Friday, January 24.

AIKMAN *v.* AIKMAN'S TRUSTEES.

Reference to Oath—Consignation. Circumstances in which a reference to oath after final judgment *sustained*, only on condition of consignation by the party referring, within eight days, of the amount of expenses in which he had been found liable.

This was an action at the instance of William Aikman, flesher in Lanark, against the trustees of his father, the late John Aikman, some time inspector of poor at Lanark. The pursuer's claims related chiefly to arrears of wages, which he alleged were due to him for assisting his father in his business as flesher and grazier. The action also contained a claim for damages on account of the defenders having failed to keep a certain drain in proper repair. The action was raised in November 1865. After various procedure, the defenders, on 20th December last, obtained decree of absolvitor from the whole conclusions of the action, and were found entitled to expenses. Decree was pronounced for the taxed amount of expenses on 11th curt. The pursuer now proposed to lodge a minute referring his whole claims to the oath of the defenders. The case appeared in the single bills.

JOHN MARSHALL, for defenders, submitted that the motion ought only to be granted on consignation by the pursuer of the expenses in which he had been found liable, on the ground that the motion of the pursuer was merely to cause delay. He cited *Conacher*, 1 Mar. 1859, 21 D. 597; and *Sayer's Assignee*, 10th June 1841, 3 D. 1005.

PATTISON, for pursuer, in reply, cited *Wallace*, 7th Dec. 1839, 2 D. 204; and *Nisbet*, 19th Nov. 1840, 3 D. 332.

LORD PRESIDENT—I have seldom seen a party less entitled to favourable consideration from the Court than this pursuer. This is not the first time he has been before us, and now he comes with this proposal to refer the matter to the oath of the defender in circumstances that satisfy me that it is entirely for the purpose of delay. It is out of the question that he can have any hope of establishing his case by the oath of these trustees. The question is one for the discretion of the Court. There may be some weight in the point which was suggested, that the mode of proof introduced and sanctioned by the Act 1679 is somewhat different from a general reference to oath, and in a certain sense the pursuer may be held entitled to make this reference, but I have no doubt that it is within the discretion of the Court to allow a reference in this case, only on condition of payment or consignation of the expenses for which the defenders have obtained a decree, dated the 11th of this month. We shall make it a condition of sustaining this reference that these expenses are consigned within eight days.

LORD CURRIEHILL—I think it is clearly established that the allowing a reference to oath after a final judgment, and the terms on which it shall be allowed, are matters entirely within the discretion of the Court. And that discretion will be exercised with regard not merely to the nature of the case, but more particularly with regard to the conduct of the parties. Looking to the interlocutors which have been pronounced in this case, and which we have now before us, I entirely concur with your Lordship.

LORD DEAS—I have no doubt, on the one hand, that in general a party has a right to refer to oath even after a final judgment, and, on the other hand, that the Court may annex such conditions as they think fit. And there is no stronger case for imposing conditions than when it is apparent that a party has been causing delay in an action. The reference may be reasonably supposed to be for delay too. If any unfair use were attempted to be made of it, the Court might refuse it altogether.

LORD ARDMILLAN—It is very well settled that the right of reference to oath is not an absolute right. The Court has, and has exercised, the discretionary power of refusing to allow it when plainly it is sought for the purpose of delay. But there is a remedy within that, and that is, that the reference shall only be allowed on condition of consignation.

Agent for Pursuer—William Mackersy, W.S.

Agents for Defenders — Mackenzie, Innes, & Logan, W.S.

Friday, January 24.

NAPIER *v.* ORR AND OTHERS.

Heritable and Moveable—Collation—Heir—Next of Kin. Circumstances in which *held*, by the whole Court, that the effect of collation by an heir was not to change the character of the property collated, but merely to give the other children a right to share in the heritage as such. Opinions, that in some circumstances the character of a subject collated may be changed from heritable to moveable.

Heir of Line—Heir of Conquest—Collation. Held that the right acquired in consequence of collation by the heir, by one of the other children, goes to the heir of line, and not to the heir of conquest. Opinions, by the majority of the Court, that the ground of this rule is, that such a right is not capable of completion by sasine in the person of the creditor, and therefore cannot descend to the heir of conquest in competition with the heir of line. Opinions, by the minority, that such a right is vested in the executor by a proper succession to the ancestor.

"In 1844 the late Mrs Janet Knox or Napier, the maternal grandmother of the several claimants in this multiplepoinding, by irrevocable disposition, conveyed the lands of Letham and others in favour of her eldest son, John Knox Napier, the pursuer of the multiplepoinding.

"By this conveyance, and the infeftment which followed upon it in the person of the disponee, there were constituted the following real burdens, in favour of the disponee's daughter Mary Orr (wife of Robert Orr), the mother of the claimants:—a sum of £1000, payable, the one-half at the first term of Whitsunday or Martinmas after the disponer's death, and the other half at the first term of Whitsunday or Martinmas occurring ten years thereafter; as also a sum of £300, payable at the first term of Whitsunday or Martinmas occurring twelve months after the disponer's death.

"The disponer, Mrs Janet Knox or Napier, survived till November 1861, by which time not only