ments beyond the amount in the sub-valuation of 1636 to such extent as to support the plea of dereliction; and, being of that opinion, I think, on the grounds I have explained, the Lord Ordinary has arrived at a just conclusion in setting aside the decreet of approbation of the sub-valuation obtained by the defender in 1838.

The other Judges concurred.

Agents for Pursuer—W. H. & W. J. Sands, W.S.
Agents for Defender—Tawse & Bonar, W.S.

Saturday, December 7.

FIRST DIVISION.

ROBERTSON *v.* MURPHY AND OTHERS.

Proof—Proof before Answer—Consent—Remit—Construction of Remit—Competency of Parole Proof. In an action by a father, alleging that advances which he had made to his son were made on the footing of forming debts against the son, to be repaid to him, the Lord Ordinary, "before answer, and of consent," remitted to an accountant to inquire into the grounds of action and defence, with power to take probation thereanent. *Held* that the defender was not excluded by the terms of the remit from objecting before the accountant to the competency of parole proof proposed to be led by the pursuer in support of his averment of the non-gratuitous nature of the advances. *Opinions* as to the meaning of "proof before answer."

This was an action at the instance of Arthur John Robertson, late of Inshes, against Michael Murphy and Charles Henry James, official assignees on the estate of the pursuer's son, Arthur Masterton Robertson, and against certain creditors' assignees on said estate. It appeared that the pursuer had been proprietor of the entailed estate of Inshes. The estate was heavily burdened, and was sold at the instance of creditors. Previous to the sale of the estate, the pursuer's son, Arthur Masterton Robertson, who was next heir of tailzie, entered the army, and various advances were made to him by his father and by his grandmother for purchase of his commission and outfit, and to enable him to purchase promotion. The son became insolvent, and the defenders were appointed official and creditors' assignees on his estate. The assignees raised an action against the father for payment of an annuity which it was alleged he had undertaken to pay to his son. The father raised this counter-action for repayment of the money advanced by him to his son, and for relief of certain pecuniary obligations undertaken by him on his son's account. In his condescendence he alleged, with reference to the advances made to his son, that "it was understood and agreed that the money which might be advanced to him, or on his account, by the pursuer, for the forwarding of his views, and to supply what he required, was to form a debt, which he was to be bound to repay. That arrangement was rendered necessary by the circumstances of the pursuer, and especially by a reasonable consideration for the interests of his other children, for whom he could not adequately provide out of the entailed estate." After narrating certain advances, the pursuer stated:—"Many other sums were advanced to the said Arthur Masterton Robertson, or upon his account, by the pursuer. All the advances so made by the pursuer were made upon the understanding and agreement libelled in the preceding article of this condescendence."

On 10th January 1866 the Lord Ordinary (Barcaple) pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, before answer, and of consent—remits the cause to Mr William Wood, chartered accountant in Edinburgh, to inquire into and report upon the matters set forth as the pursuer's grounds of action, and also as to the matters set forth in the defences thereto, with power to him to take probation thereanent: Grants commission to Mr Wood to examine witnesses and havers, and receive their exhibits, as also diligence, at both parties' instance, against witnesses and havers: Mr Wood's report to be lodged *quam primum*."

On 15th July 1857, the accountant presented an interim report in the following terms:—"The accountant begs respectfully to report that considerable progress has been made under the foregoing remit, a number of documents having been produced before him, and he having drafted a report, but a question has arisen—namely, whether it is competent to lead parole evidence? on which the parties are desirous of having the Lord Ordinary's decision. In this case the parties are at variance as to the important fact, whether the advances by the pursuer, A. J. Robertson, Esq., Inshes, to or for his eldest son, were gratuitous, or intended to be kept up as debts?—the pursuer averring in his record that it was his intention that his son should repay the advances, the defenders that they were intended to be gifts. As regards the documents produced by the pursuer, the defenders have, with very few exceptions, agreed to receive them as genuine and authentic. But they are not of a very formal character, and the pursuer moves to be allowed an opportunity of leading parole proof in support of the averments contained in his record. To this the defenders object that it is incompetent. But as it may have an important bearing on the case, and the question is one of law, the accountant begs respectfully to report it to the Lord Ordinary."

Thereafter, on 16th November 1867, the Lord Ordinary pronounced this interlocutor:—

"The Lord Ordinary having heard parties' procurators on the interim report by the accountant, No. 8 of process, and considered the same: Finds, that by the terms of the interlocutor of 10th January 1866, which proceeded of consent of parties, all probation to be taken by the accountant under that interlocutor is before answer: Finds that, under the remit in said interlocutor the accountant is authorised to receive parole proof offered by either party in support of their averments on the record, and instructs him accordingly."

The defenders reclaimed, and asked the Court to recal the foresaid interlocutor; to find that by the terms of the interlocutor of 10th January 1866, remitting to the accountant to inquire into and report upon the matters set forth as the pursuer's grounds of action, with power to him to take probation thereanent, the accountant has only power to take such probation as is competent in support of the pursuer's averments; to find that it is not competent to the pursuer to lead parole proof in support of his averment, that "it was understood and agreed that the money which might be advanced to him (his son Captain A. M. Robertson, the insolvent) or on his account by the pursuer for the forwarding of his views, and to supply what he required, was to form a debt which he was to be bound to repay,"

and to remit with instructions to the accountant; or to do otherwise.

Fraser and Crichton, for reclaimers, contended that the meaning of "proof before answer" was simply an allowance of proof, reserving the question whether, supposing the averments on record to be proved, they were relevant to support the case of either party. There was no authority for saying that a loan of money could be proved, except by writ or oath.—Stair, iv., 39, 5: and Bankton, iv., 25, 6, were referred to.

Solicitor-General (Millar) and Watson, for respondents, argued, that besides the meaning of "proof before answer" given by the reclaimers, these words also, in some cases, reserved the question of the competency of the mode of proof. That was the case in *Muir* v. *Ross' Executors*, 15th June 1866, 4 Macph., 820, where there was no question of relevancy, but only of the competency of the proof taken. *Bryce* v. *Young's Executors*, 20th January 1866, 4 Macph., 312; and *Morris* v. *Riddick*, 16th July 1867, 5 Macph., 1036, were also referred to.

Lord President—I think the first thing necessary here is to be sure that we understand the question we are to determine. The accountant to whom the remit was made, was in a position to make his report. He had drafted it, and was ready to present it; but questions had arisen whether certain parole evidence tendered by the pursuer was admissible, and he explains what that tender was. The question at issue was, whether certain advances by the pursuer to his eldest son were gratuitous, or were meant to be kept up as debts, and the accountant explains that the pursuer moved for—[*reads from accountant's report*]. Now, there are a very considerable number of averments in the record in reference to which parole proof is incompetent. There are some as to which parole proof is competent, but I give no opinion as to these, for it would require a good deal of consideration to determine the matter satisfactorily. The accountant reports to the Lord Ordinary to ask what he is to do with this proposal of the pursuer, the defender objecting, and the instruction he gets is in this interlocutor, by which the Lord Ordinary finds [*reads interlocutor*]. This interlocutor puts a particular interpretation on the remit made on 10th January 1866, and in respect of that interpretation the Lord Ordinary declines to give any instruction to the accountant as to whether the parole proof offered is competent or incompetent. The *ratio* of the interlocutor is, that the remit of 10th January contemplated that the accountant should not only have power, but be bound, to take the evidence tendered by both parties, whether competent or incompetent, reserving that question of the competency to be determined after the evidence was taken. I think that is a false construction of the remit, and proceeds on a misunderstanding of the perfectly well-known words "before answer." The remit runs thus:—[*reads*]. Now, the words "before answer" are said, in support of this interlocutor—and I suppose that is the meaning of the Lord Ordinary—to mean that the probation to be taken is to be taken without any objection to its competency, that is, not to the competency of particular questions, but the competency of the mode of proof. That is said to be the meaning of the words "before answer." That is entirely new to me. I think their meaning is perfectly settled in the practice of the last two hundred years. They mean that when proof is ordered before answer, every question raised on the record, of law or relevancy, is reserved entire. This is just a case for proof before answer, for there are a number of pleas, particularly by the defender, which raise questions of law and relevancy, but which it is inexpedient to determine till after the proof. But to construe these words as meaning that the proof is to be taken before answer, whether competent at all or not, is a construction I cannot adopt. Either that is the meaning, or that the question on which the accountant was entitled to come for instruction has not been determined by the Lord Ordinary, but left open. Whichever view we take of this interlocutor, it is a mistake. It seems to me that probably the way in which the competency of the parole proof would be best raised is that the Lord Ordinary should receive the report, and, on considering the case as it appears on the face of the report, consider what facts may be competently remitted to parole proof. His present course is not justified by the remit, and is inexpedient.

Lord Curriehill—I think some matters here cannot be competently proved by parole evidence, but some may. But it appears to be contended here, by one of the parties, that that objection is excluded, because, first, the proof is before answer; and, second, because the interlocutor was pronounced of consent. It is clear that the ordinary rule of law is that "before answer" means what Mr Crichton says it means. It is an allowance of competent proof, not of incompetent; that is well established. As for the words "of consent," if the parties consented to proof before answer, they only consented to competent proof.

Lord Deas—We are not in a position to decide whether there are points that may be competently proved by parole testimony or not, but I agree with Lord Curriehill that some things are stated here that may competently be so proved, and others not. As regards the meaning of the words "before answer," that is a question of fact. Sometimes they mean one thing and sometimes another. They may mean before answer as to questions of law and relevancy, as Stair says, but I think their meaning is not limited to that. It would be competent to pronounce an interlocutor "before answer as to the mode of proof." I am clear that in the case referred to, and in various others, that was the meaning in which the words were used, and we so construed them when the cases came back to us, because we held that, though certain facts had been proved, it was open to say whether that was a competent mode of proof. In that case, though the interlocutor did not bear it expressly, that was the meaning of the Court, and it was so construed. Unless that is understood, there is nothing in the interlocutor to throw light on the meaning. I am disposed to think that that is to some extent the meaning here, for the interlocutor says, "with power to take probation thereanent." I don't say that writings are not probation, but I think the fair meaning was, that parole proof was intended as well, and, therefore, this interlocutor does reserve the question of the competency even of the mode of proof. And accordingly, if the proof goes on, and things are proved by parole that are not competently proved, I should hold the question of competency open. This is quite a case in which it was right to do that, for some things here are competently proved by parole, and some not; and it is just where there is a difficulty beforehand in de-

termining that, that we are in the habit of remitting before answer, even as to the competency of the mode of proof. In this case no one can doubt that there are many facts very important to be known in a question whether the advances were gratuitous or not — The number of the family, their circumstances, and so on. That is an investigation in which it is next to impossible to define the boundaries beforehand; and in the course of the investigation questions may be put just on the confines; and it is to meet things of that kind that such proof is allowed. But I agree that that does not make anything competent. It is always a delicate matter for the Court, in the first instance, whether or not to allow proof before answer, and it is only done in special cases. When it is done, it is not meant to exclude all discretion on the part of the commissioner, or to hinder parties from coming to the Court with his deliverance in the course of the proof. The only objection I have to the interlocutor is, that it does not preserve that distinction. It seems to proceed on the footing that, because the proof is before answer, everything the parties propose is to be proved before the accountant. I don't think that is the meaning.

Lord Ardmillan—I think the question to be disposed of is the very same as that which the accountant has reported. He says [*reads from report*]. The accountant was quite right in reporting the matter. The Lord Ordinary says that by the terms of the interlocutor of 10th January [*reads interlocutor of the 16th November*]. I do not differ from the qualification put by Lord Deas, but I agree with your Lordship in the chair that the general meaning of the words "before answer" is before answer as to questions of law and relevancy. When proof is allowed before answer the party who has these points of law and relevancy may plead them afterwards, whatever be the result of the proof. But Lord Deas says truly that in some cases proof has been allowed before answer as to competency of evidence. But it must be clear that that is the sort of reservation intended. In all the cases referred to, the question was as to delivery of documents. The proving of facts and circumstances, clustering, as has been said, round the documents, is unquestionably competent to the length to which that has been carried in various cases. There was no doubt there. But here the case is different. I give no opinion as to whether parole evidence is or is not competent; but the question here is—the defender says, "I object to parole evidence here on this matter, whether the advances were gratuitous advances or loans. The answer is, "You can't object, because this is before answer, and the time for stating your objection is after all the evidence is led." I think any question the defender raises, either as to the competency of particular questions or of the line of evidence, is a plea which he is entitled to put to the accountant, to be reported by him to the Lord Ordinary. That is the proper course of proceeding. It would be very unusual to hold that the objections of the defender are absolutely excluded *hoc statu* because the proof is before answer.

The Court pronounced this interlocutor:—

"*Edinburgh, 7th December* 1867.—The Lords having advised the reclaiming note for the defenders, against Lord Barcaple's interlocutor, dated 16th November 1867, and heard counsel, recal the interlocutor submitted to review: Find, that by the terms of the interlocutor of 10th January 1866, remitting to the accountant to inquire and report upon the matters set forth as the pursuer's grounds of action, with power to him to take probation thereanent, the accountant is authorised to take such probation only as is competent in support of the pursuer's averments, and that the defenders are not precluded by the terms of the said remit from taking objection to the competency of any proof offered by the pursuer; and remit to the Lord Ordinary to proceed in the way he may think most expedient to determine the question or questions of competency raised before the accountant: Find the defenders entitled to expenses since the date of the interlocutor complained of, and remit the account thereof, when lodged, to the auditor to tax, and to report to the Lord Ordinary, with power to his Lordship to decern for expenses."

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Wednesday, December 11.

DONALD *v.* NICOL.

(*Ante*, vol. iii, p. 103.)

Compensation—Property—Road Trustees—Interest. The defender, in 1853, took land from the pursuer for the formation of a new road, on an agreement to pay the compensation that might be found due by the Road Trustees. The road was constructed, but through the delay of the defender the compensation was not ascertained till 1867. In 1867 the Road Trustees took over the new road, and paid £50 to the pursuer for the ground taken. The pursuer claimed interest from the defender from 1853, and an annual sum for failure to fence the ground. Claim sustained.

The pursuer in this action was Mrs Jane Robertson or Donald, residing at Bishopston, in the parish of Banchory-Devenick, and county of Kincardine, relict of the deceased James Donald; and the defender was James Dyce Nicol, Esq. of Badentoy, M.P. The summons concluded that the defender should be ordained to make payment to the pursuer of £82, 10s., with interest from Whitsunday 1853, the time at which the defender entered upon possession of certain ground then occupied by the pursuer, for the purpose of forming a new road through the lands of Bishopston, to be used in place of another road proposed to be shut up; that the defender should be ordained duly to fence the lands of Bishopston so far as necessary by their intersection by the new road; and that he should pay £1 a-year as the expense of herding cattle on Bishopston, rendered necessary by the intersection of the lands and the defender's failure to fence them, from Whitsunday 1854 yearly until the lands were sufficiently fenced.

It appeared that the deceased Mr Donald had possessed the lands of Bishopston, adjacent to Badentoy, the property of the defender, and to Auchlunies, the property of Mr Duguid. The defender and Mr Duguid desired to have a road which ran through their estates shut up, and a new road opened through the lands of Bishopston, and they obtained the consent of Mrs Donald and her son and his tutors to this proposal, on the footing that the defender was to pay them the amount of damages that might be found due by the Commutation Road Trustees. The proposed road was