his objections to the Judge's refusal to admit certain evidence, but did not present a bill of exceptions. A rule was granted. The hearing on the rule took place upon 20th June 1893 before three of the Judges of the First Division—the Lord President, Lord Adam, and Lord M'Laren, Lord Kinnear being absent—with Lord Kincairney as the Judge who presided at the trial. The Lord President and Lord Adam thought a new trial should be granted on the ground that the evidence tendered and refused should have been admitted. Lord M'Laren and Lord Kincairney thought otherwise.

The Court being equally divided in opinion the rule was discharged and the verdict upheld.

The following day counsel for the pursuer submitted to the First Division that as this was a motion for a new trial, not a bill of exceptions, with a majority "of the judges of the Division" who heard the case in favour of setting aside the verdict, the opinion of Lord Kincairney, who was not a Judge of the Division, should be disregarded and a new trial granted under section 61 read as a whole, and looking to the views expressed in Mackay's Practice, ii. p. 75. To hold otherwise would deprive the first part of section 61 and its concluding words of all meaning.

The defender's counsel waived the objection that this argument should have been stated at the hearing on the rule, but submitted that under sec. 58 Lord Kincairney's vote fell to be counted, and that under the second part of sec. 61 in case of an equal division of opinion the verdict was to be sustained.

At advising—

LORD PRESIDENT—In the first place, it is only by the concession of Mr Comrie Thomson that this matter can be well reconsidered, because judgment has been given and no objection was taken at the time to the announcement. At the same time, as the point is one of practice, it may be well to consider it on the merits.

We are concerned with a motion for a new trial, and not with a bill of exceptions, and as I understand section 34 gives an option to a party who has taken exception to a ruling of the judge to proceed either by way of a bill of exceptions, in which case there may be an appeal to the House of Lords, or by way of a motion for a new trial, in which case the objection to the ruling is raised incidentally, and there is no right of appeal. In the present case, which, as I have said, was a motion for a new trial, objection was taken to the rejection of certain evidence by Lord Kincairney. We considered that objection, and as Lord Kincairney is not one of the Judges of this Division of the Court, the Court was constituted under section 58, which directs that "if the judge who tried the cause is not one of the judges in the Division, such judge shall be called in to hear the motion or bill, as the case may be; and when the cause is advised, such judge shall give his judgment with the other judges, and the decision shall be in conformity with the opinion of the majority of the judges present." It so happened that there was an equal division, and that takes us to the second branch of section 61, which provides that "in case of equal division judgment shall be given in conformity with the verdict." Now, I take that to mean, in the case of a court constituted under section 58, that the equal division referred to is equality of division among the whole judges sitting in the Court as constituted under section 58. It is quite true that the first branch of section 61 says that "no verdict of a jury shall be discharged or set aside upon a motion for a new trial unless in conformity with the opinion of a majority of the judges of the Division," and it may be that that means a majority of the permanent judges of the Division. But I think that we are not concerned to consider whether that is the sound construction or not, because I do not think that those words apply to or govern the second branch. The language of that branch, directing that judgment shall be given "in conformity with the verdict," perhaps primarily and more naturally refers to cases in which the objection is that the verdict is against the weight of the evidence. At the same time it appears to me that it may quite reasonably be understood to include also cases in which the objection is to a ruling of the judge, the words "in conformity with the verdict" being thus regarded as equivalent to "so as to uphold the verdict." That seems to me to be the case which here occurred. The first branch of section 61 not being in point, and Lord Kincairney being a member of the Court, I think that his Lordship's vote must count, and that the verdict of the jury must, in consequence, be upheld.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused a new trial.

Counsel for Pursuer—Wilson—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—Comrie Thomson—Wilton. Agent—John Rhind, S.S.C.

Friday, June 23.

SECOND DIVISION.

[Lord Low, Ordinary.

ALSTON'S TRUSTEES *v.* ROYAL BANK OF SCOTLAND.

Retention — Bank — Cash-Credit Bond — Negotiable Securities Deposited in Security.

In 1881 a bank agreed to allow a firm of merchants in Glasgow credit upon a cash account to the extent of £10,000, and a cash-credit bond for that amount was executed by the firm and the individual partners in favour of the bank.

By the bond it was stipulated that the sums to be placed to the debit of the cash account should include, not only all sums advanced by the bank to the firm, but also any sum or debt for which the firm might be liable, and to which the bank should be in right as creditors.

In 1884 one of the partners, acting for the firm, informed the bank that it would suit the firm to have the credit reduced to £5000. This was agreed to by the bank, on the stipulation that securities of a value 20 per cent. in excess of the amount of the credit were placed in their hands. In compliance with this request the partner of the firm deposited with the bank securities of that value.

The firm having been sequestrated, *held* (*rev.* Lord Low) that the defenders were entitled to retain the securities, and apply the proceeds thereof, not only in satisfaction of the sum of £5000 which the bank were bound to advance to the firm under the cash credit-bond, but in satisfaction of all debts due by the firm to the bank.

In 1881 the Royal Bank of Scotland agreed to allow the firm of Messrs Campbell, Rivers, & Company, merchants, Glasgow, credit upon a current or cash account to the extent of £10,000. A cash-credit bond, dated 10th March 1881, for that amount was accordingly executed in favour of the bank by the firm and its individual partners. John Patrick Alston, George Alston, and Robert Findlay Alston, merchants, Glasgow, and James Brown Alston, merchant, London.

By the cash-credit bond it was "declared that the sums to be placed to the debit of the said current or cash account shall include all and every sum and sums of money which have been advanced or which shall be advanced by the said bank to us, the said Campbell, Rivers, & Company, or which may be paid by the said bank upon the drafts or orders on the said bank of us, the said Campbell, Rivers, & Company, or of the authorised mandatory or mandatories of the said firm, acting for behoof thereof, or by retiring, when due, the bills acceptances, and promissory-notes of us, the said Campbell, Rivers, & Company, payable at the said office in Glasgow of the said bank or elsewhere, or as shall be due and owing by us, the said Campbell, Rivers, & Company, upon bills or promissory-notes granted, accepted, drawn, or endorsed by us, the said Campbell, Rivers, & Company, or by the authorised mandatory or mandatories of the said firm acting per procuration or for behoof thereof, and held by the said bank, or which shall be due and owing to the said bank by their making advances in any other manner of way to, or liquidating any other debts, obligations or engagements of what nature soever prestable against us, the said Campbell, Rivers, & Company, the amount of all which advances, debts, and liabilities, or any part thereof, the said bank shall be entitled at any time to place to the debit of the said current or cash account."

In security of the cash-credit to the extent of £5000, George Alston granted to the Royal Bank a bond and disposition in security over property belonging to him of the name of Craighead. This bond and disposition in security was incorporated in the cash-credit bond.

George Alston died in 1884. Upon 24th March 1884 J. P. Alston wrote to the Royal Bank saying that George Alston's trustees must be relieved from his obligation for £5000, and adding—"It will suit my firm to have the credit reduced to £5000, the necessary security for which will be supplied by me." On 27th March Mr Robertson, the bank's cashier in Glasgow, wrote to Mr Alston, sending a copy of a letter which he (Mr Robertson) had received from Mr Fleming, the manager of the bank, to the following effect:—"We don't like to grant permanent credits on stocks of fluctuating value, but if Mr Alston will provide a margin of 20 per cent. beyond the credit, and undertake to keep up that margin, that is, to keep securities in our hands of a market value of £6000, the arrangement may be agreed to." Mr Alston accordingly tendered securities of the value of £6120, and upon 14th April a letter was addressed to Messrs Campbell, Rivers, & Company by Mr Taylor, the sub-cashier of the bank, informing them that the bank had agreed to discharge the heritable security over Craighead held by the bank, "on the credit being restricted to £5000, the security for which will be the personal bond by the partners of your firm, and the sundry securities mentioned in your letter of the 4th inst., valued in all at £6120, a margin of 20 per cent. being always maintained."

J. P. Alston accordingly handed over the securities to the defenders, and they altered in their books the amount of credit allowed, from £10,000 to £5000, at which figure it was afterwards continued. By discharge dated in June and July 1884 granted by the bank and concurred in by all the surviving partners of Campbell, Rivers, & Company, the personal obligation for £10,000 and the disposition in security over Craighead were discharged, 'but that only in so far as regards the said George Alston, his heirs, executors, and representatives whomsoever, and the subjects hereinafter described, hereby expressly reserving to the said bank in full force and effect the whole personal obligations contained in the said cash-credit bond other than those of the said George Alston, which are hereby discharged."

John Patrick Alston died on 29th May 1891.

The estates of Campbell, Rivers, & Company were sequestrated on 31st August 1891, and James Muir, C.A., Glasgow, was confirmed trustee thereon.

The estates of J. P. Alston were sequestrated on 16th December 1891, and the said James Muir was confirmed trustee thereon.

At the dates of the sequestration of the estates of Campbell, Rivers, & Company and J. P. Alston respectively, the firm, and Mr Alston as a partner of the firm, were indebted to the Royal Bank in an amount

exceeding the value of the securities deposited with the bank in 1884.

In March 1892 James Muir, as Mr Alston's trustee, with consent of himself as trustee on the sequestrated estates of Campbell, Rivers, & Company, raised an action against the Royal Bank to exhibit a full account showing the amount due under the cash-credit bond for £10,000 restricted by agreement to £5000, and on the amount found due being paid, to deliver over to the pursuer the securities handed by J. P. Alston to the bank in 1884 or alternatively in the event of the defenders having realised the securities, or any of them, to pay to the pursuer the value of the securities so realised after applying the proceeds to the payment of the amount due under the cash-credit bond.

The pursuer pleaded—"The securities set out in the summons having been deposited with the defenders expressly and exclusively in security of the cash-credit account condescended on, the defenders are not entitled to retain the same for any other debt or obligation of Campbell, Rivers, & Company, and the pursuer, as trustee on the estate of John Patrick Alston, to whom the securities belonged, is entitled to decree, with expenses, as craved."

The defender pleaded, *inter alia*—"(3) The defenders ought to be assoilzied, in respect that they are entitled to retain the said securities and to apply the proceeds thereof in satisfaction of all debts due to the defenders by Mr John Patrick Alston and by his said firm."

On 3rd February 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds in fact that the amount of the cash-credit granted by the defenders to the firm of Campbell, Rivers, & Company was by agreement between these parties restricted to £5000, and that the securities libelled were deposited with the defenders in security of the cash-credit account as restricted; and finds in law that the defenders are bound to account to the pursuer for the said securities and the proceeds thereof so far as sold, and after applying the same so far as necessary in payment of the amount due upon the said cash-credit as restricted, to make payment of the balance to the pursuer, or to deliver to him such securities as are unsold, &c.

"*Note.*—In my opinion it is proved by the correspondence which has been put in evidence, that the certificates, bonds, and shares mentioned in the summons were deposited by the deceased Mr John Patrick Alston with the defenders, in security of a cash-credit granted by them to the firm of Campbell, Rivers & Company, of which Mr Alston was a partner.

"The securities are, I understand, all negotiable securities, and the question which I have to determine is whether the defenders are entitled to retain them not only against the balance due by Campbell, Rivers, & Company upon their cash-credit account, but also against the balance due by them to the defenders upon their discount account.

"The pursuer (the trustee upon the sequestrated estate of Mr J. P. Alston) maintained that the securities having been deposited with the defenders for the purpose of securing a particular debt, the defenders cannot claim a general lien or right of retention.

"The defenders, upon the other hand, relied upon the fact that the securities were negotiable instruments. They contended that the principle recognised in the case of *Hamilton* v. *The Western Bank*, 19 D. 152, applied here. That principle is, that where the security given to the creditor is an absolute title—such as an *ex facie* absolute disposition of heritable property, or, as in the case of *Hamilton*, an unqualified delivery-order addressed to the keeper of a warehouse who has in his custody goods belonging to the debtor—the creditor has right to retain the subject of the security for all debts due to him by the debtor, notwithstanding that the *ex facie* absolute title has been qualified by a back-letter declaring that it has been granted only in security of a particular debt. The defenders argued that the securities, from their nature, became their property by delivery, subject only to a personal obligation to redeliver upon payment of any balance which might be due under the cash-credit. But (they argued) just as the holder of an absolute disposition qualified by an obligation to re-convey upon payment of a particular debt, could found upon his absolute title to the effect of refusing to re-convey until all debts due to him were paid, so the defenders having been given possession of securities, the property of which passed by delivery, were entitled to retain them not only against the particular debt in view when the securities were delivered, but against all debts due by the firm.

"I am of opinion that the defenders' argument is not well-founded. There is no doubt that where a creditor is given a written absolute title, the rule of law relied on by the defenders is well established, but where there is no written title, but merely possession given of corporeal moveables, or even of money, the Court have never, so far as I know, treated the possession as equivalent to an *ex facie* absolute title, but have inquired into the circumstances and conditions under which the possession was given. Thus in *Stewart* v. *Bisset*, M. App. 'Compensation' No. 2, Bisset had obtained money from MacDonald for the purpose of paying a bill upon which the latter was indebted to Stewart. MacDonald having become bankrupt before the bill was paid, Bisset claimed right to retain the money against a debt due to him by Macdonald, but in an action against Bisset at the instance of Stewart the Court held that the latter was entitled to the money. In the case of *Harper* v. *Faulds*, Bell's Octavo Ca. p. 440, it was held that a bleacher was not entitled to retain goods sent to be bleached for any other debt than the expense of bleaching. In *Laurie* v. *Denny's Trustee*, 15 D. 404, it was held that a storekeeper with whom a merchant was in use to deposit grain was not entitled to retain the grain in his pos-

session at the merchant's bankruptcy for the general balance arising in the course of dealing between him and the bankrupt, but only for the charges applicable to the particular parcels of grain. Further, in *Hamilton* v. *The Western Bank*, the Lord Ordinary (Lord Handyside), who dealt with the case as one of pledge—the view that there was an *ex facie* absolute written title not apparently having been argued in the Outer House,—held that there was no warrant for recognising as a principle of the law of Scotland the extension of a specific pledge into a general security for further advances.

"I do not cite these authorities as being directly in point in the present case, but as showing that where a claim of retention for a general balance is founded upon possession of a subject, the property of which is capable of being transferred by delivery, it is necessary to consider the circumstances, and the purpose for which posession was given. In the present case possession of the securities in question was given for the purpose of securing any sums drawn out under the cash-credit, and for no other purpose.

"The authority which bears most directly upon the present question is *Robertson's Trustees* v. *Royal Bank of Scotland* (18 R. p. 12.) There Mr Robertson, whose estates were sequestrated after his death, had deposited a number of bonds payable to bearer, and transmissible by delivery, with the bank. The bank granted receipts bearing that the bonds were held 'for safe keeping on your account and subject to your order.' The bank had made large advances to Mr Robertson, and they claimed right to retain the bonds as against his trustee in respect of these advances. It was argued for the trustee that the terms of the receipts showed that the bonds had been deposited for a particular purpose, viz., 'safe keeping', and that the right of retention was therefore excluded. Upon a proof it was established that when the advances were made it was agreed that the bank should hold the bonds in security, and the Court accordingly decided in favour of the bank. The decision is chiefly valuable in this case on account of the exposition of the law given by the learned Judges, and for the fact that they did not to any extent proceed upon the ground that by possession of the bonds the bank had an *ex facie* absolute title similar to that conferred by an absolute disposition, although that view of the case was argued for the bank upon the authority of the case of *Hamilton*, upon which the defenders now rely.

"The late Lord President, after explaining that a banker's lien was just an application of the ordinary rule and doctrine of retention to the settling of accounts between a banker and his customer, said :—'Of course the doctrine of retention to which I have referred is subject to this exception, that if a negotiable instrument is lodged with a banker for the purpose of securing payment of a particular debt, or for any specific purpose, then in that case the general rule does not apply; but on the other hand that specific purpose must be clearly ascertained, otherwise the general rule will prevail.'

"Lord M'Laren said :—'It is a general principle in our law that every agent has a lien or right of retention against his principal for the balance due to him, and this right of retention is not confined to moneys collected, such as rents and dividends, but may extend to securities, the precise extent of the lien being determined by the nature or character of the agency. The so-called banker lien is an example of this rule of law, and in this case the decisions establish that a banker has a lien over all such negotiable securities of the customer as are lawfully in his possession and are subject to his control, but this lien may be excluded by agreement, express or implied. If the bill or security is specially appropriated, this is equivalent to an exclusion of the lien, because in the case supposed the banker has received the instrument under instructions which are inconsistent with the supposition that he is to have a lien.'

"I think that these statements of the law meet the present case, because the securities in question were lodged with the defenders for the purpose of securing a particular debt, and were thereby appropriated.

"The next question is, whether the amount of the cash-credit was reduced from £10,000 to £5000. If it was not reduced it is not disputed that the defenders are entitled to retain the whole of the securities, because under the cash-credit bond they have power to charge the cash account with any balance due to them upon the discount account, and the total balance due to the defenders is less than £10,000 although more than £5000.

"I am of opinion that it is proved that the amount of the credit was reduced from £10,000 to £5000. . . . .

"The defenders maintain that, except in so far as the cash-credit bond was discharged, it remained in force, and that as it was only discharged as regards Mr George Alston, it remained in force as regards all the other partners, and continued to be a cash-credit for £10,000.

"Now, I agree that, except in so far as it was discharged or modified, the cash-credit bond remained in force. It was discharged so far as the representatives and property of Mr George Alston were concerned, and it was not discharged as regards the other partners. But it had been modified as regards the other partners. The correspondence to which I have referred seems to me to constitute an agreement between the defenders and the firm to restrict the amount of the credit, and that agreement was recognised and acted upon both by the defenders and the firm after the date of the discharge. The result was, that although the personal obligations of the partners remained in force, these obligations were only enforceable to the extent of the restricted sum of £5000.

"That this was what the defenders in-

tended at the time I think there can be no doubt, because in Mr Taylor's letter to the firm of 14th April 1884, to which I have already referred, he says:—'We have instructed Messrs M'Grigor, Donald, & Company to prepare a deed of discharge, and we propose to retain the present bond so as to keep up the personal obligation of the partners to the extent of the restricted sum of £5000.'

"Upon the whole matter, therefore, I am of opinion that the pursuer is entitled to prevail."

The defenders reclaimed, and argued—The terms of the discharge showed that the full amount of the cash-credit of £10,000 was kept up against all the partners of Campbell, Rivers, & Company except George Alston. But even if it was held that the cash-credit had been reduced to £5000 in 1884, the bank had a right under the original bond of cash-credit to hold these negotiable securities for all cash advances made by them to the firm. The effect of the cash-credit bond was to restrict the right on the part of the customers of the bank to obtain an advance of £5000, and imposed an obligation on the bank to furnish them with that amount, but it put no limits either on the power of the bank to advance more than £5000 to Campbell, Rivers, & Company, or on the liability of the latter for the amount so advanced. The defenders were under the cash-credit bond or at common law entitled to apply the value of the securities deposited with them in satisfaction of all debts due by Campbell, Rivers, & Company to them. The bank had possession on a property title, and were entitled to retain the securities against all advances—*Hamilton* v. *Western Bank of Scotland*, December 13, 1856, 19 D. 152; *Robertson's Trustees* v. *Royal Bank of Scotland*, October 24, 1890, 18 R. 12; *Jones* v. *Peppercorne*, December 3, 1858, 28 L.J., Ch. 158. Before he could succeed the pursuer must show some agreement, expressed or implied, by which the bank had agreed to give up the security on payment of £5000, as in *National Bank of Scotland*, December 3, 1858, 21 D. 79. By the common law a debt due to a person by a bankrupt could be set off against a debt due to him by the same person—Bell's Comm. (7th ed.) ii. 118; More's Lectures on Law of Scotland, i. 405; *Distillers' Company* v. *Russell's Trustees*, February 9, 1889, 16 R. 479.

Argued for the pursuers and respondents—The interlocutor of the Lord Ordinary should be affirmed. The cash-credit was in 1884 restricted by agreement of parties to £5000, and the securities in question were definitely appropriated to a particular purpose, viz., in order to secure to the bank the repayment of £5000, or as much of that sum as was advanced by them to Campbell, Rivers, & Company under the cash-credit bond. The contract entered into here was a contract of pledge, and *Hamilton* v. *Western Bank of Scotland* did not apply (Lord Deas' opinion, 19 D. 165), there being no transfer of property as in that case. There was here special appropriation, and the securities, in so far as not needed for the payment of the sum advanced under the cash-credit bond, must be handed back to the pursuer—*in re Meadows*, March 1, 1859, 28 L.J., Ch. 891.

At advising—

LORD TRAYNER—[*After stating the facts*]—It is not disputed that at the date of the sequestration of their estates respectively, Campbell, Rivers, & Company, and Mr Alston as a partner of that firm, were indebted to the defenders in an amount beyond the value of the securities held by the defenders, but the pursuer maintains that the said securities having been deposited specifically as against the cash-credit cannot now be held in respect of any debt due to the defenders other than the balance on that cash-credit account. The defenders maintain their right generally to hold the said securities as against the whole debts due by the firm and Mr Alston; but it was explained at the bar that the only other balance beyond the cash-credit account for which they claim to hold the securities was a balance on the discount account—that is, an account for the bills of the firm discounted by the defenders.

The Lord Ordinary has pronounced in favour of the pursuer's contention, and his view seems to be that as the cash-credit was restricted to £5000, and as the securities in question were deposited in security of that cash-credit, that therefore they cannot be retained by the defenders for any debt exceeding £5000. I think that view is erroneous.

I have said that I agree with the Lord Ordinary in holding that by the arrangement made in 1884 the credit of £10,000 agreed upon in 1881 was restricted to £5000. But the effect of that arrangement was to leave the original agreement between the parties entirely intact except only as regards the amount of the credit. After the arrangement of 1884 the parties stood toward each other precisely as if the original cash-credit bond had been for £5000 instead of £10,000. Take it, therefore, that there was in 1884 a cash-credit bond by Campbell, Rivers, & Company and the individual partners for £5000, with securities deposited as against that cash-credit account. It does not follow that no more than £5000 could ever be due as on that account. The sum of £5000 was the limit which the obligants in the bond were entitled to demand, and equally the limit of the advance or accommodation which the defenders were bound to give. But the defenders were not precluded from giving, nor the obligants from asking and obtaining, any sum on that cash-credit account on which both parties—creditor and debtor—could agree. Accordingly there might be on such an account any amount of liability. I leave out of view the case of a cautioner or other obligant on such a bond whose obligation might be limited by the terms of the cash-credit bond, for we have no such case here. The only obligants were the firm obtaining the advances, and the partners of that firm, who were undoubt-

edly liable in repayment of the advances made whatever might be the amount. Well, then, if the cash-credit account could be debited with advances or sums of money for which the obligants were bound, and the securities were deposited as against the cash-credit account, they were so deposited and could be held by the defenders for the balance due on the cash-credit account whatever that balance might be. I take it to be the case that the advances of cash made by the defenders to Campbell, Rivers, & Company under the cash-credit did not exceed £5000, but it is also the case that the defenders on discount account were creditors of the firm to the extent of over £3000. All the items in the discount account were items which the defenders were "at any time," in terms of the cash-credit bond, entitled "to place to the debit of the said current or cash account." They have not lost that right, and may now put their claims on discount account into the current or cash account. They virtually do so now by their contention in this action. That being done, the defenders hold the securities in question for the balance due them on the cash-credit account, including therein the discount account. Treating the case in that way the defenders are not holding the securities in question as for any general balance or debt other than that against which the securities were deposited with them.

In the view which I have taken of this case it is unnecessary to consider whether the principle recognised in the case of *Hamilton* v. *Western Bank* is applicable to the present case, nor to consider the cases referred to by the Lord Ordinary as settling that securities deposited or pledged in security of a specific debt or obligation cannot be retained in security of another and different debt. Nor, is it necessary to give any opinion as to how far the defenders might be justified in retaining the securities in question upon the principle of settling accounts in bankruptcy. In my opinion, none of these principles require to be appealed to for the decision of this case, which may be decided upon grounds less open to controversy. I think the present case stands thus—the late Mr Alston deposited the securities in question as against any sum which might be due by him or his firm on their current or cash account, and he expressly authorised the defenders to debit that account, not only with the sums of cash advanced, but also with all sums in which the defenders stood as creditors, and the said firm or its partners stood as debtors. The securities were therefore deposited, not as against any specific debt or obligation separable and distinguishable from the other debts or obligations of the firm and its partners, but against the amount of debt which the firm and its partners might be owing or responsible for to the defenders. Taking that view of the case, I think the Lord Ordinary's interlocutor should be recalled, and as it is not suggested that the securities in question will be sufficient to meet the defenders' claims on the estates of Campbell, Rivers, & Company and Mr J. P. Alston, I think they should be assoilzied from the conclusions of the action.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary and assoilzed the defenders.

Counsel for Pursuer—Guthrie—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for Defenders—H. Johnston—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, June 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GARDEN *v.* EARL OF ABERDEEN.

Proof—Innominate and Unusual Contract—Proof by Writ or Oath—Lease—Constitution of Independent Agreement—Verbal Alteration.

A brought an action against B, owner of the farm of C, for £5000, as the amount of the loss which he had sustained during a nineteen years' lease of that farm. He averred on record that at a meeting with B in March 1881, ten years before the close of the lease, the latter said "that if the pursuer would remain in the farm to the end of the lease and meantime pay the rent, he, the defender, would repay the pursuer all his loss for the nineteen years of the lease, and that he did not care what the sum was." He either used these words or words to that effect, namely, that he would at the end of the lease make up to pursuer the loss which he had already sustained and might sustain by his tenancy of said farm under his then current lease and rent of £390 The pursuer undertook to consider the proposal, and on 26th March 1881 he wrote to the defender in these terms—"I have now considered and cordially accept them" (said proposals) "With the utmost confidence I leave the case in your hands assured that you will see that justice is done to me which is all that I desire."

Held that the pursuer's action was relevant, but as the contract or agreement alleged by him was an innominate contract of an unusual kind it could only be proved by writ or oath.

Robert Garden, Farmer, Mains of Tolquhon, Tarves, Aberdeenshire, raised an action against the Earl of Aberdeen.

In the first six articles of the condescendence the pursuer set forth that he and his forefathers had been tenants on the estate of Haddo for upwards of a century, that his uncle was tenant of North Ythsie on that estate from 1852, and spent between £1200 and £1300 on the improvement of the farm, that on his death in 1864 the pursuer