advance a yearly sum out of the general trust-estate for the education and maintenance of the said children?

"3. What is the amount of the yearly allowance to which the said children are presently entitled for their education and maintenance? or, What yearly sum have the parties of the first part power to advance for that purpose?"

FRASER and ROBERTSON for parties of the first part (Gilmour's trustees).

WATSON for Gilmour or Wilson and husband.

REID for the tutor *ad litem* to pupil children.

At advising—

LORD JUSTICE-CLERK—Our opinion is not asked here as to the vesting of this provision. The only question is, Whether these trustees are restricted to payments out of capital? or Whether these children are entitled to payment for maintenance out of the income of the general estate? I am clear that they are entitled to make the payment out of the general estate. This is manifest from the conception of the deed, and especially the clause with regard to capital which might be set free in the event of the second marriage of Mrs Gilmour.

LORD COWAN—The question is, Are these children to be left to starve? We cannot arrive at the conclusion that the truster intended them to be left without any provision. Surely the income of this estate, which is not directed to be accumulated, is the proper source of their aliment, and one hundred pounds of that income has now been set free by the marriage of Mrs Gilmour.

LORDS BENHOLME and NEAVES concurred.

The first and second questions were accordingly answered in the affirmative, and twenty pounds per annum fixed as the yearly allowance to each of the three pupil children.

Agents for Gilmour's Trustees—A. & J. Bruce, W.S.

Agent for Mrs Wilson and Children—J. Galletly, S.S.C.

Friday, July 12

FIRST DIVISION.

BUDGE (SMITH'S TRUSTEE) *v.* BROWN'S TRUSTEES AND OTHERS.

Bankruptcy—Heritable Creditor—Preference—Maills and Duties—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), § 118.

A creditor of a bankrupt, who held a bond and disposition in security over the bankrupt's heritable estate, on which he had obtained a decree of maills and duties which was not extracted till within sixty days of the sequestration, entered into possession of the subjects and drew the rents. *Held*, in accordance with section 118 of the Bankruptcy Act, 1856, that he was bound to account to the trustee in the sequestration for the rents (deducting necessary expenses), after charging them with the interest due on his debt for the half-year current at the date of the sequestration, and any arrears of interest for the year preceding that half-year.

On 23d January 1868, the estates of Alexander Gordon Smith, residing at No. 20 Gardner's Crescent, Edinburgh, were sequestrated. The pursuer Mr Henry Budge, C.A., was elected trustee in the sequestration on 3d February 1868, and confirmed on the 7th.

The estate of the bankrupt chiefly consisted of house property in Edinburgh, yielding a gross rental of about £600 a-year, and burdened with heritable securities to the extent of £7082, 14s. 11d.

The first or leading security over the subjects was a bond and disposition in security for the sum of £6000, dated 13th May 1863, granted by the bankrupt in favour of Thomas Dall, C.A., as *curator bonis* and *factor loco tutoris* to the children of the late John Blair.

The subjects were also burdened with postponed bonds and dispositions in security in favour of Sutherland's trustees, Miss Margaret Johnston, and Miss Agnes Muir, for £282, 14s. 11d., £250, and £550 respectively. The bankrupt having failed to pay the interest due on the first-mentioned bond at Whitsunday 1867, Mr Dall, on 29th October 1867, raised an action of maills and duties, on which he obtained decree in absence on 19th November 1867, and thereupon entered into possession. The decree was extracted on 4th December 1867.

By assignation, dated 8th, and recorded 10th February 1868, Mr Dall assigned the bond and disposition in security in his favour to the defenders, Brown's Trustees and Thomas Balfour. He also assigned to the same parties the decree of maills and duties in his favour.

The rents of the subjects falling due at Martinmas 1867 were drawn partly by Mr Dall and partly by his assignees, and since that term down to and including the term of Whitsunday 1870, they were drawn by his assignees.

On 25th April 1871 Mr Budge, as trustee on the sequestrated estate, raised an action of count and reckoning against Brown's trustees and Mr Balfour, for their intromissions with the rents of the estate.

The pursuer founded on the 118th section of the Bankruptcy Act, which provides:—"No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties on which a charge has not been given sixty days before the sequestration, shall (except to the extent hereinafter provided), be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from executing or poinding of the ground, or obtaining a decree of maills and duties after the sequestration; but such poinding or decree shall, in competition with the trustee, be available only for the interest of the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

The defenders maintained that they were entitled to appropriate the whole rents drawn by them in extinction of their debt.

The pursuer maintained that the defenders were only entitled to appropriate the rents to the extent of satisfying their preferable claim for interest accruing during the year and a-half allowed by section 118 of the Bankruptcy Act, and that they were bound to account for the surplus to him.

After the action was raised the subjects were sold by Miss Agnes Muir, one of the postponed bondholders, for £7150.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor;—

"*Edinburgh, 4th July* 1871. . . . . Finds that the accounting in this case must proceed on the footing that the rents in question are chargeable under the defenders' decree of maills and duties, with—(1) the interest resting owing to them in virtue of the bond founded on by them for the half-year from Whitsunday to Martinmas 1867; (2) Any arrears of interest resting owing to them under said bond for the year preceding said half-year; and (3) the necessary expenses of keeping the subjects yielding the rents in question in repair; as also the feu-duties, rates, taxes, or other burdens payable in respect of said subjects during said year and a-half.

"*Note.* . . . The matter which has now been disposed of by the Lord Ordinary is regulated by section 118 of the Bankruptcy (Scotland) Act, 1856, quoted in article 9 of the pursuer's condescendence. It appears to the Lord Ordinary that, having regard to the terms of that section, and to the state of the facts, as referred to in article 10 of the pursuer's condescendence, and the defenders' answers to that article, and, in particular, to the fact that no charge was or could have been given under the defenders' decree of maills and duties sixty days prior to the sequestration in question. The finding in the interlocutor now pronounced is in accordance with the true meaning and construction of the statute, the general object of which, and the rights of a trustee in a sequestration, so far as the present dispute is concerned, are well explained by Mr Bell in the Commentaries published by him in 1840, for although these Commentaries related to the Bankruptcy Act of 1839 (2 and 3 Vict., cap. 41), and not that of 1856, they are, as regards the matter in question, equally applicable. And it further appears to the Lord Ordinary that the construction of the statute contended for by the defenders, as referred to in their pleas in law, especially their second and third pleas, is inadmissible. The Lord Ordinary thinks it only necessary further to remark, that both parties were agreed that the 'current half-yearly term,' referred to in the statute must be held to be the half-year current at the date of the service of the summons of maills and duties."

The defenders reclaimed.

After some discussion, the Court, on 24th November 1871, before further answer, ordered the pursuer and defenders to lodge a state of the debt due to the defenders as heritable creditors, giving effect to the sums received, or alleged to be received, by them out of the rents of the estate.

From the states lodged it appeared that the price obtained for the estate was sufficient to pay off the debt, principal and interest, of the defenders, the preferable security holders. It also appeared that, if effect were given to the intention of the defenders, viz., that they should be allowed to impute the rents drawn by them in extinction of their debt, and restrict their claim upon the proceeds of the sale to the balance, the price would be sufficient to pay the postponed bondholders in full, or very nearly so; whereas, if effect were given to the contention of the pursuer, and the surplus rents, after deducting the interest due to the defenders for the three half-years mentioned in section 118 of the statute, paid over to the trustee, the balance of the price available to meet the debts due to the postponed bondholders would be of comparatively small amount, and the greater part of these debts would be ranked as ordinary unsecured claims in the sequestration.

The Court were accordingly of opinion that the question could not be satisfactorily tried between the pursuer and the only parties called as defenders, who had really no interest in the matter, the parties really interested being the postponed bondholders.

On 15th December 1871, the postponed bondholders, viz., Sutherland's Trustees, Miss Johnston, and Miss Muir, sisted themselves as defenders.

The pursuer was allowed to amend his summons and condescendence on payment to the original defenders of ten guineas.

The summons now concluded for declarator that the original defenders Brown's Trustees and Thomas Balfour "have a preferable claim, but only to the extent after-mentioned and no further, to retain out of the rents collected by them from the said heritable subjects so much thereof as will satisfy and pay the interest which became due on the bond at the term of Whitsunday 1868 for the half-year from Martinmas 1867, being the half-year current at the date of the sequestration, and also the arrears of interest due on the bond for the year preceding Martinmas 1867," with an alternative conclusion to meet the case of section 118 of the Bankruptcy Act being held to apply to the half-year current at the date of raising the action of maills and duties, and the year preceding that half-year.

The pursuer pleaded—"(6) None of the defenders are entitled to claim from the rents of the heritable subjects belonging to the bankrupt more of said rents than will pay and satisfy the then preferable claims for interests under section 118 of the said Bankruptcy Act."

The original defenders pleaded—"(1) The defenders are entitled, in virtue of their security, to a preference over the rents of the said heritable estate in competition with unsecured creditors. (2) The provisions of the Bankruptcy (Scotland) Act, section 118, only limit the defenders' security under their decree of maills and duties, in so far as regards arrears of interest, and do not prevent it from operating as a security for interest accruing after the date of the decree. (3) The defenders have a preference over the free rents accruing since their entry to possession for the interest of their debt during the same period, and for expenses covered by the penalty and termly failure clauses of the bond, in virtue of their recorded disposition and assignation to rents, and also in virtue of the said assignation to rents, and possession under their decree of maills and duties. (4) The defenders were entitled, in virtue of the said recorded bond, to let the said subjects, and to assert a preference over the rents thereof for the interest and expenses due to them for the period of their possession. (8) The defenders having intromitted with the said rents as creditors holding a preference over the same, are entitled to appropriate the free proceeds in extinction of their debt, and to restrict their claim upon the proceeds of the sale to the balance. (10) The pursuer having allowed the original defenders to continue in the administration of the subjects under their title of heritable creditors in possession, is barred from objecting to their said administration, and can only insist in the conclusions of this action on the footing that effect shall be given in it to the defenders' security over the rents."

The compearing defenders pleaded—"(1) The

pursuer is not entitled to decree in terms of the declaratory or petitory conclusions of the summons, in respect 1st, that Mr Dall and his assignees—the original defenders Brown's Trustees—and Mr Balfour were both entitled and bound to apply the whole rents of the said heritable estate uplifted by them, whether in virtue of their decree of maills and duties or otherwise in extinguishing their entire debt, principal and interest, to the extent of the sums so uplifted, after deducting necessary expenses, including repairs on the property, and the feu-duties, taxes, and public burdens applicable to the period in respect of which the said rents were uplifted by them; and 2d, that the unsecured creditors of the bankrupt are not entitled to any portion of the rents of the heritable property of the bankrupt until the whole debts of the creditors holding securities are satisfied. (2) Mr Dall and his assignees having uplifted the rents of the properties under a good and valid title, their claims for principal and interest were thereby satisfied and extinguished to the extent of the free rents received by them. (3) In any view, the pursuer is bound to apply all rents which may be recovered by him under this action in paying the debts due to the present defenders before applying any portion thereof in paying the general creditors of the bankrupt. (5) The present defenders are entitled to have a state adjusted in this process ascertaining 1st, the amount of the debt due under the first security for £6000, and interest, after applying in extinction thereof the free rents intromitted with by the original defenders; and 2d, the free balance of the price of the property available for their respective debts after extinguishing the remainder of the said first security, and on that being done the whole defenders should be assoilzied from the action, and the present defenders found entitled to expenses."

Solicitor-General and M'Laren, for the original defenders, and Marshall, for the compearing defenders, argued—The right of a heritable creditor to the rents of the estate over which his security extends is not dependent on his obtaining a decree of maills and duties. It is true that he cannot without such decree compel the tenants to pay their rents to him. But though a decree of maills and duties is necessary to give him an active title to uplift the rents, his right to the rents, so far as not uplifted, is equally good without such decree—Bell's Commentaries, i, 793 (M'Laren's ed.); *Lady Kelhead*, 1748, M. 2785; *Webster* v. *Donaldson*, 1780, M. 2902, in both which cases a heritable creditor was, in virtue of his infeftment alone, preferred to an arrester of the rents; see also Ersk. 3, 5, 5. The right of the heritable creditor to the rents being created by his infeftment and not by the decree of maills and duties, the limitation of the effect of a decree of maills and duties by section 118 of the Bankruptcy Act cannot affect the creditor's right to the rents. The object of that section, and the only object, is to prevent an heritable creditor from interfering with the *management* of the trustee, except to a certain limited extent. The right of administration of the heritable estate may often be a very valuable one, and it is the policy of the Act that this shall be in the discretion of the trustee. But that does not affect the right of the heritable creditor to the rents, by whomsoever they are drawn. The trustee holds the estate, subject to such preferable securities as existed at the date of the sequestration (sec. 102). In this case the creditor has a power of sale. But in determining the meaning of the statute this specialty must be set aside, and the case of a heritable creditor considered who has no power of sale. According to the interpretation contended for by the trustee, such a security-holder could be kept for an indefinite period, at the pleasure of the trustee, out of all benefit of his security, if the trustee chooses not to sell. Assuming the defenders' contention to be right, the preferable security-holders were not only entitled, but bound, in justice to the postponed bond-holders, to apply the rents in extinction of their debt, and not to hand them over to the trustee.

Watson and Scott for the pursuer—It is admitted on the other side that the heritable creditor cannot compel payment of the rents without a decree of maills and duties, and therefore the trustee has the right to uplift the rents, except to the extent provided by section 118. As soon as rents come into the possession of the proprietor, they are funds available for all his creditors; there is no *nexus* in favour of the creditor who holds a security over the subjects from which they are drawn. And the same holds good when the trustee is substituted for the proprietor. The rents that come into the hands of the trustee, except as otherwise provided, are funds available for the whole creditors. If the defender's interpretation of the statute were correct, the result would be very singular. For a certain period the heritable creditor would have the right to draw the rents and pay himself the three half-years' interest allowed by the statute. Any surplus he would have to account for to the trustee, but this very surplus, according to the defender's contention, falls to be paid back by the trustee to him. In regard to securities without a power of sale, the unfortunate result which the defenders have mentioned, is merely the consequence of the creditor having taken an imperfect security; *sibi imputet.*

At advising—

Lord Kinloch—The parties before us are, on the one hand, certain heritable creditors of Mr Alexander Gordon Smith, holding bonds and dispositions of security with the usual clause of assignation of maills and duties; and, on the other hand, Mr Henry Budge, trustee on Mr Smith's sequestrated estate. The question raised regards the effect of an action of maills and duties at the instance of the first heritable creditor (in the settlement of whose claim the postponed creditors are materially interested), in competition with the sequestration. This question involves a consideration of the right of an heritable creditor holding such an assignation.

I think it cannot be doubted that the right to the rents, on the part of such a creditor, is constituted by his bond and infeftment. It has been sometimes said that the effect of the infeftment is to operate an intimation of the assignation in the bond; and this in a certain sense is true. But the expression is misleading. The right of the heritable creditor under his bond and infeftment is not *eo ipso* that of full proprietor of the rents, so that any one uplifting the rents is taking what belongs to the creditor, and must restore it. The creditor's right is that of an incumbrancer, not a proprietor. And in order to its full evolvement and enforcement, it requires judicial steps on his part. These are generally taken by raising a summons of maills and duties, the effect of which, duly followed out, will maintain the creditor's preference. But the cases of *Lady Kelhead* v. *Wallace*, Mor. 2785, and *Webster* v. *Donaldson*, Mor. 2902,

show that this step is not indispensable; but that, so long as the rents are *in medio*, the judicial appearance of the creditor, as in a process of multiplepoinding, will suffice for his success in competition. This proceeds on the simple ground, that what the creditor could at once do in the way of raising a summons of maills and duties may be reasonably supposed to be done, so long as the rents are *in medio*. If, however, before any steps are taken by the heritable creditor, the proprietor by whom the bond was granted uplifts the rents, there is, as I conceive, no legal bar to the tenants paying him; and the heritable creditor will have no legal claim against them for a second payment. In the same state of things the personal creditors of the landlord may, as I think, arrest the rents; and if, by means of a decree of furthcoming, the rents are carried off before the heritable creditor comes forward, they will not be liable to be reclaimed at the instance of the heritable creditor. But if the creditor has once raised his summons of maills and duties, no one can come into effectual competition with the right created by his bond and infeftment.

Such I conceive to be the general principles applicable to the case; and I think these principles supply an easy solution to the question touching the right of such an heritable creditor in competition with a sequestration under the Bankrupt Statute. Independently of the special provisions introduced by the statute, which I shall immediately consider, I think it necessarily follows that the raising a summons of maills and duties at any time anterior to the date of sequestration will preserve the creditor's right of preference over the rents. It will do so by virtue of the principle that such a step maintains the preference created by the bond and infeftment, over every assignation or diligence not carried into full completion by appropriation of the rents. There might be more difficulty as to a maills and duties raised after sequestration, in respect of the strong vesting clauses in favour of the trustee,—a question not necessary to be considered. But I think it beyond all doubt that, independently of special provision, the raising of a summons of maills and duties the very day before sequestration would be sufficient to give the heritable creditor a right to the rents then due, and to all accruing afterwards, to the exclusion of the trustee in the sequestration.

But the Bankrupt Statute provides, by sect. 118, "that no poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties in which a charge has not been given sixty days before the said date, shall, except to the extent hereinafter provided, be available in any question with the trustee; provided that no creditor who holds a security over the heritable estate, preferable to the right of the trustee, shall be prevented from executing a poinding of the ground or obtaining a decree of maills and duties after the sequestration; but such poinding or decree shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for the year immediately before the commencement of such term."

I can only put one construction on this provision —viz., that it was intended to limit the preference, otherwise competent, of the heritable creditor. Independently of such a provision, the creditor would carry off the rents from the trustee by a maills or duties raised at any time anterior to sequestration. The statute enacts that, except to a qualified extent, this privilege shall cease sixty days before sequestration; or, as more precisely put in the statute, unless a charge on the decree of maills and duties shall have been given sixty days previous. Any summons of maills and duties, where the decree has not been charged on sixty days before sequestration, and every action of maills and duties raised subsequently to sequestration, will be only available to secure the half-year's current interest and previous arrears to the amount of one year's interest. This seems to me to be the plain import of the provision. The only counter interpretation presented to us was that it merely imported a regulation as to possession—viz., that the creditor should be entitled to enter into possession, to the effect of helping himself to eighteen months' interest, but that for all besides he must go against the trustee,—his right to the rents, however, being exactly the same in both cases. I consider this interpretation to be altogether inadmissible, and to imply a most unmeaning arrangement as intended by the Legislature,—the arrangement, namely, that, although having right equally to all the rents due at any term, the creditor was to levy them to the extent of eighteen months' interest himself, and *quoad ultra* through the hands of the trustee. I think the clause was intended to regulate and qualify legal rights. The declaration is that, except to the limited extent of eighteen months' interest, the action of maills and duties shall not "be available in any question with the trustee;" or, again, "shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term." These words are unsusceptible of any other than one meaning.

There can be no doubt that, notwithstanding this provision as to the rents, the heritable creditor is entitled, on a sale of the subjects, to realise out of the price the full amount of his claim, both principal and arrears of interest. He therefore sustains no injury by the provision, except a postponement of payment, and the imposition of the risk that the price on a sale may fall short. It is not easy to give precise expression to the policy which dictated this provision in the statute as to the rents. It may be that these rents having, after falling due, the nature of personal estate, the Legislature intended to admit the personal creditors to a larger participation in these, and to throw the creditor back, to a larger extent, on the capital of the property. Or the intention might possibly be to quicken the diligence of the heritable creditor in effecting a sale, and so enabling the bankrupt's affairs to be wound up; which would be much less likely to be active if the creditor should have the power of postponing a sale, and continuing to draw the rents for an indefinite period. But the policy of the statute is mere matter of speculation, into which I would think it out of place to enter at large. The words of the statute I consider explicit, and hold that they must be given effect to according to what I think their clear import.

I therefore agree with the Lord Ordinary in point of principle, holding with his Lordship that the heritable creditor in this case, who had not given a charge on his decree of maills and duties sixty days before sequestration, was only entitled to the limited preference of the statute. But I think his

Lordship and the parties wrong in taking the date of service of the summons of maills and duties as the date at which the current half-year's interest is to be struck, and from which a year's arrears are to be retrospectively calculated. I think the true date is that of the sequestration. The clause is intended to regulate the competition between the sequestration and the individual diligence; and the date of the sequestration must be held the moment of time at which the conflict arises. It never could be intended to give the heritable creditor the power of delaying his diligence after the sequestration had issued, so as to embrace a year's arrears not due at the time of the sequestration, but accruing subsequently. A fixed point of time for the occurrence of the competition must have been contemplated, and this could be no other than the date of sequestration. Correcting this error, I am of opinion that the Lord Ordinary's interlocutor should be adhered to, and the rights of the parties interested adjusted on this footing.

Lord Ardmillan—I have arrived at the same conclusion. The action of maills and duties is not requisite for the constitution of the right to the rents, but to the enforcement of it. That being the case in law, the Bankruptcy statute interposes, to limit the powers of the heritable creditor. He can only bring an action of maills and duties before the sixty days, or to the limited effect allowed by the Act. I also agree with Lord Kinloch that the Lord Ordinary has fallen into an error in regard to the term to which the statute applies.

Lord Deas—Prior to the Bankruptcy Act the position of the heritable creditor was this—He had a real right over the estate, both for the principal sum and interest, but he could not make that right effectual, as regards interest, without either a decree of maills and duties or executing a poinding of the ground. If he resorted to these means he was in a position to vindicate his real right. But otherwise he could not make that right effectual. The only decisions which seem to indicate that he could make his right to the rents effectual without a decree of maills and duties, or executing a poinding of the ground, are those in which he has been held preferable to an arresting creditor. The explanation of these cases, which only occurred in a process of competition, is, that it was held that as the competition had arisen, and as the heritable creditor could at once, by going through certain forms, make his preference effectual, it was useless to compel him to go through these forms. But then comes the question—What change was made in the ights of the heritable creditor by the Bankruptcy Act? It is not contended that there was here any decree of maills and duties on which a charge had been given sixty days before the sequestration, and the next question is, What is "hereinafter provided?" The heritable creditor may still execute a poinding of the ground, or obtain a decree of maills and duties, but in competition with the trustee they are to have no further effect than to be available for the interest for the current half-year, and for the arrears of interest for one year preceding. If a poinding of the ground, or a decree of maills and duties, was essential before the statute to make the right effectual and these are declared by the statute not to be effectual, except for a limited extent, it necessarily follows that the position of the heritable creditor is changed. A certain right was given to a man if he would stretch out his hand and go through certain forms. The statute cuts off the hand. It is not necessary to inquire into the precise rights of the trustee. He has all the rights which the heritable creditor has not.

I also concur as to the half-year to which the statute applies.

Lord President—I entirely agree with Lord Kinloch, and particularly in his exposition of the rights of a heritable creditor as to the rents of the estate over which his security extends. It appears to me that, even if there was more doubt in regard to the principles of law applicable to the powers of a heritable creditor, section 118 of the Bankruptcy Act is so clear in its expression as to be incapable of other interpretation. It declares—taking the latter part first—the heritable creditor to be preferable to the trustee, although nothing has been done by him effectual till within sixty days of the sequestration, to the extent of the interest of the debt for the current half-year, and for the arrears of interest for one year preceding. His right to the rents is to be preferable to that of the trustee to that extent, but to no other extent shall a decree of maills and duties, on which a charge has not been given sixty days before sequestration, be available in any question with the trustee. I cannot imagine that the one part of the section means anything different from the other. By the phrases, "shall be available in any question with the trustee," and, "shall in competition with the trustee be available," the same thing is meant. If the right of the heritable creditor is not available in any question with the trustee, that leads us to consider what is the position of the trustee. When we look at the vesting clause (§ 102), we see that the trustee is thereby placed in the position of the proprietor of the estate. The heritable estate is to be vested in him "as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in his favour." In short, he is the singular successor of the bankrupt. If it were provided that the right of the heritable creditor shall not be available in any question with the proprietor, or in competition with the proprietor, surely there could be no doubt as to the meaning of the provision. Taking the vesting clause (§ 102) and § 118 together, the meaning of the statute is clear.

I also concur as to the term. The half-year is the half-year current at the date of the sequestration.

The Court pronounced the following interlocutor:—

"*Edinburgh, 12th July* 1872.—Recall the interlocutor reclaimed against; Find that the accounting in the case must proceed on the footing that the rents in question are chargeable under the original defenders' decree of maills and duties, with (1) the interest resting-owing to them, in virtue of the bond founded on by them for the half-year from Martinmas 1867 to Whitsunday 1868; (2) any arrears of interest resting-owing to them, under said bond, for the year preceding said half-year; and (3) the necessary expenses of keeping the subjects yielding the rents in question in repair, as also the feu-duties, rates, taxes, premiums of fire-insurance, or other burdens payable in respect of said subjects during the period of the said defenders' possession of the subjects: Find Suther-

land's Trustees and Others, the compearing defenders, named and designed in the minute No. 356 of process, liable to the pursuer in expenses since the date of their compearance on 15th December 1871: Find no other expenses hitherto incurred due to or by any of the parties; remit to the Lord Ordinary to proceed with the accounting, with power to his Lordship to decern for the expenses now found due."

Agents for Pursuer—Watt & Anderson, S.S.C.
Agents for original Defenders—Millar, Allardice, & Robson, W.S.
Agent for compearing Defenders—T. J. Gordon, W.S.

Saturday, July 13.

JACKSON *v.* COWIE & SONS.

Reparation—Breach of Contract—Competency of Second Action.

In an action of damages for breach of contract, the pursuer founded on a contract to give a daily supply of coals for a period not expired at the date of the action, reserving all claim for damages to be sustained in the event of the defenders failing to implement the contract during the period yet to elapse, and subsequently raised a second action for the damages alleged to have been sustained from the date of the first action till the expiry of the contract. *Held* that this was a competent course.

Process—Damages—Jury.

Circumstances in which it was *held* that sufficient cause had been shown why an action of damages for breach of contract should not be sent to a jury.

On 29th January 1872 Thomas Jackson, ironmaster, Coatbridge, raised an action against George Cowie & Sons, coal-masters, near Coatbridge, for breach of contract, on the allegation that the defenders had contracted to supply him with a certain quantity of coal and shale daily for six months from 4th September 1871, and that from about the beginning of October the supplies furnished by the defenders fell short of the contract amount, and on 7th December ceased altogether. The pursuer reserved all claim for damages sustained or to be sustained in the event of the defenders failing to implement the contract for the period from 26th January to the end of February 1872.

On 1st April 1872 the pursuer raised a second action for the damages alleged to have been sustained by him in consequence of the defenders failing to implement their contract for the period from 26th January to end of February 1872.

On 5th February 1872 the defenders raised a counter-action against the pursuer, for payment of the price of coals furnished by them to the pursuer in November and the beginning of December 1871.

Messrs Cowie & Sons objected to the form of the first action at the instance of Jackson, as containing a reservation of the claim for loss sustained between the date of the action and the expiry of the contract, and to the competency of the second action.

The Lord Ordinary (MURE) pronounced an interlocutor in both actions at the instance of Jackson, repelling the objections for the defender, and allowing the parties a proof, to be taken before his Lordship; and pronounced the same order in the counter-action.

"*Note.*—This action resolves substantially into one of damages for breach of contract, and may be said to fall within the class of causes enumerated for jury trial, which cannot be tried otherwise except by consent of parties or on special cause shown. But the Lord Ordinary, upon examining the records in the various actions between the parties, has come to the conclusion that the pursuer has shown sufficient cause why the cases should not be sent to a jury, for the leading question at issue, viz., whether there had been a breach of contract or not, depends mainly upon the construction of the letters founded upon, as to which parties materially differ, and which would be matter for direction, in point of law, to the jury; while, in the event of a breach of contract being made out, as alleged by the pursuer, the measure of damage claimed will turn almost entirely upon an account as to the difference between the contract price of the coal and shale and the price at which the pursuer had to supply himself with these articles in the market,—a species of damage which does not appear to be in any peculiar respect more proper for disposal by a jury than before any other tribunal.

"With reference to the objection taken to the form of the action, as containing a reservation of the pursuer's claim for the loss sustained between the date of the action and the expiry of the contract, and to the competency of the second action, it appears to the Lord Ordinary that there is no absolute incompetency, in a case of continuous accruing loss, in so proceeding to constitute the amount of that loss. The more correct and least expensive course, seeing that the defenders have ceased to make a partial delivery of coal on the 7th of December 1871, might perhaps have been to have inserted in the first action conclusions for implement of the contract during the remaining period of its duration, with an alternative conclusion for damages for the loss that might be sustained through non-implement. But, as the Lord Ordinary sees no actual incompetency in the course which the pursuer has adopted in bringing a second action to constitute the amount of loss sustained during the remaining period of the contract, and which could not very well be estimated till the expiry of the six months during which the contract has to run, he has pronounced a similar order for proof in the second action, as well as in the counter action at the instance of the defenders, in order that the whole questions at issue may at once be disposed of."

Messrs Cowie & Sons reclaimed.

SOLICITOR-GENERAL and GUTHRIE SMITH, for them, supported the objection taken in the Outer House, and also maintained that the case should be sent to a jury.

WATSON and GLOAG for Jackson.

The Court adhered.

Agent for Thomas Jackson—William Ellis, W.S.
Agent for Cowie & Sons—William B. Glen, S.S.C.
