therefore, stated by the Lord Ordinary, does it appear to me that this exceptional mode of proof can be admitted.

I think it right to add, that though a passage has been read to us from a writer on consistorial practice, to the effect that judicial examination cannot be allowed after proof has been led, I do not subscribe to that doctrine. It is quite possible —I do not say it will be the case—but merely that it is quite possible—that the facts of the case when proved may ultimately render judicial examination necessary. But if allowed it will only be so on the grounds I have mentioned.

LORD DEAS—As to the question whether proof should be allowed in the general terms contained in the Lord Ordinary's interlocutor of 21st November, I am entirely of opinion with your Lordship. The proof is allowed before answer, and in the proper terms to try the question at issue. Besides that, the proof is allowed in a case very peculiar in its circumstances, particularly as to the alleged qualifications on the promise, the effect of which may raise very important questions. I have no hesitation, therefore, in concurring in your Lordship's view.

Then as to the motion for judicial examination, I agree that, though competent, it is only to be allowed in exceptional cases. The question here then is, whether sufficient grounds for an exception have been shown. As regards the defender's knowledge of the dependence of the previous action, I see no reason to assume that there is anything occult about that which could not be proved in the ordinary way. It may be that after a proof has been led a better case may be made out for a judicial examination; and I would reserve my opinion on the point as to whether a judicial examination can be allowed after proof. The question has not been argued to us, and I would like to have all the authorities before determining the point. But supposing we assume that a judicial examination cannot afterwards be granted, we must still have very strong *prima facie* grounds for supposing that the facts averred are of such an occult nature as to justify this exceptional mode of proof. With reference to the intercourse alleged between the parties, I do not see any ground for saying that that was of such an occult nature as to require such examination. It may be that the intercourse in such cases consists of a single act, of which no one but the parties themselves have any opportunity of knowing. But that is not the case here, the intercourse libelled is continuous. There is no room therefore for presuming anything occult about it, particularly looking to the pursuer's statements as to its circumstances. Over and above all that, I am not satisfied that the existence of either of these conditions, either that *prima facie* the facts are occult, or that there is an apparent *penuria testium*, or both of them, are sufficient and conclusive in the matter. I think that, besides this, it is necessary to show that the mode of proof demanded is essential to the justice of the case. Even if these other things were made out in a satisfactory manner, I still think we must have grounds for saying that the procedure is essential to the justice of the case. And that I think the pursuer had failed to show here.

LORDS ARDMILLAN and KINLOCH concurred, reserving their opinion as to the competency of judicial examination after proof had been led.

The Court accordingly adhered to the interlocutor of the 21st November, recalled that of the 23d December, refused the pursuer's motion for the judicial examination of the defender, and remitted to the Lord Ordinary to proceed with the cause.

Agents for the Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for the Defender—J. & R. D. Ross, W.S.

Tuesday, January 21.

BROWNE *v.* SPIER'S TRUSTEES.

Process — Proving the Tenor — Public Records — Statute 1617, *c.* 16—*Extract.*

In an action of proving the tenor of a bond of annuity and disposition in security, which had been recorded in the General Register of Sasines, the Court expressed a doubt whether the pursuer had a sufficient interest in pursuing a proving of the tenor, seeing that by the Act 1617, c. 16, it is enacted that an extract from the register "shall make faith in all cases, except where the writs so registered are offered to be improven." After further argument, the Court, without expressing an opinion as to the effect of an extract from the Register of Sasines, *held* the pursuer had a sufficient interest, and the case being otherwise satisfactorily proved, pronounced decree as craved.

Expenses.

Circumstances in which expenses were allowed to the pursuer in an action of proving the tenor.

The Rev. Andrew Browne, minister of the parish of Beith, brought this action to prove the tenor of a bond of annuity and disposition in security, by which the late Mrs Margaret Gibson or Spier bound herself and her heirs and successors to pay to the pursuer and his successors in office, as trustees, an annuity of £25, to be laid out by the minister, with the approbation of the kirk-session, for the benefit of such poor persons in the parish as the kirk-session might select, debarring the interference of the parochial board; and in security of the obligation disponed certain lands. The deed contained a clause of absolute warrandice.

The testamentary trustees of the late Mrs Spier were called as defenders.

The history of the bond and the *casus amissionis* were thus stated by the pursuer:—"The bond of annuity and disposition in security libelled was duly executed by the said Mrs Margaret Gibson or Spier on 3d March 1860. It was afterwards, by her instructions, recorded in the General Register of Sasines at Edinburgh on 30th July 1860. It was thereafter, in or about the month of November 1860, delivered by Mrs Spier to the pursuer as an irrevocable deed. He received it as such, and made known, by intimation from the pulpit and otherwise, the benevolent intentions of the granter. The first payment of the said annuity was made by the granter to the pursuer, in terms of the deed, at or about the term of Martinmas 1860, and the annuity continued to be regularly paid to the pursuer, and was laid out and expended by him in terms of the directions contained in the bond, during the life of Mrs Spier. In or about the month of November or December 1862, Mrs Spier sent her servant to the pursuer with a verbal request that he would send her the bond for perusal. He

accordingly did so, and the bond was handed by the servant to Mrs Spier. The bond was never returned by Mrs Spier to the pursuer. She died in February 1870, and it was not found among her papers. As the annuity continued to be regularly paid, and as the bond was a recorded deed, the pursuer did not press Mrs Spier to return the deed to him. It has been stated that through some mistake or misapprehension Mrs Spier had put the bond in the fire. Notwithstanding the most diligent search among Mrs Spier's papers, and every exertion and inquiry on the part of the pursuer, the said bond has not been found. An extract from the record is herewith produced."

TRAYNER for the pursuer.

There was no appearance for the defenders.

A proof before answer as to the sufficiency of the adminicles and the *casus amissionis* was allowed. The proof instructed the averments of the pursuer. It did not, however, appear in evidence whether Mrs Spier had destroyed the bond intentionally or through inadvertence.

When the case came up on the proof, the Lord President intimated his doubt whether, looking to the terms of the Act 1617, c. 16, the pursuer had sufficient interest to entitle him to resort to a proving of the tenor, and suggested to counsel the propriety of considering the effect of an extract from the Register of Sasines when the conveyance itself is registered.

At advising—

LORD PRESIDENT—I thought it my duty to suggest the difficulty, because the extreme remedy of proving the tenor should only be resorted to where it is necessary. But it appears to be matter of so much uncertainty, to say the least, whether the pursuer does not require the remedy to make his right secure, that I am not disposed to urge the objection further. It is, at least, doubtful whether he would be in as good a position with the extract as with the deed itself, and I am therefore for giving him decree.

LORD DEAS—The tenor is satisfactorily proved. The only question is, Has the party shewn a sufficient interest to get a decree? It appears to me that very little interest will do. It is a strong thing to come to the conclusion that there can be no possible interest. My impression is, that wherever the registration is of such a kind that the principal deed is not retained in the register, but given back, the party is entitled, on the loss of the principal deed, to bring a proving of the tenor. Admittedly, the extract will not stand in one case. It may be useful to have this deed restored, and I do not see how it can prejudice anyone.

LORD ARDMILLAN—The action of proving the tenor is not one to be lightly considered by the Court. It is their duty to look with some jealousy on a proving of the tenor, where any doubt is suggested as to the sufficiency of the proof of tenor, or the relevancy of the *casus amissionis*. It is obvious that a party may get a great advantage, who has had a deed in his possession. But here the main points are made out, and there is nothing but the question of sufficient interest. It is enough to say that it is not clear that the pursuer has no interest. On this question I would give the pursuer the benefit of the doubt, though I would not do so in other branches of the case.

LORD KINLOCH concurred.

TRAYNER moved for expenses, on the ground that the proving of the tenor was rendered necessary by Mrs Spier's own act in destroying the bond. The question, on whom the expenses should fall, was one between the beneficiaries under the bond and the general estate of the testatrix. It was stated that she had left the bulk of her property, which was considerable, to found an hospital; also that intimation had been made to the trustees that an application would be made for expenses, and that they had expressed their resolution not to oppose the motion, but to leave the question in the hands of the Court.

The Court decerned in the proving, with expenses.

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

Wednesday, January 24.

JOHN JAMIESON *v.* JOHN CLARK AND ANOTHER.

Testament—Executor—Negative Prescription.

A testator left a settlement dated 1787, and two holograph undated testamentary deeds, executed shortly before his death in 1823. By both the latter, though not formally recalling the previous settlement, he appointed one of his nieces, Mrs C., executrix and "universal intromitter" with his moveable estate, under the burden of certain specific legacies. Mrs C. at once assumed that the moveable succession of the deceased was to be regulated entirely by the two undated holograph deeds, which were a practical revocation of that of 1787, so far as moveables were concerned, and at once took up the position of executrix and universal legatory, administered the estate, paid debts and legacies, and herself appropriated the residue under the character which she assumed, in an open manner known to all the relatives of the deceased interested in his succession, for whose benefit all the deeds had been put on record. No challenge of her proceedings was made at the time or for forty years after.

Held that the terms of the later undated holograph deeds effectually vested Mrs C. with the character of executor and universal legatory, which she had assumed, and operated a revocation of the prior deed of 1787. But that, independently of this, any claim against her as executrix, founded on the assumption that she held the position of executrix merely, and not of universal legatory also, was cut off by the negative prescription.

This action of count, reckoning, and payment was brought by a descendant of one of the nephews of the deceased William Gilmour, who was also a legatee under his will, against the representatives of his executrix.

The said William Gilmour, who died in 1823 without children, had executed along with his wife, who predeceased him in 1819, a mutual disposition and settlement disposing of their whole means and estate, heritable and moveable. This deed was dated 1787. In that part of it which bore reference to William Gilmour's own property, the most important clause was as follows:—"And as I have at present sixteen nephews and nieces all equally near of kin, and whether these shall be