Saturday, Dec. 22.

FIRST DIVISION.

REPORT OF ACCOUNTANT OF COURT IN RANNIE'S FACTORY.

Factor Loco Tutoris—New Appointment—Cautioner for former Factor. Held inexpedient, but not incompetent, to appoint the cautioner for a former factor to be the factor *loco tutoris* to a pupil.

R. W. Rannie was, on 2d November 1865, appointed to be factor *loco tutoris* to D. W. Rannie, and having found caution, he entered on the duties of his office. His cautioner was David Mackenzie, solicitor, Perth. R. W. Rannie died on 19th Feb. 1865, and David Mackenzie was, on 11th December 1866, appointed his successor, on the application of the nearest relatives on both sides of the pupil. In the petition for his appointment it had not been noticed that he had been cautioner for the former factor. Upon 12th November 1866 the Accountant of Court (under the Pupils' Protection Act, 12 and 13 Vict., cap. 51) reported the fact to the Junior Lord Ordinary for direction, or for such other action as his Lordship might deem proper, stating that it was the duty of the succeeding factor, in cases like the one in hand, to see that his predecessor's actings, intromissions, and management had been correct and satisfactory, and that it seemed proper that the person discharging the preceding factor's representatives and cautioner should have no beneficial interest in the discharge.

Upon 14th December 1866 the nearest relatives of the pupil on both sides, having been informed of the report by the Accountant, represented that they had the most perfect confidence in Mr Mackenzie, who, as brother-in-law of the pupil's father, had the fullest knowledge of his affairs, and who, in respect of the former factor's (his father-in-law) inability, had actually managed the estate for him, and had so acquired a complete knowledge of it. The accounts of the late factor had been examined by the Accountant of Court and found correct, and the representatives of the late factor did not ask for a discharge (and were willing to give in a minute to that effect) till the pupil came of age, upon receiving a receipt for the amount brought out by the Accountant upon his accounts. These last mentioned facts were stated in answers for Mr Mackenzie, which he was allowed to give in, in reply to the Accountant's report.

After considering the report and answers and hearing parties, the Lord Ordinary (Mure) recalled Mackenzie's appointment, and appointed another factor.

Mackenzie reclaimed, and the nearest relatives aforesaid conjoined themselves with him in the reclaiming note, in which was craved a recal of the Lord Ordinary's interlocutor, and that it should be found that no sufficient cause for the removal of Mackenzie had been alleged.

It was conceded that the new factor appointed by the Lord Ordinary was qualified for the office.

The Court unanimously held that there was no ground for disturbing the interlocutor of the Lord Ordinary; that, while it was competent, it was, in the general case, inexpedient that a cautioner for a former factor should be appointed factor; that, in the present case, the new factor was equally qualified to discharge the duties of the office; and that, although the objection resolved very much into a technicality in respect of the cautioner's qualifications, it was on the whole better to adhere to the general rule.

Counsel for the Accountant—Mr H. J. Moncreiff.

Counsel for Mackenzie—Mr Gifford. Agents—Thomson & Dickson, W.S.

TASKER *v.* SHAWS WATER COMPANY.

Obligation—Implement—Damages—Parliamentary Company — Director. A company having agreed to sell heritable property to one of its directors on a representation by him that it belonged to the company, and the company having afterwards ascertained that it did not belong to it, and declined to grant a conveyance—Held (diss. Lord Ardmillan), that in the circumstances the pursuer was not entitled to demand implement or damages. Opinion, per Lord Deas, that the transaction was illegal. Opinion, per Lord Ardmillan, that it was not.

This was an action of declarator, adjudication, and damages, at the instance of James Tasker, merchant, Greenock, against the Shaws Water Company, brought on the ground that the company had refused to grant him a conveyance of a certain piece of land on the west side of Regent Street, Greenock, which, he says, the company agreed to sell to him by a minute of sale. There was a proposal by him to buy and an agreement by the defenders to sell. But when the deed came to be granted, the company had begun to entertain doubts as to their power to grant an effectual disposition; to doubt, in fact, whether the ground in question really belonged to it. In consequence of these doubts, certain alterations were made on the proposed disposition, to the effect that the company could not hold themselves out as heritable proprietors, and could not grant absolute warrandice, but only a conveyance in such terms as were consistent with the right they might be found to possess. Tasker struck out these alterations on the draft conveyance; and it was when matters were in this position that the present action was raised. It concluded that it should be found that the company were bound to grant a disposition in the usual form, or that, if they failed to do so, they should be found liable in damages, and that adjudication should be granted if necessary. The company defended on the ground that they were not satisfied that they were proprietors, that in fact they were not, the piece of ground really belonging to Sir Michael Shaw Stewart. They also said that Tasker was a partner, indeed vice-chairman of the company, at the time of the transaction, which was therefore altogether illegal. They further maintained that they had been led into the transaction by his misrepresentation, that he had had long experience in the affairs of the company, and that when some members were dubious as to their property in this piece of ground, and put the question to Tasker, he had assured them that it belonged to the company, and so led them into the difficulty.

The Lord Ordinary (Jerviswoode), on the motion of the parties, and before answer, allowed them a proof, which was led; and thereafter he pronounced the following interlocutor:—

"*Edinburgh, 20th March* 1866.—The Lord Ordinary having heard counsel and made avizandum, and of new considered the record, with the proof adduced, productions, and whole process,

1*st*, Sustains the objection taken on page 36, A B of the print, No. 94 of process, consideration of which was reserved under the interlocutor of 28th February last: 2*d*, Finds that, at the time when the resolution of the Shaws Water Joint Stock Company to grant to the pursuer, under an application by him to that effect, a conveyance or feu-disposition of the subjects to which the conclusions of the summons have relation, was adopted at the meeting of the committee of management of the said company held on the 13th March 1863, the pursuer was a director, and was deputy chairman of the directors of the said company: 3*d*, That, on the said occasion, the pursuer stated that the said subjects were the property of the company, and that thereafter the resolution was carried at the meeting to grant a conveyance of the subjects in question to the pursuer: 4*th*, Finds it not proved as matter of fact that the said subjects are the property of the company, and finds that the same are claimed on the part of Sir Michael Shaw Stewart, as belonging in property to him: 5*th*, Finds that the pursuer insists in the assertion of a right to obtain from the defenders a feu-disposition or other deed of conveyance of the subjects, containing *inter alia* a clause of absolute warrandice, and other clauses of the character set forth in the draft feu-contract, No. 44 of process, and that the defenders decline to grant any deed of conveyance unless limited to the extent of such right in, or power of disposition of, the subjects as they may possess: Finds, as matter of law, and with reference to the facts above found in regard to the relation in which the pursuer stood to the company, and the part which he took in promoting the resolution of the company to convey the subjects to himself, that he is barred from insisting in the conclusions of the present summons, and therefore sustains the defences, dismisses the action, and decerns: Finds the defenders entitled to their expenses of process, of which allows an account to be lodged, and remits the same to the auditor to tax and to report. "CHARLES BAILLIE."

"*Note.*—The agreement to which the company came to sell the subjects, to which the action relates, to the pursuer, was carried at the meetings where, as appears from the minutes, the pursuer was not only present, but at which he took an active part; and having thus aided in promoting his own object, he now insists on the company, as such, granting absolute warrandice of the right, in the face of an intimation on the part of Sir M. Stewart that he claims the ground in question as belonging to him, and not to the company. On the whole, the Lord Ordinary is of opinion that the pursuer is not in a position to carry his case to so high a point as he thus proposes to do; and that, having reference to the delicate position in which he stood in relation to the company, he cannot well demand from the company a conveyance of the property in question, excepting in such terms as may secure to him such right, if any, as the company truly holds; but without recourse, under a claim of warrandice, in the event of the ascertainment of the fact that he was himself in error in asserting the right of the company to convey.

"C. B."

The pursuer reclaimed.

CLARK and LEE were heard for the pursuer.

YOUNG and N. C. CAMPBELL for the defenders.

At advising,

LORD PRESIDENT—This is an action of declarator and damages at the instance of Mr Tasker against the Shaws Water Company, and the ground of the action is that they refused to grant to him a conveyance of a certain piece of land which he says they agreed to sell to him by a minute. It would appear that there had been a proposal by Mr Tasker to purchase from the company, and that the company had agreed to sell to Mr Tasker, the piece of land which is now in question; but it appears that by the time the deed came to be granted, the company had doubts of their power to give an effectual conveyance to Mr Tasker. They had doubts as to whether the property really belonged to them, and certain alterations were made upon the proposed conveyance—alterations to the effect that the company did not hold themselves out to be the heritable proprietors of the ground, and to the effect that they would not give absolute warrandice to Mr Tasker, but would only give him a conveyance in accordance with such right as they possessed. We have the draft of the conveyance here with the alterations made by the agent for the company upon it. Mr Tasker disapproved of these alterations, and struck them out of the revised draft; and in that position of matters he has brought the present action concluding against the company, that they are bound and obliged to grant to him a conveyance or feu-disposition of the subjects in question, &c.

It is plain that this action is brought in consequence of the difference that arose as to the terms of the deed to be granted. Mr Tasker repudiates the alterations that are proposed by the company, and he brings this action for the purpose of having a deed without those alterations, but in the precise terms in which he had drafted it. The Shaws Water Company defend themselves against that demand, and say that they are not satisfied that they are the proprietors of the ground—that, on the contrary, they believe they are not the proprietors of the ground, and that from the investigations they have made they are of opinion that the ground is not any part of the subjects which were conveyed to them by Sir Michael Stewart by the only deed which gives them right to ground in that locality. Mr Tasker says that he is of a different opinion—that he thinks the ground does belong to them; and he says, further, that that is no reason for withholding from him a conveyance, or, at all events, not a reason for withholding absolute warrandice, that they have sold to him property to which they have no clear title, or perhaps no title at all, and that he has sustained damage by not getting a conveyance. The reply they make to that is, that Mr Tasker was the vice-chairman of the company, and that, whilst some of the members of the company were consulting as to whether they had a right to dispose of this property, they put the question to Mr Tasker, who had had large experience in the company—larger, perhaps, than any of them, or as large, at any rate, because he had been a director from its commencement—they asked him whether that property really belonged to them, and they say that he assured them that it did belong to them. They say—"We were led to sell it upon the representation of Mr Tasker to that effect, and we are not responsible for any mishap that has befallen him by becoming involved in this; for it is he that led us into the difficulty, and not we that led him into the difficulty." They further say that the transaction is altogether improper and incompetent, inasmuch as Mr Tasker was a director of the company, and that he ought not to have been a purchaser of part of the property of the company, even assuming it to be their property. It appears to me that one of the

leading questions—indeed, the leading question of the case, and the first matter for inquiry, taking it step by step—is, whether this property does or does not appear, from the titles before us, to be part of the subjects which were conveyed by Sir Michael Stewart in 1825 to the Shaws Water Company for particular purposes, and which they were warranted in conveying to Mr Tasker. The conveyance by Sir Michael Stewart describes the property conveyed, not by the boundaries of the particular subject, but it is generally, that it lies along a certain course of water, and with certain limitations, and while it conveys property there to an extent not exceeding seventy acres, to be disposed of in the way there pointed out, it contains a clause to the effect that if any part of the property is not used in the way that is described with reference to the particular lots into which it is to be given out, every portion of it which is not given out in the way the deed prescribes is to revert to Sir Michael. That conveyance refers to a plan, and that plan is instructive in this case. At the same time, there is a certain amount of confusion introduced into the case by the enumeration on the plan being in a different order from what it is in the conveyance. The conveyance describes the plan as being numbered from right to left, whereas the numbers on the plan go from left to right, and in that way there is a necessity for scrutinising the matter a little, in order to see what is the real meaning, but I think that when we do scrutinise it, we can have no difficulty in arriving at the real meaning. I have no doubt that the plan produced is the plan referred to, for it is signed as relative to the disposition; and the Shaws Water Company cannot dispute it, I think, because it is a plan which they hold to be part of their title. Now, according to that title, and the description in the conveyance. it appears that Sir Michael bound himself, when he was required, to grant to the company the feu-right or feu-rights of the ground to be occupied by the two leads or aqueducts mentioned in a certain agreement, "and of as much ground upon or along the sides or banks of the said leads as should not in whole exceed seventy acres, to be selected and marked off in lots surrounding each millstead by the engineer appointed by the said company, in such places along the same as should be most convenient for millsteads, and of as much ground surrounding or adjoining each millstead for manager's house or garden, or other uses of the said mill, not exceeding in whole for any one millstead one acre and a half or two acres." Then it says there has been a plan prepared, and that "by the said plan the water is conducted from the reservoir in one lead or aqueduct until it descends about 150 feet, and on this lead there are five millsteads, marked Nos. 1, 2, 3, 4, and 5, with lots of ground attached to each; that the said lead or aqueduct then divides into two branches, one leading eastward until it falls into the Dellingburn, and the other leading westward until it falls into the Westburn." Now, it is quite plain that these five numbers, 1, 2, 3, 4, and 5, being at a place where the lead is of the altitude here described, and at a place where the lead divides into two branches, one leading eastward until it falls into the Dellingburn, and the other leading westward until it falls into the Westburn, it is quite plain that the five lots there referred to are not these marked in the plan, 1, 2, 3, 4, and 5, but are those that would have been so marked if the enumeration had commenced at the opposite end, and therefore they come to be those marked on the plan 19, 18, 17, 16, and 15. Then it goes on to state that on the east branch there are thirteen millsteads with lots of ground attached to each, marked Nos. 6 to 18 inclusive—that is the branch that is now in question; and on the west branch there are twelve millsteads marked Nos. 19 to 30, that is there are thirteen in addition to the five that are mentioned before, upon the east branch. Then it describes the purposes for which this was done. It sells "all and whole the lead or aqueduct leading from the reservoir formed by the said company on the Whinhill above the town of Greenock, and which lead divides into branches as before mentioned, one falling into the Dellingburn, and the other into the Westburn, and also the millsteads marked off along the banks of the said burn, and branches thereof, being thirty in number, of which the first five are situated on that part of the lead nearest the reservoir before it divides into two branches, and have each double water power of the remaining numbers, and the next thirteen, being marked Nos. 6 and 18 inclusive, are situated on the east branch of the said lead or aqueduct which falls into the Dellingburn; and the remaining twelve millsteads, marked Nos. 19 and 30 inclusive, are situated on the west branch of the said lead which falls into the Westburn; and also a plot of ground adjoining to and surrounding each of the said first five millsteads, not exceeding four acres to each, in regard these five millsteads have double water power; and a plot of ground surrounding each of the remaining twenty-five millsteads of the extent specified in the said plan, but which shall not for any one millstead exceed two acres." And they are authorised to sub-feu, sell, or dispose of the ground in thirty lots, each lot to contain one millstead marked and numbered on the plan, with a space of ground surrounding the same, not exceeding four acres for each of the first five millsteads, and not exceeding two acres for each of the remaining twenty-five millsteads; and then it says that the company or their sub-feuars shall only be entitled, on each of the thirty millsteads, to erect certain buildings.

It appears to me from that conveyance, and looking to this plan, that there were just thirty millsteads which were to be the subject of the proceedings that were to take place, and each of these millsteads was to have a plot of ground attached to it of limited dimensions, not exceeding a certain amount. It might be less, but if it was less, the surplus ground was to revert to Sir Michael Stewart. Now, Mr Tasker had at that time a millstead which he had acquired from Sir Michael Stewart previous to this disposition by Sir Michael to the company; and it was not, and could not be, in that view, any one of the thirty millsteads that are mentioned on this plan. It was clearly not any one of them. It was, therefore, not any part of the scheme upon which this conveyance was constructed, when this transaction took place, that any piece of ground comprehended in that conveyance should be given to that millstead which belonged to Mr Tasker, because the contemplation was that the ground should be given to thirty millsteads only, which thirty millsteads were exclusive of that one. And it was to be to thirty millsteads, to be acquired from the company out of the ground so feued—the position of the millsteads to be out of the ground so feued, and not with reference to millsteads that had been erected before. Not that they were not entitled to supply water for various purposes; that is a different matter altogether; but that, with regard

to the ground to be given out, it was to be given out to them in the different lots pointed out on this plan for the use of the thirty millsteads which are there pointed out and mentioned in the conveyance, and none other. Now, here I think that a great deal of difficulty arises in holding that the company have any power to convey to Mr Tasker any of that ground. Further, according to the description of the ground on the plan as marked here and the lots as marked here, I cannot discover that this piece of ground which is now in question, and which lies almost entirely upon the north side of the Dellingburn, at the place where it is, and lies to the west of Regent Street, was any part of what was intended to be laid out in lots; and even if it had been a part, I think there was such a limitation as to the reversion of the ground to Sir Michael as would have precluded it from being given away for another purpose. Now, applying my mind as I best can to this conveyance and to this plan, it does not appear to me that the company had a control over this piece of ground, or a title such as would have enabled them to give it out in feu to Mr Tasker for the use of his mill, or for any mill other than one of the thirty, if he had acquired one of the thirty; and even with regard to that, I doubt whether it is within the conveyance. In that state of matters I think it is out of the question to require that the company shall give a conveyance of this land to Mr Tasker, holding themselves out as the proprietors with absolute warrandice. And that is the purpose for which this action is brought, because that was the whole question of contention between the parties when the case came into Court. But the Company say they will not concede anything, and they demand *absolvitor* from this action. They further say, with regard to the conclusion for damages, that they cannot be brought within that conclusion, inasmuch as, in the circumstances, they were not to blame for what took place if Mr Tasker has suffered by reason of not getting this conveyance. They say he has not sustained any absolute loss or damage, but only that he has been prevented from making a profit.

Lord DEAS—He built a wall.

LORD PRESIDENT—Yes, he built a wall; but it appears to me that the answer of the company on that subject is sufficient, for they say, in the first place, that if this ground was theirs and they could sell it, it would have been irregular in Mr Tasker, and illegal, to have entered into a transaction whereby they were to sell their property to one of their own directors. I cannot say that I am prepared exactly to go into that view. I do not want to express the opinion that one of the directors could not have become the feuar of one of these millsteads. I do not go into that; but I think the other part of their answer is sufficient, namely, that if they have agreed to sell that which they have no power now to give, Mr Tasker cannot complain of that, because, he being the vice-chairman and their adviser, advised them that they had the power so to sell it to him. I think that is a sufficient answer to any demand for damages on his part. On these grounds, I am disposed to concur in the view of the Lord Ordinary.

Lord CURRIEHILL—I concur with the conclusion which your Lordship has come to, and in the grounds on which you have arrived at that conclusion; and without repeating what your Lordship has stated, I shall add only a few grounds which appear to me to confirm very strongly the views of your Lordship. The action is at the instance of Mr Tasker, concluding for implement of a contract to sell, which, he says, is contained in a minute of this company, dated 13th March 1863, by granting such a conveyance as your Lordship has referred to, or for damages. The defences stated against this action are—in the first place, that the ground to which Mr Tasker demands a conveyance does not belong to this company; and, secondly, that Mr Tasker is precluded from asking them to convey property which belongs to a different party, in consequence of his position and conduct at the time that the alleged contract was entered into. We have, therefore, two matters to inquire into—one is, whether or not the piece of ground which forms the subject of this alleged contract of sale is at present the property of the Shaws Water Company; and the other is, if it be not so, whether Mr Tasker can notwithstanding insist upon the company granting such a conveyance. Now, with reference to the first of these questions—the question, namely, of whether this piece of ground is at present part of the company's property, we must look at the company's title—the disposition which the company received from Sir Michael Stewart in the year 1827. But before looking at the terms of the disposition there, it is of great importance to identify the subject to which a conveyance is demanded. I am more impressed with the importance of having that clearly in view, from the fact that until the debate was more than half concluded, I could not ascertain what the subject truly was. That was cleared up in the course of the debate; and I put the question to the counsel for the parties whether my notion of the boundary was a correct one, and I was informed that it was. Now, then, let us see what the subject of it is. The conclusion is to have a conveyance of the subject purchased by the minute of 13th March 1863. That minute refers for the description of the subject, back to the minute of 20th February 1863. Now, what is the description here? The minute is in these terms—"The vice-chairman laid on the table a memorandum requesting to have conveyed to him as an adjunct of fall No. 1"—that is, the description in what is called the contract of sale. Now, what are the subjects which are there described? It would have been very difficult indeed to have identified these subjects, if we had not had the plan No. 16 of process, upon which the subject is coloured yellow; but with reference to that plan, there is no difficulty in identifying it. Now what is it? It is described as "the aqueduct and its sides," between two points. On looking at this plan, I find that the aqueduct from Mr Tasker's reservoir more than half-way downwards is not an artificial aqueduct at all, but it is the Dellingburn. It is the Dellingburn from that point until it arrives at the place where the tail-race of the artificial aqueduct runs into it; but we have no artificial aqueduct at all until we arrive there.

Then there is a bit of an aqueduct to the left hand of that—to the north or north-east. All that part of it is above this point, where the artificial aqueduct runs into the Dellingburn. Then what are called sides are the banks of the Dellingburn, and not of any artificial aqueduct, up to the first point I have mentioned; and then beyond that, if the word bank is applied to it at all, it applies only to that part leading to Mr Tasker's sugar-house. The whole of that is on the left side of the Dellingburn, except a small portion at the right hand end, where there is a little place coloured yellow, and which marches with a feu which was granted to

M'Kenzie & Walker in the opposite direction. Now these are the subjects of which a conveyance is demanded, and these are the subjects as to which we are to inquire whether the property of them belongs to the Shaws Water Company, and that question, as I have already said, depends upon the title of the Water Company, which title was a feu-disposition granted by Sir Michael Shaw Stewart on 5th July 1827, and which will be found at page 42.

Therefore, we have to read the dispositive clause of that charter, and ascertain whether or not in that dispositive clause the piece of ground which I have so identified is contained. Now, what is conveyed by that dispositive clause? It consists of three descriptions of property; the first is, all and whole the lead or aqueduct. Now, that is the artificial lead or aqueduct, and what are its dimensions? It is "the lead or aqueduct leading from the reservoir formed by the said company on the Whinhill, above the town of Greenock, and which lead divides into branches as before mentioned." We see very clearly from the plan itself where this commences—at the Whinhill above the town of Greenock—and we have it traced all the way down to the other termination which is there described; it divides into two branches, "one falling into the Dellingburn." Well, we have it falling into the Dellingburn marked on the plan, at a point to the south-west of Regent Street; and in the plan of the subjects which the pursuer says he purchased we have the tail-race running into the Dellingburn very distinctly marked, but no part of that aqueduct between these two termini is in the subjects purchased according to this plan. Even that tail-race is not coloured yellow, and there is no part of the subject in this contract included in the first subject of the conveyance—namely, the aqueduct leading from the reservoir on the Whinhill, which aqueduct divides into two branches, one falling into the Dellingburn. The next subject is described as, "and also the millsteads marked off along the banks of the said burn, and branches thereof, being thirty in number"—[Reads at p. 42 G]. Now, the feuing plan is quite distinct as to this, although the numbers are reversed. Beginning with the one at the Whinhill, and counting downwards, you have 5 on the main branch, and the 13, counting downwards, end at No. 2, Mackenzie & Walker's, so that all the millsteads are above the tail-race marked here as falling into the Dellingburn, and every one of them is on the opposite side of the Dellingburn, and on the line of the aqueduct. There is another millstead marked No. 1 on this plan, but it is not one of the 13. It is a millstead which belonged to Tasker, Young, & Co., and which they had acquired before this feu-contract was granted. Sir Michael Stewart could not have conveyed that millstead then, because he had been divested of it before, and accordingly the description of the millsteads is such as to exclude it. Therefore, this piece of ground is not included in the millsteads. The remaining subject is described as "a plot of ground adjoining to and surrounding each of the said first five millsteads not exceeding four acres to each, and a plot of ground surrounding each of the remaining twenty-five millsteads," &c. Now, you have thirty millsteads, and you have thirty plots of ground, but these plots of ground are exclusively those marked as surrounding the thirty millsteads, and as none of the millsteads come down to the ground in dispute, of course none of the plots of ground do so either. As marked upon the plan, none of them are down to this piece of ground; and, as described in the title-deed, none of them are there, and none of them could be there. They are limited to what is there marked, and even what is there marked, though it is the maximum of what could be conveyed, is not the maximum, because if in feuing out the grounds the company should not give the full extent of what is there marked, what is not given away should fall back to the disponer, Sir Michael Stewart. I therefore think that it is not left in the slightest doubt that the subject which is claimed as the subject of the contract is not included in the conveyance by Sir Michael Stewart to the Water Company in 1827. That conveyance conveys no part of the Dellingburn—of the natural flow of the water. I suppose it is a small stream. It certainly conveys no part of the Dellingburn, and particularly no part of the Dellingburn above the tail-race by which the artificial aqueduct is emptied into that burn; and it does not convey any part of the Dellingburn below the place where the aqueduct runs into it, and it conveys no lead beyond that. The lead which is the subject of conveyance ends at the Dellingburn, for it runs into it, and although there is a piece of artificial lead of about twenty-three yards which terminates there, it is no part of that lead which is described as conveyed to the Shaws Water Company. Now, that being the case, I think the company must succeed in their first defence that they are not the owners of this piece of ground. The next question is, Are they bound to convey ground which belongs not to themselves, but to some other party, to Mr Tasker, in consequence of this contract? I am of opinion that they are not. I quite concur with your Lordship in holding that if one of these millsteads and a piece of surrounding ground had been the subject of this contract, the company would not only have been able but bound to convey it; but the question is, Are they bound to convey to him what is not theirs, but belongs to another party altogether? They might have been liable in damages, though, in the next place, I think the Lord Ordinary is right in finding that there is a personal objection to Mr Tasker demanding such damages. He contracted with himself, and not only did he contract with himself as one of the directors, but when he asked them to enter into this contract, there was a direct appeal made to him by the chairman for information—"Mr Tasker, Does this ground belong to the Company?" Mr Tasker took it upon him to answer that question, and he said it did belong to the company. That is proved by the most satisfactory evidence—namely, by Mr Tasker's own testimony. Very candidly he admits that the question was put to him by the chairman, and that that was the answer which he gave. It is confirmed by the testimony of the chairman, and by the testimony of Mr Macdougall. Mr Tasker was therefore not misled by the company; if there was any misleading at all, he was the party who misled the directors of the company at the time. I therefore hold that he is in the position of being personally barred from insisting upon their doing what they have no power to do—namely, to convey property which belongs to another man. A great deal of this argument was founded upon a disposition which Mr Tasker obtained from this company in 1832. It was said that somehow or other this entitled Mr Tasker to insist on this disposition in 1863 being implemented. I am afraid I failed to understand that argument, for I cannot comprehend

how it can be made to apply to this question. It cannot be held that by their granting that deed in 1832, the company made themselves the owners of this piece of ground, which did not formerly belong to them. I cannot conceive how that proposal permits of being stated. What was done by that disposition in 1832 was simply this—The company thereby conveyed what is called a water privilege to Mr Tasker, but that was a thing which they were entitled to do. They were entitled to sell their water to all and sundry; but their selling water, which they had the power of doing under the Act of Parliament, can have no effect in this question, whether or not they were owners of this piece of ground under the disposition dated five years before. It also appears that in the disposition they conveyed what is called an aqueduct. We are not told what that means, but certainly it was not part of the aqueduct which they had purchased from Sir Michael Shaw Stewart five years before, because I have stated that that aqueduct terminated at the place where the water runs into the Dellingburn; and if the aqueduct which they purchased then had included any part of the subjects now in dispute, I would like to know what was the use of the purchase in 1863? The subject which was purchased then by Mr Tasker was not a subject to which he had acquired right twenty or thirty years before. He cannot maintain that, and I do not think he does maintain it. The place where this mill is situated is at a distance of several hundred yards from the subjects in dispute, as stated by Sir Michael Shaw Stewart himself, and by Mr Macdougall, and we have intervening between them Chapel Street, Regent Street, and Dellingburn Square; so that what bearing the granting of that disposition in 1827 can have on the question whether or not the ground in dispute has been acquired by the Shaws Water Company, when it is not in the disposition by which they acquired it, I cannot see. I think the case is therefore quite clear upon the title-deeds themselves. As corroborating that, it is worth while to observe that the company itself, even in the year 1832, recognises the subjects in dispute at the right hand end of it, where it marches with M'Kenzie & Walker's feu; they recognise that as being still the property of Sir Michael Shaw Stewart, for in the disposition to Mackenzie & Walker in that year you have the description which this company itself then gave of the subjects so conveyed. And it is there described as being bounded by the property of Sir Michael Shaw Stewart. That is their own description of it, whereas, according to Mr Tasker's argument, it was then bounded by what belonged to themselves. And there is no dispute about the meaning of that, for we have Mr Macdougall, who was thoroughly acquainted with the details and the situation of the property, referring in his evidence to that description, and with reference to the plan describing the march there as being part of the subjects. But I will not pursue the matter further. I have made these remarks as confirmatory of the views which your Lordship has stated, and as making it to my mind not doubtful, but perfectly certain that the subjects in dispute are not included in that title of the Shaws Water Company; and, not belonging to them, the pursuer is not entitled to insist that they shall convey them to him.

Lord DEAS—I arrive at the same conclusion as your Lordships. I think it right to say, at the outset, that I don't see the slightest reason for attributing any bad faith to Mr Tasker in this transaction. It would appear that he had been allowed to have possession of this ground ever since he got his waterfall—in 1828, I think. It seems to be what we call in Scotland a sort of waif ground, and was not considered of much value. In order to arrive at the conclusion which we have arrived at about it, it was necessary to know a great many things which it took a great deal of trouble correctly to ascertain, and these were very much matters of law with which Mr Tasker could not reasonably be supposed to have been acquainted. We had a very full argument, and, to my mind, it had this interest along with other grounds of interest, that, before I knew all about it, as I know now, my mind fluctuated on several occasions as the argument went on. I allude to that only as explanatory of the opinion which I hold, that there is no room for supposing that there was any bad faith or any improper views here on the part of Mr Tasker, and the opinion which I have formed in the end does not rest upon anything of that kind, but rests upon grounds of law; and the main ground of law upon which my opinion rests, is, that Mr Tasker is not in a position in which he could contract with this company for this purchase. I mean that, as one of the committee of management, otherwise called directors—a small body of only seven in number, with power to act for the company—he was in a position in which he could not, according to law, be both seller and purchaser, unless he could bring himself into some circumstances which, under the statute, could be called exceptional, so as to get him out of that general rule of law. In the ordinary case, I think, a party holding the official position of Mr Tasker could not be both seller and buyer, more particularly of the heritable estate of that company, supposing this ground had belonged to them. I don't mean to say, any more than your Lordships do, that there might not be many things in respect of which any member of that committee was entitled to contract with the company, looking to the terms and objects of this Act of Parliament. I think the Act of Parliament took the matter which I am now speaking of, to a certain extent, out of the ordinary rules of law. I think it was not contemplated by this Act of Parliament that the partners of the company, and even the members of the committee of management, were not to be entitled to contract with the company in regard to these advantages which the Act had it mainly in view to confer. For instance, I have no doubt that under the 48th and 49th sections of this statute a member of the committee of management might contract with the company, or with the majority of the committee of management, it may be, for the supply of water to his house or to his mill. Neither is it necessary to have any doubt that he might contract with the company, under section 47 of this Act, for a site or situation for the erection of a mill or manufactory, or other work or building for the construction of machinery to be driven by water, or other works there mentioned requiring a supply of water, in which case the company were either to sell absolutely or to feu such sites or situations as might be agreed upon, and to grant conveyances or feu-rights accordingly in favour of that party; but these feu-rights or conveyances were, according to the same section, to "describe the extent and boundaries of the ground thereby conveyed, and the uses to which the same is to be applied." I don't call in question that Mr Tasker, though a member of the committee of management,

might contract with the company for a purchase or a feu of ground under that section. I am disposed to think that the object of the Act was to provide all the accommodations which are mentioned here, and that it was not contemplated to exclude members of the committee of management from these advantages more than other parties. Further, I am not disposed to doubt that Mr Tasker might contract with the company for a sub-feu of ground, in terms of Sir M. S. Stewart's feu-disposition, notwithstanding his position as a member of the committee of management—I mean if he had the qualification which under that feu-disposition was necessary to entitle the company to feu the ground to him. The Act of Parliament obviously contemplated a feu-right to be obtained from Sir M. S. Stewart; I suppose it could be got nowhere else; it may therefore be fairly held that whatever might be done under that feu-disposition, fell within the principle of being done under the 47th section of the Act of Parliament. The one was substantially a following out of the other, and it may be fairly held that as to anything authorised by the Act of Parliament or the feu-disposition, Mr Tasker, though a member of the committee of management, might lawfully contract with the company. Now, assuming that that took the matter out of the common law, the question remains, whether Mr Tasker had the particular qualification that put him into that position so as to enable him to contract with the company, when otherwise he could not have done so. I don't rest my opinion at all upon the footing that this ground belongs to Sir M. S. Stewart, and does not belong to the company. If it had been necessary to decide that question, I should have held that it was right and proper to have had Sir M. S. Stewart here as a party to the action. He is not here. We cannot therefore pronounce any effectual decision about that, and, moreover, I have no opinion upon what I may call the matter of fact. I mean that I have no opinion as to whether this ground belongs to the company or to Sir M. S. Stewart. I think that may be extremely doubtful, because the ground conveyed by Sir M. S. Stewart was not to exceed in whole seventeen acres; and there are restrictions laid on the way in which they were to sub-feu it, though how far these were followed out we don't know. It would rather appear that they were not followed strictly, and it might be a question between Sir M. S. Stewart and the company if this ground was comprehended in that disposition, and if they had given to a party to whom they were entitled to give it, whether he was or was not entitled to claim it. There is a provision in the feu-contract that the ground, in so far as they don't give it out, is to revert back to Sir Michael. That might be a plea on his part as regards the bit of ground, but I don't think we could very safely assume here that in either view of it it is the same. In point of situation, it is very like a piece of ground that might be contemplated to be given out in that way. All I say is, that that is a darker subject than the subject we have to decide. But what I go upon is that, supposing that to have been the property of the company, Mr Tasker is not in a position to be the seller and the buyer of part of that ground. If the company had sold to Mr Tasker ground that was not theirs, but for the disqualification I am speaking of, they must have made the sale effectual to Mr Tasker, or paid damages. In that view of it, it could be no answer on the part of the seller to say, "Very true, I sold you the subjects, but they are not mine;" the seller must either convey or pay damages, and that would have been the position of this company, whether the ground was theirs or not, if it had not been for the single thing on which I rest my opinion, that Mr Tasker was not in a situation validly to contract with them. Now it may perhaps be fairly enough held that he could contract with them for a purchase either under the Act of Parliament, or as it was proposed to be carried out under the feu-disposition. But this is not a transaction that can be brought within the 47th section of the Act of Parliament. This is not a feu, or a purchase of a site or situation coming under that clause. It is not said that any work to be driven by water was to be erected upon it, and the minute of agreement does not specify the uses to which the same is to be applied, nor did either party propose to specify these uses in the conveyance which was to be granted. The mere circumstance that he had previously the waterfall or a grant of water power will plainly not bring this within the category of transactions under the 47th or any other section of the statute, so far as I can see. It still leaves the question whether, if you are to read the feu-disposition by Sir Michael in connection with the Act of Parliament as explanatory of the objects of it, which I don't call in question, Mr Tasker has the qualification which was necessary under that feu-disposition to entitle him to get it, or to entitle the company to give him a portion of the ground contained in that feu-disposition. Now, I think it very clear that he had not, because the feu-disposition is quite express as regards that ground that they are to have power to sub-feu the ground to the extent of the seventeen acres in thirty lots, each lot to consist of one of the thirty millsteads and of the ground round the same; and they are not to feu the ground around the millsteads in thirty lots, but only in one lot, so that the ground shall never be sub-divided into more than thirty lots, and all the ground not dealt with in that way is to revert to Sir Michael. It seems to me perfectly clear, therefore, that nobody could lawfully get from this company, and this company could not give to anybody, any portion of that ground, unless it was to some party with one of these thirty millsteads. Confessedly Mr Tasker had not that. There would appear to have been thirty-one falls. I don't see any reason to doubt that he got the fall lawfully and effectually with reference to the Act of Parliament; but the fall was not one of the millsteads, and unless he got one of the millsteads, or unless he had a transaction under the 47th section, he had not the qualification which was necessary to entitle him to become the purchaser here, or to entitle him to sell. Now, supposing you assume that everybody who had the qualification might lawfully contract with the company although himself one of the committee of management, in respect that the Act of Parliament contemplated that, and suppose that would take him out of the ordinary rule of law that the member of a committee of management cannot contract with himself, he is not in that position. This is a transaction not contemplated by the Act of Parliament or by the feu-disposition. On the contrary, it is in the teeth of the disposition so far as his qualification as a purchaser goes, and therefore he is left in this position, that he is subject to the ordinary rules of law as to members of a committee of management or directors making a purchase of heritable property from the company. Now if he cannot found upon the special nature of the things done by the Act of Parliament or upon the special purposes of the feu-disposition, and if he is

just left in the position of a director contracting for a sale with his own company, he is not entitled to say— "It is of no consequence whether he could do it or not; you must do it, or be answerable in damages to me," because he had not the power of entering into it, and they had not the power.

That is the simple ground on which my opinion rests in this case, and if it is well-founded, it is quite sufficient to prevent success in this action, and to prevent it equally whether absolute warrandice is insisted in or not. It is an answer to the observation, "If you cannot or will not convey it to me with absolute warrandice, at least convey to me all the right you have." It is an answer to that as well as to the claim for damages. It goes to the nullity of the transaction. And in that simple view, though I don't throw the slightest blame on Mr Tasker, and though it has taken me a long time to see it distinctly, to the satisfaction of my own mind, the result I come to is in accordance with the opinion of your Lordships.

Lord ARDMILLAN—I have so high a respect for your Lordships' opinions, and so much diffidence in my own, that I have endeavoured to come to the same conclusion, although my impression after the debate was that Mr Tasker was entitled to succeed; but I have not been able to arrive at the same conclusion as your Lordships. I still think that Mr Tasker is entitled to succeed, and I shall state my views very shortly. We are not dealing here with the rights of Sir Michael Shaw Stewart, whatever they may be. He is not a party to this action. This is an action entirely between Mr Tasker and the Shaws Water Company. Now, I entertain a pretty clear opinion that if this was a transaction within the power of the Shaws Water Company, there is nothing in the position of Mr Tasker, as one of the directors, to preclude his entering into it. I do think that when you consider the nature of the company, the terms of the Act of Parliament, and the manner in which they have all along proceeded in the administration of the business of the company, it is really nothing but a caricature of a principle very sound in itself about trustees and directors not entering into contracts, to apply that principle to such a case as this. This company, I think, were quite entitled to deal with any one of their partners, or any one of their committee of directors, in any of these transactions which were within the contemplated business of the company; and if Mr Tasker was not precluded upon other grounds from claiming this piece of land, I do not think that he can be prevented from claiming it merely because he was a director of the company. If that plea were good, it would have some singular effects, because, if Mr Tasker could enter into no transaction with this company because he was a director, then the result would be that no director could enter into any transaction with the company, although the transaction might be contemplated as one of the purposes of the company. That can hardly be maintained. I perceive upon p. 85 a list of documents, one of which is a feu-disposition by Sir Michael Shaw Stewart in favour of this company, dated 28th November 1851; and another, by the same gentleman, in favour of the same company, dated 16th April 1852; and a third, on 21st August 1850. I believe there is no doubt that Sir Michael Stewart was a director of the company on all these occasions. He certainly was so with regard to one of them, because I have the minutes here before me of a meeting of the directors of the company on 5th April 1852, at which he was present, and chairman. Consequently, it is impossible to say, on the broad grounds on which it was argued by Mr Campbell, that this gentleman (Mr Tasker), because he was a director of the company, could enter into no transaction with the company. That cannot be said, at least it cannot be said by this company, who have transacted with a director and with the chairman on the occasions I have mentioned. But, then, it is said that Mr Tasker was not in a position to be entitled to claim this piece of land, and that is the part of the case about which I have felt really the most serious difficulty; and the views stated by Lord Deas with great weight just now do very strongly affect my mind; but I think they can be overcome, and I think that justice requires that they should be overcome in this case. I think that the plan which is here before us, and which has been proved to be the very document mentioned in the original feu-disposition by Sir Michael Stewart to the company, and signed as relative thereto, is a very important part of the title. I think it has been pretty well settled that a plan signed as relative to a disposition must be taken into consideration as part of that disposition, and read with it when you are estimating the limits of the conveyance. Now, on this plan I find thirty-one numbers, call them millsteads or falls, I do not just now mind which. Whichever they are, they are numbered thirty-one, and the one called No. 2 is conveyed as No. 2 by a separate conveyance. It is therefore part of this conveyance that, although it states that there are to be only thirty millsteads, there are thirty-one numbered upon that plan. Now, I think that if this were a question as to the true reading of the disposition of 1827, it would be right to inquire how the parties have acted since 1827 upon a conveyance of an aqueduct and water-power and ground, with thirty-one numbers on the plan limited to thirty in the conveyance. If the parties have for a long period read this as a conveyance, and acted upon it as a conveyance of the same ground with thirty-one numbers, I have very great doubt whether the law could limit it to thirty. If these parties have been dealing with it for a long period of years, as a conveyance of ground capable of being divided into thirty-one, although there is a clause in it saying that it shall only be divided into thirty, and if the plan has thirty-one marked upon it, and is signed as relative to the disposition, I entertain the gravest doubts whether it could be held to be a conveyance of only thirty, after so long a period of practice and usage following upon the plan. There are fourteen falls on this plan upon the east line. No doubt it is said that there would only be thirteen if you have thirty in all, but in point of fact there were fourteen standing on that plan; and the plan is signed as part of the conveyance. The next thing is—does this aqueduct, conveyed by Sir M. S. Stewart to the company, cease where it falls into the Dellingburn? Lord Curriehill thinks that an important part of the case. Far be it from me to deny that it is so. Assume that the case of the company is that it does there stop. It was so put by Mr Campbell, in answer to a question by myself, that that is the proposition he maintains.

Now, did this company deal with it as ceasing there in 1832? They conveyed in 1832 to Mr Tasker the waterfall No. 1, which is below the point where they now say their own right and title ceased altogether. That conveyance is in entire conformity with this plan, and in entire disconformity with the limitation to thirty numbers.

But it is a conveyance which this company made, and I hold that to be their own reading of their own title, for they have made £160 a year out of it from 1832 downwards. They have drawn from the pocket of Mr Tasker £162 a year for all these thirty years, by reading their title as one which enabled them to convey fall No. 1; and now they are in Court pleading that fall No. 1 was outside of their conveyance, and below the utmost limit of their aqueduct, and that they never had any right to it. I have great hesitation in allowing them to plead that with success. I rather think it would be injustice to allow them to plead that with success. Mr Tasker's feu of his mill or sugar-house was before the date of this certainly, and it was a feu from Sir Michael Shaw Stewart; but there are other instances of feus from Sir Michael of the millsteads, separate from the company's feus of the falls, and the company have been in the habit of recognising the feu from Sir Michael separate from their feu of the fall, and consenting to it, and holding it as uniting the millstead and the fall. They were quite entitled to do that here. Mr Tasker held a feu of the sugar-house which is at No. 1. They seem to me to have recognised that as a feu to which they were entitled to attach as an adjunct the fall No. 1 on the plan, and I find that through the greater part of the minutes and the titles and the whole proceedings of the company, they deal with the right to claim the ground afterwards as an adjunct to the fall rather than as an adjunct to the millstead. I find that in a document called a vidimus, which was prepared and presented to the company, there is a distinct reference to the manner in which all these different falls have been feued, and they speak of the ground to be claimed as ground allotted to each fall. That is page 82–3. And then they go on to speak specially of Mr Tasker's, and they call it the fall No. 1, and they say, "Fall No. 1 was applied for by Messrs Tasker, Young, & Co., to supply power to their premises at the Dellingburn." Now, their premises at the Dellingburn were the premises they got in feu from Sir Michael, and they got fall No. 1 as applicable to that. The company deal with the right to claim land as land allocated to the falls, and so dealing with it they in 1863 give him the ground which he claims as an adjunct of the fall previously conveyed. Now, I think it very hard that after they have enjoyed the benefit of this feu-duty, because their deed to Mr Tasker was a feu-contract, after they have enjoyed that for thirty years, and Mr Tasker makes a claim for the land as an adjunct to the fall, and after they have recognised that allocation of land to falls throughout these proceedings, they should now take up new ground and fall back from their agreement, I do think it is a very hard case that they should refuse to give that now to Mr Tasker, unless it clearly beyond doubt belongs to another; and if it clearly beyond doubt belongs to another, then the usual result is that those who have agreed to convey property not belonging to themselves must pay damages if they cannot fulfil their agreement. That is the usual result under such circumstances. I have bestowed the greatest attention in my power on the whole case; and I feel it to be attended with very great difficulty. I think, on the whole, it is not proved that this piece of ground was not fairly within the disposition by Sir Michael Shaw Stewart to the company in 1827, reading that disposition by the light we get from the plan, and by the light we get from the Act of Parliament, and the light we get from the long-continued usage and actings of the parties. I think, in the next place, that if this ground did belong to the company, they are bound to give it to Mr Tasker; and if there is difficulty and doubt as to its belonging to the company, I have only to say in conclusion, that I think the proposal made formerly to grant a conveyance without absolute warrandice was a very fair proposal, and I regret extremely that it has been departed from here. We are now called on to decide this case on the footing that the company refuse all conveyance of any kind, and all compensation of any kind to Mr Tasker. That I think is high ground to take, and very inequitable ground to take, looking at the whole course of proceedings. I would be disposed to find that Mr Tasker is entitled, at all events, to a conveyance of all the right which the company have to this property. If Sir Michael Stewart has really a right to the property, let him come forward and vindicate it. If Mr Tasker gets a title with no absolute warrandice, but merely warrandice from fact and deed, he must then maintain his title against Sir Michael; but I am not prepared to say that the company, who have enjoyed the benefit of their former transaction with him, which proceeded on a different construction of their own title from that which they now maintain, can escape both from the giving of the conveyance and from all the consequences of refusing it to a man who has laid out above £300 since the date of the agreement.

Lord President—Then the judgment of the Court is to adhere to the interlocutor of the Lord Ordinary, but I think it right that our interlocutor should bear, *in gremio*, that the defenders decline to grant any disposition. There is also a verbal alteration which must be made in the finding in law. The Lord Ordinary says—"The pursuer is barred from insisting." Now, I do not know what that means, and I think it would be more correct to say—"Is not entitled to insist."

Adhere.

Agents for Pursuer—Murray, Beith, & Murray, W.S.

Agents for Defenders—Patrick, M'Ewen, & Carment, W.S.

Saturday, Dec. 22.

SECOND DIVISION.

MACINTOSH *v.* ARKLEY.

Sheriff—Reduction of Warrant—Want of Interest. A person brought an action against a Sheriff-Substitute concluding for reduction of a warrant and license under which he was conveyed to, and detained in, a Madhouse. Action dismissed in respect the defender had no interest in it. Observed that the defender had erred in satisfying the production.

The pursuer, Angus Macintosh of Holm, seeks to reduce an order dated 13th June 1852, and signed by the defender, who is one of the Sheriff-Substitutes of Edinburgh, by virtue of which he was taken to Saughton Hall Madhouse, and confined there; as also a license to Drs Smith and Lowe to receive and detain him there. He complains that he never was a furious or fatuous person, or lunatic, and that in the petition presented to the defender he was not described as such, but only as a person who was in a state requiring the restraint of an asylum, which might mean no more than that he had been drinking to excess.