opinion, because I think it clear that the objection to relevancy is well founded. This action is founded upon the supposition that what happened was a mistake in the due execution of a diligence. But that is not so. The petition was served and the party was called to show cause why he should not be sequestrated. It was a judicial proceeding *in foro contentioso*. The creditor required to lodge a copy of the oath required by statute, and the debtor appeared to point out an error in it and to oppose sequestration. The Sheriff repelled the objection he took, and awarded sequestration *in foro contentioso*. Thereafter a petition for recall of sequestration was presented, and the sequestration was recalled, and on that recall this action is grounded. But the defenders here only exercised their ordinary privilege, and I am clear as to the rule that a person who has only exercised his ordinary privilege cannot be subjected to an action of damages unless there be made against him an averment of malice and want of probable cause.

Lord Shand—I agree with your Lordships in holding that an application for sequestration of a debtor's estate, though it result in a diligence of a sweeping character, is a judicial proceeding. Nothing could be a better illustration of that than what took place here. An application for sequestration was presented to a Court; a legal question was raised which was founded on a technical objection to the oath produced; the Judge decided that question and granted sequestration. On a petition for recall that judgment was reversed, and the opinion of the Judge who awarded sequestration was held to be wrong. I think it clear that this was a judicial proceeding, and that the pursuer can only maintain his claim against the defender by averring malice and want of probable cause. I do not mean that this record would be made a whit better by merely putting in these words if alongside of them we had merely the averment that there was a technical objection to the oath produced in this judicial proceeding. In order to give substance to a case founded on that circumstance mere averment of malice and want of probable cause would not suffice. I am of opinion that in the absence of an averment of malice and want of probable cause, and some specialisation of circumstances to ground that averment, this action is irrelevant.

The Court recalled the interlocutor of the Lord Ordinary, disallowed the issues proposed, sustained the third plea-in-law for the defenders, and assoilzied them.

Counsel for Pursuer — Rhind. Agent — R. Menzies, S.S.C.
Counsel for Defenders—W. C. Smith. Agents —Murray, Beith, & Murray, W.S.

Thursday, March 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

ROSS *v.* HERDE.

Process—Reclaiming Days—Expiry of on Saturday.

A reclaiming note was *refused* as incompetent because it had been boxed on Monday instead of the previous Saturday, on which day the reclaiming days had expired, there being no consent by the respondent.

The reclaimer cited as authorities 6 Geo. IV. c. 120, sec. 18; *Hume* v. *Macalister*, 21st Feb. 1855, 27 Sc. Jur. 195, 17 D. 477; *M'Call* v. *Laing & Wilson*, 7th July 1868, 40 Sc. Jur. 569. The respondent replied that in the cases cited the note was received of consent—here there was none.

Counsel for Suspender and Respondent — Baxter. Agent—W. Lowson, Solicitor.
Counsel for Respondent and Reclaimer — J. A. Reid. Agent— D. H. Wilson, S.S.C.

Thursday, February 9.

OUTER HOUSE.

[Lord Fraser.

CLYNE (GARDEN'S EXECUTOR) *v.* GAVIN AND OTHERS.

Entail—Bond of Provision—Personal and Real—Competition — Aberdeen Act (5 Geo. IV. cap. 87), secs. 4, 8, and 9.

A bond of provision in favour of younger children was granted under the Aberdeen Act, and was registered in the register of sasines as being in a deed containing an annuity in favour of the granter's widow. The sums due to the children were not paid by the succeeding heir, but the children assigned their rights to a third party, who advanced the amount, and to whom the heir paid interest for several years. The heir on succeeding granted a bond conveying to trustees in security his rights in the entailed estates. The trustees under this bond were duly infeft, and subsequently intimated to the tenants on the estate the assignation to the rents contained in their bond. After the date of this intimation the holder of the bond of provision obtained decree for the amount, and used arrestments thereon in the hands of the tenants. *Held (per* Lord Fraser, Ordinary) that the holder of the bond of provision had a personal right merely, and that the arrestments used by him must be postponed to the prior intimated assignation to the rents, and the tenants assoilzied accordingly in an action of furthcoming raised by the holder of the bond of provision.

The late Peter Ettershank Gordon, as heir of entail in possession of the entailed estate of Mosstown, on 3d October 1842 granted a bond of provision in favour of his wife and younger children, by which he gave an annuity to his wife on his death, and also bound and obliged himself, and

the whole heirs of entail succeeding to him in the same estate, to make payment of a provision to his younger children, if three or more, of the sum of £540, but subject to modification so far as that sum should be found to exceed three years' free rents; which provision was payable one year after his death in terms of the said bond, and bore interest from the date of the granter's death, all in terms of the Act 5 Geo. IV. cap. 87. The bond was recorded in the register of sasines on 14th April 1865.

Peter Ettershank Gordon died on 23d January 1865, leaving besides his widow seven children, of whom the eldest, Gordon Ettershank Gordon, one of the defenders in this case, succeeded as heir of entail. The amount which now became payable to the younger children under the bond of provision was found by a reference to an accountant to be only £519, 16s. 2d. The heir of entail was not able to pay this sum from his own funds, and had to borrow it, and Miss Garden, whose executor-nominate the pursuer was, and the trustees of the deceased James Johnston, who consented and concurred in the present action, lent £513, 2s. 7d., and in consideration thereof the younger children executed an assignation, dated 27th August and 18th September 1869, in favour of Miss Garden and Johnston's trustees of the sums due to them under the bond of provision, and of the bond itself, with their whole right, title, and interest therein. No action was taken on the bond, and interest at 4 per cent. was regularly paid to Miss Garden and Johnston's trustees till the term of Martinmas 1878. Miss Garden died on 1st January 1879, leaving a will in which she appointed the pursuer her sole executor.

By bond, assignation, and disposition in security for the sum of £860, in favour of Edward Carter and others, trustees of Arthur William Hepburn, in Montreal, dated the 8th and recorded in the register of sasines the 26th of July 1871, Gordon Ettershank Gordon disponed to the said Edward Carter and others the lands and estate of Mosstown, and assigned to them the rents thereof, but only in so far as was consistent with the deed of entail of the said lands, and the rights of the heirs who should succeed to them. This bond was afterwards assigned to Miss Humphrey and Mr Macqueen, in Aberdeen, as trustees for the deceased John Humphrey of Comalegy, who were in right thereof at the time this action was brought. The said bond and its assignation were on 29th February 1880 intimated to two of the defenders, Alexander Gavin and David Milne, by these trustees. On the 6th and 7th December 1880 the pursuer Norval Clyne (Miss Garden's executor) arrested, in execution of a decree obtained by him and the other pursuers in this case against Gordon Ettershank Gordon in the Sheriff Court of Aberdeen, funds due by the defenders Gavin, Brown, and Milne to him as their landlord, sufficient to meet the whole or part of the pursuers' claim for £513, 2s. 7d. due to them under the assignation of September 1869.

By a trust-disposition, dated 6th June and registered in the register of sasines 20th July 1872, Gordon Ettershank Gordon disponed to Mr Macqueen, as trustee for the use and behoof of his creditors, the lands of Mosstown, and on 9th February 1881 Miss Humphrey and Mr Macqueen, as trustees for Mr Humphrey, obtained a decree in the Sheriff Court of Aberdeen in an action of maills and duties against Gordon Ettershank Gordon, Mr Macqueen as trustee under the trust-disposition of 1872, and the defenders Gavin, Brown, Milne, and others, under which decree Brown and Gavin paid certain sums to the trustees.

The present action of furthcoming was therefore brought by the pursuer Norval Clyne as executor-nominate of the deceased Miss Garden, with consent and concurrence of the trustees of the late James Johnston, to have the defenders Gavin, Brown, and Milne, arrestees, decerned and ordained to pay to him sums due by them as tenants to Gordon Ettershank Gordon—at least of such part as would pay him the sum of £513, 2s. 6d. with interest.

The pursuer pleaded—"(1) In the circumstances condescended on the pursuer is entitled to decree for payment out of the sums arrested of the said principal sum, interest, and expenses contained in the said decree, or of such part thereof as the said arrested sums shall be sufficient to meet, and also to decree for the expenses of this action of furthcoming against the principal debtor. (2) The trust-disposition founded on in the defences never having been acceded to by the pursuer, cannot be pleaded in prejudice of his rights. (3) The bond of provision founded on by the pursuer having been duly constituted a burden on the entailed estate of Mosstown in terms of the statutes, the subsequent debts and deeds of a succeeding heir of entail cannot compete with the same."

The defenders pleaded—"(1) The arrestments founded on having been used against Gordon Ettershank Gordon, and he being divested of his right and interest in the estate by the said trust-disposition and his trustee's infeftment following thereon, and, *separatim*, the arrestees having had no funds in their hands belonging to the said Gordon Ettershank Gordon, the arrestments are not effectual to attach any funds in the hands of the arrestees. (2) By the assignation of rents, and the notarial intimation following thereon, the tenants were legally interpelled from paying rent except to the assignees, Humphrey's trustees. (3) In respect of the decree of maills and duties obtained by Humphrey's trustees, the defenders the arrestees were entitled and bound to make payment of their rents to those trustees, and cannot be called on to make them forthcoming to the pursuer."

Lord Fraser issued the following interlocutor:—"Finds that the now deceased Peter Ettershank Gordon, heir of entail in possession of the estate of Mosstown, who died on 23d January 1865, granted a bond of provision in favour of his younger children as under the Act 5 Geo. IV. cap. 87, by which he bound himself, and the heirs of entail succeeding to him in the estate, to make payment of a provision to his younger children, if three or more, which was the case, of the sum of £540, but subject to modification as far as the said sum should be found to exceed three years' free rents, the said provision being made payable one year after his death, but bearing interest as from the date of his death: Finds that the amount due under the said bond was, after the death of the granter thereof, ascertained to be £519, 16s. 2d.: Finds that the said P. E. Gordon was succeeded in the said entailed estate by his eldest son Gordon Etter-