or conveying of the said materials suspected to be purloined or embezzled, and not producing the party or parties being duly entitled to dispose of the same, of whom he or she bought or received the same, nor any credible witness to testify upon oath the sale or delivery thereof, nor giving a satisfactory account how he or she came by the same (as the case shall be), shall for every such misdemeanour forfeit, for the first offence, the sum of £20, and for the second offence the sum of £30, and for every subsequent offence the sum of £40, and failing payment shall be imprisoned for the space of one month for the first offence, and for the second offence for the space of two months, and for every subsequent offence for the space of six months.

The complaints, after narrating these clauses, stated that the complainer had cause to suspect and believe that there were certain purloined and embezzled materials of flax used in the linen manufactures in the premises occupied by the respondents, and prayed for warrant to search, and on the said materials being found "to apprehend the respondent, and bring him before any two of your number to answer to the said complaint; and upon him failing or refusing to account to your satisfaction how he came by said materials, to convict him of the offence above specified, and in respect that this is his first offence, to punish him as for a first offence, in terms of law."

Warrant to search having been granted, and the respondents having been apprehended, they were, on 11th December 1865, brought before Sheriff Robertson, of Forfar, and Mr George Webster, Senior Bailie of Forfar, as justices; and the counsel for the respondents objected to the relevancy of each complaint, "that in the complaint two misdemeanours are specified, while the prayer of the petition is defective, in so far as it does not specify of which offence the party is so to be convicted." The said justices sustained the objection, and dismissed both complaints.

The Court having asked the counsel for the respondents to support the objection which the justices had sustained, it was argued that it was impossible for the respondents to know from the prayer of the complaint what branch of the statute they were charged with contravening. It was also stated that the proceedings were null because the oath on which the warrant to search had been granted did not support the complaint. Counsel for the advocator were not called upon.

Lord COWAN said—The first step in such a case as this is no doubt to consider the complaint and the oath; and, if any conviction followed in a case which was bad *ab origine*, in consequence of the oath being ill taken, it will be our duty to give redress. But all that we can now consider is the objection to the relevancy which has been sustained by the justices; and I think it would be a waste of judicial time to state the grounds on which I consider the objection wholly groundless.

Lord NEAVES concurred. He could not understand how the justices took it into their heads that the complaint was objectionable. To him it seemed unexceptionable. In reference to the objection to the oath which had been stated, it was impossible that it could be listened to in an advocation brought by a prosecutor of a judgment on relevancy. The search warrant could not be reviewed in such a process and without a suspension by the person objecting to it.

The LORD JUSTICE-CLERK concurred, and the Court remitted to the justices to repel the objection in both cases. The advocator was found entitled to £5, 5s. of expenses in each case.

JURY TRIAL.

(Before Lord Jerviswoode.)

CONNOR *v.* KIDSTON.

Reparation—Culpa—*Master and Servant.* Verdict for the defender in an action of assythment.

Counsel for the Pursuer—Mr W. N. M'Laren and Mr Grant. Agent—Mr J. M. M'Queen, S.S.C.

Counsel for the Defender—Mr John Millar and Mr MacLean. Agent—Mr John Leishman, W.S.

This was an action of damages tried without a jury, for reparation in respect of the pursuer's son being killed by an explosion of fire-damp, through fault imputed to the defender. The action was instituted at the instance of John Connor, collier in Hamilton, in the shire of Lanark, against John P. Kidston, coal and iron master, residing at the Cairns, Cambuslang, in said shire; and the issue upon which it was tried is in the following terms:—

"Whether, on or about the 10th day of January 1865, the deceased William Connor, son of the pursuer, while engaged in the employment of the defender as a drawer in the Kidston Camp Pit belonging to the defender, was killed in consequence of an explosion of fire-damp in a waste in the said pit, caused by the fault of the defender—to the loss, injury, and damage of the pursuer?"

Damages laid at £300.

At the close of the evidence, Lord Jerviswoode took the whole case to avizandum; and he has issued a judgment finding that the death in question was not caused through the fault of the defender, in the following terms:—"Edinburgh, March 8, 1866.—The Lord Ordinary having heard the evidence adduced for the parties respectively on the 2d March last, and made avizandum, and considered the same, with the record issue and whole process, Finds in point of fact that on or about the 10th day of January 1865, the deceased William Connor, son of the pursuer, while engaged in the employment of the defender as a drawer in the Kidston Camp Pit, belonging to the defender, was killed in consequence of an explosion of fire-damp in said pit, but not by the fault of the defender. (Signed) CHARLES BAILLIE."

COURT OF SESSION.

Friday, March 9.

SECOND DIVISION.

DUNN PATTISON *v.* HENDERSON AND OTHERS.

Title to Pursue—Reduction ex capite lecti—*Heir of Provision.* Terms of a provision in a deed of settlement which held to confer on the heir of provision a title to pursue a reduction on the head of deathbed of a conveyance to his prejudice.

Counsel for the Pursuer—The Solicitor-General, Mr Clark, and Mr Shand. Agents—Messrs Dundas & Wilson, W.S.

Counsel for the Defenders—Mr Gordon, Mr Hector, Mr Gifford, Mr Fraser, Mr Lee, Mr Ivory, Mr Anderson, Mr Watson, and Mr Gloag. Agents—Messrs Murray & Beith, W.S.; Maconochie & Hare, W.S.; A. G. R. & W. Ellis, W.S.; Webster & Sprott S.S.C.; and Mr John Ross, S.S.C.

The deceased William Dunn of Duntocher, by disposition and deed of settlement, dated 17th April 1830, disponed to his brother, Alexander Dunn (now also deceased), "and his heirs and assigns whomsoever, all and sundry lands, tenements, tacks, and other heritages, and goods, gear, debts, sums of money, and effects; and in general the whole subjects and estate, heritable and moveable, real and personal, owing and belonging, or that shall be owing and belonging to me at my death, with the whole rents, interest, and produce, and writs, evidents, and securities of the premises;" and by a subsequent clause, "declaring, as it is hereby specially provided and declared, but without prejudice

in any respect to, or limitation of, the rights and powers of the said Alexander Dunn, under and by virtue of the conveyance in his favour before written, to exercise the most full and absolute control in the disposal of the said estate and effects, either during his lifetime or by settlements or other writings, to take effect at his death; that in the event of his dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estates hereby conveyed to him, the same shall fall and devolve, and accordingly I do hereby, in these events, but under the burdens and provisions before written, dispone, alienate, and convey my said subjects and estates, heritable and moveable, to the persons, and in the terms aftermentioned." William Dunn died on or about 13th March 1849, and thereafter Alexander Dunn made up titles to the subjects conveyed to him as above, and to the lands of Boquhanran, including the property and superiority thereof and other subjects. Alexander Dunn died on the 15th of June 1860, leaving a trust-disposition and settlement, bearing date 11th June 1860, whereby he, in the fourth place, directed his trustees to convey the lands, part of Boquhanran, and others, with the mansion-house of Dalmuir, situated thereon, also acquired by his said brother since the date of his disposition and settlement, in favour of the eldest lawful son of Sarah Park or Black, his niece, whom failing, as provided by his said brother's settlement, with respect to the third portion or division of the lands thereby specially destined.

The pursuer, Mr Alexander Dunn Pattison, is the eldest son of Mrs Janet Park or Pattison, another of Mr William Dunn's nieces, and seeks to challenge *ex capite lecti* the second trust-disposition and settlement executed as above, in so far as it conveys the said lands of Boquhanran and others to the parties therein named. The case was on a former occasion before the Court on a question between the heir-at-law of William Dunn and the several beneficiaries under his settlement, when the court held that the heir-at-law had no title to sue a reduction of Alexander Dunn's settlement, in respect he was excluded by a valid substitution in favour of others, contained in the prior settlement of William Dunn (M'Ewan *v.* Pattison and Others, 27th March 1865, 3 Macp. 779). The judgment then pronounced is referred to in the opinion of the Lord Justice-Clerk today, and formed the main ground upon which the present judgment was rested.

In the present action the Lord Ordinary (Jerviswoode) held, in point of law, that the title of the pursuer, libelled as heir of provision to Alexander Dunn, "under and in virtue of a disposition and settlement, made and granted by the said deceased William Dunn," is excluded, and is unavailing to the pursuer as a title to reduce the trust-disposition and settlement of Alexander Dunn, in respect of the conveyance as above set forth by the said William Dunn in favour of his brother, the said Alexander Dunn, "and his heirs and assignees whomsoever," and in respect of the exercise by the said Alexander Dunn of the special powers conferred upon him under and in terms of the said disposition and deed of settlement of William Dunn.

In advising a reclaiming note for the pursuer

The LORD JUSTICE-CLERK said—This is a summons which contains several conclusions, but the leading conclusion is for reduction of a deed executed by Alexander Dunn, in so far as it conveys certain heritage to the prejudice of the pursuer, on the ground of deathbed. We have to deal with that part of the case alone, and with the objection to the title of the pursuer to sue a reduction *ex capite lecti*, as this is the only matter disposed of by the Lord Ordinary. The judgment of the Lord Ordinary sustaining the objection to the title to sue disposes of the whole case, because the other conclusions depend upon the pursuer succeeding in the leading conclusion of his action. The title libelled by the pursuer is this, that he is the only lawful son of Mrs Janet Park or Pattison, niece of William Dunn and as such an heir of provision to Alexander Dunn in the lands, &c., under and in virtue of the disposition of William Dunn. The plea of the defenders, which is directed to a challenge of this title, is as follows:—"The pursuer, in respect he does not possess the character of heir of provision to the deceased Alexander Dunn, alleged by him, so far as regards the lands of Boquhanran and others, with the mansion-house thereon, conveyed, or directed to be conveyed, to the defender, has no title to challenge the trust-disposition and deed of settlement of the deceased, so far as it conveys or relates to the said lands. The pursuer's title to sue is excluded by the disposition and settlement of William Dunn." There is a second objection to the title to sue in regard to the *dominium utile* of Boquhanran, but that is mixed up with the merits, and if we repel the first objection it will not be necessary for us to consider that. If the first plea is not a good one against the title of the pursuer he is entitled to sue to some effect or other, so that the question of the *dominium utile* of Boquhanran is not before us. In order to ascertain whether the pursuer possesses the character of an heir of provision thus libelled on, and whether that character gives him a good title to sue, it is necessary to go back to the deed of William Dunn, and to ascertain the position of Mr Dunn Pattison under it. The view of the Lord Ordinary is expressed in his last finding, where he finds in point of law (his Lordship read the judgment, which is quoted in the narrative). There seems to me to be two grounds adopted by the Lord Ordinary for denying to the pursuer the title which he libels. (1) Because of the conveyance in William Dunn's deed to Alexander, and his heirs and assignees whomsoever; and (2) because Alexander Dunn, by the exercise of special powers, must be held to have excluded the pursuer's title and interest. It appears to me that the interlocutor of the Lord Ordinary proceeds upon a misapprehension of the judgment which we previously pronounced in this case. We were of opinion that the conveyance in William Dunn's deed to Alexander Dunn and his heirs and assigns whomsoever, was controlled by what occurred in an after part of the deed, and, as we thought, of the dispositive part of the deed, in which it was provided that, in certain events, this conveyance to the heirs and assignees of Alexander Dunn should not take effect. It was provided that if Alexander should succeed to the estate, and should die without issue, and should not dispose of the estate in his lifetime, and should make no settlement by *mortis causa* disposition, then certain persons are introduced as heirs of provision; and, in particular, it is provided that if these four conditions are purified, the lands in the parish of Old Kilpatrick, and the lands of Mount Blow and Dalmuir, and superiority of Boquhanran, &c., shall devolve on the eldest son of Mrs Janet Park or Pattison. It is in virtue of this substitution or devolution that Mr Dunn Pattison pursues the present action; and I think therefore that, in conformity with our first judgment, we must hold that the conveyance to Alexander Dunn is not sufficient to exclude the pursuer's title or his claim as an heir of provision, if these four conditions are purified. But, further, the Lord Ordinary says that an exercise by Alexander Dunn *in lecto* of certain special powers conferred upon him by William Dunn, excludes the pursuer's title. In that also I cannot agree with the Lord Ordinary. Alexander Dunn was full fiar—was so full a fiar that he could have no faculty; he had unlimited powers, and could have no special powers. Therefore, in executing this deed, he was exercising not special powers, but his *jus disponendi*. It was contended, further, in support of the judgment of the Lord Ordinary, that although what Alexander did was not the exercise of a faculty, his deed is good as a conveyance of the moveable part of the succession of William Dunn; and therefore it is not strictly accurate to say that Alexander Dunn died intestate; and it is only in the event of intestacy,

among other things, that the conditional substitution in favour of Mr Dunn Pattison comes into operation. It appears to me that this proceeds upon a false construction of the settlement of William Dunn. The event of Alexander's dying intestate, as a condition of the substitution, seems to me to mean dying intestate as regards each of the special subjects respectively destined to the different substitutes. (His Lordship here read the clause in William Dunn's deed in support of this construction). It surely cannot be maintained that if Alexander had availed himself of his right so far as to have sold a separate subject belonging to William Dunn, that that would have evacuated the other substitutions. But, in the second place, it is contended that Alexander Dunn did not die intestate, but left a deed disposing of his whole heritable and moveable estate. If William Dunn intended to confer, and did confer, on his brother Alexander a power of defeating these substitutions by a deed *in lecto*, that is a good argument. But if no such power was conferred, I cannot see any good in the argument, because a deed executed *in lecto* is inoperative against an heir of provision; and it is absurd to say that an unavailing deed shall be a good objection to the pursuer's title to sue. That is just reasoning in a circle. But if William Dunn intended to confer, and did confer, on Alexander a right to defeat these substitutions by a deed executed on deathbed, the defender must prevail. That question must be answered by a reference to William Dunn's deed; and certainly this is clear on the face of William Dunn's deed, that notwithstanding his desire to make a substitution in favour of the persons named, he was most anxious to preserve his settlement from even the appearance of derogating from the full right of *dominium*, vested in Alexander. It was intended that Alexander should have unlimited powers, not special powers, but it was not intended that he should be exempted from any law that was applicable to other fiars. His Lordship proceeded to say that it was unnecessary to consider how far any person could abrogate the public law of deathbed—that if, in addition to the four conditions mentioned in William Dunn's deed, William had given Alexander the power of evacuating the substitutions on deathbed, he might have done so; but there was no evidence that he intended the exercise of any such special powers, and he had certainly not conferred them.

The other Judges concurred.

The Court accordingly repelled the defender's objection to the pursuer's title to sue, and sustained the latter. All the defenders, who maintained the objection to the pursuer's title, were found liable in expenses to the pursuer. At the close of the advising, Mr Shand, for Mr Dunn Pattison, moved the Court, on the ground of the distress that was prevailing in the village of Duntocher, by reason of the subsistence of the litigation, and the consequent continued interruption of the working of the mills, to take up the remainder of the cause without remitting it back to the Lord Ordinary to dispose of the other pleas on the merits; and in the special circumstances the Court assented to the motion, and promised a hearing in May.

Saturday, March 10.

FIRST DIVISION.

ORMOND *v.* BORRIES.

Cautioner—Bond of Presentation—Liberation. A person having been apprehended under a *meditatione fugae* warrant, the petition for which stated that the claim was for the aliment of a natural child which was conceived in *August* 1864, and the cautioner being afterwards sued on the bond under a summons in which the child was said to have been conceived in *July* 1864, held (aff. Lord Kinloch) that this variance did not liberate the cautioner.

Counsel for Pursuer—Mr J. G. Smith and Mr R. V. Campbell. Agent—Mr H. Forsyth, W.S.

Counsel for Defender—Mr William Thomson. Agent—Mr David Milne, S.S.C.

The pursuer gave birth, on 11th March 1865, to an illegitimate child, of which she alleged that one of the defenders, a lad of about sixteen years of age was the father. In November 1864, having been informed that he was about to emigrate to Australia, she presented a petition to the Sheriff of Forfarshire against him as *in meditatione fugæ*. In this petition she expressly averred that the intercourse which afterwards resulted in the birth of a child took place "on various occasions between the 8th and 27th days of August 1864." Under this application he was apprehended, but afterwards liberated on his father, the other defender, granting a bond of presentation for him.

After the birth of the child the pursuer raised this action against the alleged father, and also against his cautioner, founding on the bond of presentation. The intercourse was now alleged to have taken place "on the 11th and subsequent days of July 1864." The cautioner pleaded that in consequence of this variance he was not liable under the bond, the conception of the child, in regard to which he became bound to present his son, having taken place in August 1864. This plea was repelled by the Lord Ordinary (Kinloch), and the cautioner reclaimed. He argued that he had granted the bond in consequence of the statement in the petition that the child was conceived in August, which he knew could not be true if his son was its father. The variance was therefore material. He founded upon Campbell *v.* Hamilton, 20th January 1789 (Hume 82), and M'Neill *v.* Stewart, 18th November 1823 (2 S. 439 N. E.). The Court, without calling for a reply, adhered.

Lord CURRIEHILL—The objection stated comes to this—the debt sued for is not the debt in respect of which the cautioner became bound. I think that cannot be maintained. The debt was a claim for the aliment of a natural child of which the pursuer was at the time pregnant. That is just what is now sued for. I think therefore the identification is sufficient. If it should turn out that the other defender is not the father of the child, then the cautioner will be free. But that is all reserved.

Lord DEAS—The question is whether the bond applies to the debt in dispute. I think it does. The mention in the petition of the date of the intercourse was a superfluity. The two cases founded on were quite distinguishable from the present.

Lord ARDMILLAN concurred. He thought the defence was an attempt to take advantage of what was a manifest error.

The Lord PRESIDENT was absent.

SECOND DIVISION.

SCEALES *v.* SCEALES AND OTHERS

(*ante, p.* 109).

Proof—Declarator of Marriage—Judicial Examination of Party. Circumstances in which a motion for the judicial examination of a pursuer of a declarator of marriage (aff. Lord Ormidale) *refused.*

Counsel for Pursuer—Mr Scott. Agent—Mr A. P. Scotland, S.S.C.

Counsel for Defenders—Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

In this action of declarator of marriage, the defenders, who are the representatives of Stewart Sceales, to whom the pursuer says she was married by habit and repute, made a motion to the Lord Ordinary (Ormidale) to ordain the pursuer to be judicially examined before fixing any diet for proof. The Lord Ordinary refused the motion,