Carruthers in 1894. The petitioner, in answer, maintained, first, that a deposit-receipt is not revocable; and secondly, that at the date of the will Mrs Carruthers was not of sound disposing mind, and there was evidence on this point as to which the Sheriffs differed in opinion. It will appear sufficiently from what I have said that my opinion is irrespective of the will of 1894 altogether. It is of no materiality except in the view that the deposit-receipt operated as a will. It has therefore in my view no bearing on the issue between the parties. I therefore think it unnecessary to express any opinion on the state of Mrs Carruthers' mind, but only hold that this deposit-receipt or its contents must be handed for administration to the executor of Mrs Carruthers. If the will is not challenged, the executor will be the respondent, but with that we have nothing to do. The contents of the deposit-receipt have been uplifted and consigned, and of that consigned money £350 must go to Mrs Carruthers' estate, and £50 to the petitioner, but the question in this case must be decided against the petitioner, with expenses in this Court and in the Courts below.

LORD TRAYNER—I agree with Lord Young in the conclusion at which he has arrived.

There has been a good deal of discussion as to whether what is called by the pursuer herself in the prayer of the petition a "deposit-receipt" is a deposit-receipt or something else. It has been variously represented as in effect, if not in form, to be a mutual settlement, or a contract, or a mutual conveyance with a special destination; it has been assimilated also to a personal bond. I think it is nothing more or less than what it bears *in gremio* to be—a deposit-receipt. It is no doubt a deposit-receipt for money which is to remain on deposit for a fixed period, and it states the rate of interest payable to the depositor during the currency of that period. These two features may not be found invariably

in the ordinary bank deposit-receipt, but I have been unable to see how they can change radically the character of the document, or affect the transaction of which it is at once the expression and the voucher. Taking it, however, as a deposit-receipt, it is maintained for the pursuer that the terms in which it is conceived are sufficient, according to the law of England, to confer on the survivor an absolute right to the whole sum deposited, and that the rule of English law must here be applied, the deposit-receipt having been issued by an English bank. I am of a different opinion. The deposit-receipt represents a contract between the depositor and depositary, and both the *locus contractus* and *locus solutionis* are in England. As regards, therefore, any question between the depositor and depositary, it may very well be that the English law must govern. But there is no such question here. On the other hand, in any question between the depositors themselves, or their representatives, I think the Scotch law must govern, seeing that the depositors are both Scotch, that they were dealing with moveable estate situated in Scotland, and that they cannot be presumed to have transacted with each other on any other footing than that their respective rights should be determined by the only law with which they are supposed to be acquainted, that is, the law of their own country. Now, according to our law, a deposit-receipt taken in name of the depositor and another, or the survivor, is not habile as a testamentary disposition. Nor does such a deposit-receipt *per se* support the view of donation, and in this connection it is a material, if not conclusive, circumstance that the supposed donor Mrs Carruthers never delivered the deposit-receipt to the donee, but retained possession of it till her death. If the deposit-receipt, therefore, was neither a testamentary conveyance by Mrs Carruthers to her brother nor a donation, it confers no right on the pursuer or other representative of the brother other than that which he had irrespective of his sister. That right was to get repayment of what he had deposited, namely, £50, while the remaining £350 belonged to Mrs Carruthers, her right in like manner never having been enhanced by anything which her brother, the co-depositor, had done. This result is, I think, what both depositors intended and had in view when the deposit was made. The evidence of Mr Burns satisfies me of this, for he says that Mrs Carruthers understood that she could at any time get her share of the deposited money placed in her own name, that is, could separate it from her brother's money, and hold it as her own just as it had been hers before the deposit was made. The fourth finding by the Sheriff seems to me, therefore, inapplicable. There was no special destination to recal or revoke. But I object more seriously to his fifth finding, to the effect that Mrs Carruthers' will "is valid and effectual." The validity of that will only comes here in question, because it was put forward as an answer to the pursuer's demand; and the pursuer was therefore entitled by way of exception to object to its validity. We have, however, come to a conclusion adverse to the pursuer, irrespective of that will altogether, and therefore are not called upon to pronounce any judgment upon its validity or invalidity. I feel bound, however, to say that on this matter I concur in the opinion of the Sheriff-Substitute. I refrain from saying more, for if I allowed myself to remark upon the conduct of the defender and his coadjutor Mr Reive in reference to the mode in which the execution of that will was brought about, it would certainly not be in the language of commendation.

LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor appealed against, and also recal the interlocutor of the Sheriff-Substitute dated 26th July 1895: Find in fact (1) that on 15th July 1892 the late David Dinwoodie, acting for himself and his sister Mrs Mary Dinwoodie or Carruthers, deposited with the National Bank of New Zealand, Limited, London, the sum of £400 as a deposit-receipt in his own name, to be repaid to him with interest at the rate of 5 per centum per annum on 15th July 1895; (2) that of the said sum £50 was contributed by the said David Dinwoodie and £350 by the said Mary Dinwoodie or Carruthers; (3) that on 20th September 1892 the said deposit-receipt was returned to the said bank by the said David Dinwoodie, and in lieu thereof a new deposit-receipt of that date, being the deposit-receipt referred to in the prayer of the petition, given to him by the said bank; (4) that the said Mary Dinwoodie or Carruthers did not make a gift to the said David Dinwoodie of the said sum of £350 contributed as aforesaid by her, or make any contract or agreement with him to the effect that he should have right to the said sum in the event of his surviving her; (5) that the said Mary Dinwoodie or Carruthers died on 17th, and the said David Dinwoodie on 21st January 1895, and that in March 1895, when the present petition was presented, the aforesaid sum of £400 remained in the said bank on deposit: Find in law (1) that the said deposit-receipt does not import a gift absolute or conditional by either party named therein to the other, or a will by either in favour of the other, or affect their rights or the rights of their executors to the sums contributed by each as aforesaid; (2) that the pursuer, as executor of the said David Dinwoodie, is entitled to receive £50 of the said deposited money, and the defender, as executor of the said Mary Dinwoodie or Carruthers, to the remaining £350 thereof: Therefore repel the first, second, third, and fourth pleas-in-law for the pursuer; assoilzie the defender

from the conclusions of the petition: Find the pursuer, as executor of said David Dinwoodie, entitled to £50, with the interest due thereon, and find the defender, as executor of Mrs Mary Dinwoodie or Carruthers, entitled to the balance of £350 of said deposit-receipt, with the interest due thereon: Ordain the Clerk of the Sheriff Court to make payment to them accordingly," &c.

Counsel for the Pursuer—Dickson—Clyde. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defender—Comrie Thomson—Wilson. Agents—Buchan & Buchan, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Low, Ordinary.

(With Lord Adam, and without Lords Young and Rutherfurd Clark).

HILSON *v.* SCOTT.

Property—Mill-Lade—Title—Construction—Property or Servitude.

A decree of ranking and sale of a mill and mill machinery conveyed, *inter alia*, "and particularly the mill-lead and that portion of ground or embankment lying to the west of the said mill and between the mill-lead and the water of Jed, and extending upwards from said mill to and including the waste-water sluice on the side of the lead between the said mill and the Abbey Mill."

Held (*rev.* the Lord Ordinary) (1) that these terms imported a conveyance of the whole mill-lade, and not merely of the mill-lade extending up to and including the sluice, and (2) that such a conveyance conferred not merely a servitude of aqueduct in the water and a right of property in *opus manufactum*, but a right of property in the lade and in the *solum* of the lade so far as necessary to its support.

Property—Mill-Lade—Prescription on Title a non domino—Exclusive Possession.

The owner of a mill maintained and used the mill-lade for the prescriptive period for the purposes of his mill. His title to part of the mill-lade rested upon a conveyance *a non domino*, that part of the lade being constructed on the property of riparian proprietors. These proprietors raised no opposition to the construction of the lade, and continued to use the stream during the period of prescription to the extent of drawing water from the lade, for which purpose steps were constructed down to it.

Held that the possession by the mill-owner was sufficiently exclusive to confer a title by prescription as against the original proprietors, and that he was entitled to interdict them discharging sewage into the lade.

In 1835 the dam-head or cauld and intake of a mill-lade formed in the river Jed were destroyed by a flood. The magistrates of Jedburgh, who were the owners of the mills supplied by the lade, rebuilt the cauld further up the stream, and constructed a new mill-lade on the northern half of the bed of the river. This mill-lade passed *ex adverso* of lands then belonging to Thomas Miller, which were described as bounded on the south by the river Jed. These lands, therefore, *prima facie* extended to the *meduim filum* of the river, and the magistrates in constructing the mill-lade on the northern half of the bed of the river, were constructing it on ground belonging to Thomas Miller. He, however, raised no objection to the construction of the mill-lade.

The mill-lade supplied two mills, the upper of which was known as the Abbey Mill, and the lower as the Waulk Mill. The latter is now known as the Canongate Mill. The magistrates of Jedburgh remained in possession of the said mills and mill-lade until 1845. In 1845 the magistrates, under the powers conferred by a private Act of Parliament, sold, under a ranking and sale, the upper or Abbey Mill to Mr Robert Laing, town clerk of Jedburgh, and the lower or Waulk Mill to Mr George Hilson, manufacturer in Jedburgh. The decree of sale, dated 1st July 1845, describes the subjects sold and adjudged to Mr Laing as follows:—"All and whole that corn mill of Jedburgh commonly called the Abbey Mill, with the whole machinery thereof, and the waterfall, dam-head, sluices, and other works thereof, and all and sundry multures, sequels, mill lands, particularly that portion of the ground or embankment lying to the east of the said mill, and between the mill-lead and the water of Jed, and extending downwards from the said mill to the waste-water sluice in the side of the lead between the said mill and the Waulk Mill, and the houses, biggings, yards, and the whole parts and pertinents thereof, all as presently occupied by William Dodd, the tenant therein." By the same decree the subjects sold to Mr Hilson are thus described:—"All and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery house and all machinery thereof, and the waterfall, dam-head, and sluices, and other works thereto belonging, and mill lands, and particularly the mill-lead, and that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead between the said mill and the Abbey Mill, and the houses, biggings, yards, and whole parts and pertinents pertaining thereto, all as presently occupied by Messrs James and George Hilson, the tenants thereof." The decree subsequently contained the following findings:—"Find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, dam-head, or