[HEARD and JUDGMENT *27th July*, 1850.]

11 D. Bell 601

JAMES CLELAND, *Appellant.*

CLASON and CLARK, W.S., *Respondents.*

Process—Remit.—It does not form any objection to a remit *ob contingentiam*, that the process, in respect of which the remit was made, had been removed by appeal to the House of Lords, and that the appeal was still in dependence at the time the remit was made.

Ibid.—Ibid.—There is such a contingency between a process, in which a decree had been made upon the merits and decerning for payment of expenses to the agents of the party, and a suspension and liberation, brought by the unsuccessful party against the agents, in respect of irregularities in the extract of the decree and the subsequent procedure, as will justify a remit of the suspension and liberation *ob contingentiam* to the branch of the Court before which the original process depended.

Diligence.—A warrant to charge, poind, and imprison embodied in an extract decree, bearing to be made by the officer signing it as "Extractor of the Court of Session," shows that the warrant was made at Edinburgh, because Edinburgh is the commune forum.

Ibid.—The date at which an extract decree embodying a warrant to charge, poind, and imprison in virtue of 1 & 2 Vict. cap. 114, was made, does not require to be inserted *before* the signature of the officer signing the extract—it may be put *after* it.

Diligence—Statute.—The Statute 1 & 2 Vict. cap. 114, is directory not preremptory as to the form of warrant to charge, poind, and imprison specified in its first schedule.

THE Act 48, Geo. III, cap. 151 enacts, in its 9th section, that all causes, actions, processes, or matters shall be heard

before that division of the Court of Session which the party instituting it shall choose, "provided that, where any action, "matter, process, complaint, or cause, has been brought "before one of the said divisions, or the Lords Ordinary "thereof, the other division, or the Lords Ordinary thereof, "shall remit any action, process, matter, complaint, or cause, "subsequently brought before them, relating to the same "subject, matter, or thing, or having a connection or contin-"gency therewith, to the consideration of the division or "Lords Ordinary before whom the first cause, action, process, "complaint, or matter, had been previously brought."

The 1st section of 1 and 2 Vict., cap. 114, is expressed in these terms:—"Whereas it is expedient to "improve the form and to diminish the expense of the dili-"gence of the law in Scotland against the persons of debtors, "and to amend the law as to the diligence of arrestment and "poinding: Be it therefore enacted by the Queen's most "excellent Majesty, by and with the advice and consent of "the Lords Spiritual and Temporal, and Commons, in this "present Parliament assembled, and by the authority of the "same, That from and after the thirty-first day of December, "one thousand eight hundred and thirty-eight, where an extract "shall be issued of a decree or act pronounced or to be "pronounced by the Court of Session, or by the Court of "Commission for Teinds, or by the Court of Justiciary, or "of a decree proceeding upon any deed, decree-arbitral, bond, "protest of a bill, promissory note, or banker's note, or upon "any other obligation or document on which execution may "competently proceed, recorded in the books of Council and "Session, or of the Court of Justiciary, the extractor shall, "in terms of the Schedule (No. 1,) hereunto annexed (or "as near to the form thereof as circumstances will permit), "insert a warrant to charge the debtor or obligant to pay the "debt or perform the obligation within the days of charge,

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" under the pain of poinding and imprisonment, and to arrest " and poind, and for that purpose to open shut and lockfast " places; which extract shall be subscribed and prepared in " other respects as extracts are at present subscribed and " prepared."

The schedule No. 1, referred to in this section of the statute just quoted, is in this form:—

" And the said Lords grant warrant to messengers-at-arms, " in her Majesty's name and authority, to charge the said A " personally, or at his dwelling-place, if within Scotland; and " if furth thereof, by delivering a copy of charge at the Record " Office of the Keeper of the Records of the Court of Session " (*state what the party is decerned to do; if to pay money,* " *specify the sum, interest, and expenses; or if to fulfil an* " *obligation, specify it as in the decree or other document,*) and " that to the said B (*specify the name of the person in whose* " *favour the decree is pronounced*) within (*insert the appropriate* " *days*) next after he is charged to that effect, under the pain " of poinding and imprisonment (*if the sum or any part thereof* " *be payable at a future time, add here,* 'the terms of payment " 'being always first come and bygone;'), and also grant " warrant to arrest the said A's readiest goods, gear, debts, " and sums of money, in payment and satisfaction of the said " sum, interest, and expenses; and if the said A fail to obey " the said charge, then to poind the said A's readiest goods, " gear, and other effects, and, if needful for effecting the said " poinding, grant warrant to open all shut and lockfast " places in form as effeirs. Extracted (*specify place and date*).

(*Extractor's Signature.*)

The same statute, 1 and 2 Vict., cap. 114, in its 5th section, enacts that it shall be competent, within year and day after a charge has expired, to present it to the " Keeper of the General " Register of Hornings at Edinburgh," who is to record the

execution in his register, and this registration is to have the same effect as if the debtor had been denounced rebel, according to the forms then in use, and the 6th section enacts that on the execution being so recorded, the "Keeper of the "Register" shall write upon the extract, and upon the execution, if written on paper apart, a certificate of the registration thereof, "in terms, or to the effect of the Schedule (No. 3) "hereunto annexed, which he shall date and subscribe." This extract and certificate of registration are then to form authority for a deliverance by the clerk in the Bill Chamber, authorizing the imprisonment of the debtor.

The Appellant was Pursuer of an action of count and reckoning against Weir deceased, which was subsequently awakened against his representatives. The Appellant was also Defender in an action of multiplepoinding and exoneration at the instance of Weir. The object of these actions, which were conjoined, was to try the circumstances under which Weir had administered the estate of Williamson, under a will in Weir's favour, while there was in existence a will of a posterior date in favour of the Appellant. An issue was framed and tried in these conjoined actions, and a special verdict was returned. The Appellant took an exception to the charge at the trial. The exception was overruled by the Court, but was sustained by the House of Lords upon appeal, and a new trial was allowed. Upon the second trial a special verdict was again returned. This verdict was applied by the Court of Session by a judgment upon the merits of the question at issue between the parties, and by a finding that neither party was entitled to the expenses of the first trial, but that the Appellant was liable to his opponents in the expenses of the second trial, and of the subsequent proceedings to apply the verdict.

The Appellant presented an appeal against this judgment upon the ground that it was contrary to the intent and meaning of the verdict.

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While this appeal was in dependence, the opponents of the Appellant presented a petition to the Court of Session for interim execution of the decree for expenses against the Appellant, and prayed that the execution might pass in the name of the Respondents, their agents, and the disbursers of the expenses. The prayer of this petition was granted by a decree decerning for payment, and allowing extract of it to go out in the name of the Respondents *ad interim*. This decree was made by an interlocutor, which was pronounced on the 8th, but was not signed until the 11th of July, 1848. This circumstance was stated upon it by the proper officer.

The Respondents obtained extract of this decree which set out with the date 11th July, 1848, and was thus framed:—

"At Edinburgh, the 11th day of July 1848 years—sitting in "judgment, the Lords of Council and Session decerned and "ordained, and hereby decern and ordain, James Cleland of "Ravenshall, at present residing at Mavisbank Cottage, Govan "Road, near Glasgow, to make payment to Messrs. Clason and "Clark, writers to the Signet, agents for Mrs. Mary Weir or "Fleming, executrix of the late William Weir, of Shotts Inn, "in the parish of Shotts, and county of Lanark, and John "Fleming, farmer, Rouchrig, her husband, and John Weir, "farmer, Cleland Townhead, heir of the said William Weir, of "the sum of 141*l.* 14*s.* 1*d.*, being the taxed amount of expenses "found due to the Defenders, after deducting 3*l.* 3*s.*, to which "the said James Cleland was found entitled, in a conjoined "process of multiplepoinding, and exoneration, and count and "reckoning, and damages, depending before the said Lords "between the said parties: Item, To make payment of 17*s.*, "sterling, as the dues of extracting this decree: And the said "Lords grant warrant to messengers-at-arms, in Her Majesty's "name and authority, to charge the said James Cleland per-"sonally, or at his dwelling-place if within Scotland, and if "furth thereof, by delivering a copy of charge at the office of the

" keeper of the record of edictal citations at Edinburgh, to " make payment of the foresaid sum or sums of money, principal, " interest, and expenses—all in terms and to the effect contained ' in the decree and extract above written, and here referred to " and held as repeated *brevitatis causâ*, and that to the said " Clason and Clark, within fifteen days, if within Scotland, and, " if furth thereof, within sixty days next after he is charged to " that effect, under the pain of poinding and imprisonment; " and also grant warrant to arrest the said James Cleland's " readiest goods, gear, debts, and sums of money, in payment " and satisfaction of the said sum or sums, interest, and " expenses: And if the said James Cleland fail to obey the said " charge, then to poind the said James Cleland's readiest " goods, gear, and other effects, and, if needful for effecting the " said poinding, grant warrant to open all shut and lockfast " places in form as effeirs. Extracted upon this and the pre- " ceeding page by me, principal extractor in the Court of " Session. (Signed) " J. PARKER.

" November 4th, 1848."

By virtue of this extract and warrant, the Respondents gave the Appellant a charge for payment, and the charge having been disobeyed, they obtained a warrant for his incarceration, which was duly put in force. The Appellant presented a note of suspension of the charge, which he marked for the first division of the Court; the cause in which the decree extracted had been pronounced having depended before the second division. The Lord Ordinary allowed the Appellant to be liberated upon his consigning the sum charged for, and reported the case to the first division of the Court. The first division remitted the case to the second division " in respect of its contingency and near " connection with another case which is in dependence in that " division." The second division pronounced the following interlocutor:—" In, respect 1mo, That the Act of Sederunt,

" dated the 24th day of December, 1838, was not intended to " make any change in any form prescribed by the Diligence " Act, and in respect that the extract charged on in this case, " prepared in the form which has been in use in all cases for " ten years, does state the place where it was prepared, viz., in " the office of the principal extractor in the Court of Session, " and is dated on the day on which the same is completed and " issued: In respect, 2ndo, That the certificate of registration " issued from the keeper's office, is signed by an officer found " by the party applying for the same, to be in the actual exer- " cise of the duties of such office, and not averred by the " suspender to be an intruder into the office, and is issued from " the said office as the proof of the actual registration therein: " In respect, 3tio, That the execution refers to the date of the " decree, but does not state the warrant to be of the same date, " but only in common style mentions the warrant thereon that " is on the said decree, the date of which is given: In " respect, 4to, The interlocutor of Court forming the decree in " question, was verbally pronounced on the 8th day of July, " but was signed, and bears to be signed, on the 11th day of " July, according to the form and practice of the Court; and " in respect that in such cases the true date is that on which " the interlocutor was signed, when the cause was again in the " Roll of the Court for judgment, and by which the extractor " must be, and always is, guided in giving the date of the decree, " being the day on which the warrant for this extract is signed " and judgment finally completed: In respect, 5to, That the " bond of caution found by the parties in whose favour decree " for expenses was pronounced, necessarily applies to repetition " of the same in the event of a reversal, whether payment is " enforced by these parties directly, or by others, as in their " right and with their consent and concurrence, and that such " is the established rule and practice in cases where the decree " is allowed to go out in name of the agents of the party in

" whose favour expenses are found due, and where interim exe-
" cution of the same is sought for, pending appeal; and in
" respect that no other objections were taken to any of the
" grounds and warrants of the said charge, or any other reason
" of suspension proposed,—Therefore the Lords remit to the
" Lord Ordinary to refuse the note of suspension and liberation,
" and to find the chargers entitled to expenses, and decern."

This interlocutor and that by the first division of the Court remitting the case *ob contingentiam* to the second division, were both appealed.

Mr. Anderson for the Appellant.—By the 9th sect. of 48 Geo. III. cap. 151, the Appellant was entitled to choose the division of the Court before which to bring the question of suspension raised by him. Availing himself of that right, he had marked the note of suspension for the first division, and unless there was a contingency between the suspension and a case previously in dependence between the same parties before the second division, the first division had no power to deprive him of the selection he had so made. No mention is made in the interlocutor of remit of the case in respect of which it was made so as to enable the party to discover it. It was thought at the time that the contingency referred to by the interlocutor was between the present case and one of Wilson *v.* Wilson, 11 *Dun:* 161. where a similar question had been raised before the second division; but that case had no other contingency with the present than that similarity, which is not such a contingency as the statute had in view, for it never could have been the intention of the legislature that where a particular question of law might be raised before one division of the Court, it should be in the power of the other division to remit all similar questions to it, and deprive the subject of the benefit of the opinion of the separate judicature upon one and the same question. The contingency in view by the statute was between two cases

depending between the same parties in both, and having reference to the same subject of patrimonial interest; whereas the parties here were entirely different, the subject in disputewas different, and the case of Wilson *v.* Wilson had already been decided.

If the case referred to by the interlocutor was not Wilson *v.* Wilson, but the case between the Appellant and the representatives of Weir, in which the decree raising the present question of suspension was pronounced, the answer to that is threefold. In the first place, the parties in the two cases are not the same. The present Respondents were no parties to the original case, and Weir's representatives are no parties to this case. 2nd.—The present case is separate and independent, raising an entirely new question, no way involved in or having connexion with the questions embraced by the original action; and 3rd., the origina case was at an end, so far as the Court of Session was concerned at the time the remit was made—there was nothing remaining for that Court to determine, whatever might be the issue of the appeal taken to this House.

II. The extract and warrant forming the ground of suspension is void, and inept, inasmuch as it does not in terms of 1 and 2 Vict., under which it is framed, specify the place at which, and the time at which it was signed and issued, although both of these particulars are specified by the Schedule to the statute as necessary to be inserted, and therefore cannot be omitted. Syme *v.* Yuille, 8 *Co. of Sess; Ca.* 8. With regard to the date, that at the commencement of the extract is the date of the decree extracted, not of the giving out of the extract, which is an act that could not be done until the lapse of a certain time after the making of the decree; and the date, "November 4th, 1848," as it is found at the end after the extractor's signature, cannot form any part of the instrument, for the schedule to the statute not only requires the place and date to be specified, but points out the place in the extract where the specification is to be made.

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[*Lord Brougham.*—The schedule is sometimes part of an Act and sometimes not. The Court of King's Bench in this country have so held, according to the good sense of the matter, and it has been held that whatever comes under a "viz." in pleading is to be regulated by the sense of the passage.]

Admitting that, the objection here is nevertheless good, for it is obvious that what the schedule specifies is necessary, in order to prevent abuse, which might readily be introduced if it were allowed that the date may be placed out of the four corners of the instrument, and perhaps long after it has been completed. With regard, again, to the place at which the extract was made, there is no mention of it anywhere. The words "at Edinburgh," with which the extract commences, has reference to the place at which the decree was made, not to that at which the extract was given out. No doubt the person signing calls himself "principal extractor in the Court of Session," but that was obviously intended to describe his character, not the place where he was acting; and were this otherwise, the words would not have the effect contended for, because the Court of Session has sat away from Edinburgh, and may do so again; and for aught that appears, it was sitting elsewhere at the time this extract was issued.

III. The warrant of imprisonment was void, because the certificate of presentation and registration of the execution of charge was not in conformity to the enactment of 1 and 2 Vict. That statute requires that the certificate shall be signed by the Keeper of the General Register of Hornings; but the certificate here is signed "D. Craig, P. K." Craig was not, however, the Keeper, and who he was, nor what was meant by the letters "P. K." does not appear. Possibly the letters may be intended for "pro Keeper," but the statute does not give any authority to the Keeper to do the act by deputy, even if there were proof, of which there is none, that the person professing to be a deputy really held that character. This objection must be fatal

to the diligence, for the certificate is the foundation of the warrant of imprisonment.—Forrester *v.* Harvie, 4 *Bell's Ap. Ca.*, 197; Cumming *v.* Munro, 12 *S. & D.*, 61.

IV. The extract of the decree is further void, because it sets out the date of the decree as the 11th of July, 1848, being the day on which it was signed, whereas the true date was that on which the interlocutor was pronounced, viz., the 8th of July.

Mr. Rolt and *Mr. Adolphus*, for the Respondents.

LORD BROUGHAM.—My Lords, I do not think it necessary that your Lordships should delay disposing of this case. Although the amount of money in question is a trifling sum, yet the case certainly involves considerations of importance. I am, however, prepared to recommend that your Lordships should dispose of it at once.

There are two grounds alleged in support of this appeal. One, that the remit to the second division from the first, upon the question *ob contingentiam*, was improper, because there was no real *contingentia*. The second is, that there are fundamental irregularities, radical irregularities, which are sufficient to vitiate the whole proceeding.

With respect to the first of these points, I certainly hold the opinion which was held by the Court below, that there is a *contingentia*. It is a complete mistake to suppose that the Act which prescribes a remit in case of contingency requires that there should be a *lis pendens* before the Court to which the remit is made at the time of making the remit. The direction is in the past tense. The Act requires that there must have been *de facto* a suit pending there at some one time, and however that suit may have been disposed of, whether it continue pending or not at the time in the Court, it was quite sufficient if that suit had been there instituted and had there subsisted,

and though the suit might, in its course of proceeding, be, I do not say altogether determined, but removed to another Court, the Court of Appeal, your Lordships' House, in which it might then be locally situate, that would make no difference; for the words are, "Provided that where any action, matter, process, "complaint, or cause has been brought before one of the said "divisions, or the Lords Ordinary thereof, the other division or "the Lords Ordinary thereof shall remit any action, process, "complaint, matter, or cause, subsequently brought before them "relating to the same subject matter, or thing, or having a con-"nexion or contingency therewith to the consideration of the "Division or Lords Ordinary before whom the first cause," that "is the first mentioned cause, "action, process, complaint, or "matter had been previously brought."

Now it is said that this case was so far at an end that nothing of it subsisted, save a petition which had been presented for interim execution, pending the appeal here, and that this petition having been acceded to by interim execution being granted, was also at an end, and that, therefore, there was nothing through which the contingency could be asserted, which was the ground of remit under the interlocutor. My Lords, I deny that. The suit of Cleland *v.* Weir, which had given rise to this suit, and was intimately connected with it, was here pending; and there might have been a remit from this House in that suit of Cleland *v.* Weir at the time at which this remit took place. Then was there a contingency, was there a suit upon the contingency of which there might have been a ground of remit? Was there such a similarity, a connection with the subject matter of that suit as to justify the remit within the words of the statute? I apprehend that there was a connection, and one cannot very well conceive a connection more close than between a suit in which a judgment is had, and one in which the execution taken upon that judgment is the subject

of it. I am therefore of opinion that there was such "connection or contingency" as justified the remit by the Court below.

But your Lordships have been referred to the case of the Earl of Mansfield *v.* Aitchison; and I was anxious to see that case; for, as stated at the bar, it did seem to have some bearing upon the question now before your Lordships. In that case, a question arose, not upon a remit *ob contingentiam*—for a most material difference exists in that respect, as I shall presently show—but it was upon an advocation *ob contingentiam*, and there the test seems to have been, whether or not the processes should be formally conjoined; otherwise there could be no advocation, for obvious reasons. Now the Court before whom the question came, (it never was here by appeal,) were equally divided. Two learned Judges thought there was no contingency, one being Lord Glenlee, an eminent and most able person, of whom, while I wish to speak with the greatest respect, it must be observed that he was apt to doubt, and afterwards to express his final opinion with hesitation; the other being Lord Cringletie, a Judge fully entitled to our respect also, but of inferior estimation to the former; the others who joined in the decision were the Lord Justice Clerk and Lord Pitmilly, two of the most eminent Judges who ever sat upon the Scotch bench. They had no doubt whatever that there was a contingency sufficient to support the advocation claimed; and they gave their opinion accordingly. What followed? The Court being equally divided, says the reporter, it was agreed upon and proposed by the Lord Justice Clerk to take a very excellent course,—not to hear one counsel on a side, which would have given rise to delay and expense, but to refer it to Lord Moncrieff,—the Lord Ordinary, in the Bill Chamber, from whom it had come, by his reporting that he had a doubt whether he should refuse or pass the bill—to him they determined to refer it. And they were to be guided by his decision between the two conflicting

portions of the Court, that is, the equal two on each side. What happened? Lord Moncrieff gave his decision, which I presume proceeded—by reference to his statement—upon the same grounds as those upon which he made his report. Observe what these grounds are. If you look at them you will find that they are confined to the question of inconvenience. He seems to have had great doubt on the point; and your Lordships find, whatever it was that determined him, when the reasons on each side hung about as even as the numbers on each side hung in the Court, it was a consideration of the nature of the case. What was that? An advocation. He goes upon the ground of the inconvenience which might arise in such a case. He specifies the reason which guided him, viz., because it was an advocation. Therefore I agree entirely with the two learned Judges, the Lord Justice Clerk and Lord Pitmilly, and differ, with great respect, from Lord Glenlee and Lord Cringletie. I do not say I am obliged to differ with Lord Moncrieff, because he rests his opinion upon the peculiarity of that case, an advocation *ob contingentiam;* and on reasons drawn from thence, which do not apply to the matter before your Lordships.

This brings me, therefore, to the second ground of appeal before your Lordships, viz., with respect to the practice of the Court, which was one of the points raised in the argument. Now, I do not say that if a clear case was made out of the practice having been wrong, as Lord Robertson, an able and experienced Judge, in his very elaborate note, appears to have thought it, it would not be the duty of this Court of Appeal to amend the *mala praxis* by putting a better in its place. You would reverse the judgment which had gone upon a mistaken view of the practice. But, generally speaking, your Lordships, where such a question comes before you upon the proceedings in any inferior Court, are very slow to say that it did not understand its own practice. The course of every Court is the law of the Court. You would only interpose as a correcting power where

it appeared that there had been most clearly a miscarriage, and that the Court had misunderstood its own practice. But in a case like the present, in which there is a unanimous opinion, with the exception of Lord Robertson, in the second division, it is a very strong thing to say that those learned Judges so far lost their way as to decide in ignorance of their own practice. I do not think that there is any circumstance to justify such a conclusion.

My Lords, upon all these points their Lordships have given a very strong opinion unanimously, with the exception of Lord Robertson. I have looked with great anxiety into every argument adduced, and into the different points of the case, and I am decidedly of opinion that, independently of the weight due to their Lordships' authority upon the question of practice, they have decided rightly; and that the practice is not at all interfered with, even taking the schedule, the Act of Sederunt, and the pieces of the process, and comparing them together.

It is very important to consider what was the object of the Act of the 50th George III. cap. 112, and the other statutes for regulating the Scotch judicature, what was their origin, and what their purview, what they were introduced for, and what they were dealing with? It appears to have been the purpose of these statutes (I am now speaking particularly of the Governing Act, the 1 and 2 Victoria, cap. 114,) to have required the insertion, where an extract shall be issued, of a warrant to charge the debtor or obligant, which warrant is to pursue as nearly as possible, the form of Schedule No. 1 to the Act annexed, not literally, not verbally, not following every letter, but as nearly as the circumstances will permit. In these terms the extract is to "insert a warrant to charge the debtor;" now that is the object of the Act.

Then comes the warrant in Schedule No. 1. Nothing is given there as to the extract: there is no new point of extract provided by the Act, nor by the warrant to which the Act refers.

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It is the warrant that is the subject of the Act; the insertion of the warrant is the object of the Act; and the form of the warrant is what the schedule provides. But there is nothing there said about the extract. The Act says "which extract "shall be subscribed and prepared in other respects" (that is in other respects than hereinbefore named and provided) "as "extracts are at present subscribed and prepared, and for which "extract no higher fees shall be exigible than those which are "payable as by law established." Then comes the warrant which is to be inserted. The form of the warrant given must be pursued, and as I had occasion to throw out before in the course of the argument, it is most material that the form of the warrant should be accurately pursued. The very object of the schedule is to require that it shall be inserted, and the object of the Schedule No. 1. is to give the form by which the warrant shall be framed. It is, however, one thing to say that you shall pursue the warrant strictly in the form given, but it is another thing to say that the words which follow the word "extracted," must be precisely as given in Schedule No. 1. The words are "extracted [specify place and date]." That only refers to the extract and not to the warrant. It refers to that which is done with the warrant, namely, "extracted."

Now it is said that the portion which in this case follows the word "extracted," does not contain either place or date. I am astonished to find that it is said not to contain the date, when you find the date "November 4th, 1848," and the signature "J. Parker," the name, James Parker, being that of the principal extractor. True, it happens that after the name "J. Parker," follows the date, but even if it were necessary to follow the prescribed form to the very letter, is any one prepared to say, that we can find anything which declares that the date must be before the signature, and immediately after the word "extracted," and not after the signature? No such thing can be said. The words "specify place and date," are by juxta-

position, attached to the word "extracted," but that is all. It does not say you must put the date in here, and if you do not put it in here, but put it in after the name, the whole shall be null and void. It seems to me that this would be the most absurd construction which could be put upon any plain and simple words.

Then it is said that the place is not there. I am supposing it is necessary to put the place, though, according to my argument, for the reasons which I have already assigned, that is not required. But supposing it were required; suppose that instead of being merely directory, the provisions were peremptory, is not there the place here? Taken altogether, nobody can doubt it, because it is "extracted upon this and the prece-" ding page by me, principal extractor in the Court of Session." I certainly deny the position attempted to be set up, that the Court of Session is an ambulatory body. It is as much a fixed body by the Common Law as the Court of Common Pleas is by Magna Charta. It cannot move from Edinburgh, that is the *Commune Forum*, the whole proceedings in criminal cases, as well as civil go up, on the supposition that Edinburgh is the *locus in quo* of the Court of Session. By the Common Law of Scotland, any party may be tried for any offence, misdemeanour, felony, or murder, in the county in which it is alleged to have been committed, or in Edinburgh. Why? Because Edinburgh is the *Commune Forum*, where sits the Court of Session, the highest Court of Judicature within the country. I do not consider, however, that it is necessary to rest any opinion upon that view; for independently of it, I think the place is sufficiently indicated, the known fact being that Edinburgh is the seat of the Court, and that no Circuit Court is ever termed Court of Session.

My Lords, the other points do not require that I should go further into them. I have given a sufficient proof, I think, of

the futility of the grounds of appeal, to justify me on the whole in advising your Lordships to affirm this decree.

It is Ordered and Adjudged, That the said petition and apppeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DUNN and DOBIE—TATHAM, UPTON, JOHNSON, UPTON, and JOHNSON.