

CLARK and PATTISON in answer.

To-day the Court adhered to Lord Ormidale's interlocutor, but recalled Lord Mure's; and upon Paul's finding caution, passed the note to try the question. The majority of the Judges were of opinion that suspension was a competent remedy, assuming unconditional payment of the sum in the decree had been tendered and consigned on refusal. The question whether the tender under conditions here made was equivalent to an offer of a payment raised a nice and important question, on which they expressed no opinion, that being a question on the merits, to be determined on the passed note.

The LORD JUSTICE-CLERK said—We have first to decide whether the suspension is competent. Mr Thomson Paul's position is this: he is decerned against in a decree in which he is conjoined with another party. He has tendered payment of and consigned the whole amount in the decree; and he says that tender has been wrongly refused. I do not think the remedy of suspension is incompetent (Stair, 1, 18, 4). Consignation is equivalent to payment, and had payment been actually made, suspension would have been competent if the debt was not at once surrendered. There is no rule that the decret must be extracted. Take, for instance, the cases in which titles to land are tried in this way. Mr Paul was not premature, if he has done what is equivalent to payment. It was not unnecessary either. I express no opinion at present on the merits of the important question Whether Mr Henderson was bound to accept the offer and grant an assignation? But the note ought to be passed on caution.

Agent for Suspender—Party.

Agents for Respondent—J. & A. Peddie, W.S.

Friday, July 19.

BARSTOW (MALTMAN'S FACTOR) v. COOK.

Commission—Foreign Witnesses—Penuria Testium—Closed Record. Motion, in a case where the record was not closed, for a commission to examine witnesses abroad, refused, an order for proof after closing of the record being held to serve the same purpose.

This was a motion by one of the claimants in this multiplepointing for a commission to Nova Scotia, to take the evidence of three witnesses who reside there, the depositions to lie *in retentis*, and it came before the Court on report of Lord Barcaple, the Ordinary in the case. The motion is made in a process of multiplepointing and examination brought by Mr Barstow, judicial factor on the estate of the late William Maltman, purser in the East India Company's service. Maltman died at Elie, Fifehire, 3d March 1854, intestate and unmarried, leaving considerable property. Gavin Maltman, in Nova Scotia, a younger brother, was sole heir-at-law and next of kin, and was last heard of about 1849.

After very extensive searches and advertisements in the British American Colonies, it is believed and averred by some of the claimants that he was shipwrecked on the coast of New Brunswick, on the 30th October 1855.

The object of the commission was to examine those parties, with the view of founding on their evidence, as the only vestige to be obtained.

TRAYNER, for the claimants, maintained that he

was entitled to this commission, even although the record had not been closed on the ground of *penuria testium*, and he offered to pay all expenses, including a reasonable sum for the employment of an agent in Nova Scotia to take charge of the interests of his opponents.

The Court unanimously refused to grant the commission, on the ground that the claimant, when the record was closed, might get an order for proof, which would serve his purpose equally well as a commission now.

Agent for Pursuer—William Sime, S.S.C.

Agent for Claimant—Thomas M'Laren, S.S.C.

HOUSE OF LORDS.

Friday, June 7.

LORD ADVOCATE v. SINCLAIR.

(In Court of Session, 3 Macph., 981.)

Salmon—Fishing—Crown Charter—Prescription. Circumstances in which held, on construction of titles and proof of possession, that a proprietor of lands on the sea-shore was vested in the salmon-fishings *ex adverso* of his lands.

This was an appeal against a judgment of the First Division of the Court of Session. In 1846 the Lord Advocate and the Commissioners of Her Majesty's Woods and Forests brought an action against James Sinclair, Esq. of Forss, proprietor of the lands of Holburnhead and others, lying on the sea-shore in the parish of Thurso and county of Caithness, concluding for decree (1) that the salmon-fishings in the bay of Scrabster belong exclusively to the hereditary revenues of the Crown in Scotland, so far as the said salmon-fishings have not been expressly granted to subjects or vassals by charters or otherwise; (2) that the defender "has no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or in any part of the bay of Scrabster, or the sea coast adjoining, by means of stake-nets or bag-nets, or by net and coble, or in any other manner of way; or at least, in case it should be found that the defender and his predecessors have acquired a right to salmon-fishings *ex adverso* of their lands by exercising the same for forty years under a proper title, for declarator that the defender is only entitled to exercise the said right of salmon-fishing in the manner and to the extent possessed by him and his predecessors during the said period of forty years, and that he has no right or title to extend his fishings into the bay beyond the boundaries within which he and his predecessors formerly fished." The action made no progress until 1860, when the record was closed on revised condescendence and answers. The defender then pleaded (1) the pursuers are not entitled to insist in this action, as they are not vested with a right to salmon-fishings in the bay of Scrabster, and in particular to those *ex adverso* of the defender's lands, either *jure coronæ*, or by a singular title clothed with possession; (2) the Crown having divested itself of the right of salmon-fishing *ex adverso* of the defender's lands by grants to vassals, the pursuers cannot now insist, *jure coronæ*, to prohibit said fishings by the defender; (3) the defender having right by his titles to the lands of Holburnhead and others, which were a portion of the barony of Scrabster, with fishings, is entitled