tion of these words has in several cases been viewed as qualifying the language of the context by reference to the prior usage. But here, where the new grant was issued as the result and in terms of a compromise and transaction not relating to the subject of the vassal's entry, I do not think that the omission of the words "as use is" can have the effect contended for by the vassal.

Then I do not think that the use of the word "assignees" is of itself sufficient to support the defender's plea. A fixed and inflexible meaning is not attached to the word, and it does not necessarily and exclusively express assignees to the personal right and before infeftment. But it may do so, and it has frequently done so, and in this case, when I consider the introduction to the charter—the whole structure of the charter,—the obligation to infeft "Alexander Wilson and his foresaids," which would be inapplicable if it meant his disponees,—and the fact of the existence of other questions regarding minerals really turning on disconformity between the old and the recent charters—I feel unable to resist the conclusion at which your Lordships have arrived, that taxation of this entry by substitution of a duplicand feu-duty for a year's rent was not intended by the parties in 1858—not demanded by the vassal, and not conceded by the superior. I have considered this case with great anxiety. The views which I entertain in regard to the change in the relations between superior and vassal, and in regard to the presumptions and canons of construction in application to modern charters of *novodamus*, tended to dispose me to concur, if I could, with the Lord Ordinary's judgment. But notwithstanding these views, and not rejecting or overlooking the equitable considerations to which I have adverted, I have been unable to read the words of this charter before us otherwise than as your Lordships have done.

LORD MURE concurred.

The Court pronounced this Interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the Magistrates of Inverkeithing against Lord Young's interlocutor of 25th June 1874, Recal the said interlocutor, Find that the entry of original successors to the lands first, second, and fourth mentioned in the conclusions of the summons is not taxed; find the pursuers entitled to expenses since the date of the interlocutor reclaimed against, and remit to the Auditor to tax the account of the said expenses, and report to the Lord Ordinary, reserving all other questions of expenses; and remit to the Lord Ordinary to proceed with the cause, and with power to decern for the expenses now found due."

Counsel for Pursuers—Dean of Faculty (Clark) and Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for Defenders—Marshall and M'Laren. Agents—Lindsay, Paterson, & Hall, W.S.

Friday, October 30.

FIRST DIVISION.

[Sheriff of Wigtown.

SHENNAN v. AUSTIN.

Poor—Poor Law Amendment (Scotland) Act, 1845, *sec.* 71.

Held (*dub.* Lord Deas)—(1) that the traveling expenses incurred by an Inspector of Poor for a parish in obtaining information as to the true settlement of a pauper to whom the said parish had afforded relief, and (2) that the expense incurred by the said parish in prosecuting the husband of the said pauper for desertion, could not be claimed in terms of the 71st section of Poor Law Amendment (Scotland) Act, 1845, against the parish to which the pauper was ultimately found to belong.

Counsel for the Pursuer—Macdonald. Agent—James Somerville, S.S.C.

Counsel for the Defender—Solicitor-General (Watson) and Guthrie Smith. Agent—W. S. Stuart, S.S.C.

Tuesday, November 4.

FIRST DIVISION.

DAVIDSON v. FLETCHER.

Process—Removing, Action of—Decree—Appeal—Suspension—Act 6 *Geo. IV. c.* 120, *sec.* 44.

Held that under the 44th section of the Judicature Act, 1825, a decree of the Sheriff in an action of removing, brought in terms of the 5th section of the Act of Sederunt of 14th December 1756, can only be brought under review of the Court of Session by suspension.

Counsel for the Pursuer—M'Kechnie. Agent—W. Kelso Thwaites, S.S.C.

Counsel for the Defender—Pearson. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Wednesday, November 4.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

DANIEL STEWART v. JOHN STEWART'S TRUSTEES.

Succession—Deathbed—Ratification—Homologation.

Circumstances *held* to bar a pursuer from reducing a trust-disposition and settlement made by his brother on deathbed.

This was a reclaiming note in two actions, in which the question between the parties was as to whether the pursuer Daniel Stewart, at one time shipbuilder, and now carpenter at Saltcoats, homologated the will of his late brother John Stewart, merchant at Ardrossan. The actions were defended by the trustees under the will. In the first action Daniel Stewart asked for reduction of the will on the ground of deathbed, a plea which was in itself well-founded, but the defenders contended that he was barred from insisting in it in respect (1) that he had ratified and approved of the deed of settlement, and had renounced his right to challenge it on the head of deathbed; (2) that he had taken payment of the two first half-yearly portions of an annuity payable to him under the will; (3) that in the receipt thereof he had acknowledged receiving it from his brother's testamentary trustees; and (4) that on 3d May 1869 he obtained from them an advance of £40, with the

consent of the liferentrix under the will, for which he granted an acknowledgment binding himself to assign his right and interest in his brother's estates, and again ratified and confirmed his will.

In answer to this, Daniel Stewart brought a supplementary action for reduction of the deeds of ratification founded on, in respect that the same had been granted by him under essential error as to his legal rights and the scope and effect of the deeds, undue influence, and fraudulent misrepresentation and concealment on the part of his late brother or his agent.

By the deed in question the testator left an annuity of £20 to each of three married sisters and to the pursuer, whom failing to his wife, terminable on the death of their sister Catherine Stewart, and the liferent of the remainder of his whole estate to his unmarried sister (Catherine Stewart). On Catherine's death he directed his heritable estate to be realised and to be divided into two shares, one of these to go to Catherine's children and the other to the children of his brother (the pursuer). In the event of Catherine dying without issue, he directed his trustees to realise his heritable property, and (1) to pay £250 of the proceeds equally to his brother and three married sisters and their issue; and (2) to apply and divide the remainder of the proceeds among the pursuer's children. On Catherine's death he also directed his trustees to pay and convey his moveable estate to his brother and three married sisters and their issue equally.

After a proof the Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 4th June* 1874.—The Lord Ordinary having heard the counsel for the parties and considered the closed records and proof in the conjoined actions, Repels the reasons of reduction, and assoilzies the defenders from the conclusions of the summonses in the conjoined actions, and decerns: Finds the pursuer liable in expenses in the conjoined actions, of which allows an account to be given in, and remits the same, when lodged, to the Auditor, to tax and to report.

"*Note.*—John Stewart, spirit merchant in Ardrossan, died there on 9th June 1868, survived by the pursuer his brother, and three married sisters, and also by an unmarried sister Catherine Stewart. On 12th May 1868, that is four weeks previous to his death, he executed the trust-disposition and settlement sought to be reduced. By this deed he left an annuity of £20 to each of his married sisters and to the pursuer, whom failing, to his wife, terminable on the death of their sister Catherine Stewart, and the liferent of the remainder of his whole estate to his said unmarried sister Catherine Stewart, who had always resided with him, and who had, as is proved, contributed by her labour to the realization of his means and estate. On Catherine's death he directed his heritable estate to be realized, and to be divided into two shares, one of these to go to Catherine's children, and the other to the children of his brother the pursuer. In the event of Catherine Stewart dying without issue, he directed his trustees to realize his heritable property, and, *first*, to pay £250 of the proceeds equally to his brother and three married sisters and their issue; and, *second*, to apply and divide the remainder of the proceeds among the pursuer's children, in manner therein mentioned. On Catherine Stewart's death he also directed his trustees to pay and convey his moveable estate to his brother and three married sisters and their issue, equally.

"The Lord Ordinary is of opinion that it is clearly proved that when the testator executed the said trust-disposition and settlement he was ill of the disease of which he died, and that he was not at kirk or market between the date of the deed and his death, which occurred four weeks after the execution of the said deed.

"The defenders, who are the trustees under the said trust-disposition and settlement, maintain that the pursuer is barred from reducing the said deed on the head of deathbed, in respect, *first*, that he duly ratified and approved of the deed, and renounced his right to challenge it on the head of deathbed; *second*, that he took payment of the first two half-yearly portions of the annuity of £20 left him by the deed, which fell due at Martinmas 1868 and Whitsunday 1869; *third*, that in the receipt which he granted on 26th November 1868, for the first half-yearly payment of said annuity, he acknowledged having received the same from the trustees nominated by his brother's trust-settlement, 'dated 12th May 1868, confirmed by me on the 27th day of said month and year;' and, *fourth*, that on third May 1869 he obtained from the trustees an advance of £40, with consent of his sister the liferentrix, for which he granted the trustees an acknowledgment, binding himself to assign in security his right and interest in his brother's estates 'as regulated and destined in my favour by his trust-settlement, dated the 12th day of May 1868, and referred to in my ratification thereof, dated the 27th day of the said month and year last mentioned, all of which I again ratify and confirm.'

"The pursuer in his first action concludes for reduction of the deed of ratification on the ground of essential error, undue influence, and fraudulent representation and concealment, and he concludes in his second action for reduction of the receipt of 26th November 1868, and of the acknowledgment of 3d May 1869, on similar grounds.

"The Lord Ordinary is of opinion, after careful consideration of the proof, that the pursuer has failed to prove the reasons of reduction libelled on by him in his two actions, and he considers that, when the pursuer ratified his brother's trust-disposition and settlement, he did so freely and voluntarily, in the full knowledge of his legal rights and interest as his brother's heir-at-law, and of the nature and effect of the deed of ratification, and that there was no essential error on his part, and no concealment, or misapprehension, or pressure, or undue influence, either on the part of his brother or his agent Mr John Emslie, or of any other person.

"1. According to the evidence of the pursuer, he never heard of the deed of ratification until the day on which it was executed, when happening to call he was unexpectedly asked to sign it in his dying brother's presence; he was not informed of, and did not understand, the nature and effect of the deed, and the nature and extent of his legal rights, and he was in entire ignorance thereof; no time was given him for consideration; he was so much under the influence of drink at the time that he was confused and did not know what he was doing; and he signed the ratification under the pressure of his dying brother and of his agent, Mr John Emslie.

"The Lord Ordinary is of opinion that not only has the pursuer failed to prove these essential state-

ments, but that the contrary has been proved by the defenders.

"Mr John Emslie depones that the testator, who was desirous that the deed should be ratified, as the pursuer was labouring under pecuniary difficulties, told him that he would speak to the pursuer on the subject; that the testator afterwards told him that he had done so; that he, at the testator's request, and in the testator's house and presence, told the pursuer, on 25th May 1868, the contents of the trust-settlement, of the existence of which he had been previously informed; that the testator asked the pursuer if he would ratify it; and that the pursuer said he was quite satisfied with its terms, which he thought 'were exceedingly reasonable; and he was glad to see that his sister, who had as much to do with the making of the money as his brother, was to be provided for so amply.' Mr Emslie further depones that he then got instructions to prepare the necessary deed; that on 26th May he informed the testator that the deed would be ready that night, and that the testator told him to come on the following day, and that he would have the pursuer there. He also depones that the testator told him in his house, on Wednesday, 27th May, that the pursuer was to be there that forenoon to sign the ratification. That deed was executed on that day. Mr Robert Emslie, who was a witness to its execution, states that the testator told the pursuer 'that the documents which he had spoken of to him previously were now to be read over to him.' The pursuer's sisters Mrs Crawford and Catherine Stewart also state that the testator told them that the pursuer was to come to his house on that day to execute the deed.

"It is proved by the evidence of Mr John Emslie and of Mr Robertson, the surgeon who attended the testator, and of Archibald Workman and Robert Emslie, two of Mr John Emslie's clerks, that, before the deed of ratification was executed by the pursuer, the testator's trust-settlement was read over and fully and clearly explained to the pursuer, clause by clause, that the nature and extent of his rights as his brother's heir-at-law to challenge the deed on the head of deathbed, should his brother die within sixty days from the date of the settlement, were also fully explained to him, and that he was told that if he signed the deed of ratification he would be barred from challenging the settlement on the head of deathbed. The pursuer was a regular visitor at his brother's house. He states that he did not know then how long his brother was likely to live, but that he admits that he had seen 'that he was in a very poor, weak state long before that,' and also, that in the end of May 1868 he 'thought death was approaching very fast,' and that the testator would die soon. It is established that although the pursuer at first demurred to the settlement on the ground that he had not been nominated a trustee or made factor, and also on the ground that his sister Catherine's children, in the event of her marrying and having children, were given an equal share with his children, yet that he ultimately expressed himself as satisfied, and freely and voluntarily signed the ratification at the request of his brother, and not of Mr John Emslie, who never asked him to do so. It is proved that there was no pressure or undue influence used. The pursuer lived near his brother, and he was very frequently at his house. It is impossible to believe that the pursuer, a master boat-builder in Saltcoats, who employed four men and twelve apprentices, did not know the value of the heritable property in Ardrossan which belonged to his brother, especially having regard to the evidence of Mr John Emslie, who depones that months before the execution of the deed of ratification he and the pursuer had often spoken about its value, and that he then told him that it was worth about £3500, but was burdened to the extent of £2000.

"It is not averred on record that the pursuer was confused from drink at the time that he signed the deed of ratification, and the first intimation of such an objection was given by the questions put to the pursuer when he was examined as a witness. The pursuer and the witnesses Cuthbertson and Wyllie, with whom he says he had been drinking, gave evidence to that effect; but the evidence of the four witnesses already mentioned, who were present when the ratification was executed, proves that the pursuer was then quite sober and intelligent, and attended to the reading of the deeds and to the explanations given him, before he signed them. The Lord Ordinary considers that the evidence of these witnesses, corroborated as it is by the evidence of the pursuer's three sisters as to his sobriety, is entitled to much greater consideration than that of the pursuer and his two tavern companions. It is also not to be overlooked that the pursuer when examined as a witness admits that Mr John Emslie told him rightly what was in the settlement on the day that it was read over to him, and that he signed the ratification. The pursuer denies many important matters which are clearly proved to have occurred. Perhaps this may be accounted for by his memory not being, as he admits, 'overly good.'

"It is no doubt to be kept in view that the pursuer had not the advice and assistance of a law agent before he executed the ratification, while John Emslie acted for the testator. That was not a proper or prudent course, and it would have been much better if Mr Emslie had advised him to consult an agent before executing that deed. But the deed is not thereby rendered invalid. As well stated by the Lord President in the case of *Hannah*, Feb. 16, 1869, 6 Scot. Law Rep., 329, that only lays 'a more severe burden on the persons holding the deed to show that it was executed by the pursuer when he knew his legal rights, and the question here is whether that burden on the defender is discharged.' In the present case the Lord Ordinary is of opinion that the defenders have fully discharged that burden.

"2. The case of the pursuer, as regards the receipt of 26th November 1868, is, that Mr John Emslie took him to an hotel, where they had drink, and that he fraudulently took that receipt from him. Mr John Emslie depones that he was in no hotel or public-house with the pursuer on that day; that the £10 was paid to the pursuer as the first half-yearly payment on account of his annuity of £20, of which he on that day came to receive payment; that he had heard frequent rumours that the pursuer intended to challenge his brother's settlement, and that Mr Kirkhope, writer, Ardrossan, as acting for the pursuer, had (as was the case) written him twice on the subject, and that he told the pursuer he would, by signing the receipt, homologate the settlement. The instrumentary witnesses to that receipt are Mr John Emslie and Mr Glass, who, it is proved, has gone to China. But Mr Workman proves that Mr John Emslie was not out with the pursuer, and that the

pursuer came into and left the office alone. The evidence of the pursuer is insufficient in such circumstances to set aside that receipt.

"3. The pursuer denies that the three payments of £5, £2, and £3, for which the receipts Nos. 205, 206, and 207 of process were respectively granted by him on 24th March and 15th and 26th April 1869, were paid to account of the half-yearly instalment of his annuity due at Whitsunday 1869; but the last of these receipts expressly bears to be on account of the annuity; and Mr George Barrie, now coal-merchant in Ardrossan, who was then accountant in the City of Glasgow Bank, of which Mr John Emslie was agent, depones that he paid the sums of £2 and £3, for which the receipts Nos. 206 and 207 of process were granted by direction of Mr Emslie, to account of the pursuer's annuity: Further, Mr John Emslie depones that the pursuer asked and got the whole three sums, which amount together to £10, as payment on account of his annuity, and granted these three receipts for the same.

"It is proved by the pursuer's witness Robert Rodger that the pursuer never spoke of challenging the settlement and ratification when he was sober, but only when he was drunk. It is also proved that a few days before his brother's death, and again in October 1868, he consulted Mr Kirkhope, writer, Ardrossan, as to his rights with regard to these deeds, and that he refused to give him instructions to make the necessary investigations with a view to ascertain whether they were challengeable, although Mr Kirkhope recommended him to do so, and wrote him on 15th June 1868 that he had been greatly wronged, but that he could yet be put right. Mr Kirkhope states that the pursuer explained his brother's settlement, and seemed to have a distinct idea of the legal effect of that will.

"4. As regards the acknowledgment and ratification of 3d May 1869, when the pursuer received an advance of £40 to pay the composition to his creditors, there is no proof that he was drinking with Mr John Emslie previous to granting it. Mr Emslie denies that this was the case, and his evidence is corroborated by that of Mr Barrie. It is proved by Mr John Emslie, Mr Barrie, and Mr Workman that when the pursuer got this advance, for the purpose of paying the composition to his creditors, the acknowledgment and ratification was read over to him, and he was told that by signing it he was confirming his previous ratification, and that it would bar him from challenging his brother's settlement. His own evidence to the contrary is entirely unsupported, and is, the Lord Ordinary thinks, completely negatived by the evidence of these witnesses. The subscription of this document excludes, in the opinion of the Lord Ordinary, the attempt now made to reduce the trust-disposition and settlement and the ratification thereof.

"5. Further, the pursuer's estates were sequestrated on 23d July 1869, and in the state of affairs which he lodged in the sequestration and swore to as correct (No. 15 of process), he entered among his assets the annuity of £20, payable to him under the settlement of his brother. This was in accordance with his rights, on the footing that the ratification of his brother's settlement was, as the Lord Ordinary thinks, valid and effectual.

"Such being, as the Lord Ordinary thinks, the import of the evidence, the defenders are, in his opinion, entitled to be assoilzied from the conclusions of the two summonses at the pursuer's instance, with expenses."

The pursuer reclaimed.

Authorities cited—Ersk. iii, 8. 99; M. 5677, 3322, 3227; Bell's Com., vol. i. 90; 2 Bankton, 304; M'Laren on Wills, 175; *Murray*, 4 S., 381.

At advising—

Lord Neaves—Looking to the whole proceedings here, I am satisfied this pursuer is barred from setting aside a ratification which has been acted on in the most substantial manner. I should be inclined to say there is a difference between homologation *rebus et factis* and actual execution of a formal deed of ratification, which is more formal and deliberate—though even in the latter case, if one sees an ignorance of the party's rights displayed, and a manifest intention to keep him in ignorance, he will be reponed *de recenti*. But on lapse of time and intervening circumstances a great deal depends. Here the pursuer had frequent opportunities of ascertaining his rights, and was aware that it would be for his interest to set the ratification aside. He does nothing to set it aside, but by a series of acts deliberately elects to hold his estate (as in question with his creditors) on the footing of not having this claim settled with his creditors, and now, after getting the benefit of a composition, seeks to set the ratification aside. I think it would be contrary to justice to sustain such a claim.

Lord Ormidale—I concur. Laying aside the abstract question, whether a deed of ratification can be efficacious, and looking at this case as if no ratification had been made, I find a deed of settlement, rational, fair, and judicious in itself, and that the pursuer delayed for five years, during which he had ample time to ascertain his rights, and actually was told his rights by an agent not long after the testator's death. The question comes to be a jury question, Is he now precluded from objecting? He adopted the part of the settlement beneficial to himself in a question with his creditors, and said nothing of any right of challenge. I am clear, on these facts, that there is enough to dispose of the case; and that the pursuer cannot now challenge the ratification. On the abstract question I give no opinion. It cannot arise again, as the law of deathbed is abolished.

Lord Justice-Clerk—I concur in the result at which your Lordships have arrived. On the general question of the effect of a general ratification during the life of a testator, no doubt the older law seems to regard the law of deathbed to be a matter of public policy, but we can hardly now hold that to be the case; but certainly a ratification of that kind, under such circumstances, has a presumption against it if the party making it is in ignorance of his rights and has not had independent advice. Here the party had two interests to look to, and it is plain that so long as he was undischarged the pursuer meant to hold by the deed, and then to turn round and attempt to upset the whole arrangements.

Counsel for Reclaimer — Balfour and A. V. Campbell. Agent—A. K. Mackie, S.S.C.

Counsel for Respondent — Solicitor-General (Watson) and Burnet. Agent—J. Scott Hampton, S.S.C.