*Friday, Nov.* 24.

## FIRST DIVISION.

### PETN. —A. B. AND ANOTHER.

Agent for the Petitioners—Mr John Stewart, W.S.

This petition was presented by A B and his wife for the appointment of a judicial factor. It was refused by Lord Benholme, in respect no sufficient cause was shown to him for the appointment.

It appeared that the husband was proprietor of three different heritable properties in Edinburgh, which were burdened with heritable securities over them for sums of £600, £400, and £450 respectively. The sums so borrowed formed part of the residue of the means and estate of his wife's father, to which his wife succeeded under her father's settlement.

The destination in each of the three bonds was to the wife in liferent, for her liferent use allenarly and exclusive of the *jus mariti* and right of administration of the husband, and to their only child *nominatim*, and to such other children as may be born of the wife, in such proportions as she shall appoint; and failing such appointment, equally amongst them and their heirs and assignees in fee. The only child at present surviving is in pupilarity.

The title to the securities having been taken in this manner, a difficulty was raised as to who had the power of discharging the bonds, two of which, it was now proposed, should be paid off, in consequence of the properties having been sold. The prayer of the petition was to appoint a person as judicial factor over the fee of the said sums of £600, £400, and £450, and over the fiars' right and interest in and to the said bonds, and in and to the said subjects themselves, in so far as conveyed in security of the said sums, for the interest of the said surviving child, and of any other lawful children who may be born of the female petitioner — or as judicial factor to act for the said surviving child, and for the interest of any other lawful child who may hereafter be born, as aforesaid, in so far as regards, and for the purpose of protecting their rights and interests in the fee of the foresaid sums, and in order that the said sums might be invested, when paid up, in heritable security, under the same destination as at present; and further, for authority to the factor, when appointed, to uplift the two sums, and to grant discharges of the two bonds.

After hearing Mr DONALD MACKENZIE for the petitioners, the Court, having doubts as to whether their interference in the way proposed was absolutely necessary, appointed them to lodge a minute stating the grounds on which they supported their application.

## SECOND DIVISION.

### MILLER *v.* HUNTER.

Counsel for the Pursuer—The Lord Advocate and Mr Gifford. Agents—Messrs H. & H. Tod, W.S.

Counsel for the Defender—The Solicitor-General, Mr Patton, and Mr Blair. Agents—Messrs Hunter, Blair, & Cowan, W.S.

A landlord having presented a note of suspension and interdict to prevent his tenant from taking away growing crop from 100 acres of his farm, the Court ultimately repelled the reasons of suspension, and recalled the interdict. The tenant thereafter raised an action of damages for wrongous use of interdict, and obtained a verdict from a jury, who assessed the damages at £1068. The landlord afterwards obtained a rule which was made absolute, and a new trial granted upon two grounds—(1) that upon the evidence and law applicable to the evidence the obtaining of the verdict was erroneous in the sense of the issue, and (2) that the damages which the jury awarded were excessive. A second trial took place, the result of which was that the second jury considerably reduced the damage given to the defender.

The case was on the roll to-day, on the motion of the pursuer, to apply the verdict in the second trial. The question of the expenses of the first trial had been reserved at the time of the discussion on the rule, and now came up for disposal. The defender contended that the pursuer should not be allowed these expenses, because the extravagant award of damages which the jury made was clearly referable to the fault of the pursuer himself, in respect he laid before them evidence which proceeded on a totally erroneous scheme of calculation, and, moreover, the sum awarded was under the amount of the claim made. The defender was entitled to expenses because the pursuer has misled the jury and caused the miscarriage, but, in any event, the defender should not be found liable in expenses. The pursuer answered that he was not responsible for the erroneous result at which the jury had arrived. He had called the most respectable witnesses in support of his claim, who had given their evidence according to a method of calcuation which they considered right. There was no doubt of his *bona fides;* and, moreover, there was fault on the part of the defender, which probably misled the jury to as great an extent as the fault of the pursuer, in repect he had maintained that no damages were due at all.

The Court, on the ground that there had been fault on both sides—on the side of the pursuer in respect he adopted an erroneous scheme in estimating the damage—on the side of the defender in respect he was wrong in point of law in maintaining that no damage was due at all—found neither party entitled to expenses. The same principle was applied to the expenses of the discussion on the rule, and they were allowed to neither party, in respect the defender had obtained and maintained his rule upon two grounds, in one of which he had been successful and in the other unsucessful.

### MACBRIDE *v.* GRIERSON, CLARK, AND CO.

Counsel for Defender—The Solicitor-General and Mr Clark. Agents—Messrs A. G. R. & W. Ellis.

Counsel for Pursuer—Mr Pattison and Mr Watson. Agent—Mr James Renton, S.S.C.

This case, which we reported at the time of its hearing, and which involves the construction of a cautionary bond, was advised to-day.

The LORD JUSTICE-CLERK said—This case is one of some difficulty, but I don't think that it depends on any clear legal principle, but on the construction of a particular bond. The question is, whether in this cash credit bond there be five cautioners or three, or, in other words, whether, in addition to the caution granted by Clark, Grierson, & Co., as a company, there is superadded a personal obligation of caution by the individual partners of the company? Now, this is just one of those cases in which it is impossible not to suspect that the parties may have intended to say something very different from what they have said, and that is always a painful position. But however much we may suspect that, we are bound to give to the bond what the Lord Ordinary says is its sound legal construction, and if, according to that construction, an obligation is laid on Mr Grierson and Mr Clark as individuals, we must give effect to it, however much we may suspect or believe that that was not intended. The words have a clear legal meaning, and whatever that is it must receive effect. The way in which I look at this case is, in the first place, to consider who I think are bound to the bank. I think there are nine persons bound. [His Lordship enumerated the two firms and the various individual partners and others bound.] Speaking of William Anderson, John Anderson, and Francis Clark, the individual partners of the firm of William Anderson, Son, & Co., his Lordship said—All these gentlemen are bound conjunctly and severally to