expenses is first of all what is laid down in the Act of Sederunt, 15th July 1876, that a pursuer who is unsuccessful in one branch of his case will not be allowed expenses. By "unsuccessful" the Act I think means that his opponent has been successful. I do not think the present case falls under that head. Again, apart from the Act of Sederunt, I think the Court may order that expenses may not be awarded to a party if by his conduct unnecessary matters have been gone into thereby causing additional expense. I do not think this case falls under that head either.

Further, I agree with all that was said by Lord President Robertson in *Shepherd* v. *Elliot*, 23 R. 695, as to the principles on which the Court proceeds in awarding expenses in actions tried with a jury.

As this case does not fall within any of the categories I have indicated, I think we should follow the ordinary rule, apply the verdict, and find the defenders entitled to expenses.

LORD M'LAREN—I am of the same opinion. It cannot be said that the defenders have failed on the counter issue because in the circumstances it came to be unnecessary in the view of the Judge and the jury to consider it. Accordingly, the provisions in the Act of Sederunt as to disallowing the expenses of a part of the litigation in which a party has been unsuccessful do not apply. I think we must consider that in the proper conduct of the case it was necessary that the witnesses in regard to the counter issue should be examined, and that the expense of bringing forward these witnesses should be expenses in the cause. I see no reason for treating this case exceptionally.

LORD KINNEAR — I am of the same opinion.

LORD PEARSON—I also agree.

The Court found the defenders entitled to expenses.

Counsel for Pursuers—Guthrie, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders — The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents —Kirk, Mackie, & Elliot, S.S.C.

Friday, March 16.

SECOND DIVISION.

MACFARLANE'S TRUSTEES *v.* MACFARLANE AND OTHERS.

Succession—Vesting—Survivorship—Conditional Institution—Accretion—Clause of Exclusion—Substitution of Issue for Parents—Parents' Rights Conditional—Effect on Children's Rights—Clause of Exclusion as to Original Shares Applicable to Accrescing Shares.

A testator who died in 1863 directed his trustees twelve months after the decease of the longest liver of himself and spouse to convert his estate into cash, divide the proceeds into a certain number of parts, and "pay" certain of them to the children of his son A. There followed immediately declarations to the following effect—(1) That the shares in question should not be payable to the grandchildren till the death of both parents, who were meantime to receive the income; (2) That E, one of the grandchildren (otherwise provided for) should not participate in the bequest; (3) That in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parents' share.

There were four grandchildren, C, D, E, F. The testator's widow died in 1871; the survivor of the grandchildren's parents in 1904. C died without issue in 1883. D died in 1895 leaving issue still surviving. E died in 1880 leaving a son G surviving. F was still alive.

In a special case brought to determine the rights of parties in the succession to C, *held* (1) that vesting of the grandchildren's shares was postponed till the death of their mother in 1904; (2) that the express exclusion of E sufficed *per se* to exclude his son G; (3) that D's issue, as conditional institutes and in their own right, took only D's original share of the bequest and not the proportion of C's share which would have accresced to D had D survived the liferentrix; (4) that the whole of D's share by the express clause of survivorship was carried to F.

Martin v. *Holgate*, (1866) L.R., 1 E. & I. Ap. 175, and *Young* v. *Robertson*, 1862, 4 Macq. 337 (second case), *discussed*.

This was a special case brought to determine certain questions arising on the trust-disposition and settlement of Alexander Macfarlane of Thornhill, who died on 11th March 1863. By his trust-disposition and settlement he conveyed his whole estate to trustees for various purposes.

By the *second* purpose the truster directed his trustees to pay to his spouse Mrs Helen Mitchell or Macfarlane, in case she should survive him, an annuity of £200 sterling, and also to allow her the liferent use of the mansion-house of Thornhill and others. By the *third* purpose he further directed his trustees, after payment of said annuity, to pay and divide the free income arising from his heritable estate and also from his moveable estate, until divided as therein appointed, among his children or grandchildren (whose share of income should be paid as after appointed) according to the proportions of the residue of his estates payable to them as thereinafter directed. By the *fourth* purpose the truster directed his trustees, within twelve months after his decease, or sooner if his trustees should be in a position to do so (after setting aside

such a sum as, together with the income of heritage, should be sufficient to provide for his widow's annuity), to convert his moveable estate into cash, and pay and divide the same among his sons and daughter and grandchildren in the proportions thereinafter directed, the grandchildren's shares to be deposited in bank or invested as thereinafter mentioned. By the *fifth* purpose the truster directed his trustees at the expiry of twelve months after the death of the survivor of himself and his wife to invest 1/24th share of his means and estate for behoof of Alexander Macfarlane junior, his eldest son, and Mrs Marion Clark Scott or Macfarlane, his spouse, in liferent allenarly, and Alexander Macfarlane *tertius*, their son, in fee; said liferent to the spouses being terminable, and said provision being payable to the fiar on his attaining twenty-five years of age, an event which happened. By the *seventh* purpose the truster, on the narrative that the existing children of his marriage were his sons Alexander and Robert and his daughter Helen, then Mrs M'Micking, directed his trustees, on the expiry of twelve months after the decease of the longest liver of himself and his said spouse, or so soon thereafter as, in the opinion of his said trustees, should be advantageous for the interest of the trust, to convert the whole of his estates, heritable and moveable, into cash, so far as not then done, and to divide the same (including therein the proceeds of his heritage and certain other sums therein mentioned) into twenty-four equal parts or shares, and pay the same (with the exception of the one twenty-fourth part or share dealt with in the fifth purpose) to and among his children, namely, Alexander Macfarlane junior seven parts, Robert Macfarlane eight parts, Mrs M'Micking five parts, "and to the children of the said Alexander Macfarlane junior, my son, the remaining three parts or shares, and which three parts or shares shall not be paid to my said grandchildren as aforesaid, but shall be invested by my said trustees on good security, and the annual income or interest derived therefrom shall be made payable to my said son Alexander Macfarlane and Mrs Marion Clark Scott or Macfarlane, his spouse, during their joint lives, and to the said Alexander Macfarlane, my son, during his life, in case he survive his said spouse, and to his said spouse, in case she survive him, so long as she shall continue his widow, and that half-yearly for and during the whole period of their respective lives; and upon the death of the longest liver of my said son and his spouse, or in the event of her entering into a second marriage, I direct and appoint my said trustees to divide the said three twenty-fourth parts or shares equally between and among his children (the said Alexander Macfarlane *tertius*, my grandson, being always excluded from participation in such division), share and share alike." By the *eighth* purpose of his said trust-disposition and settlement the truster further provided as follows:—"In the event of the death of any one or more of my said children before the period of division above pointed out, without leaving lawful issue of his, her, or their bodies, I hereby direct and appoint my said trustees to pay and divide the share of such deceaser or deceasers equally among the survivors of the children of Alexander Macfarlane junior, my son, share and share alike, but should such deceaser or deceasers leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parent's share; and in the event of the decease of any of my said grandchildren before the period of payment of their shares, without leaving issue of his, her, or their bodies, then and in that case I direct my trustees to pay and divide the share of such deceaser or deceasers equally among his, her, or their brothers and sisters, but should such grandchild or grandchildren leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parent's share."

The truster was survived by his widow and by his two sons Alexander Macfarlane junior and Robert Macfarlane, and his daughter Mrs Helen Macfarlane or M'Micking (with the two latter and their shares this case is not in any way concerned).

The truster's widow died on 22nd March 1871. Alexander Macfarlane junior died on 1st October 1871. Mrs Marion Clark Scott or Macfarlane never remarried and died on 9th October 1904. Alexander Macfarlane junior was survived by four children, the only ones of the marriage, the youngest of whom was born in 1861, namely, Alexander Macfarlane *tertius*, John Scott Macfarlane, Jane Scott Macfarlane, and Robert Craig Macfarlane.

Alexander Macfarlane *tertius* died on 3rd October 1880, leaving an only son, William Henry Macfarlane (the *fifth party* to the special case).

Jane Scott Macfarlane married James Ferrie, and by her antenuptial contract dated 8th December 1883 conveyed to trustees the whole property belonging to her or that might belong to her during the marriage. Her marriage-contract trustees were the *third parties* to the special case. She died on 26th February 1895 without leaving a settlement, survived by her husband and four children, who were the *fourth parties* to the special case.

John Scott Macfarlane died intestate and unmarried on 16th September 1883.

Robert Craig Macfarlane was still alive and was the *second party* to the case.

On the death of Mrs Marion Clark Scott or Macfarlane on 9th October 1904, the 3/24th shares of the truster's estate, destined by the seventh purpose to the children of Alexander Macfarlane junior, became divisible. Questions of difficulty having arisen with regard to them, and in particular as to the date of vesting of the shares, and as to the succession to the share destined to John Scott Macfarlane, a special case was presented for the opinion and judgment of the Court (the trustees of Alexander Macfarlane senior being the *first parties*), in which the questions were the following:—"(1) Did the right to said 3/24th shares of the truster's estate vest in the beneficiaries not later than the date of the death of the trus-

ter's widow in 1871? Or (2) Was vesting postponed until the death of Mrs Marion Clark Scott or Macfarlane in 1904? (3) In the event of question 2 being answered in the affirmative, does the lapsed share of the said John Scott Macfarlane accresce and now fall to be paid by the first parties—(*a*) To the party of the second part alone? Or (*b*) Equally between the second party and the representatives of Mrs Fernie? Or (*c*) Equally between the second party, the representatives of Mrs Fernie, and the fifth party? (4) In the event of branch (*b*) or branch (*c*) of question 3 being answered in the affirmative, does Mrs Fernie's share of said accrescing share fall to be paid to the parties of the third or to the parties of the fourth part?"

The second party contended that vesting in the grandchildren was postponed to the date of the death of the liferentrix Mrs Marion Clark Scott or Macfarlane in 1904—*Young* v. *Robertson*, [1862] 4 Macq. 314; *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421. As the only grandchild alive at that date he was, under the eighth purpose, entitled to the whole of the lapsed share of John Scott Macfarlane. In any event the express exclusion of Alexander Macfarlane *tertius* entirely barred the fifth party, his son, from taking any share.

The third parties contended that vesting took place in 1871 at the death of the truster's widow—*Wood* v. *Neill's Trustees*, November 6, 1896, 24 R. 105, 34 S.L.R. 107; *Fairgrieve and Others* (*Stirling's Trustees*) v. *Stirling and Others*, 34 S.L.R. 80. There was a distinct direction in the seventh purpose to pay; the liferents were merely burdens on the fee. The eighth purpose properly construed did not apply to the three shares in question, but to the twenty shares with which the case was not concerned. Accordingly they were entitled to one original share and one-half of John Scott Macfarlane's share. If, however, vesting were postponed as regarded original shares until 1904, that did not apply to accrescing shares, and the share which would have fallen to John Scott Macfarlane vested as at the date of his death in 1883 in his then surviving brother and sister, viz., the second party and Mrs Fernie. They accordingly, as her marriage-contract trustees, were entitled to one-half thereof. The case of *Martin* v. *Holgate*, quoted below, and founded on by the fourth and fifth parties, was opposed to *Young* v. *Robertson*, [1862] 4 Macq. 337 (second case). They also referred to *Cattanach's Trustees* v. *Cattanach*, November 28, 1901, 4 F. 205, 39 S.L.R. 154; *White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660.

The fourth parties contended that vesting took place in 1904, and that they as issue of Mrs Fernie took under the conditional institution in the eighth purpose as conditional institutes and in their own right or otherwise in virtue of the *conditio si institutus sine liberis decesserit*, not only the original share destined to her but also the proportion which would have accrued to her of John Scott Macfarlane's share if she had survived the liferentrix. They founded on *Martin* v. *Holgate*, L.R. 1 H.L. 175; M'Laren on Wills and Succession, i, 704; Jarman on Wills, 5th ed., ii, 1045; Theobald on Wills, 6th ed., 649; *in re Woolley*, [1903] 2 Ch. 206. Their parent's right might be conditioned on her survivance of a certain person or event, but it did not follow that these conditions were to be held as attaching also to the children's interest.

The fifth party maintained that vesting took place in 1871. The exclusion of his father Alexander Macfarlane *tertius* was contained only in the seventh purpose and was not repeated in the eighth purpose that dealt with accrescing shares. Accordingly as an heir *in mobilibus* of John Scott Macfarlane he would succeed to part of his share. Otherwise, if vesting did not take place until 1904, *Martin* v. *Holgate* and the other authorities quoted above applied, and he took part of the share which would have fallen to John Scott Macfarlane.

At advising—

LORD KYLLACHY—This question relates to 3/24th parts of the estate of the late Alexander Macfarlane senior which are bequeathed to his grandchildren—the children of his son Alexander Macfarlane junior. The gift is in the first place expressed absolutely, and in favour of all the grandchildren as at the death of the truster's widow. But then it is immediately qualified by declarations to the effect (1) that the shares in question should not be payable to the grandchildren till the death of both their parents, who are meantime to receive the income; (2) that one of the grandchildren Alexander Macfarlane *tertius* (who had a special provision otherwise) should not participate in the bequest; and (3) that in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parent's share.

There were in all four grandchildren, three sons and a daughter. The truster's widow died in 1871. The survivor of the grandchildren's parents died in 1904. Between those dates three of the four grandchildren died. One (John Scott Macfarlane) died without issue in 1883. Another (the daughter Mrs Fernie) died in 1895 leaving issue, who all still survive. The third predeceaser was Alexander Macfarlane *tertius*, the grandchild excluded from the bequest. He died in 1880 leaving a son who still survives.

The first question is whether the interests in the bequest of John Scott Macfarlane and Mrs Fernie vested in them in 1871 at the death of their grandmother, or only on the death of their mother, the survivor of their parents, in 1904. I am of opinion that the latter is the correct view upon the terms of the settlement. The clauses of survivorship and conditional institution

are expressly referable to predecease of the *period of payment;* and it is not, I think, possible to contend that the period of payment referred to was any other than the period at which the liferent of the last survivor of the grandchildren's parents expired. That is the sole period at which the actual payment of the grandchildren's shares is directed.

The next question is, whether the fifth party, the child of Alexander Macfarlane *tertius*, takes a share of the thus lapsed share of John Scott Macfarlane. He claims to do so on the footing that the conditional institution of issue applies as well to devolved as to original shares. In his case, however, no such question, in my opinion, really arises. His father Alexander Macfarlane *tertius* was expressly excluded from the bequest, and that being so the fifth party cannot, it seems to me, take any interest which his father could not have taken were he now alive.

The remaining question is, whether Mrs Fernie's children take, as conditional institutes and in their own right, not only her original share of the bequest (as to which there is no dispute), but also the proportion which would have accrued to her if she had survived, of the share of her predeceasing brother John Scott Macfarlane. As to that we had an ingenious argument founded on the English case of *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175. And it is true that, if the event had here occurred of the death of one or more of Mrs Fernie's children between their mother's death in 1895 and the period of division in 1904, there might have been an interesting question as to whether, on the doctrine of *Martin* v. *Holgate*, such deceasing children took on their mother's death an independent vested interest—not contingent on their surviving the period of division—in their mother's original share. But that question, which was the only point argued or considered in the case of *Martin* v. *Holgate*, does not of course arise here. We have here to deal only with an accrescing or devolved share, the share of John Scott Macfarlane, as to which there is an express clause of survivorship carrying, in the event which occurred, the shares in question to the second party, his surviving brother. Now, having carefully considered both the arguments and the judgments in the case of *Martin* v. *Holgate*, I have come to the conclusion that the decision in that case is here inapplicable. In other words it appears to me to be clear that with respect to devolved shares the ruling decision is that of *Young* v. *Robertson*, 4 Macq. 337. I mean the decision under the second appeal in that case, which practically I think rules this particular question.

LORD STORMONTH DARLING—The testator, who died in 1863, was survived by his wife and three children. His wife, to whom he left a liferent annuity and other provisions, died on 22nd March 1871. The general scheme of his settlement was, that at the expiry of twelve months from the decease of the longest liver of himself and his spouse his trustees should convert the whole of his estates, heritable and moveable, into cash (subject to certain options to his children about his heritable estate), and divide the same into twenty-four equal parts or shares. Twenty of these shares were to be paid in specified proportions to his children or their issue. The remaining four shares were to go to his grandchildren, the children of his eldest son Alexander Macfarlane. Of these four shares one was separately dealt with by the fifth purpose of the settlement, with the effect of giving it to his grandchild Alexander Macfarlane *tertius* when he attained twenty-five years of age. No question arises about that one-twenty-fourth share. The controversy relates entirely to the vesting of the remaining three-twenty-fourth shares, of the value of £2300 or thereby, the directions as to which are to be found in the seventh and eighth purposes of the settlement.

By these directions the three shares were to be liferented by the testator's son Alexander and his wife Mrs Marion Macfarlane and the survivor, being the father and mother of the family to whom the fee was destined. The father died on 1st October 1871. The mother survived till 9th October 1904. At the death of the father the family were four in number—(1) Alexander *tertius*, whom I have mentioned above and who died on 3rd October 1880; (2) John Scott Macfarlane, who died unmarried on 16th September 1883; (3) Jane Scott Macfarlane, who entered into an antenuptial contract of marriage on 8th December 1883, married Mr J. A. Fernie, and died on 26th February 1895, leaving four children who survive; and (4) Robert Craig Macfarlane, who also survives.

Although the words of the seventh purpose profess to give the three shares "to the children of the said Alexander Macfarlane junior, my son," they must be read in connection with the words which follow, where the testator directs his trustees, upon the death of the longest liver of the said son and his spouse, "to divide the said twenty-three parts or shares equally between and among his children (the said Alexander *tertius*, my grandson, being always excluded from participation in such division)." The reason of this exclusion was plainly that Alexander *tertius* had got a whole share to himself by the operation of the fifth purpose. At his death, however, he left a son, who is the fifth party to the case, and claims to participate through his father in the share which would have fallen to John Scott Macfarlane had he survived the liferentrix. The other claimants (not counting the trustees of the testator) are Robert, the only surviving grandchild, the marriage-contract trustees of Mrs Fernie and the Fernie children.

The eighth purpose of the settlement, on the terms of which the question mainly turns, deals first with the contingency of the death of any of the testator's own children before the period of division (*i.e.*, twelve months after the decease of the testator's widow) without leaving lawful issue. With

that part of the clause we are not concerned. But then the clause goes on to provide—"And in the event of the decease of any of my said grandchildren before the period of payment of their shares without leaving lawful issue of his, her, or their bodies, then and in that case I direct my trustees to pay and divide the share of such deceaser or deceasers equally among his, her, or their brothers and sisters, but should such grandchild or grandchildren leave lawful issue of his, her, or their bodies, then such issue shall be entitled to their parents' share."

Now, what is the "period of payment" there mentioned? Clearly, as it seems to me, the death of the longest liver of Mr and Mrs Alexander Macfarlane, which took place on 9th October 1904. Before that date three of the grandchildren had died, two leaving issue, viz., Alexander and Mrs Fernie, one leaving no issue, viz., John. The issue so left, by force of the clause which I have just quoted, would undoubtedly "be entitled to their parents' share." But Alexander *tertius* was by the 7th purpose expressly excluded from participation in the division which was to take place on the death of the liferentrix, and therefore I fail to see how his son, as representing him, could possibly take anything which his father could never have taken. With regard to Mrs Fernie, her issue are admittedly entitled to take her original share; but with regard to the share which would have accresced to her by her survivance of John, if she had also survived the liferentrix, I think that her issue are excluded by the express terms of the 8th purpose, even apart from the decision on the second point in the leading case of *Young* v. *Robertson*, 4 Macq. 314 and 337—the point relating to the appeal of John Lawford Young. The claim of her marriage-contract trustees could only succeed on the footing that a right had vested in her at the date of her marriage-contract in 1883, which is inconsistent with the declared date of payment, and therefore of vesting, being 9th October 1904.

An argument was founded by the fourth and fifth parties on the case of *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175, as affecting the right which is said to have accresced from John. That was a case of the highest authority, decided in the House of Lords in 1866 by the same Law Lords who had decided the case of *Young* v. *Robertson* four years before. It dealt with a direction to trustees to pay the proceeds of the testator's estate to his wife for life, and "after her decease to distribute and divide the whole amongst such of my four nephews and nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead leaving issue, such issue shall be entitled to their father's or mother's share." Three of the nephews predeceased the testator's widow, two of them without ever having had a child, one of them leaving a daughter, who herself predeceased the widow. In these circumstances it was held that this daughter, upon her father's death, took a vested interest in the share which if he had survived he would have taken, on the ground that the fact of the gift to the parent being contingent did not affect the nature of the gift to the issue, which was an independent bequest. The declaration by the House undoubtedly bore that the daughter took a vested interest in one-fourth of the residuary estate of the testator, which implied that her representatives took, not merely her father's original share, but that they participated with the surviving uncle and aunts in the share which had been destined to one of the uncles who had predeceased the testator's widow. The share of the other uncle had lapsed by his predeceasing the testator.

Now, all I can say about that case is, that if there is any inconsistency between it and *Young* v. *Robertson* (which is difficult to believe, as the tribunal was the same and the interval of time between the two decisions was so short), *Young* v. *Robertson* must rule, as being an appeal from Scotland expressly governed by a series of Scottish decisions. Undoubtedly there the declaration of the House, differing in result from the declaration in *Martin* v. *Holgate*, admitted the appellant John Lawford Young to the share originally given to his father, but debarred him from participating in the share of a legatee (William Macdougall) who had died before the appellant's father. Now, it is only as regards the share accrescing from John Macfarlane that the case of *Martin* v. *Holgate* is founded on. It is not required to help the claim of the fourth parties to their mother's original share, which is not disputed. It cannot help the fifth party to claim as his father's share what his father was excluded from for a reason independent of survivance. It thus touches only a small part of the case, and it seems to me that to apply it here would be inconsistent with the whole tenour of this particular deed, and particularly with the express direction that, in the event of any of the grandchildren dying before the period of payment without leaving issue, the share of such deceaser should be paid to his, her, or their brothers and sisters.

I am therefore for answering the first question in the negative, the second question in the affirmative, and branch (*a*) of the third question in the affirmative. The fourth question and branches (*b*) and (*c*) of the third question are superseded.

LORD JUSTICE-CLERK—That is my opinion also.

LORD LOW was absent.

The Court pronounced this interlocutor:—

"Answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative; answer branch (*a*) of the third question of law therein stated also in the affirmative: Find it unnecessary to answer the fourth question of law therein stated."

Counsel for the First and Second Parties—Munro. Agents—Murray, Lawson, & Darling, S.S.C.

Counsel for the Third Parties—Ingram. Agent—David Philip, S.S.C.

Counsel for the Fourth Parties—Paton. Agents—Ross & M'Callum, S.S.C.

Counsel for the Fifth Party — Laing. Agent—J. Ferguson Reekie, Solicitor.

Friday, March 16.

SECOND DIVISION.

[Lord Johnston, Ordinary.

WOLFE *v.* ROBERTSON.

Process—Misnomer—Jurisdiction—Review—Small Debt Court—Diligence—Suspension—Misnomer of Party Obtaining Decree—Finality of Decree—Attempt to Suspend Diligence following Decree — No Distinction between Suspension of Decree and Diligence following it — Action of Damages for Wrongful Poinding—Justices of the Peace Small Debt (Scotland) Act 1825 (6 *Geo.* IV, *c.* 48), *secs.* 14 *and* 15.

By secs. 14 and 15 of the Justices of the Peace Small Debt (Scotland) Act 1825 it is provided that small debt decrees shall not (except in cases not here in point) be "subject to advocation, nor to any suspension, appeal, or other stay of execution . . . nor . . . reduction before the Court of Session."

A, registered under the Moneylenders Act 1900 as carrying on business at X under the name of "the Exchange Loan Company," lent a sum of money to B and took in exchange a bill drawn by himself in the name of "The Exchange Loan Company, Limited," payable at X and accepted by B. B having failed to repay the advance, A raised an action against him on the bill in the Small Debt Court under the Act of 1825 in the name of "The Exchange Loan Company, Limited," and obtained a decree in the following terms:—"Find the above-designed B liable to the also above-designed Exchange Loan Company, Limited, in the sum of . . . and hereby decree and ordain . . . execution to pass hereon by poinding . . ." B throughout knew that A was the Exchange Loan Company, Limited, and, although present in Court, raised no objection to the instance of the action. A proceeded afterwards to poind B's effects. B brought a suspension on the ground that it was incompetent to do diligence on the decree because of the inaccurate addition of the word "Limited" to A's registered name. He also brought an action for damages for wrongful poinding.

The Court, *holding* that all objections to the decree and diligence were foreclosed by secs. 14 and 15 of the Act of 1825, *refused* the suspension and *assoilzied* the defender in the action for damages.

The Justices of the Peace Small Debt (Scotland) Act 1825 provides, sec. 14—"The decree given by the said justices in any case competent to them by this Act shall not be subject to advocation, nor to any suspension, appeal, or other stay of execution, excepting only in the case of consignation, as hereinbefore provided for the purpose of a rehearing before the justices, nor shall be set aside or altered in an action of reduction before the Court of Session on any other ground except that of malice and oppression on the part of the justices, nor shall any such action of reduction be at all competent after the expiration of one year from the date of the decree of the justices."

Section 15 provides that in case of a reduction being brought on the ground of malice and oppression the pursuer must find sufficient caution.

Andrew Robertson was under section 2 of the Moneylenders Act 1900 (63 and 64 Vict. cap. 51) registered as carrying on business as a moneylender at 429 Lawnmarket, Edinburgh, under the name of the "Exchange Loan Company" (without the addition of the word "Limited"). On 13th February 1904 he advanced a sum of money to Manuel Wolfe and two others, who in return accepted a bill in the following terms:—

"Edinburgh, 13th February 1904.

"£3, 0s. 0d.

"One day after date pay to us or our order, within our office at 429 Lawnmarket here, the sum of three pounds sterling, for value received.

"*To* Freda Funk, broker, 18 South Richmond Street, Edinburgh.
Walter Funk, broker, 2 Pleasance, Edinburgh.
Manuel Wolfe, rag merchant, 13 Richmond Place, Edinburgh."

Exchange Loan Co., Ltd.
Freda Funk.
Walter Funk.
Manuel Wolfe.

Being unable to get payment of his advance, Robertson, under the name of the Exchange Loan Company, *Limited*, brought an action against Wolfe and the other two debtors in the Justice of Peace Small Debt Court, Edinburgh. When the case was called in Court the two other debtors allowed decree in absence to go out against them. Wolfe was present in Court and consented to decree and took no objection to the instance of the action. Decree was accordingly given on 31st October 1904, finding the defenders liable to the "above designed Exchange Loan Company, Limited, pursuers, in the sum of three pounds ten shillings with six shillings and seven pence of expenses," and decerning and ordaining "instant execution of arrestment, and also execution to pass hereon by poinding after a charge of ten free days." Throughout the whole transactions there was no doubt that Wolfe knew that Robertson was really the person with whom he was dealing, and that the Exchange Loan Company, Limited, was simply a business name assumed by him. On the 15th of June Robertson executed a poinding of Wolfe's effects under the above decree. After the poinding was partially executed Wolfe paid £2 to account