second party and his foresaids purging the irritancy at the bar." Now it is admitted that upwards of two years' ground-annual had fallen into arrear, and that admission brings into play, if the superior think fit, the provision of the contract. It was maintained that it was a good defence that the pursuers having failed to put the defender into possession of a material part of the subjects, the defender was not bound to pay the ground-annual. I am of opinion that that plea, as an answer to a demand for payment of ground-annual, is not a good defence, because the claim which it involves is illiquid. This is fixed by the cases of Dun *v.* Craig (November 12, 1824, 3 S. 193) and Dods *v.* Fortune (February 4, 1854, 16 D. 478), and the rule is quite settled. If this had been a suspension of a charge for payment of ground-annual, the same plea, if stated, would have been equally unfounded. But then this is an action of declarator of irritancy. I do not think that the nature of such an action is that it is merely a mode of compelling payment. It is one of two alternative proceedings which a superior may resort to, and its true object is to bring the contract to an end. This was deliberately considered in the case of the Magistrates of Edinburgh *v.* Horsburgh (May 16, 1834, 12 S. 593), in which Lord Balgray begins his opinion by saying—"I had persuaded myself that there were some points fixed and settled in the law of Scotland beyond the power of challenge. But I find I have been mistaken at least as to one of these, for the question is now raised whether a superior who has taken a declarator of tinsel of the feu can also demand arrears of feu-duty from the vassal. It was the opinion of Lord Justice-Clerk Miller that he could not. I have heard Lord Justice-Clerk Braxfield and Lord Justice-Clerk Rae confirm that opinion, and after these authorities, especially the first, who was one of our greatest feudal lawyers in modern times, I am not disposed to treat the matter as an open question or one upon which the law admits of change." Therefore, I think, that when a party brings an action for declaring the forfeiture, he is selecting a most severe remedy, and I think he must set up his title not altogether at the cost of his opponent. The plea of the defender was, I think, a bad plea; but then, dealing with the question of expenses, I think the pursuers took a severe course, and looking to the nature of the pleas, I am disposed to suggest that the defender should be found liable in expenses, but subject to modification.

Lord CURRIEHILL concurred.

Lord DEAS also concurred in the result, but expressed an opinion that the pursuers had selected the proper and most suitable remedy.

Agents for Pursuers—A. G. R. & W. Ellis, W.S.
Agent for Defenders—William Muir, S.S.C.

Saturday, Feb. 23.

SECOND DIVISION.

M'LEAN AND HOPE *v.* FLEMING.

Process—Evidence (Scotland) Act, 1866*—Commission—Witnesses abroad—Jury Trial.* Held that under this Act it is only competent to grant commission to take the whole evidence in a cause where there is either an interlocutor of the Court to that effect or a consent of parties, and interlocutor of Lord Ordinary granting commission for the examination of certain witnesses abroad recalled, in respect it did not recognise the existing practice adopted in jury trials.

In this action, which is one of the enumerated causes that falls under the 47th section of the Act of 1850, Lord Kinloch pronounced the following interlocutor. He had previously pronounced an interlocutor appointing the proof to be taken before himself:—"The Lord Ordinary, having heard parties' procurators, in respect it is stated by the defenders, Messrs M'Lean & Hope, that there are a number of witnesses in Constantinople, and on the coast of the Mediterranean Sea, whose evidence is of great importance in the case, and that there is danger of its being lost owing to their residence abroad, and their not being likely to come within the jurisdiction of the Court, grants commission to the British Consul-General, or to the Vice-Consul at Constantinople, to examine such witnesses as shall be adduced by the defenders on the subject-matter of the closed record in the conjoined actions, with the exception of the conclusion for damages in the action at the instance of George Fleming, which has been abandoned, due notice being given to the pursuers, to the satisfaction of the said commissioner, of the time and place fixed for the witnesses' examination before such examination proceeds, and appoints the depositions of the witnesses to be reported by the third sederunt day in May next."

The pursuer reclaimed, and asked the Court to remit to the Lord Ordinary to appoint a day for taking the proof under the Evidence (Scotland) Act 1866.

At the discussion the defender departed from the interlocutor of the Lord Ordinary and made a motion that the whole of the evidence in the cause should be allowed to be taken on commission.

To-day the Court unanimously recalled the interlocutor, holding that under the Evidence Act it was only competent to grant commission to take the whole evidence in a cause when there was either an interlocutor of the Court to that effect or a consent by parties, but the Court could not entertain this motion under the reclaiming note. As to the power to grant commission to examine witnesses abroad, that could only be done under reference to the existing practice of making affidavit and adjusting interrogatories, and that practice was entirely disregarded by the Lord Ordinary.

The interlocutor, therefore, was recalled as incompetent, and expenses were granted to the reclaimers.

Counsel for Reclaimers—Mr Clark and Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Respondent—Mr Young and Mr Mackenzie. Agents—White-Millar & Robson, S.S.C.

Tuesday, Feb. 26.

Lord Glencorse, late Lord Justice-Clerk, this day presented her Majesty's letter appointing him Lord Justice-General of Scotland and Lord President of the Court of Session, and having taken the customary oaths, his Lordship took his seat on the bench as Lord President.

Wednesday, Feb. 27.

FIRST DIVISION.

ANDERSON AND WATT *v.* SCOTTISH N.-E. RAILWAY CO. (*ante*, vol. i. p. 116).

Diligence—Arrestment—Validity. An arrestment by a railway company of stock and dividends belonging to an alleged debtor reduced as