reference to this act of parliament. If the act gives the Crown process to the surety in the event of their being called upon to pay, and if they were not placed in that respect in a worse situation, that is one view of the case: but if there are clauses in the act requiring the commissioners to sue without delay; and the commissioners being so required to sue without delay, have put that out of their own power, then it will be to be considered whether all are to be taken as being parties to this act of parliament; and whether the commissioners, being under an obligation by the act to sue without delay, could take the benefit even of passiveness as against the surety.

Mar. 13, 1818. SURETY.—BILL OF EXCHANGE, &c.

But I give no final opinion upon these points till we have authentic copies of these instruments, that we may take care to be accurately informed of the nature of the instruments to which we are called upon to give legal effect.

Decree afterwards AFFIRMED. Judgment.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRANT—*Appellant*.
CAMBPELL and others—*Respondents*.

A. gives a cautionary obligation to B. and engages to transfer and assign to him certain property in security, to en- May 1, 1818.

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SECURITY.—NOTICE, &c.

able B. to raise money, under an agreement, by which certain contemporaneous conditions were to be performed by B. and then gives B. a letter and orders for the property, in which the conditions were not mentioned. C. advances money for B. obtains an assignation of the letter and orders, and brings an action of adjudication in implement of his obligation against A., alleging that the money had been advanced on the faith of the letter and orders, and not on that of the agreement, of which B. had not performed his part. So found by the Court below, and decree for C. But the judgment reversed by the House of Lords, on the ground that C. before he advanced, or became bound to advance money for B. had such notice of the existence of some agreement relative to the obligation by A. as imposed upon him the duty of inquiry as to its terms, also on the ground that the letter by itself was an obligation without consideration, and that the agreement must be let in to give it validity, &c.

Summons.

THIS was an action, brought by the Respondents, Messrs. Campbell and Stuart, for themselves, and as trustees for certain other persons, against the Appellant, to enforce performance of a cautionary obligation; and the import of the summons, which was termed a summons of adjudication in implement in security, was, that the Appellant had, by certain holograph missive letters of the 8th and 13th March 1811, bound himself to become cautioner to the friends of Mr. James Walker, in the pleadings mentioned, to the extent of 8,000*l.* for such sums as his friends might advance for him; and, having given to Walker orders upon his forester at Rothiemurchus, and his agent at Garmouth, to deliver him timber to the amount of 8,000*l.* had also bound himself to execute to Walker an assignation of his lease of the forest of Rothiemurchus to the ex-

tent of 8,000*l.* in as far as the sum was not covered by the orders: that on the faith of these securities the Pursuers granted bills, and interposed their credit for certain sums in Walker's favour, he undertaking to assign to them, or a trustee for them, the foresaid security on the wood and forest of Rothiemurchus: that Walker, on the 21st of August, 1811, assigned the security to trustees for behoof of the Pursuers, with power to demand from the Appellant a direct assignation of his lease of the forest of Rothiemurchus to the extent of 7,000*l.* subscribed by them for Walker's behoof, or such part thereof as had been advanced or paid to Walker by them: and the summons concluded for delivery of the wood and assignment of the lease to the extent of 7,000*l.*

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The defence on the merits was, that the Pursuers had become bound for money for Walker, not on the faith of these letters, but on the faith of an agreement entered into on the 11th March, 1811, by and between the Appellant and Walker, with reference to which the letter of the 13th March, and the orders on the agent and forester, had been given to Walker, and that by this agreement the obligation on the part of the Appellant was made to depend on the performance of certain conditions by Walker, which Walker had not performed.

Defence.

Defences in point of form, that the adjudication in implement was irregular without a previous constitution of the debt; that the adjudication in security was a different action, and that an adjudication in implement in security had never before been heard of; and also that this was an accumulation

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of actions, were urged in the Court of Session and House of Lords. In the Court below these objections did not prevail, and in the House of Lords it was not found necessary to give any opinion upon them.

With respect to the merits, it appeared that the letter of the 8th March, which confined the obligation to 5,000*l.* or 6,000*l.* was not shown at all. On the 11th of March, after previous communications, in which Walker had the assistance of Mr. Jameson, his law agent, heads of agreement, between Walker and the Appellant, were determined on, and reduced to writing. By this agreement the Appellant engaged to transfer timber, and assign his lease to Walker in security for 8,000*l.* of which 3,000*l.* was to be advanced to the Appellant; and Walker engaged to advance the 3,000*l.* to the Appellant, to give the Appellant a back security over his West India property, and to relieve the Appellant of certain securities, in which he was bound along with or for Walker: and it was provided, that in case Walker could not supply the 3,000*l.* and relieve the Appellant of the securities, the agreement was to be at an end. The agreement contained the following stipulation: "It is understood, that if the "said sum of 8,000*l.* can be raised for the said full "period, the said transfer and assignation shall be "held by Mr. Walker, in security only, for the "said period of five years; but if the said sum can-"not be raised for so long a period, then one fourth "in value of the said timber (or of the proceeds, if "converted), but no more, shall be at the absolute "disposal of Mr. Walker, at the end of twelve

" months, from the time when Mr. Grant receives May 1, 1818.
" his proposed proportion of the money, if necessary, SECURITY.—
" but no sooner; and the remainder of the said 8,000*l.* NOTICE, &c.
" in virtue of the said timber (or of the proceeds, if
" converted), in moieties at the end of eighteen and
" twenty-four months from the same time, if neces-
" sary, but not sooner; it being understood, that
" in case of such partial or total advance by Mr.
" Grant, the security of Mr. Walker's friends shall
" still, for the said space of five years, be forth-
" coming when he requires it, if he can thereby
" operate his relief, by procuring a loan or loans
" anew for the remainder of that period: and the
" foresaid transfer and assignation shall continue
" to be held by Mr. Walker in security only of the
" whole, or such part of the said sum of 8,000*l.* as
" may, in all, so continue in loan to the end of the
" said period of five years." This agreement, although the heads were thus prepared on the 11th March, was not formally executed till the 29th March, 1811.

On the 16th March, 1811, the Pursuers and those for whom they appeared as trustees, Mr. Jameson, Walker's law agent, being one, engaged to become bound for money advanced to Walker, by a writing in the following terms, subscribed by each of the parties, and stating the sums for which each was to become bound: " Whereas Mr. James Walker having been
" induced to go into considerable advances on goods
" and security of a permanent nature, and we being
" of opinion that he will be ultimately enabled to
" pay off every claim against him, and desirous of
" assisting him in the mean time, do hereby agree to

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" become bound to any lender of money, to the ex-
" tent of our subscriptions hereto, to be repaid one
" fourth part in one year, and the balance in eighteen
" months, and two years from the date of advance:
" And we further agree, in case our assistance shall
" be further requisite, to continue the same until
" the lapse of five years from this date; he always
" assigning to us, or a trustee for our behoof, the
" goods and security he now holds for his own
" advance." This writing was subscribed by each of the parties, specifying the sum for which each was to become bound; and an explanatory note was added, stating that the total aid was not to exceed 8,000*l.* to which amount Walker was to produce security, &c.

Walker procured the signature of the subscribers to several bills, the first of them in point of time dated the 22d April, 1811; and on receiving the bills, he delivered to each of the Respondents a letter mentioning the agreement of the 11th of March generally, and engaging to transfer the timber and assign the lease to them, or a trustee for them, for their security.

In August, 1812, Walker became bankrupt, and the Appellant refused so execute the transfer and assignation, as Walker had performed none of the conditions incumbent on him by the agreement. One of the Respondents was appointed agent in the sequestration against Walker, and thus obtained access to his books and papers; and it was then only for the first time, as the Appellant alleged, that the Respondents saw the letters and orders, although that was denied by the Respondents. The Pursuers

then procured from Walker an assignation of the letters of guarantee and orders of delivery, in which Walker stated that they had bound themselves upon the faith of these letters and orders, and thereupon brought their action. May 1, 1818. SECURITY. NOTICE, &c.

The Lord Ordinary, on the 22d June, 1812, pronounced an interlocutor, finding that the Pursuers were no parties to the agreement directly, and could not, in sound reasoning, be held to be constructively such; and that the subscription of the Pursuers and their subsequent advances, must be held as proceeding on the letters of the 8th and 13th March, 1811, and that they had no concern with the private agreement; and decerned and declared in terms of the libel. Interlocutors.

The Pursuers gave in two minutes restricting the decree;—1st. As to the sum for which Mr. Cunninham, one of the subscribers, had become responsible, he having advanced nothing. 2d. As to Mr. Jamieson's debt, the Respondents alleging that they had discovered circumstances which might occasion some debate as to his claim. 3d. As to the amount of a dividend from Walker's property.

Upon reclamation by the Appellant, the Court found that under the restrictions, the Pursuers were entitled to a decree of adjudication in security of the sums of money which might have been advanced by them, and decerned accordingly, reserving all objections *contra executionem*, until the precise amount of the said advances should be ascertained, and for that purpose remitted to the Lord Ordinary. From these interlocutors the Appellant appealed. Apppeal.

May 1, 1818.

SECURITY. NOTICE, &c.

The Lord Chancellor in the course of the argument above, observed that in England before the Pursuers could have proceeded on these letters, they must have gone to the stamp office to get them stamped, and have paid a large penalty.

Judgment, May 1, 1818.

Lord Eldon (C.) In this case it is not my intention to say any thing as to the nature of the adjudication, whether in implement, or in security, or as to the accumulation of actions, because it appears to me that the case may be decided without touching upon these points.

In looking at the summons, it seems clear that the Respondents must recover on the guarantee of these letters, of the 8th and 13th March, or that they cannot recover at all; and the question is whether the Respondents advanced their money on the faith of these letters. The summons is in this form: "that the Appellant on the 8th of March, "1811, addressed to Mr. Walker a holograph mis- "sive letter of the following tenor:

"MY DEAR SIR, *Edinburgh, Mar.* 8, 1818.

"Understanding that your friends are willing to "come forward with certain securities or advances "which you at present have occasion for, if they "have sufficient indemnity; I hereby become bound "to become your cautioner to them to the extent of "5000*l.* or 6000*l.* if you require it, and to assign to "you in an effectual manner, in corroboration of "such cautionary engagement, timber in the North "cut down, and ready for market, to the above ex-

" tent, exclusive of what you have in your own
" hands, hereby undertaking that I have so cut
" down, and ready for market, a larger quantity than
" the above value.

" I am, my dear Sir,

" Most sincerely yours,

(Signed) " J. P. GRANT."

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This letter was addressed to Walker, and it is obvious, from the contents of it, that he was to be at liberty to show it to any person who might be willing to advance him money on that security. And if there had been any improvidence in not calling it out of his hands, when the agreement of the 11th of March was entered into; I say the 11th, although it was not executed till the 29th; the consequences must have been endured, because principle is not to be sacrificed to prevent the effects of such improvidence. The case states that this letter was not presented to the Respondents, because the Appellant became desirous to obtain a larger sum than it warranted Mr. Walker to raise. The summons proceeds: " That the whole of the sum men-
" tioned in the above mission being intended for the
" said James Walker's accommodation, in retiring
" those bills on which Mr. Grant and he stood as
" joint obligants, but which were the proper debts of
" the said James Walker; the sum was afterwards,
" with the view of accommodating Mr. Grant, ex-
" tended to 8,000*l.* of which the sum of 3,000*l.*
" was to be given directly to Mr. Grant." It appears to me to be of no importance for whose accommodation it was intended. " That accordingly

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SECURITY.—NOTICE, &c.

" on the 13th day of March foresaid, the said John " Peter Grant, Esq. alongst with an order on his " forrester for wood to the value of 8,000*l.* delivered " another holograph missive letter to the said James " Walker, of the following tenor:

" DEAR SIR, *Edinburgh, Mar.* 13, 1811.

" Having of this date given you orders on my " forrester and agent at Garmouth, to deliver you " timber to the amount of 8,000*l.* I hereby bind " myself to execute in your favour an assignation " to my lease of the forest of Rothiemurchus, to the " extent of the said 8,000*l.* in so far as the same is " not covered by the above orders.

" I am, dear Sir,

" Your most obedient humble servant,

(Signed) " J. P. GRANT."

(Addressed) " To James Walker, Esq. Leith."

" That on the faith of these sureties several of " Mr. Walker's friends did grant bills, and give " their credit for the following sums, viz. Robert " Jamieson, Esq. writer to the signet, 1,000*l.*; Dr. " Thomas Davidson, of Muirhouse, 1,000*l.*; Ro- " bert Boog, Esq. of Dundas-street, 1,000*l.*; Wil- " liam Cunningham, of Fredrick-street, 1,000*l.*; " John Pitcairn, of Pitcairn, 1,000*l.*; Thomas " Wood, Esq. 500*l.*; the said John Campbell, " 500*l.*; and the said James Stuart, 1,000*l.*; it being " a condition annexed to their engagements, that he " the said James Walker should assign to them, or " a trustee for their behoof, the foresaid security " upon the wood and forest of Rothiemurchus." By

what facts they intended to prove that they did proceed on the faith of these securities, or the time when they granted any bills, is not stated.

In this summons there is not a word about the instrument of the 16th March, to which the names of the Respondents are subscribed: and it is not immaterial that in the suit the name of the first subscriber Jamieson is dropped, and that the name of Cunningham is also dropped; and I presume, the John Campbell and James Stuart, whose names are subscribed, are the same to whom the assignation of the letters was made by Walker. "That the said "subscribers having thus given Mr. Walker bills for "the sum subscribed by them, he raised money "and applied the same, in terms of the agreement "between Mr. Grant and him, having paid Mr. "Grant 3,000*l.* in cash out of the first end of it. "That in order to effectuate their security, the said "subscribers named the said John Campbell and "James Stuart trustees for them; and the said "James Walker, by his assignation in favour of the "Pursuers, of date the 21st day of August, 1812, "and which is registered in the books of council "and session, on the 30th day of September there-"after, on the foregoing narrative, and further "narrating that the said obligatory missives were "granted by the said John Peter Grant, Esq. in "order to enable him, the said James Walker, to "raise a sum of money not exceeding 8,000*l.* ster-"ling, on the security therein mentioned, and "which money was to be applied for their mutual "behoof; and that his name having been used in "these letters, merely for behoof of his friends,

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" till they should name trustees to hold the right " for themselves, it was just and reasonable that he " should fulfil the obligation upon him to assign to " them the foresaid security, and they having ap- " pointed the said John Campbell and James Stuart " as trustees, therefore he thereby assigned, con- " veyed, and made over to and in favour of the said " John Campbell and James Stuart, in trust for " behoof of themselves, and the said Robert Jamie- " son, Thomas Davidson, Robert Boog, William " Cunningham, John Pitcairn, and Thomas Wood, " right, title, and interest which he had or could " have in and to the said obligation on John Peter " Grant, Esq. to deliver the wood, and assign the " forest of Rothiemurchus, in consequence of the " above recited letters by the said John Peter Grant, " Esq. to him, and in and to the timber which " might be lying at that time at Garmouth, in " terms thereof, with full power to the said John " Campbell and James Stuart, as trustees for them- " selves and the gentlemen above-named, if neces- " sary, to apply to and demand from the said John " Peter Grant, Esq. a direct assignation to them- " selves to his lease of the wood and forest of " Rothiemurchus, to the extent of the said sum of " 7,000*l.* sterling, or such part thereof as has been " advanced and paid to him, the said James Walker, " by them." Then it states that the Appellant refused to implement the obligation, and concluded that he should be decerned to implement, &c. Without stating all the findings in the Lord Ordinary's interlocutor, I call your Lordships' attention only to the concluding findings in these words; " Finds

" that the subscriptions of the Pursuers, and their " subsequent advances, must be legally held as pro- " ceeding on the letters of the 8th and 13th March, " 1811, and no others. Finds that the Pursuers " have no concern with the private agreement and " arrangement made between the Defender and " James Walker, of whatever date it may be: " therefore adjudges, decerns, and declares, in terms " of the conclusions of the libel."

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On the 25th February, and 3d March, 1814, the Respondents gave in two minutes, restricting the decree; the latter of some importance, on account of the light which it throws on the real nature of the transaction. The first related to a sum for which Mr. Cunningham had subscribed, but which was not advanced. The second restriction, which reduced the sum to between 5 and 6,000*l.* was that of Mr. Jamieson's debt, and the reason alleged was, that circumstances had been discovered which might occasion some doubt as to his claim, though he had actually advanced the money. It is always with great diffidence that I speak of the forms of proceedings in Scotland; but to be sure if it had been a proceeding in this country, it would have been very extraordinary that Jamieson's name could be dropped. But so it is represented. What the doubts were is not explained. But it is impossible to look at these transactions without seeing that Jamieson must have known all that was intended between Walker and the Appellant, whether the others knew it or not.

I do not state the subsequent interlocutors any further than to mention that judgment was given,

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that the Respondents were entitled to a decree of adjudication in security, upon which so much has been said at the bar.

Now as to these letters, if the principles of the law of Scotland as to the matter of guarantee do not differ, as I conceive they do not, from those of our law, if one puts into the hands of another a letter by which he engages to pledge himself for the payment of whatever sums may be advanced on the faith of that letter, if money is so advanced, he must abide by the consequences. But in our law, that guarantee may be withdrawn before it is acted upon. Now that letter of the 8th March, 1811, was not shown at all; and the letter of the 13th March, 1811, was for a different sum. And he who drew the engagement of the 16th March, seems to have had some notion of the agreement of the 11th March, for so it is dated in the paper itself, although not executed till the 29th. Jamieson, beyond all doubt, knew it; and it is difficult to suppose that when he subscribed that engagement, he did not communicate what he knew, as to the real nature of the transactions, to the rest who subscribed along with him.

The engagement is in these terms: "Whereas "Mr. J. W. having been induced to go into consi- "derable advances on goods, and security of a per- "manent nature," &c. I request your Lordships' attention to the words "to be repaid one fourth in "one year, and the balance in eighteen months, and "two years, from the date of advance," and to the words, "he always assigning to us, &c. the goods "and security he now holds for his own advance," which I interpret to mean—whatever securities he

holds for his own advances to Mr. Grant, he is to give us the benefit of them. The total aid was not to exceed 8,000*l*, to which amount J. W. was to produce security, and then there is a memorandum among themselves.

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Now although the agreement was not executed till the 29th March, it is clear that it was in contemplation on the 11th, before this engagement of the 16th March was drawn. And when you look at it, it is an engagement on the part of the Appellant to transfer the timber and assign the lease, subject to a previous assignation, Walker engaging on his part to give the Appellant a back security over his West India property, and to perform some other conditions, in which, if he failed, the agreement was expressly stated to be at an end. This was communicated to them by Walker before they had granted bills or advanced any money; and is distinct notice given to them in this sense that, although the agreement was not executed, yet that it was agreed that there should be such articles, which imposed upon them the duty of inquiry, when they would have found that the indemnity was not so pure and unincumbered as they might on the 16th have imagined.

Notice.

I am therefore of opinion, subject to the correction of the House, that looking at the effect of the whole transaction, they could have only the same relief that Walker would be entitled to. Whether Walker can successfully make any claim, I do not say. Their summons does not proceed upon that ground, but on the ground of these letters: and they cannot be permitted to allege now that they shall have the same benefit in this case that Walker might have

May 1, 1818.

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had. The claim of the Respondents, therefore, cannot in this case be supported.

Lord Redesdale. I concur in the opinion that the claim cannot be supported in this action. The summons demands the delivery of the timber, and an assignment of the lease as a further security. The ground on which this claim is made, is these letters of the 8th and 13th March, 1811. The first question then arises upon this letter of the 8th March. They say, they advanced their money on the faith of this and the subsequent letter. But they admit that this letter was never shown. What, however, is this letter? It amounts only to an engagement to become security for him upon certain terms, and they were never called upon to advance their money according to the terms of that letter. And in whatever way the Appellant might have been liable under that letter, as the terms of it were never acted upon, it is out of the question. It is admitted that it was never shown, and that is manifest from the terms of the instrument of the 16th March, which do not bear the slightest reference to this letter of the 8th March; and it was not then in contemplation. What is next? The orders of the 13th March, to deliver timber for Walker's behoof to the amount of 8,000*l.* and the letter of that date to Walker. That letter is an engagement to execute in Walker's favour an assignation of the lease of the forest of Rothiemurchus, to the extent of the said 8,000*l.* "in so far as the same is not co-"vered by the above orders;" so that, if the timber to the amount should be delivered, there was to be

no assignation of the lease. But what is that letter standing by itself? An engagement without consideration. It must be connected with something else: and what is that? The contract of the 11th March, 1811, is necessarily let in, and there is nothing else to give the undertaking of the 13th March any validity. I conceive, therefore, that the letters of the 13th March, standing alone, cannot be founded upon; and the letter of the 8th March is, as already stated, out of the question.

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To supply the defect, they say that the whole sum mentioned in the first letter being for Walker's accommodation, the sum was afterwards extended to 8,000*l.* with a view to accommodate Mr. Grant. Where did they find that? Only in the agreement of the 11th March; and it is manifest that whoever framed the summons had that in view, otherwise this would not have been said. Then the summons states that on the faith of these sureties they granted bills and gave their credit. Now what is the fact? On the 16th March they signed the subscription paper, in the contemplation and on condition of his assigning to them the securities which he held for the advances which he had made. It is impossible that the ground here laid could be that on which they agreed to advance their money. They agreed to advance it only on the securities which Walker could make available. The engagement of the 13th March is merely to assign the lease to the extent of the 8,000*l.* in as far as the sum was not covered by the orders for the delivery of the timber. But here they demand, first, the delivery of the timber to the amount of the 7,000*l.*; and, secondly, the assignment

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of the lease to the extent of that sum; which goes beyond the terms of the letters. But that engagement could not by itself be the foundation of an action without something else. Then they undertook to advance their money on the engagement stated in the instrument of the 16th March, and that was nothing except the securities which Walker could have enforced. They advanced nothing at that time: but they afterwards granted bills when they had distinct notice of the existence of the contract of the 11th March; and it is clear that Jamieson was informed of the nature of that contract. It does not appear that the others knew the precise terms of it; but they were sufficiently informed of it to know, that it was by that only that the Appellant was bound: so that they could not, with effect, demand the assignation of the lease, or the delivery of the timber, without referring to that instrument of the 11th of March, and complying with all the terms of it.

It is clear then that they did not advance their money on the faith of the letter of the 8th March; and the letter of the 13th, by itself, contained nothing of which they could take advantage; and by the instrument of the 16th March, they had the benefit only of such security as Walker could have enforced. I do, therefore, conceive that they cannot claim to have the timber delivered, or the lease assigned to them, as they had no title, except as assignees of Walker, since they did not advance their money on any security that he could not have enforced: and the instrument of the 16th speaks only of securities held by him for his own advances.

Upon the whole then, I am of opinion that this judgment ought to be reversed; and that the Appellant ought to be assoilzied, also from the costs of the action below. He cannot have his costs here.

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Judgment of the Court below REVERSED: and the Appellant assoilzied accordingly.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WOOLLEY and another—*Appellants.*
MAIDMENT—*Respondent.*

March 13, May 27, 1818.

ALIMENT.—JUS NATURÆ.—ENGLISH SETTLEMENT, &c.

ACTION for aliment by a son against his mother. The mother had been a ward of Chancery, and having, when fifteen years of age, married Maidment, the Respondent's father, a settlement of her property real and personal was then made, under the direction of the court, by which the interest of the personal estate was made payable to her for life, and the principal to her children, in equal shares at her death; but their interests to be vested, as to sons, at the age of twenty-one, and, as to daughters, at the age of eighteen, or on their marriage. As to the freehold, copyhold, and leasehold estates, they were to be sold, and the money to be invested in purchase of freehold and copyhold estates, of which the mother was made tenant for life, with remainder to her first and other sons in tail, &c. The Pursuer was the first son. The father died. The mother advanced 100*l.* as a fee, to a clerk to the signet, into whose office the son entered with a view to the profession of an advocate, the mother then residing in Scotland. The mother married again, and refusing to allow her son a certain annual sum for his maintenance, he brought the action for aliment, being then past the age of twenty-one, and the claim to