

*Respondent's Authorities.*—42. Geo. III., and previous Redemption of Land-tax statutes; Stair's Inst. 4. 40. 21.; M'Donells, Nov. 20. 1772, (4974.); Bankton's Inst. 1. p. 259. § 65.; Burdon, (Elchies on Fraud, No. 11.); Stair's Inst. 3. 1. 21. May 2. 1828.

FRASER—RICHARDSON and CONNELL,—Solicitors.

WILLIAM BURRIDGE CABELL, Cashier to the Glasgow Bank Company, Appellant.—*Bosanquet—Spankie—Fullerton.* No. 6.

JAMES BROCK, (Newbigging and Company's Trustee), Respondent.—*Sol.-Gen. Hope—Adam—T. H. Miller.*

*Title to Pursue—Lease—Assignment in Security.*—A mercantile company, in possession of a lease of a printfield, having borrowed money from a private Bank, and granted an assignation of the lease in security to the Bank, which was intimated to the landlord; and the Bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the Bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors; and the Bank having appealed in name of the office-bearers;—Question raised, but not decided, 1. Whether they had any title to appear; and, 2. A remit made to take the opinions of all the Judges on the merits.

By two separate deeds of tack in 1800 and 1801, James Buchanan, Thomas Hopkirk and Company, (of whom, among others, Archibald Newbigging was a partner), merchants in Glasgow, obtained certain portions of the lands and estate of Denovan, from the proprietor, Johnston of Alva, on lease for 100 years, with the right, liberty, and privilege of using the same as a printfield, bleachfield, &c. The leases were taken to the Company, and to the partner or partners who might be assumed, and to their heirs, assignees, and subtenants whomsoever, 'but for whom always the original tenants shall continue bound.' Having entered into possession, the company converted the premises into a bleachfield and printfield, built houses, erected and placed extensive machinery and utensils, and furnished the subjects with every implement essential to the proposed operations. In 1806 this company was dissolved, and in January 1807 they assigned the whole premises to Archibald Newbigging, and his heirs and assignees.\* This assignation was recorded in March

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2D DIVISION.  
Lord Cringletie.

\* In the question which arose, it was maintained by the opposite party, that there was satisfactory evidence in the case, that this assignation was taken solely for the

May 13. 1828. 1808. In September 1807 Archibald Newbigging formed a company with John Newbigging and Peter Scott, who had also been partners of the previous company. These parties entered into possession of the subjects, made extensive additions and alterations on the buildings and machinery, and carried on the works. In 1809, the company requiring a cash-credit, obtained one from Kensington, Styan and Adams, of London. The bond for this credit, and assignation of the leases in security, were granted solely by Archibald Newbigging, and the leases were declared redeemable by him, his heirs and assignees. This deed was recorded in the same year. Kensington, Styan, and Adams having failed, and the money having been called up, Newbigging and Company required pecuniary assistance in another quarter. They therefore entered into a transaction with the Glasgow Bank Company, for the advance of L.7000; and for an after sum of L.5000, if required. This was effected by an assignation on the 12th March 1816, by Newbigging and Company, which, after describing the leases, and the assignation to Archibald Newbigging, proceeds:—‘ And seeing that the partners of the company  
‘ carrying on business under the name and firm of the Glasgow  
‘ Bank Company, have, by the hands of William Burridge  
‘ Cabbell, Esq. banker in Glasgow, their cashier, and from the  
‘ funds of the said banking company, instantly advanced and  
‘ paid to us, the said Archibald Newbigging, John Newbigging,  
‘ and Peter Scott, as partners foresaid, for the use of the said  
‘ company of Archibald Newbigging and Company, the sum of  
‘ L.12,000 sterling, of which sum receipt, &c.; therefore we,  
‘ and each of us, as individuals and partners foresaid, have sold  
‘ and assigned, as we and each of us, of one advice and consent,  
‘ do hereby sell, alienate, assign, &c. from us, and each of us,  
‘ and one and each of our heirs, executors, and successors, to  
‘ and in favour of William Burridge Cabbell, cashier, and Robert  
‘ Brown, accountant, for themselves, and as trustees for the  
‘ other partners of the Bank, and to the assignees and subtenants  
‘ of the said William Burridge Cabbell, and Robert Brown, and  
‘ survivor of them, and the heir of the said survivor, absolutely  
‘ and irredeemably, not only All and Whole the two tack rights,  
‘ &c. with full right to the possession, use, and disposal of the  
‘ subjects, grounds, and buildings, and others therein described,

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behooof of the company. On the other hand, it was contended, that there was no foundation whatever for this averment.

‘ for all terms and years thereof to run from and after the date May 13. 1828.  
 ‘ thereof, in so far as we, or any of us, or our foresaids, had,  
 ‘ have, or can pretend right thereto in any manner of way, But  
 ‘ also the whole of the buildings, machinery, printing utensils,  
 ‘ and others erected by and belonging to us, or any of us, in  
 ‘ said company of Archibald Newbigging and Company, in or  
 ‘ upon the subjects set; together with the said tacks,’ &c. On  
 the other hand, the Bank obliged themselves, by acceptance,  
 to relieve Newbigging and Company of the tack-duties and  
 other obligations payable by or incumbent on the tenants by  
 the terms of the original leases. Of the same date Archibald  
 Newbigging and Company granted their promissory-note for  
 L. 7000, at twelve months, to Messrs Muir and Johnstone,  
 and on their indorsation it was discounted by the Bank, who  
 retained the discount of L. 350. Also of the same date New-  
 bigging and Company wrote to Mr Johnstone, the landlord,—‘ In  
 ‘ consequence of a considerable part of our funds being for the  
 ‘ present locked up in the hands of several houses here, (Glas-  
 ‘ gow), who have suspended payment, we have made an applica-  
 ‘ tion to our bankers for a temporary loan upon our works at  
 ‘ Denovan, which loan they have granted to us in the hand-  
 ‘ somest manner. The forms of law, however, require that this  
 ‘ measure, although only of a temporary nature, must be inti-  
 ‘ mated to you, and our partner, Mr Scott, will wait on you for  
 ‘ that purpose. Although we find that our funds are by present  
 ‘ wants to be withdrawn for a time from the business, our own  
 ‘ prospects are, that they will be restored in good time, under no  
 ‘ greater ultimate loss than from L. 1000 to L. 2000.’ On the  
 14th March 1816 this assignation was intimated to Mr John-  
 stone. The notarial instrument then taken bears, ‘ that the said  
 ‘ assignation was duly and legally intimated, and that the said  
 ‘ James Johnstone, and his heirs and successors, should be liable  
 ‘ to the said William Burridge Cabbell and Robert Brown, for  
 ‘ themselves, and as trustees foresaid, and their foresaids, in per-  
 ‘ formance of the whole conditions and obligations incumbent on  
 ‘ him and them by the foresaid tack, and should be bound to  
 ‘ consider them as in all respects his lawful tenants in the subjects  
 ‘ in time coming, in terms of the said tack and assignation, and  
 ‘ should not pretend ignorance thereof.’ Mr Johnstone wrote  
 on the deed, ‘ The foregoing assignation intimated to me at Alva;  
 ‘ 14th March 1806. JAMES JOHNSTONE.’ And an entry,  
 acknowledging the assignees, was made in his book by his agent  
 or factor. On the 15th March the following missives were in-

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 ‘ Messrs Archibald Newbigging and Company. Gentlemen,  
 ‘ — We, as assignees to the tacks thereof, hereby offer and  
 ‘ agree to subset to you the printfield, ground, houses, and ma-  
 ‘ chinery at Denovan, as presently occupied by you, for the  
 ‘ space of one year from this date, at the subrent of  
 ‘ per annum, over and besides the whole rent and others payable  
 ‘ to Mr Johnstone, the landlord, and others, for the same, which,  
 ‘ with all taxes, burdens, and duties whatever affecting the pro-  
 ‘ perty or possession, you are to pay and fulfil, as well as to up-  
 ‘ hold and keep the whole buildings, fences, machinery, in good  
 ‘ order and repair; and having by our cashier, Mr William  
 ‘ Burridge Cabbell, signed this missive, written by William Lang,  
 ‘ writer in Glasgow, at Glasgow the 15th March 1816, we are,  
 ‘ &c. for the Glasgow Bank Company, (signed) W. B. CABBELL.’  
 — ‘ To the Glasgow Bank Company. Gentlemen,— We do here-  
 ‘ by accept of the offer expressed in the above letter, subscribed  
 ‘ by your cashier; and obliging ourselves to pay and fulfil the  
 ‘ rents, taxes, and obligations therein mentioned or referred to,  
 ‘ have subscribed this missive, written by me Archibald New-  
 ‘ bigging, at Glasgow this 13th March 1816. (Signed) ARCHI-  
 ‘ BALD NEWBIGGING and Company.’ Of the same date Cabbell  
 and Brown, on behalf of the Bank, granted their back-bond to  
 Archibald Newbigging and Company, which, after narrating  
 the leases and different transmissions thereof, proceeded, ‘ And  
 ‘ also considering, that although the said disposition and assig-  
 ‘ nation in our favour proceeds on the narrative of the said  
 ‘ Glasgow Bank Company having, by the hands of me, the said  
 ‘ William Burridge Cabbell, their cashier, actually advanced and  
 ‘ paid the sum of L.12,000 sterling from the funds of the said  
 ‘ Banking Company to the said Archibald Newbigging, John  
 ‘ Newbigging, and Peter Scott, for the use of the said Company  
 ‘ of Archibald Newbigging and Company, for and in considera-  
 ‘ tion of the said assignment; yet we hereby declare, that the  
 ‘ same was only granted, and the said tacks and others dispo-  
 ‘ ned, by the said Archibald Newbigging, John Newbigging, and  
 ‘ Peter Scott, in security of the punctual repayment, in the first  
 ‘ place, of the sum of L.7000, and interest to become due thereon,  
 ‘ contained in and due by a promissory-note, of date the said 12th  
 ‘ March current, and payable twelve months after date, granted  
 ‘ by the said Archibald Newbigging and Company to William  
 ‘ Johnstone, Hugh Muir, and Robert Hugh Muir, merchants in  
 ‘ Glasgow, and indorsed by the three payees to the said Glasgow

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‘ Banking Company for the said sum of L.7000 sterling, advanced  
‘ by that Company to the granter; and, in the second place, in  
‘ security and for payment of such other sums or balance as the  
‘ said Archibald Newbigging and Company are, or shall become  
‘ owing to the said Banking Company, in account or credit with  
‘ the latter, not exceeding in all the said sum of L.12,000 sterling,  
‘ including the contents of the said promissory-note.’ And this  
clause followed; binding the Bank to denude ‘ in favour of the  
‘ said Archibald Newbigging, &c. and their foresaids, of the said  
‘ disposition and assignation in our favour, and of the tacks and  
‘ others above-mentioned, thereby conveyed, and for that pur-  
‘ pose to grant, subscribe, and deliver, on the expenses of the  
‘ grantees, to and in favour of the said Archibald Newbigging  
‘ and Company, and the individual partners thereof, a formal  
‘ retrocession, assignation, and reconveyance of the said tack and  
‘ others.’ It was also declared, that in case Johnstone, Muir, or  
Hugh Muir, or their heirs or successors, paid the L.7000, then  
the retrocession should be granted in their favours, for the  
better enabling them to operate their relief, they being in fact  
merely cautioners for Archibald Newbigging and Company:  
When the bill of L.7000 fell due, it was renewed, the Bank  
deducting discount; and this mode of operation continued until  
July 1819, by which time the Bank, in consequence of increased  
advances, were creditors of Archibald Newbigging and Com-  
pany for L.6648. 10s. 5d. more. In the meanwhile, Archibald  
Newbigging and Company remained in possession of their pre-  
mises,—paid the rent as usual to Mr Johnstone, and all the  
burdens and taxes affecting the Denovan works,—and received  
receipts in the same terms as before. The Bank never paid any  
rent to the landlord; nor did Archibald Newbigging pay rent  
to the Bank, unless it were possible to consider the discount on  
their various bills as rent. The Company made extensive ad-  
ditions to the moveable stock of utensils, and to the build-  
ings; and insured the works in their own names. Accordingly,  
Mr Johnstone, in the course of the following summer, in let-  
ting them an additional portion of land in the neighbourhood  
of Denovan, designated them ‘ tenants of the printfield of  
‘ Denovan;’ and the evidence predominated, that the rent re-  
ceived from them by the landlord, was never considered by him  
as paid on the part of the Bank. Neither did the Bank ever  
take natural possession of the subjects; nor was any instrument  
of possession executed, or inventory made up, of the machinery  
and utensils.

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In July 1819 Archibald Newbigging and Company became bankrupt, were sequestrated, and Walter Brock appointed trustee. On receiving this information, the landlord intimated to the Glasgow Banking Company, that he held them liable for the current and future rents of the printfield, and other property of Denovan, possessed by Archibald Newbigging and Company, in terms of the intimated assignation. The trustee entered into the natural possession of the premises; paid the rents, and performed the obligations incumbent on the bankrupts as those fell due. The Bank, learning that he proposed to dispose of the machinery and utensils, presented a bill of suspension and interdict, which was passed, and interim interdict granted. The Lord Ordinary, when the letters were expedite, suspended simpliciter, and continued the interdict; and afterwards adhered, ‘reserving  
‘ to the trustee to demand from the Bank the value of any addi-  
‘ tion made to the machinery existing at the date of their as-  
‘ signment thereto, which additions may be considered separate  
‘ from, and extensions of what formerly existed, if such additions  
‘ there be; and to the Bank their defences against paying such  
‘ value, and also their claim against the trustee, to put the  
‘ machinery in the order stipulated by the lease.’ The trustee now raised an action of declarator against the Bank, stating, that the pursuer, in his character of trustee, had entered into and taken possession of the whole subjects contained in the leases, and of the whole buildings, machinery, materials, utensils, furniture, and other articles which had been erected, furnished, and fitted up thereon, and had continued to possess the same, paying to the landlord the proper rents at the usual terms, and defraying the burdens and charges connected with the property; that when about to realize, as trustee, the said whole subjects and others, he had been molested and interrupted by the Glasgow Bank Company and the cautioners, ‘who, without any proper or legal  
‘ title fairly completed and made up in their persons, but on the  
‘ faith alone of some simulate and colourable title, privately and  
‘ improperly concocted by them, and never published or com-  
‘ pleted in a legal sense, nor, in fact, at all acted upon in any real  
‘ shape whatever, and, at any rate, ineffectual in law, and altoge-  
‘ ther different from the one pretended to be entered into between  
‘ them and the said Archibald Newbigging and Company, falsely  
‘ and injuriously, and to the great prejudice of the sequestrated  
‘ estate, and the interest of the creditors, pretend that the whole  
‘ right to the foresaid leases, and the use and possession of the  
‘ subjects thereby let, together with the right to possess all build-

ings, and the property of the machinery, materials, &c. and May 13. 1828.  
 the articles of whatever kind or denomination, is now completely  
 and absolutely vested in them, to the entire and utter exclusion  
 of the pursuer as trustee foresaid; and concluding, that it  
 should be found and declared, that the pursuer (as trustee fore-  
 said) has the only good and undoubted right, not only to the  
 two tacks, and whole terms and years still to run, and to the  
 free use and enjoyment and disposal of the subjects therein  
 described, but also to the value and right of possession of the  
 whole buildings, and to the property of the whole machinery,  
 materials, utensils, furniture, and other articles of whatever  
 description or denomination, situated upon the said subjects or  
 others at Denovan aforesaid, in so far as the said original  
 tenants had, or would have had right thereto, if no such pre-  
 tended assignation had ever been made; together with the said  
 tacks and other relative writings, &c.; and that the said William  
 Burrige Cabbell and Robert Brown, whether for themselves,  
 or for and in name and in behalf of the said Glasgow Banking  
 Company, or as trustees for the whole partners of the said  
 Bank, or in whatever other character they pretend right to the  
 foresaid leases, subjects, and others; as also the said William  
 Johnstone and Robert Hugh Muir, before designed, have no  
 right or title to the same, and that the said defenders should  
 be decerned to cease from molesting or interrupting the pur-  
 suer as trustee aforesaid in the free use and enjoyment, &c. in  
 all time coming.'

The Lord Ordinary conjoined the processes, adhered in the suspension, and assoilzied in the declarator. On advising petition and answers, the Court, on the 15th November 1821, altered, and found, that under the whole circumstances of this case, the assignation founded on cannot be effectual against the trustee for the creditors of the cedents; and therefore, in the suspension, found the letters orderly proceeded, and in the declarator decerned in the terms of the libel; and on the 29th November 1822 adhered.\*

The Bank appealed in name of their office-bearers, and when their Counsel began to argue the merits,

*Solicitor-General Hope*, (for the respondents), objected, That there were no proper parties to the appeal.† It was presented in the names of William Burrige Cabbell, cashier, and Robert Brown, accountant to the Glasgow Banking Company, for and

\* 2. Shaw and Dunlop, No. 54.

† This discussion occurred in 1825.

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‘ on behalf of that Company, and William Johnstone of Grange,  
 ‘ and Robert Hugh Muir, merchant in Glasgow, cautioners for  
 ‘ Archibald Newbigging and Company to the said Bank.’ But  
 they have no royal charter, and are not an incorporated body,  
 and therefore had no *persona standi*.

*Bosanquet (for the appellants).*—The appeal is by two individuals, in their own names, for and on behalf of the Glasgow Banking Company, and of William Johnstone and Robert Hugh Muir, cautioners for Archibald Newbigging to the Bank. Although others may have a beneficial interest, these parties have a similar interest in their own right. If this were an appeal merely on the part of the Bank, the want of a charter might be fatal. But that is not the case. The assignation is to William Burrige Cabbell, cashier, and Robert Brown, accountant, for themselves, and as trustees for the other partners of the Bank. These individuals do not appear merely in their official capacity, but as trustees having important interests. Besides, here are the two cautioners, who have clearly an interest; for if the suspension fail, they must bear the loss.

*Solicitor-General.*—The object of an incorporating charter is to enable the corporate body to sue and be sued by a trustee. But this cannot be gained merely by a declaration in the Bank contract, that a trustee may sue and be sued. If the interlocutors are affirmed, execution might be attempted to be stayed on this very ground, that the proper parties were not in the field. The cautioners here are not interested in the assignation. Before they have a legal interest of any kind, they must shew that they are distressed. Their present interest is too remote and indirect. They are merely cautioners for due payment of the bills; but they have no title to sue until the Bank assigns to them a right to pursue.

*Lord Gifford.*—In the declarator I see little difficulty. It is directed against the appellants, as individuals, and also against the Company; but in the suspension, you sue on behalf of the Company.

*Fullerton (for the appellants).*—The case is not different from having sued for A and B, and certain others who are interested. The question truly is, whether or not the appellants come forward for the Company. The suspension and interdict merely apply to the machinery, and not to the lease. Besides, the suspension and interdict is good as far as concerns the two individual cautioners. They have certainly both a good title and a good interest; at any rate, the declarator is properly instituted.



*Lord Gifford.*—Observe, the appellants have appealed not in their individual character. Could this House allow the case to proceed as being in the name of the cautioners? I consider, that in the declarator you come here as assignees to the tack; but in the suspension the Company are at the Bar. The case is certainly materially different from that of the Commercial Bank against Pollock.\* Counsel may therefore proceed, and this objection which has been raised, shall be considered before delivering judgment. May 13. 1828.

Counsel having been fully heard,—

*Lord Gifford* said,—I am not yet satisfied on the question of form. The Company appears in the suspension; the individuals in the declarator. But the appeal is brought on behalf of the Company. No doubt, there are also the cautioners.

*Solicitor-General.*—They have not paid. They have not been distressed, and cannot therefore be parties.

*Fullerton.*—Still they would have a good title to appear. They have been called as defenders, and are they not entitled to defend themselves?

*Lord Gifford.*—I am unwilling to turn you out, if you could get the matter amended. But how can you separate these actions? If the suspension is ill brought, and in it you find great difficulty in supporting the judgment, and the declarator well brought, can we still discern in the latter?

*Fullerton.*—We submit that your Lordships can. Such proceeding is adopted every day.

*Solicitor-General.*—But observe, no defences were given in for the parties called in the declarator; and can they who were never parties below become parties here?

*Fullerton.*—If the House can allow the matter to be remedied, there is nothing in the objection that they did not appear in the declarator. If they did not appear it was a judgment in absence, and they have an interest to appeal. Whether the appeal has been taken formally, is a different thing.

*Lord Gifford.*—The difficulty is, whether Cabbell and Brown have been so before the Court below, as to be parties here.

The consideration of the cause was then put off; but at the same time it was ordered, that the appellants be at liberty to apply for leave to amend their appeal. They accordingly by

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\* See postea, 28th July 1828.

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petition prayed to ‘ have leave to amend their said appeal, by  
 ‘ stating your petitioners, the said William Burrige Cabbell  
 ‘ and Robert Brown, as appellants, for themselves, and as trus-  
 ‘ tees for the individual partners of the said Bank; and, if ne-  
 ‘ cessary, that your Lordships might make such order in regard  
 ‘ to the said William Johnstone and Robert Hugh Muir, the  
 ‘ cautioners, as to your Lordships might seem proper.’ The  
 appeal committee ordered the matter of the petition to be argued  
 by one Counsel on each side at the Bar of the House. Some  
 delay was created by abatement of the appeal by the death of  
 Walter Brock, the respondent, and the revival in the name of  
 James Brock. In the meanwhile, the statute 7. Geo. IV. c. 67.  
 was passed, to regulate the mode in which Scotch Banking  
 Companies may sue and be sued. But this Act provides, that  
 nothing therein contained should in any way affect any question  
 which may be in dependence before any Court of law at the  
 passing of the Act. Both parties, however, having agreed to  
 waive this saving clause, a petition was presented, (William  
 Burrige Cabbell having, in terms of the statute, been register-  
 ed as the individual by whom the Company was to sue or to  
 be sued), praying that the case might be restored to its place and  
 be heard; which prayer was granted. Counsel were then heard  
 during the present session fully on the merits; but, as no deci-  
 sion was pronounced on them, and a remit was made to the  
 Court of Session to review their judgments, it is unnecessary to  
 give the arguments.

*Lord Chancellor.*—The point in this case is similar to the one  
 raised in Breadalbane against Russell. That case Lord Gifford  
 moved to be remitted to the Court of Session, to be reviewed gene-  
 rally, &c.\* The question went back, but the case was disposed  
 of on other grounds than the point of law.† I think, therefore,  
 that your Lordships ought to be of opinion that the same course  
 should be pursued here.

The House of Lords accordingly ‘ ordered and adjudged, that  
 ‘ the cause be remitted back to the Court of Session in Scot-  
 ‘ land, to review generally the interlocutors complained of in the  
 ‘ said appeal: And it is further ordered, that the Court to which  
 ‘ this remit is made, do require the opinion of the Judges of the  
 ‘ other Division, and of the Lords Ordinary, on the matters and  
 ‘ questions of law in this case stated in writing, which Judges of  
 ‘ the other Division and Lords Ordinary are so to give and

\* 1. Wilson & Shaw, 28th June 1825.

† 5. Shaw & Dunlop, No. 433.

‘communicate the same; and, after so reviewing the interlocutors complained of, the said Court are to do and decern in this cause as may be just.’ May 13. 1828.

*Appellants' Authorities.*—Stair's Inst. 3. 1. § 1. 6.; Bankton's Inst. 3. 1. § 2. 6.; Ersk. Inst. 3. 5. § 2. 3.; Wallace, Nov. 16. 1750, (2805.); Douglas, June 6. 1794, (2802.); Yeaman, Feb. 2. 1813, (Fac. Coll.); Ersk. Inst. 2. 6. § 23.; Bell on Leases, (Edit. 1805.) p. 361.; Bell's Comm. vol. i. p. 51.; Chambers on Leases; Barnwell and Alderson's Rep. 514.; Turnbull, June 12. 1751, (868.); Bell's Comm. vol. ii. p. 614.; Arkwright, Dec. 3. 1819, (Fac. Coll.)

*Respondent's Authorities.*—Craig, 2. 10. 9.; Dirleton, 223. 295–6.; M'Kenzie's Observations, p. 37.; Mack. Inst. 2. 6. 5. and 8.; Stair's Inst. 2. 9. 4. and 7.; 2. 3. 2. 6.; Bank. Inst. 2. 9. 3, 4.; Ersk. Inst. 2. 6. 25.; Bell on Leases, 346. 354.; Bell's Comm. vol. i. p. 5. 51. 86. 187.; Stair's Inst. 3. 1. 8.; and 2. 3. 27.; Ross's Lectures, vol. ii. p. 386. 506.; Kilkerran, voce Competition, p. 145.; Russell's Conveyancing, p. 6. 23.; Elchies' Decisions, voce Tack, No. 17.

RICHARDSON and CONNELL—MONCREIFF, WEBSTER, and  
THOMSON,—Solicitors.

MARY BLACK M'NEILL, or JOLLY, Spouse of ROBERT JOLLY, No. 7.  
Appellant. — *King's Advocate (Dr Jenner)*—*Brougham*—*T. H. Miller*—*Wilson*.

MALCOLM M'GREGOR, Respondent.—*Lushington*—*Keay*.

*Husband and Wife—Marriage—Proof—Process.*—A party having raised a declarator of marriage and adherence against a woman, whom he alleged was his wife, stating in the summons an irregular marriage followed by consummation at Holytown, and the celebration of that marriage by a subsequent regular marriage in facie ecclesie in Edinburgh; and the wife having denied marriage and consummation at Holytown, and averred that she had not consented ad ipsum matrimonium in Edinburgh, but had been concussed by threats to submit to the ceremony there; and having immediately thereafter entered into a marriage with another party, enjoyed the status of marriage, and had a family; and the alleged first husband being perfectly aware of that status, and having expressly recognized her and husband in their character of husband and wife;—

1. Found, (reversing the judgment of the Court of Session), That there was no proof whatever of the Holytown marriage, nor of any regular marriage in facie ecclesie in Edinburgh; and further, taking into consideration all the facts and circumstances proved in relation to the conduct of the parties before and after the alleged Edinburgh marriage, that there was not evidence sufficient to justify the conclusion that the parties did, on the day when the Edinburgh marriage was said to have been celebrated, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage as was said to have taken place.

2. Question raised, but not decided, Whether, in a case where the alleged first husband had been aware of the second marriage in the manner proved, a court of justice, even if they felt themselves bound to decern in the declarator of marriage,