[*25th July* 1839.]

(Appeal from the Court of Session, Scotland.)

MALCOLM STEWART, Esq., of Atholl Bank, Appellant.[1] (No. 24.)

[*Lord Advocate (Rutherfurd)—James Anderson.*]

WILLIAM GLOAG, Esq., residing in Perth, Manager, and others, the Ordinary Directors, of the County and City of Perth Fire Insurance Company of Scotland, for themselves, and for behoof the said Company and whole individual Members thereof, Respondents.

[*Pemberton—A. M'Neill.*]

Advocation — Amendment of the Libel — Practice. — An insurance company raised an action against one of their former partners and directors to have him ordained to concur in signing a discharge of an heritable debt which stood in his name; an extended deed of discharge was produced along with the summons, and the conclusion of the libel was to ordain the defender "to grant, execute, "and deliver to the pursuers the foresaid discharge and "renunciation, to be produced at calling hereof;" the defender stated objections to signing the deed in the shape it then stood; the pursuers craved leave to amend the summons by inserting the words "or such valid and sufficient discharge and renunciation of the said debt as the "debtor therein is bound to receive;" the defender opposed the amendment, and the sheriff found the proposal incompetent, "because changing and extending the nature

[1] Rep. 16 D., B., & M., 86.

" and conclusions of the libel." The record was closed, and the sheriff found that the defender was not bound to execute the deed libelled on and produced, but suggested alterations which he, the sheriff, thought necessary; and a new deed, accordingly altered, having been lodged in process, the sheriff " decerned the defender to subscribe the " amended deed of discharge," which the defender refused to do, and advocated; the pursuers did not advocate on the ground of refusal to allow the amendment, neither did they propose to open up the record, and state an additional plea in law on that point: Held (reversing the judgment of the court, but affirming the interlocutor of the Lord Ordinary) that the defender was not bound to sign the only deed which he was called upon by the summons to subscribe.

Observed, per L. C.—(1.) In courts of equity, under a prayer for general relief, the court is at liberty to give relief consistently with the case stated, but there the court never give relief inconsistent with the case stated; and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defender was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself, but of some other deed which the court should take upon itself to frame and tender to the party. (2.) It is well understood now, and settled to be the practice in England, that when a judgment has been pronounced, and one party complains and brings the judgment under review by a regular course of appeal to a superior court, the other party, if he has any thing to allege against the judgment, is at liberty to state his objections to the judgment in the same proceeding. It is a constant rule in chancery, that if a party appeals against part of an order, the appeal is open as to the rest; and that is the whole effect of the Scotch case of Cuningham v. Duncan, 17th July 1837 [1], and the judgment in that case did not go the length of letting in the parties to amend in the superior court.

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[1] 2 Sh. & M'Lean, 984.

1st Division.

Lord Ordinary Cockburn.

THE action commenced by an ordinary summons before the sheriff of Perth, at the instance of Mr. Gloag and other directors of the Perth Fire Insurance Company, against the defender Mr. Stewart, dated the 26th of May 1835, and which set forth, that by the thirty-fifth article of the copartnery of the said County and City of Perth Fire Insurance Company, it is stipulated, " That all dispositions, assignations, securities, and other " writings whatsoever to be executed in favour of the " company shall be taken to and in name of the " manager and the three junior ordinary directors, or " those standing at the bottom of the list of such " directors for the time, or such other three of the " ordinary directors as the directors or major number " of them may appoint, and to the survivors or survivor " of them, and their or his assignees; but in trust " always for themselves and the whole other partners of " the company, future as well as present; and which " trustees and their foresaids, in whose favour such " securities and writings shall be taken and conceived, " shall be bound at any time when required to denude " themselves by habile conveyances of the said trust " property, but that always at the expense of the " company, and to convey the same to such person or " persons, and upon such terms, and under such " conditions and declarations, as shall be appointed by " the directors, with warrandice from their own facts " and deeds; and all dispositions, assignations, renun- " ciations, bonds, contracts, submissions, and other " deeds whatsoever to be executed by the company " shall in like manner be signed and executed by the " manager and the said three ordinary directors at the " bottom of the list for the time being as aforesaid, or

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"such other three of the ordinary directors for the time "as the directors or majority of them may appoint, unless "the same shall happen to relate to any of the subjects "or matters vested in trust, as above written, in which "case the said deeds to be executed by the company "shall be signed and executed by the proper trustees, "but always under the control and superintendence of "the directors as aforesaid." That the defender was a partner of said company, and on 21st March 1832 was elected director, and acted as such; he was one of the three junior ordinary directors during the remainder of the year 1832, and was present at a meeting of the ordinary directors, on 7th May 1832, at which he was elected preses, and as such subscribed the minute of the meeting, when it was agreed to advance a sum of 1,400*l.* sterling upon an assignation of a security held over the lands and estate of Kinloch, the property of John Campbell esq., and it was then agreed that the manager should advance the said sum as soon as the necessary assignation could be prepared; that the sum was, in terms of said minute, advanced by assignation dated 15th May 1832, which, in terms of the company's contract, was taken to the manager, and two other parties and the defender, as the three junior ordinary directors, and to the survivors or survivor of them, and their or his assignees, in trust always for themselves and the whole other partners of the company, future as well present; that the said John Campbell intimated his intention to pay off the said debt to the manager of said company, and a discharge and renunciation was prepared by the agent of Mr. Campbell, and subscribed by the said William Gloag as manager and the two other directors, and on the 28th day of December 1834 it was intimated

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that Mr. Campbell's agent was ready to pay the amount of the said heritable debt, and interest due thereon, on receiving the discharge and renunciation; "but in consequence of the said defender refusing to execute the said discharge and renunciation unless certain clauses were inserted therein, to which the agent for Mr. Campbell would not agree, the pursuers have been unable to obtain a settlement of the said debt and interest; therefore the said defender ought and should be decerned and ordained to grant, execute, and deliver to the pursuers the foresaid discharge and renunciation, to be produced at calling hereof."

In defence it was admitted that the defender was at one time a shareholder and a director of the company, but that he had ceased to hold shares therein. His objections to sign the deed were thus stated:—

"Subsequent to the period when the defender's connexion with the company so terminated, and, as he thinks, about the time mentioned in the summons, the agent of the pursuers presented to him the discharge and renunciation libelled, requiring him to subscribe the same as a director of said company. This deed proceeds in name of Mr. Gloag, the present pursuer, as manager of the company, and Mr. Robert Bisset, writer in Perth, Malcolm Stewart esquire, of Atholl Bank, and George Lawson Cornfute, manufacturer in Perth, three of the ordinary directors of the said company, for themselves and the whole other partners of the said company, future as well as present; and the defender, in an after part of the deed, as trustee or director and for

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"behoof of said company, is made to exoner and "discharge the debtor in the bond, and to bind himself, "and the whole partners of the company, in absolute "warrandice of the discharge; the defender refused "and still refuses to subscribe this deed, because it sets "forth, on the face of it, a positive falsehood. It "proposes to make the defender a party to it in a false "and fraudulent character, namely, as a director of the "company, while in point of fact, he is no director, "having long ago ceased to be so, and notified this to "the public through the medium of the local news-"papers;" and it was pleaded that the conclusion of the action being, that the defender should be ordained to execute a particular deed in the character of a director of the Perth Fire Insurance Company, but the defender not being, in point of fact, either a director, shareholder, or in any way connected with the company, such conclusion is incompetent, because the defender cannot be compelled to assume and act in a false and fictitious character, or to execute any deed at variance with the fact, or write himself down a director, while he is neither a director nor a shareholder of the said company; and that the defender is entitled to absolvitor, with expenses.

Upon advising the case afterwards, with replies for the pursuers and duplies for the defender, the sheriff, on 25th September 1835, ordered the parties to state, within a certain period, whether they were willing to hold their pleadings as containing their full and final statement of facts. Against this interlocutor the pursuers reclaimed, craving, before closing the record, to be allowed to amend their libel in certain terms;

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the sheriff substitute, by interlocutor of 18th November 1835, found, " that the same is incompetent, because " changing and extending the nature and conclusions of " the libel, and refuses the motion to amend." [1]

Thereafter the record was closed, and the following interlocutor pronounced: " Perth, 16th December 1835. " Having advised the closed record, before answer, " appoints the pursuers, between and the 23d cur- " rent, to produce the original assignation of date " 15th May 1832, or certified copy thereof." And the assignation ordered by the last-quoted interlocutor having been produced, the sheriff substitute (23d December 1835) found, " that the defender, having " admittedly accepted the office of one of the directors " of the pursuers company, is bound at common law, " and under the rules of the company, to execute all " writings necessary for the ordinary management of " the business of the company, and specially for the

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[1] " *Note.*—The conclusions of a summons may be restricted by a minute, " without any amendment, because that the greater comprehends the less, " But it is incompetent to change the nature of the action, or to extend " its conclusions. In this case the conclusions are specific to compel the " defender to execute a certain deed, and the amendment craved is to " generalize the conclusions, so as to embrace any deed necessary for the " end sought. Although such amendment cannot, on correct principles, " be permitted, perhaps it is unnecessary, because when the deed libelled " is objected to by the defender, on certain technical grounds, there " appears no incompetency in the court making such alterations on the " deed as may obviate these objections, and decerning for execution of the " deed so amended. No change would be made on the action, but this " result would arise from the defence, and the court would decern in " terms of the libel as modified by the defence. Is it not the recognized " rule of law that where the nomination does not specially stipulate to " the contrary a majority of the trustees possess the whole powers of the " trust? Stair, b. i. tit. 12. sect. 13.; 12th June 1824, Campbell v. " M'Intyre. In the case, 15th February 1827, Lord Lynedoch, " (affirmed) the deed declared three to be a quorum, to which number " the trustees were reduced."

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" transfer and discharge of all such securities as may " have been taken in name of the said defender as one " of the said company directors, and, as such, one of " the trustees for the company; but finds that the " defender, as admittedly no longer a partner, nor of " consequence a director, in the said company, is not " bound to subscribe any deed or writing as may be " inconsistent with the said last-mentioned fact, and " which, in any way, recognizes him as being, at the " time of subscribing the same, a partner in the said " company; therefore, requires the pursuers to delete " from the discharge, No. 3. of process, the words " ' three of the ordinary directors of the said company, " ' for ourselves and the whole other partners of the " ' said company, future as well as present,' which " words are in the preamble in the said deed, and are " unnecessary as well as inconsistent with fact; requires " the pursuers farther to introduce after the words ' to " ' and in favour of,' which occur on the first line " of the fourth page of the said deed, the words as they " stand in this dispositive clause of the disposition and " assignation, No. 13. of process, as follows, ' We the said " ' William Gloag, manager of the said company, &c., " ' and to and in favour of us the said Robert Bisset, " ' Malcolm Stewart, and George Lawson Cornfute, " ' three of the then ordinary directors of the " ' said company,' and thereon deleting the words, " ' us, as managers, and ' on the first line of the said " fourth page; farther, requires the pursuers to delete " the words ' and directors foresaid ' on the margin " of page fifth, and the word ' other ' on the seven- " teenth line from the top, and the words ' ourselves " ' and ' on the fourth, and the word ' other ' on the

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" third line from the foot of the sixth page of the said " discharge, these words being all unnecessary, and of " doubtful consistency with the fact that the said " defender is not now a partner of the said company: " Appoints the said deed, as so amended, to be of new " engrossed and produced in process, and thereupon " decerns the defender to subscribe the same, reserving " consideration of the farther conclusions of the sum- " mons, and decerns." To which interlocutor the sheriff substitute (10th February 1836) adhered.[1]

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[1] " *Note.*—The defender's case has been pled with remarkable ability in " the reclaiming petition, remarkable the more that a very trifling question " has been raised into one of importance. It is permitted to explain the " conclusions of a summons by the narrative. The narrative of the " summons in this action clearly shows that all that was sought at the " hands of this defender was a valid discharge of a certain heritable " security, in the constitution of which the defender's name was assumed " as one of the trustees for the creditors in the debt. The conclusion, " no doubt, bears reference to a certain writing produced as the discharge " sought at the defender's hands, and there is no question but that the " conclusion might have been framed in more general terms. The " defence was that the defender was not bound to subscribe the discharge " in the precise words used in the writing put in. But if the objection- " able words were removed there existed no other legal defence against " becoming a party to the deed. The court has adopted the defence, " and ordered the objectionable words to be expunged, and the deed, as " so expunged, to be subscribed. The defender now pleads that the " action must fall, because the deed which he is decerned to execute is " no longer the deed embraced by the conclusions of the summons. " With the most scrupulous observance of form, there exists a clear and " obvious distinction between the substance of a deed and its mere mate- " rials. The deed wanted, and concluded for, is substantially the " discharge of a certain bond, and nothing but that discharge has been " decerned for, although it may be that the discharge may not be on " precisely the same paper,—but even this may be effected,—and although " a few words are expunged. Suppose a summons brought to compel " the execution of a certain conveyance, and that there, as here, the " proposed disposition is concluded for specially conform to the same " produced. Suppose farther, that the defender objects that the deed so " produced binds him in absolute warrandice, and that he is liable only " in the restricted warrandice from fact and deed. Suppose the court " sustains the defence, and ordains the deed to be corrected, so as to

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And again, (25th March 1836,) having advised with the sheriff, adhered, the sheriff adding the following note, "This case is attended with very considerable "difficulty; it involves an important point in regard to "the forms of process, and the sheriff does not think "that there are sufficient grounds to warrant an altera-"tion in the judgment appealed from."

The pursuers then produced a discharge and renunciation, with alterations as appointed by the sheriff substitute, and craved that the defender might be ordained to subscribe the same, when the sheriff substitute (25th May 1836) "allowed the defender to see "the extended discharge, and to state any special "objections against his being ordained to subscribe "the same between and the 7th day of June next." On 24th June the sheriff substitute, "on the defender's "failure to state any special objections to the amended "deed of discharge, decerns the defender to subscribe "the same."

"obviate the objection, and then decerns the same to be executed, "would the defender be heard in his plea, that the pursuer must be "nonsuited, because he had not succeeded in compelling the defender "to execute the identical deed produced in its every word? This case is "not so strong as the one supposed, because in this case no one "obligation is changed, but merely the defender's designation altered "from a present to a former manager of the company. With regard "to the defender's plea, that the deed only negatively shows that he has "ceased to be interested in the company, the answer is, that the positive "evidence of that fact is in his public announcement to that effect, and "there is nothing in the deed which can, by any torture of argument, "be made to prove a reassumption of liabilities. His continued obliga-"tion to extricate the company from the securities contracted in his name "exists both at common law and under the contract. Of course no "decision can be given in this case as between the company and the "debtor in the bond. If the latter refuses to pay on an ample discharge "he must just take the consequences. He cannot interpose himself in "the question between the company and the defender."

To which interlocutor the sheriff substitute (13th July 1836) adhered [1], and the sheriff, on appeal, adhered.

Stewart advocated to the Court of Session, and gave in a note of additional pleas in law, in these terms:—

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1. The advocator, having ceased to be a director or a partner of the County and City of Perth Fire Insurance Company, was not bound to execute the deed libelled on. 2. The record having been closed on a summons which concluded specifically to have the advocator ordained to execute the discharge libelled and produced with it, and the sheriff having found that the advocator was not bound to execute that deed, the advocator ought to have been assoilzied or the action dismissed. 3. It was incompetent for the sheriff to order a new deed to be prepared, or the old one remodelled, under the conclusions of the respondents summons, and the narrative on which they proceeded, more especially as the grantee of the deed by whom it was prepared was no party to the action. 4. Although the advocator might be obliged to concur, along with the existing directors, in executing a discharge and renunciation, setting forth the res veræ gestæ, he was not bound to appear actively, and undertake obligations on himself individually or the company collectively; and he was entitled, before being dragged into court or called upon to subscribe the deed, to revise it for his own safety and interest; and the

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[1] "*Note.*—The question urged in the first branch of the petition has "been long since determined by final judgments. The defender is not "entitled to his expenses, seeing that he has been unsuccessful in his "defence that no alteration could be permitted on the deeds of discharge "as originally produced. Expenses have not been given against him, "because that he has been assoilzied from the claim of interest up to "the date when the deed has been finally approved."

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whole tenor of the deed sought to be executed was adverse to or inconsistent with the advocator's true condition and capacity. 5. At all events there were no termini habiles in the action brought by the respondents, to adjust the character and terms of the deed which the advocator was bound to concur in, or the grantee bound to accept.

Gloag, in his note of additional pleas in law, pleaded:—1. The advocator having, as director and trustee for the County and City of Perth Fire Insurance Company, held an heritable security in trust for the company, was bound to become a party to any deed necessary for enabling the company to receive payment of the sum so secured. 2. The advocator having absolutely refused to become a party to the execution of any such deed, upon the sole ground of his having ceased to be a shareholder in the company, and therefore not under any obligation to execute any such deed, an action became necessary with a view to compel his concurrence. 3. The only tenable objection made by the advocator to the execution of the necessary deed being that it was prepared upon the erroneous assumption that he was an actual director and partner at the time, and that objection having been removed by an alteration of the deed, and the withdrawal of the objectionable expressions, the advocator had not the slightest shadow of a pretext for withholding his subscription to the deed. 4. For the like reasons the advocator had no just interest in bringing or in insisting in the present advocation, in respect that the only objections which were tenable against the subscription of the deed have been completely obviated, and that

there truly exists no disputable matter for a decision of the court between the parties.

The parties having respectively lodged their notes of additional pleas, and being satisfied with the record as made up in the inferior court, the Lord Ordinary, Corehouse, before whom the cause originally came, pronounced the following interlocutor:—"23d December "1836. The Lord Ordinary, in respect the record "as closed in the inferior Court is not objected to, and "the parties having each given in additional pleas in "law, holds the record as closed in this court, and "appoints parties to debate."

No renewal of the proposal to amend their summons was made by the (respondents) pursuers.

Lord Corehouse having been moved to the Inner House the cause came to depend before Lord Cockburn, as Ordinary, and his Lordship, on hearing parties, pronounced the following interlocutor:—"8th June 1837. "The Lord Ordinary having heard parties, and con-"sidered the process, sustains the reasons of advocation, "advocates the cause, recalls the interlocutors of the "sheriff; finds that the advocator was not bound to "sign the only deed which he was called upon by the "summons to subscribe; sustains this defence, assoil-"zies the defender, and decerns; finds him entitled "to expenses incurred by him in this and in the inferior "court, and remits to the auditor to tax the account "thereof, and to report." And added this note:—"The original pursuers should, in prudence, have "concluded generally against the defender for the "execution of any proper discharge. But, instead of "this, they exhibit a specific deed, already extended, "and subscribed by other parties, and conclude solely

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"for the execution by the defender of this particular "instrument. Perceiving that the defender had an "invincible objection to sign this as it stood, they apply "to the sheriff for leave to generalize the conclusion; "but this the sheriff refuses, and the interlocutor con- "taining the refusal has been allowed to become final. "Yet the sheriff, by the interlocutors in question, directs "the defender to set his name, not to the specific deed "concluded for, but to a different deed, containing "most material additions and alterations, which, in "effect, just amount to the very clauses which it had "been fixed could not be introduced under the "summons."

The respondents reclaimed.

Judgment of Court, 21st Nov. 1837.

On advising the cause, the First Division pronounced the following interlocutor:—"Edinburgh, 21st Novem- "ber 1837. The Lords having considered[1] this re- "claiming note, and heard counsel for the parties, "alter the interlocutor reclaimed against, repel the "reasons of advocation, and remit to the sheriff sim- "pliciter, and decern: Find no expenses due to either "party."

Stewart appealed.

Appellant's Argument.

Appellant.—The summons concludes for one thing, the judgment orders something different to be done; the deed, as altered, is made quite different from what the appellant was asked to sign,—so far different indeed as to involve him in liabilities with other parties; and so conscious were the respondents of the incompetency of

[1] See their Lordships opinions in 16 D., B., & M., 91.

this, that they proposed to extend the grounds of their action by amending the libel. Yet the sheriff and court erroneously, under an action which did not conclude for that, ordained the appellant to subscribe the deed. The Lord Ordinary's view of the matter is the correct one. There are objections to the deed proposed to be signed, particularly in the clause of warrandice; but the question is, whether under this unamended action the appellant can be required to sign it. After closing the record in the Court of Session it was no longer competent to ask to amend the libel; the party must, under 6 Geo. 4. c. 120., abandon his action if insufficient. A deed newly engrossed, and to be executed of new, was produced, under the judgment of the sheriff; therefore it was not a deed that under this summons the appellant could be required to execute. The appellant was not bound to state any other objections to the action.

There were no other parties than the appellant and respondents to this action; the grantee, Mr. Campbell, was not made a party to it. The only issue raised by the summons was whether the deed, as proposed and prepared by the grantee's agent, should be forced upon the appellant for signature. That was given up; but without any alteration on the action, the appellant was asked to sign another deed, involving him in obligations which he did not choose to undertake. Although the deed is not set forth in terms in the summons, it has been held in the Court of Session that by simply referring in the summons to a deed to be produced it is sufficient. [*Lord Chancellor.*—This is important, because if the deed were set forth in the summons the

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Appellant's Argument.

alterations proposed on the deed might be held to be amendments.]

A party is not entitled to bring forward new grounds of action not in his summons.[1]

In Cuningham v. Duncan[2], referred to by the respondents, there was acquiescence by the parties to the action as it stood, but reference may be made to the Lord President's opinion in Gifford v. Trail, 8th July, 7 S. & D. 854, who holds that the nature of the action is to be gathered only from the conclusions of the summons, by which the judgment is alone to be regulated.

Even where the variance lies not in the thing claimed, but in the reason for claiming it, the pursuer will not be entitled to succeed in that action. A party who concludes for payment of a sum of money as due by a bond, will not be entitled to a decree for the sum on showing that it was due under a bill. This has been frequently found. Thus, in the case of Dickie, the rubric is, "A pursuer is not entitled, without an amend-" ment of the libel, to set forth new grounds of action " in the condescendence." Much more inflexible is the rule in regard to the conclusion. A new ratio may be introduced by amendment, but in the general case a new conclusion cannot, because that would be altering

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[1] Shaw's Digest, p. 207, Forbes v. Livingstone, 16th Feb. 1832, affirmed 8th July 1834; Rollo v. Campbell, 12th Jan. 1831, 9 S., D., N., & B., 260; Webster, 1st March 1823, 2 S. & D. 229, new ed.; Blincow's Trustees, 22d Jan. 1831, 9 S., D., N., & B., 317; Hyslop, 16th June 1824, 2 Sh. App. 451; M'Brien, 22d March 1826, 2 W. & S. 66; Clerk, 1 Murray, 195, 10th July 1817; and see also Lord Corehouse's opinion in the present Case, 16 D., B., & M., 91.

[2] House of Lords, 17th July 1837, 2 Sh. & M'Lean, 984.

the basis of the action. Vide also Peacock, 26th November 1821; Jackson, 9th December 1825; Still's Trustees, 12th November 1829; Stirling, 4th March 1830; and Waldie, 2d December 1830. In all these cases the court applied the rule that a pursuer could not found on grounds of action not contained in the summons.

Now, to oblige the appellant to sign the newly engrossed deed would be to make him do what is quite out of the conclusion of the summons, and involving obligations which, at the proper stage, he will show he is not at law, independently of this matter of form, bound to undertake.

The argument of the respondents upon the point of still allowing the amendment leads to important consequences, because if they did not ask the Court of Session to allow amendments, how can they ask this House to do so? [*Lord Chancellor.*—In such a state of matters this House is accustomed to reverse the interlocutor, and remit to the court, when the parties may ask and the court do what is thought necessary]. The advocation touched only the merits, not the interlocutor refusing the amendment; then there is a new closing of record in the Court of Session, which clearly shut out the amendment, no such amendment having been proposed.

Besides, there can be no amendment of the libel after the record is closed; see 6 Geo. 4. c. 120. (Judicature Act), confirmed by the case of Wilson, 11th July 1826.[1]

[1] Shaw's Digest, voce 'Process,' p. 371, sec. 5, and references.

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Respondents Argument.

Respondents.—It is always important to keep in view Lord Eldon's [1] opinion in Lord Lynedoch's case as to interfering with decisions on points of practice, and also what was observed by Lord Brougham in the Magistrates of Annan v. Farish.[2] There is no doubt that, if the amendment had been or were still admitted, decree might be given conform to the amended action. Although no counter advocation was brought, the amendment was not the less competent in the Court of Session, as is clear, for though Lord M'Kenzie's opinion inclined to there being no necessity for a second advocation, the case of Cuningham v. Duncan[3] settled what Lord M'Kenzie held not fixed law,—that the advocation brings up the whole cause. Here the amendment was tendered before the record was closed; and thus it was competent to the sheriff or to the superior courts to allow it to be received. There can be no ground then for dismissing an action which may be competently amended. The respondents admit that they can ask nothing but what is within the summons. [*Lord Chancellor.*—Can he amend now, the record being closed?] Although by 6 Geo. 4. c. 120. amendment cannot be allowed, yet when an amendment has been tendered before the record was closed, and refused by the judge, a superior court may remit to the sheriff to open up the record to allow the amendment.

The deeds were to be prepared by the directors, and executed by the parties. After repeated applications in vain, the action was raised; the appellant did not refuse

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[1] Lord Kinnoull v. Gray, 1st March 1805. House of Lords.
[2] 14th July 1837, 2 Sh. & M'Lean, 930.
[3] 2 Sh. & M'Lean, 984.

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to sign a discharge, but objected only to particular parts of the deed as framed, because he says, "it sets "forth a falsehood," he not being a director, as set forth on the deed. Liberty was refused to amend, because the sheriff thought it unnecessary; so it was not to be expected that the interlocutor so refusing would be carried to review by the respondents. [*Lord Chancellor.*—They do not seem to have the prayer for general relief in Scotland.] The words "to add and "eik" were used in defences; and to "do otherwise as "to your Lordships shall think proper," in petitions, confine the parties within the conclusions or substantial prayer of the application. But farther, the appellant now admits he is bound to execute a discharge though not under this action. The respondents do not ask for general relief, nor indeed for more than is concluded for in the summons; but they are entitled to that, under such modifications as the appellant by his defence called for as necessary. The court merely adopted the appellant's own defence, and suggests under what alterations he ought to sign the deed.

The appellant's defences and pleas in the sheriff court shew that his defence was exclusively confined to the deed setting forth erroneously that he was then a director. The deed which the party is now required to sign imports no higher obligation than is contained in the first deed. Instead of giving the respondents more it gives them less, if possible, than they ask. Instead of individual warrandice, as required in the first deed, mere general warrandice is introduced into the second. Besides no plea upon the ground was taken by the appellant.

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Ld. Chancellor's Speech, 23d July 1839.

LORD CHANCELLOR.—My Lords, in this case one cannot but regret (whether the cause of regret is to be attributed to the parties on the one side or the other is of very little consequence) the great expense which has been incurred; but it involves a question of some importance with regard to the practice of the court, and nothing would be more unsafe than to permit our judgment to be influenced by the litigious conduct of either party, and so lead to a decision which may prove very prejudicial to the general practice of the court below.

My Lords, certainly the summons is addressed to no particular instrument; the pursuer alleges that a certain instrument had been prepared, "that the said John "Campbell, intending to pay off the said heritable "debt, intimated this to the manager of the said "company, and a discharge and renunciation was "prepared by the agent of the said John Campbell, "and was subscribed by the said William Gloag as "manager, and the said Robert Bisset and George "Lawson Cornfute, on these dates; and on the 28th "day of December last it was intimated that Mr. Camp-"bell's agent was ready to pay the amount of the said "heritable debt and interest due thereon, on receiving "the discharge and renunciation, but in consequence "of the said defender refusing to execute the said "discharge and renunciation unless certain clauses "were inserted therein, to which the agent of "Mr. Campbell would not agree, the pursuers have "been unable to obtain a settlement of the said debt "and interest. Therefore the said defender ought "and should be decerned and ordained to grant,

" execute, and deliver to the pursuers the foresaid " discharge and renunciation, to be produced at calling " hereof."

Therefore the whole suit is founded upon this, that a certain instrument had been prepared which the pursuers alleged the defender ought to have executed. They do not ask that he may perform any other duty, or that he may execute any other deed, but they state a certain deed to be produced, and that he ought to be called upon to execute that deed, and the whole of the pleadings proceed upon that supposition. His defence is grounded on the fact, not that he is not bound to give any discharge, but that he is not bound to give a discharge in the terms in which it had been tendered. Thus the contest between the parties is, whether he is bound to execute that deed. The pursuers seem to have been aware of that in bringing before the court a case entitling them to what they ask, and that no doubt was the ground of the application to amend their summons; and accordingly they made an application in due time, the record not being closed, to be permitted to amend. The sheriff was of opinion that ought not to be granted. He " finds that the same is incompetent, " because changing and extending the nature and con- " clusions of the libel: Refuses the motion to amend, " reserving all questions of expenses to the final " issue."

Now whether the sheriff was right or wrong in that opinion I apprehend is not a question which your Lordships are now called upon to consider at all; but I cannot but observe, as applicable to this part of the case, that what the sheriff ultimately did is not very consistent with the reasons he assigns for refusing per-

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mission to amend. For he goes on to say, "The con-
"clusions of a summons may be restricted by a minute
"without any amendment, because there the greater
"comprehends the less; but it is incompetent to
"change the nature of the action, or to extend its
"conclusions. In this case the conclusions are specific,
"to compel the defender to execute a certain deed, and
"the amendment craved is to generalize the conclu-
"sions so as to embrace any deed necessary for the
"end sought."

Those are all very intelligible reasons. The ground upon which the sheriff came to the conclusion that he ought not to give leave to amend does seem a very odd result of that reasoning; that because it so altered the nature of the action that he could not be permitted to amend he might still have the power of giving the relief which was asked without any amendment at all. If that be to generalize it will be to do more than the summons prayed, and if it be the acknowledged rule that the court cannot give more than the summons prays, where a specific thing is prayed, then all the reasons which he suggests against the application to amend, one would suppose would have been applicable to the question which he afterwards decides, namely, whether on such a record he could grant the relief prayed.

The whole of the subsequent proceedings seem to have arisen from the suggestion which the sheriff made. He goes on to say, "Although such amendment cannot,
"on correct principles, be permitted, perhaps it is un-
"necessary, because, when the deed libelled is objected
"to by the defender on certain technical grounds,
"there appears no incompetency in the court making

" such alterations on the deed as may obviate these " objections, and decerning for execution of the deed " so amended. No change would be made on the " action, but this result would arise from the de- " fence, and the court would decern in terms of the " libel as modified by the defence. Is it not the recog- " nized rule of law, that, where the nomination does " not specially stipulate to the contrary, a majority " of the trustees possess the whole powers of the " trust?"

My Lords, on that the record was closed, and there was no complaint made on the part of the pursuers against the sheriff refusing liberty to amend. Then, on the matter coming on again before the sheriff, on the 23d of December, this interlocutor was pronounced:— " Having resumed consideration of this process, finds " that the defender, having admittedly accepted the " office of one of the directors of the pursuers company, " is bound at common law, and under the rules of the " company, to execute all writings necessary for the " ordinary management of the business of the company, " and specially for the transfer and discharge of all " such securities as may have been taken in name of " the said defender, as one of the said company directors, " and as such one of the trustees for the company; " but finds that the defender, as admittedly no longer a " partner, nor, of consequence, a director in the said " company, is not bound to subscribe any deed or " writing as may be inconsistent with the said last- " mentioned fact, and which in any way recognizes him " as being, at the time of subscribing the same, a " partner in the said company." That was, according to the fact in issue between the parties, the pursuers and

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defender, a distinct adjudication in favour of the defender, the sole question between the parties being, whether the deed tendered was such a deed as the defender was bound to execute; there is therefore, looking at the proceedings, looking at the matters in issue, looking at that which alone was the matter in contest, an adjudication that the defender was not bound to execute that deed so prepared and tendered.

Then what is there in issue between the parties as to what deed he shall execute? This refusal to execute any deed was nowhere brought into question; but, without any discussion between the parties, without any opportunity of raising any points, at least on the pleadings, as to whether any particular instrument should be executed or not, without any opportunity to take objections, after the whole proceedings were closed, and the case was in a situation for judgment, the sheriff "requires the "pursuers to delete from the discharge, No. 3. of pro- "cess, the words" he mentions. He then goes on, and gives directions as to the alterations to be made, not in this deed, but describing what sort of deed he is of opinion ought to be the deed executed by the defender; and "appoints the said deed, as so amended, to be new "engrossed, and produced in process, and thereupon "decerns the defender to subscribe the same, reserving "consideration of the further conclusions of the sum- "mons, and decerns."

My Lords, there have been cases referred to for the pursuers which I must have an opportunity of minutely examining before I finally dispose of this case; but I have had no case referred to in which it has been held to be competent to a court in a suit of this sort, raising a particular question between the parties as to a par-

ticular act to be done by one of them, which was claimed to be done by the pursuers, and resisted on particular grounds by the defender,—in which it has been thought competent to a court to adjudicate that the defender was quite right in the resistance he made to the execution of a particular instrument tendered, but the court still went on to direct that another deed should be prepared, and that he should execute the deed so prepared. Non constat, with respect to the deed directed by the sheriff to be prepared and submitted to the defender, that he would not have resisted the execution of it; but the matter was never submitted to his consideration, therefore he never had an opportunity of acquiescing in or resisting such application.

My Lords, this case was brought by advocation before the Court of Session, and the Lord Ordinary took precisely that view of it. Still there was no advocation against the refusal of the sheriff, and for liberty to amend. The cause was brought up entirely on the last interlocutor; and the practice of the court gave the party an opportunity still of putting new matter in issue, if he had thought proper to make an application for the purpose. But on the 23d December 1836 the Lord Ordinary pronounced the following interlocutor: "In respect the record, as "closed in the inferior court, is not objected to, and the "parties having each given in additional pleas in law, "holds the record as closed in this court, and appoints "parties to debate."

Now, what advantage might have been afforded, if such opportunity had been taken, in the advocation, it is not necessary now to consider, because it is conceded on all hands that the act of parliament is imperative on that point, that after the record is closed

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there can be no question of amendment. But the record might be closed adversely, the sheriff having refused the parties liberty to amend; the record being closed might be the consequence of his so refusing to allow the party to amend against whom that decision was made, namely, the pursuers; and if the pursuers thought proper to quarrel with the decision of the sheriff, inasmuch as the application was made before it was closed, it might be considered that they had a right to bring the decision of the sheriff under review, inasmuch as they were right in insisting that they ought to be at liberty to amend, and the subsequent interlocutor would be erroneous in having proceeded on an erroneous refusal of the pursuers to amend; but here they come into the Court of Session and make no such application, and the record is again closed in the Court of Session, and if they had the power of so doing, no application is made to amend, nor is that part of the proceeding of the sheriff brought under consideration.

The case of Cuningham v. Duncan [1] has not gone the length of letting in the parties to amend. It is well understood now, and decided to be the practice here, that where a judgment has been pronounced, and one party complains of the same, and brings it under review by a regular course of appeal to a superior court, the other party, if he has any thing to allege against the judgment, is at liberty to state all legal competent objections to the judgment in the same proceeding, so that the expense of double proceedings or of a cross appeal is saved by the adoption of that rule. It is a constant rule in the Court of Chancery, that if a party

[1] 2 Sh. and M'Lean, 984.

appeals against part of an order, the appeal is open as to the rest; and a very convenient rule that is; it saves great expense. That is the whole effect of the decision in Cuningham's case.

Now, here is an interlocutor not brought under review; the others are; and there is an appeal against the decision on the merits. I cannot but consider that your lordships will ultimately come to the conclusion that the interlocutor of the Lord Ordinary was the correct one, and that the alteration of it in the Inner House cannot be supported; that there is no reason for altering the interlocutor of the Lord Ordinary, so far as it disposed of the record. When it came before the Lord Ordinary he pronounced this interlocutor: "Sustains the reasons of advocation; advocates the "cause; recals the interlocutor of the sheriff; finds that "the advocator was not bound to sign the only deed "which he was called upon by the summons to sub-"scribe; sustains this defence, assoilzies the defender, "and decerns; finds him entitled to expenses incurred "by him in this and in the inferior court."

On the case coming before the Inner House the court simply remitted it to the sheriff; but the reasons given by the learned judges on which they founded their opinion seem to have proceeded very much on the supposition that there ought to have been liberty to amend. Now, it does not appear to me that that opinion was well founded, or that they were correct in thinking there ought to have been liberty to amend, and that therefore it was competent to the court to adjudicate on the merits as if there had been liberty to amend. On the contrary, if it were necessary to amend in order to come to that conclusion, that would

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be a strong reason against coming to the conclusion. But it comes simply to this, whether on such a record, without reference to the question of amendment, it was competent to the court to adjudicate such relief. It would be very inconvenient if such were the practice, because no man can know what he is called upon to resist. He is called on to do a particular act, and the court holds he is not bound to do that act. That is the whole suit; the whole contest. The court says, We are of opinion that you were right in resisting it; it was quite competent for you to refuse to execute that deed; but we are of opinion that you ought to have executed some other deed containing some other provision.

But the question is not whether the alterations were right or wrong. In one view of the case they might become material. If it were competent for the court to go into that question at all, then the particular alterations would be material to be considered; but if the court did not adjudicate on any thing but the particular deed, then it would be immaterial whether the alterations were more or less material, or such as the defender had a right to insist upon, because the objection would not be to the interlocutor, but to the jurisdiction of the court to deal with that subject matter at all.

There were some decisions referred to by the appellant, for the purpose of showing the extent to which it is competent for the court to go in cases where the court has thought it not competent to go beyond that which the pursuers have asked. I do not find the cases referred to on the other side lead to the conclusion which the learned judges of the Inner House seem to have come to; but as it is a point of practice of the court,

and a point on which this House is unwilling to interfere,—inasmuch as those who are in the daily habit of practising in those courts are much more competent to decide what that practice is, than it is possible your Lordships can be on a case of appeal,—it appears to me to be a case that requires great caution and consideration to be exercised before your Lordships would differ in opinion from a judgment pronounced on argument in the court below. But if, on reference to the authorities, it appears that that which has been done by the court below has been contrary to the practice, it will become the duty of your Lordships, if there has been any such departure, to keep that practice within its proper limits; because nothing can be more injurious to pleading in general than the introduction of a laxity of practice, in consequence of an opinion applying to the circumstances of a particular case. It is that which courts in this country are very cautious in permitting; and it is now a very wholesome rule to keep the practice within the limits which the ordinary rules prescribe, and not to make exceptions to it, on account of feelings that exist because one party or another may be thought to be improperly litigious. It is much to be regretted that this expense has been incurred by these parties, between whom there is scarcely any thing in question; still it is your Lordships duty to look to the general question, and the effect of the general practice. There are two or three cases which bear on this subject, which I shall be glad to have an opportunity of looking at, and for that purpose I would propose to your Lordships that the further consideration of this case be postponed.

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LORD CHANCELLOR. — My Lords, this is a case which I approach with considerable anxiety, as it involves a question of practice on which I have the misfortune of not coming to the same conclusion to which the court below has come. And undoubtedly, my Lords, I feel extremely reluctant to interfere with a judgment of the Court of Session, inasmuch as the learned judges who have decided are in the constant habit of considering these questions in their own court, and their minds must be more familiar with the practice which ought to regulate their proceedings than it is possible for your Lordships to be; but this, my Lords, appears to me to fall within the exception which has been recognized in the observations of Lord Eldon and other members of this House, when adverting to the danger of reversing interlocutors turning on points of practice. I find it impossible to ascertain the grounds on which the judgment of the court below can stand.

My Lords, the proceeding was for the purpose of compelling a party to execute a discharge of an heritable debt by subscribing a particular deed. The directors of the company had come under an obligation to do that which was necessary to enable the company to carry on their concern. The appellant ceased to be a director; the nature of the transaction made it necessary that a deed should be executed, and he, being a director at the time the transaction took place, was one of the necessary parties to that deed; and the deed having been prepared and approved by the party who had been dealing with the company, the appellant, having been a director, was called upon to execute the deed; he declined, whereupon the company instituted

proceedings against him, and, at the conclusion of the summons, stated these facts:—They stated that the deed was prepared; that the deed was approved by the borrower; that what they asked was, "that the defender "should be decerned and ordained to grant, execute, "and deliver to the pursuers the foresaid discharge and "renunciation, to be produced at calling thereof." He alleged an objection to the deed so prepared, and stated grounds on which he was not compellable to execute, not any deed, but the deed so prepared. The whole cause turned upon that ground, whether that deed was such as the defender was bound to execute. So satisfied were the pursuers in the course of the cause that that was the issue, that they felt no hesitation in coming to the hearing of the cause, praying nothing else against the defender but that he might execute that particular deed.

The cause came on first before the sheriff, and then they applied for liberty to amend their summons, and to plead generally that he should execute that deed, or some other deed for the purpose of operating as a discharge and renunciation of the said debt. The sheriff thereupon disposed of the cause in the manner already stated.

The whole question then, my Lords, was disposed of; there was nothing that was asked by the pursuers but what was disposed of by the finding of the 23d December 1835; the whole suit appears to be at an end; the pursuers having unfortunately limited their demand to call upon the defender to execute that deed, they could have no redress against him for not executing some deed, which, so far as appears, he had never refused to execute. The sheriff

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before had refused to permit an amendment because it extended the object of the suit; but strange as it may appear, in a case where amendments were rejected because they purported to extend the object of the suit, such suit, without any amendment, was considered competent to enable the defender to do that which, according to the decision of the sheriff on the motion to amend, was felt to be subject to objection, as being beyond the object of the suit; and yet the sheriff goes on, and says, "therefore requires the pursuers to delete "from the discharge" such and such words; so that, after finding he is not bound to execute the deed tendered, and that the pleadings cannot be altered so as to comprehend another deed, because it would change and extend the nature and conclusions of the libel, he goes on, and enumerates the objections to the deed, with respect to which there is nothing to be found on the pleadings, except that the defender insists on particular circumstances as furnishing reasons for objecting to the particular deed, and another stating the particulars in which he is of opinion the deed ought to be corrected, he directs the deed, so amended, "to be newly engrossed, "and produced in process, and thereupon decerns the "defender to subscribe the same;" that is to say, the deed tendered is not a proper deed to be executed; but in this proceeding, which had for its object only to compel the execution of a particular deed, you shall be directed to execute some other deed, though that is so foreign to the purpose, and much larger than the object of the suit instituted for the purpose of procuring his signature to a particular deed.

My Lords, this case, according to the usual practice, having been afterwards brought before the Court of

Session, the Lord Ordinary altered the interlocutor of the sheriff, but the Court recalled his Lordship's interlocutor; and in that shape it comes before your Lordships.

Now, this being a question of practice, however unwilling your Lordships may be to meddle with the decisions of the Court of Session in matters of that kind, and your Lordships are always very slow to interfere with the course of practice of courts of a peculiar jurisdiction having their own rules, the case being brought to your Lordships bar it is our duty to deal with it, and it so happens that not one case can be found that justifies or approaches this case in its principle; on the other hand, several cases are cited, which though they do not correspond exactly in their facts, go a great way to shew that the practice of the Court of Session is much more reasonable than it would be supposed to be according to this decision. I will only call your Lordships attention to three or four of the cases to which reference has been made by the counsel. They all go to the full extent for which they are cited.

The first is, Dickie v. Gutzmer, 6 Shaw and Dunlop, p. 637. The case was of this nature:—The libel stated the liability; the defender having raised a defence, the pursuer by his condescendence stated a new case, leading however to the same liabilities. The question was, whether he was justified in the mode by which he attempted to come to his conclusion; and the court said the pursuer was not at liberty to go out of his libel, and to state a totally different ground of action on his condescendence. The only competent remedy would be an amendment of the summons.

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The case of Williamson v. Jackson, on the 9th December 1825 [1], was an action on a bill alleged in the summons to have been drawn by A. B. The defender alleged that the signature of the drawer was not that of A. B.; but it purported in the title of the bill to be drawn by A. B. Upon this the pursuer offered to prove that the signature was by the son of A. B., by his desire, and in the presence of the acceptor. It was held that it was not competent, with a view to support the allegation of a liability by the personal signature of the party, to allege that which was the same thing in effect,—the signature by another person, with his concurrence.

The case of Still's trustees, on the 12th of November 1829 [2], was an action by an outgoing tenant against an incoming tenant, to compel him to take the crops, alleging a verbal agreement with him so to do. The defender denied that there had been any such agreement. In reply to which the pursuer alleged, that in the lease he had taken from the lessor he had bound himself so to do. It was held that the pursuer was not at liberty, having put his claim on the personal liability of the incoming tenant, to support his case by a covenant in a lease with the landlord in a totally different form from what he had stated in his pleadings.

In the case of Kerr, on the 10th of July 1827 [3], an action for the delivery up of a bill alleged in the summons to have been obtained from the pursuer by fraud, the case was attempted to be supported by the allegation that it had not been obtained by fraud, but was actually

[1] 4 S. & D. 292. (new ed. 296.)
[2] 8 S., D., & B., 9.
[3] 5 S. & D. 926. (new ed. 860.)

a forged bill. It was held that the party was not enabled to go into proof of that, because it was not consistent with the case he had himself stated.

There is another case referred to in the printed papers, which appears to me also to be of considerable importance on this question; the case of Forbes v. Livingstone, the judgment in which case was affirmed in this House, 8th July 1834. The summons in that action concluded to have it found that certain lands were comprehended within and were parts and pertinents of the pursuer's estate, and that the defender had no right to them. The defender also brought a counter-action of declarator, concluding to have it found that the disputed lands were his property, and that the pursuer had no right to them. There was an adverse claim therefore by the pursuer and by the defender, each claiming the lands. It turned out in the course of the action, that the pursuer in the first summons discovered that he had made an error, and that the lands were not exclusively his, nor exclusively the property of the parties with whom he was contending, but that they were what is called runrig lands, or mutual property. The objection there was the other way. He had made out a case; but as that case was not consistent with the claim in his summons, inasmuch as he had claimed the lands exclusively as his, it was held that he could not support his action. The Lord Ordinary having sustained his right to the extent to which he had proved it, the Court of Session, on the ground that the decree was not warranted by the conclusion, altered the interlocutor; and this is stated to be the reason of the judgment:—"In respect that

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"there appears not to be sufficient evidence to warrant "the finding of the interlocutor, and that the said find- "ings are not applicable to the conclusions of the sum- "mons in the conjoined actions;" and that judgment was affirmed on appeal. The Lord Chancellor[1] of that day observed, he had very little doubt whatever as to the judgment to be given.

All these cases, though none of them are cases exactly similar to the present in their circumstances, clearly apply to the present, and they establish that the courts of Scotland require that there should be consistency between that which is asked and that which the court shall ultimately decree. It is very proper it should be so, and I should very much regret to find the practice of the Courts of Scotland different from that which exists here. Here there is no question that the party would be immediately nonsuited if, proceeding upon one ground, it turned out that he could claim only on another. There is a mode of proceeding in courts of equity whereby, under what we call a prayer for general relief, the court is at liberty to give relief consistently with the case stated; but there the court never give relief inconsistent with the case stated, and if the case stated had been that of the delivery of a particular instrument, and the demand of the execution of that particular instrument, and it turned out that the defendant was not bound to execute that instrument, no court would think of directing the execution, not of the deed itself, but of some other deed which the court should take upon itself to frame and tender to the party.

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[1] Lord Brougham, C.

On the other hand, if the complaint had been that he refused to execute the deed tendered, and that he refused to execute any deed, that might have given the court jurisdiction; but if it had been confined in its terms to the complaint that he had not executed a particular deed, no court would take the course adopted in this proceeding, because he had refused to execute the deed itself, of proceeding to alter the instrument, and of decreeing that he should be ordered to execute the deed so altered.

Under these circumstances, my Lords, I cannot but think it would be very unsafe if your Lordships were to affirm the interlocutor appealed from; for that would be binding upon your Lordships and the court, and would necessarily lead to the greatest possible laxity in future proceedings, which could not but produce great injury to the public. I cannot but think that in coming to their conclusions the court were a little too much influenced by the litigious conduct of the defender. I have nothing to say in favour of his conduct; he appears to have given a great deal of unnecessary trouble, and occasioned a great deal of unnecessary expense, in refusing to do that which in some form or other he was bound to do. I very much regret that, according to the course your Lordships are bound to pursue, you are putting the company to additional expense; but they will have their remedy in a proceeding properly framed for that purpose, if the appellant should be advised, or without advice should think proper, to continue the conduct which he has hitherto pursued. The result will be to reverse the interlocutor appealed from, and to affirm the interlocutor of the Lord Ordinary, if your Lord-

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ships take the same view of the case which I have now submitted to your Lordships.

The House of Lords ordered and adjudged, That the several interlocutors, so far as complained of in the said appeal, be and the same are hereby reversed, and that the said interlocutor of the Lord Ordinary of the 8th of June 1837 be and the same is hereby affirmed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment.

DEANS and DUNLOP — G. and T. WEBSTER, Solicitors.