the tutor had under the Entail Amendment Act the most ample discretion, and in the exercise of that discretion the most ample immunity. He was entitled to come to what decision he pleased, and no one was entitled to know what the elements of his decision were. Unless he acted corruptly, his actings could not be called in question. The Court would be stepping out of its province to offer advice.

Counsel for Tutor—A. R. Clark. Agents—Patrick, M'Ewen, & Carment, W.S.

Counsel for Petitioner—J. M. Duncan. Agent—William Sime, S.S.C.

SECOND DIVISION.

WILLIAMSON *v.* M'LACHLAN.

Diligence—Charge—Sheriff Court Extract—Appeal. *Held* (aff. Lord Mure)—(1) That a charge on a Sheriff Court decree need not contain the date of the extract. (2) That the provisions of the Act 16 and 17 Vict. cap. 80, with regard to the time of appeal, applies only to interlocutors dealt with by that Act, leaving the A. S. of 10th July 1839 operative with respect to others.

Opinions (dub. Lord Neaves) that there is no statutory authority requiring a Sheriff Court extract to contain its own date.

Held by Lord Mure, and acquiesced in, that an extract need not refer to an interlocutor of a Sheriff adhering to that of his Substitute, and containing no decerniture.

On 15th January 1866 the Sheriff-Substitute of Lanarkshire at Airdrie assoilzied the respondent from the conclusions of conjoined petitions brought against him by the suspender and another, and found the respondent entitled to expenses. Warrant was also granted to the Clerk of Court to pay over to him a sum which had been consigned in the processes. The suspender and the other petitioner appealed against the interlocutor. The appeal, however, was dismissed by the Sheriff, who adhered to the Sheriff-Substitute's interlocutor. The Sheriff's interlocutor is dated 6th April 1866. The respondent having uplifted the consigned money obtained his account of expenses taxed, and upon 17th April 1866 (the suspender and the other petitioner not having lodged objections to the taxation) the Sheriff-Substitute approved of the auditor's report, and decerned against the suspender and the other petitioner for £29, 12s. 7d. An extract of the said decree was obtained by the respondent upon 21st April 1866. That extract began as follows:—"At Airdrie, the 15th day of January and 17th day of April, both in 1866, sitting in judgment, William Logie, Esq., Substitute of Sir Archibald Alison, Bart., advocate, Sheriff of the county of Lanark, in the conjoined actions, before the Sheriff Court of the said county, at the instance of," &c. It contained a statement of the actions, and of the two interlocutors referred to, and ended as follows:—"Extracted by me, Sheriff-Clerk-Depute of Lanarkshire. Four words being deleted, and two marginal additions being made before subscription.—THOMAS CLARK, *Sh-Clk-Dep.* Written and collated by THOMAS CLARK, Junr., *Dep.* Signed 21st April 1866."

Upon this extract decree the suspender and the other petitioner were upon 25th April 1866 charged to make payment of the expenses decerned for. The charge given to the suspender began as follows:—I, Thomas Twycross, sheriff-officer, by virtue of an extract decree of absolvitor from the Sheriff Court books of Lanarkshire, and warrant therein, dated at Airdrie, the 15th day of January and 17th day of April 1886, pronounced in favour of Henry M'Lachlan, after designed, in the conjoined actions before the Sheriff Court of said county, at the instance of,"—and concluded thus:—"Do hereby, in Her Majesty's name and authority, and in name and authority of the Sheriff of Lanarkshire, lawfully charge you, the said Robert Williamson, to make payment of the sum of £29, 12s. 7d. sterling of expenses of process, attour the sum of 8s. sterling as the expense of extracting said decree in said action, and of recording the same, conform to said extract decree and warrant, and that to the said Henry M'Lachlan, defender, within fifteen days next after the date of this my charge, under the pain of poinding and imprisonment, with certification. This I do upon the 25th day of April 1866, before Thomas M'Lachlan, residing in Coatbridge, witness.—T. TWYCROSS, *Sheriff-Officer.*"

The suspender thereafter brought this note of suspension, to which the respondent was allowed to give in answers. The suspension was presented upon several grounds, which may be stated as follows:—"1st, That the extract decree was null, as it did not give the date of the judgment of the Sheriff-Depute as well as those of the Sheriff-Substitute upon which it proceeded; 2d, that the charge itself was null upon the same ground, and also, as not giving the date of the extract decree; and 3d, that the extract was not a legal warrant to charge, in respect it was issued before the time for appealing had expired."

The Lord Ordinary on the Bills (Mure) refused the suspension, and found the suspender liable in expenses.

His Lordship in a note to his interlocutor explained the grounds of his judgment. The first objection and part of the second was held to have been decided by the case of Thomson *v.* M'Donnell, July 6, 1841, 3 D. 1167. With regard to the remaining part of the second objection, his Lordship said he had always understood that an extract decree bears the date at which the decree of which it professes to be an extract was pronounced, and the Personal Diligence Act did not require that a charge should specify any other date. With regard to the third objection, his Lordship said—"At the discussion before the Lord Ordinary it did not seem to be disputed on the part of the complainer that, if the provisions of the Act of Sederunt of 10th July 1839 were still in operation, there was no ground for the objection founded on the allegation that the extract was issued before proper time had been allowed to appeal. For the 109th section of that Act of Sederunt, which regulates the matter of the taxation of accounts and objections to auditor's reports, while it makes it competent for either party, within forty-eight hours after taxation, to lodge a note of specific objections to the taxation, at the same time expressly provides that no appeal shall be competent against any interlocutor dealing with such taxation 'unless lodged within forty-eight hours of its date.' Now, in the present case no specific objections were made to the auditor's report, which is dated 13th April 1866; and the forty-eight hours having expired without any objections having been lodged, the interlocutor of the 17th April was pronounced, approving of the report, and decerning for the expenses; and no appeal having been taken within the time prescribed by the Act of Sederunt, viz., forty-eight hours from the date of the interlocutor, the decree was, on

the 21st of April, extracted in common form, and a charge given upon it on the 25th. In all these respects therefore the proceedings were in conformity with the regulations of the Act of Sederunt, and the usual practice.

"But it is maintained on the part of the complainer that the provisions of that Act of Sederunt, limiting the time for appealing against interlocutors dealing with the taxation of expenses, are no longer binding; because by section 16th of the 16 and 17 Vict. cap. 80, seven days are allowed to parties to appeal; and by the 51st section of the same Act the provisions of the Act of Sederunt of 1839 must be held to be repealed in order to let in and give effect to the provisions of the Sheriff Court Act in the matter of appeal.

"The Lord Ordinary, after repeated consideration of the provisions of sections 16, 19, and 51 of that Act relied on by the complainer, is unable so to read those sections. One object of that statute confessedly was to restrict rather than to extend the right of appeal; and as the Lord Ordinary reads section 16 of the Act it makes no new provision as to what interlocutors are appealable, or as to the time within which appeals must be lodged, but rather leaves these matters subject to the restrictions in section 19, to be regulated by the then existing rules. For while it makes new regulations as to the manner in which appeals are to be entered and dealt with, it takes the same period of time as the Act of Sederunt of July 1839, section 98, as that within which an appeal must in the ordinary case be taken, viz., seven days, and the expression in section 16 relied on by the complainer, viz., any judgment 'which, under this Act, may be brought under review of the Sheriff' is, it is thought, used with reference to the restrictive provisions of the 19th section, and cannot be held by implication to extend the period for appealing against interlocutors dealing with the taxation of accounts to seven days, and so to make it necessary to decide that the provisions of the Act of Sederunt of 1839, by which alone these matters have since that date been regulated, must be held as repealed, in order to prolong discussions as to the taxation of accounts."

Against this interlocutor the suspender reclaimed.

SCOTT and BRAND, for him, argued upon the latter part of the second and upon the third objection (the other grounds of suspension not being now insisted in). The Personal Diligence Act (1 and 2 Vict. cap. 114), secs. 9 and 10, and relative schedules, and A. S., 6th March 1829, render it imperative that an extract decree should bear its own date, and that the execution of a charge should also give that date. The charge should also contain the dates both of the decree and of the extract, the latter of which was its real and proper warrant. With regard to the third objection, the meaning of the Sheriff Court Act of 1853 (16 and 17 Vict. c. 80), sections 16, 17, and 19, was that seven days were to be allowed for appealing against all interlocutors against which that Act did not render it incompetent to appeal, and the A. S. of 10th July 1839 was repealed to this extent. The interlocutor in question could be appealed against for seven days.

MILLAR and MACLEAN, for the suspender, answered—The Personal Diligence Act was the authority for the form of extracts. It had been determined by the case of Wilson *v.* Wilson, 25th November 1848, 1 D. 160, that extracts of Sheriff Court decrees, &c., under sec. 9 of that Act did not require a date. The A. S. of 1829 had been virtually repealed by the A. S., January 1830, and the Personal Diligence Act was the final authority for their form. If so, neither the execution of charge, nor the charge itself, need bear the date of the extract, though as here it had one. There was, besides, no statutory provision for the form of a charge, and it was enough if it described the decree, and what was required of the person charged. With respect to the third objection, the A. S. of July 1839, sec. 109, was still operative. No provision was made under 16 and 17 Vict. cap. 80, for such interlocutors as the one in question, and the seven days allowed for appeal applied only to interlocutors dealt with by that Act. Section 51 repealed the A. S. of 1839 only in so far as it was necessary to give effect to the provisions of the Act of 1853, but to no other extent.

The Court adhered to the Lord Ordinary's interlocutor.

The LORD JUSTICE-CLERK—Three objections were taken to this diligence before the Lord Ordinary. One of these has, however, been abandoned, and there remain therefore only two to be disposed of. Upon the first of these, though it is one of some delicacy and requiring close attention, I am disposed to agree with the Lord Ordinary in thinking that it is not well founded. The charge is said to be defective and null in respect it does not give the date of the extract decree. Now, that assumes, of course, as the foundation of the objection, that the extract of a Sheriff Court decree must contain the date of the extract as distinct and separate from that upon which the decree was pronounced. Upon that we have had a good deal of investigation, the result of which is that I can't find any statutory authority requiring the date of the extract to be given in the case of a Sheriff Court decree. The Act of Parliament (the Personal Diligence Act) on which the suspender relies requires extracts of such decrees to be in the form of the schedule No. 6 appended to the Act. Now, that form concludes with the words "extracted, &c.," and is distinguishable from the form appropriated for extracts of Court of Session decrees (schedule No. 1) which concludes thus—"extracted (specify place and date)." So that, unless we are to take "&c." to signify that you are to go back for its meaning to schedule 1, it does not seem to be imperative that a Sheriff Court extract should contain the particulars required therein. Now, it seems to me that it would be a very dangerous and serious matter to hold that a practitioner must in such things be held bound to understand that "&c." refers to another schedule, the particulars of which he must import under pain of his diligence being declared null. Acts of Parliament must speak more distinctly before such effect can be attached to them. There seems, then, to be no statutory authority absolutely requiring the date of an extract of a Sheriff Court decree to be embodied in it. If that be so, it is in vain to say that it is fatal to the present charge that it does not contain a date which is not required in the extract. But further, even if the extract had required to contain its date, I should have hesitated to say that a charge proceeding upon it was null unless it specified that date in addition to the date of the decree. It might be more expedient that it should do so. But there is no statutory form for a charge, and if it be so expressed as to convey to the person charged positive information, both upon what he is required to do and the authority for requiring him, it complies with all that is necessary. Upon both of these grounds I agree with

the Lord Ordinary. With regard to the other objection a question of some nicety is involved, viz., how far the Sheriff Court Act of 1853 repeals or affects the Act of Sederunt of 1839. Upon this point the suspender has offered a very ingenious argument. I cannot, however, agree with the view he submitted. It appears to me that the fair meaning of section 16 of the Act of 1853 is that in every appeal contemplated as being taken under the Act, in the case of interlocutors mentioned and dealt with in the Act, seven days should be allowed. There are three classes of interlocutors mentioned and dealt with—(1) interlocutors upon the merits; (2) those not on the merits, but specially allowed to be appealed against under section 19; and (3) all interlocutors which can't be directly appealed against, but which may be brought up when an appeable interlocutor is obtained. The Act deals with no other interlocutors, and not with such as are pronounced after the merits of the case are disposed of, and therefore not with such as the one now in question. If that be so the 51st section of the Act does not affect the 109th section of the Act of Sederunt of 1839, for it only repeals that Act of Sederunt "in so far as may be necessary to give effect to the provisions" of the Act of 1853. It is not in the least necessary to give effect to the provisions of that Act to hold that section 109 of the A. S. of 1839 is repealed. They may quite well stand together. If that be so the objection stated is bad, for it is that the extract was found prematurely. The extract was not issued for three days, and was competent after forty-eight hours. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord COWAN—I quite agree with your Lordship's observations upon both of the objections argued to us. Upon the latter of these I had no difficulty whatever. With regard to the former, though more difficult, I am satisfied that one date, the date of the decree, is enough in a charge, there being no legislative enactment requiring a double date.

Lord BENHOLME—I am of the same opinion.

Lord NEAVES—I concur. With regard to the second objection pleaded I think it was the plain meaning of the Legislature in the Act of 1853 to leave the special case of the approval of an auditor's report and decerniture for the amount to the regulation of the A. S. of 1839. It is an interlocutor of a very special kind, with regard to which special provision is therein made. With respect to the first objection, I should not like to say with regard to *every* extract that it should not mention the date at which the extract was given. In certain cases time must be allowed to elapse before an extract can be issued, and as here questions may arise as to what that time is, and I should be sorry to say that it was not a thing intended to be kept up that extracts should bear a date. But that does not solve the present question. For here the extract contains both the dates of the decrees and that of the signing of the extract; and the question is, is it a nullity in the charge that it does not specify the latter? Now, there is no statutory legislation upon the subject, and the question just comes to be, has the officer sufficiently communicated to the person charged the thing to be done, and the authority upon which he proceeded? Time is given to fulfil the requirements of the charge, and the party can go and see whether everything is regular. Therefore, though it might have been better that the charge had given the date of the extract, it would be out of the question to hold that the charge is bad because it has not done so.

The Court therefore refused the reclaiming-note with additional expenses, and remitted to the Lord Ordinary to decern for the same.

Agent for Suspender—John Walls, S.S.C.
Agent for Charger—John Leishman, W.S.

Friday, July 20.

FIRST DIVISION.

RIDDELL *v.* CUNLIFFE'S TRUSTEES AND OTHERS.

Entail—Obligation—Provision to Younger Child. An entailed proprietor, in respect of a consent to disentail for the purpose of burdening with debt, granted a personal obligation to execute a new deed of entail. The new deed contained a power to burden the lands with provisions to younger children. In a question betwixt the marriage trustees of his daughter, to whom he had granted a provision in virtue of this power to the extent of £6000, and the next heir of entail—*held* that the provision was not challengeable on the ground that it was a breach of the personal obligation, the provision having been granted for an onerous cause to a third party and having been followed by infeftment, and there being no *mala fides*.

In the year 1784 Sir James Riddell, Baronet, executed a deed of entail of the lands of Ardnamurchan and Sunart. By this deed the heirs of entail in possession were empowered to make provisions for younger children, not exceeding £2000 to one, £3000 to two, and £4000 to three or more, which provisions should be secured only by way of infeftment in security, or by assignation to the rents of the said lands.

In the year 1797 the late Sir James Milles Riddell succeeded as heir of entail to the said lands, and continued to possess them as such down to the year 1850. In that year, in consequence of his affairs having become embarrassed, he entered into an arrangement with the three heirs of entail then entitled to succeed after him, with the view of effecting a disentail of the lands, and re-entailing them after burdening them with debts to the extent of £100,000.

The three next heirs of entail were his son, the pursuer Sir Thomas Milles Riddell, his brother Mr Campbell Drummond Riddell, and his nephew Mr Thomas Milles Stratford Riddell.

The agreement made by Sir James was embodied in a deed of obligation which he executed on 4th February 1850, and which, after narrating that his son and brother had been requested by him to give their consent to the proposed disentail, on the understanding that a new entail would be executed after the estates were burdened as aforesaid, thus proceeded:—

"Therefore, in the event of the said consents being given by the said Thomas Milles Riddell and Campbell Drummond Riddell, I do hereby bind and oblige myself, and my heirs, suc cessors, and representatives whomsoever, that I shall, immediately upon the said disentail being carried through, and upon the said estates being thus acquired by me in fee-simple and burdened as aforesaid, execute a deed of entail thereof in favour of myself and the heirs-male of my body, whom failing in favour of the said Campbell Drummond Riddell, Esq., and the heirs-male of his body;