question of expenses; and considering that this point, with respect to the Accumulation Act, was not brought to the notice of the Court below, but was mooted here for the first time, although it be successful, inasmuch as that success is so very small, that it can have no practical effect upon the state of the claims between the parties, I do not think, that that trifling alteration of the interlocutor should at all induce your Lordships to treat this appeal upon any other principle than the ordinary principle in such a case of dismissing it with costs.

I therefore move your Lordships, that the interlocutors of the Court below be affirmed, with this variation, namely, a declaration, that, in respect of the income of the personal estate from the expiration of 21 years after the death of the testator down to the time when Euphemia Warroch died, the same, and the trust for the accumulation thereof, was in excess by the operation of the Statute, and that the income falls to the next of kin of the testator; and that the appellant would be entitled to the one half of that income in the account to be hereafter taken in the cause. With that variation, or rather with that addition, I must humbly advise your Lordships to affirm the interlocutors, and to dismiss the appeal, with costs.

LORD CRANWORTH.—I will only say, that I entirely concur with the whole of what has fallen from my noble and learned friend on the woolsack, and that I think I should be only wasting your Lordships' time if I said more upon the subject.

LORD KINGSDOWN.—I entirely concur.

Interlocutors affirmed, with a variation and addition, and appeal dismissed with costs.

The *declaration* in the *order* of the House was as follows: "Declared, that in respect of the income of the personal estate from the expiration of 21 years from and after the death of the truster, James Warroch, down to the death of Euphemia Warroch, the same and the trust for the accumulation thereof was in excess by the operation of the Statute 39 and 40 Geo. III. c. 98, and that the income falls to the next of kin of the said truster, and that the appellant is entitled to the one half of that income in the account to be hereafter taken in this cause."

Appellants' Agents, W. Officer, S.S.C., Edinburgh; Grahames and Wardlaw, Westminster. —*Respondents' Agents*, L. M. Macara, W.S., Edinburgh; Holmes, Anton, Turnbull, and Sharkey, Westminster.

MARCH 31, 1865.

ROBERT ADDIE and Others, *Appellants*, v. HENDERSON and DIMMACK and Others, *Respondents*.

Railway—Use of Railway—Servitude—Feu Contract—Ownership—*B, the superior, in his feu contract with his vassal A, granted a perpetual servitude and privilege of using a railway, which lay on B's lands, to A for the use of his feu. B reserved the minerals, stipulated that A was to lay down and maintain the rails, and empowered A to double the rails, with a proviso, that if B used the railway, the rent paid by A should be reduced, and if B's tenants used it, they should contribute to the expense of maintaining the line.*

HELD (affirming judgment), *That B was not divested of his ordinary right of ownership of the railway, and that he could grant liberty to third parties to use the railway.*[1]

By feu contract, executed in 1840, Mr. Buchanan of Drumpeller, father of, and represented by, the defender, Mr. Buchanan, feued to Addie, Miller, and Rankin, ironmasters, represented by the pursuer, Robert Addie, 23 acres of land or thereby, "but excepting always from this disposition, and reserving to the said Robert Carrick Buchanan, and his heirs and successors whomsoever, the whole coal, ironstone, and fireclay connected therewith, and other metals and minerals on the said lands," for payment of a certain feu duty to Mr. Buchanan "and his foresaids."

The pursuer averred, that Addie, Miller, and Rankin took this feu for the purpose of carrying on there their business as ironmasters, which was extensive, and required facilities of transit for the raw material on the one hand, and the manufactured pig iron on the other, and, accordingly, various stipulations were made in the feu contract with the view of securing means of transit by canals or railways to the Monkland Canal on the north of the feu, and to the Monkland and Kirkintilloch Railway on the east of the feu, through Mr. Buchanan's lands, which intervened between the pursuer's feu and the canal, and between the feu and the Monkland and Kirkintilloch Railway.

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[1] See previous report 2 Macph. 41; 35 Sc. Jur. 18. S. C. 3 Macph. H. L. 30: 37 Sc. Jur. 414.

There existed at the date of the feu contract a mineral railway, with a single line of rails, and worked by horsepower, called the Drumpeller Coal Company's Railway; which railway extended from near the pursuer's feu to the Monkland and Kirkintilloch Railway, and had, prior to the feu contract, been used for conveyance of the minerals raised out of the lands of Drumpeller. There was only one pit on the lands of Drumpeller, at which, at that time, there was any output of minerals. This pit was called, in the feu contract, pit No. 4.

The question raised in the present action regarded the right conferred on the feuars, Messrs. Addie, Miller, and Rankin, and now vested in the pursuer, under the 9th head of the feu contract, which referred to the feu contract plan, and conferred on the feuars a right of railway, from a point on the Drumpeller Coal Company's Railway, marked X on the feu contract plan, at the eastern extremity of the feu, and at a distance of between 600 and 700 yards from the Monkland and Kirkintilloch Railway.

By this head of the feu contract, Mr. Buchanan granted to Addie, Miller, and Rankin, "or their foresaids, a perpetual servitude and privilege of using the Drumpeller Coal Company's Railway, and also the use and servitude of ground necessary for enabling them to double the said railway from the point X marked on the said plan, eastward to the Monkland and Kirkintilloch Railway, and for which servitude and privilege the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, shall make payment to the said Robert Carrick Buchanan or his foresaids, of the yearly rent or sum of £50 sterling, provided the said Robert Carrick Buchanan, or his foresaids, do not themselves make use of the said railway; but in the event of the said Robert Carrick Buchanan, or his foresaids, making use thereof, the said rent or yearly payment of £50 shall be reduced to £25 during any one year in which the said railway shall be so used; and if the said railway shall be used by the said Robert Carrick Buchanan, or his foresaids, for a less period than a year, a deduction of two guineas for each month the railway is so used by the said Robert Carrick Buchanan, or his foresaids, or the Drumpeller Coal Company, shall be made from the said rent of £50. And the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, shall be obliged, as they hereby bind and oblige themselves, to cut down or lower the said Drumpeller Coal Company's Railway to the level of the Monkland and Kirkintilloch Railway, and to lay a double line of rails, partly on the present line of the said Drumpeller Railway, and partly on the space of thirty feet reserved by the said Robert Carrick Buchanan on the south side of the railway, and north side of a piece of ground sold by him to John Wilson, Esq. of Dundyvan works, which operations of cutting down or lowering the said railway, and laying the said double line of rails, shall be performed entirely at the expense of the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, besides their paying to the said Robert Carrick Buchanan, and his foresaids, a price or valuation to be fixed mutually by men, to be mutually chosen, for the present rails, chairs, and blocks, on being allowed to lift and remove the same, and to relay the present line of the said railway with heavier rails. . . . And further, it is expressly provided and stipulated, that the said Robert Carrick Buchanan, and his foresaids, and his coal tenants, or the Drumpeller Coal Company, tenants during their lease, shall be entitled to pass toll free along the said railway in all time coming, excepting that there shall be deducted from the said rent of £50 the sum of £25 a year for each year the railway shall be so used, or two guineas for each calendar month, if used for a shorter period than a year, as the time may be, as before mentioned; and the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, shall be at the sole expense of keeping the said railway in repair; but should any other parties than the said Robert Carrick Buchanan, or his foresaids, or his coal tenants of Drumpeller, or elsewhere in the parish of Old Monkland, use the said railway, the said second parties and their foresaids shall be paid, by such other parties, a fair proportion of the expense of maintaining the said railway; and, *lastly*, it is hereby stipulated and agreed, that should the said railway be disposed of by the said Robert Carrick Buchanan, or his foresaids, to any public railway company, the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, shall be paid the full value for the railroad at the time in its working state, and shall in all time thereafter be freed from the payment of the said rent of £50 a year, and besides, shall have full power and liberty guaranteed to them, and to their foresaids, to pass and repass along the said railway from the lands hereby feued, and the said second party's works thereon, east to the Monkland and Kirkintilloch Railway, in all time coming, without payment of any tolls or tonnage, as fully and freely as if the said road were the said second party's own private property."

In the present action the pursuer averred, that Addie, Miller, and Rankin were infeft on the precept in the feu contract, the above stipulations being, in accordance with the conditions of the feu contract, set forth in the instrument of sasine; that they erected the works, furnaces, and buildings, called the Langloan Iron Works, on the feus, and that there they, and subsequently the pursuer, carried on the manufacture of pig iron; that in conformity with the 9th head of the feu contract above quoted, they removed the Drumpeller Coal Company Railway from the point X to the Monkland and Kirkintilloch Railway, and constructed on the site of it, and on additional land alongside of it, a railway with a double line of rails, the rails laid down being

adapted for traffic carried by locomotive engines; and that, since constructing the railway, they had had the exclusive use and possession of it, except that for a short time it had been used by Mr. Buchanan's coal tenants in Old Monkland. That, however, the defenders, Henderson and Dimmack, had feued land from the other defender, Mr. Buchanan, in the immediate neighbourhood of the pursuer's feu and of the railway; that they had erected on the feu works for the manufacture of malleable iron; and that, contrary to the wish of the pursuer, they had used the railway from the point X eastward to the Monkland and Kirkintilloch Railway. This they alleged they did by virtue of a right granted by the other defender, Mr. Buchanan.

The pursuer averred, that the traffic of the defenders, Henderson and Dimmack, along the railway was great and incessant, and that they refused to be subject to any control on the part of the pursuer. Their use of the railway caused the pursuer great inconvenience, and caused great and injurious interruption to the pursuer's traffic.

The conclusions of the summons were, that Henderson and Dimmack had no right to use the railway in question for the transport or carriage of goods or materials, whether manufactured or otherwise, for the purposes of or in connexion with their trade or business of malleable iron manufacturers, to or from their works at Drumpeller Iron Works, eastward to the junction of said railway with the railway sometime called the Monkland and Kirkintilloch Railway, now merged in or forming part of the Monkland Railways; and they should be interdicted from using, the railway, to the extent aforesaid, for the purposes aforesaid in time coming.

The Court of Session held, that the right of the feuars to the railway was not exclusive, and that the superior could validly confer on others the right to use it.

The pursuers appealed against the interlocutors, and in their *printed case* contended, that the interlocutors should be reversed, for the following reasons:—1. The respondents, Henderson and Dimmack, can only maintain their position in the right of the respondent, Mr. Buchanan. 2. Mr. Buchanan cannot maintain his right to confer the use of the railway on Henderson and Dimmack unless he can maintain, that he has an unrestricted power to confer a right to use it on any person or class of persons, because Henderson and Dimmack are not among those specified in the feu contract. 3. The general nature of the deed being, as regards Mr. Buchanan, a feu contract reserving his minerals, the deed, considered in its general character, does not imply a power in him to grant right to use the railway to Henderson and Dimmack, who have no concern with the mineral produce of his estate. But the general character of the deed implies, that he has no power. 4. The deed is framed on the plan of expressing the rights of Mr. Buchanan as well as of Messrs. Addie, Miller, and Rankin, from which it follows, that neither party has any right which is not expressed. The deed is anxious and full, and it is not competent to supply clauses on the notion, that they have been omitted by mistake; neither is it competent to add words to a clause which is intelligible without them, merely on the ground, that without these words the clause, though intelligible, is superfluous. 5. The right vested in the appellant under the contract is not a servitude, because the appellant is put in possession of the railway. 6. Seeing that, except by pre-arrangement, a railway can be used by one person only, a right to use a railway *primâ facie* means an exclusive right to use. 7. The right vested in the appellant is a right to occupy or possess, and to use the railway, and that necessarily implies an exclusive right unless to the extent to which it is expressly qualified. 8. Since the rails belong to the appellant, no right of Mr. Buchanan to use them is inherent in him, or can be implied. 9. The contract, according to the appellant's construction, is in accordance with the objects and requirements of the contracting parties. It is not so according to the construction contended for by the respondents. 10. Considering that the appellant and his predecessors made the railway, and considering the large rent payable for it, it is contrary to equity, and to the true meaning and good faith of the contract, to hold, that the appellant's right is so elusory as the respondents' argument implies. 11. The last paragraph of the 9th head of the contract shews, that the right of Addie, Miller, and Rankin, was more than a right of free passage, and that they were regarded as having the whole substantial interest in the railway, and it is conclusive against the respondents' argument and in favour of the argument of the appellant. 12. Regard should be had, in construing the contract, to the objects which the parties had in view, and to the possession which followed on it. 13. The clause especially founded on by the respondents cannot bear the meaning which has been put on it in the Court of Session, and when regard is had to the facts, it is quite in harmony with the appellant's construction. 14. The other clauses of the deed support the appellant's argument. 15. The Court were bound, at all events, to allow the proof with regard to the nature of the interference and interruption of his traffic of which the appellant complains.

The *Attorney General* (Palmer), *Sir H. Cairns* Q.C., and *W. E. Gloag*, for the appellants.—The interlocutor was wrong. The true construction of the contract was, that the appellants got the exclusive use of the railway, a reservation being made in favour only of Mr. Buchanan and his foresaids, and his coal tenants. The respondents do not come under the description in these words. If, then, Mr. Buchanan can grant the use of the railway to the respondents, this must be because he can grant the use to anybody. To hold that would be absurd. The right conferred

on the appellants was not a servitude strictly so called, but more resembled a lease. But it was not necessary to reduce the right under either classification ; it was enough to construe it according to the special stipulations of the contract. The other clauses of the contract were inconsistent with the notion, that the superior was entitled to grant the use to anybody, otherwise there would not be an express clause to entitle him to pass toll free when he used the railway himself. Who ever heard of an owner stipulating to pass toll free along his own way? If his entire right had not been given away, that provision would have been superfluous. Then, again, the rails being the property of the appellants, this shews, that *primâ facie* their exclusive use belonged to the appellants. But even if there is only a joint use in the appellants, then the respondents used the railway in excess.

[LORD CHANCELLOR.—You have not raised that point by your pleadings.]

It results from the construction of the contract, that such limited user only was intended, and we say, that the whole question of construction is open upon the pleadings.

Rolt Q.C., and *Selwyn* Q.C., for the respondents, were not called upon.

LORD CHANCELLOR WESTBURY.—I think, my Lords, it will be the unanimous opinion of your Lordships, that the Lord Ordinary, and the Judges of the Court below, arrived at a correct conclusion in this case, and that the interlocutor appealed from ought not to be disturbed.

The present appellant claims under a feu contract made by a gentleman named Buchanan in 1840. The appellant's firm are large iron masters, living in the neighbourhood of the property included in the feu contract, and the object of that feu contract was, that they should use the lands comprised in it for the purpose of extending, and more conveniently carrying on, their iron works. The lands in question were part of a large estate belonging to Mr. Buchanan, and Mr. Buchanan was also the owner of other portions of land not comprised in the feu contract, and among others, of a private railway, which communicated with a public railway, and he granted accordingly to the appellants the user of that railway, under certain conditions. He also granted to them the right of passing over other parts of the land, and those two rights of communication and transit are granted obviously for the benefit of the appellants with reference to their adjoining works.

Now the proposition which is maintained by the appellants is this : That under the feu contract, the grant of the right to use this railway is made in such terms, and in so stringent a manner, that with the exception of certain persons who are specified in the grant, and whose right to use the railway conjointly with the appellants is therein expressly reserved, Mr. Buchanan has no power to grant a similar right to any other person whatever. That is the proposition, and it is on that proposition that the whole of the action rests.

I must beg your Lordships to observe carefully the distinction that exists here between that proposition, which denies in the first place to Mr. Buchanan the right of making any other grant of liberty to use the railway, and, secondly, denies to Mr. Buchanan the right of making any grant to use the railway which would interfere with the appellants' rights. That case must be distinguished altogether from another case which might exist and might have been stated, namely, that Mr. Buchanan having the right so to do, had subsequently made other grants of a similar liberty and user, and that his grantees were using the railway injuriously to the appellants, and excluding them from their fair right of participation in the enjoyment of that railway. That second proposition would be raising a question of fact only as between the appellants and other grantees. The first proposition, which is the only one to be found in this record, is one that rests entirely upon the capacity of Mr. Buchanan to make any grant at all, or at all events to make any grant which should in any way interfere with the enjoyment of the railway by the appellants.

I think your Lordships will agree with me, that the Court of Session was quite right in treating this matter as one that was intended to be rested only on the construction of the contract, and that the action being brought with that view, it ought not to be sustained by the defender being allowed to introduce into the record any ground of action altogether *diversi generis*, founded on different facts, and raising a different issue from that issue which alone can be raised by this form of summons. The question depends entirely on the construction of the feu contract. Is Mr. Buchanan disqualified in the manner which the appellants have averred? They have averred in effect that Mr. Buchanan, being the unquestioned *dominus* or owner of the soil of the railway in question, has denuded himself by this feu contract of the ordinary right of ownership, namely, the right to grant to any other persons a similar power to that which was granted to the appellants, that is to say, the power to use this railway.

The appellants' chief argument, which includes, in fact, the material part of the feu contract, is founded on the 9th clause of that feu contract. In the ninth place, "the said Robert Carrick Buchanan hereby grants to the said Robert Addie, Robert Miller, and Patrick Rankin, or their foresaids, a perpetual servitude and privilege of using the Drumpeller Coal Company Railway, and also the use and servitude of ground necessary for enabling them to double the said railway from the point X, marked on the said plan eastward to the Monkland and Kirkintilloch Railways, and for which servitude and privilege the said Robert Addie, Robert Miller, and Patrick Rankin,

and their foresaids, shall make payment to the said Robert Carrick Buchanan or his foresaids of the yearly rent or sum of £50 sterling, provided the said Robert Carrick Buchanan or his foresaids do not themselves make use of the said railway ; but in the event of the said Robert Carrick Buchanan or his foresaids making use thereof, the said rent or yearly payment of £50 shall be reduced to £25, during any one year in which the said railway shall be so used."

On examination of that clause, however, I think your Lordships will look in vain for any words making over Mr. Buchanan's right, or anything like such terms of absolute surrender as could have the effect of denuding Mr. Buchanan of his ordinary right of ownership of this railway. He has granted to the appellants a particular servitude, that servitude to be exercised over the land of Mr. Buchanan, namely, a right of way, a right to travel along the railway. But what is there here to deprive the owner of the railway, or of the lands, from granting a similar right of way to any other party?

The argument on the part of the appellants is this, that that power to grant a similar right does not exist, because this particular contract is coupled with the condition, that the appellants should improve the way itself by laying down a new line of rails and making the railway to consist of a double instead of a single line. In respect of that privilege, a particular benefit is reserved to them, and there is an express stipulation in the contract to that effect. But that will no more interfere with the right of Mr. Buchanan to grant a similar servitude, than it would take away his right to an ordinary road to grant a right of way, because he had already granted to one party a right of way on condition of his putting the road into repair. As well might it be contended, that it would be incompetent to him in such a case to grant that right of way, as it could here be contended, that the accompanying obligation to improve the railway according to the contract deprived Mr. Buchanan of the power to grant a similar right to any other person.

But not only would it be necessary, in order to support the argument of the appellant, to find in this particular clause language which would deprive Mr. Buchanan of the ordinary rights of ownership, but it would be necessary to put upon words which are actually to be found there, and which clearly recognize Mr. Buchanan's still retaining his legal right, a very extraordinary, and I think unnatural, interpretation. After several stipulations, the feu contract, clause 9, contains these words: "And the said Robert Addie, Robert Miller, and Patrick Rankin, and their foresaids, shall be at the sole expense of keeping the said railway in repair, but should any other parties than the said Robert Carrick Buchanan or his foresaids, or his coal tenants of Drumpeller, or elsewhere in the parish of Old Monkland, use the said railway, the said second parties and their foresaids shall be paid by such other parties a fair proportion of the expense of maintaining the said railway.

Now it has been contended by the learned counsel for the appellants, that those universal words "any other parties," ought to be limited so as to receive a most partial and restricted signification, and ought to be taken to describe the same parties only which it is contended are included in the prior clause, but not included in the words of enumeration found in conjunction with those words, "any other parties."

But I cannot for a moment accept this restricted interpretation of those general words. It is said, that the antecedent words extend the liberty of passing toll free to his coal tenants generally, and the Drumpeller Coal Company's tenants during their lease. Then, with respect to the words previously read, enumerating Mr. Buchanan, his heirs and successors, and his coal tenants of Drumpeller, or elsewhere within that particular parish, and so on, it is contended, as he had coal tenants out of that particular parish, the latter words are not coextensive in signification with the previous words. The consequence of that would be to restrict these general and universal words, "any other parties," to that mere description of those other coal tenants who might not be in the parish of Old Monkland. But it is impossible to put that interpretation on those words, for they are words which include any person whomsoever to whom Mr. Buchanan might think proper to grant the right and privilege of enjoying a similar servitude.

Thus, then, I think that the right interpretation of the contract is that interpretation, in arriving at which all the Judges in the Court of Session were unanimous. I think it is an interpretation which is consistent with the ordinary sense and right meaning of the words, and the proper construction of the terms which it was antecedently probable would be found there. There is nothing which in any way leads to the other construction—a construction which might be considered antecedently most impossible in itself, and which could only be admitted upon words of the most plain and distinct meaning manifestly requiring its adoption, the construction, namely, that Mr. Buchanan intended to denude himself in the manner contended for by the appellants, of his right of ownership.

With reference to the extent of the action, what it covered, and what can be brought within it, your Lordships would, no doubt, hesitate very much to rely on a point of that nature, confined as it is entirely to a question of pleading and procedure, unless you were quite clear, that the Court below was wrong. I think your Lordships will come to the conclusion from the whole tenor of the contention of the appellant, that the entire gist of the action was made to lie in the

construction of the contract, and that that, therefore, was the only question that could properly be raised in this form of summons.

I therefore humbly move your Lordships to affirm the order of the Court below, and to dismiss the appeal with costs.

LORD CRANWORTH.—My Lords, I entirely concur with the noble and learned Lord on the woolsack. The only argument that at all raised a doubt in my mind was that of the learned counsel, Sir Hugh Cairns, with respect to the clause, in which there is a stipulation which establishes a title to pass toll free along the railway. His argument upon that was, that *expressio unius est exclusio alterius;* but looking at it a little more narrowly, I think your Lordships will come to the conclusion, that that is merely an inartistic and clumsy way of saying that they shall pay the £25 a year for each year the railway shall be used, but not that they are to pass toll free in such a way, that they shall not be liable to pay the £25 a year for each year the railway shall be so used. But even if that interpretation were not put upon it, it is quite impossible so to narrow the rights of a landlord as to suppose, that he would grant by implication in that way, that which, if he had intended to grant it, he might have granted in direct and indisputable terms. With regard to the suggestion, that on this record a narrower interpretation might be assumed, I think that is entirely a mistake. There is no allegation whatever of an exceptional use of the railway. The pursuer says, you have granted something which you had no right to grant; I am entitled to damages: and I will shew you, that I have incurred damage, for the Messrs. Henderson are using the railway, and in that way they are profiting by me. But there is no suggestion, that if the grant was right, there was an exceptional use made of it.

LORD KINGSDOWN.—My Lords, I entirely agree both with the conclusions at which my two noble and learned friends have arrived, and with the arguments on which they are founded. I confess, that when I heard the commencement of the argument, I scarcely thought it would have proceeded further.

Interlocutors affirmed, with costs.

Appellants' Agents, Burn, Wilson, and Burn, W.S.; Grahames and Wardlaw, Westminster. —*Respondents' Agents,* Horne and Rose, W.S., Melville and Lindsay, W.S.; Maitland and Graham, Westminster.

MAY 5, 1865.

JOHN EWART and Mandatory, *Appellants, v.* JAMES LATTA (Christie's Trustee), *Respondent.*

Principal and Cautioner—Bankruptcy of Cautioner—Assignation of Securities—*C., as cautioner of M., joined M. in a joint and several promissory note to E. for £1000. C. became bankrupt, and E. proved on C.'s estate for the whole debt, and claimed payment of the dividend of 7s. 6d. then payable.*

HELD (reversing judgment), *That the trustee on the sequestrated estate of C. could not insist, before payment of the dividend to E., upon an assignation of the security held by E., for a creditor is not bound to assign his securities, except on full payment by the cautioner.*[1]

This was an appeal from a judgment of the First Division.

In 1856, the appellant, Mr. Ewart, advanced a sum of £1000 to Messrs. Mounsey and M'Alpin, solicitors, Carlisle, for which he took their joint and several promissory note, which expressed, that the money was to be repaid in half yearly instalments of £100, with interest at five per cent., and they gave a further security each of a policy of insurance on his own life, that of Mr. Mounsey being for £1000, and that of M'Alpin for £500, of which they paid the premiums. The half yearly instalments were not regularly paid, and the firm was dissolved. In 1860, Mr. Ewart requested additional security from Mr. M'Alpin, who had taken the greater number of clients, and was to recover the debts of the firm. On pressure, Mr. M'Alpin procured his father in law, Mr. Alexander Christie, wine merchant, George Street, Edinburgh, to join him in a new promissory note as follows:—"Two years after date we jointly and severally promise to pay John Ewart, Esq., or order, £1000, with interest thereon in the mean time yearly at the rate of 5 per

[1] See previous report 1 Macph. 965; 35 Sc. Jur. 539. S. C. 4 Macq. Ap. 983: 3 Macph. H. L. 36: 37 Sc. Jur. 419.