

COURT OF SESSION.

Tuesday, June 19.

FIRST DIVISION.

CAMPBELL'S EXECUTORS *v.* CAMPBELL'S TRUSTEES (*ante p.* 12).

Expenses—Jury Trial—Fees to Counsel. Held that in taxation of expenses as betwixt party and party the fees of only two counsel at a jury trial should be allowed except in exceptional cases; and the fees of a third counsel accordingly disallowed.

This case was tried before Lord Jerviswoode and a jury. The trial lasted three days. The defenders, who gained the verdict, had three counsel—the Lord Advocate, the Solicitor-General, and Mr Fraser. In their account of expenses they charged as fees to the Lord Advocate thirty guineas for the first day, twenty for the second, and ten for the third. The same fees were charged for the Solicitor-General; and for Mr Fraser twenty, fifteen, and ten guineas for the three days respectively.

The Auditor reported that if three counsel were to be allowed as against the unsuccessful party (a point which he left to the Court), he thought the fees charged, considering the nature of the case, were not unreasonable.

The defenders maintained that in this case they should not be required to pay for more than two counsel, and also that the fees charged were excessive. They cited on the first point Walker, 19th July 1862, 24 D. 1441; and on the second Cooper and Wood *v.* North British Railway Company, 19th December 1863, 2 Macph. 346; and Hubback *v.* North British Railway Company, 25th June 1864, 2 Macph. 1291.

The Court having taken time to consider, the case was advised to-day.

The LORD PRESIDENT said—It has long been the rule that as betwixt party and party no more than two counsel should be allowed to be charged for against the adverse party, unless in exceptional cases. That rule the Court has no desire to depart from, and the question is whether this is an exceptional case. We think there is nothing in any way exceptional in the present case. The case was no doubt an important one, and to the defenders as well as the pursuers an anxious one, but the parole evidence was not voluminous, and the documentary evidence, though considerable, could not have required much expiscation, for it had been a long time under the consideration of counsel. We are therefore of opinion that one senior and one junior counsel was the proper staff for conducting this case; and we therefore disallow the fees of one of the seniors—it does not matter which, for they are the same in amount. We see no reason for interfering further.

Counsel for Pursuers—Clark, Gifford, and John Hunter. Agents—A. & A. Campbell, W.S.

Counsel for Defenders—Lord Advocate, Solicitor-General, and Fraser. Agents—Webster & Sprott, S.S.C.

CARMICHAEL *v.* ANSTRUTHER.

Res judicata—Competent and Omitted—Heir of Entail. Held (1) that it was no answer to a plea of *res judicata* that there were certain objections to the citation of the defender, these

objections not having been pleaded but waived, or that a defence might have been stated which was not; that being competent and omitted; and (2) that the plea of competent and omitted may be proponed against an heir of entail.

This is an action of declarator and payment at the instance of Sir William Henry Gibson Carmichael of Skirling, Bart., against Sir Windham Carmichael Anstruther of Anstruther and Carmichael, Bart. (1) to have it found and declared that the defender and his heirs and successors in the lands and estate of Carmichael and others, which formerly belonged to James, second Earl of Hyndford, are bound to warrant the teinds, parsonage, and vicarage, of the lands and barony of Skirling and others, disposed as principal by the said Earl of Hyndford and his spouse in favour of Mr William Carmichael, advocate, and his heirs and assignees, by disposition dated the 23d May and 3d June 1724, against all augmentation of minister's stipend, or other burdens imposed or to be imposed in all time coming on the said teinds after the date of the said disposition, over and above the stipend modified to the minister of Skirling on 25th July 1739; (2) to have the defender decerned and ordained to make payment to the pursuer of the sum of £338, 7s. 2d. sterling, being the amount of stipend and augmentation paid by the pursuer to the minister of Skirling for crops and years 1862 and 1863 furth of the teinds of the foresaid lands, over and above the said modified stipend, with interest on said sum; and (3) to have the defender and his heirs and successors ordained to free and relieve the pursuer and his heirs and assignees of all augmentations of minister's stipend or other burdens imposed or to be imposed upon the teinds of the said lands in all time coming.

The pursuer averred—(Cond. 34)—In October 1818 his predecessor in the said entailed lands of Skirling, Sir Thomas Gibson Carmichael, in consequence of the refusal of Sir John Carmichael Anstruther, the then heir of entail in possession of the lands of Carmichael and Anstruther, and his tutors and curators, to satisfy his claim under the said clause of warrandice and obligation contained in the disposition of 1724, raised in the Court of Session an action of declarator and payment against the said Sir John Carmichael Anstruther (otherwise Sir John Anstruther Carmichael), and his tutors and curators, concluding for payment of the sum of £260, os. 10d., being the difference between the stipend and communion elements as modified by the decree of 25th July 1739, and the stipend and communion elements payable to the minister of Skirling for the crop and year 1817, with interest from the date at which the same was paid to the minister, and for decree ordaining the said Sir John Carmichael Anstruther, and his tutors and curators, as defenders and heirs and successors in the said estates of the said James, the second Earl of Hyndford (*i.e.*, the estate of Carmichael) to free and relieve the said Sir Thomas Gibson Carmichael, and his heirs and successors in the lands and barony of Skirling, of and from payment of all augmentations of stipend granted or to be granted to the minister of Skirling, over and above that granted on the said 25th July 1739, in all time to come, from and after the said crop and year 1817. (Cond. 35) To this action defences were lodged by Sir John Carmichael Anstruther and his tutors, and ultimately, on January 31, 1821, decree was pronounced by the Lords of Council and Session, whereby they repelled the

defences, decreed for the sum sued for, and ordained the said Sir John Carmichael Anstruther and his tutors and curators, "and heirs and successors in the said estates, to free and relieve the pursuer and his heirs and successors of and from payment of all augmentations of stipend granted or to be granted to the minister of Skirling, over and above that granted on the said 25th July 1739, in all time to come, from and after the said crop and year 1817." (Cond. 36) This decree was acquiesced in by Sir John C. Anstruther and his tutors and curators, and was obtempered and implemented up to the date of his death in 1831. He was succeeded in the entailed estate of Carmichael by his uncle, the present defender, who made up titles thereto as heir of entail, and continued to implement the above-mentioned decree until May 1862, when he refused to continue the annual payments to the minister.

The defender averred:—(Stat. I.) The summons in the action referred to in the 34th article of the revised condescence was directed against Sir John Anstruther Carmichael, and not against Sir John Carmichael Anstruther. Sir John Carmichael Anstruther never was called Sir John Anstruther Carmichael. The summons was not duly executed against Sir John Anstruther Carmichael and his tutors and curators. The execution of the summons bears that the messenger warned and charged Sir John Anstruther Carmichael. It further bears that it was executed by delivering a full double thereof, with a copy of citation for Sir John Anstruther Carmichael, Bart., and a like double and copy thereof for his tutors and curators, "to John Ker, Esquire, Writer to the Signet, Edinburgh, their known agent, who accepted thereof, and agreed to hold the said summons as duly executed against the said Sir John Anstruther Carmichael, Bart., and his said tutors and curators." The said Sir John Carmichael Anstruther had then no tutors or curators, and the said John Ker had no power or authority to accept the said service. The summons was not duly called. It was called against "Sir John Anstruther Carmichael, of Anstruther and Carmichael, Baronet, and his tutors and curators, if he any has, for their interest." Farther, the decree pronounced in said action was inept, because it was a decree not against Sir John Carmichael Anstruther, but Sir John Anstruther Carmichael and his tutors and curators.

The pursuer pleaded, *inter alia*:—8. The present defence is excluded by the decree *in foro* of 31st January 1821, which makes the title of the heirs and successors of the said Sir Thomas Gibson Carmichael, the first, in the lands and barony of Skirling, to the said claim of warrandice or obligation, and to relief under the same, as also the liability of the said Sir John Carmichael Anstruther's heirs and successors in the estate of Carmichael, in such relief, *res judicata*. 9. If any of the defender's present pleas were not stated in the proceedings which terminated in the said decree *in foro* of 31st January 1821, the said pleas, even if originally competent, cannot now be maintained in respect of the exception of "competent and omitted." 10. The defender's fourth plea-in-law falls to be repelled, in respect that (1) the proceedings therein referred to were taken in all respects regularly, and in terms of law, against the said Sir John Carmichael Anstruther (otherwise Sir John Anstruther Carmichael), and his tutors and curators; (2) The said Sir John Carmichael Anstruther and his tutors lodged defences to the said action, and litigated the same until it termin-

ated in the decree of 31st January 1821; (3) The reasons set forth in the said plea cannot be stated *ope exceptionis*, or otherwise than in a regular action of reduction of the said decree; and (4) The present defender did not challenge or take steps for setting aside the said decree within four years after he succeeded to the said Sir John Carmichael Anstruther.

Various pleas were stated for the defender. *Inter alia*, he pleaded:—4. The decree founded on is inept, for one or other of the following reasons:—(First) The summons upon which the same proceeded was not duly called against the said Sir John Carmichael Anstruther; (Second) The summons was not duly executed against him and his tutors and curators; (Third) The said Sir John Carmichael Anstruther, against whom the decree was obtained, died in pupillarity; (Fourth) The summons was not directed against Sir John Carmichael Anstruther, and the decree is not against him, but, on the contrary, both the summons and the decree were against a person called Sir John Anstruther Carmichael. 6. The decree founded on by the pursuer is in no way *res judicata* against the defender, who does not represent the defender in said action; and *separatim*, the said decree is not *res judicata*, in respect that no question as to the title of the pursuer was raised in that action, and no judgment was pronounced thereon. 8. The defender not representing the granter of the obligation or the person against whom the alleged decree was obtained, he is not liable as concluded for.

The Lord Ordinary (Kinloch), on the 8th December 1865, gave effect to the pursuer's pleas in the following interlocutor:—Finds that the judgment pronounced by the Court, on 31st January 1821, in the action at the instance of Sir Thomas Gibson Carmichael against Sir John Carmichael Anstruther, and his tutors and curators, is *res judicata*, to the effect that the pursuer in the present case, as heir and successor to the said Sir Thomas Gibson Carmichael in the estate of Skirling, is entitled to be relieved of the augmentations libelled by the defender, as the heir and successor of the said Sir John Carmichael Anstruther, in the estate of Carmichael: Finds and declares, in terms of the first or declaratory conclusions, and of the last or conclusion of relief contained in the summons in the present case, and deems; and with regard to the petitory conclusion, appoints the cause to be enrolled. W. PENNEY.

Note.—The present action is brought by Sir William Henry Gibson Carmichael of Skirling against Sir Windham Carmichael Anstruther of Carmichael, in order to enforce an obligation of relief from augmentations of stipend to the minister of Skirling, alleged to be contained in the disposition of the lands of Skirling by James, second Earl of Hyndford, to Mr William Carmichael, dated 23d May and 3d June 1724.

The first question to be considered, and that which, if decided in the affirmative, supersedes every other, is whether the Court has or has not already pronounced a judgment establishing the pursuer's right to this effect. The pursuer maintains the affirmative.

The action in which the judgment in question was pronounced was raised on 14th October 1818. It is raised at the instance of Sir Thomas Gibson Carmichael of Skirling, the succession to which estate is set forth as having opened to him "as heir of entail under a deed of entail executed by John, the fourth Earl of Hyndford, who had, before succeeding to the title and estate of Hyndford, succeeded to the said lands and barony of

Skirling, as heir to the Honourable William Carmichael, his father." The action is directed against "Sir John Anstruther Carmichael, of Anstruther and Carmichael, Baronet, and his tutors and curators, as in possession of the estates of James, the second Earl of Hyndford." The summons narrates the disposition of 1724, by which William Carmichael acquired the lands of Skirling from this James, second Earl of Hyndford; and the claim of warrandice against augmentations contained in that disposition; and after a petitory conclusion for arrears of augmentations, concludes thus:—"The said Sir John Anstruther Carmichael, Baronet, and his tutors and curators, and heirs and successors in the said estates, ought and should be decerned and ordained, by decree foresaid, to free and relieve the pursuer, and his heirs and successors in the said lands and barony of Skirling, of and from payment of all augmentations of stipend granted or to be granted to the minister of Skirling, over and above that granted on the 25th day of July 1739, in all time coming."

The messenger's execution, attached to the summons, bears it to have been executed by delivering a copy for Sir John Anstruther Carmichael, and another copy for his tutors and curators, "to John Ker, Esq., W.S., Edinburgh, their known agent, who accepted thereof, and agreed to hold the said summons as duly executed against the said Sir John Anstruther Carmichael, Baronet, and his said tutors and curators."

Defences were given in to this action, which are entitled "Defences for Sir John Carmichael Anstruther, of Anstruther and Carmichael, Baronet, and his tutor *ad litem*." The process, as produced, does not show in any of its numbers an appointment by the Court of a tutor *ad litem*.

There were afterwards lodged additional defences under the title of "Additional Defences for Sir John Carmichael Anstruther, of Anstruther and Carmichael, Baronet, and his tutors-dative." The names of the tutors-dative are not given; and the process as produced does not show any minute formally sisting them.

A debate having been had, mutual memorials were ordered. That for the defence was entitled, "Memorial for Sir John Carmichael Anstruther, Bart., and his tutors, defenders."

On 31st January 1821, "The Lord Ordinary, having advised the memorials, productions, and whole procedure, for the reasons before explained, repels the defences; and in respect that no objection is made to the sum concluded for, decerns against the defenders in terms of the libel; but in respect that all the documents were not shown to the defenders before this action was commenced, nor even produced with the summons, finds no expenses due."

A reclaiming petition was presented for "Sir John Carmichael Anstruther, of Anstruther, and Carmichael, Bart., and his tutors." On 22d July 1821, "The Lords, having considered this petition, refuse the desire thereof, and adhere to the interlocutor complained of."

The extracted decree bears to have been pronounced "upon a summons and action pursued before the Lords of Council and Session, at the instance of Sir Thomas Gibson Carmichael of Skirling, Bart., against Sir John Anstruther Carmichael of Anstruther and Carmichael, Bart., and his tutors and curators, if he any has, for their interest." It narrates the summons at length, and bears, "The Lords of Council and Session, sitting in judgment, repelled, and hereby repel, the defences; and in respect that no objection is made

to the sum concluded for, decerned and ordained, and hereby decern and ordain, the said Sir John Anstruther Carmichael, Bart., and his tutors and curators, to make payment to the pursuer of the foresaid sum of £260, os. 10d. sterling, with the legal interest thereof from 1st June 1818, being the date at which the same was paid by the pursuer to the said minister of Skirling, and in time coming during the not-payment: And further, decerned and ordained, and hereby decern and ordain, the said Sir John Anstruther Carmichael, Bart., and his tutors and curators, and heirs and successors in the said estates, to free and relieve the pursuer, and his heirs and successors in the said lands and barony of Skirling, of and from payment of all augmentations of stipend granted or to be granted, to the minister of Skirling, over and above that granted on the said 25th July 1739, in all time to come from and after the said crop 1817."

The Lord Ordinary is of opinion that this judgment forms *res judicata* in regard to the question raised in the present action.

1. The parties to the present case are indisputably the heirs and successors in the respective estates in question, of the parties to the former process. The pursuer is the heir in the estate of Skirling to the pursuer of the former action. The defender is the heir in the estate of Carmichael to the defender in the former action. If the judgment establishes a right of relief by the heir in Skirling against the heir in Carmichael, the pursuer is the undoubted creditor, the defender the undoubted debtor in the obligation.

2. The matter in controversy in the former case is identically the same with that in the present. It is, whether, by virtue of this disposition of May and June 1724, the heir in possession of Carmichael is liable to relieve the heir in possession of Skirling of all augmentations of stipend posterior to 1739. The judgment found that he was.

3. The former action was rightly brought against Sir John Anstruther Carmichael (admittedly a pupil) and his tutors and curators. Whatever difficulties may occur in regard to an action *sued* by a pupil, in respect of the general principle that a pupil has no *persona*, the necessity of the case has made it competent to direct an action *against* a pupil and his tutors and curators, if he any have. It may be necessary to look into the proceedings in such an action to discover if the pupil has been properly defended,—by his tutors and curators, if he have any, by the appointment of a curator *ad litem*, if he have not. But the action is competently laid; and a decree in absence taken in such an action will be valid, although liable to be opened up like any other such decree. The decree is not null. It is only open to an inquiry into its soundness, if pronounced in absence. In the present case, it was pronounced *in foro*; and is therefore conclusive, if not impeachable on other grounds. *Sinclair v. Stark*, 15th June 1828, 6 S. 336.

4. The defender objects that the former action was directed against "Sir John Anstruther Carmichael," and not against "Sir John Carmichael Anstruther," which was the true name of the defender. This objection appears to the Lord Ordinary to be of no weight. The identity being unquestionable, the Lord Ordinary considers this clerical inversion of the two names, both undoubtedly borne by the defender, to be immaterial. *Constat de persona*. But, besides this, the defender and his tutors appeared and pleaded to the action under the true designation of Sir John Car-

michael Anstruther. The Lord Ordinary considers that this would be sufficient to neutralise the objection, even if otherwise well founded.

5. The defender further objects that the former action was not duly executed, not being formally executed, against the defender at his dwelling-place, and against tutors and curators at the head burgh of the shire, but simply executed by service accepted by the agent—for which there was not, and in the case of a pupil could not, be any authority. The pursuer answered, *inter alia*, that the execution of the summons was one of those warrants of a decree which could not be asked for or inquired into after the lapse of twenty years. *Lane v. Campbell*, 17th January 1752, M. 5179. The Lord Ordinary held this a good answer. There was the further answer, that appearance was actually made in the process, on the part of the defender, without any objection to the citation, after which no objection could be stated in respect of defectiveness of citation. This answer the Lord Ordinary thinks also sufficient. The fact that at this distance of time there is not discovered in the process any formal appointment of a tutor *ad litem*, or a formal sisting of the tutors-dative, or that these are not specified by name in the titles of the still extant papers, appears to the Lord Ordinary insufficient to affect the conclusion that appearance was made, and issue joined, and the case fully litigated. In such a case, many objections are inapplicable, which might be formidable if stated against a decree in absence.

6. The defender lastly contends that the plea of *res judicata* cannot be given effect to, inasmuch as the point now in controversy was not brought into discussion, nor determined in the former case. What the defender was understood to mean was that the main ground of defence relied on in the present case is, that the right of relief, originally competent to William Carmichael, has not been transmitted from him by effectual deeds of transmission, as in certain well-known judgments of the House of Lords was held to be necessary; and that this defence was not stated, and therefore was not adjudicated upon, in the former case.

The defender's argument on this point has involved throughout a confusion between the point in issue in a case, and the legal arguments by which the point has been either maintained or assailed. The point in issue in the present case is identical with that in the former, to wit, whether there was a right of relief from augmentation of stipend transmitted from William Carmichael, to his heirs and successors in the lands of Skirling, against the heirs and successors in the estate of Carmichael. The *medium concludendi* in the former case was, exactly as here, that such a right was transmitted. It was on the ground of such transmission, whether expressly set forth or not, and on this exclusively, that the pursuer of the former action could possibly prevail. It cannot therefore be maintained that the point at issue in the present case is in the least different from that which arose in the former. What the defender's contention amounts to is, that in pleading to that point the defender in the former case omitted an argument on the defectiveness of the transmission, — a thing not wonderful to happen, seeing that the discussion was long prior in date to those judgments in the House of Lords, by which some ancient Scottish prepossessions were rather rudely shaken. But it never will destroy the effect of *res judicata* merely to say that former advisers omitted an argument which

either the ingenuity or the better information of after counsellors reared up. If this were sanctioned, there would probably never be *res judicata* in any case. At the best the case is one of a plea of "competent and omitted;" and in the case of a defender this is never held to prevent *res judicata* being given effect to—*Stair*, iv. 1. 50; *Ersk.* iv. 3. 3.

It is true that in the former case the defender Sir John Carmichael Anstruther was a pupil; and it is sometimes loosely said that "competent and omitted" is not proponible against a minor. But, soundly interpreted, this only means that the minor may have redress against the consequences of the omission by an action of reduction on the ground of minority and lesion, raised, as such an action must be, within the *quadrimum utile*. In the present case Sir John Carmichael Anstruther died before he attained majority. But this only extended the right of redress of his successor, the present defender, to a period of four years after Sir John's death. Admittedly no reduction was brought.

7. The Lord Ordinary is, on these grounds, of opinion that the judgment of 1821 decides the question raised in the present action, and precludes the necessity of inquiring whether the right of relief was in reality well transmitted from William Carmichael to his successors in the lands of Skirling. There were some arguments used by the pursuer in support of the plea of *res judicata*, which the Lord Ordinary was not prepared to adopt. It was said that all objections to the decree of 1821, of whatsoever kind, were excluded by the operation of the negative prescription of forty years. But so soon as that prescription was introduced into the case, the answer was introduced that the years of Sir John Carmichael's minority (which were all the years of his life) must be deducted; and as these did not terminate till 1831, forty years had not elapsed prior to the raising of the present action, nor have elapsed now. An argument was also founded on alleged homologation of the judgment of 1821, by payments under it. But, like all other arguments on homologation, this would require an investigation into the circumstances in point of fact in which the payments were made, before the plea could be sustained. It appeared, however, to the Lord Ordinary, that, laying aside these arguments, there was enough left in the case to warrant a decision in favour of the pursuer.

The case is ordered to the roll in order to fix the precise arithmetical amount of arrears of stipend for which decree should go out, under the petitory conclusion. W. P.

The defender reclaimed.

FRASER and LANCASTER were heard for the reclaimers, and

GORDON and BALFOUR in reply.

The following authorities were cited in the course of the discussion, viz. :—*Crichton*, M. 2178; *Dalglish*, M. 2184; *Macduff*, 7th Feb, 1815, F. C.; *Sinclair*, 6 S. 336, 13 S. 602, and 15 S. 770; *Thomson*, 2 Macp. 114; *Brown*, M. 5169; *Craven*, 16 D. 811; *Agnew*, 1 Sh. App. 333; *Bell*, 3 D. 380; *Bogie*, 3 D. 309; *Mackenzie*, 8 D. 964; *Napier*, M. 6047; *Calderhead's Trustees*, 10 S. 582; *Huntly v. Nicol*, 20 D. 374; *Fleming*, M. 16,221; *Keith*, 15 S. 116; *Ferguson*, 2 Stuart, 455; *Ersk.*, 4. 2. 5.

At advising,

THE LORD PRESIDENT—This is an action of declarator and payment, and concludes for relief from payment of all burdens upon the teinds of the lands of Skirling. The defender has stated

among other defences one, of which the substance is that the right upon which this claim is made was not transmitted to the pursuer. The reply to that is, that the right of the pursuer is *res judicata*, being established by a decision of this Court in 1821. To that it is answered, that the proceedings in that litigation are not obligatory on the defender; that they were inept; and at all events irregular in their origin, and never were such as to be the foundation of a valid and effectual judgment. And further, even supposing there was no irregularity, that the pleas now adduced on the part of the defender were good and effectual pleas, and that the failure to state them in the previous action prevented the judgment being founded on as *res judicata* against subsequent heirs of entail. In regard to the procedure, the objections taken were numerous. In the first place, it is said there was no citation of the pupil, or his tutors or curators, if he any had; and it does not appear that there was any execution of service on the pupil, or of service as against his tutors or curators, if he any had, in usual form. It appears that Mr John Ker, W.S., received a copy, which he accepted as service for the defender. It was stated that there was no proper evidence of this fact; that the statement of the messenger to that effect was extrinsic to the execution. If the case here depended on that, I would have great hesitation in giving effect to that view. But it is further said, *esto*, that Mr Ker did receive service, he had no power to accept it; and it is said that all that followed in the case was a nullity, in consequence of the want of citation. The next thing that appears in process is, that defences were given in for the pupil and his tutor *ad litem*, and then it is said that there is no trace of the appointment of a tutor *ad litem*, and that it will not do to suppose that the evidence of their appointment had fallen aside, because, if such an appointment had been made, it would have been made by a regular and formal writing, either on some of the steps of process, or by a separate paper, which would have been a separate step of process; and therefore the inference is, that it is a gratuitous statement of the agent who lodged the defences that they were lodged on behalf of a tutor *ad litem*, there being no such tutor *ad litem*. And further, that even if there had been a tutor *ad litem*, that would not have made the process a competent process, if it was originally incompetent by reason of want of service. To that argument several answers were made. Among others, it was said that such a mode of service was competent; that Mr Ker was competent to accept it, because he was, and acted as, the known agent of the defender. It is further stated as an answer, that the defences lodged in name of the tutor *ad litem* were merely dilatory, complaining that the pursuer had not produced all his documents and calling upon him to produce them, that tutors-dative were thereafter appointed, and that defences having been lodged on the merits for the pupil and them, the litigation proceeded. There was a great deal of argument in the case. Memorials were ordered, and there were full pleadings, and then there was a reclaiming petition and answer, and a judgment on that. And it is said by the pursuer in this case that that interposition of tutors-dative was itself sufficient to support the whole proceedings; that any objections which may have existed to the previous proceedings were objections which might be competently waived by them, and that they did not object. Without going into the merits of the objections taken to the shape of the ser-

vice, or the efficacy or non-efficacy of Mr Ker's acceptance, I am of opinion that, looking to the stage at which the tutors-dative intervened, their interposition was sufficient, if the interests of the pupil appear to have been fairly taken care of, and that the other objections must be held to be waived. But another objection is that the tutors-dative did not do their duty, inasmuch as they did not plead what might have been a good defence, and that it was not in their power to compromise the interests of the pupil; that the succeeding heirs of entail are not bound, inasmuch as their interests were not fairly defended. Upon that question it appears to me that what we have to look to is whether the litigation was conducted fairly and *bona fide*. Looking at the arguments maintained on the part of the pupil heir, I think the proceedings were conducted fairly and *bona fide*. It was a *bona fide* defence, maintained with all the skill the bar at that time afforded. It may be that some arguments were not insisted in, and some arguments considered not to be wholly bad were not maintained. But it does not follow that all litigations with heirs of entail which have taken place in this Court, and where arguments which have since received effect in the House of Lords were not maintained, are bad judgments. I can't doubt that the plea of competent and omitted is pleadable against an heir of entail. Indeed it would be difficult to see what effect a judgment would have against heirs of entail as *res judicata*, unless it were on the same footing as *res judicata* against other parties. On these grounds I think the opinion of the Lord Ordinary well founded.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defender—H. G. & S. Dickson, W.S.

Wednesday, June 20.

FIRST DIVISION.

POLLOCK v. MEIKLE.

Res Judicata—*Declarator of Right of Property*. A plea of *res judicata* stated to an action of declarator of right to heritable property, in respect the question had been incidentally raised in a process of suspension betwixt the parties, in which a final judgment had been pronounced, *repelled*, the process of suspension having been raised to try merely a question of possession, and that of only a portion of the subjects embraced in the declarator.

This was an action in which the pursuer concluded for declarator "that a piece of ground or unbuilt area, consisting of 51½ superficial yards or thereby, bounded on the north by the division wall between said piece of ground and the property known as Bennet's Feu; on the east and south by the tenement of houses belonging to the defender, erected upon the portion of area which was sold and disposed by David Sutherland, builder in Edinburgh, to Robert Dickson, plumber there, as aforesaid; and on the west by a straight line extending from the west gable of the defender's said tenement northwards to the division wall aforesaid, and along which line the defender has recently erected a wooden rail or paling, and which piece of ground or unbuilt area, bounded as aforesaid, has been taken possession of by the defender, is part and portion of, and comprehended