[13*th August*, 1846.]

ARTHUR J. ROBERTSON, ESQ., of Inches, *Appellant*.

RICHARD PATTINSON, ESQ., and Mandatory, *Respondents*.

Diligence—Evidence.—Where a purchaser of property under a deed of sale and conveyance, averred in general terms, that an understanding or agreement had existed, which created a variation in regard to the price of the purchase, from the terms contained in the deed, and asked a diligence for recovery of all possible documents, to prove this understanding or agreement, *held*, that the Court exercised a sound discretion, in requiring the party to describe, by date or otherwise, any document he averred to exist in support of his averment, and in refusing the diligence when he failed to do so.

Sale.—Where a purchase, generally without specification, of an heir's whole interest in the estate real and personal of a testator, was made and carried out by a deed reciting that the accounts and particulars of the estate had been examined by the purchaser, it was *held*, that no inquiry could be gone into, in regard to portions of the real estate having been previously sold by trustees in the management of the estate, for the general purposes of such management, whereby the land was reduced as alleged, below what the purchaser had expected, the purchase not having been of any ascertained quantity.

THE respondent was the son of Richard Pattinson, deceased, by a second marriage the only issue of which were the respondent and one sister. The appellant was the husband of the deceased's only child by his first marriage. The deceased was possessed of considerable personal property, and of real estate in the two provinces of Canada. At his death he left a will, giving the respondent the option of taking his whole estate under burden of a provision for his two daughters, or of dividing it equally with them. The respondent, who was a minor at the

time of his father's death, attained majority in the year 1830. Shortly afterwards he elected to take an equal share of his father's estate with his sisters, and agreed to sell to the appellant, his brother-in-law, his share for the sum of 5000*l.*, under a power for redemption at any time within two years.

In the course of the two years, after a little more was known by the parties of the value of the estate, instead of the respondent exercising the power of redemption, a new arrangement was entered into, by which the appellant agreed to pay him 8000*l.* as the price of his share: this was reduced to writing by a deed, dated 20th April, 1832, duly executed, which, after reciting the will of the deceased, and the devise thereby to trustees, continued thus:—"And whereas the said trustees "lately rendered to the parties interested in the said estate, full "accounts of their intromissions therewith, together with sche- "dules and estimates thereof: and whereas the said Richard "Pattinson having, after a full examination of the said accounts, "schedules, and estimates, come to the determination of declin- "ing to take under the said will, on the conditions therein "expressed, the testator's said estate falls to be equally divided "among his said children in terms of the said will: and whereas "it appears from the said estimates, that the value of the share "of the said estate falling to the said Richard Pattinson consi- "derably exceeds the said sum of 5000*l.*; and the said Arthur "John Robertson has therefore agreed to allow and pay unto "the said Richard Pattinson the further sum of 3000*l.* money "foresaid, as the balance of the value of his said share: and "whereas one-third part of the said estate falls and belongs to "the said Arthur John Robertson in right of the said Mary "Ann Pattinson, his wife: and whereas the said Arthur John "Robertson has settled with the said Ellen Phyllis Pattinson, "for her one-third share of the said estate. Now this indenture "witnesseth, that in consideration of the said additional sum of "3000*l.* of lawful money of Great Britain to the said Richard

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" Pattinson in hand, well and truly paid by the said Arthur " John Robertson, at or immediately before the sealing and " delivery of these presents,—the receipt whereof the said " Pattinson doth hereby acknowledge; he, the said Richard " Pattinson, hath granted, bargained, sold, assigned, transferred, " and set over, and by these presents doth, without hurt or pre- " judice to the foresaid indenture or deed of conveyance, assign- " ment, and transfer, but in corroboration and confirmation " thereof, of new grant, bargain, sell, assign, transfer, and set " over unto the said Arthur John Robertson, his heirs, executors, " administrators, and assigns, all and singular the estate, both " real and personal, wheresoever situated, goods, chattels, and " effects, which pertained to the said Richard Pattinson his " father, so far as he has right thereto by virtue of the said will " or otherwise, as the heir-at-law, and one of the nearest of kin " of his said father, and all interest, benefit, and advantage " which he has, or can claim, in and from the estate and succes- " sion of his said father in any manner of way howsoever, toge- " ther with the rents, income, and profits of the said estate, so " far as he has right thereto: to have and to hold the said real " estate, with its appurtenances, and the rents, profits, and pro- " duce thereof, unto the said Arthur John Robertson, and his " heirs and assigns for ever; and the said personal estate, with " the profits and produce thereof, unto him, his executors, " administrators, and assigns, for ever, to the only proper use " and behoof of him, the said Arthur John Robertson, and his " heirs, executors, and administrators and assigns for ever: and " the said Richard Pattinson, for himself, his heirs, executors, " and administrators, doth covenant, promise, grant, and agree, " to and with the said Arthur John Robertson, his heirs, execu- " tors, administrators and assigns, that he, the said Richard Pat- " tinson, hath not, at any time or times heretofore, done, com- " mitted, or suffered any act, deed, matter, or thing howsoever, " whereby, or by means whereof, the aforesaid estate, real or

" personal, is or shall be impeached, charged, or incumbered, in " any way howsoever."

After the execution of this deed, if not previously, the appellant corresponded with and visited the trustees in Canada, in regard to the management and winding up of the deceased's estate.

Neither the 5000*l.*, the price of the original sale, nor the 3000*l.*, the additional price of the second sale, were paid at the period of the respective sales; but on the occasion of the second sale, the appellant gave the respondent his promissory note for 7000*l.*, and afterwards he treated the debt thus constituted against him as a fund of credit for the respondent, by honouring the drafts of the respondent upon him, and paying monies on his account. In the month of June, 1832, the parties adjusted accounts, which were docqueted by the appellant in these terms:—" And I declare that all accounts betwixt " the said Richard Pattinson and me, at and preceding the said " 20th day of April, 1832, are finally settled, (with the excep- " tion of 127*l.* 8*s.* 9*d.*, due to Mr. Shepperd,) I having granted " him my note for 7000*l.*, of that date."

On the 15th May, 1833, the parties again adjusted an account which set out with the 7000*l.* contained in the promissory note, and was balanced by 5000*l.* in favour of the respondent, after deducting payments by the appellant on his account. For this sum of 5000*l.*, the appellant gave the respondent his promissory note. This second account was docqueted in these terms:—" The above account is this day settled, and Inches" (the appellant) " has granted his promissory note at twelve " months' date, for the balance of 5000*l.* arising thereon, the " said note being payable to Mr. Pattinson."

At this period the respondent quitted England for military service in India; and the estate, as thitherto, was thenceforth managed by the appellant.

In the month of October, 1842, the respondent brought an

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action against the appellant for payment of 3,925*l.* 11*s.* 4*d.*, as the balance owing upon the promissory note for 5000*l.*, after deducting a variety of payments made to the respondent, by the appellant, between the years 1833 and 1842, two of the payments, one of 500*l.* and the other of 300*l.* being marked on the note. The appellant, in his defence to this action, made the following statement in regard to the second sale:—"The pursuer "subsequently availed himself of that power, and a new transac- "tion was entered into between the parties, whereby the *nomi-* "*nal* price was fixed at 8000*l.*, being 3000*l.* in addition to what "had been previously agreed upon. But as it was known that "this would give the pursuer 1000*l.* more by his father's suc- "cession than either of his two sisters (whose shares, it was "ascertained, would not exceed 7000*l.*), it was expressly agreed "upon, and formed part of the contract, that though the price "was nominally fixed at 8000*l.*, yet as the defender had never "seen the property, and had no proper knowledge of its real "value, no more should be exacted from him than 7000*l.*, in "the event of his being dissatisfied with the property, or of his "being a loser by becoming the purchaser of the pursuer's "share. In that event, the whole members of the family were "to be placed upon a footing of equality. It was further agreed, "that, unless for the purpose of procuring a commission in the "army, and for defraying his outfit, the pursuer was not to "exact payment of the capital, but was to allow it to remain in "the defender's hands until he should sell, or otherwise dispose "of, the Canadian property to advantage. On the other hand, "the defender agreed to pay the interest to the pursuer for his "support." This statement he followed up by another, that he had not been enabled to dispose of the Canadian property to advantage, and had been a loser by the bargain with the appellant. Upon these grounds, he insisted that on a final adjustment of the account, he would be entitled to a deduction of 1000*l.* from the price of the respondent's share.

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The appellant's defence to the action was rested upon this statement; but in a statement of facts made by him in the course of preparing the record, he introduced this new statement:—

"On reaching Canada, the defender, (appellant,) discovered "that a large and valuable section of land contained in the "schedules and conveyance before mentioned, and amounting "to upwards of 1600 acres, had been sold in payment of taxes "due from the estate. Farther, the defender found that the "pursuer's father had laid himself under an obligation to grant "a title in favour of a person of the name of Connar to another "section of land situated in the United States, and which was "likewise represented to the defender as forming part of the "estate purchased by him; and the defender was himself under "the necessity of executing a conveyance of said section, in "implement of the late Mr. Pattinson's obligation. He farther "discovered that another section of land, consisting of about "100 acres, and situated in the London District, Township of "Blenheim, and contained in said schedules, and forming part "of his purchase, had likewise been sold in payment of taxes. "Moreover, in the Eastern District, another small portion of "land had been disposed of in payment of taxes, and which the "defender afterwards redeemed for 45*l.* sterling. The value of "the above deficiencies in the subjects sold amounts to upwards "of 3000*l.* sterling."

Upon this statement, the appellant founded a plea, that he was entitled to a deduction from the sum sued for, corresponding to the deficiency in the value of the property sold to him.

After the record had been closed, the appellant craved a fishing diligence for recovery of all writings, "tending to show "the value" of the property purchased, at the date of the conveyance in April, 1832, "to instruct what passed between the "pursuer and defender, or between the pursuer's agent and the

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" defender, at or about the period" of the first sale, the second sale, and the docqueting of the accounts, in June, 1832; " all " letters tending to instruct that the pursuer agreed to restrict " and limit the nominal price of his share of his father's suc- " cession to the sum of 7000*l.*," and " that the pursuer agreed " and undertook not to demand payment of the balance of his " share of the father's succession, until the defender should " sell, or otherwise dispose of the Canadian property; and that " the pursuer agreed to restrict his drafts upon the defender to " the annual interest of the sum left in his hands. And all " documents tending to instruct that certain parcels of the lands " contained in the deed of April, 1832, had been previously " sold in payment of taxes; and any conveyances or agreements " for conveyances of other parcels of the land in favour of " Connar."

The diligence asked by the appellant was refused by the Lord Ordinary, and afterwards by the Court. The cause then returned to the Lord Ordinary, who, on 23rd December, 1843, pronounced the following interlocutor, adding the subjoined note:—

" Finds it admitted by the defender, and proved other- " wise by writings produced, that he did, by indenture dated " 26th August, 1830, purchase and acquire right to the whole " succession, real and personal, which the pursuer, his near " relative, was entitled to claim, either by the will or otherwise, " as a legatee or heir of the deceased Richard Pattinson, of " Montreal, his father, subject to a power of redemption by the " pursuer at Whitsunday, 1832, if then disposed to exercise it: " Finds that the pursuer, in virtue of the said reservation, " insisted upon a farther consideration and sum being paid to " him as the value of his share of the said succession; and " accordingly, by indenture, dated 20th April, 1832, produced, " the defender agreed to pay 3000*l.* additional to the pursuer: " Finds that the said indenture contained a clause, 'whereby

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" ' the said Richard Pattinson, (pursuer,) for himself, his heirs,
" ' executors, and administrators, doth covenant, promise, grant,
" ' and agree to and with the said Arthur John Robertson, his
" ' heirs, executors, administrators, and assigns, that he, the
" ' said Richard Pattinson, hath not, at any time or times here-
" ' tofore, done, committed, or suffered any act, deed, matter,
" ' or thing howsoever, whereby, or by means whereof, the
" ' aforesaid estate, real or personal, is or shall be impeached,
" ' charged, or encumbered in any way howsoever:' Finds it
" not denied, that the defender acted upon and ratified the said
" agreements, by extensive intromissions with the estate of the
" defunct, and taking the whole management and administra-
" tion of the same, of which no account has been exhibited, or
" was exigible by the pursuer, subsequent to the said inden-
" tures: Finds that the said indentures were farther homolo-
" gated and ratified, by the defender making large payments to
" the pursuer to account of the said stipulated price: Finds
" that the defender has not offered to prove, in any competent
" manner, any relevant allegation or plea to entitle him now to
" be relieved from implement of the said covenants, either in
" whole or in part: And in respect that no specific objection is
" stated to the account, No. 9 of process, libelled on, assuming
" effect to be due to the indentures libelled on, repels the
" defences, decerns against the defender for payment to the
" pursuer of the balance of 3,925*l.* 11*s.* 4*d.*, with interest there-
" of, from and since the 31st day of May, 1842, till payment,
" as libelled: Finds the pursuer entitled to expenses, as the
" same may be taxed by the auditor, and decerns.

" *Note*:—The pleas or claims of abatement urged by the
" defender seem to be twofold:—

" 1*st*. Upon the averments in statement 3rd of his revised
" answers to condescendence, a deduction of 1000*l.* is claimed
" by the defender, as it is said to have been agreed to by the
" pursuer *at or prior* to the execution of the indenture of 28th

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" April, 1832, libelled on. That claim being inconsistent with " the formal written contract executed by the parties at that " time, is only provable by the *oath* of the defender; and as " no reference to that oath is made, it has been disregarded.

" *2nd.* The defender, upon his allegations in statement 7th " of condescendence, sets forth that sundry large properties, " said to have been specified in the schedules referred to in the " indenture, turned out to have been *sold* for payment of taxes, " or otherwise alienated, for which he is entitled to a large " *deduction* from the covenanted price. But it is thought that " such a claim is clearly irrelevant and untenable, on the fol- " lowing grounds:—

" (1.) The demand of the defender is of the nature of a " claim *quanti minoris*. He has never offered to give up the " whole succession and account for all his intromissions, but " seeks abatement from the price. On obvious grounds of law " such a claim is not maintainable.

" (2.) The claim of deduction urged by the defender is " inconsistent with the terms and meaning of the contract. " The pursuer was not asked to *guarantee* the schedules; all " that he became bound for was, ' that he hath not done any- " ' thing, &c., whereby the said estate may be impeached or " ' encumbered.' It is not alleged that the pursuer has violated " that obligation.

" (3.) The allegations of the defender, of errors and defal- " cations in the schedules, come *too late*. The defender says he " discovered them in 1833. But he did not propose then to " abandon his bargain, and *give back* the estate to the pursuer. " He seems not to have given any intimation of this claim to " the pursuer, till he lodged *Revised Answers* in this cause in " 1843. Even in his *Defences*, lodged 7th December, 1842, he " does not distinctly set forth the claim now chiefly insisted " upon.

" (4.) As Pattinson, senior, died many years prior to 1832,—

" and as the defender was himself a legatee of old Pattinson, " and had been in the possession and management of the pur- " suer's share of the succession as purchaser between August, " 1830, the date of the first indenture, and April, 1832, the date " of the second indenture, it is not credible, and cannot be " taken at his hand, that he did not then know how far the " schedules referred to in the indenture could be relied on or " not.

" There is one schedule produced, (No. 28 of process,) " marked 1832, to which no specific objection is made; and " unless there be some great error in that state, it would appear " that there was then above 24,000*l.* of assets, which was more " than sufficient to pay the price of the pursuer's share. But " the defender took his chance of this, and knew, at least as " well as a youth who had arrived at the years of majority only " two years before that agreement, what the estate was likely " to yield.

" The Lord Ordinary conceives that the granting such a " diligence as the defender asked, would lead to long and vex- " atious delay in the constitution of a liquid claim. If such " a diligence was necessary, it should have been asked for " long ago."

The appellant reclaimed, and on the 16th February, 1844, the Court before answer, allowed him to put in a minute " des- " criptive by date or otherwise, of any document or writing " which he can aver to exist in support of the averment" that the respondent had agreed to restrict the purchase-money to 7000*l.*

The appellant applied to a solicitor, who had been the common agent of himself and the respondent, for inspection of all letters which had passed from either of them to the other, but was refused inspection of any but his own letters. He then complied with the order of the Court by putting in a minute, which did not describe either by date or otherwise any document

whatever, but simply stated the nature of his application to this solicitor, and its result.

The Court, on the 6th of March, 1844, pronounced this interlocutor:—"In respect that the demand for payment in the "summons, is founded on an express obligation contained in "the contract libelled on, find that the defender has failed to "prove, by any writings under the hand of the pursuer, or to "aver the existence of any writings sufficient to prove the con-"ditions which he alleges formed part of the agreement of "parties at the time when the said contract was entered into: "And further, find that the claim of deduction stated in respect "of the alleged deficiency in the extent of the Canadian pro-"perty, has not been competently introduced into this record, "and, as stated, is now wholly barred by the facts of the case: "Therefore refuse the said reclaiming note, and adhere to the "interlocutor reclaimed against, so far as it repels the defences "and decerns."

The appeal was against these different interlocutors.

The Attorney-General and *Mr. Anderson* for the Appellant.—I. The averment of the record, in regard to the sale of parts of the land previous to the sale to the appellant, was timeously stated, so long as it was done before the record was closed. At the time the defences were prepared, the appellant was not possessed of the information which enabled him afterwards to make that statement; and the very object of papers additional to the summons and defence being allowed, was to give the parties the benefit of laying before the Court any new statement or information. Even were this otherwise, the statement would have been admissible upon payment of costs, Donaldson *v.* Bannatyne, 9 *S.* & *D.* 333; but the respondent, by pleading over waived all right to ask for costs. Indeed, in Watson *v.* Edwards, 13 *S.* & *D.* 196, the Court allowed a new plea to be stated after the record had been closed, and refused to order payment of costs.

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II. Admitting this matter to be well pleaded in form, it is good in substance, for although the Courts in Scotland do not allow a rebate where the party claiming it is the actor, they do allow it where he is the defender, upon the same principle that in this country, the Courts require a party seeking to enforce a foreign decree, to establish that the decree is good and regular; whereas, if the party be defending himself upon a foreign judgment, the Courts assume the decree to be good and regular until the contrary is shown. Although the *actio quanti minoris* is not a favourite of the law, it is nevertheless admissible in some cases. Moreover, as the contract relates to land in Canada, the question must be regulated by the law of Canada, *lex rei sitae*, according to which a rebate is claimable. This in truth, however, is not a question upon the *actio quanti minoris*, in which the contract is affirmed but some abatement of the price or damage is demanded; here the action is for specific performance, and the abatement is only set up in defence, which is perfectly competent.

III. With regard to the diligence it was not possible for a party to remember the dates and particulars of a variety of letters and documents so as to be able to describe them, and it was not necessary that he should describe them. He was bound to prove any variation from the deed of 1832 *scripto*; this he undertook to do, and he was entitled to the diligence he asked, in order to enable him to do so without any such clog being put upon his demand as had been imposed by the Court below.

[*Lord Chancellor.*—Is not that matter of discretion for the Court?]

I admit it is.

[*Lord Chancellor.*—Then it has been exercised here.]

Mr. Bethel and the Honourable *Mr. Wortley* were heard for the Respondents.

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LORD CHANCELLOR.—My Lords, this case arises between parties who claimed under the will of the testator giving an estate in Canada to his son, subject to certain charges for the benefit of his younger children. The appellant having married one of the daughters, the son it appears gave up his interest in the estate, and the appellant agreed to purchase whatever interest the son might have in it. All this is contained in the deed to which I shall have occasion to advert for another purpose. Upon that purchase, the brother-in-law, the appellant, who married the sister, agreed to pay to the son of the testator, the brother of his wife, a certain sum of money for his interest in this property. But not being prepared to pay, or it being more convenient to him to postpone the payment, he gave him a promissory note for a sum, the balance of the purchase-money which remained unpaid; and upon application by the brother for the payment of this sum of money, he failed to obtain payment.

Upon this, a proceeding was instituted in the Court of Session, for the purpose of compelling the payment of that balance of the purchase-money. The case was met by two grounds of defence. The first is to be found in the 8th page of the appellant's case, in which he says: "By that transaction "the nominal price of the pursuer's interest, in his father's suc- "cession, was fixed at 8000*l.*, being 3000*l.* in addition to what "had been previously agreed upon. At this period it was "ascertained that the shares of the pursuer's two sisters, would "not amount to more than 7000*l.* each, and the defender accord- "ingly purchased Mrs. Rose's share for that sum. Since the "pursuer was in this way to get 1000*l.* more by his father's "succession, than either of his sisters, it was expressly agreed "upon and formed part of the contract, that though the price "was nominally fixed at 8000*l.*, yet as the defender had never "seen the property, and had no proper knowledge of its real "value, and would be put to very heavy expenses in journeys

"to London and to Canada, and otherwise, in the settle-
"ment and adjustment of accounts with the trustees and
"others in the management of the estates; no more should
"be exacted from him, than 7000*l.*, in the event of his being
"dissatisfied with the property, or of his being a loser by becom-
"ing the purchaser of the pursuer's share. In that event, the
"whole members of the family were to be placed upon a foot-
"ing of equality. It was further agreed, that unless for the
"purpose of procuring a commission in the army, and for
"defraying his outfit, the pursuer was not to exact payment of
"the capital, but was to allow it to remain in the defender's
"hands, until he should sell or otherwise dispose of the Cana-
"dian property to advantage." That is one of the allegations. And to test, therefore, the probable truth of that statement, I will now refer your lordships to what is stated in the deed itself, by which Richard Pattinson, the respondent, transferred to Robertson, the appellant, his interest in the father's property. It states, that by a certain indenture, of the 26th of August, 1830, Richard Pattinson, the son of the testator, in consideration of the sum of 5000*l.* to him paid, by Arthur John Robertson, did bargain, sell, assign, and so on, "to Robertson, all and
"singular, the estate, both real and personal, chattels and effects
"which pertained to Richard Pattinson, his father, at the time
"of his death, so far as he, Richard Pattinson, had any right
"thereto, in virtue of the last will and testament therein before
"recited, or otherwise, as heir-at-law of his father, to have and
"to hold the real estate to Robertson, and his heirs for ever, and
"the personal estate, with the profits and produce thereof, unto
"him and his heirs for ever, subject nevertheless to the condi-
"tions and provisions specified and contained in the will of the
"father."

Then comes this recital, "And whereas, the said trustees
"lately rendered to the parties interested in the said estate, full
"accounts of their intromissions therewith, together with

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" schedules and estimates thereof; and whereas the said " Richard Pattinson, having after full examination of the said " accounts, schedules, and estimates, come to the determination " of declining to take under the said will, on the conditions " therein expressed, the testator's said estate falls to be equally " divided between his children in terms of the will; and whereas " it appears from the estimates, that the value of the share of " the said estate, falling to the said Richard Pattinson, con- " siderably exceeds the sum of 5000*l.*, and the said Arthur John " Robertson has therefore agreed to allow and pay unto the " said Richard Pattinson, the further sum of 3000*l.* money " foresaid, as the balance of the value of his said share."

We have this deed, therefore, reciting that to be the offer of the appellant. He is satisfied from the state of the accounts, that his brother-in-law's share exceeds 5000*l.*, and he therefore offers and agrees to give him 3000*l.* more, in consideration of which Richard Pattinson transfers and hands over, (the usual words,) in behalf of John Robertson, " all and singular the estate, " both real and personal, wheresoever situate, goods, chattels, " and effects, which pertained to the said Richard Pattinson, " so far as he has right thereto, by virtue of the said will or " otherwise."

Is it possible, therefore, for words to express more distinctly the absolute purchase out and out of whatever right and interest the son might have in his father's property? And yet that being expressed on the face of the deed, the brother-in-law taking the property from the son, by an assignment of all his estate and interest therein, he says it was part of that contract and agreement, that all that was so recited in the instrument, should go for nothing; that that 8000*l.* was merely a nominal sum, not being the sum contracted for between the parties; and that the sum actually agreed to be paid, was to be the result of future inquiries aud future contingencies, as to whether it might

or might not turn out a profitable speculation for the appellant to purchase the respondent's interest.

That, however, my Lords, he puts forward as his defence.—I am now addressing myself to the occasion of the production of the instrument; and he then applies to the Lord Ordinary for a diligence against havers, upon which the Lord Ordinary states this:—"The Lord Ordinary having heard counsel on the "closed record, and more especially on the motion of the "defender for a diligence against havers, to recover the writs "set forth in the specification No. 50 of process, which he "insisted on his right to obtain *in modum probationis*, and before "debating the case on the merits, refuses the diligence craved "*in hoc statu*, and appoints the debate on the merits to proceed "at the Lord Ordinary's first hour in November."

And so the case went on upon the merits; the record was closed, and the Lord Ordinary made his interlocutor, which I shall presently refer to; and then, when it came before the Inner House, the appellant again applied for this diligence against havers, for the purpose, as he said, of proving his case.

The application which the Lord Ordinary had refused in the first instance, was the subject of an application to the Inner House, and it was again refused. But when the case came to be heard upon the merits, the second division of the Court pronounced the following interlocutor:—"The Lords having "advised the reclaiming note of Arthur John Robertson, against "Lord Cuninghame's interlocutor, dated the 23rd day of De-"cember last, and heard counsel for the parties thereon before "answer, allow the defender to put in a minute, descriptive by "date and otherwise, of any document or writing which he can "aver to exist in support of the averments contained in the "third statement of the record."

Now nothing can be more indulgent than this mode of proceeding. He makes his statement in very general terms. Still if there were any truth in the allegation, he states a

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transaction to which he was himself a party. All parties agree that what is said to have been done could only be effectually shown by evidence in writing. It was something, therefore, which had passed either between himself and those with whom he was dealing, or between his agent and the agent of the other parties;—something to which he was either a party himself, or, at all events, a party through the means of his agent. And he is called upon to specify what this is upon which he relies—by which as he has stated upon the record, this contract so evidenced upon the face of the deed itself, has been varied—some other arrangement, the terms of which he is called upon to specify in the proceedings.

Now, my Lords, nothing can be much more general than the terms in which he describes, in the first instance, what it is that he requires. It is not necessary to refer to it, because the reading it through would be merely reading through a description of every possible document that could have existed at any time. But a letter is produced in the correspondence between the solicitors, in which we see a little what it is that he was relying upon, or rather, we see that there was nothing upon which he had to rely when he put in his defence. He says, "with "reference to the conversation which Mr. Belford and I had "with you to-day, I have to request that you will, at your very "earliest convenience, examine the correspondence in your "possession, between the late Mr. Alexander Shepperd, solici-"tor, here, Mr. Pattinson, and Mr. Robertson, during the "years 1833, 1834, 1835, and 1836, with the view of ascer-"taining the exact understanding entered into between Mr. "Pattinson and Mr. Robertson, as to the disposal of Mr. Pat-"tinson's interest in the property in Canada, which belonged "to his father."

Now these parties had come to a final conclusion—they had executed a deed in which the contract between them was distinctly specified. It is perfectly immaterial, therefore, what

the understanding might have been at any time, anterior to that deed; and here, when he is making inquiry, what documents may be capable of being produced for the purpose of establishing his case, he does not speak of any contract varying the terms of that deed; but all he wants is to find out what was the understanding between the parties. My Lords, there can be no understanding between the parties capable of affecting the provisions of that deed, unless there be some contract or some evidence in writing by which the terms of that deed are varied or departed from. He cannot tell what that is. He declines to comply with the requisition of the Court of Session, by which he is only asked to specify and describe what this is upon which he relies. He does not do it because he cannot do it, because in the nature of the case it is obvious that it did not exist. It appears to be, as the Lord Ordinary has said, a pretence for delaying the period within which he should be called upon to pay the money.

Now, my Lords, the powers of the Court in making these orders are discretionary. By "discretionary," I mean, of course, that they are to be regulated by the rules which regulate the administration of justice; but it is not a matter of right to which the party is entitled as a matter of course, but it is in the discretion of the Court to be regulated according to the circumstances of the case. In this case, I think the Court have exercised a most wise and salutary discretion, having put the party to specify what it is that he wants, and when he cannot tell them, not to delay the administration of justice on this ground. So much, my Lords, for the first point in this case, as to refusing the diligence against havers.

Now, my Lords, the second ground of defence which the appellant rests upon is to be found, not in the original defence, but is to be found in the statement of facts by the defender, which he put in after having put in his regular defences; the answer to the summons being totally silent in this respect,

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taking no notice of it at all. In his second statement, the statement of facts, he states this:—"On reaching Canada, the "defender discovered that a large and valuable section of "land, contained in the schedules and conveyance before men- "tioned, and amounting to upwards of 1600 acres had been "sold in payment of taxes due from the estate. Further, "the defender found that the pursuer's father had laid himself "under an obligation to grant a title in favour of a person of "the name of Connar, to another section of land, situated in "the United States, and which was likewise represented to the "defender as forming part of the estate purchased by him; and "the defender was himself under the necessity of executing a "conveyance of said section, in implement of the late Mr. "Pattinson's obligation. He further discovered that another "section of land, consisting of about 100 acres, and situated in "the London district, township of Blenheim, and contained in "said schedules, and forming part of his purchase, had likewise "been sold in payment of taxes. Moreover, in the eastern "district, another small portion of land had been disposed of in "payment of taxes, and which the defender afterwards redeemed "for 45*l.* sterling. The value of the above deficiencies in the "subjects sold amounts to upwards 3000*l.* sterling."

That is his statement, therefore, that he found the landed property was not such as he had expected; that he found that certain portions had been sold for the payment of taxes, and other circumstances connected with the property, which diminished the value. This he does not state, as I before observed, in the defence to the summons, but in his statement of facts.

Now all this is perfectly immaterial, for what he has purchased is not an ascertained quantity of land to be paid for so much by the acre, giving the means by which the Court can ascertain to what extent he ought to be relieved from the purchase-money. It is perfectly immaterial, if what he has purchased was all the interest of the party from whom he

purchased, what the extent of it might be. Having married one of the sisters, he probably knew a good deal more of the estate than the person from whom he was purchasing. He states that the accounts had been transmitted by the trustees in Canada; there is no fraud or misrepresentation alleged in the statement remitted by the trustees; and then he states that he, Arthur John Robertson, had agreed to allow and pay to Richard Pattinson, the further sum of 3000*l.* more than the sum which he before had agreed to pay, in consideration of which Mr. Pattinson assigned to him "all and singular the estate, both real and personal, "wheresoever situated, goods, chattels, and effects, which per- "tained to the said Richard Pattinson, his father, so far as he "has right thereto by virtue of the said will or otherwise."

Now it is impossible to find terms which can more distinctly express the purchase of all such interest as the son had. There is no reference to quantity; nothing by which it was to be ascertained whether the sum was too much or too little; but, whatever it might be, it was purchased by the brother-in-law at the sum fixed.

Under these circumstances it is quite immaterial to consider whether the statement I have alluded to was properly introduced, or not properly introduced into the record. It has no reference to the subject matter of the transaction between the parties; and, therefore, in my opinion, this defence on this ground totally fails; and I should, therefore, advise your lordships to affirm, with costs, the interlocutor appealed from; and I must say, that this is one of the most ungracious defences against a legitimate demand which has come under my consideration.

It is ordered and adjudged, That the said petition and appeal be, and is hereby, dismissed this House; and that the said interlocutors, therein complained of, be, and the same are hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be

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paid, to the said respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

GEORGE PARSONS—RICHARDSON and CONNELL, Agents.