done, that the commitment was bad, the further question arises whether such a blunder can be any obstacle to the Lord Advocate in serving an indictment and insisting on the prosecution. I do not think that it can. If such a mistake has been made, the prisoner has the right of redress against the person who has made it, but that it should prevent the Lord Advocate from doing his duty is a proposition to which I cannot for a moment assent.

In the course of the debate attention was called to the distinction drawn by Hume between procedure by indictment and procedure by criminal letters, the former being appropriate to persons in custody, and the latter to those who are at large—Hume on Crimes, 3d ed., vol. ii, p. 155. Under section 2 of the Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35) all prosecutions where the case is to be tried by jury must now proceed on indictment, including those which formerly proceeded on criminal letters, but in any case I do not think that even prior to 1887 there was any rule of practice obliging the Lord Advocate to use criminal letters in any particular instance.

On the whole matter I am of opinion that while there may have been some irregularity in the proceedings, no sufficient grounds have been stated for suspending the conviction.

LORD DUNDAS—I am of the same opinion on both points. As regards the first point, I agree that the practice is not a good practice and ought not to be continued. As to the second point, if the authorities which have now been referred to had been brought under our notice at the first hearing, I think we should have been in a position then to decide the matter on a satisfactory basis.

LORD JOHNSTON—I concur.

LORD SALVESEN—I concur in the result at which your Lordships have arrived, but I reserve my opinion as to the first point which was argued. I cannot assent to the proposition that the warrant of commitment was good. The old proceedings having been abandoned, nothing that took place in the course of them could be utilised with regard to the new proceedings, which, although they related to the same charge, should have been initiated and conducted exactly as if no prior proceedings had taken place. It is the absolute right of an accused who is arrested on a criminal charge to be brought before a magistrate within forty-eight hours of his apprehension (section 17 of the Criminal Procedure Act 1887), and it is the duty of the procurator-fiscal to see that he is so brought. It is within the competency of the magistrate—although no doubt the power is seldom exercised—to discharge the accused when brought before him; and the complainer was deprived of this chance. It is no answer to this to say that a prisoner may at any moment demand that he shall be taken before the Sheriff to emit a declaration, for this provision in his favour is probably not known to many prisoners who are charged with crime; and it is a most important safeguard of the liberties of the subject that every person must be brought before a magistrate for examination within a short space of time before a warrant of imprisonment is granted. It follows that, as this was admittedly not done, the warrant for imprisonment ought not to have been granted. Although I take a different view on this point, and hold that this was a fundamental irregularity, and not merely a bad practice, I concur with your Lordships in holding that an invalid warrant of commitment does not vitiate a conviction proceeding on an indictment regularly served and a trial regularly conducted. While on principle I had no doubt as to this, I am glad to be fortified in my opinion by the authorities referred to by the Lord Justice-General. These seem to make it plain that this objection cannot receive effect, and I am therefore of opinion that the conviction must be sustained.

The Court refused the bill of suspension.

Counsel for the Complainer—Gentles—E. O. Inglis. Agents—Weir & Macgregor, S.S.C.

Counsel for the Respondent—Munro, K.C., A.-D.—D. Anderson, A.-D. Agent—W. S. Haldane, W.S.

COURT OF SESSION.

Friday, June 9.

FIRST DIVISION.

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

Succession—Legacy—Satisfaction—Debitor non presumitur donare—Proof—Extrinsic Evidence.

In a deed of separation between spouses, A, the husband's father, bound himself to pay to his daughter-in-law during her life an annuity of £1000 terminable on the reconciliation of the spouses. He afterwards executed a trust-disposition and settlement by which he directed his trustees to pay her an alimentary annuity of £1000 restricted to £250 in the event of her re-marriage. In a letter to her brother, written upwards of a year after the date of his settlement, a holograph copy of which was found in his (A's) repositories, he stated that after his death the provision secured to Alice (his daughter-in-law) was £1000 a-year, reducible to £250 in the event of her contracting a second marriage. In reply to this letter her brother wrote saying that he considered the arrangement just and fair.

Held that on a sound construction of the deeds, and without taking into con-

sideration the terms of the testator's letter above referred to, the annuity conferred by the trust-disposition and settlement was in substitution of that conferred by the deed of separation.

Opinion per curiam that it was unnecessary to determine whether the letters referred to were or were not competent evidence of the testator's intention.

On 18th August 1910 Sir Henry Peto, Baronet, Chedington Court, Somerset, and others, trustees of the late Right Hon. James Alexander Campbell, of Stracathro, Forfarshire, acting under his trust-disposition and settlement, dated 27th April 1896, *first parties;* Mrs Nora Jane Campbell or Adamson, wife of William Shaw Adamson, Careston Castle, Forfarshire, the testator's married daughter, and others, *second parties;* Miss Hilda Sophia Campbell, and Miss Elsie Louisa Campbell, Stracathro, Forfarshire, the testator's unmarried daughters, *third parties;* James Hugh Campbell, the testator's grandson, only child of James Morton Peto Campbell, Belmont Castle, Perthshire, *fourth party;* the said James M. P. Campbell, *fifth party;* and Mrs Alice Eliza Mosman or Campbell, wife of the said J. M. P. Campbell, *sixth party,* presented a Special Case in which they, *inter alia,* craved the Court to determine whether an annuity conferred by the testator on the sixth party was or was not in substitution of an annuity of the same amount conferred upon her by the testator in a deed of separation between her and her husband, the said J. M. P. Campbell, dated 16th May 1895, and to which he (the testator) was a party.

With regard to this *question* the Case stated:—"The second matter in dispute between the parties is with regard to the annuity of £1000 provided by the ninth purpose of the trust-disposition and settlement to Mrs Alice Eliza Mosman or Campbell, wife of the said James Morton Peto Campbell, and who is the sixth party hereto. The said James Morton Peto Campbell and his wife separated in 1895, and entered into a deed of separation in English form, dated 16th May 1895, to which the testator was a party, the fourth article of which was as follows:—'The said J. A. Campbell, his heirs, executors, or administrators, will during the life of the said A. E. Campbell pay to her the clear annual sum of £1000 as and for her separate estate, with restraint on anticipation. The said annual sum shall be considered as accruing from day to day, but shall be paid in advance by equal quarterly payments on the usual quarter days, the first payment to be made on the 24th day of June next, but no allowance or return of money shall be made in respect of anything which may have been once paid under the present clause if the said annual sum shall cease on any other day than one of the said quarterly days.' The tenth article provided that if the spouses should be reconciled and return to cohabitation, the covenants and provisions of the deed of separation should as from that time become void. The spouses are still living apart."

The ninth purpose of the trust-disposition, by which an annuity of the same amount was conferred upon the sixth party, was as follows:—"For payment to my daughter-in-law Mrs Alice Eliza Mosman or Campbell, wife of the said James Morton Peto Campbell, during all the days and years of her life, of a free yearly alimentary annuity of one thousand pounds, payable at two terms in the year, Whitsunday and Martinmas, and in advance, beginning at the first of these terms which shall occur three months after my death, and the next payment at the term succeeding, restricted to two hundred and fifty pounds a-year in case of her entering into a second marriage; and in order to meet said annuity or said restricted annuity my trustees shall set aside out of the residue of my estate a capital sum the interest of which will, in the opinion of my trustees, be sufficient to meet said annuity, with power to my trustees to encroach on the capital sum which may be so set aside to meet the said annuity if the annual interest thereon should in any year or years be insufficient to meet the same."

The tenth purpose, disposing of the residue, contained this proviso:—"Declaring that in making the division of the residue of my estate amongst my grandson and daughters or others in their right my trustees shall take into account any provisions I have made for them or any of them by any antenuptial contract of marriage entered into by any of them or other deed of trust executed by me, such provisions being accounted as payments to account of the share of the residue of my estate falling to the party receiving the same, it being my wish and intention that my grandson and daughters or others in their right should all be on an equal footing and receive an equal share of the residue of my estate."

The Case further stated—"On 29th September 1897 the testator wrote to Mr Hugh Mosman, brother of Mrs Alice Eliza Mosman or Campbell, a letter, a holograph copy of which was found in the testator's repositories, and in which the following passage occurs:—'I promised to let you know what arrangements I have made for Alice. She is secured in £1000 a-year. I give her double that allowance at present, because living at Dun she requires it. But after my death the provision secured to her is £1000 a-year, subject only to the condition that in the improbable event of her contracting a second marriage it will be reduced to £250.' On 24th October 1897 Mr Mosman replied to this letter to the effect that he considered these arrangements just and fair. . . . From the date of the deed of separation until his death the testator paid Mrs A. E. Campbell quarterly an allowance at the rate of £2000 per annum."

The second and third parties *maintained* that the annuity of £1000 conferred on the sixth party by the ninth purpose of the

trust-disposition and settlement was in implement of, or substitution for, the annuity of £1000 secured to her in the deed of separation. The fourth and fifth parties, while not desirous of pressing their claim, adopted the contention and also the argument of the second and third parties. The sixth party contended that the annuity conferred on her by the ninth purpose of the testator's settlement was additional to, and not in substitution of, that secured to her by the deed of separation.

The *questions of law* included the following:—"(3) Is the annuity of £1000 conferred on the sixth party by the ninth purpose of the trust-disposition and settlement in substitution of the annuity secured to her by the deed of separation? or (4) Is the same additional to the said last-mentioned annuity?"

Argued for the second and third parties—The sixth party were not entitled to two sums of £1000, for the maxim *debitor non presumitur donare* applied where, as here, the settlement contained no words of gift but merely a direction to pay—*Smith* v. *Common Agent in Ranking and Sale of Auchenblane*, June 20, 1841, 3 D. 1109; *Kippen* v. *Darley*, (1858) 3 Macq. 203; *Cowan* v. *Dick's Trustees*, November 1, 1873, 1 R. 119, 11 S.L.R. 25; *Kippen* v. *Kippen's Trustee*, July 10, 1874, 1 R. 1171, 11 S.L.R. 686; *Johanson* v. *Johanson's Trustees*, December 9, 1898, 1 F. 244, 36 S.L.R. 169. As to the admissibility of the letter of 29th September 1897 they cited *Farquhar* v. *Farquhar's Executors*, November 3, 1875, 3 R. 71, 13 S.L.R. 36, and *Johanson* (*cit.*).

Argued for the sixth party—The general rule was that both legacies were payable unless special circumstances showed that the second was to be in substitution for the first—M'Laren on Wills, 747, note 3; Theobald on Wills (7th ed.), p. 764. Moreover, the provisions differed in three important respects, viz.—(*a*) the provision in the deed of separation terminated on reconciliation; (*b*) the testamentary provision was restricted to £250 per annum on the sixth party's remarriage; and (*c*) the two provisions were payable at different periods. These factors indicated that two separate sums were payable—*Balfour* v. *Balfour's Trustees*, March 10, 1842, 4 D. 1044; *Horsbrugh* v. *Horsbrugh*, May 4, 1845, 9 D. 324; *Trustees of the Free Church of Scotland* v. *Maitland*, January 14, 1887, 14 R. 333, at p. 338, 24 S.L.R. 290; *Johnstone* v. *Haviland*, February 17, 1896, 23 R. (H.L.) 6, at p. 9, 33 S.L.R. 511; *Dowse* v. *Glass*, (1881), 50 L.J. (Ch.) 285. As to the admissibility of the letter, reference was made to *Ritchie* v. *Whish*, November 19, 1880, 8 R. 101, *per* the Lord President at p. 104, 18 S.L.R. 81.

At advising—

LORD JOHNSTON—Questions have arisen, under the settlement of the late James Alexander Campbell of Stracathro, dated 27th April 1896, which require a general consideration of his testamentary and other deeds. Mr Campbell, who died in 1908, was predeceased by his wife, and survived by four children, his son James Morton Peto Campbell, and three daughters, Mrs Adamson of Careston and the Misses Hilda Sophia and Elsie Louisa Campbell. His son James had been separated from his wife Mrs Alice Eliza Mosman or Campbell in 1895, and of their marriage there was one son, James Hugh Campbell, who with his mother also survived the testator. The testator's son James had been the source of much anxiety to the testator, and the terms of his settlements were largely affected by arrangements which in his opinion were made necessary by his son's conduct.

Mr Campbell, the testator, had executed a prior settlement dated 25th January 1895, and shortly thereafter, on 16th May 1895, he became a party to a deed of separation between his son and daughter-in-law. Before noticing the terms of this deed it is necessary to premise that the truster had been a partner of the firm of Messrs J. & W. Campbell & Company, merchants, Glasgow, and that although he had before the dates in question retired from the business, a good deal of his capital still remained at his credit with the firm, and that in 1891 he had, with the view of establishing his son James, caused to be transferred to him in the books of the firm a sum amounting to £20,000 out of his capital remaining with Messrs J. & W. Campbell & Company. It was, however, a moot point between father and son whether this provision was an absolute unconditional gift or whether it was subject to conditions.

In these circumstances, in the deed of separation between Mr and Mrs James M. P. Campbell the testator undertook that he, his heirs, executors, or administrators, would during the life of his daughter-in-law "pay to her the clear annual sum of £1000 as and for her separate estate, with restraint on anticipation." But it was provided that if Mr and Mrs James M. P. Campbell should "be reconciled and return to cohabitation, then and in such case all the covenants and provisions herein contained shall become void."

The arrangement for the separation and the agreement to that end immediately above referred to led to a revisal by Mr James A. Campbell of his testamentary disposition of his affairs. Accordingly except in some minor details he revoked his settlement of 1895, and executed the new settlement of 27th April 1896, to which codicils were subsequently added.

By his settlement of 1896, which is the deed to be interpreted, in the eighth head, Mr James A. Campbell directed an annuity of £200 to be paid to his son James Morton Peto Campbell, with this explanation—"In respect that this is the only provision made by me for my son by these presents, and it may appear small in amount, I have to explain that on or about the twenty-third day of July Eighteen hundred and ninety-one I handed him the sum of twenty thousand pounds as a gift and for a settlement in life for him, and further that on my death he will be entitled to one-fourth share of the funds settled under the indenture or settlement executed on the mar-

riage between me and my late wife, and that the income or annual produce from these sums will, together with the foresaid annuity of two hundred pounds hereby provided to my son, be sufficient to give him a fixed income of at least one thousand pounds a year, and this I consider will in the circumstances be ample for him: And, moreover, that I have made separate provisions in these presents for his wife and son, which provisions or their equivalents I would, in ordinary events, have made for him personally; and that in making the division of my estate among my children I have taken the provisions in favour of my son's wife and his son into account as if they had been made in favour of my son himself: And I desire to express my regret that I have had to regard it advisable and necessary, both in the interests of my son and in the interests of his wife and son, to divide my estate in this manner."

He then proceeded in the ninth head to direct payment to his son's wife, Mrs Alice Eliza Mosman or Campbell "during all the days of her life, of a free yearly alimentary annuity of £1000," restricted to £250 a-year in case of her entering into a second marriage, and directed that in order to meet said annuity or said restricted annuity his trustees should set aside out of the residue of his estate a capital sum, the interest of which would, in the opinion of his trustees, be sufficient to meet his said annuity. [*His Lordship then proceeded to consider two questions relating to the provisions made by the testator for his son James M. P. Campbell, which are not reported.*]

With reference to the third and fourth questions—As the testator's daughter-in-law Mrs Alice Eliza Mosman or Campbell receives an annuity of £1000 under the ninth purpose of his settlement, whereas he was bound to make payment to her of an annuity of similar amount under the prior deed of separation, the parties are at issue whether the testamentary bequest of such annuity is in addition to or in substitution for the annuity of similar amount which the testator was bound to pay under the deed of separation. I have come, on consideration of the general scope of the testator's settlement, and after an examination of the various authorities bearing on the point to which we were referred, to the opinion that the provision of the annuity by the settlement was intended by the testator to be in substitution for or satisfaction of that provided by the deed of separation. I think that it has been regarded in the leading authorities on the subject that though the old maxim *debitor non presumitur donare* is in no way conclusive, it does require the legatee who maintains that the bequest is in addition to the obligation, to show from the scope and terms of the deed whereby the bequest is made that such must be inferred to have been the testator's intention. If the terms of the bequest differ substantially in detail from those of the obligation, this may be the necessary inference. Such was the case in *Haviland* v. *Johnstone*, 23 R. (H.L.) 1, notwithstanding that the identity of the sum and the surrounding circumstances raised considerable doubt as to duplication being the testator's real intention.

Now here there are differences, but they are of too slight a character to be conclusive. Under the deed of separation the annuity was terminable on the reconciliation of the spouses; under the settlement it was restricted on the second marriage of the lady. But I think that the effect of these differences, though they cannot be left out of sight, is more than countervailed by a view of the general scheme of the testator's settlement. I think that this leads to the conclusion that the testator regarded the deed of separation as a provision by him for his daughter during his life to be replaced by a repetition of a similar provision upon his death which he made with reference to the general scheme for the division of his estate amongst those directly dependent on him. His settlement was a universal settlement, in which, after providing for a few legacies, he contemplates division among the interests represented by his son and his three daughters. It is true that in that division his son as regards his share is not made the primary beneficiary, for the reasons which I have explained. But there is an express indication that in his own mind the testator was combining the provision which he had made and was making for his son, for his son's wife, and his grandson together, and weighing them against the provisions made for his daughters and their issue. And in this mental balancing of the respective provisions he most emphatically says that it is the separate provisions which he has made, not generally but "in these presents," for his son's wife, that he has in view. I refer to that portion of the eighth head of his settlement, in which, in course of explaining why his testamentary provision for his son is apparently so small in amount, the testator refers to provisions he has in other parts of the deed made for his daughter-in-law and his grandson, and declares that he has taken them into account in his division of his estate. It is inconceivable that the testator should so write if he contemplated that his general funds would be burdened also by a conventional obligation to his daughter-in-law of similar and such substantial amount.

I am corroborated in this view by two other considerations — 1st, the testator brings in *computo* all provisions made by marriage-contract or other deed of trust in favour of his grandson and daughters. And when it is kept in mind that he regarded his son, daughter-in-law, and grandson as in conjunction or as *stirps* in his general scheme of division, it is not readily to be accepted that he brought his grandson's external provision into computation but left his daughter-in-law under no obligation to bring into computation her external provision; 2nd, the testator was aware of the necessity of setting aside a capital sum to provide

the annuity of £1000 for his daughter. And he carefully provides for the division of this sum on her death or second marriage in the same manner and under the same conditions as he had already directed with regard to the residue of his estate. Now he must have known that the similar annuity of £1000 under the deed of separation of 1895 would have required as large a sum to be set aside out of residue if it was still to subsist. And that he does not make provision for the division of such capital sum, as he is careful to do in the case of the testamentary bequest of an annuity of the same amount, shows, I think, that in his own mind he did not regard it as to be subsisting concurrently with the testamentary annuity.

I find myself able to dispose of the question regarding the double annuity of £1000 provided in favour of the testator's daughter-in-law without having recourse to a consideration which was much pressed upon the Court in argument. There were produced and made part of the case, without further information as to the circumstances in which they were written, a letter of an explanatory character dated 29th September 1897 by the testator to Mr Mosman, the brother of his daughter-in-law, and the reply of the letter dated 24th October 1897. The former of these letters commences—"I promised to let you know what arrangements I had made for Alice." Were I at liberty to consider these letters in determining Mr Campbell's intention as to duplicating, or satisfying by his settlement the annuity of £1000 provided to his daughter-in-law by the deed of separation, the opinion which I have formed and expressed above would, I think, receive the most positive confirmation. But I am aware that your Lordships find some difficulty in interpreting these letters themselves, and are not satisfied that it is competent to regard them at all in determining the question at issue. I do not therefore think that, as it is unnecessary, it would be appropriate, that I should say anything further regarding them, except to express my opinion that it is by no means clear that they are not competent evidence of the testator's intention. This is not a question of interpreting the testator's settlement with the assistance of extraneous evidence. It is a question of ascertaining the effect of that settlement upon another deed which the settlement finds existing alongside of it. It is a very similar question to that which has more than once occurred where it has been necessary to determine whether a general settlement supersedes a special destination. And the letters in question are not only not mere parole evidence, nor are they mere casual correspondence, but are, as regards the former at least, the testator's own holograph explanation of what was in his mind, written with a definite purpose.

Accordingly, applying the above opinion to the questions as put to the Court, I should propose . . . to answer question 3 in the affirmative, and to find it unnecessary to answer question 4.

LORD KINNEAR—I concur. I desire only to add that my opinion, which is in accordance with that which has been read by Lord Johnston, is founded exclusively upon the trust-disposition and settlement of Mr Campbell with its codicils and the other holograph testamentary writings, which are appended to the case upon the one hand, and the contracts which are described as the deed of separation and the deed of compromise on the other hand. As I believe that so far we are all agreed as to the annuity in the will being in substitution of the one in the deed of separation, I agree with Lord Johnston that it is not necessary to decide whether Mr Campbell's letter is admissible for the purpose of explaining or of adding anything to his will; and as we are to hold that we do not require to take that letter into account, I have myself formed no opinion as to what the true meaning or effect of it may be. I go upon the deeds alone, and I express no opinion upon the point, which Lord Johnston also leaves open.

LORD MACKENZIE — I am of the same opinion.

The LORD PRESIDENT did not hear the case.

The Court answered question 3 in the affirmative, and found it unnecessary to answer question 4.

Counsel for First Parties—M'Clure, K.C. —Chree. Agents—J. & A. F. Adam, W.S.

Counsel for Second Parties—Blackburn, K.C.—Maconochie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third Parties — Johnston, K.C.—D. M. Wilson. Agents—Oliphant & Murray, W.S.

Counsel for Fourth Party—Wilson, K.C. —Black. Agents—Forrester & Davidson, W.S.

Counsel for Fifth Party — Maitland. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Sixth Party—J. H. Millar. Agents—W. & J. Cook, W.S.

Thursday, July 6.

FIRST DIVISION.

INCORPORATION OF CORDINERS OF EDINBURGH, PETITIONERS.

(*Ante*, vol. xliv, p. 495, 1907 S.C. 654.)

Burgh — Trade Incorporation — Entrance Fees—Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 7), *sec.* 3.

An ancient trade incorporation whose exclusive trading privileges had been taken away by the Burgh Trading Act 1846, had obtained in 1850, approved by the Court, a set of bye-laws sanctioning certain rates of entry for relatives of members, "entrants at the near