that there would have been a relevant case for reduction of the will. We say that this ratification, and the disposition following on, it were obtained by fraud. The Lord Ordinary has adopted the view that after the death of Miss Crichton the question as to the validity of the will was raised, and that the pursuers in this action chose to surrender for £600 their rights as heirs-at-law. We submit that there is disclosed a case of gross fraud. The question may be asked, to what is the enquiry to extend, and what is to be done with the £600? There is no reason why the pursuers should have to pay that into Court as a condition of going on. The defenders do not ask it, and there would be considerable difficulty in paying it. As it is, if we are successful we get the estate, and if we fail we get credit for the £600. [LORD JUSTICE-CLERK—If you fail have the other party any consideration?] We maintain that these are not honest deeds.

Argued for respondents—This was really a transaction although it was put in rather a peculiar way. [LORD JUSTICE-CLERK—Why was it put in this way?] Because Mrs Salmond was not a party to the transaction, and accordingly it was thought that she must not get the benefit of a compromise for nothing. The Soutars had truly purchased this compromise, and it was not reasonable that Mrs Salmond should reap the benefit in this way.

At advising—

LORD JUSTICE-CLERK—This case, my Lords, stands in a very peculiar position. I am not satisfied entirely with the interlocutor of the Lord Ordinary, excluding as it does all enquiry; and that being so, I will not enter into the points of importance which arise in the action itself. These we can only consider when the facts have been ascertained, and these will be so by the course about to be adopted of allowing a proof before answer. I do not regard the case as one suited for trial in the Jury Court, and accordingly the Court will retain it in their own hands. If the two deeds stand the action is excluded, whether we take the deeds as operating a transaction or as assigning the rights for a valid consideration.

In these circumstances, before further answer, I am inclined to allow to the parties a proof of their respective averments.

LORD BENHOLME—The parties here have each pushed their pleas too far, the one that theirs can competently have effect at once given to them, and the other that the question cannot be reached at all. Accordingly I am for allowing a proof before further answer.

LORD NEAVES—I cannot doubt our duty to enquire into the points raised on this record, and the enquiry should, I think, be one conducted before ourselves and not in a jury trial.

The Court pronounced the following interlocutor:—

"The Lords having considered the specification of additional documents called for by the pursuers, No. 17 of process,—Grant diligence for recovering the same, and commission to Professor Berry of Glasgow and the Sheriff-Substitute at Dunfermline to take the deposition of havers and receive exhibits, to be reported *quam primum*."

Counsel for Pursuer (Reclaimer)—Clark, Q.C., and Scott. Agent—W. R. Garson, S.S.C.

Counsel for Defenders (Respondents)—Balfour and Keir. Agents—M'Gregor & Ross, S.S.C.

[*M.* Clerk.

Tuesday, March 3.

FIRST DIVISION.

[Lord Gifford, Ordinary.

TRUSTEES OF WILLIAM SIMPSON'S ASYLUM *v.* JAMES GOWANS.

Lease—Essential error.

In a case where the lease of a quarry stipulated for the payment of a fixed rent, or in the option of the landlord, a royalty to be calculated according to the weight of stone on which carriage was charged in the railway company's books, which weights were to be held to be the correct weights, *Held* (diss. Lord Deas) that the landlord was not barred from concluding for arrears of lordship by having for several years accepted the fixed rent, he having been induced to do so by erroneous returns furnished by the tenant himself.

The pursuers of this action were proprietors of the estate of East Plean, in the county of Stirling, and in the year 1864 they granted a lease of a freestone quarry on the estate to the defender James Gowans, who bound himself to pay a fixed yearly rent of £200, or, in the option of the pursuers, a lordship of sixpence for each ton of ashler, and one penny for each ton of rubble stone. It was further provided by the lease that in order to ascertain the amount of lordships payable in respect of all stone sent off by railway, the weights for which carriage was charged should be held to be the correct weights; and, in respect of other stone, that each cartload should be held to be one ton weight.

The defender further bound himself to cause regular books to be kept, in which should be inserted in a distinct manner the whole out-put and disposals of the freestone, including any that might have been used for buildings connected with the workings, which books were to be at all times open and patent to the proprietors and their factor, or others authorised by them, and also to transmit quarterly to the proprietors, or their factor, extracts or statements from the said books of the quantities of freestone disposed of or used, which extracts it was provided should be certified by the tenant or by his manager, and verified on oath if required. The defender accordingly continued to transmit quarterly returns, but instead of taking the weights according to the railway books, he made up the returns from his own books, giving an amount greatly less than that which was really sent away. The pursuers, on the faith of these returns, settled with the defender from time to time, but at length, having reason to doubt the accuracy of the defender's statement, they examined the railway company's books, and finding from them that far more stone had been sent away than appeared from the defender's returns, they raised this action, concluding for payment of the arrears of lordship.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 4th December* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, Finds (*first*), That under the terms, and according to the sound construction of the lease entered into between the pursuers and defender, dated 10th May and 2d June 1864, the weight of stone excavated by the defender, and upon which weight lordship fell to be paid, was to be determined, so far as the said stone was sent by railway, by the weights charged by the railway company, and upon which carriage was paid to the railway company: Finds (*second*), That the rents or lordships actually paid by the defender to the pursuers, for the years ending 3d February 1868, 3d February 1869, 3d February 1870, 3d February 1871, and 3d February 1872, were not calculated according to the weights of stone charged by the railway company, and on which carriage was paid to the railway company, but according to calculations and returns made by the defender himself, irrespective altogether of the actual weights on which carriage was charged and paid: Finds (*third*), That the defender has not instructed any ground, either in fact or in law, sufficient to bar the pursuers from going back, and from now charging the defender for the said years with the full lordships payable by him under the exact terms of his lease: Finds (*fourth*), That on a just accounting between the pursuers and the defender, taking the weights charged by the railway company and on which carriage was paid them as the basis of calculation, there is due and resting-owing by the defender to the pursuers, for the years ending Candlemas 1868 to Candlemass 1873, both inclusive, a sum of at least £450 sterling; therefore decerns and ordains the defender to make payment to the pursuers of the sum of £450 sterling, and that in full of the whole rents and lordships due by the defender up to the term of Candlemas 1873, with interest thereon at the rate of 5 per cent. per annum, from 14th June 1873 and until paid: Finds the pursuers entitled to expenses, but subject to very considerable modification, and, in the circumstances, modifies the same to one-half of the taxed amount: Remits the account of said expenses to the Auditor of Court to tax the same, and to report.

"*Note.*—As this case stood upon record, and when the proof commenced, it raised a very serious question of a painful nature, affecting the honesty and good faith of the defender. There were serious charges, or at least imputations, amounting to fraud, directed against the defender, or against those in his employment. The defender was charged (Cond. VII.) with making false returns, 'false to the knowledge of the defender or of those acting for him.' This averment gave an anxious character to the case, both in the conduct of it by the parties and in the disposal of it by the Court.

"At an early period of the proof, however, it became apparent that fraud was really out of the case, and the counsel for the pursuers candidly and fairly admitted that he did not lay their case upon fraud, that is upon conscious or intentional deceit practised either by the defender or by those in his employment. The Lord Ordinary accordingly has considered the case on the footing that both Mr Gowans and those in his employment acted honestly and in *bona fide*, without any intention of defrauding or deceiving the pursuers.

"The elimination of the question of fraud, however, while it relieves the case of its painful aspect, does not relieve it of its difficulties. Nay, in one sense it increases those difficulties, for it strengthens the defender's plea, that the pursuers are barred by settled accounts from going back on the rents or lordships for the five years preceding Candlemas 1872. This is, in truth, the real difficulty in the case, and the Lord Ordinary will advert to it immediately. It will conduce to distinctness, however, to explain *seriatim* the steps or findings on which the Lord Ordinary's final judgment rests. He has embodied the leading or more important points in the findings in the preceding interlocutor.

"(1) The Lord Ordinary is of opinion that, according to a sound construction of the lease between the parties, the rent or lordship payable to the pursuers was to be determined by the weight of stone actually sent from the quarry. The lordship was fixed at 6d. per ton for ashlar or cubic stone, and 1d. for each ton of rubble stone. The lordship was fixed not by measure but by weight, and though the defender might sell his stones by measure, or by number, or in any way he pleased, and actually did so, still, in regard to every description of stone he must pay lordship by weight alone. This is quite clear from the lease, and was hardly matter of dispute.

"(2) The Lord Ordinary thinks that according to the lease the lordship was to be calculated according to the gross weight as the stone left the quarry, and not according to the weight which the stones ultimately had, after they were hewn and shaped and dressed by the builders who purchased them from the defender. The defender maintained that from the gross weight must be deducted what is called the quarry allowance, which is extra weight or extra measure given by the quarry-master to his customers, to allow for dressing or chipping, and which varies from 10 to 25 per cent. The Lord Ordinary thinks that in a question of lordship the defender is not entitled to any such allowance excepting in so far as the defender himself dresses or shapes the stones in the quarry. The criterion is,—What did the stones weigh when they were sent off from the quarry, whether by cart or by railway? What became of them afterwards is of no consequence, whether they were hewn into statues, or into highly ornamental work, or built into walls without shaping at all, does not matter. The lordship is fixed by the weight as they leave the quarry. This seems manifest.

"(3) From the provision that the true and correct weight shall be held to be the weight for which carriage is charged by the railway, it is clear that the railway company have nothing to do with how the weight may be reduced by shaping or dressing, or carving. The railway makes no deduction on that account. The railway company simply charges for the weight which passes over their steelyard, or if they do make any abatement such as disregarding odd hundredweights, then of that abatement the defender will get the benefit, but of nothing else. The weight for which the railway company charge carriage is to be the weight which is to fix the lordship. It is inconceivable that the parties intended that there should be deductions or abatements from the railway weights, none of which are mentioned, or defined, or even hinted at. If any abatement was meant, it should have been stipulated for in the lease.

"(4) Accordingly, the Lord Ordinary holds

that the railway weights are made the absolute rule for determining the lordship as between landlord and tenant. Whatever the railway company charge and obtain carriage for shall be held to be the weight upon which the defender must pay lordship.

"The expression of the lease is 'weight charged for;' but the Lord Ordinary is disposed to read this fairly as meaning *weight charged for and according to which carriage was paid.* If a dispute arose, and the charge was rectified, then it was the rectified charge, and not the original one, that would rule. Thus, when the defender got an abatement from the railway's charge for carriage, he would be entitled to the same abatement in a question with the landlord. But beyond this the Lord Ordinary cannot go. Whatever weight, according to which carriage was ultimately paid, must be absolutely held to be the weight on which lordship also must be held to be paid. This was the bargain, and the Court cannot alter it. It must be given effect to.

"And it was a most wise provision, calculated, as the proof in this action abundantly shows, to prevent endless disputes; for if the railway weight is not to be taken, there is no end to the views which may be urged by the contending parties. It is in evidence that the stone is never weighed at all by anybody, excepting by the railway company.

"Accordingly, the Lord Ordinary utterly disregards all the evidence relied on by the defender as to the railway weights and the railway system of weighing being inaccurate. In a question of the meaning of the lease this is wholly irrelevant. The railway system of weighing has always been the same, and both parties knew this perfectly and took their chance in it. It is true the weights are only roughly ascertained, and now and then perhaps only guessed at, but on the whole justice is done, the customer getting the benefit, it is proved, of odd weights. But whether just or not, the railway weights must fix the lordship, for both parties have said so, and neither party will take the trouble to weigh for themselves.

"(5) What the railway weights actually were can hardly be a subject of serious dispute. There may be minute decrepancies between different books kept by the railway company, and probably some errors have been discovered, but the invoices, according to which carriage was actually paid, have been recovered, and that fixes the weight as in a question of lordship.

"(6) The next point is that for the five years ending Candlemas 1872 lordship has not been paid by the defender according to the railway weights, or according to any actual weights at all, but merely according to certain returns and calculations made by the defender himself at his own hand. The Lord Ordinary assumes that the defender acted honestly and in *bona fide* in making these returns, but the fact is undoubted that the lordship was calculated not according to the manner prescribed in the lease, but according to mere calculations made by the defender himself, and founded not upon actual weight at all, but upon estimates or calculations taken from the measurement of the stones sold.

"Now it turns out that these calculations and returns made by the defender show a much less weight than the weight charged for by the railway company—the difference being the sum sued for in the present action, and this raises what is really the only difficult question in the present case, viz., whether the pursuers are entitled to go back on the past five years, rectify the computation of lordship, and charge the same in exact accordance with the lease? Now—

"(7) The Lord Ordinary is of opinion that no sufficient ground, either in fact or in law has been instructed creating any bar against the pursuers yet rectifying the account, and obtaining from the defender the just rent to which, according to the exact terms of the lease, they are unquestionably entitled.

"The defender founded on various circumstances as barring the pursuers from now demanding the just lordship according to the lease, at least for the period prior to Candlemas 1872. It was hardly disputed that for the last year embraced in the present action, the year ending Candlemas 1873, and which has not been settled for at all, the lordship must be paid according to the lease. The Lord Ordinary will shortly notice the grounds relied on by the defender.

"The defender maintained that the terms of the lease had been altered or departed from, and that both parties agreed that the railway weights should be laid out of view altogether, and the lordship calculated from the defender's books alone. The Lord Ordinary thinks that no such agreement has been established. It would be very difficult to establish such an agreement by anything short of a deed derogating from the lease. The defender's books don't show weight at all except of rubble. For the great bulk of his output he charges by measure, and endless controversies would arise, and have arisen, as to the principle upon which measure is to be converted into weight. It is impossible to throw everything loose in this way. The unanswered letter of 12th February 1868 cannot possibly be held as an agreement to subvert the whole lease. Besides, that letter proceeded upon a false or erroneous return, said to have been got from the railway company by the defender, but which unquestionably does not show the true amount of the railway company's weights. The defender has not explained how he got this incorrect return, or even the terms in which he asked for it. Probably it was only a partial return got from only one of the stations at which the stone was weighed. The defender has lost the principal return, and has nothing but a copy, but the fact is certain that the return is false and incorrect, and this alone would be sufficient to destroy any agreement based thereon.

"Again, the defender maintained that in each year there was a settlement and final discharge, which, without fraud, cannot be reduced. But this is not so. There was nothing of the nature of compromise or transaction. There was no investigation into accounts or adjustment of balance. All that was done was, that the pursuers' agent, believing the defender's own returns to be correct, accepted the fixed rent or the lordships in terms of these returns. But if it turns out, as is now shown, that the defender's returns were grossly incorrect, even although made in *bona fide*, it would be very strong to hold that the pursuers are barred from having the mistate corrected.

"If the mistake had been owing to the pursuers themselves,—if it had been solely the pursuers' fault that they charged and accepted a less lordship than the true lordship under the lease, there might

have been some force in the defender's plea. But the mistake was not owing to the pursuers, but to the defender himself. It was the defender's own returns, now proved to be erroneous, that misled the pursuers, and it is hard to see how the defender can found upon his own mistake as barring the pursuers from rectifying the accounts according to the true terms of the lease. It is worthy of notice that all the returns made by the defender bore to be according to the weights 'as entered in the railway company's books.' This was not the case, and although possibly the pursuers might have assumed, from the letter of 12th February 1868, that the defender was taking the weights from his own books as a mere matter of convenience, it is completely proved that the pursuers never knew that the defender's books did not show weight at all, and that the returns were a mere *ex parte* calculation, made up by the defender himself upon principles which he never once communicated or hinted to the pursuers.

"It is true there may have been looseness, and perhaps carelessness, on the part of the pursuers. They seem to have accepted the defender's returns without due inquiry, or, perhaps, without inquiry at all. They never asked to see the defender's books, and they never went themselves to see the railway books. But it is hardly for the defender to plead that the pursuers had too much confidence in him the defender himself, if he, however innocently, misled them. The true consequence of the pursuers' neglect or over confidence is to affect their claim for expenses, and not to preclude the just rectification of accounts. The Lord Ordinary, in the matter of expenses, has given full effect, and he thinks the utmost effect, to the somewhat loose conduct of the pursuers.

"(8) Holding, then, that the accounts are to be rectified and the true lordship ascertained in terms of the lease, the only remaining questions relate to the calculations of lordship as based upon the railway weights.

"Here there are some difficulties in detail, but they do not very greatly affect the amount; and the Lord Ordinary has found himself obliged, acting as a jury, to take a general or average view. The question whether scuntions and backs are ashlar or rubble may well be a matter of doubt and dispute, as most of the witnesses say they are neither the one nor the other. And so with various other disputed points. On these the Lord Ordinary has given the defender the benefit of any doubt; and instead of the amount sued for, £598, 19s. 2d., and instead of the lesser amounts brought out by the pursuers' accountants, £568, 12s. 11d. and £491, 11s. 1d., the Lord Ordinary thinks that he does substantial justice by giving the pursuers decree for a slump and estimated sum of £450. About one-half of this sum can hardly be disputed as being applicable to the year ending Candlemas 1873, which year has never been settled for in any way, and as to which the Lord Ordinary thinks there is really no defence. The deficiencies applicable to the preceding five years now decerned for are under £250.

"The Lord Ordinary may remark, that the whole short-paid lordships are completely accounted for by simply adding the quarry allowance, which the defender has wrongly deducted, but on which, the Lord Ordinary thinks, lordship must be paid. The quarry allowance varies from 10 to 25 per cent. on the whole stone.

"The Lord Ordinary has severely modified the pursuers' expenses, reducing them to one-half. His grounds are—(1) The defender's character was attacked, fraud was imputed—a charge now withdrawn; (2) The defender has been successful on various matters of detail; but (3, and chiefly) The pursuers are really much to blame for the looseness with which they went about the matter. If they had made reasonable inquiry at the beginning, or year by year, this heavy litigation and inquiry would have been avoided; (4) Both parties are to blame for the indefiniteness of the lease, which assumes, contrary to the fact, that rubble and ashlar embrace the whole output of the quarry."

The defender reclaimed.

At advising—

LORD PRESIDENT—The pursuers of this action are the trustees of William Simpson's asylum, and are proprietors of a quarry called Plean Quarry, of which the defender James Gowans is tenant, under a lease dated May 10, 1864. The purpose of the action is to recover certain lordships said to be due by the defender for the years between Feb. 3, 1868, and Feb. 3, 1873; and the defence is (1) that these lordships are not due on any sound construction of the provisions of the lease, and (2) that even if they might have been claimed for each of those years, the claim is barred now by the fact of the pursuers having accepted the fixed rent and granted discharges therefor. The first of these defences depends on the construction of the deed, which contains the following provisions:—"For which causes, and on the other part, the said James Gowans binds and obliges himself, and his heirs, executors, and successors whomsoever, to make payment to the said trustees or their successors, or to the factor appointed or to be appointed by them, of the yearly rent or tack-duties after specified, and that half-yearly, at the terms of Candlemas and Lammas, commencing the first term's payment thereof as aftermentioned, and with a fifth part more of each termly payment of penalty in case of failure, and the interest of each half-year's rent at five per centum per annum from the time at which the same falls due until payment thereof, *videlicet:* For the whole freestone hereby let, the sum of £200 sterling of fixed money rent yearly, or, in the option of the proprietors, the following lordships or royalties, *videlicet:* For each ton of ashlar or cubic stone, a lordship or royalty of sixpence, and for each ton of rubble-stone, a lordship or royalty of one penny; and the proprietors shall declare their option of said fixed rent or alternative royalties at the term of Candlemas in each year for the year preceding such term, and the half-year's fixed rent payable at the term of Lammas preceding shall be held as payment to account, and at Candlemas the next half-year's fixed rent shall be paid, or, in the option of the proprietors, the lordships for the whole year bygone, under deduction of sum paid to account at the term of Lammas preceding."

Then follows a most important clause:—"And in order to ascertain correctly the quantities of freestone produced in virtue hereof, and the amount of lordships or royalties to be paid yearly, it is agreed that, in respect of all stone sent off by railway, the weights for which carriage is charged shall be held to be the correct weights; and in respect of other stone, that each cart-load shall be held to be one ton weight: and the said James Gowans binds himself and his foresaids to cause

regular books to be kept, in which shall be inserted, in a distinct manner, the whole output and disposals of said freestone, including any that may have been used for buildings connected with the workings as aforesaid, which books shall at all times be open and patent to the proprietors and their factor, or others authorised by them; and also to transmit quarterly to the proprietors, or their factor, extracts or statements from the said books of the quantities of freestone disposed of or used, which extracts shall be certified by the tenant or by his manager, and verified upon oath if required, and it shall be competent to the proprietors at their own expense to appoint a check grieve to take account daily of the amount of the produce of the said freestone."

Now, it is maintained for the pursuers that the railway company's books, showing the weights of stone for which they charged carriage, must be held to be conclusive of the amount of output of the quarry so far as carried by them, and that as regards the other stone, the weight was to be calculated in an equally simple way. The defender maintains that this was not the true construction of the lease, because the railway books did not distinguish between the amounts of ashlar and rubble carried (on which the amount of lordship was different), and because, further, the railway books were inaccurately kept; and lastly, that in calculating the amount of lordships he is entitled to a deduction for "quarry allowance." He explains this to mean that while the railway books show the gross amount carried, he can only charge his customers on the weight of the stone when dressed. Now, as regards these grounds of objection, it is important to observe (1) that the fact of the railway books not showing the distinction between ashlar and rubble cannot affect the construction of the lease now, and (2), as to the inaccuracy of the railway books, that both parties took their risk of that—and I agree with the Lord Ordinary that it will not do to say that the rule which they laid down for themselves for calculating these weights is not to receive effect. As regards the quarry allowance, the terms of the lease are plain and unambiguous, and it has not been shown on the part of the defender that it was ever suggested that such an allowance should be deducted, and I therefore come to the conclusion that the lordships sued for are due as awarded by the Lord Ordinary, and that they are no more than the landlord was entitled to demand.

The second defence is, that though the lordships might have been claimed as they fell due, the landlords are precluded now from claiming them by accepting the fixed rent; and this leads one to examine the correspondence between the parties. The lease had been in operation some three years when Mr Burn Murdoch, the landlords' agent, wrote to the defender a letter dated January 31, 1868, in which he says—"*Edinburgh, 31st January* 1868. Dear Sir,—A half-year's rent of the freestone and grass parks falls due at this term of Candlemas, of which please let me have payment. It will be necessary that I obtain from you a note of the output of the freestone for the years from Candlemas 1867 (2d Feb.) to Candlemas 1868 (2d Feb.). By your lease it is provided that the weights entered in the books of the railway company are to be taken as regards stone sent away by railway, and the number of carts of stone sold otherwise, taken at a ton each. Will you be good enough to let me have such a return as soon as possible, and in future we must arrange for its being made quarterly. Unless the rent, calculated by lordship, for the past year exceeds the fixed rent, the amount now due is £107, 10s. If there is any excess, I can get it afterwards.—Yours truly,—A. Burn Murdoch."

To this the defender sent no immediate answer, and on February 6th Mr Burn Murdoch wrote again as follows:—"*Edinburgh, 6th February* 1868. Dear Sir,—Referring to my note of 31st ulto., I now enclose a schedule which I have had printed in a form similar to that used for the coal output at Plean, in order that the quarterly returns may be regularly made in future with as little trouble as possible. In the one now sent please include the whole output for the year ending Candlemas 1868. I can give you a supply of these schedules the first time you call here.—Yours truly,—A. Burn Murdoch." The schedule thus sent called upon the tenant to make a return of the quantity of stone sent away by rail, calculating the amount by the railway books, and of the quantity sent by cart, counting each cart as one ton. Thus the matter was brought very clearly before Mr Gowans that the railway books were the test of weight. Now, let us see what was his answer; it is printed at p. 105:—"*Edinburgh, 6th February* 1868. Dear Sir,—In reply to your note of 31st ulto., I beg to say that the quantity of stone taken from Plean Quarry from Candlemas 1867 to Candlemas 1868, is—4581 tons rubble, at 1d., £19, 1s. 9d.; 6174 tons hewn, at 6d., £154, 7s.—£173, 8s. 9d." Now, the mode in which that return is made is disclosed by a subsequent letter and by some of the evidence, but it must be observed that the return is made in answer to Mr Burn Murdoch's letter of the 31st January, and when he received this letter he was fairly entitled to conclude that the true amount was as here stated, and that it was calculated by the railway books. But Mr Gowans writes again on February 12 a letter to which he attaches great importance. It is in these terms:—"*Edinburgh, 12th February* 1868. Dear Sir,—Herewith I send you a copy of a return I have received from the railway company for stone from Plean. You will observe they cannot give the separate quantities of ashler and rubble for all the year, as the rates were equalized. According to my own returns, the quantity is more, being 4581 tons rubble, 6164.12" ashlar. I return you the form, as I don't know which you will have put in, the company's quantity or mine."

Then follows a statement of quantity, which he says he received from the railway company; the total as brought out is 10,026 tons. Now to this letter the defender complains that he never got any answer. I do not in the least wonder at it. If it was true that the railway company's return showed a less amount of output, so that the lordship would have been less than the fixed rent, it was simply a case for paying the fixed rent, instead of the lordship. As to the landlord losing his right to claim lordship now by having accepted the fixed rent, it turns out now that neither return was accurate, and that the return which the defender says he received from the company was not in fact so received at all. Mr Burn Murdoch was induced by the defender's misrepresentation into a serious error. It may not have been a dishonest one, but it is very important, for while the return which he sends as brought out by the railway

books is 10,026 tons, the lordship on which would have been under the fixed rent, the actual amount in these books was some 13,000 tons. Whatever followed on this was done by Mr Burn Murdoch in essential error, and what did follow? Nothing except that certain fixed rents were paid and received on the faith of the defender's representation that no more was due. This went on till September 17, 1872, when Mr Burn Murdoch wrote as follows:—"*Edinburgh, 17th September* 1872,—Dear Sir,—You are aware that it is stipulated in your lease of East Plean freestone that for the purpose of ascertaining the amount of output of stone, quarterly returns are to be made by you, extracted from your books, and vouched as correct; and that, as a check upon such quarterly returns, the weight charged by the railway company on stone carried by it is to be held as authoritative, stone otherwise sent out being counted as one ton per cart. I recently obtained from the railway company returns of the weights of stone from your quarries upon which carriage has been paid during the past five years and a quarter, and on comparing the figures with those in the quarterly returns made by you, I find there exists a most material difference. Thus, I find that for the year ending Candlemas 1868 the weight which the railway carried away for you exceeded the amount stated in your quarterly returns by 2350 tons; in the year to Candles. 1869 by 3191 tons; in the year to Candles. 1870 by 3804 tons; in the year to Candles. 1871 by 2518 tons; in the year to Candles. 1872 by 7810 tons; and for the first quarter of 1872 by 2468 tons. It appears thus that in all 22,141 tons more have been carried by the railway company alone than is stated in your returns as the total output of the quarries. But to this already large excess must be added all the stone carted out. I submitted these figures to a meeting of the trustees of William Simpson's Asylum, the proprietors, held on Friday last, and I am instructed by them, in the first instance, to make this intimation of the above results to you, in order that you may afford explanation of the very large discrepancy between the weights of stone given in your returns and in the railway company's books.—I am, yours truly, A. Burn Murdoch." What says Mr Gowans in answer—"*Edinburgh, 18th September* 1872.—*Plean Quarry.*—Dear Sir,—I have your letter of 17th. The returns made of the output of stone is the actual weight of the stone sold; and the only way I can account for the difference between the railway weight and the quarterly returns rendered to you, is that in selling the stone I have to give an allowance over and above what is paid for, viz., on sized stones, I allow 1½ in. on the foot, or something like 8 per cent. In rubble we give about the same percentage. This has to be done, otherwise the stone could not be sold, as there is a risk of the stone being scirted in transit if the bare size was strictly adhered to; and, besides, this is the usual custom of quarries. I make this explanation on the assumption of the railway weight being correct; but such is not always the case, as in one transaction I have had with the Caledonian Company in connection with the Tramways there is a discrepancy of upwards of 400 tons on a total of about 4000, equal to 10 per cent. In this case, however, it is the opposite of Plean, as I have paid on this quantity at the quarry more than the weight on which the carriage has been charged.—Yours truly, James Gowans." That was the first time that Mr Burn Murdoch ever heard of this quarry allowance. In short, it seems to me to be simply introduced in order to account for the enormous discrepancy between the returns. But the important thing to observe is, that payment of the fixed rent was accepted on Mr Murdoch's belief in the honesty and accuracy of Mr Gowans' returns. All that Mr Murdoch did to compromise the landlord was to believe the tenant, and now it turns out that the tenant was not worthy of belief. I do not mean to say that he acted fraudulently, but in the sense that he was most inaccurate. I agree with the Lord Ordinary.

LORD DEAS—This action was brought in 1873. It is a claim for additional lordships back to 1868, and I am disposed to consider it in rather a different way to your Lordship—rather as a claim for arrears than as regards the construction of a lease. If it had been a question of the construction of a lease, I should have liked to know more clearly what is the custom of the trade, because leases of quarries are in some respects very peculiar, and in many cases are subject to be construed by trade usage, and I am not prepared to say that the words of the lease exclude the view of the deduction for quarry allowance.

But I do not view the question so. I consider it to be a question whether there should be a claim for arrears after so many years' acquiescence. I have great doubts of it unless clear bad faith could be shown on the part of the tenant. There is plenty of bad faith averred on record, indeed the foundation of the summons is on fraud, but the Lord Ordinary says that that plea was given up before him, and so it was in the argument before us. Without that, however, the question becomes a very narrow one. What strikes me is, that settlements took place on the faith of a different arrangement to that concerning the railway company's books, and the landlord's agent knew it. The railway company's books at first distinguished between the different kinds of stone, but when that ceased to be the case a new arrangement ought to have been come to. The question is, whether the landlord is now entitled to go back upon the old arrangement. These schedules before us are on the footing of paying according to the weights as ascertained from the railway books, but it is clear from the evidence that they were a most unsatisfactory guide. That is plain from the evidence of Mr Macmartin, the defender's quarry manager. From the day of Mr Gowans' letter to Mr Murdoch to the date of this summons he never got any answer desiring him to go by the railway weights in filling up his forms. On the whole matter, I come to an opposite conclusion from your Lordship as to the reasonableness of allowing the landlord to go back on the settlements of all these years.

The other Judges concurred with the Lord President.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming-note for the defenders against Lord Gifford's interlocutor, dated 4th December 1873,—Adhere to the said interlocutor, and refuse the reclaiming-note: Find the pursuers entitled to expenses since the date of the said interlocutor reclaimed against: Allow an ac-

count thereof to be given in, and remit the same when lodged to the auditor to tax and report."

Counsel for Simpson's Trustees—Dean of Faculty (Clark) and Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Gowans.—Watson and Darling. Agents—Lindsay, Paterson, & Hall, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Lord Gifford, Ordinary.

OGILVY'S TRUSTEES *v.* NATIONAL PROVINCIAL BANK OF ENGLAND AND OTHERS.

Process—Multiplepoinding—Form of Action—Competency.

Under a marriage-contract, power to apportion the shares of the younger children was conferred upon the parents jointly, or, failing the joint exercise of the power, upon the survivor. The spouses executed a joint deed apportioning the shares equally, but revocable by the survivor. After the death of the wife, the husband made advances to his children, and took discharges from them *pro tanto* of their shares. One of the daughters thus received one-fourth of her apportioned share as under the joint deed, and she obtained subsequently advances from other parties, giving in return bonds and assignations in security upon her provisions under the marriage-contract. The father thereupon executed a new deed of apportionment to revoke the prior deed, and dealing with the balance of the fund so far as undischarged by his advances to his children, and subsequently he died. The assignees under the bonds granted by the daughter disputed the validity of this later deed, and claimed payment out of the sums provided under the marriage-contract, and the younger children maintained the contrary. In these circumstances the marriage-contract trustees raised a multiplepoinding. *Held* that although this might not be the best form of process, it was nevertheless competent.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary [GIFFORD], of date 25th November 1873. The action was one of multiplepoinding at the instance of the trustees of the late Peter Wedderburn Ogilvy (pursuers and nominal raisers) against the Rev. C. Chevallier, George Mercer, and Rowley Lascellas, together with the trustees of the National Provincial Bank of England (real raisers), and the whole of the children of the late Mr Ogilvy as individuals (defenders). By antenuptial contract of marriage, dated 15th April 1811, and recorded 5th April 1873, between Captain Peter Wedderburn and Miss Ogilvy of Ruthven, the former, *inter alia*, bound and obliged himself, and his heirs, executors, and successors, in the event of there being a younger child or children of the then intended marriage, male or female, other than the heir who should succeed to his fortune under the destination before written, or in the event of there being only daughters of the said marriage, who should be excluded from his fortune by an heir-male of any after marriage, to make payment to the said younger child or children or daughters, in the event, which occurred, of there being three or more younger children, a sum of £10,000, which was declared to be payable to them at the first term of Whitsunday or Martinmas after the death of the said Peter Wedderburn Ogilvy. It was further by the said antenuptial contract of marriage declared that the said provision in favour of younger children or daughters, in the event of the son of any after marriage succeeding, should be divided among them by the parents jointly, as they should think fit; and failing such division by them jointly, then as the same should be divided by the survivor; and in case of no division being made by the parents or surviving parent, then to be equally divided. The marriage which ensued was dissolved by the death of the lady in 1853. There were issue of the marriage—(1) Lieutenant-Colonel Thomas Wedderburn Ogilvy, who has succeeded to the entailed estate of Ruthven; (2) Lieutenant-Colonel James Wedderburn Ogilvy; (3) Major John Andrew Wedderburn Ogilvy; (4) Jane Wedderburn Ogilvy; (5) Isabella Wedderburn Ogilvy; (6) Anna Wedderburn Ogilvy, who all survived, and Thomas Wedderburn Ogilvy, who predeceased both his father and mother, without issue.

A trust-disposition and deed of settlement, and of joint apportionment, was executed by Peter Wedderburn Ogilvy and his wife on the 14th April 1828, whereby it was stated that they had jointly exercised the power of apportionment contained in the antenuptial contract of marriage, and declared that the sum of £10,000 should be divided equally among their then existing younger children therein named, being their children above mentioned other than Lieutenant-Colonel Thomas Wedderburn Ogilvy, and the apportionment so made was declared to be revocable by the survivor of the spouses. No other joint allocation or apportionment was executed or exercised by Mr and Mrs Wedderburn Ogilvy. Captain Ogilvy made after his wife's death advances to his children, and obtained from them discharges, and from Jane Wedderburn Ogilvy two partial discharges, dated respectively 15th January and 23d December, both in 1869. Miss Ogilvy's share, it was maintained, if no valid apportionment had been made, would be £2000, less of course the amount of the advances made to her by her father. In this state of matters, the defenders, the Reverend Charles Henry Chevallier, George Mercer, and Rowley Lascellas advanced to Jane Wedderburn Ogilvy (first) the sum of £900, on 10th June 1870; and (second) the sum of £240, on 7th June 1871; for which sums and interest thereon she granted two bonds and assignations in security, whereby she assigned to them her rights and interest in and provision due under the contract of marriage. On 4th April 1872 the other defenders, trustees of the National Provincial Bank of England, advanced to Jane Wedderburn Ogilvy (third) the sum of £270, for which she also granted her bond and assignation in security, whereby she assigned her said rights and interest in and provisions under the contract of marriage to them as trustees. All these bonds and assignations were intimated to Peter Wedderburn Ogilvy, and intimation thereof acknowledged by minute by his agents, on 26th September 1870 for the first, and May 13, 1872, for the second and third. A deed of apportionment, dated 26th November 1870,