ment of the annuity. Here, however, the fund is expressly declared to be alimentary, and a trust is provided to continue and carry out the purposes specified.

LORD COWAN—I concur. The cases of *Tod* and *Kippen* proceeded on grounds not applicable to this case. Here there is a specific annuity given by the marriage-contract, declared to be alimentary, and confirmed by the subsequent settlement. I do not think a husband stands in a different position from a father giving an alimentary annuity to his daughter. By the proposed sale the alimentary character of the annuity would be completely destroyed, no conditions of any sort are proposed to be adjected, but the money to be handed over to the annuitant. I am clear any discharge so given is not good so as to compel the trustees to denude. There are many ways by which the ultimate destruction of the annuity fund might be prevented, as, for instance, a ranking and sale, by which the true value of the estate would be realised, and an annuity bought and settled on the annuitant under limitations to be imposed by the Court.

LORD BENHOLME—I concur.

LORD NEAVES—I concur. The element of alimentary provision has often been recognised, and is a substantial object for a parent or husband to look to.

The Court answered the question in the negative.

Counsel for Heir-at-Law—Marshall. Agents—J. & J. Turnbull, W.S.

Counsel for Trustees — Lee. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, June 26.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MACVEAN *v.* MACLEAN.

(*Ante*, p. 312.)

Obligation—Conditional Discharge—Grassum—Process—Sist.

An action being raised on certain bills, the defender pleaded discharge thereof in consideration of a long lease of a farm granted to the pursuer. *Held* (*diss.* Lord Benholme) that the bills had been conditionally discharged, but action sisted to allow the determination of the emerging interest of the heir of entail in a reduction of the lease.

Observed (*per* Lord Cowan) that these bills were clearly not intended to be rendered inoperative in the event of the pursuer being deprived of his lease.

In this case, it having been held that parole proof might competently be allowed to explain and supply omissions in certain documents in process, but that it could not be admitted to prove any discharge thereof, further proof was taken before Lord Neaves on 12th May, and now the question came up for argument. The circumstances of the action are partly stated in the previous report (*ante*, p. 312), but in the revised condescendence, articles 5 and 6, the position of matters, according to Macvean's statement, is clearly set forth. These are as follows:—In the beginning of April 1869 the defender offered to give the pursuer a lease for nineteen years of Sallachan, from Whitsunday 1869, at a rent of £300, provided the pursuer would discharge the debt for £1000 contained in the promissory-notes. In consequence of this offer the pursuer wrote to the defender a letter in the following terms: — "Alexander M'Lean, Esq. of Ardgour. Dear Sir,—According to your request, I now make you an offer of Three hundred pounds of yearly rent for the farm of Sallachan, as presently possessed by myself, the lease to endure for 19 years from Whitsunday first 1869, and I am to give up the promissory-notes for the £1000 as you proposed. I have the honour to be your obedient servant, DOND. M'VEAN." To this letter the defender replied, accepting the offer; and the letter quoted in the defences was written in answer to the defender's acceptance. After writing the letter quoted in the defences, the pursuer went to Fort-William and consulted the late Mr Macgregor, writer there, who was also local agent for the defender, as to whether a lease at a reduced rent, for which a grassum of £1000 had been paid, would be binding on the defender's heirs of entail, and he received an opinion to the effect that it would not. He then consulted Mr D. S. Maclaren, writer, Fort-William, on the same point, and received the same opinion. In consequence of this the pursuer, on his return to Sallachan, called on the defender, and informed him that he had been advised that the lease would not bebinding on the defender's successors, and that therefore the transaction could not be gone on with. To this the defender replied that it was all right, and he could do as he pleased. The pursuer, however, declined to enter into the transaction further. Nothing further was said upon the subject of a lease until the beginning of January 1870, when, in consequence of a report that the pursuer was looking out for another farm, the subject was resumed by the defender, who wrote to the pursuer a letter in the following terms:—"Private. Ardgour H., 1st Jany. /70. Dear Macvean,—I have by no means given up the intention of giving you a new lease of Sallachan. I hope it is not too late to do so. I should be sorry to lose you as a tenant and neighbour. Yrs. truly, ALEXR. MACLEAN. Donald Macvean, Esquire, Sallachan." In consequence of this letter the pursuer called upon the defender, when the defender offered to the pursuer to give him a lease of the farm at the old rent of £361, 6s. 10d. for twenty-one years, as from Whitsunday 1869. No agreement was come to at this interview, and the pursuer received from the defender another letter, dated 5th January 1870, in the following terms:—"Ardgour, 5th January 1870. Dear Donald,—I had intended going to see you yesterday and to-day, but the weather is so bad that I have [been] prevented. Oblige me by signing the enclosed, and return it to me. I suppose you will go to Fort-William to-morrow. I am quite prepared to complete the lease at once if you willing to take it. Yrs. very truly, ALEX. MACLEAN. D. Macvean, Esq., Sallachan. The enclosed will require two signatures—one on its face, the other on its back." The "enclosed" was an accommodation bill for £400 in favour of the defender, which the pursuer signed, and upon which the defender raised the money. This bill was eventually retired by the defender. The pursuer agreed to the defender's offer of a twenty-one years' lease, as from Whitsunday 1869, and the lease was

accordingly extended, and under this lease the pursuer now possesses the farm of Sallachan.

The pursuer further averred that on the faith of the lease he had expended £1000 in improvements.

To these averments the defender gave a general denial. He further narrated, in his statement of facts, the letter quoted in the previous report, and again by Lord Neaves at advising *(infra)*, and added that the promissory-notes therein referred to were those libelled on, and the lease therein referred to was that of 20th Jan. 1870, under which Macvean now holds the farm. The letter was written, he stated, in answer to a request that Macvean would return the two promissory-notes: Further, that the rent for Sallachan was at least £100 below its value.

Defender's pleas in law were as follows:—"(1) The defender not being indebted in the sum sued for, is entitled to be assoilzied, with expenses. (2) The sum sued for is not due, in respect that the pursuer has received a new lease of his farm as the consideration for his discharging or cancelling the same. (3) The sums contained in the notes libelled on having been paid, the pursuer is bound to deliver the same to the defender."

For the pursuers it was argued—The lease of 20th January 1870 is the only lease in existence of which we have any written evidence. There is no allusion therein to the £1000. No interest was paid after 28th March 1869.

For the defenders it was argued—No less than three leases existed in all—(1) in 1863, which was renounced: (2) in 1865, for seven years; and (3) on January 20, 1870, for 21 years, with entry as at Whitsunday 1869. Ardgour was in pecuniary difficulties, while Macvean was a man of high professional skill. The rents till 1869 were paid directly to Ardgour. The notes were received in 1868, and the interest was paid at irregular periods and in irregular sums as the defender could manage it. We have a letter indicating Macvean's intention to get another farm. We, in 1872, produced notes in our possession, and we produce the lease—the burden of proof lies on the party disputing. The defender's case is that the letter of "Saturday evening" was written in January 1870, and the lease must have from the evidence been delivered before February 5, 1870. The draft lease also is now produced. To several of its provisions Macvean objected; and this was the document Ardgour handed at his door to Macvean.

At advising:—

Lord Neaves—This case is attended with considerable difficulty and delicacy—difficulty as to the matters of fact to be ascertained, and delicacy as to some of the points of law involved. The pursuer's action in itself was rested upon simple and clear grounds. He sued the late Ardgour for payment of £1000, contained in two promissory notes granted by him to the pursuer in March 1868, for £500 each. The notes were produced and, not being prescribed, they were *prima facie* due. Ardgour, who was alive when the action was brought, and who survived the closing of the record, did not dispute the original constitution of the debt, and did not allege payment of it. But he defended himself on this ground—that in 1868, at the time when the bills were granted, the pursuer was tenant of the farm of Sallachan on a lease, and that it was afterwards arranged between them that the pursuer should get a new and longer lease at the same rent in consideration of his cancelling Ardgour's debt to him upon the notes libelled. In evidence of this alleged arrangement the defender, the late Ardgour, produced a letter which he alleged the pursuer had written to him in reference to the new lease. That letter was in these terms:—"*Saturday evening.*—In looking through my papers to-day I find that all the documents I have of any consequence are lying in the bank safe, amongst others your promissory-notes for £1000, and if you have any doubts of my integrity, you had better keep the lease until I give you a sufficient guarantee that I'll never claim the above. I called up this evening but could not find you."

This letter, the defender contended, proved that an agreement had been made by the parties in connection with the new lease, that the pursuer would never make a claim upon the promissory notes in question, and that it was understood that the notes and the lease were to be exchanged, but that if the lease was delivered without delivery of the notes, which were not at hand, the pursuer was, if required, to give a guarantee that he would never claim on them, or, if Ardgour had no doubts of the pursuer's integrity, he might trust to that without a guarantee. The defender alleged that having no such doubts he had delivered the lease without requiring a guarantee, and without again demanding delivery of the notes, relying upon the letter as sufficient evidence of the agreement. In reply to this defence, the pursuer made a very elaborate statement in his revised condescendence, particularly in articles 3 to 6 inclusive. The statement in article 5 deserves special attention. (These statements seem to have been added upon a revisal, having become necessary in consequence of what was stated from the bench.) But the pursuer goes on to say that this arrangement came to an end in the manner explained, and that he, the pursuer, then declined to go on with the transaction, and nothing more took place till the beginning of January, in which month the new lease was entered into—entered into no doubt for the period agreed on but not at the reduced rent—at the existing rent of £361. Now, this is his explanation:—that the letter which has no other date than that of "Saturday evening," cannot be available to the defender in this case, because in reality it applied to a totally different transaction, which had taken place in April 1869, and had so far been completed, but was afterwards departed from, and in which it was part of the transaction that the bills were to be given up. But in that negotiation the rent mentioned was £300 instead of £361, and upon finding quite unexpectedly, as the pursuer contends, that this was an invalid contract, he, although he had been corresponding—retired from it, and consequently that transaction fell through, and the letter of Saturday evening, to which alone it had reference, ceased to be binding when the new lease was entered into in January 1870. Now, besides this letter of Saturday evening, other circumstances were founded on by the defender in support of his statement, and, in particular, the fact that the pursuer, when written to by the defender's agents to furnish a statement of his claims against the defender, brought forward no other debt than one of £300, contained in another promissory note. Some other circumstances were also founded on, to which I shall afterwards refer.

The Lord Ordinary, when the case came to be debated after the closing of the record,

has it not, and it is not to be found) but the pursuer says he kept a copy of it, and he produces a copy of it. It bears the date of April 1869. It is a rather remarkable looking document, and it is attended with this peculiarity also, that he says he took a copy of this proposal at the time when he made it, and then at an after time he made a copy of that copy to send to his agent, and he says the copy produced is one or other of these copies—either the first copy or the second, but which it is he cannot tell. That is rather a curious circumstance in the case. No second copy has been found, and it is impossible not to notice the fact that this copy was long in appearing in the proceedings. Well then, the way in which the pursuer's explanation is sought to be corroborated is by reference to the meetings which he had with his agents—for there were agents on both sides—as to the legality of such a lease. The result of this, I think, is that it is most probable that Ardgour was anxious to make some arrangement to get rid of the £1000, and I think it is probable that the pursuer wanted, if possible, to get not merely a new lease but a longer lease at a lower rent, and it is certain that he consulted agents as to the safety of doing so; but it is not so clear that Ardgour ever contemplated this, much less that he actually proposed and concluded such an agreement, either verbally or by letter. One of the statements that the pursuer makes about this subject is rather a curious one. He is asked, "You have said that in 1869 Mr Maclean made a proposal to you for a new lease Did he say what induced him to make that proposal?—A. Yes. He thought it was very hard on him to be paying me £50 a year for the interest, and he thought if we could come to an understanding about getting the farm at a reduced rent, and me giving up the £1000, it would accommodate him very much." Now, there is no doubt that giving up the £1000 would accommodate him, but the way in which Ardgour is made to put it is rather singular, and not very probable, or, if so, very extraordinary, for what he says is that it was hard to be paying £50 a-year, and he was wanting therefore to get rid of that burden. And how was he to get rid of the burden? He was to get rid of the burden of paying £50 a-year by paying £60 a-year of what was got by the existing lease!—for that was the nature of it. It seems, no doubt, to be much the same. The ultimate getting rid of the debt was no doubt a great object, but at present the difference was little if, instead of getting £360 and paying £50, he lowered the rent to £300. It appears to show a loss and a very illogical way of putting it. But still something of that kind was in the mind of the pursuer, and let us see how he corroborates that story by evidence. He says he consulted oftener than once three men of business, Mr Mackenzie, Mr M'Gregor, and Mr M'Laren. The time for all this the pursuer positively states to be April 1869. Of that he has no doubt; the copy of one of his letters bears that date. Mr M'Gregor unfortunately is dead, and Mr M'Laren, the pursuer's own agent, though he speaks of a consultation, can affix no date to it except that it was between the death of young M'Gregor and that of his father—the one in February 1868, the other in the end of 1869. But Mr Mackenzie is more precise, and it is very difficult to get over Mr Mackenzie's evidence—"I went to Fort William at Whitsunday 1868 to be associated in business with the late Mr M'Gregor. I was his partner in connection with the Bank, as well as with the writing business, from that time. At that time Mr M'Gregor was agent for Ardgour, and also for Mr Macvean." Now, the dates are corroborated so far as this goes, because Mr Mackenzie went to supply the place of Mr M'Gregor's son, whose death took place in February 1868; and he says, "I remember Mr Macvean coming to the office one day in the course of the summer of 1868, but I am not prepared to say at what time in the summer. I am quite sure it was in the summer of 1868. He saw Mr M'Gregor in the first instance, and I was afterwards called in from a separate apartment to the room in which they were. After being introduced to Mr Macvean, Mr M'Gregor asked me if a sum of money paid by a tenant for a lease would invalidate the lease in the case of an entail. I answered that it would—upon which Mr M'Gregor turned round to Mr Macvean and said to him, 'noo Donald,' or some similar expression." Mr Mackenzie is pressed particularly about the date—"How do you remember that it was the summer of 1868 that the pursuer called upon Mr M'Gregor.—(A) I recollect it because I went to Fort William in the beginning of the summer of 1868, and it was at that interview that I was introduced to Mr Macvean for the first time. It was in the end of May that I went to Fort William." It certainly seems difficult to resist the effect of that evidence. Mr Mackenzie was Mr M'Gregor's partner in the writer business, and used necessarily to see Mr Macvean often; and it is incredible that this interview could have happened in April 1869, which is what the pursuer says, contrary to Mr Mackenzie's statement, that it happened in May 1868, because that involves this, that Mr Mackenzie had remained twelve months altogether at Fort William a partner in Mr M'Gregor's business and in the bank, and had not seen Macvean; whereas he says in the most clear manner that this was his first introduction—which is very probable—and that when he came in this question was discussed and answered. That is no corroboration certainly as to the time; and if we believe this, how can we reconcile it with the pursuer's statement, that (having got this information and learned this view of the law in 1868, if Mr Mackenzie is correct) he, in April 1869, in ignorance of any such objection, entered into—first verbally and then in writing—an arrangement with Ardgour for a lease of that objectionable kind—not only extending the term, but lowering the rent by £60—and then, after that, found out (if Mr Mackenzie is right he knew it long ago) that it was an objectionable transaction, and thus resiled. Now, if the pursuer is not corroborated as to that, it gives a very awkward appearance to the whole case, because it then comes to this—that there could not have been in April 1869 a proposal for a lease at £300, because he tells you he would not have entered into such a thing if he had known it was objectionable in law. If he knew it, the story is thrown into inextricable confusion; and if in 1869 there was a proposal for a lease, he having known in 1868 that the terms were objectionable, then the letter of Saturday evening, written in 1869, cannot have referred to a lease at a lower rent (for the pursuer must have given up any idea of that), but to a lease which, though not carried through in 1869, was allowed to go off and on, and was carried out in January

and after the death of the original defender, allowed the parties before answer a proof of their respective averments, and on advising a reclaiming note the Court adhered. In doing so the Court did not overlook the delicate nature of the point of law thus raised as to the competency of parole proof. But they thought themselves, in the circumstances, bound to allow an investigation. On the one hand, no doubt, the pursuer had his documents to found on as establishing his debt, but, on the other hand, the defender had a document to rely on of a very peculiar kind —a document under the hand of the pursuer, which, if it referred to the transaction which led to the new lease, seemed clearly to infer some obligation on the pursuer not to make a claim on these bills. That document referred to a lease as about to be delivered, and it indicated very plainly that although the lease might be delivered, and the bills not delivered, this was not to infer a claim upon the bills as competent to the pursuer. It is certain that a lease was granted and delivered to the pursuer in January 1870, and although the letter of Saturday evening does not explicitly show that the lease there referred to was the one of January 1870 which was executed, and although there was no such date to the letter as unequivocally connected it with that transaction, yet that uncertainty was the result of the pursuer's unbusinesslike conduct in putting an imperfect date and otherwise using ambiguous language; and, on the other hand, the fact remained that the letter of Saturday evening was left in Ardgour's hands, and that its terms called imperatively for explanation, to clear them up and take off their effect. The proof having now been taken, it is our present task to state our opinion of its import as far as we can, and to say what course shall be taken. In support of the defender's allegation that the letter of Saturday evening was written in reference to the new lease of January 1870, there is not much direct evidence, unless it be the defender's own statements during his lifetime, before the action came into Court. But it seems expedient in these circumstances to look at the pursuer's proof as to this matter, for if he has sufficiently proved that the letter had reference to another and earlier transaction, and a totally different state of things, this may put an end to the whole case. The pursuer states in his deposition these facts—(1) that before the January lease was concluded—a considerable time before that—there was a proposal that Ardgour should give him a lease for nineteen years at the rent of £300 a year. (2) He says that this proposal was first spoken of in the beginning of 1869. (3) That the proposal was made at Ardgour House, and that in answer to the proposal the pursuer agreed to it, and a verbal bargain was concluded. (4) That this bargain was shortly afterwards departed from, also verbally, in consequence of the pursuer having when in Fort William consulted Mr M'Gregor, Mr Mackenzie, and Mr M'Laren, who advised him that it would not be a nice bargain, or binding on the heirs of entail, so that, he says "I threw up the bargain at once." It is somewhat remarkable that in the first part of his evidence the pursuer makes no reference at all to writings as passing between him and Ardgour as to the £300 lease. He says they made the bargain for the new lease verbally, and he threw it up verbally. However, though there is a good deal of going backwards and forwards in the evidence, I am not inclined to give much effect to that, for so much may depend on the way in which questions are asked that we must give all fair play. In the latter part of his evidence, when cross-examined by his own counsel, he gave another statement, being very nearly that made on record. When asked about the letter of Saturday evening he tells how he wrote it—"I wrote that letter to Ardgour in answer to a note from him saying that he had written the lease, or the letter of lease as he called it, for £300 of yearly rent to endure for 16 years. I took that note back to Ardgour when I found it was not according to law to take a lease of that sort. That letter from Ardgour to me was written in April 1869. Q. Did he ask in that letter that you should deliver up the bills?—A. Yes: I think he said something about that. Q. What did he say?—A. So far as I remember he wrote me that it was better that we should exchange the lease and the bills, or something to that effect; I cannot remember the words. Q. What did you understand him to mean by the lease?—A. The letter of lease that he had written out himself. Q. Had he given it to you?—A. He had not given it, but he sent me that note, saying it was ready. Q. Where are these notes?—A. I brought them back to Ardgour when I told him that the transaction could not be gone on with. Q. Was it in answer to these notes that you wrote that letter?—A. Yes; it was in answer to the note agreeing to give me the lease for £300 for the farm of which I was then in possession. Q. Had he given you that letter agreeing to give the farm at the rent of £300?—A. He had sent me that note saying it was ready. Q. Upon what condition was he to give you the farm at that rent?—A. Upon the condition that I was to give up the £1000. Q. That letter being in your possession, what did you refer to in the letter No. 11 when you said that 'if you have any doubt of my integrity, you had better keep the lease until I give you a sufficient guarantee'?—A. I just wanted him to keep the lease. Q. But you had it?—A. No, I did not have it. Q. Did you not say that you had the letter in your possession at that time?—A. I did not. Q. Had there been a letter of lease prepared by Mr Maclean at that time?—A. He said so in his note. Q. And you took that note back to him? —A. Yes; I took it back after I returned from Fort William. Q. Why did you not get up the letter No. 11, when you took back his note? —A. I never thought anything about it." Now, it is certainly remarkable that the pursuer, after an exchange of missives on the subject—(he having, as he says, made an offer, at Ardgour's request, for a lease at £300, and having got Ardgour's acceptance, and then, in answer to that acceptance, having written the letter of Saturday evening containing a very remarkable statement about the bills)—when he finds that that lease is challengeable, goes to Ardgour and breaks it off, and gives up, as I understand, Ardgour's note to him, and does not get up that letter which he had written in these circumstances, but allows Ardgour from that time forward to remain in possession of that letter—a letter having such an equivocal meaning that it was impossible to tell from the face of it the year in which occurred the transaction to which it referred; that he should moreover leave the thing to stand on that footing, and be now obliged to make this elaborate explanation. Let us see what corroboration there is of it. The letter that he sent to Ardgour making the offer is not recovered (Ardgour

1870. That makes a very material difference on the pursuer's statement, for undoubtedly the pursuer's case is this—that this document of Saturday evening, which is capable of being considered as relating to the lease actually carried through, and has no date incompatible with that, can be explained away by the fact that at the time it was written there was a verbal and written agreement for the lease at £300, and that a diminution of rent was the consideration for which he agreed to abstain from claiming on the bills. If that is not true, it comes to this—that there are two competing transactions for explaining that letter, but that in so far as the rent is concerned from 1868 downwards, after that interview with Mr Mackenzie there was only the old rent to be exacted, whatever lease was executed. Then came the transaction, there being a lease for the old rent, carried through after some delays.

This letter, written and delivered to Ardgour for an important purpose, and which in this transaction must be considered of special importance, was allowed to remain in Ardgour's possession, just as the bills were allowed to remain in Macvean's possession: What the effect of that will be I shall afterwards speak to, but it appears a matter for the pursuer to prove; and if he has not made out his case, then there comes to be considered how we are to dispose of it. Another thing with regard to this letter is that it speaks of a lease; but pursuer says there was no lease, but only his own offer—his own copy of that offer,—and the answer by Ardgour accepting that offer, which he says he returned. Now if that be so, it just comes to this, that the letter was left—an important document, which it undoubtedly was,—and it never occurred to the pursuer that, having written such a document, knowing the transaction had gone entirely off, he should have got it up, so as to prevent the possibility of its being used against him. That seems difficult to explain. There are some other circumstances that we have to keep in view. The copy of this letter proposing the lease has rather made its appearance in a peculiar way. Pursuer had mentioned verbally to his agent Mr M'Laren that there had been a talk about the rent being £300, and Mr M'Laren had spoken to Ardgour about that before the action was raised. But although he had told that to Mr M'Laren, he furnished him with no evidence. Mr M'Laren tells us he had several meetings with Mr Macvean before he sent him the copy letter. "He did not at any of these meetings make any reference to such a letter being in his possession. (Q.) Can you recollect the terms of the letter in which he sent the copy to you?—(A.) The substance of it was that the copy was evidently a discovery made by him after he had seen me on several occasions. (Q.) Did the thing so far come upon you as a surprise?—(A.) It did. I said to him the first time he came to me afterwards that it was a very stupid thing he had not sent me that letter at first, and I begged him to go home and make a thorough overhaul and get every paper bearing on the case." So that this letter was only sent in some time after the process was raised; and it may be—I do not give my opinion on that—suggested by the necessity of showing some evidence to counteract the effect of the letter of Saturday evening. Again, the pursuer was applied to by Ardgour's agents for a statement of any claim which he had against the original defender, in order that they might arrange for a settlement, and he wrote a letter, which he explains he consulted Mr Mackenzie about, in which he only refers to a claim for £300, and says nothing about the £1000. He says he kept back the £1000 at Ardgour's request. Of that there is no evidence. He certainly told Mr Mackenzie that he had received such a letter, and wanted to know whether, were he to claim only the £300 at that time, it would cut him out of the claim for the £1000 if he ever chose to insist in it again. He asked Mr Mackenzie how long the bills would stand, and was told they would stand for six years. Another thing with regard to the bills is, that he tells us he got them up at the time he learned the transaction was a bad one. He says the bills were handed back. That is curious, if he got them up, for this reason—he thought he had made them a binding transaction, and when he went to get them up he was told that it was bad, so that he would have to keep them. There is no corroboration of this by anyone. Now, all these are peculiar circumstances. Another fact is that pursuer got no interest from the date of the lease. The lease began at Whitsunday 1869, and he got no interest subsequent to that period on the £1000, though he got interest on other debts due to him by Ardgour. Then there is another statement that he made to Mr Mackenzie, that if the lease stood good he was not so much caring about the £1000. All these are indications somewhat at least in the direction of the defender's plea that the lease of 1870 was granted in consideration of the debt under the bills being cancelled. Now the result appears to me upon the whole case to be this—1st. That whilst the pursuer so early as the year 1868 was disposed to obtain a new and longer lease of his farm, and to make some concession as to this debt due to him for that purpose, and whilst the late Ardgour was also disposed to come to terms on the subject, it is not proved that Ardgour ever made or entertained an offer for such a lease at a reduced rent of £300. 2d. That at an early stage of their communications on the subject, the pursuer ascertained or became aware that a lease for a reduced rent and also for a longer period would form a serious objection to such a transaction, and that it is not proved that any lease was ever made the subject of mutual agreement except for payment of the old and existing rent. 3d. That, in particular, it is not proved that the letter dated Saturday evening was written in April 1869, between the time—for this is the pursuer's statement—when a proposal for a lease had been agreed to and the time when such a proposal was resiled from as alleged by the pursuer. 4th. That while the pursuer avers that other documents passing between the parties were given up, the document of Saturday evening was allowed to remain in the late Ardgour's possession, and ought to receive effect as part of the transaction according to the true interpretation that may be due to it.

Then comes the question as to obligation under the bills. Now, on this part of the case I think it is not clear that the notes were finally discharged. It seems to me, from the bills being allowed to remain, and the letter in the hands of the opposite parties, that the transaction is more like what in Roman law is described as *pactum de non petendo*—that there may have been a condition that if the lease stood the bills were not to be enforced. The agreement may have been conditional, and I think it was so; at any rate, I

am not at present prepared to ignore that view. It may deserve serious consideration, whether we should not interpone between the parties; and in the present state of the case it occurs to me that it is a matter for consideration whether we ought not to know a little more about this case before we decide it. We see that the lease, though threatened to be cast, has not yet been made the subject of a regular trial. If the heir of entail chooses to do so, and does so, and if that succeeds, it is one thing; but if the heir fails in that the lease will stand. Now I am not prepared to give the pursuer both his lease and the bills, nor am I prepared to say that he shall have neither. I think that, in these circumstances, after findings to the effect aforesaid, we should sist procedure *in hoc statu*, and in course of time the case must come to a point in one way or other, and we shall see what is proposed to take place between those parties who are interested, and who have their own evidence and views to bring forward, which may ultimately throw light on the matter and enable us to do justice in the case. I propose that your Lordships should sist procedure *in hoc statu*, prefixing some findings that will show the general views we take, but without conclusively determining the question whether there is a complete discharge of the bills, but only such a conditional discharge of their obligations as constitutes a bar *in hoc statu* to the pursuer.

Lord Cowan—This is a novel case, inasmuch as the question proceeds on bills which of themselves clearly constitute a debt, and require parole proof to destroy their effect of showing that the debt was one honestly due. There are, however, remarkable facts and allegations by the parties which led the Court to adopt the course which the Lord Ordinary had suggested—that before they should proceed to adjudicate as between the pleadings of the parties, they ought to have the whole circumstances and facts of the case before them in evidence; and accordingly a proof has been taken. I think, in common with your Lordships, that we are much indebted to Lord Neaves for the very clear analysis and summing up of the evidence which he has now stated to the Court. It has my entire approval. I have gone over the depositions with great care, frequently and patiently, and I can come to no other conclusions than those which have just been stated. In the first place, it seems very clear upon the evidence that the lease referred to in the letter—the important letter with which we have to deal as purifying the obligations of the bills—cannot be held to be any other than the lease of 1870, under which the pursuer was now in possession of his farm. Now, if that is the case, into what position does it bring us as between the parties? It is clear that the Court cannot allow the pursuer both to recover on the bills and to have implement of the lease under which he might possess the farm. But then I think it equally clear that these bills were not intended to be set aside and rendered inoperative as documents of debt in the event of this gentleman being deprived of the lease of the farm of Sallachan. Now in that position of matters the peculiarity of the whole case on the evidence is, that we are left in the dark as to the rights of parties; and I concur in adopting the course that has been recommended. There can be no objection to it on the part of the pursuer if he were left in enjoyment of his lease. On the other hand, if the lease should be challenged by the heir-at-law, the obligation on the executors of Ardgour to make payment of the bills may not extend to the son; and if so, then the condition on which the pursuer had agreed not to exact payment of the bills may not be fulfilled, and so they may become documents constituting the debt which this action had been brought to recover. It may be that the heir-at-law and Ardgour's executors will take counsel together and endeavour to arrange the family matters, but, whether or not, that ought not to interfere with the Court in doing justice to the pursuer, who had these documents of debt in his hand, and in giving effect to the documents which were in the late Ardgour's own handwriting. Therefore I see no objection to the course proposed by Lord Neaves—to sist the action until the state of parties and the interest which might afterwards emerge should be seen.

Lord Benholme—I have studied this case several times, and I confess my opinion has varied from time to time as to its merits. At this moment I cannot say that I have any decided opinion either one way or another, but I say this—that the proposal made will to my mind take the justice of the case, for it is quite evident to me that upon the conduct of the heir of entail ought very much to depend our action in the matter, and that we ought not to determine the suit till that is ascertained—which of course will not be long delayed—for if his intention is to challenge this lease he must do so forthwith. Upon the facts of the case I have very little to add. I would only make this observation—and it is one somewhat in favour of the pursuer—the pursuer has made a detailed statement, embracing an allegation that the letter of Saturday evening was in reference to negotiations previous to those for the lease which was completed in January 1870. Now, I observe that Ardgour seemed entirely to ignore this; and in his lettors there is no admission anywhere that there ever was a previous negotiation about a lease until that which terminated in January 1870. Although letters are quoted and a precise statement made on the one side, he says he does not recollect, and he does not admit, that there were any negotiations previous to that which terminated in the lease of 1870. Now, I have been very much struck with the general evidence in the case. There must have been negotiations previous to those in 1870. They had been off and on about a new lease, and there had been a consultation of great importance as to the validity of such a lease between the pursuer and his agents, the result of which was that an opinion was given that a lease on the terms mentioned would be challengeable, and that he had resolved not to accept the lease, and not to go on with the negotiation, which had proceeded to a certain length. And then there is the letter from Ardgour of 1st January 1870, which seems to my mind to be a genuine proof that there had been previous negotiations, and that the negotiations which terminated on 20th January were not commenced only on 1st January. He writes—"Dear Macvean, I have by no means given up the intention." What was the intention?—the intention "of giving you a new lease of Sallachan." That intention was spoken of in one way or other, although Ardgour does not say anything about it in his record. Here, on the 1st day of January he invites Macvean to come to

terms about a new lease, and on the 5th of that month he comes to an agreement—a very sudden transaction—for he says, "I am quite prepared to complete the lease at once if you are willing to take it." That is on the 5th, and on the 20th the lease was executed. Now it seems very strange to me that Ardgour should leave that without explanation of their previous communings, and say nothing except that the negotiations were opened with the letter on 1st January 1870. I do not mean to say that these observations I have made are decisive one way or other, but the circumstance has certainly struck me. We should stay our hand, and not take any steps until we see how the interest of the heir of entail is being carried out. If the heir of entail does not disturb the lease, then it will be time enough for us to resume consideration of this action. If, on the other hand, he raises a reduction, we may see how that reduction shall go ere we determine this action.

LORD JUSTICE-CLERK—My Lords, with the analysis which your Lordships have had from Lord Neaves I entirely concur, and, if I rightly understand, I also entirely concur with the result at which he has arrived, which I take to be this—that in the first place it has been proved that these bills were the subject of a negotiation between the granter and the acceptor, the creditor and the debtor. The nature of that negotiation was this—that a lease should be granted of the farm which was held by the creditor for a renewed term, and that it was to be a condition of the granting that lease that these bills should not be exacted—that is to say, that if the lease held and were unobjectionable, the bills were discharged, and on that condition alone. I am of opinion that that condition was accepted, acted on, and was finally completed; and that therefore under this action upon the bills the pursuer is not in a position just now to ask us to give decree, because, as he stands, he is under an obligation not to sue upon them. Now, as I understand Lord Neaves' proposal, and as I entirely agree with it, it is that we shall find that such were the terms on which the lease was accepted, and on which the bills were held, but that, as it does not appear whether that condition will be fulfilled or not, we should sist this process in the meantime till we see whether the obligation under the bills be purified or not, for we might put the pursuer to great hardship if we gave the defender absolvitor in this action, and left him to uphold the lease; while it would be an equal hardship on the defender were we to give a finding for the pursuer in this action, and after all that the lease proved to be not challengeable.

On the understanding which I have now explained, I entirely concur.

A note of proposed findings was then read by Lord Neaves, and their Lordships took time to consider these. It was afterwards stated that they would be agreed to, including a finding that the bills had been conditionally discharged.

LORD BENHOLME—I dissent from the judgment, on the ground that there was no sufficient evidence that that Saturday night's letter was written after the commencement of the final negotiation—that which terminated in the lease. My own impression is that it had been written with reference to some of the former negotiations.

The Court pronounced the following interlocutor:—

"Find that prior to the 20th day of January 1870 the pursuer was tenant of the farm of Sallachan, belonging to the original defender Alexander Maclean of Ardgour, under a tack dated 14th February 1865, for the period of seven years from Whitsunday 1865, but terminable at the tenant's death, if that event should sooner happen, and this at the money rent of £361, 6s. 10d. yearly: Find also, that prior to the year 1870 the pursuer was creditor of the said Alexander Maclean in certain sums of money, and specially in the sum of £1000 contained in the two bills libelled for £500 each: Find that in the course of the years 1868 and 1869, communings and correspondence took place between the said parties as to the said farm and the said bills, and, in particular, as to the pursuer's obtaining a new and longer lease of the said farm and the power of the said Alexander Maclean as an heir of entail to grant such a lease: And find that ultimately, on the said 20th of January 1870, the lease, of which No. 10 is a copy, was agreed upon and was executed between the parties for the period of twenty-one years, at the old rent: Find that in the course of the said communings and correspondence the letter No. 11 of process, dated Saturday evening, was written and sent by the pursuer to the said Alexander Maclean, in which he refers to the bills for £1000 libelled, and to a lease as then ready to be delivered, and proposes that if Maclean has any doubts of his integrity he should keep the lease until the pursuer gave him a sufficient guarantee that he would never claim the said bills: Find it is not proved at what precise time the said note, dated Saturday evening, was written or sent; but find that the said letter was allowed to remain in the hands of the said Alexander Maclean, who produced it in this process as having been written in reference to the said lease of 20th January 1870: Find that after the execution of the said last mentioned lease the pursuer, though he kept possession of the said bills, neither received nor claimed any payment of interest thereon subsequent to Whitsunday 1869, the commencement of the new lease, and that in March 1872, when requested by the agents for Ardgour to state the particulars of any claim he had against the said Alexander Maclean, he mentioned a debt of £300 as due to him on another bill, but did not mention any debt as due under the bills libelled: Find that in May 1872 the agents for Mr J. D. Maclean, the said Alexander Maclean's son, intimated to the pursuer that it was intended to challenge the lease of 20th January 1870, as granted *in fraudem* of the entail of Ardgour, and that thereafter, in July 1872, the present action was raised: Find, on the one hand, that the said letter No. 11 of process, dated Saturday evening, does not support a final discharge of the bills libelled; but find that it imports an undertaking and obligation by the pursuer of the nature of a *pactum de non petendo* that he would not make a claim upon the said bills as matters stood when the lease of 1870 was executed or agreed upon, or except in the

event of the said lease being set aside: Find that, as far as appears, no challenge of the said lease has been brought by the heir of entail now in possession of the estate of Ardgour, and that the pursuer is as yet in the undisturbed possession of the said farm under the said lease: Find that, in these circumstances, the pursuer is not *in hoc statu* entitled to decree in terms of the conclusions of the summons, Therefore, supersede further consideration of this process, reserving all further questions on the merits of the case, and all questions of expenses."

Counsel for Pursuer—Solicitor-General (Clark) Q.C., and Fraser. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Millar, Q.C., and Adam. Agents—Tods, Murray & Jamieson, W.S.

R., Clerk.

Thursday, June 26.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

DEAN *v.* WALKER.

Expenses—Jury Trial.

Circumstances in which a pursuer—who had obtained damages on one issue, but had been unsuccessful on all his own remaining issues and all the counter-issues—*held* not entitled to expenses.

In this case the pursuer had raised an action of damages against the defender on the ground of defamation—the said defamation consisting of charges of perjury, subornation of perjury, and certain abusive language. The jury affirmed the truth of the charges made against the pursuer, but in respect of the abusive language found him entitled to £300 of damages. The Lord Ordinary found neither party entitled to expenses, on the ground that the pursuer, though successful in obtaining damages, had been unsuccessful on all the counter-issues, and all but one of his own issues.

The pursuer reclaimed.

At advising—

Lord President—I do not think there is any fixed rule which forms a safe guide in such cases as this. The so-called rule established by the decisions in the cases of *Stoppel* and *Smellie's Trustees* goes no further than this, that when the Court is of opinion that the expenses should be divided, the mode of effecting that is not to be a mere haphazard division, but that they will ascertain through the Auditor what amount of expense is applicable to each branch of the case; and it seems to me that that is the only course we could take, namely, to remit to the Auditor to report. But we must not do that unless we are prepared to carry out his report. Now, I cannot say that I am prepared to do so, because it is quite possible that a very small part of the expense is attributable to the pursuer. The case is a peculiar one, and much difficulty arises from the fact that it is not easy to understand on what principle the jury found the verdict which they did for the pursuer. He charges against the defender no more than he admitted himself in the witness box, so that the verdict is really not intelligible, but still we must deal with it as we find it; and taking it as it stands I cannot say that the judgment of the Lord Ordinary does any injustice to either party, and I am besides disposed to pay great deference to the opinion of the Judge who presided at the trial.

The other Judges concurred.

Counsel for Pursuer—Fraser, Macdonald, and Robertson. Agents—Philip, Laing, & Munro, W.S.

Counsel for Defender—Millar, Q.C., Trayner, and J. A. Reid. Agent—W. G. Roy, S.S.C.

Saturday, June 28.

SECOND DIVISION.

SPECIAL CASE—ALEXANDER'S TRUSTEES.

(*Ante*, vol. vii., p. 240.)

Trust—Powers of Trustees—Vesting.

A testator empowered his trustees "if they should think proper" to make advances to his children or grandchildren "not exceeding one-fourth of the estimated value of the share of such child or grandchild should they survive the term of division of the estate." *Held* that the trustees might exercise this power at any time during the subsistence of the trust, even prior to the period of division.

This was a Special Case brought by the trustees of Mr Alexander and his daughters. The facts upon which the parties were agreed were as follows:—

John Alexander, the truster, died at Edinburgh on 4th January 1869, leaving a trust-disposition and settlement and codicil. His family at his death consisted of Mrs Mary Walker or Alexander, his second wife, now his widow; Mrs Waters and Mrs Black, his only surviving children by his first marriage, neither of whom has had any children; Mrs Tait, Mrs Wilson, Mrs Smith, and Mrs Gregory, only surviving children of the truster's second marriage, all of whom have children. The truster had other children, but they predeceased him without leaving any issue. Mrs Waters, Mrs Black, Mrs Tait, Mrs Wilson, Mrs Smith, and Mrs Gregory, are respectively aged 43, 40, 37, 35, 29, and 23 years.

The truster's widow, Mrs Mary Walker or Alexander, who is now in the 60th year of her age, some time ago executed, and intimated to the trustees, a deed formally rejecting the provisions made in her favour by the truster in his settlement, and electing to take her legal rights.

In 1869, a Special Case was laid before the Second Division by the parties to the present case, and the truster's said widow and his grandchildren then existing. In that Special Case the opinion and judgment of the Court were requested on the following question, *inter alia*:—"Did the widow's rejection of her conventional provisions operate as an acceleration of what is called in the trust-disposition 'the term of payment' of the residue, to the effect of making it the duty of the trustees, after satisfying the widow's legal claims, to deal with the residue in the same manner as if the widow were naturally dead?" By interlocutor, dated 15th January 1870, their Lordships, *inter alia*, answered the said question in the affirmative. (See 8 Macph. 414, 7 Scottish Law Rep. 240.)