They were apprehended and charged with theft, in so far as on the 24th October, they did, within the said railway station, or at some other place within the bounds of the Edinburgh Police, steal the said box and watches, or otherwise with a contravention of the 166th section of the Edinburgh Police Act, in having found the said box and failed to report the finding within forty-eight hours thereafter. The Bailie found the charge of theft proved, and sent the suspenders to prison for sixty days. The grounds of suspension urged were (1) oppression, in respect that no copy of the complaint was served and no warning was given in the complaint of the kind of theft intended to be charged, the words of the complaint being applicable only to an ordinary charge of theft; (2) the evidence led did not support the charge made; (3) the *locus* libelled in the complaint was stated with undue latitude. In support of the first ground, Mr Campbell cited the cases of M'Kinnon, 4 Irvine 398, and Douglas, 37 Jurist 354. He alluded, in conclusion, to the extreme severity of the sentence pronounced, but the Lord Justice-Clerk observed that they could not exercise the prerogative of mercy, which rested with a higher power. Without calling for a reply from Mr Gifford, who appeared for Mr Linton, the suspension was refused.

STANLEY *v.* JOHNSTON.

This was a suspension and advocation of certain proceedings which had been taken against Edward George Stanley, of Plumstead, near Woolwich, a young man said to have been residing for some time in the Royal Hotel, Kirkcudbright, by the chief constable of the county, Mr Johnston. Mr Johnston had presented a complaint to the justices alleging that a person calling himself Alfred Tennyson, junior (now the advocator), had, on 20th October last, fired a gun from a boat on the river across the highway to the annoyance of John Docherty, a hawker, in contravention of sec. 96 of the General Turnpike Act, which was incorporated in the Kirkcudbright Road Act of 1864. Warrant to apprehend the complainer was craved, and had been granted by a justice of the peace. The forms of the Summary Procedure Act were adopted.

MR PATTISON, for the complainer, argued that the warrant to apprehend had been incompetently granted. Section 110 of the Turnpike Act authorised the citation of persons charged with contravening it, and section 111 of the same Act authorised warrant of apprehension only in cases where the justice was satisfied that such a warrant should be granted. But in this case the warrant to apprehend was asked under the Summary Procedure Act, section 6 of which only authorised the granting of a warrant to apprehend "where apprehension is competent." Besides, the warrant which had been granted was a warrant to apprehend and bring the complainer into court to answer the charge, whereas the Turnpike Act only authorised in any case a warrant to apprehend and take before a justice for examination.

After hearing Mr Pattison, and without calling on Mr Moncrieff, who appeared on the other side, the Court intimated their opinion that whatever foundation there might be for the complainer's objection to the validity of his apprehension, the present suspension was premature and incompetent. The complainer ought to appear before the justices, and state his objections as a dilatory plea, and possibly the justices might sustain it. It was not for this Court to step in and interpose its authority before it was known whether or not the inferior Court would go wrong.

The suspension was therefore refused as incompetent, with expenses.

COURT OF SESSION.

Wednesday, Nov. 8, 1865.

FIRST DIVISION.

PETITION—THOMAS JACKSON FOR REMOVAL OF A TRUSTEE.

Counsel for the Petitioner—The Lord Advocate and Mr Monro. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Mr Welsh—The Solicitor-General, Mr Clark, and Mr Scott. Agent—Mr David Crawford, S.S.C.

This was an application by Thomas Jackson, writer in Kirkcaldy, for the removal of Charles Welch, writer in Cupar-Fife, from the office of trustee on the estates of Pearson & Jackson, writers in Kirkcaldy, and David Pearson, and the petitioner, the individual partners of that firm. The parties had been allowed a proof of their averments, and a long proof had been led.

It appeared that on 17th September 1860 Pearson & Jackson had disposed their whole means and estate to Welch in trust, the purposes of the trust being the realisation of the estate, the payment of the creditors of the firm, and paying the residue, if any, to the partners. The deed provided that the trustee was to be remunerated for his trouble. The application for removal was rested on the following grounds:—Part of the estate consisted of the superiority of certain subjects near the south toll-bar of Cupar, the casualties of which were said to be valuable. This superiority had been conveyed to Pearson & Jackson by a person named Andrew Thallon, and had been conveyed to Thallon under burden of a sum of £50 payable to his sisters. Mr Welch exposed the property to sale in his own office on 16th July 1861, and it appeared to have been purchased by Thomas Galloway, who was a clerk in Mr Welch's office, at the price of £181. On 5th August 1861 Mr Welch executed a disposition in favour of Galloway, in which he acknowledged receipt from Galloway of the price, although the price had not yet been paid. He thereafter prepared a notarial instrument in Galloway's favour, which was recorded in the Register of Sasines on 4th March 1862. It was alleged by the petitioner that this sale to Galloway was not a *bona fide* transaction on Mr Welch's part; that his clerk, Galloway, was a person of most intemperate habits, who had at one time enlisted in the army as a common soldier; that when in the army his father died, in consequence of which he succeeded to some heritable property; that Mr Welch thereupon purchased Galloway's discharge, and took him again into his office; that Galloway was completely under Welch's control; that he had no ready-money or uninvested funds at the time of the purchase with which he could pay the price; and that the purchase was made in his name at the instigation of Mr Welch, and for Mr Welch's own purposes and objects.

It was also stated that a sum of £500 had been borrowed in March 1862 on the security of three heritable subjects—one of which was the right of superiority before referred to, and that a bond had been granted for said sum to the lender by Thomas Galloway, his mother, and his brother-in-law. This sum of £500 was received by Mr Welch, and stated by him in his books on the credit side of an account which he had against the Galloway family for advances made to them or on their account. It was therefore averred that this loan transaction was entered into solely for Mr Welch's personal behoof, and that the whole proceedings in reference to the pretended sale to Galloway were a mere scheme on the part of Welsh to get the use of, and to raise

money upon, the trust property for his own individual behoof, Galloway being a mere tool in his hands. On 25th December 1863 Galloway died, leaving a settlement whereby, passing over his sister, he left his whole means and estates to Mr Welch, burdened with legacies of £50 each to his uncle John Condie and Mr Welch's brother James.

It was replied for Mr Welch that Mr Galloway was not the pauper which he was represented by the petitioner to have been, for he was proprietor of a portion of the subjects from which the feus sold to him were payable, and it was for that reason that he wished to purchase the superiority. It was explained that the conveyance was granted to him by Mr Welch, without settlement of the price, because he (Galloway) was threatening to involve the trust estate in an action for implement of the bargain, which it was impossible to settle until a discharge had been obtained of the real burden which Andrew Thallon's sisters held over the subjects. It was also argued that after this course had been taken it met with the approval of Mr Pearson, and came to the knowledge also of Mr Jackson. This Mr Jackson denied, but it had been proved. The petitioner was not, therefore, now entitled to found upon this matter, which he did not object to when he came to know it, as the ground of a charge of corruption against the trustee. Besides, the estate had never suffered to any extent in consequence of what had been done, and had never been in danger of suffering from it. In regard to the bond for £500, it was pretended that the superiority was the valuable part of the subjects conveyed in security. In point of fact, the other two heritable subjects were far more than sufficient to cover the security. It was said that no value was given to the Galloways for the bond, for the sum borrowed went all into Mr Welch's pocket. But the petitioner had nothing to do with that. Mr Welch was at the time their creditor to the extent of £200; he held the balance for their behoof, and it had now been fully accounted for to them.

After a debate which occupied almost the whole day, the Court took time to consider its judgment.

Friday, Nov. 10.

The Court gave judgment in this case this morning. The trustee was removed from office.

The LORD PRESIDENT, who delivered the judgment of the Court, said—This is an application for the removal of Charles Welch, writer in Cupar, from the office of trustee on the estates of Pearson & Jackson, writers in Kirkcaldy. The ground of the application is misconduct on the part of the trustee. It appears that in 1860 Pearson & Jackson dissolved partnership, and appointed Mr Welch as their trustee, conveying to him their whole estates, with power to wind up the estate, and to act as arbiter betwixt the partners in all matters necessary for the winding up. In the course of the following year certain feus belonging to the concern were exposed to sale. The articles of roup are pretty much in the ordinary form. On 16th July 1861 the feus were purchased by Mr Galloway, a clerk of Mr Welch. This person seems to have had some means, but how far these were extant at the time of the purchase does not appear. A disposition in his favour was in a few days thereafter executed and delivered to him by Mr Welch. Sasine was recorded on 4th March 1862. Then it appears that the purchaser, or Mr Welch acting for him, negotiated a loan of £500 on the security of the feus and some other heritable subjects of greater value. That sum of £500 was received by Mr Welch, as appears from his cash-book, on 6th March 1862. Meanwhile the price of the feus had not been paid by Galloway, and the trust estate was not credited with it. A process of multiplepoinding seems to have afterwards depended, and the price was not credited in it either. We are told, however, that the sum has been consigned in this process. It appears that the trust did not go on very smoothly with Mr Jackson. The trustee says he was very obstructive. It appears that Pearson & Jackson, whatever was the case before the dissolution, were after it in anything but a comfortable position towards each other. Pearson and his son seem to have gone into partnership, and Mr Welch seems to have been in consultation with them as to their matters. This petition is then presented for the trustee's removal. Answers are given in both for Mr Welch and for Mr Pearson. Pearson says he is quite satisfied, and does not wish Mr Welch's removal. A condescendence was ordered and lodged, and Mr Jackson there sets forth very distinctly his charge against Mr Welch. In Art. 7 he says that "it was at the respondent's instigation, and at his hand, and for his behoof, that Galloway purchased the said subjects at £181—a sum far below their value." Then he goes on to state the granting of the disposition and the borrowing of the money. And in Art. 14 he says—"The whole proceedings in reference to this pretended sale were taken for the respondent's own purposes and objects, and were in fact a mere scheme on the part of the respondent to get the use of, and to raise money upon, the trust property for his own individual behoof, Galloway being a mere tool in the hands of the respondent. These proceedings have been studiously concealed from the petitioner. In virtue of the foresaid deed of settlement by Galloway (referring to a settlement executed by Galloway before his death in favour of Welch), the respondent is now *ex facie* proprietor of the superiority in his own right, without the trust estate being credited either with the price of the feu-duties or casualties which have become payable in respect of Galloway's death or otherwise." A proof has been led, various documents have been recovered, and a number of witnesses examined. In particular, Mr Welch himself was examined at great length. His examination seems to have extended over several days. Some of the examination may have been unnecessary; but, at the same time, it is to be observed that there appears to have been great difficulty in extracting from him what he should not have been so unwilling to tell. The question we have to decide is, whether the proof discloses sufficient to justify our removing the trustee. This is not the case of a trustee in bankruptcy, nor that of a testamentary trustee, nor that of a judicial factor. It is a trust constituted by two parties which both might put an end to if they pleased. It is not enough to put an end to it that one party wishes it. It was contended for Mr Welch that the ground of this application was that the trustee had acted corruptly, and that a case of corruption must be made out. I think that is an over statement of the petitioner's case. That is, no doubt, stated, but there are other things also stated. It was stated that the subjects were sold at an undervalue. I think that ground was departed from by the Lord Advocate, at all events it has not been supported by evidence. But still, though that is not established, we have before us the whole history of the matter, and the question is whether in the course of that history there was a breach of trust on Welch's part, such as will justify the Court in exercising its power of removal. Some of his proceedings were of a most singular kind. He has most unfortunately, to say the least of it, allowed himself to be mixed up with Galloway in the business in a most unseemly manner. He acted both for the trust estate and for Galloway, and, like most people who act for two parties in the same matter, with opposing interests, he has imperilled the one in attending to the interests of the other. It is a singular fact that on the day of the sale he granted a letter to Galloway giving him an obligation as to the completion of the title, which placed him in a better positon than those who had merely read the articles of roup. It is said that this letter contained nothing that was not in the articles. Then why was it granted? Then, when the purchase was made, the purchaser, whose history, as it appears in evidence, shows that he was a party as to whom caution was to be ob-

served rather than otherwise, is put in possession of a disposition without his having paid the price. Then a loan is obtained over the subjects, and the sum borrowed is received by Mr Welch, but no part of it is applied in payment of the price. The money seems to have been applied otherwise. Mr Welch gives no explanation except that his brother took charge of his cash matters. That is not satisfactory. In the meantime, Mr Jackson is proceeded against for payment of a trust debt little more in amount than the price of the subjects, and he is incarcerated for it. What is the explanation of all this? It is said there was a real burden over the subjects which had to be cleared off. There does seem to have been such a burden at one time, but there is also some evidence that it had been paid off, although there was no discharge of it. That, however, was no reason for putting Galloway in possession. It might have been a reason for suspending the settlement. I don't see that it is any excuse at all. This is not satisfactory; but it is said that Mr Jackson afterwards acquiesced in what had been done. That is not a good answer either. I don't think it is proved that he did acquiesce in the sense in which the statement is made. Therefore I think there has been a great departure from the course of conduct which this trustee ought to have followed, and irregularity of such a character that I think it not right that he should be continued as trustee. I give no opinion as to his motives. If he had sold the property at an undervalue, that would have been a case of the grossest kind imaginable. But although he did not do so, he had ulterior views, whatever they were, which were favourable to Galloway, the purchaser, and unfavourable to the trust estate. And besides, he mixed himself up with one of two parties, betwixt whom he had been empowered to act as arbiter. The judgment of the Court is that Mr Welch must be removed from office.

On the motion of the LORD ADVOCATE, Mr Welch was found liable to the petitioners in expenses, subject to some modification; and it was stated that he would not be allowed to charge his own expenses against the trust estate.

Wednesday, Nov. 8.

SECOND DIVISION.

WILSON *v.* NIGHTINGALE.

Counsel for the Pursuer—Mr Mackenzie and Mr Orphoot. Agents—Messrs Traill & Murray, W.S.

Counsel for the Defender—Mr Fraser and Mr Scott. Agent—Mr James Nisbet, S.S.C.

This is an action at the instance of Mr Richard Wilson, chartered accountant in Edinburgh, against Mr Edward William Nightingale, clothier there, in which he concludes for the sum of £97, 15s. 11d., conform to account rendered for professional business done by him on account of and under the employment of the defender. The defender does not dispute the employment of Mr Wilson, but maintains that his charges are quite exorbitant, and that the understanding between them was that Mr Wilson was not to charge the full fees of an accountant. After the Lord Ordinary had repelled a preliminary plea stated by the defender, to the effect that the pursuer had not relevantly set forth the grounds of his claim by specific accounts, the parties agreed to refer the matter to Mr John Hunter, Auditor of the Court of Session, *qua* accountant, whereupon the Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"The Lord Ordinary, having heard counsel and made avizandum, repels the first plea in law stated for the defender, and *of consent* remits to the Auditor of Court, *qua* accountant, to examine into the nature and extent of the services rendered by the pursuer which are set forth on the record as the ground of the claim made by him under the conclusions of the present action, with power to the said Auditor to call for documents and explanations from the parties, and take such probation by examination of havers and witnesses as may be necessary to enable him to carry out this remit; and grants commission to him, and diligence against said witnesses and havers accordingly; and thereafter to report what sum in his opinion would amount to adequate remuneration to the pursuer for work done by him on behalf of the defender."

Upon this a long proof followed before the Auditor, in the course of which several objections were taken by the defender, and brought by him, by appeal, under review of the Lord Ordinary. Mr Hunter reported that the work which Mr Wilson had been employed to do for the defender was of such a nature as to be suitable only for a professional accountant, and that his charges were extremely moderate, and ought to be sustained in full. Against this report the defender lodged a number of objections, and a full discussion took place before the Lord Ordinary both upon these objections and on the objections that were raised in the course of the proof. The Lord Ordinary repelled all the objections, sustained Mr Hunter's report, and found the defender liable. To-day the Court concurred in the result of this judgment, but held that they could not enter on the objections which were taken in the proceedings before the reporter. The parties had preferred that manner of ascertaining their rights to going, in the usual way, through the courts of law, and they must be held bound by their own acts. The remit to Mr Hunter was not a judicial reference, but a private arrangement among the parties, and Mr Hunter had thereby conferred upon him a discretionary power with which the Court could not interfere, and which they were not by any means prepared to say he had exceeded.

MACBRIDE *v.* CLARK, GRIERSON, AND CO.

Counsel for the Pursuer — Mr Pattison and Mr Watson. Agent—Mr James Renton, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Clark. Agents—Messrs A. G. R. & W. Ellis, W.S.

This is a question as to the construction of a cautionary obligation. It arises in the following circumstances: — In 1861 the company of William Anderson, Son, & Clark, of St Vincent Street, Glasgow, obtained from the Union Bank a cash credit upon a current account to the amount of £3000, upon their granting a bond along with several co-obligants. The said company, and the individual partners of it, Mr James Gemmell, Glasgow; Mr James Munn, Glasgow; and Clark, Grierson, & Co., Argyle Street, Glasgow, as a company; and Robert Bland Clark, and William Grierson, the individual partners of the company, all bound and obliged themselves as full debtors and co-obligants to pay to the bank whatever might be found owing by the firm of William Anderson, Son, & Clark. This firm became bankrupt in 1861, and at that time there was due by them to the bank, in respect of their operations on the cash credit, a sum of £2790, 6s. 3d. of principal, besides interest on the current account. After the insolvency various payments were made by several of the co-obligants in implement of their obligation. Among other payments some were made from time to time by the pursuer, who is judicial factor on the estate of Mr Munn, now dead, one of the co-obligants, and an action is now brought by him to determine what are the several obligations of the parties. The question which truly arises is whether Robert Bland Clark and William Grierson signed merely as partners of Clark, Grierson, & Co., and in corroboration of the company signature, or added their individual obligations to that of the company. The pursuer, on the one hand, contends that according to the sound legal construction of the bond there are five separate cautionary obligants; while the defendants, on the other hand, contend