the subjects that he lets, and shall be completed within ten years, otherwise the lease shall be null and void; and if at the end of ten years the party has not even commenced the operations which he had undertaken to complete, it seems to me, that it would be contrary to all equity as well as law to hold, that he is now at liberty to begin to perform these things which he ought to have completed. It would be making a different contract between the parties.

Then as to the lease continuing for 25 years, I think it is clear, on the face of this lease, that it is not a lease granted in reference to the powers of the proprietor under the conditions of the entail, but that it is granted plainly and purposely as a lease authorized by the Statute of 10 Geo. III., and of no other character; and that, having come into the predicament in which that Statute declares and the lease itself declares it shall be void, we have no alternative but to declare that it is so. I therefore entirely concur in the judgment proposed by my noble and learned friend.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Solicitors, Campbell and Smith; Grahames and Wardlaw, Westminster.—*Respondent's Solicitors*, Robert Pringle, W.S.; Connell and Hope, Westminster.

JUNE 25, 1868.

CARRON COMPANY, *Appellants*, *v.* WILLIAM HUNTER, Esq., and Others, *Respondents*.

Company—Sale of Shares—Right to Concealed Profits—Title to Sue—*C. being holder of ten shares in a company from* 1824 *to* 1847, *received the usual dividends, but owing to the fraud of the manager, large profits all that time were concealed, and not paid over to the shareholders. C. by will, gave the shares to L., and died in* 1847, *and L. then, being ignorant of the concealed profits, sold the shares to the company for what the company offered him. Afterwards L., discovering the fraud, raised an action to reduce the sale for fraud, and the company compromised his action by paying a large sum. Then C.'s representative also raised an action to recover concealed profits, in respect of ownership of the shares between* 1824 *and* 1847.

HELD (reversing judgment), *That there was no right of action in C.'s representative, for whatever right to concealed profits existed up to* 1847 *passed as an accessory with the transfer of the shares to L. in* 1847, *and L. alone could recover from the company on this ground.*[1]

This was an action at the instance of the representatives of the late Mrs. Hunter, or Caldwell, or Lothian, against the Carron Company, its manager, and certain partners, and also against Mrs. Macfie or Lothian, widow of John Lothian, S.S.C. In 1824, Mrs. Hunter or Caldwell, widow of Mr. Caldwell, acquired ten shares in the Carron Company on the death of her husband, and held them till her own death in 1847, being all that time registered as proprietrix in the company's books. She had married Mr. Lothian in 1828, and the shares were included in a marriage settlement then executed, which also reserved to her a power of disposing of the same in the event of her death. In 1837 she executed a deed of settlement by which she directed her trustees after her death to pay half of her trust estate to Mr. Lothian. Afterwards, in 1843, she made the following codicil:—"In the third place, as my said husband thinks highly of the stock of the Carron Company, whereof I hold ten shares, my title to which was completed by confirmation expede by me before the commissaries of Edinburgh, of date the 29th day of November 1824, I do hereby direct and appoint my said trustees, or survivor, to allow my husband the option of taking, if he pleases, said ten shares as part of his provisions under said marriage contract, such ten shares to be estimated to him as not exceeding in value the sum of £6000 sterling, and my said trustees being at the whole expense of completing his title to the same. And in order that the title of the said trustees, nominated in said marriage contract, survivors or survivor, may be complete, I do hereby assign and convey said ten shares over to them, in trust, for the ends, uses, and purposes specified in said marriage contract and in these presents, declaring that in the event of the said Carron Company insisting on their right to have the first offer of these shares, any increased price which may be got by said trustees therefor beyond said sum of £6000, shall belong as a gift to my said husband, and that whether he takes said shares or not,

[1] See previous reports 4 Macph. 216: 38 Sc. Jur. 118. S. C. L. R. 1 Sc. Ap. 362: 6 Macph. H. L. 106: 40 Sc. Jur. 546.

and to carry out my intention, said shares shall, if necessary, be offered to said company at the market price of the day, or at such price as my said husband shall consider them to be worth."

Mr. Lothian, after the death of his wife in 1847, according to the terms of the company's deed of copartnery, offered the shares to the Carron Company, and accepted for them a sum of £680 per share, and executed a deed of transfer in 1847, to which Mrs. Caldwell's trustees were parties. Afterwards Mr. Lothian married Mrs. Macfie or Lothian, and died in 1851, leaving her his sole executrix. In 1860, Mrs. Lothian brought an action against the Carron Company, (36 Sc. Jur. 270,) to reduce the sale by Mr. Lothian in 1847, on the ground that, owing to fraudulent concealment of profits, the shares were much more valuable than they made her husband believe, and so defrauded him. The company compromised that action by paying Mrs. Macfie £11,000 in discharge of all her claims.

Mrs. Caldwell's representatives now raised an action also to obtain from the company a proportion of the concealed profits during the time between 1824 and 1847, on the ground, that Mrs. Caldwell had a right to the dividends effeiring to her shares and not accounted for, and not paid to her during her life, and Mr. Hunter, the respondent, being the representative of her marriage trustees, was as such entitled now to demand and receive a sum of £30,000, or some other adequate sum.

The Lord Ordinary (Mure), and the First Division (Lord Curriehill dissenting), held, that the pursuer had set forth a sufficient right and title to insist in the present action. The Carron Company appealed.

Dean of Faculty (Moncreiff), and *Cotton* Q.C., for the appellants.—The whole question between the parties turns on the codicil of 1843, by which Mrs. Caldwell or Lothian gave all her interest in the shares to her husband. The right to the undisclosed dividends was an accessory of those shares, and passed with the shares to Mr. Lothian. It may be conceded, that the company was bound to account to Mrs. Caldwell for her unknown interest in the balance of funds during her lifetime, but whatever interest she had passed with the shares, for the accessory passes with the principal. Therefore, all the interest being vested in Mr. Lothian, if his claim has been satisfied, there can be now no other outstanding claim in anybody, in respect of these shares. Even if Mrs. Lothian had been only a liferentrix of the shares, the result would have been the same, for her right would have been only to the ordinary dividends and not to any extraordinary dividend such as this, which would have belonged to those entitled to the capital—*Irving* v. *Houston*, 4 Paton, 521; *Thomson* v. *Lyall*, 15 S. 32. The condescendence does not allege any fraud in the company; on the contrary, it was the company that was defrauded, and the fraud was not the inducing cause of any contract between the company and Mrs. Lothian. The fraud, if any, was shared in by Mrs. Lothian herself, who was a partner. The respondents are not partners, and so not entitled to any division of profits. Therefore there was no right of action in this case, and the interlocutors of the Court below are wrong.

Sir R. Palmer Q.C., and *D. Horne*, for the respondents.—The judgment of the Court below was right. The respondents were entitled to the income arising from the concealed capital between 1824 and 1846, and that right was not attached to the shares as an accessory.

[LORD CHANCELLOR.—There was fruit on the tree ready to be gathered, but it was not gathered, and the parties did not know it was there. Still the fruit would pass with the tree?]

The true result of all that happened was, that the respondent was a creditor for the surplus. The relation of debtor and creditor subsisted between the parties. If then that debt, unascertained though it was, has never been paid, it was still demandable. The additional profits were fraudulently concealed by those for whom the company was responsible. Her right to the unascertained profits formed part of her general estate, and is now vested in the surviving trustee. Therefore there was a right of action in the representative of Mrs. Caldwell or Lothian.

Cur. adv. vult.

LORD CHANCELLOR CAIRNS.—My Lords, in this appeal the question which lies at the threshold of the case is as to the right and title of the pursuers to maintain the action which was instituted in the Court of Session. Upon this point the Court of Session were of opinion, (Lord Curriehill differing from the majority of the Court, and I think my noble and learned friend, who was then the Lord President, expressing some doubt as to the title of the pursuer,) the majority of the Court were of opinion, that at all events, in that stage, the title of the pursuers to insist in the action should be maintained, and that the action should proceed to trial upon certain issues which were settled by the Court.

For the purpose of dealing with this question upon which the appellants have appealed from the judgment of the Court of Session to your Lordships, the facts which require to be stated are very few in number. The Carron Company was established in the year 1760, and it received a grant of a royal charter in 1773. At that time, and from that time onward, it was regulated by a contract of copartnery which was dated in the year 1771. As to the constitution of the company, it is sufficient for the present purpose to say, that it was a company of the nature of an incorporated joint stock company. The shares were transferable; but before any transfer or sale they

had to be offered to the company, which might on certain terms as to price become the purchasers of the shares. Provisions were made as to the capital and stock of the company, and as to the mode of ascertaining and declaring the dividend, and other provisions such as are usual in similar cases.

In the year 1828 there was a Mrs. Caldwell, a widow, who held ten shares in this company. She was about to be married to Mr. Lothian, and by her marriage contract those ten shares were settled in substance upon her for liferent, and then upon her husband for liferent, then upon the children of the marriage, if there should be any, and failing children, one half of the corpus or fee in the shares was to belong to the husband, and the other half was to go as the widow, Mrs. Lothian, should dispose of by instruments of the kind described in the contract. In pursuance of this marriage contract, and of the power contained in it for Mrs. Lothian, she made a settlement in the year 1837, and by that settlement, after giving various specific benefits to different persons named in it, which were to be satisfied out of her property, as to the residue of her property, she expressed herself thus:—"I direct and appoint my trustees to invest the whole residue of my means and estate remaining after satisfying each and all of the foregoing provisions and appointments in heritable bonds, or such other securities as they may approve of, and that for behoof of my sister Mrs. Mary Hunter or Philp, spouse of Charles Philp, merchant, Bonnington, in liferent for her liferent use allenarly, exclusive of the *jus mariti* of her present or any future husband, and to Charles, Mary, and Jane, the children procreated of my said sister equally amongst them, in fee." Under this residuary gift the respondents in this appeal claim.

To this settlement by Mrs. Lothian she added a codicil in the year 1843, upon the construction of which I think your Lordships will find the question in the present case in a great measure turns. In that codicil she made this provision for the benefit of her husband Mr. Lothian:—"In the third place, as my said husband thinks highly of the stock of the Carron Company, whereof I hold ten shares, my title to which was completed by confirmation expede by me before the commissaries of Edinburgh, of date the 29th day of November 1824, I do hereby direct and appoint my said trustees or survivor to allow my husband the option of taking, if he pleases, said ten shares as part of his provisions under said marriage contract, such ten shares to be estimated to him as not exceeding in value the sum of £6000 sterling, and my said trustees being at the whole expense of completing his title to the same, and in order that the title of the said trustees nominated in said marriage contract, survivors or survivor, may be complete, I do hereby assign and convey said ten shares over to them in trust for the ends, uses, and purposes specified in said marriage contract and in these presents, declaring, that in the event of the said Carron Company insisting on their right to have the first offer of these shares, any increased price which may be got by said trustees therefor beyond said sum of £6000, shall belong as a gift to my said husband, and that whether he takes said shares or not, and to carry out my intention, said shares shall, if necessary, be offered to said company at the market price of the day, or at such price as my said husband shall consider them to be worth. And I do hereby declare, that the provisions herein contained in favour of my said husband are in addition to and over and above those previously conceived by me in his favour, and that the same shall be considered preferable to all other provisions made or to be made by me in favour of other parties."

Mrs. Lothian, who made this codicil, died in the year 1847. The shares were proposed to be taken by her husband, under the codicil, but the company electing to become the purchasers, they were sold to the company for the sum of £6,800, and a tripartite contract was executed between Mr. Lothian in his own right, the trustees of his wife, and the company, dated in the year 1847, by which the shares and all interest in them were conveyed, so far as the parties to the contract could convey them, to the company. The wording of this tripartite contract may, I think, be put aside. If it goes beyond the expression of the will, there is a conclusion in the action for reduction, and therefore it may be assumed, for the purpose of what I have to say, that that tripartite contract does not advance the case in any respect beyond the position in which it would stand if the case rested on the codicil alone.

The question now arises under these circumstances between the residuary legatees of Mrs. Lothian taking under her settlement to which I first referred, who are the respondents in the appeal and the representative of Mr. Lothian, (who is dead,) whose representative is the appellant in the appeal. The way in which the question arises between these parties is this: It appears, that in the progress of this company very large profits were made from time to time beyond those which were acknowledged and brought into the balance sheet and divided among the shareholders. These profits are alleged, as to part, to have been concealed among the assets of the company, and not brought to light or laid before the shareholders, and, as to the other part, to have been misappropriated and fraudulently abstracted from the funds of the company. This is alleged to have been done by persons who were agents of the company, and done by them for their own objects. Beyond all doubt, a fraud, and a very gross fraud, was committed—a fraud, however, which was clearly a fraud of the agent upon the company, and not in any sense a fraud of the company as such. The funds to which I have referred have since been brought

back, and may now be taken to be in the possession and control of the company. For the purpose of what I have to submit to your Lordship, I think it better to assume, as indeed was contended on behalf of the respondents at your Lordships' bar, that these funds, either in whole or in part, if they had been known at the time at which they came into existence, ought to have been brought into the balance sheets of the company, and ought to have been, and beyond all doubt would have been, divided in the shape of dividends among the shareholders. In point of fact, whatever was the position formerly taken up by the company in this respect, the company itself now agrees to this view of the case. They agree further, that in consequence of these funds having been concealed, they became the purchasers from Mr. Lothian of the ten shares in question at what was an under value. They agree further, that they must make good the difference in value between what was paid for the shares and what ought to have been paid for them. And they allege, (and this indeed is not disputed,) that this they have already done, that they have paid by way of compromise to the representatives of Mrs. Lothian the additional value which ought to have been placed on the shares. On the other hand, the respondents, the residuary legatees of Mrs. Lothian, allege, that they are the persons to whom the payment and satisfaction ought to have been made. They allege, that these profits were obtained during the lifetime of Mrs. Lothian, while she was liferentrix of the shares, and that her representatives and residuary legatees, and not those who represent her husband, are now entitled to the dividends that would represent her share in those profits. I repeat, that I assume in favour of the respondents, that if these funds had been known as belonging to the company, they would have been paid, as the respondents insist they ought to have been paid. I assume, that the declaration of the dividend and its payment was prevented by the fraud of the agents of the company. I assume further, that in consequence of the dividend not having been declared, the company remained the possessor of those funds, or of a great portion of them. I assume further, that the company must make good those funds to the persons who are entitled to them; but the question remains, To whom are they to be made good?

The answer to that question appears to me to depend upon another extremely simple and short question. The question I would put to your Lordships is this: Did the right to compel a division of those newly discovered funds pass as an incident to the shares, or did it remain with the previous owner of the shares? I think, beyond all doubt, those funds which I have described as the newly discovered funds, remained part of the estate or credit of the company *de facto* at the time of the execution of the codicil by Mrs. Lothian. If there were debts due from the company, these funds must have gone and been applied to the payment of those debts, and the shareholders for the time being could in my opinion have taken nothing but the surplus assets of the company after paying all debts. Any right, therefore, of Mrs. Lothian was a right by virtue of and attached to the ten shares of which she was the owner, and if her codicil passed those ten shares, it appears to me beyond all doubt, that it passed, along with the shares, every incident that properly attached to the shares. Now, that the codicil passed the shares appears to me to be beyond all possibility of argument; it passed them in terms the most general that could be used, and it passed in my opinion, along with them, every right that was incident to the shares. In order to make the disposition more emphatic, this declaration was added, that the provisions contained in the codicil in favour of the husband should be taken to be in addition to, and over and above, those previously conceived by her in his favour, and that they shall be considered preferable to all other provisions, made or to be made by her in favour of other parties, preferable, therefore, (if it were necessary to resort to this clause,) to the disposition made in the will in favour of the residuary legatees.

Upon these short and simple grounds, if they meet with your Lordships' approval, I think, that the course which your Lordships should adopt, (speaking with great respect for the majority of the Court of Session,) is to hold, that the pursuers have not made out any title to insist on their claim in this action, and that from the time that the record was closed, the interlocutors pronounced by the Lord Ordinary and by the Court of Session cannot be sustained. I would therefore humbly advise your Lordships to reverse the interlocutors commencing with that of the Lord Ordinary of the 15th May 1865, (the previous interlocutors were merely introductory,) and to assoilzie the defenders in the action, with expenses.

LORD CRANWORTH.—My Lords, I concur with my noble and learned friend in the conclusion at which he has arrived, and in the grounds upon which he has proceeded. Mrs. Lothian, by her codicil, assigns the ten shares to her trustees, in order that her husband might, if he thought fit, take them as part of his claim under the marriage contract, at the value of £6000, and she expressly declares, that any sum which may be got for the shares beyond £6000, shall belong to her husband as a gift from her. If, therefore, her claims on the dividends withheld were included in the word "*shares*," that claim passed to her husband.

I cannot doubt, that the share includes everything effeiring or appertaining to the share, everything which, if the affairs of the company were wound up, would belong to the shareholder at the time of the winding up. If, at the date of the tripartite contract in September 1847, Mr. Lothian,

instead of selling and transferring his shares to the company, had induced them to bring its affairs to a close, all its assets must have been realized and its debts paid, and then the surplus would have been divisible into 600 parts, ten of which would have belonged to Mr. Lothian as the holder of ten of the 600 shares. This surplus must have included the whole of the profits, which had up to that time been kept back from the knowledge of the shareholders. And it can make no difference, that the affairs of the company were not brought to a close, but were continued to be carried on.

That which would have belonged to the shareholder as his share of the assets of the company, if its affairs had been wound up, continued to be his, though its affairs were not wound up. I am unable to imagine a case in which a person, not a shareholder, can set up a claim in competition with the shareholders to funds which are admitted to be funds of the company. I do not doubt, that if Mrs. Lothian had in her lifetime taken proper steps, she might have compelled the company, or those who managed its concerns, to pay over to her the fair proportion of the accumulated profits appertaining to her ten shares. But that would have been a right which she would have possessed as being then a shareholder. So if by her will she had said, that she gave the ten shares to her husband, but with a provision, that she was only to take the shares to the extent in value of £6000, and that any profits belonging to the shares beyond that sum should go as part of her residue, there is no doubt that by apt words this might have been done. But she has not done it. She has given the shares to her husband, and this gift must, I think, include all which the owner of the shares could claim.

I have attentively considered the opinions of the learned Judges below, but I own they do not convince me. I must also observe, that they were not unanimous, and the Lord President, who was one of the majority, evidently felt great difficulty, and came to the conclusion in favour of the respondents with much hesitation.

With these few observations, I have only to express my concurrence in the course recommended to your Lordships by my noble and learned friend.

LORD COLONSAY.—My Lords, I concur in what has been said by my noble and learned friend who last addressed your Lordships, as to the rights which would have belonged to Mrs. Lothian had she in her lifetime insisted on them. I think, that upon statements such as we find upon this record, Mrs. Lothian would have had a right to have insisted on the separation and distribution of the funds which had been so fraudulently withheld from being distributed. I think, that she would have been entitled to do that as being the party entitled to the dividends. If these funds attached to the shares entirely by reason of not having been already distributed, she could not have compelled the company to distribute these funds. But these funds have lain in a state of suspense and concealment, and she might therefore have insisted on the company doing that which they contend now they would not have been bound to do, namely, to state a new account, and to pay over to her as the party who had been from year to year entitled to the dividends, that proportion of the funds so concealed, which ought to have been paid to her. But the question comes to be a different one when we are dealing with the matter after her death, and when she has made a settlement of her affairs, and I concur with both my noble and learned friends who have addressed your Lordships in thinking, that the real question to be determined here is, whether by her settlement the fund in question went to Mr. Lothian or went to her residuary legatees? Now it is pretty clear, that Mrs. Lothian herself had no opinion on the subject, because she made her will, and died in ignorance of the fact. But still the question requires to be solved, and there may be principles found for solving it. I cannot agree with the pleas maintained by the defenders, that the averments of the pursuers being substantially groundless and unfounded, the defenders are entitled to absolvitor, because we have not gone into that inquiry. Neither can I agree with the plea, that the sale of the shares, which is sought to be reduced, was a sale for a fair and adequate price, and that, therefore, the pursuers are not entitled to succeed. If she had made a claim in her lifetime upon these profits, the defenders might have set up these pleas, but these pleas would not have been sufficient to exclude her. An investigation must have taken place, and if Mrs. Lothian had established the facts on this record, I think she would have prevailed. But on the other hand, I think, that if she had discovered the fraud, it would have been in her option to have insisted on having the funds distributed, or if she thought it more for her advantage to do so, she might have allowed the funds which had been concealed to be added to the stock of the company. Now, as she did not know of this fraud, we cannot say how she would have exercised her option if she had known it. Therefore we are placed in a difficulty; *non constat*, that she would have insisted upon the distribution of the funds instead of taking the benefit of them in the increased value of the stock of the company. I think, that the words which she has used in conveying the shares to her husband are not necessarily exclusive. I think there is some doubt on the subject as to whether she meant, that he should take the shares with all the benefits that could be got out of them, whether they were benefits that she ought to have reaped during her lifetime, or benefits which were allowed to remain unreaped. But, upon the whole, I think, that no violence is done to her will by the construction which is proposed to be put upon

it, and although I entertain some doubts, I am not disposed to differ from the result which has been come to by my two noble and learned friends.

Mr. Cotton.—Would your Lordship pardon me for mentioning, that certain costs have been paid under the orders which have been reversed by your Lordships. Of course an order will be made for the repayment of those costs.

LORD CHANCELLOR.—That is always a matter of course.

Certain interlocutors reversed, and defenders below assoilzied, with expenses.

Appellants' Solicitors, Gibson-Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.—*Respondents' Solicitors*, Duncan, Dewar, and Black, W.S.; Loch and Maclaurin, Westminster.

JULY 16, 1868.

The Hon. CORNWALLIS FLEEMING, *Appellant*, *v.* JAMES HOWDEN, Accountant, Edinburgh, *Respondent.*

Entail—Clause of Devolution on succeeding to Peerage—Bankruptcy—Right of Succession—Declarator—*F. was heir of entail of D. estate under a deed made in* 1847, *but not recorded in the Register of Taillies, providing, that if he succeeded to a peerage, he should be bound to denude, and the lands should thenceforth* ipso facto *devolve on the next heir. F., on succeeding to a peerage, did not denude, but remained in possession till his death, and was deeply involved in debt, and after his death his estates were sequestrated. The trustee claimed to have the D. estate transferred to him, which the next heir, who had been served heir to F., resisted.*

HELD (reversing judgment), *That, at the moment of F. succeeding to a peerage, he ceased to be tenant in tail, and became trustee for the next heir, though the deed of* 1847 *was not recorded, and therefore the lands of D. were not part of the heritable estate of F. at the date of the sequestration.*

QUESTION, *Whether the deed of* 1847 *being made in pursuance of* 20 *Geo.* II. *c.* 50, *and the estate of D. being purchased with tailzied funds arising from the sale of lands held under a clause of devolution, the heir was not bound by the conditions of the former entail of* 1741?—*Per* LORDS CRANWORTH *and* WESTBURY.[1]

The estates of John Fleeming, Lord Elphinstone, who died in 1861, were sequestrated in 1862, and Mr. Howden, C.A., was appointed trustee. Lord Elphinstone had succeeded to the title on 19th July 1860, and was then heir of entail in possession of the lands of Duntiblae. The deed of entail was executed in 1847 by George Turnbull, who was a trustee acting under 20 Geo. II. c. 50, whereby he disponed the lands to John Fleeming, and the deed was never recorded in the Register of Tailzies. It contained this clause:—"And further providing, that in case the said John Fleeming, or any of the heirs of taillie before mentioned, shall succeed to the title and dignity of peerage, then and in that case, and how soon the person so succeeding, or having right to succeed, to the said lands and others, shall also succeed, or have right to succeed, to the said title and dignity of peerage, they shall be bound and obliged to denude themselves of all right, title, and interest which may be competent to them of the said lands and others, and the same shall thenceforth *ipso facto* accresce and devolve upon the next heir of taillie in existence for the time being, sicklike as if the person so succeeding and bound to denude were naturally dead."

In 1859 John Fleeming disponed the said lands to George Dunlop in security for certain debts as far as he could convey the lands. When John Fleeming succeeded to the peerage in 1860, the next heir of entail, namely, his sister Viscountess Hawarden, considered, that the lands *ipso facto* vested in her; and the Court had so declared with respect to certain other estates, in the deed of entail of which a similar clause was found (see 38 Sc. Jur. 175). Viscountess Hawarden died in 1865, and her son, the present appellant, was the next heir.

The trustee in the sequestration petitioned the Court, that the said estate of Duntiblae should be transferred to him as representing the creditors as being part of the property of the late Lord Elphinstone—(Bankruptcy (Scotland) Act 1856, § 106). The Hon. C. Fleeming opposed.

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[1] See previous report 5 Macph. 658: 39 Sc. Jur. 312. S. C. L. R. 1 Sc. Ap. 372: 6 Macph. H. L. 113; 40 Sc. Jur. 616.