regulating the conditions upon which disused tollhouses may be sold is applicable in terms to county road trustees alone, and that therefore it must be held that the Legislature did not contemplate that such buildings should in any circumstances be transferred to the local authority of a burgh. But the positive enactment of section 37 must receive effect; nor does it appear to me that there is anything in section 44 inconsistent with that enactment. There may be very good reasons for requiring that in the landward part of a county tollhouses that are to be sold should be offered first to the adjoining proprietors, which would have no force or validity with reference to property within burgh. But however that may be, the buildings in question cannot be held to have been vested by implication in the pursuers—contrary to the express enactment which vests them in the defenders. Nor is there any difficulty in reconciling that enactment with the other vesting clauses of the statute. The 32d section, upon which the pursuers relied, appears to me to be applicable to roads and bridges situated in a single county—exclusive of the burghs therein. The 47th section, in like manner, applies to roads and bridges within a burgh. The only provisions applicable to the property of a trust embracing roads which are not wholly within one county or burgh are those of the 37th section. There is no provision, therefore, in the statute to which the pursuers can point as vesting the buildings in question in them."

The pursuers reclaimed, and argued—Section 32 vested all the roads, bridges, land, &c., in the county road trustees under the exception of section 37, which gave to the local authority of such a burgh as Airdrie all that was necessary for the maintenance of the roads under the new system. Tollhouses, however, could not be said to be of such a nature, and it was against the spirit and meaning of the Act to include them in what was given by the 37th section. Section 44 regulating the conditions upon which disused tollhouses may be sold, was applicable in terms to county road trustees alone, and therefore the Legislature could never have contemplated transferring them to the local authority of a burgh.

The Court, without calling on counsel for the defenders, adhered to the Lord Ordinary's interlocutor.

The LORD JUSTICE-CLERK was absent.

Counsel for Pursuers—Mackintosh—Jameson. Agents—Bruce & Kerr, W.S.

Counsel for Defenders — R. V. Campbell. Agent—Alexander Wylie, W.S.

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*Friday, February 20.*

## FIRST DIVISION.

[Sheriff of Roxburghshire.

## BLYTH *v.* CURLE.

*Donation* mortis causa—*Bank Pass-Book—Apprehension of Death not Necessary—Delivery.*

In order to the validity of a *mortis causa* donation it is not necessary that the donor be at the time of the gift in immediate prospect of death or ill of the disease of which he dies.

A man gradually accumulated money in a bank account kept in name of himself and his wife conjunctly and severally, and the longest liver of them. He gave his wife the bank book to keep, and told her repeatedly that the money was intended to be hers and to be a provision for her on his death. *Held* on the death of the husband that a good *mortis causa* donation had been effected, and that actual delivery of the money was not necessary.

William Curle died on 5th January 1882, intestate and without children, survived by his wife, Elizabeth Baptie or Curle, who was decerned executrix-dative *qua* relict of her husband.

This action was raised in the Sheriff Court of Roxburghshire at Jedburgh, by Agnes Curle or Blyth, wife of Walter Blyth, and only surviving full sister of the deceased, to enforce payment of what the pursuer alleged was her share in the succession of her deceased brother. The defender admitted the claim except in so far as the pursuer alleged right to share in a sum of £182, 10s. 1d. deposited in the National Security Savings Bank at Jedburgh in name of her deceased husband and herself. This, the defender said, was the subject of a *mortis causâ* donation to her from her husband.

The material facts of the case, as brought out in the proof before the Sheriff, are given in the opinion of the Lord President, *infra.*

The Sheriff Substitute (RUSSELL) on 21st August 1883 pronounced an interlocutor by which, after several findings in fact, he found that the estate of the deceased, after deduction of the deposits in the Savings Bank, interest thereon, and debts and expenses, amounted to £25, 16s. 2d., and that the pursuer as one of the next-of-kin, was entitled to payment of one-fourth, being £6 9s. 6d. *Quoad ultra* he assoilzied the defender.

The pursuer appealed to the Sheriff (PATTISON), who on 24th May .1884 pronounced this interlocutor:—"Finds, as matter of fact, that the deceased William Curle, the husband of the defender, who died intestate and without children on the 5th day of January 1882, did during his life, and in the prospect of death, give and make over to the defender, his wife, the money which then stood deposited with the National Security Savings Bank at Jedburgh, in name of himself and his wife, and which at the 20th day of November 1881 as then accumulated amounted to £182, 10s. 1d., and that this donation remained unrecalled at his death: Finds that the defender, as executrix of the said defunct, is not liable to account for or to pay to the pursuers, Agnes Curle or Blyth and Walter Blyth, her husband, she being one of the nearest of kin of the said defunct, the sum of £183, 19s. 7d. (being the above-mentioned sum with interest to the

date of her confirmation as executrix aforesaid) or any part thereof: Finds the defender as executrix foresaid liable to the pursuers in the sum of £6, 10s. 6d. sterling, being the amount of the share belonging to said female pursuer of the free residue of the moveable estate of the said defunct, exclusive of the above sum of £183, 19s. 7d., and decerns against the defender for payment to the pursuers of the said sum of £6, 10s. 6d. to the pursuers: *Quoad ultra* sustains the defences and assoilzies the defender from the action."

The pursuer appealed to the Court of Session, and argued—The facts of the case were not in dispute, but admitting the defender's statement, there was no proof of *donatio mortis causa*. To constitute a proper *mortis causa* donation the gift must be made when the donor is under apprehension of death.—*Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1043, *per* Lord Deas; *Milne* v. *Grant's Executors*, June 5, 1884, 11 R. 887, *per* Lords Young and Craighill. The donation must at least be made in "emergency or exceptional circumstances." In this case the deceased had said nothing to his wife about the deposits during his last illness. This case was distinguishable from *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, because (1) there the subject of the donation was a deposit-receipt, here it was a bank pass-book; (2) the donation there was a present donation of money—*Watt's Trustees &c.*, July 1, 1869, 7 Macph. 930; *Cuthil* v. *Burns*, March 20, 1862, 24 D. 840; *Commercial Bank* v. *Rhind*, January 31, and Feb. 10, 1860, 3 Macq. 643. There had been no delivery here—*Morris* v. *Riddick*, *supra*; *Thomson* v. *Dunlop*, January 23, 1884, 11 R. 453.

The defender argued—The present case was ruled by *Crosbie's Trustees*, *supra*. There was no distinction in such a matter between a deposit receipt and a pass book. *Thomson's Executor* v. *Thomson*, June 8, 1882, 9 R. 911. There could be no actual delivery of money deposited in bank—*Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923; *Lord Advocate* v. *Galloway*, February 8, 1884, 11 R. 541. It was clearly proved that it was the intention of the deceased to give the donee a title to the money.

At advising—

Lord President.—The pecuniary interest of the parties in this case is small, but the points of law raised in the appeal are important, and require careful consideration.

The question to be decided is, whether the defender, the widow of the deceased William Curle, who died on the 5th January 1882, is entitled to a sum of £182, 10s. 1d. deposited in the National Securities Savings Bank at Jedburgh by the deceased. The pursuers maintain that this sum forms part of the executry estate of the deceased, who died intestate, while the defender asserts that it formed the subject of a donation *mortis causa* to her by her deceased husband.

The *onus*, of course, lies on the defender of proving this allegation, and the circumstances established by the evidence are as follows:—

The deceased was a working-man earning 14s. 6d. per week of wages. Neither of the spouses had any other means. But by rigid economy they had saved so much that when the husband died at the age of seventy, his estate amounted in value to £241, consisting (besides furniture) of a deposit of £50 in the British Linen Bank at Jedburgh and the sum in dispute. The deposits in the Savings Bank began with a sum of £13 on 4th October 1862, and by the 23d November 1867 they amounted to £150. By the rules of the Savings Bank this is the full amount that any one person is entitled to have on deposit. The difference between this sum and £182, 10s. 1d., being the balance due on the account at Curle's death, is made up of interest accrued since November 1867, less six payments drawn out of the account during the same period, amounting in all to £34, 5s. 9d., thus shewing that the drafts on the account for a period of fourteen years fell short of the interest for the same period by about one-half. This history of the account indicates a desire on the part of the deceased to accumulate as much as possible the money invested in the Savings Bank, while it is proved otherwise that when he wanted money for current purposes he preferred to draw it from his account with the British Linen Company. The account in the Savings Bank is headed "William Curle, miller, Bongate Mill, and Elizabeth Baptie, his wife, conjunctly and severally, and the longest liver of them." I need hardly say in passing that I ascribe no testamentary effect to this heading, though made at the request of the deceased himself. It is only an indication that the deceased had at the time some purpose in his mind beyond merely making a deposit of money. In that view it is an article of evidence in support of the allegation that a *mortis causa* gift was made. Mr Grieve, the actuary of bank, who wrote this heading, is now dead, but the defender depones that when the first deposit was made, and when the heading must have been written, her husband said to Mr Grieve "that he was doing this to keep me comfortable in case anything befel him," and when the husband and wife were leaving the bank, taking with them the pass-book containing the above heading, Mr Grieve said, "Now, you are all right whatever happens either of the parties." This evidence receives confirmation from the statements of Mr Heriot, present actuary, as to the practice of the Savings Bank. The defender farther depones that the pass-book was always kept by her, and remained in her possession at the time of her husband's death, and that she alone operated on the account, while as regards the deposit-account at the British Linen Company's Bank (which was in name of her husband alone), "When I needed money my husband used to say, 'Just go to the British, and let the other money lie; it is aye gathering for you.' He always gave this as the reason." These statements of the deceased are proved by the defender's brother (a perfectly independent witness) to have been made in his presence. In her additional evidence the defender depones that her husband "often said he hoped he would be taken away before me, for I could do well without him, but he could not do wanting me. He died on the 5th of January, and on the New Year's day he wished me a happy new year, and said that I would never want because the money was all mine." It is proved by the same evidence that the deceased suffered from heart disease, that he was often unwell, that for the last five years of his life he was quite unable to work, and that he died very suddenly, "falling down on the floor in a moment."

If this evidence is to be believed (and I see no reason to doubt it, considering how satisfactorily the documents harmonise with and support the defender's deposition), the *animus donandi* is very clear, and the words of present gift are, I think, also quite sufficient. In these respects it seems impossible to distinguish this case from *Crosbie's Trustees*, 7 R. 823, and *The Lord Advocate* v. *Galloway*, 11 R. 541.

But the appellant contends that the defender's case is imperfect in two respects—(1) that the alleged gift is not proved to have been made under an immediate apprehension of death; and (2) that the subject of the gift was not delivered by the donor to the donee.

(1) In support of the first of these objections, the appellants rely on the opinion of Lord Deas in the case of *Morris* v. *Riddick*, 5 Macph. 1043, to the effect that a donation *mortis causa* must be made in the immediate prospect of death, and "takes effect only in the event of death occurring from the existing illness; otherwise it falls to be returned." Reference was also made to some expressions which fell from Lord Young and Lord Craighill in the later case of *Milne* v. *Grant's Executors*, 11 R. 887, which give countenance to the same view.

After a careful consideration of the question thus raised, I am satisfied (1) that if a donation *mortis causa* cannot be sustained according to the law of Scotland unless the donor at the time of making the gift believes himself to be in imminent peril of speedy death, then the law of Scotland has adopted the third, and the third only, of the three kinds of donation *mortis causa* known in the Roman law, and has made the condition more severe than it was in the Roman law; and (2) that if there be superadded this farther condition, that in the event of death not occurring from the specific peril apprehended, the gift falls to be returned, then the law of Scotland has introduced a new species of gift which was unknown to the Roman law, from which it professes to be borrowed.

The text of the Digest is as follows (Lib. 39, tit. 6):—"Julianus tres esse species mortis causa donationum, ait. Unam cum quis nullo præsentis periculi metu conterritus, sed sola cogitatione mortalitatis, donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat ut statim fiat accipientis. Tertium genus donationum ait, si quis periculo motus non sic dat ut statim fiat accipientis sed tunc demum cum mors fuerit secuta." The second species named by Julianus we should of course class as donation *inter vivos*. The first requires only that the gift shall be made in prospect of death, in the sense that it is not intended to take full effect until the death of the donor. And with regard to the third, the imminency of the peril required may be best estimated by the examples which are given in the same title, on the authority of Paullus, Gaius, and Ulpian—"Non tantum infirmæ valetudinis causa, sed periculi etiam propinquæ mortis vel ab hoste vel a prædonibus vel ab hominis potentis crudelitate aut odio, aut navigationis ineundæ, aut per insidiosa loca iturus, aut ætate fessus." In no part of these texts is there any appearance of the doctrine that upon the removal of the immediate peril under a sense of which the gift was made, or on the donor's escape from or survivance of that peril, the subject of the gift falls necessarily to be returned to the donor. On the contrary, the fair implication seems to be, that while the donor's power of revocation subsists till his death, if he die without revoking, the gift will become absolute by his death, though that may occur after many years and not as the result of the peril, the apprehension of which was the immediate motive of the gift.

In the Institutes no mention is made of more than one species of *donatio mortis causa*, which is thus defined,—"Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset is, qui donavit, reciperet, vel si eum donationis penituisset, aut prior decesserit is cui donatum sit."—Inst. 2, 7, sec. 1.

In the Code (8, 57, 4), formalities to be observed in making donations *mortis causa* are prescribed, and the donations are spoken of as made under different circumstances, "sive juxta mortem facientis fuerint celebratæ, sive longiore mortis cogitatione subsecutæ sunt," clearly shewing that such a gift might be made either under the fear of an imminent peril or on a calm contemplation of death as the common lot of humanity.

The *mortis causa* donation of the Roman Jurists has been adopted in almost all the European systems of jurisprudence—in England, France, Germany, and Holland,—though with a variety of different qualifications and conditions to suit the genius and principles of each particular system and country. Obviously the only relevant inquiry here is, to what extent and effect the principle or rule which gives effect to such donations has been recognised in the decisions of our Courts, and thus made part of the common law of Scotland.

I adhere to the opinion which I expressed in *Morris* v. *Riddick*, that in the law of Scotland *donatio mortis causa* does not precisely answer to any of the species of donation described in the Digest, but follows more the general definition of the Institute, which distinguishes it from donation *inter vivos* on the one hand, and legacy on the other. But I cannot find in any of our authorities, with the exception of the *dicta* relied on by the appellants, a recognition of the necessity of a present imminent peril to life as a condition of the right or power to make a donation *mortis causa*.

To avoid misapprehension, however, I must here observe that the state of the donor's health, his prospect of life, and above all, his own feelings and belief on this matter, are relevant and important considerations in such a case, as bearing on the proof of the *animus donandi*, and also as tending to shew whether the gift is meant to be absolute or *sub modo*. In many of the cases, therefore, these considerations are dealt with as material, for an apprehension of an early or immediate death may naturally supply or suggest the motive and occasion of the gift.

The earliest reported case, so far as I know, in which the subject was discussed is *Irvine* v. *Skeen*, March 7, 1707, M. 6350, where an assignation by a mother to her bastard son was objected to as being a *donatio mortis causa* and so void because the donor survived the donee. The representatives of the assignee maintained that the assignation was a deed *inter vivos*, and could not be

*donatio mortis causa*, because such donation is "never presumed unless it clearly appear from the testamentary conception of the writ, or be granted in contemplation of immediate death, or some eminent danger feared by the disponer." The Court found the assignation to be *donatio mortis causa*, and so disregarded this plea.

Bankton, the only one of our institutional writers that bestows much attention on the subject, cites the above-mentioned case of *Irvine* v. *Skeen*, and defines *donatio mortis causa* as "a deed whereby one in contemplation of his death gives anything to another, or grants a right in his favour, revocable at the granter's pleasure," and adds,—"The characteristic of these donations is, that the giver prefers the grantee to his heir, but prefers himself to both." But there is nothing to shew in the section which he devotes to the subject, that by the words "in contemplation of his death" he mean anything more than that the gift is made *intuitu mortis*, and to take effect at death and not sooner—1 Bankton, Tit. 9, secs. 16, 18, and 19.

In the middle of last century there occurred two cases, *Whiteford* v. *Ayton*, 1742, M. 8072, and *Mitchell* v. *Wright*, 1759, M. 8082 (the one before and the other after the publication of Bankton's Institute), which are valuable authorities, particularly in combination, because while in both the *donatio mortis causa* was sustained, in the latter the gift was made on deathbed, and in the former the donor was apparently in his usual health, under no apprehension of speedy death, and lived for two years after, when he fell sick in a friend's house and died there. The Court made no distinction between the two cases, and in neither does the judgment refer in any way to the circumstances now mentioned.

*Fife* v. *Kedslie*, 9 D. 853, was a donation *mortis causa* of bank stock constituted by deed of transference and back-letter, which was sustained by a large majority of the whole Court, Lord Mackenzie, at the final advising in the First Division, remarking,—"He meant clearly to make a *donatio mortis causa*, and while I find all the features of such a donation here, I cannot find those of an ordinary trust." In that case the donor survived the gift for nine months, and it is not stated that his health was in any way impaired at the date of the gift, though probably, from the relation of the parties and the circumstances of the case, he was an old man.

*Miller* v. *Milne's Trustees*, 21 D. 377, was also before the whole Court, and led to a great diversity of opinion, the question being whether a provision of £200 to be paid after the granter's death was a direct obligation with a postponed term of payment, or a donation *mortis causa*, or a legacy. But the Judges, and particularly those who were in favour of donation *mortis causa*, never inquired or concerned themselves with the question, whether the gift was made while the donor was under some immediate apprehension of death. In fact, the lady, who was the donor, was, so far as appears, in perfect health when the gift was made, and survived the donee.

In *Gibson* v. *Hutchison*, 10 Macph. 923, two separate donations *mortis causa* by a husband to a wife were sustained by this Division of the Court, affirming the judgment of Lord Gifford, Ordinary, though there was no allegation or proof of any immediate apprehension of death on the part of the donor. I had the misfortune to differ from the other members of the Court as regarded the second gift, because the proof of gift depended entirely on the evidence of the donee, and because I thought the words ascribed by the donee to the donor did not necessarily import a present intention to make a donation *mortis causa*. But this does not at all interfere with the authority of this judgment in the present question.

Lastly, there is the case of *The Lord Advocate* v. *Galloway* in this Division of the Court last year (11 R. 541), in which the Judges now present sustained a donation *mortis causa* as good though the donor was engaged in the management of his farm at the date of the gift, and survived the gift for three years, and could not be said to be in any particular peril, except perhaps what is expressed in Ulpian's phrase *ætate fessus*.

In this state of the authorities I am unable to give any effect to the appellants' first objection.

2. The second ground of objection may be disposed of in a very few words. It could not be sustained without deciding in effect that money lodged in a savings bank could not form the subject of a gift *mortis causa*, unless the money were actually uplifted by the donor and delivered to the donee *de manu in manum*. But in such cases proof of actual delivery is not required, as is clearly established by the judgments of this Court in *Gibson* v. *Hutchison* and *Crosbie's Trustees*.

It is only necessary to observe in conclusion that Lord Deas' opinion on this point, expressed in *Morris* v. *Riddick*, was afterwards largely qualified by his Lordship, if not altogether withdrawn, in his subsequent opinion in *Crosbie's Trustees*.

Lord Mure—I entirely concur in the exposition now given by your Lordship of the various important questions of law raised in this case, and I have very little to add.

I think that the circumstances of this case as disclosed on the evidence bring it within the principal of *Crosbie's Trustees*. With reference to the question of the necessity for delivery of the subject of donation, I then expressed certain views after a careful examination of the authorities, and the conclusion to which I came was that actual delivery of the subject is not necessary, provided there is distinct evidence of an intention to make a donation. I think there is such evidence in the present case.

In these circumstances, the only other point of difficulty is whether the donor must be at the time he makes the gift in the knowledge that he is ill of the disease from which he subsequently died. On that point I agree with your Lordship that there is no authority for saying that such knowledge is necessary. I do not think it is essential for the donor to know himself to be suffering from the disease of which he afterwards dies. The wife here states in her evidence that she knew her husband was subject to heart disease, and I am inclined to think that if the question had been asked it would have turned out that her husband was also aware of it.

Lord Shand—The argument which was maintained by the appellant has made this decision of

great importance. The case has formed the subject of anxious consideration by the Court, and I am entirely of the same opinion as your Lordships.

No doubt it has not been shown that when this donation of the money put in the bank pass-book was made the deceased was under any apprehension of immediate death. If therefore the appellant's argument were sound, that a *mortis causa* donation can only be made by one who is under apprehension of immediate death, then she must succeed. But I am of opinion that the donation here was made in contemplation of death. The deceased thought his life was short and uncertain, and that his wife would probably outlive him. In these circumstances I think that this *mortis causa* donation was good, and that it was not necessary that the donor should be in immediate peril of death, provided he intended that on his death the subject of the donation should become the property of the donee. I cannot see any sound principle for the necessity of there being immediate peril. Both on principle and on the authorities I am of opinion that this was a *mortis causa* gift which ought to receive effect.

The Court affirmed the judgment of the Sheriff.

Counsel for the Appellant—Strachan. Agents—Mack & Grant, S.S.C.

Counsel for the Respondent—Darling. Agent—J. H. S. Graham, W.S.

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*Saturday, February 21.*

## FIRST DIVISION.

[Lord Lee, Ordinary.

## FLETCHER *v.* H. J. & J. WILSON.

*Reparation — Slander* — Res noviter — *Issue in Justification.*

In an action of damages for slander contained in a newspaper which had erroneously stated that the pursuer had been seven times convicted of theft, the verdict was for the pursuer, damages £50. At the trial the pursuer stated that he "was never convicted of theft, or of any dishonesty." The defenders subsequently discovered that he had twenty-three years previously, when a boy of fourteen, been twice convicted in the same year of petty theft, and had been sent to a reformatory. They obtained a rule for a new trial, on the ground that the damages were excessive, because the jury had been misled by the pursuer's evidence, and because these two convictions had come to their knowledge, which constituted *res noviter*, entitling them to an issue in justification. *Held* that the two convictions would not support an issue in justification, and that the damages were not excessive, and rule *discharged.*

This was an action of damages for slander at the instance of John Fletcher, against H. J. & J. Wilson, proprietors of the *Edinburgh Evening News*. The alleged libel was published in the newspaper of 25th September 1884, and was to the following effect:—"ASSAULT ON A MAN.—For striking a man several times on the face, in a house at South Richmond Street, on 23d inst., John Fletcher, who had been seven times previously convicted of theft, was sent ten days to jail by Sheriff Baxter, at Edinburgh Sheriff Summary Court this afternoon."

The defenders admitted that the statement in the paragraph that the pursuer had been previously convicted of theft was erroneous. They explained that the error was merely clerical, and was corrected whenever the defenders became aware of it, by their publishing in the newspaper of 9th October the following paragraph:—"In our report of a case, which came before the Sheriff Summary Court on the 25th ult., it was stated that a man named John Fletcher, who was sent to jail for ten days for assault, had been seven times previously convicted of theft. The previous convictions were for assault, and we regret that by a clerical error it should have been made to appear that Fletcher had been guilty of theft."

The defenders denied that the pursuer had suffered any damage, and pleaded that they were therefore entitled to absolvitor, but judicially tendered £10, which the pursuer refused, and the case went to trial before a jury on an issue whether the paragraph, which was admittedly of and concerning the pursuer, falsely and calumniously represented him to have been seven times convicted of theft, to his loss and damage. No counter issue was taken.

At the trial the pursuer in his evidence deponed—"It was not true that I had been seven times convicted of theft. I was never convicted of theft, or of any dishonesty."

The jury returned a verdict for the pursuer, damages £50.

Subsequently to the trial it was discovered by the defenders' agent that the pursuer had been twice convicted of theft in the year 1862. He was then fourteen years of age. The first conviction was on 8th August 1862, when the pursuer pleaded guilty along with two others to the theft of an empty purse, for which they were ordained to find caution for their good behaviour for twelve months. The second conviction was on 20th November 1862, when the pursuer along with two others pleaded guilty to the theft of 20s., for which he was sentenced to be imprisoned for fifteen days, and to be sent to a reformatory for five years.

An affidavit was then lodged, sworn to by the defenders' agent, setting forth these two convictions, and the defenders moved for, and obtained, a rule for a new trial, on the ground of *res noviter* and excess of damages.

The pursuer thereafter showed cause—It would not have been competent to lay this *res noviter* before the jury, as there was no counter issue—*Paul* v. *Jackson*, January 23, 1884, 11 R. 460. The case simply went to the jury for the assessment of damages. There was no fraud, for the question which had caused this difficulty was put to the pursuer without his being in any way prepared for it. [LORD PRESIDENT—It was quite an incompetent question, which the defenders might very well have objected to].

The defenders argued—There was here *res noviter*, from which it was evident that the jury had been misled. They were entitled to an issue in justification founded on these two previous con-